Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00652-CV

JENNIE KAY LYLE BIERSCHEID, EXECUTRIX OF THE ESTATE OF KENNETH R. LYLE; LYLE ENGINEERING COMPANY; HOUSTON BLUEBONNET LLC; E&H, LP; AMERICAN UNIVERSAL INVESTMENT CO.; ESTHER SUCKLE, TRUSTEE OF THE SUCKLE 1999 LIVING TRUST; AND C.G. ENTERPRISES, INC., Appellants

V.

JPMORGAN CHASE BANK AND LLOYD BENTSEN III, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF JANE JAPHET GUINN; JPMORGAN CHASE BANK, LLOYD BENTSEN III, AND GAYLE F. BENTSEN, AS CO-TRUSTEES OF THE GAYLE F. BENTSEN GST NON-EXEMPT TRUST; JPMORGAN CHASE BANK AND LLOYD BENTSEN III, AS CO-TRUSTEES OF THE DAN J. FLANNERY GST NON-EXEMPT TRUST; JPMORGAN CHASE BANK, LLOYD BENTSEN III, AND JOHN F. FLANNERY, AS CO-TRUSTEES OF THE JOHN F. FLANNERY, JR. GST NON-EXEMPT TRUST; JILL BAUCUM FLANNERY, AS INDEPENDENT EXECUTOR OF THE ESTATE OF DAN JAPHET FLANNERY, ALL OF THE FOREGOING AS SUCCESSORS-IN-INTEREST OF THE JANE GUINN REVOCABLE TRUST; PERRY B.

MENKING, JR., SUCCESSOR-IN-INTEREST OF THE PERRY B. MENKING, JR. INVESTMENT MANAGEMENT TRUST; LYNN SAHIN; KATE LUTKEN BRUNO, SUCCESSOR-IN-INTEREST OF THE KATE LUTKEN BRUNO GRANTOR TRUST; WESLEY C. LUTKEN, JR., SUCCESSOR-IN-INTEREST OF THE WESLEY LUTKEN GRANTOR TRUST; DANIEL R. JAPHET, JR.; GRETCHEN JAPHET; SUSAN JAPHET SCOTTY; AND LARKEN JAPHET SUTHERLAND, Appellees

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On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Case No. 30776

O P I N I O N

This case is a suit to enforce and collect upon a net profits interest that was reserved in an assignment of an oil and gas lease ("the Lease or "the Hogg-Japhet Lease") in 1919. The plaintiffs/appellees (collectively, "the Japhets") are the heirs and successors-in-interest of Dan A. Japhet, who transferred his mineral interest in the Hogg-Japhet Lease to Humble Oil & Refining Company in a 1919 assignment ("the 1919 Assignment") and reserved an interest in the net profits. The defendants/appellants own working interests in the Hogg-Japhet Lease and are the successors-in-interest of Humble Oil (collectively, "the Working Interest Owners"). The Japhets filed suit in 2004 against two defendants, asserting claims to "recover title and possession of" the reserved net profits interest in the 1919 Assignment, for breach of the 1919 Assignment and specific performance of the covenants contained in the 1919 Assignment, and for declaratory judgment "concerning the existence of

the Reserved [net profits interest], the proper calculation of the net profits, and other matters arising under the 1919 Assignment." After the trial court rendered a summary judgment on liability in favor of the Japhets, in an interlocutory appeal, this Court affirmed the summary judgment ruling, holding that the 1919 Assignment reserved a net profits interest for the Japhets and that the 1919 Assignment was binding on the Working Interest Owners. *See Lyle v. Jane Guinn Revocable Tr.*, 365 S.W.3d 341 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

While the interlocutory appeal was pending, the Japhets asserted identical claims against four additional defendants. After the appeal concluded, these six defendants moved to compel arbitration under the 1919 Assignment. The trial court denied this motion, and the litigation continued. Ultimately, the Japhets asserted identical claims against eight Working Interest Owners, and they also amended their petition to name additional plaintiffs who were successors-in-interest of a plaintiff who passed away during the pendency of the litigation. In 2015, the trial court granted another partial summary judgment ruling on liability in favor of the Japhets. In 2018, the case went to trial and a jury found in favor of the Japhets on their claims and awarded attorney's fees. The trial court entered judgment on the jury verdict, awarding the Japhets $758,934.65 in damages, a total of $565,740 in trial-level attorney's fees, and $254,734.50 in prejudgment interest. The trial court also made several declarations in favor of the Japhets.

The Working Interest Owners raise ten issues, most with multiple subparts, on appeal. In addition to generally arguing that the trial court erred in entering judgment in favor of the Japhets, the Working Interest Owners argue the trial court reversibly erred by: (1) denying their motion to compel arbitration; (2) entering judgment for plaintiffs who were added to the case in 2017; (3) entering judgment for the Japhets with regard to two specific lots covered by the Hogg-Japhet Lease; (4) entering judgment for the Japhets based on the court's liability determination; (5) awarding damages to the Japhets; (6) awarding prejudgment interest to the Japhets; (7) awarding attorney's fees to the Japhets; (8) awarding non-monetary relief, in the form of declaratory judgments, to the Japhets; and (9) refusing to award relief to the Working Interest Owners. The subparts for each of the Working Interest Owners' issues are discussed in each relevant section below.

We affirm.

Background

A. The 1919 Assignment and Related Documents

The dispute in this case arises out of the 1919 Assignment, in which Dan A. Japhet and others conveyed their interests in the Hogg-Japhet Lease, an oil and gas lease covering property in Brazoria County, to Humble Oil & Refining Company. The 1919 Assignment recited a series of conveyances and reservations of royalty interests beginning in June 1913, when Ima Hogg, Mike Hogg, Will Hogg, and Tom

Hogg executed to John Hamman a lease contract on the property ("the original contract"). This series of transactions set out in the 1919 Assignment included, among others, a transaction in October 1913, in which George Hamman, John Hamman, and three others reserved a 1/8 royalty interest, and a conveyance in April 1918, in which Dan A. Japhet acquired an interest in the Lease "upon said lots 17, 18, 19 and 20." Dan A. Japhet transferred portions of his interest to three other people—R.S. Coon, J.A. Williams, and T.W. Wilson—and he retained fifty-two-sixtieths of the interest originally conveyed to him. Japhet, Coon, Williams, and Wilson then assigned their interests in the Lease to Humble Oil.

We set out the provisions of the 1919 Assignment at length:

> Now Therefore, Know All Men By These Presents: that for and in consideration of the premises and of the agreements to be performed by said Humble Oil & Refining Company, as hereinafter set out, and of the payment by said Humble Oil & Refining Company to said Dan A. Japhet [et al.] of the sum of $200,000.00, the receipt of which is hereby acknowledged, said Dan A. Japhet [et al.] have bargained, sold, transferred and conveyed, and do by these presents hereby bargain, sell, transfer and convey unto the said Humble Oil & Refining Company all of their right, title and interest [in the Lease], subject to the royalty interests reserved under [the previous conveyances] and transfers hereinbefore referred to, and to the royalties herein reserved to assignors [Japhet et al.], and subject also to any and all of the conditions and agreements to be performed by said Humble Oil & Refining Company, as hereinafter set out. . . .
>
> TO HAVE AND TO HOLD unto the said Humble Oil & Refining Company, its [successors] and assigns, forever.
>
> Said Humble Oil & Refining Company, by its acceptance hereof, and in consideration of this transfer, agrees to comply with each and every obligation of said assignors hereafter arising or becoming incumbent

upon them as sub-lessees, including the drilling obligations and the payment of royalties imposed upon said assignors as sub-lessees under [the Lease and prior conveyances], and also agrees to comply with the provisions hereof. Should said Humble Oil & Refining Company make default in the performance of any of said obligations, it shall be by said assignors, or either of them, notified in writing of the facts constituting such default, and thereupon said Humble Oil & Refining Company shall have thirty (30) days after receipt of such notice, or after final decision of the arbitrators hereinafter provided for, within which to comply with any material obligation that may have been breached and called to its attention. Should said Humble Oil & Refining Company fail to comply with any such obligation in respect to which a breach shall have occurred within said time, time in this respect being of the essence of this contract, then this transfer shall immediately terminate and [the Lease] shall revert to said Dan A. Japhet [et al.] In case of such reversion, however, any well or wells which may be producing oil and any well or wells as may be in course of drilling, together with 40,000 square feet of said land around each such well in as near a square form as practicable, shall not revert, but said well and area shall be retained under the terms hereof so long as there is produced, or reasonable diligence is being used to produce, oil in paying quantities from such well or wells, or from such area or any other well drilled thereon.

Should there exist at any time a good-faith dispute as to whether or not a default in the performance of any obligation has occurred, then grantors herein [Japhet et al.] or their successors in interest shall jointly appoint an arbitrator and grantee herein [Humble Oil] shall appoint an arbitrator and the two so chosen shall select a third arbitrator, and the matter at issue as set forth in the notice from grantors to grantee above provided for shall be submitted to said arbitration committee for decision. . . .

. . . .

In further consideration of this transfer said Humble Oil & Refining Company further agrees to carry said Dan A. Japhet [et al.] for a working interest of one-fourth (1/4) of the net money profit realized by it from its operations upon said tracts of land, accountings to be had monthly once profits begin to accrue, and no expense commonly known as over-head expense, such as head-office superintendence, book-keeping, cost of rendering accounts, etc. to be charged against said land

> or against assignors; nor shall said Humble Oil & Refining Company, in computing the profits, be entitled to reimburse itself for the cash consideration above receipted for. . . .
>
> . . . .
>
> Said assignors do hereby warrant that they are the present owners of the leasehold rights created by said original contract and subsequent contracts, in so far as said lots 17, 18, 19 and 20 [are] concerned, and that said original contract is now valid and in force and free of encumbrances. Grantors further represent and warrant that the 2,000 foot well required by the original lease, and subsequent transfers[,] to be drilled has been drilled to completion in accordance therewith and that the only royalties now outstanding against said lease and production therefrom are the one-eighth (1/8) royalty payable to the original lessors [the Hoggs] and the net 1/8 money working interest reserved originally in the transfer from George Hamman et al. to the Producers Oil Company of date October 17, 1913 hereinbefore referred to. They, however, do not warrant the lessors' title to said land. . . .
>
> . . . .
>
> It is further agreed that all the conditions and terms hereof shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto.

After the parties executed the 1919 Assignment, it was filed in the property records of Brazoria County.

On the same day that the parties executed the 1919 Assignment, they also executed a second agreement, in which Japhet, Coon, Wilson, and Williams conveyed some personal property and stored oil to Humble Oil ("the Second 1919 Agreement"). The Second 1919 Agreement provided, in relevant part:

> WHEREAS, on the 20th day of February, 1919, Dan A. Japhet, R.S. Coon, T.W. Wilson, and J.A. Williams . . . transferred to the Humble Oil & Refining Company . . . certain leases owned by them . . . .

> WHEREAS, [Japhet et al.] have agreed to convey to [Humble Oil] all of their right, title and interest in and to the oil in storage and the hereinafter described personal property located on said 22 ½ acres of land, [Humble Oil] having agreed to take charge of all operations upon said tracts of land from and after February 20, 1919, at six o'clock P.M. and further agreed to conduct all operations at its own cost and expense, including the payment for the labor performed and material used upon said premises, and to pay to [Japhet et al.] from said time their one-fourth (1/4) royalty interests accruing from production, as specified in said transfers;
>
> NOW, THEREFORE, in consideration of the promises, the parties hereto have agreed as follows:
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> . . . .
>
> It is further agreed that from and after six o'clock, P.M. February 20, 1919, all operations upon said 2 ½ and 20 acre leases, transferred to [Humble Oil] have been and shall be conducted at the cost and expense of [Humble Oil], and that from said time [Humble Oil] shall pay [Japhet et al.] for royalties accruing to them under the terms and provisions of said transfers which are referred to and made part hereof.

In 1923, a dispute arose between Japhet and the other assignors and Humble Oil "regarding the accounts between the parties relating to credits for oil and charges for rig rent, house rent, warehouse expense, water, pumping oil, and other matters in connection with said premises." The parties entered into another agreement to settle these matters ("the 1923 Settlement Agreement").

This agreement recited that Japhet and the other assignors "are the joint owners of a one-fourth net profits working interest in an oil and gas lease . . . [that] covers and includes what is known as the Japhet 20 acres, being Lots 17, 18, 19, and 20 [of a particular survey in Brazoria County]." The 1923 Settlement Agreement

also stated that the parties had settled their differences "and the accounts adjusted up to and including December 31, 1922, and agreements have been arrived at with a view to avoiding similar differences in the future." The parties agreed as follows:

> 1. [Humble Oil] is allowing and making a credit upon its books to the account of [Japhet et al.] in the sum of [$80,157.95]. In consideration for this credit it is agreed and understood by all parties hereto that the debits and credits as now shown upon the books of [Humble Oil] for the period to and including December 31, 1922, correctly state the accounts between the parties hereto and reflect the settlement made of all the issues and differences of every kind between the parties as to the accounts between them in reference to the Japhet 20 acres above described up to and including said date; it being the intention of the parties hereto that all issues and matters between them in connection with said property shall be and they are hereby settled for the period up to and including December 31, 1922, and the accounts are closed in accordance with the debits and credits now shown on the books of [Humble Oil] for such period. [Japhet et al.] hereby specifically ratify the methods of handling accounts between the parties employed by [Humble Oil] in relation to warehouse, water, rig rent, house rent, and all other expenses and charges in connection with the operation of said premises as being in conformity with the terms and provisions of the original assignment to [Humble Oil] of date February 20th, 1919, above referred to, and as being in full accord with the rights of the parties hereto.
>
> 2. It is understood that the oil produced from the leased premises above described shall be credited to the lease at the posted field price of [Humble Oil] for coastal crude of the same grade and quality on the day such oil is produced. In the event emulsion or roily oils are produced or anything is required to place the oil produced in pipe line condition such oil shall not be considered as produced until it is as placed in pipe line condition.
>
> 3. If within Ninety (90) days from the date of issuance of any monthly statement of account by [Humble Oil] as contemplated in the original assignment to [Humble Oil] of date February 20th,

> 1919, above referred to, no objections are made in writing to [Humble Oil] by [Japhet et al.] regarding the correctness of a specific item in such statement, it will be conclusively presumed to be a proper charge or credit, as the case may be, insofar as each of [Japhet et al.] not so filing written objections is concerned.

Japhet, the other assignors, and Humble Oil signed the Settlement Agreement in April 1923.

B. The Successors-In-Interest

As stated above, Dan A. Japhet owned an undivided 52/60 of the reserved net profits interest created in the 1919 Assignment. Dan A. Japhet died in 1942, and his three sons inherited his interest, each of them owning 1/3 of 52/60 of the net profits interest. Over the next several decades, Dan A. Japhet's original interest was devised to his sons, grandchildren, great-grandchildren, and other family members. All of the plaintiffs in the underlying litigation are descendants of Dan A. Japhet or are trustees of trusts for which Dan A. Japhet's descendants are the beneficiaries.

In 1969, Humble Oil conveyed its rights, title, and interest in the Hogg-Japhet Lease to Salmon Corporation. Exhibit A of this assignment to Salmon Corporation identified the interests being assigned and stated:

> 1. All of Assignor's [Humble Oil's] interest in the oil, gas and mineral lease contract dated June 6, 1913, by and between Miss Ima Hogg et al, First Parties, and John Hamman, Second Party, of record in Volume 125, Page 53 of the Deed Records of Brazoria County, Texas, insofar and only insofar as said lease affects Lots 17, 18, 19 and 20 of the J.S. Hogg 160 acre subdivision . . . said property being assigned by Dan A. Japhet et al to Humble Oil & Refining Company on February 20, 1919,

> said instrument of record in Volume 152, Page 274 of the Deed Records of Brazoria County, Texas.
>
> The above described lease is subject to the following:
>
> (a) An Agreement dated February 20, 1919, as amended, between Humble Oil & Refining Company and Dan A. Japhet et al. It is specifically understood that Assignee [Salmon] takes the property subject to said Agreement and Assignor makes no representations as to what items should or will be charged as expenses or taken into consideration in determining profits under said Agreement.

The working interest in the Hogg-Japhet Lease was subject to numerous conveyances over the two decades following the assignment from Humble Oil to Salmon. Nearly all of the instruments conveying a working interest in the lease contained similar language as the assignment from Humble Oil to Salmon, noting that the assignor's interest in the Hogg-Japhet Lease was subject to the 1919 Assignment.[1]

Ultimately, through the various conveyances, Kenneth R. Lyle obtained a 27.125% working interest in the Hogg-Japhet Lease.[2] Houston Bluebonnet, LLC, obtained a 27.1300% working interest on January 1, 2008. American Universal Insurance Company obtained a 9% working interest in June 1983. Henry Suckle

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[1] At least one conveyance, a conveyance of a 0.0025% working interest from G.W. Russell to Kenneth Lyle, did not mention the 1919 Assignment.

[2] Lyle passed away in 2016, during the pendency of this litigation. His daughter, Jennie Kay Lyle Bierscheid, is the executor of his estate, and, in that capacity, she substituted as a defendant in this suit.

acquired a 5.625% working interest in the Hogg-Japhet Lease in 1976, and defendant E&H LP was his successor-in-interest. E&H transferred the working interest to defendant The Suckle 1999 Living Trust on October 31, 2010. James Abbott acquired a 5.625% working interest in 1986, and he transferred the interest to defendant C.G. Enterprises that same year.

C. The Underlying Lawsuit and 2008 Summary Judgment Proceeding

In October 2004, Dan R. Japhet, Lynn Sahin, and JPMorgan Chase Bank, as the trustee of four trusts, including the Jane Guinn Revocable Trust, the Perry B. Menking, Jr. Investment Trust, the Kate Lutken Bruno Grantor Trust, and the Wesley Lutken Grantor Trust filed suit against Lyle and Warbonnet Exploration Co.[3] in Brazoria County. The Japhets alleged that they were the heirs and successors-in-interest to Dan A. Japhet and, as such, were the current owners of "an undivided 52/60" of the "1/4 net profits carried working interest" that Dan A. Japhet reserved under the 1919 Assignment of the Hogg-Japhet Lease ("the Net Profits Interest"). The Japhets further alleged that Lyle and Warbonnet operated oil and gas wells on the Hogg-Japhet Lease and were the successors-in-interest of Humble Oil. Therefore, Lyle and Warbonnet owed the Japhets "the duty to account for said net profits and to pay the same" to them. They alleged that they had demanded an

[3] Lyle was the president of Warbonnet. Warbonnet filed for bankruptcy and the Japhets ultimately nonsuited their claims against Warbonnet in 2016. Warbonnet is not a party to this appeal.

accounting and payment from Lyle and Warbonnet, but the defendants denied the Japhets' interest in the Hogg-Japhet Lease and had refused to give an accounting or make payment.

The Japhets alleged that they "are entitled to recover the title and possession of the [reserved Net Profits Interest] and [they seek] to quiet their title thereto against the claims of" Lyle and Warbonnet. The Japhets also asserted a breach of contract claim against Lyle and Warbonnet, alleging that, as successors of Humble Oil, they were "bound to perform the covenants contained in the 1919 Assignment, including but not limited to accounting for the Reserved [Net Profits Interest] and payment of [the Japhets'] share of such net profits." The Japhets asserted that they were entitled to specific performance of the 1919 Assignment. Finally, the Japhets sought a declaratory judgment that they "are entitled to and own an undivided 52/60 of said Reserved [Net Profits Interest] and to receive payment on account thereof." The Japhets sought recovery of attorney's fees under Civil Practice and Remedies Code Chapter 38 and the Texas Declaratory Judgments Act.

In September 2007, the Japhets amended their petition to assert that Lyle and Warbonnet had breached their statutory duties under Texas Natural Resources Code Chapter 91 to pay royalties. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 91.402(a) (providing that proceeds derived from sale of oil or gas production from well located in this state must be paid to each payee on or before 120 days after end of month of

first sale of production from well and then on timely basis according to lease or other written agreement between payee and payor). The Japhets alleged:

> [Lyle and Warbonnet] are "Payors" as defined under this statute and are obligated to make payment to [the Japhets] in accordance with the requirements of the statute. These requirements include the duty to make full payment for all gas production no later than ninety (90) days after the end of the calendar month in which production is sold. [Lyle and Warbonnet] have wholly failed to pay [the Japhets who] have demanded an accounting of and payment for their portions of Dan A. Japhet's original Reserved [Net Profits Interest] and [Lyle and Warbonnet] have wholly breached their duty to account for such profits or to pay the same to [the Japhets]. [The Japhets], therefore, seek damages and prejudgment interest as authorized by this statute for all net profits due and owing [the Japhets] for production under the Hogg-Japhet Lease.

The Japhets also asserted that Natural Resources Code Chapter 91 entitled them to recover attorney's fees.

In October 2007, the Japhets moved for partial summary judgment on their claims, arguing that they were entitled to "an accounting by [Lyle and Warbonnet] for 52/60 of 25% of any and all net profits from the Hogg-Japhet Lease and to an order directing specific performance of [the 1919 Assignment]." The Japhets attached evidence documenting their chain of title as successors-in-interest of Dan A. Japhet, evidence documenting Lyle and Warbonnet's chain of title as successors-in-interest of Humble Oil, and evidence identifying Warbonnet as the operator of a well on the Hogg-Japhet Lease. The Japhets argued that Lyle and Warbonnet were on constructive notice of Dan A. Japhet's reserved interest in the 1919 Assignment,

and their summary judgment evidence included the documents transferring an interest in the Hogg-Japhet Lease to Lyle and Warbonnet, which mentioned the 1919 Assignment and stated that the Hogg-Japhet Lease was subject to the Assignment. The Japhets also attached evidence that the Estate of Dan A. Japhet was listed as an owner of the Hogg-Japhet Lease in the Brazoria County tax records and that plaintiff Dan R. Japhet paid taxes on the Lease on behalf of the estate. Nevertheless, Lyle and Warbonnet failed to pay the Japhets the Net Profits Interest provided for in the 1919 Assignment.

Lyle and Warbonnet responded to the Japhets' partial summary judgment motion and filed their own traditional and no-evidence summary judgment motion on the Japhets' claims against them. Lyle and Warbonnet argued that the Japhets did not have an interest in the leasehold. Specifically, they argued the claim of a Net Profits Interest "was not a reserved right from the leasehold," but was instead "merely additional consideration, called working interest of one-fourth (1/4) of the net money profit realized, for purchase of the existing wells and was fully paid." Lyle and Warbonnet characterized this as "a covenant only, not a reserved interest" and "not a possessory or future interest in the lease," and they argued that the interest only applied to wells in existence at the time of the 1919 Assignment, which had been plugged. Lyle and Warbonnet further argued that the Japhets' claims were

barred by the statute of limitations and laches, and Warbonnet asserted that it "has no interest in the leasehold, and has no duty or obligation" to the Japhets.

Lyle and Warbonnet argued that, in the 1919 Assignment, Japhet "convey[ed to Humble Oil] all leasehold interest without an express reservation" and that the provision discussing a working interest of one-fourth of the net money profit realized was "not a reservation," but was instead "further consideration, a carrying of working interest of one-fourth of the not money profits realized." They stated, "No records provided by Humble [Oil] indicate the existence of any interest in effect owned by Japhet or its assignees when sold in 1969 to Salmon." They argued that the Japhets were not entitled to "receive any funds or any money from the current production," and they stated that the Japhets had not received any payments from operators of the Hogg-Japhet Lease in the previous six decades. They further argued that the Japhets had failed to prove the terms of their alleged interest under the 1919 Assignment and "have failed to demonstrate that the obligations of that alleged interest have not been satisfied and are present obligations of" Lyle and Warbonnet. Lyle and Warbonnet argued that any interest Dan A. Japhet had after the 1919 Assignment was "further consideration for the contract and was satisfied by Humble [Oil]," prior to Lyle's acquiring an interest in the Hogg-Japhet Lease. They argued that, as a matter of law, they were entitled to a judgment declaring that the Japhets have no reserved interest in the Hogg-Japhet Lease or any wells currently operated

by Warbonnet and that Lyle and Warbonnet owe no duty or obligation to the Japhets to account for any interest that they own in the Lease.

In January 2008, prior to the trial court's ruling on the parties' summary judgment motions, the Japhets filed a third amended petition. This petition listed the following plaintiffs: JPMorgan Chase Bank and Lloyd Bentsen III, Independent Co-Executors of the Estate of Jane Japhet Guinn, successor-in-interest of the Jane Guinn Revocable Trust; Perry B. Menking, Jr., successor-in-interest of the Perry B. Menking, Jr. Investment Management Trust; Lynn Sahin; Kate Lutken Bruno, successor-in-interest of the Kate Lutken Bruno Grantor Trust; Wesley C. Lutken, Jr., successor-in-interest of the Wesley Lutken Grantor Trust; Daniel R. Japhet, Jr.; Gretchen Japhet; Susan Japhet Scotty; and Larken Japhet Sutherland.[4] This pleading did not assert any additional claims against Lyle and Warbonnet.

On December 29, 2008, the trial court denied Lyle and Warbonnet's summary judgment motions and granted the Japhets' summary judgment motions in part. The trial court ruled that, under the 1919 Assignment, Dan A. Japhet "owned an undivided 52/60 of the carried working interest of one fourth (1/4) of the net money profit realized from operations on the Hogg-Japhet Lease," that the 1919 Assignment

[4] Daniel R. Japhet, Jr., Gretchen Japhet, Susan Japhet Scotty, and Larken Japhet Sutherland are the children of Dan R. Japhet, Sr., one of Dan A. Japhet's grandchildren and one of the original plaintiffs, and are his successors-in-interest. Dan R. Japhet, Sr. assigned his portion of the reserved Net Profits Interest to his children in June 2007.

was binding on the original parties' successors and assigns, and that the Japhets are the present-day owners of Dan A. Japhet's interest.

The trial court ruled that Lyle was bound by the 1919 Assignment but Warbonnet was not bound by the Assignment and was not liable to the Japhets because it was not a successor-in-interest of Humble Oil but was instead a "'contract operator' pursuant to a written operating agreement among the [W]orking [I]nterest [O]wners." The trial court ruled that the 1919 Assignment required Lyle to account to the Japhets for his proportional share of the Net Profit Interest "from and after four years prior to the filing of this suit," but it did "not determine the amount of money, if any, which is due to" the Japhets. The trial court signed an order granting the parties' agreed motion to allow an interlocutory appeal of the summary judgment ruling to this Court.

D. The Interlocutory Appeal and This Court's 2010 Opinion

In March 2009, while Lyle's interlocutory appeal to this Court was pending, the Japhets amended their petition to add eleven additional defendants. Four of those newly-added defendants are parties to this appeal: Lyle Engineering Company, Houston Bluebonnet, LLC, E&H, LP, and American Universal Investment Company.[5] The Japhets alleged that the newly-added defendants were, like Lyle,

[5] The other defendants added to the suit in this amended petition were: Allan Seth Blank, Virginia Nixon, Thunderbird Drilling Company, Spring Creek Resources, LLC, Patrick D. Reardon, Michael J. Reardon, and Lukin T. Gilliland. Nixon,

successors-in-interest of Humble Oil and owned working interests in the Hogg-Japhet Lease, and, as such, had "succeeded to a portion of the obligations of Humble [Oil] to account for and pay a portion of the Reserved [Net Profits Interest] to" the Japhets. This petition asserted the same claims against the newly added defendants as the Japhets had asserted against Lyle and Warbonnet, and this petition did not add any additional claims. None of the newly added defendants became parties to the pending interlocutory appeal. At Lyle and Warbonnet's request, the trial court stayed all proceedings pending this Court's ruling on the interlocutory appeal "except as to additional parties and disclosure."

In the interlocutory appeal, Lyle raised seven issues challenging the trial court's 2008 order granting the Japhets' partial summary judgment motion and denying his own summary judgment motion. In several related issues, Lyle argued that he was not subject to the 1919 Assignment, that the "working interest of one-fourth (1/4) of the net money profit realized" was a production payment that had been fully discharged, that Dan A. Japhet did not reserve an interest in the 1919

Thunderbird Drilling, Spring Creek Resources, and the Reardons reached a settlement agreement with the Japhets in May 2013, in which these defendants acknowledged the Japhets' Net Profits Interest and agreed to account to the Japhets for their shares of the net profits to the extent of each defendant's working interest in the Hogg-Japhet Lease. In a 2015 summary judgment ruling, the trial court ruled that Blank did not own an interest in the Hogg-Japhet Lease and that he was not liable to the Japhets. Although the jury rendered a verdict against Gilliland, the money judgment awarded against him was minimal, and he did not join the notice of appeal filed by the other Working Interest Owners.

Assignment, that he is not required to account to the Japhets because "they are strangers to him, because they have no title, and because he has superior title to his leasehold interest," and that the Japhets "have no record interest in the lease." *See Lyle*, 365 S.W.3d at 349–50. Lyle also argued that the Japhets' claims were barred by the statute of limitations, laches, and the statute of frauds. *Id.* at 354.

This Court interpreted the 1919 Assignment and concluded that, under its plain language, Humble Oil "received all of the assignors' 'right, title and interest [in the Hogg-Japhet Lease] . . . subject to . . . the royalties herein reserved to assignors" and that the Assignment set out the specific terms of the royalty, providing that Humble Oil "agreed 'to carry [Dan A. Japhet et al.] for a working interest of one-fourth (1/4) of the net money profit realized by it from its operations' on the lease." *Id.* at 350. After addressing whether the 1919 Assignment entitled Dan A. Japhet to a royalty interest or a "production payment," as Lyle argued, we concluded that the 1919 Assignment "reserved for Dan A. Japhet 52/60 of the one-fourth royalty interest in the profits realized from Humble Oil's operations on the lease and obligated Humble Oil to provide monthly accountings to Dan A. Japhet." *Id.* at 352.

In addressing whether the 1919 Assignment was binding on Lyle, we noted that the assignment by which he received his working interest, as well as "every other assignment of the lease between 1969 and 1991," clearly stated that the Hogg-

Japhet Lease was subject to an agreement dated February 20, 1919, between Humble Oil and Dan A. Japhet and others that was recorded in the Brazoria County property records and "contained the specific details of the interests reserved by Dan A. Japhet and the other assignors when they conveyed the lease to Humble Oil." *Id.* at 353. We also held that the covenants recited in the 1919 Assignment were covenants that run with the land and, therefore, Lyle was bound by the covenants as a matter of law. *Id.* We stated, "Lyle, as the most recent assignee of the lease, has a 'successive relationship to the same rights of property' as Humble Oil, and the Japhet heirs, as inheritors of Dan A. Japhet's interests, have a successive relationship to the same property rights as Dan A. Japhet." *Id.* We further noted that the Japhets "claim only their proportionate shares of the one-fourth royalty interest reserved to Dan A. Japhet in the 1919 Assignment—not any of the other interests in the mineral estate" and that the assignment to Lyle "clearly stated that it was subject to the royalty interest reserved in the 1919 Assignment, so, as a matter of law, Lyle does not have 'superior title' to that royalty interest." *Id.* at 354. We concluded that the trial court did not err in holding, as matter of law, that the 1919 Assignment is binding on Lyle and that he is obligated "to account for and pay the Japhet heirs for their shares of the one-fourth royalty interest in his portion of the lease." *Id.*

With respect to Lyle's argument that the Japhets' claims were barred by the statute of limitations, we noted that if the terms of an agreement call for periodic

payments during the course of the contract, "a cause of action for such payments may arise at the end of each period, before the contract is completed." *Id.* at 355 (quoting *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)). In this case, "where the 1919 Assignment contemplated a monthly accounting and payment for the one-fourth royalty," we concluded that the statute of limitations "only bars recovery of the royalty payments accruing more than four years prior to the filing of the suit." *Id.* The trial court's summary judgment order ruled that the 1919 Assignment required Lyle to account to the Japhets for their interest "from and after four years prior to the filing of this suit," and we held that this ruling was not erroneous. *Id.* We further held that Lyle failed to establish his defense of laches as a matter of law because he had presented no evidence or argument that laches should apply or that he "made 'a good faith change of position' to his detriment" based on the Japhets' delay in bringing their claims. *Id.* We also held that both the 1919 Assignment itself and the assignment under which Lyle obtained his working interest satisfied the statute of frauds, and that Lyle's defense was therefore unmeritorious. *Id.* at 356.

We affirmed the trial court's 2008 partial summary judgment order. *Id.* The Texas Supreme Court denied Lyle's petition for review.

E. The Defendants' Motion to Compel Arbitration

In April 2012, after the Texas Supreme Court denied Lyle's petition for review, the Japhets moved the trial court to lift its stay order so proceedings in that court could resume. Lyle, Warbonnet, Lyle Engineering, Houston Bluebonnet, E&H, and American Universal opposed lifting the stay and argued that, under the 1919 Assignment, the Japhets' "exclusive remedy is arbitration." The Working Interest Owners argued that the 1919 Assignment required the Japhets to "serve notice of the claim of breach of contract and if disputed, demand for arbitration on Defendants owning any interest" in the Hogg-Japhet Lease, but that the Japhets had not provided notice of breach and had not demanded arbitration. The Working Interest Owners argued that "[t]he cause of action should be abated and stayed pending proper notice of the alleged breach, demand for arbitration and determination of the claim through the arbitration process and detailed in the" 1919 Assignment.

The Working Interest Owners filed a contemporaneous "Motion to Stay Litigation Pending Arbitration." They argued:

> [The Japhets] assert Defendants' interests, as successors in interest of Humble Oil & Refining Company are subject to the 1919 Assignment. All Defendants have disputed this and a good faith dispute exists as to the applicability of [the Japhets'] claims. Defendants have denied the applicability of the claim, have denied that [the Japhets] have standing, and assert that the assignment has been fulfilled and terminated. An agreement of the same date as the Assignment was entered into [the

> Second Agreement], amended and any obligation was fulfilled or terminated.
>
> If the 1919 Assignment applies (which Defendants deny), all claims in the litigation for breach of contract are subject to arbitration, including any assertion of non-payment of the disputed net profits interest. [The Japhets] have alleged breach of contract; however, [the Japhets] have failed to satisfy the conditions precedent to bringing an action alleging breach of contract because no 30 day written notice or demand has been delivered by any Plaintiff to any Defendants owning an interest, specifying the alleged default.

The Working Interest Owners argued that the notice and arbitration provisions contained in the 1919 Assignment "require written notice of any claimed default and further requires the parties to arbitrate this controversy in its entirety if there is a dispute of the claim."

In an additional filing, the Working Interest Owners argued that they had invoked the arbitration clause in the 1919 Assignment "at the first opportunity when a question of applicability of the contract ha[d] been made." They argued that they had not waived their right to compel arbitration, noting that the parties had not completed discovery, "all issues and defenses have not been fully raised or litigated," and the trial court's prior summary judgment ruling only addressed Lyle's liability: it expressly ruled that Warbonnet had no liability under the 1919 Assignment and the additional Working Interest Owners had not been added as defendants at the time of that ruling. They argued that Lyle and Warbonnet did not represent the subsequently added defendants and no theory of virtual representation applied. They

further argued that the Japhets could not demonstrate that compelling arbitration would cause prejudice to them.

In response, the Japhets argued that, if Lyle and the Working Interest Owners had a right to invoke the arbitration provision in the 1919 Assignment, they had waived it by waiting nearly eight years after suit was originally filed to assert the provision. The Japhets pointed out that Lyle and Warbonnet did not invoke the arbitration provision when they first answered the suit in 2005. Both parties had moved for summary judgment, which the trial court granted in favor of the Japhets in 2008, a ruling that this Court affirmed in 2010, and which the Texas Supreme Court declined to review "[a]fter extensive briefing." The Japhets argued, "After all the appeals were exhausted, the 1919 Assignment was upheld as valid and enforceable against the Defendants as successors in interest of Humble [Oil], and the only issues that remain for trial are the amount of the net profits which are due each Plaintiff and how much is owed by each of the Defendants." They argued that, instead of agreeing to lift the stay of trial court proceedings so discovery could proceed on the only remaining issue in the case—damages—the Working Interest Owners sought, for the first time, to compel arbitration. The Japhets thus argued that the Working Interest Owners had "substantially invoked the litigation process" and could no longer move for arbitration. The Japhets also argued that the Working Interest Owners who were added as defendants in 2009 were bound by the trial

court's earlier summary judgment ruling under the doctrine of virtual representation and because they were in privity with the original named defendants, Lyle and Warbonnet.

On April 17, 2012, the trial court denied the Working Interest Owners' "Motion to Stay Litigation Pending Arbitration." The next day, the trial court lifted its 2009 order staying trial court proceedings pending the resolution of the interlocutory appeal.

F. Suspension of Payments and Deposit Into Registry of Trial Court

During the pendency of this lawsuit until April 1, 2016, Dorado Oil Company had a contract to purchase oil produced from the wells located on the Hogg-Japhet Lease. In April 2012, counsel for the Japhets sent a letter to Dorado, demanding that it "cease distribution to the [W]orking [I]nterest [O]wners of the 52/60 of 25% of 7/8 of the production revenues from the Hogg-Japhet Lease." Dorado informed the Working Interest Owners that, due to the Japhets' demand, it would suspend the funds, and it requested that each party "reply with what they believed the proper decimal interest should be for each [W]orking [I]nterest [O]wner." When the parties were unable to agree on the percentage of funds that should be placed in suspense, Dorado filed an interpleader petition in the underlying lawsuit.

In May 2013, the trial court granted Dorado's petition in interpleader and discharged Dorado "without liability from this suit." The court ordered the

suspended funds and future "funds consisting of distributions for the monthly revenue for [W]orking [I]nterest [O]wners of the 52/60 of 25% of 7/8 of the production revenues from the Hogg-Japhet Lease . . . to be paid into the court registry so long as Dorado is the oil purchaser." Ultimately, Dorado paid $278,000 into the registry of the trial court pursuant to this order.

G. The 2015 Summary Judgment Proceedings

In May 2012, American Universal, which had been added as a defendant in 2009, filed its original answer. As an affirmative defense, it argued that the Japhets' claims were barred by res judicata. It alleged:

> [T]he title and ownership of all royalty, parties with interest in proceeds or revenues, and leasehold to the Hogg Lease, including the twenty (20) acres in issue here, was determined as of 1927 to be the Hogg lessors as to 1/8 and to Humble Oil and Refining Company as to 7/8, totaling 8/8ths, in Cause No. 22,151, *Hogg, et al. v. Sheffield, et al.*, in the District Court of Brazoria County, Texas. There was no 25% of 7/8 interest in any other party or parties.

American Universal denied that the Japhets have a claim under the 1919 Assignment, but argued that, if they did, that claim would be subject to arbitration under the Assignment. It also specifically denied that the Japhets have "any interest in Defendant's leasehold interest or the proceeds therefrom" and specifically denied that its interest in the Hogg-Japhet Lease is subject to the 1919 Assignment. On the same date, E&H filed a substantively identical original answer, and Lyle, Houston

Bluebonnet and Lyle Engineering amended their answers to raise identical arguments.

In January 2014, the Japhets again amended their petition to add additional defendants. In addition to the already-existing defendants, the Japhets asserted claims against James Abbott *d/b/a* Jim Abbott Oil Properties, C.G. Enterprises, Inc., Karol Lyle Easterwood, Jennie Lyle Bierscheid, and Esther Suckle as Trustee of the Suckle 1999 Living Trust, all of whom allegedly owned working interests in the Hogg-Japhet Lease.[6] The Japhets acknowledged in this petition that they had settled their claims against Thunderbird Drilling, Spring Creek Sources, Nixon, and the Reardons, and they did not assert any claims against these former defendants. The Japhets amended the portion of their petition in which they sought declaratory judgment to allege:

> In December 2008, Partial Summary Judgment was granted in favor of Plaintiffs and against Defendant Lyle, providing in pertinent part, as follows:
>
> - In the 1919 Assignment, Humble agreed, in "further consideration of this transfer" to "carry Dan A. Japhet [et al] for a working interest of one fourth (1/4) of the net money profit realized by [Humble] from its operations" upon the Hogg-Japhet Lease. As stipulated in the 1919 Assignment, Dan A. Japhet owned an undivided 52/60 of the carried working interest of one

[6] Abbott and Easterwood are not parties to this appeal. Easterwood passed away in 2013, and in a 2015 summary judgment proceeding, the trial court ruled that both Abbott and Easterwood owned no interest in the Hogg-Japhet Lease and were not liable to the Japhets. Bierscheid is a party to this appeal, but only in her capacity as the executor of Lyle's estate and not in her individual capacity.

fourth (1/4) of the net money profit realized from operations on the Hogg-Japhet Lease.

- The 1919 Assignment is binding on the successors and assigns of the parties to it, subject to the terms and conditions thereof.

Plaintiffs seek a declaratory judgment that the remaining Defendants, to-wit: WARBONNET EXPLORATION CO., LYLE ENGINEERING CO., HOUSTON BLUEBONNET, LLC, LUKIN T. GILLIAND, E&H, LP, AMERICAN UNIVERSAL INVESTMENT CO., JAMES C. ABBOTT, JR., dba JIM ABBOTT OIL PROPERTIES, C.G. INVESTMENTS, INC., ALLAN SETH BLANK, KAROL JOE LYLE EASTERWOOD, JENNIE KAY LYLE BIERSCHEID, and ESTHER SUCKLE, TRUSTEE OF THE SUCKLE 1999 LIVING TRUST are successors of Humble under the 1919 Assignment and are likewise bound by it to account for and to pay the plaintiffs 52/60 of ¼ of the net profits therefrom.

The Japhets also alleged that the 1919 Assignment required Humble Oil to comply with all of the obligations of the original lease contract executed in 1913 and provided for "partial forfeiture and termination of the assignment and reversion to Dan A. Japhet et al of the premises assigned thereby upon a breach" of the Assignment. The Japhets alleged that the Working Interest Owners, as successors-in-interest of Humble Oil, had breached material obligations of the 1919 Assignment by failing to account for and pay the Japhets their reserved net profits interest. The Japhets sought a declaration "that the 1919 Assignment has terminated as to, and all rights therein granted have reverted to [the Japhets] with respect to 52/60 of, the Hogg-Japhet Lease, except for 40,000 square feet around any well producing oil as

of thirty (30) days after April 11, 2012," a date on which the Japhets made a demand in writing for payment of their interest.

Suckle, as Trustee of the Suckle 1999 Living Trust, filed an answer that was substantively identical to those filed by American Universal, E&H, Lyle, Houston Bluebonnet, and Lyle Engineering. C.G. Enterprises filed an answer in which it specifically denied that "any interest was reserved by the instrument relied upon by [the Japhets]" and denied that the Japhets "have any interest in Defendant[']s leasehold interest."

On August 26, 2015, the Japhets filed a partial motion for summary judgment ("the 2015 summary judgment motion"). After briefly recounting the trial court's 2008 summary judgment ruling establishing Lyle's liability, the Japhets argued that all of the defendants own working interests in the Hogg-Japhet Lease and are successors-in-interest to Humble Oil. As a result, all of the defendants, like Lyle, are "bound by the 1919 Assignment and required to account to the [Japhets] for their respective shares of the 'carried working interest of one-fourth of the net money profit' realized from operations on the Hogg-Japhet Lease, during the relevant time periods." The Japhets sought (1) a summary judgment ruling that they are entitled to an accounting and payment by each defendant "for their respective shares of 52/60 of 25% of any and all net profits from the Hogg-Japhet Lease through 2014" and (2) an order directing specific performance of the 1919 Assignment for periods after

2014. They also sought rulings setting forth each defendant's "percentage share of such obligations," awarding to each plaintiff damages for each defendant's share of the obligations, declaring the 1919 Assignment terminated "except with respect to certain limited areas around any producing well," and declaring that they are entitled to attorney's fees and prejudgment interest. The Japhets argued that they were entitled to summary judgment because all legal issues had been resolved by this Court's 2010 opinion, and the damages issues were "purely mathematical computations based on the undisputed, stipulated working interest revenues and expenses during the relevant time periods."

The Working Interest Owners responded to the 2015 summary judgment motion and also moved for summary judgment on their affirmative defenses. In addition to reasserting the same arguments Lyle had made in the 2008 summary judgment proceeding, the Working Interest Owners argued that title and ownership of the Hogg-Japhet Lease had been determined in 1927 by a Brazoria County court and that court had determined that the Hoggs owned 1/8 and Humble Oil owned 7/8 of the leasehold interest. The Working Interest Owners argued that, based on res judicata and stare decisis, the Texas Supreme Court's 1934 opinion in that dispute precluded any assertion by the Japhets that they had an interest in the Hogg-Japhet Lease and were entitled to payments. The Working Interest Owners argued that this 1934 opinion was law of the case, and not this Court's 2010 opinion. Additionally,

the Working Interest Owners challenged the models that the Japhets used to calculate their damages.

On November 6, 2015, the trial court entered an interlocutory summary judgment order, granting the Japhets' 2015 summary judgment motion in part and denying it in part. In this order, the trial court ruled that the Japhets "own the Japhet Net Profits Interest, defined as 52/60 of the one-fourth interest in the net money profit realized from operations on the Hogg-Japhet Lease reserved to the Assignors Dan A. Japhet et al in the 1919 Assignment" and set out the proportion each plaintiff owned of the interest.[7] The trial court ruled that "net profits" means "the net revenues derived from all sales of oil and gas attributable to the 7/8 working interest, minus the severance taxes and direct costs of operations thereon" and that "such costs do not include any amount charged as 'overhead' or any legal fees paid to the operator's attorneys." The trial court also set out the percentage of each defendant's working interest in the Hogg-Japhet Lease and, thus, the extent to which each defendant was liable to the Japhets for the Net Profits Interest.[8] Further, the court set the date from

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[7] Specifically, the trial court ruled that JPMorgan Chase Bank and Lloyd Bentsen III, as Independent Executors of the Estate of Jane Japhet Guinn, owned 1/6 of the interest, Kate Lutken Bruno and Wesley C. Lutken, Jr. each owned 1/6 of the interest, and Lynn Menking Sahin, Perry B. Menking, Jr., Daniel R. Japhet, Jr., Gretchen Japhet, Larken Japhet Sutherland, and Susan Japhet Scotty each owned 1/12 of the interest.

[8] Specifically, the trial court ruled that American Universal had a 9% working interest, Houston Bluebonnet and Lyle each had a 27.125% working interest, and Suckle and C.G. Enterprises each had a 5.625% working interest. The trial court

which each defendant would be responsible to account to the Japhets for the Net Profits Interest and to pay their respective shares.[9] The trial court refused to rule on the amount of damages that each defendant owed to the Japhets, reserving that question for trial.

Additionally, the trial court ruled that the Japhets were entitled to specific performance of the 1919 Assignment. The court ruled:

> Summary Judgment Defendants are severally ordered to account to [the Japhets] for the Japhet Net Profits Interest for all periods of time from and after January 1, 2015. In said accountings, no "overhead" charges and none of the operator's legal fees are to be taken into account, and the accountings shall be performed on a monthly basis as required by the 1919 Assignment.

The court also ruled that the Japhets were entitled to attorney's fees, costs and expenses, and prejudgment interest "in such amounts and shares as may be determined upon further proceedings herein." In a separate order, the trial court denied the Working Interest Owners' cross motion for summary judgment.

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also ruled that Abbott, Lyle Engineering, Blank, Easterwood, and Bierscheid, in her individual capacity, owned no interest in the Hogg-Japhet Lease as of January 1, 2015. The court ruled that these defendants were not liable to the Japhets for a share of the Net Profits Interest.

[9] The trial court ruled that American Universal was liable from March 9, 2005, Houston Bluebonnet from January 1, 2008, Lyle from October 1, 2000, E & H from March 9, 2005, to October 30, 2010, Suckle from October 31, 2010, C.G. Enterprises from January 7, 2010, and Warbonnet "to the extent it receives or has received working interest revenues" from December 9, 1999.

H. Additional Changes In Parties and Claims Between the 2015 Summary Judgment and the 2018 Trial

In April 2016, Warbonnet filed for bankruptcy. The defendants moved to stay proceedings in the trial court pending Warbonnet's bankruptcy proceeding. Later in April 2016, several of the Working Interest Owners removed the case to federal bankruptcy court. The Japhets nonsuited their claims against Warbonnet. The bankruptcy court remanded the case to the trial court on June 1, 2016.

Lyle passed away in April 2016. In June 2016, the Japhets amended their petition and sought to proceed against Lyle's estate. This petition also no longer asserted claims against Warbonnet, noting that it had been dismissed by order of the bankruptcy court after the Japhets nonsuited their claims against it and that it no longer served as operator for the Hogg-Japhet Lease. The Japhets also recited the trial court's 2008 and 2015 summary judgment rulings and requested that these rulings be incorporated into the court's final judgment.

The Working Interest Owners sought leave to file an amended answer and counterclaim in August 2016. In this filing, the Working Interest Owners for the first time alleged that the 1923 Settlement Agreement, which was signed by Dan A. Japhet, among others, "settles the disputes and all accounts among the parties as of December 31, 1922 and provides for [an] additional sum of $80,157.95 to the four [assignors], including Japhet, which was subsequently paid or satisfied from

production at the time."[10] The Working Interest Owners argued that this document "clearly show[s] the valid defenses of the Defendants, no personal liability, bar by settlement and amendment, and that [the Japhets] never acquired an actual interest in any valid claim and should not have brought this lawsuit." The Working Interest Owners stated that, in their amended answer and counterclaim, they intended to seek a declaratory judgment "related to the 1923 [Settlement] Agreement that settled matters between the parties, and seeks to quiet title and removal of the clouds on title placed there by" a lis pendens filed by the Japhets. They also stated that they intended to seek an injunction permanently enjoining the Japhets from interfering with the new operator of the Hogg-Japhet Lease.

The Working Interest Owners then filed an amended answer and counterclaim in which they asserted that the 1923 Settlement Agreement barred the Japhets' claims. As a counterclaim, the Working Interest Owners alleged:

> [The Working Interest Owners are] seeking declaratory judgment that the 1923 Settlement [Agreement] to the 1919 [Assignment] did settle all differences and accounts between Japhet and others and Humble [Oil], the remaining consideration of $80,157.95, was subsequently paid or satisfied. The Interlocutory Orders [the 2008 and 2015 summary judgment rulings] entered by this Court granting partial summary judgment to [the Japhets] are not final and are inoperative, were entered by mistake without benefit of the operative documents between the real parties in interest including the 1923 Settlement [Agreement] between Japhet and Humble [Oil].

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[10] The Working Interest Owners stated that they had recently received a copy of the 1923 Settlement Agreement in response to a subpoena directed to ExxonMobil, Humble Oil's successor.

The Working Interest Owners also asserted claims for slander of title and tortious interference with contract, alleging that the Japhets had interfered with Dorado's contract to purchase oil and gas from the Lease. The Working Interest Owners sought declarations that a lis pendens filed by the Japhets and the trial court's interlocutory summary judgment orders were invalid and unenforceable, "ordering each be removed from the title to the Working Interest Owners' interest in the 20-acre Hogg[-Japhet] Lease and property made the subject of this litigation, quieting title in the [Working Interest Owners] and removing the clouds on [the Working Interest Owners'] title." Furthermore, they sought a declaration that they were "the owners proportionally of the proceeds" that Dorado had placed in the registry of the court.

The Working Interest Owners also moved the trial court to reconsider its prior summary judgment rulings based on the discovery of the 1923 Settlement Agreement, the *Hogg v. Sheffield* decisions, and *Estate of Japhet v. Commissioner of Internal Revenue*, a 1944 federal tax court opinion, which, according to the Working Interest Owners, ruled that Dan A. Japhet had sold all of his rights in the Hogg-Japhet Lease to Humble Oil and that Humble Oil's payment obligation was a "contractual payment obligation" and not a covenant running with the land. The trial court denied the Working Interest Owners' motion for reconsideration.

In January 2017, the Japhets filed a partial summary judgment motion ("the 2017 partial summary judgment motion") on the amount of damages and prejudgment interest owed by each Working Interest Owner to each plaintiff. The Japhets argued:

> [The Japhets'] damages are measured by the monthly revenues, as shown by Dorado's payments for 7/8 of the oil production, net of severance taxes, minus the monthly operating expenses (excluding "overhead" and Warbonnet's legal fees), as shown by Warbonnet's joint interest billings ("JIBs") to the [W]orking [I]nterest [O]wners. . . . Warbonnet's monthly expense billings must be adjusted downwards by the $900 per month that it charges for "overhead" expense, which, as the 1919 Assignment expressly provides, is not allowed to be charged in determining profits. Likewise, the "legal fees" which appear on many of Warbonnet's monthly billings is not taken into account in determining the "net profits" which are due to the [Japhets], since "legal fees" as a matter of law are not expenses of "operations" and the legal fees in question were expended in defending against the claims of the [Japhets] in this lawsuit. The Court, in its 2015 [summary judgment] Order, declared that in accounting for the Japhet Net Profits Interest, the monthly overhead charges and the operator's legal fees are not to be taken into account.

They argued that if the trial court grants summary judgment on damages, the only issue that would remain for trial is attorney's fees. The Japhets also sought a declaration "that the 1923 [Settlement] Agreement . . . did not materially alter the obligations of the 1919 Assignment."

In response to this motion, the Working Interest Owners asserted, among other things, that a title search had revealed that, at the time of the original contract in 1913, the Hoggs did not have title to Lots 17 and 18 of the subject property. Neither

the original contract nor the 1918 assignment under which Dan A. Japhet purportedly obtained an interest in the Hogg-Japhet Lease contained a warranty, and the Working Interest Owners thus argued that Dan A. Japhet never obtained title to Lots 17 and 18, on which one of the primary wells that produced oil was drilled. They argued that the Hoggs obtained title to Lots 17 and 18 in February 1918 and December 1919, respectively, and they later "recognized the lots under the [Hogg-Japhet Lease] during Humble's ownership." The Working Interest Owners later amended their answers and counterclaims to assert that because Dan A. Japhet allegedly did not own an interest in Lots 17 and 18 at the time of the 1919 Assignment, neither he nor his successors "were entitled to any proceeds of any well located on Lots 17 and 18," including a well located on Lot 17 that "has accounted for approximately half of the production from the 20 acres" of the Hogg-Japhet Lease.[11]

The trial court denied the Japhets' 2017 partial summary judgment motion.

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[11] The Working Interest Owners also sought declarations from the trial court that the 1923 Settlement Agreement "settled all accounts and disputes to the premises," "that the title determination made by the Brazoria [County] District Court in 1929, that the Hoggs owned 1/8 royalty and that Humble owned 7/8 leasehold interest as affirmed [by] the Texas Supreme Court was valid and enforceable and any assignee of such parties can rely upon same free of encumbrances," and that *Estate of Japhet v. Commissioner of Internal Revenue* "determined the conveyance of all right, title and interest from Japhet to Humble [and] is binding on Japhet's successors and assigns . . . ."

In February 2017, the Working Interest Owners filed special exceptions to the Japhets' live pleading, which had been filed in June 2016. Among other things, the Working Interest Owners specially excepted

> to the inclusion and standing of JPMorgan Chase Bank and Lloyd Bentsen III, as Independent Co-Executors of the Estate of Jane Japhet Guinn in the capacity stated as Jane Japhet Guinn Estate was not the successor-in-interest to the Jane Guinn Revocable Trust, a separate entity, rather the Gayle F. Bentsen GST Non Exempt Trust, Dan J. Flannery GST Non Exempt Trust and John F. Flannery, Jr. GST Non Exempt Trust are the successor by assignment dated August 26, 2009 recorded under instrument . . . [in] Brazoria County. . . . The Jane Guinn Revocable Trust is no longer a party to the case, and the actual three trusts that are successors-in-interest to the Jane Guinn Revocable Trust are not parties to the case.

The Working Interest Owners also continued to argue in this filing that the 1919 Assignment "is not the operative instrument of any contractual rights of the carried interest," that "[t]here was no net profits interest," and that the 1923 Settlement Agreement "settled the disputes between Japhet and Humble [Oil]."

In response to the Working Interest Owners' special exceptions, the Japhets filed a supplement to their live pleading. The Japhets alleged that Jane Guinn passed away in 2007 and that the co-executors of her estate, JPMorgan Chase Bank and Lloyd Bentsen III, had been prosecuting the case in their capacity as executors. Jane Guinn's will established four trusts for the benefit of her children. One of her children, Dan Japhet Flannery, passed away in 2016, and the trust created for his benefit terminated. The Japhets sought to add the three remaining trusts and the

executor of Dan Japhet Flannery's estate as plaintiffs, arguing that the new parties "are not asserting any new or additional claims against the defendants, but join in and assert only the claims stated in the pleadings of the Executors of the Estate of Jane Japhet Guinn." This supplemental petition named the following new plaintiffs: JPMorgan Chase Bank, Lloyd Bentsen III, and Gayle Bentsen as Co-Trustees of the Gayle F. Bentsen GST Non-Exempt Trust; JPMorgan Chase Bank and Lloyd Bentsen III as Co-Trustees of the Dan J. Flannery GST Non-Exempt Trust; JPMorgan Chase Bank, Lloyd Bentsen III, and John F. Flannery as Co-Trustees of the John F. Flannery, Jr. GST Non-Exempt Trust; and Jill Baucum Flannery, as Independent Executor of the Estate of Dan Japhet Flannery. These plaintiffs sought to recover the 1/6 of the net profits interest to which the Jane Guinn Revocable Trust had been entitled.

Working Interest Owner C.G. Enterprises did not respond to the Japhets' 2017 partial summary judgment motion. On December 3, 2017, the trial court entered an order granting the 2017 partial summary judgment motion as to C.G. Enterprises. The trial court ruled that C.G. Enterprises was liable to the Japhets for damages for "failure to pay or to account for the Japhet Net Profits Interest, defined as 52/60 of the one-fourth interest in the net money profit realized from operations through November 2016 on the Hogg-Japhet Lease, reserved to Dan A. Japhet in the 1919 Assignment," and the order set out the amounts C.G. Enterprises owed to each

plaintiff. The trial court also ruled that the 1923 Settlement Agreement "did not materially alter C.G. Enterprises, Inc.'s obligations under the 1919 Assignment." The court further ruled that the applicable pre-judgment interest rate was that set out in Texas Finance Code section 304.003 and that the 1919 Assignment "has terminated, pursuant to its terms, as to the interest of Defendant C.G. Enterprises, Inc., as to all of the premises covered thereby, except for a 200 foot x 200 foot square (40,000 square feet) around each producing well."

I. The 2018 Jury Trial on Damages

At trial, Dan R. Japhet, Jr., one of the plaintiffs and Dan A. Japhet's great-grandson, testified concerning the calculation of the Net Profits Interest. The trial court admitted exhibits in which the parties had agreed upon the revenues and expenses for the Hogg-Japhet Lease from January 2000 through December 2017, and Japhet used these agreed numbers to calculate what the plaintiffs were entitled to receive. He testified that the Net Profits Interest is calculated by taking the working interest revenues, minus the working interest expenses, plus lease overhead, plus legal fees to arrive at "net money profit." To obtain the Japhets' share of the net money profit, that amount is then multiplied by 52/60 times ¼. The trial court admitted a document that reflected these calculations, which were performed for every month from October 2000 through December 2017. This exhibit also

multiplied the net profits number by each defendant's percentage of working interest ownership to show each defendant's share of the profits.

The trial court also admitted a series of exhibits that divided the Net Profits Interest due to the Japhets as a group and calculated each plaintiff's share of the profit.[12] Each of these exhibits also showed "each defendant and what their liability of that amount is" and these exhibits calculated each Working Interest Owner's liability to each of the Japhets beginning four years from the date the particular Working Interest Owner was added to the lawsuit. Japhet agreed with his counsel that the exhibits took "into account both the time that the defendants were made defendants to the case and transfers of ownership of these interests" between defendants. The exhibits also summarized "the total amounts liable by a defendant based on their working interest ownership in the [Hogg-Japhet Lease] for the time periods that they were part of this lawsuit" for each of the Japhets. The trial court also admitted an exhibit that summarized "the net profits due to all the plaintiffs by each defendant, collectively." This exhibit listed the total amount of net profits due to all of the Japhets as $758,934.65. The trial court also admitted documents showing the chain of title from the original lease executed by the Hoggs in 1913 to Dan A.

[12] On cross-examination, Japhet agreed that, in making his calculations for each plaintiff's share, he considered time periods before the date the particular plaintiff obtained an interest in the Net Profits Interest.

Japhet, from Dan A. Japhet to each of the plaintiffs, and from Humble Oil to each of the Working Interest Owners.

During trial, the trial court granted a directed verdict in favor of the Japhets on the Working Interest Owners' counterclaims for slander of title, tortious interference with contract, and requests for declaratory judgment.

Question One of the jury charge asked, "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the [Japhets] for their damages, if any, that resulted from the Defendants' failure to comply with their obligations under the 1919 Assignment to the [Japhets]?" The jury charge instructed the jury that the 1919 Assignment "obligates each of the Defendants to account monthly for such Defendant's proportionate share of Japhet Net Profits Interest, and to pay such share of such net profits to the [Japhets] in proportion to their interests" and that "Japhet Net Profits Interest" means "52/60 of ¼ (or 13/60) of the Net Money Profits from operations on the Hogg-Japhet Lease." The charge instructed the jury that the Japhet Net Profits Interest is calculated "as follows: the Working Interest Revenues minus Working Interest Expenses from operations on the Hogg-Japhet Lease, multiplied by 13/60 (which is 52/60 times ¼). Then for each Defendant, multiply that number by that Defendant's working interest percentage." The trial court further instructed the jury that "Working Interest Expenses" does not include "overhead expenses, such as head-office superintendence, bookkeeping, or cost of

rendering accounts," nor does it include "any of the operators' or [W]orking [I]nterest [O]wners' legal fees." The jury answered Question One as follows:

- Lukin T. Gilliland: $231.59
- American Universal Investment Co: $96,942.64
- Houston Bluebonnet, LLC: $224,251.60
- Kenneth R. Lyle and Jennie Kay Bierscheid, Independent Executrix of the Estate of Kenneth R. Lyle: $341,037.12
- E&H, LP: $28,387.37
- Esther Suckle, Trustee of the Suckle 1999 Living Trust: $32,201.78
- C.G. Enterprises, Inc.: $35,882.55

Question Two asked, "What is a reasonable fee, if any, for the necessary services of the [Japhets'] attorneys, stated in dollars and cents?" For the trial court proceedings, the jury was instructed to "[a]nswer separately for each Defendant and state the total for all Defendants." The jury answered as follows:

- Kenneth R. Lyle and Jennie Kay Bierscheid, Independent Executrix of the Estate of Kenneth R. Lyle: $322,600
- C.G. Enterprises, Inc: $25,550
- Lukin T. Gilliland: $110
- American Universal Investment Co.: $46,880
- Houston Bluebonnet, LLC: $141,300
- E&H, LP: $220

- Esther Suckle, Trustee of the Suckle 1999 Living Trust: $29,080
- Total for All Defendants: $565,740

The jury awarded the Japhets a total of $180,000 in appellate attorney's fees.

Question Three asked whether the Working Interest Owners' withholding of payment to the Japhets of the Japhet Net Profits Interest and prejudgment interest was excused. The charge instructed the jury that the Working Interest Owners were excused if, "on each date of payment due, if any," there was either "a title dispute that would affect distribution of payment" or "a reasonable doubt that" the Japhets had "sold or authorized sale of [the Japhets'] share to Purchasers,[13] or had clear title to the Japhet Net Profits Interest." The jury answered, "No."

J. Post-Trial Proceedings

On April 2, 2018, the Japhets moved the trial court for entry of judgment on the jury verdict. In this motion, the Japhets noted that C.G. Enterprises, which was represented by different counsel than the other Working Interest Owners, did not appear for trial. The Japhets presented the trial court with a proposed final judgment, as well as calculations for pre-judgment interest.

The Working Interest Owners objected to entry of judgment on the jury verdict. They argued, first, that the Japhets' claims were subject to a valid arbitration agreement and that "[t]his matter should be stayed pending the completion of

[13] The jury charge did not define "Purchasers."

arbitration, following which the Court should enter judgment confirming the arbitration award." The Working Interest Owners also argued that *Hogg v. Sheffield* and *Estate of Japhet v. Commissioner of Internal Revenue* were res judicata to the Japhets' claims and precluded a judgment in their favor. The Working Interest Owners also argued that the 1923 Settlement Agreement settled all disputes between Dan A. Japhet and Humble Oil and imposed a "contractual debt obligation of Humble that was not agreed to or assumed by any of the Defendants." They further argued that the Japhets' claims were barred by the statute of limitations and that the Japhets' claims were "lost through nonaction" because the last payment to the Japhets was by Humble Oil in 1968, but they did not assert a claim for breach of the 1919 Assignment until 2004. The Working Interest Owners also made specific objections to virtually every paragraph in the Japhets' proposed final judgment.

The trial court signed a final judgment on April 9, 2018. The final judgment specifically defined several terms, including the original 1913 contract, the Hogg-Japhet Lease, the Japhet Net Profits Interest, "Net Money Profits from operations on the Hogg-Japhet Lease," Working Interest Revenues, and Working Interest Expenses. The trial court granted a total of $758,934.65 in damages to the Japhets for the Working Interest Owners' failure to account for the Net Profits Interest, and the judgment set out the specific amount for which each Working Interest Owner was liable, as the jury verdict did. The judgment also awarded a total of $565,740 in

trial-level attorney's fees, separated by Working Interest Owner, and a total of $180,000 in conditional appellate-level attorney's fees. The court awarded a total of $254,734.50 in pre-judgment interest, specifying that the applicable interest rate was 5% per annum "from the date each Defendant was made a Defendant herein through April 8, 2018."[14] The trial court awarded the funds placed into the registry of the court by Dorado to the Japhets, and the final judgment specified how the funds were to be distributed to each plaintiff, as well as how the funds were to be credited to the liabilities of each of the Working Interest Owners.

The trial court also granted declaratory relief to the Japhets. The judgment declared the proportions by which each plaintiff owned the Net Profits Interest, as well as the percentage working interest for each defendant. The trial court also made the following declarations:

- [T]he 1923 [Settlement] Agreement, defined as the agreement dated April 17, 1923, between Dan A. Japhet et al and Humble Oil and Refining Company, did not materially alter the Defendants' obligations under the 1919 Assignment, and did not authorize the charging of any overhead expenses or legal fees in accounting for the Japhet Net Profits Interest.
- [T]he Hamman net profits or net proceeds interest, being that interest reserved to the Assignors in the 1913 Assignment from John Hamman et al to Producers Oil Company . . . shall not be counted as an expense in the net profits accounting due [the Japhets] by Defendants unless and

[14] The judgment specified that each Working Interest Owner owed the following amounts in pre-judgment interest: Lukin Gilliland: $73.75; American Universal: $30,874.08; Houston Bluebonnet: $63,033.28; Lyle: $135,251.22; E&H: $12,253.04; Suckle: $7,043.26; and C.G. Enterprises: $6,205.86.

until the Hamman net profits interest is actually paid by the Defendants, and then only to the extent actually paid by Defendants.

- Defendants' Counterclaims against [the Japhets] are without merit, and that Defendants shall take nothing on account of their Counterclaims asserted against [the Japhets]
- [T]he deposits made into the registry of Court by Dorado Oil Company from 2013 to 2016 do not abate or reduce the amount of pre-judgment interest due on [the Japhets'] claims.

The court declared that the 1919 Assignment is binding on all of the Working Interest Owners as successor-in-interest of Humble Oil, that the Japhets are entitled to specific performance of the 1919 Assignment, and that the Working Interest Owners are required to account to the Japhets for the Net Profits Interest in proportion to each defendants' percentage working interest. The court also declared that the 1919 Assignment "has terminated, as to the 74.5215% interest of Defendants in the Hogg-Japhet Lease, pursuant to its terms, as to all of the premises covered thereby, except for two oil wells located on the Hogg-Japhet Lease . . . and 40,000 square feet designated for retention around [each of two specified wells] in the shape of a square, 200 feet on each side, running parallel with the sides of the Hogg-Japhet Lease."

The Working Interest Owners moved to disregard all of the jury findings and for judgment notwithstanding the verdict. In addition to reasserting most of the arguments they had made in various summary judgment filings and in their objection to entry of judgment on the verdict, they argued that the plaintiffs who were added

to the suit in 2017 were not entitled to any recovery, in part because they were not parties to the suit when the trial court made its summary judgment rulings on liability and the court did not submit any questions on liability in the jury charge. The Working Interest Owners also argued that none of the Japhets could recover to the extent that they sought monetary relief for wells drilled on Lots 17 and 18 covered by the Hogg-Japhet Lease because Dan A. Japhet never acquired title to those to lots and, therefore, he had no interest in those lots to convey.

The Working Interest Owners asserted numerous challenges to the award of attorney's fees, including the sufficiency of the evidence and an argument that the Japhets could not recover attorney's fees from Houston Bluebonnet and E&H under Civil Practice and Remedies Code section 38.001 because these two entities are a limited liability company and a limited partnership, respectively, and the statute does not allow for recovery of attorney's fees against those two types of entities. The Working Interest Owners also challenged the award of pre-judgment interest, the trial court's ruling granting specific performance, and each of the trial court's declarations. The Working Interest Owners further argued that the trial court should order the notice of lis pendens removed and that the court should order a new trial on the Working Interest Owners' counterclaims.

The Working Interest Owners also filed a motion to modify the judgment and a motion for new trial, in which they asserted many of the same arguments raised in

their motion to disregard jury findings and for JNOV. In their motion for new trial, the Working Interest Owners argued that there was charge error with respect to several of the instructions, the court's refusal "to submit a separate answer blank for each Plaintiff," the court's refusal "to instruct the jury that, in computing Plaintiffs' alleged damages, not to take into account any revenues or amounts received by Defendants prior to the date each Plaintiff acquired its alleged interest," and the court's refusal to submit questions on liability, the Working Interest Owners' defenses, and their counterclaims.

The trial court denied the Working Interest Owners' motion to disregard jury findings and for JNOV and their motion for new trial. Their motion to modify the judgment was overruled by operation of law. This appeal followed.

Denial of Motion to Compel Arbitration

In their first issue, the Working Interest Owners argue that the trial court erred in denying their motion to compel arbitration because the 1919 Assignment has a valid and enforceable arbitration agreement and the Japhets' claims fall within the agreement. They also argue that the Japhets failed to establish an affirmative defense to arbitration.

A. Standard of Review and Governing Law

Whether an arbitration agreement is valid and enforceable is a question of law that courts review de novo. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227

(Tex. 2003). A party seeking to compel arbitration must establish that a valid arbitration agreement exists between the parties and that the claims asserted fall within the scope of that agreement. *In re 24R, Inc.*, 324 S.W.3d 564, 566 (Tex. 2010) (per curiam); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 605 (Tex. 2005) (per curiam). If the party establishes that a valid arbitration agreement exists, the burden shifts to the party opposing arbitration to prove a defense against enforcing an otherwise valid arbitration agreement. *24R*, 324 S.W.3d at 566. Absent evidence supporting a defense to arbitration, the trial court must compel arbitration. *Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 780 (Tex. App.—El Paso 2015, no pet.).

When the relevant facts are undisputed, whether a party has waived its right to arbitrate is a question of law. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015); *see Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (stating that whether party has waived right to arbitrate is question of law that we review de novo). A party waives an arbitration clause by "substantially invoking the judicial process to the other party's detriment or prejudice." *Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008). Because arbitration agreements are favored in Texas, there is a "strong presumption against waiver of arbitration," and establishing waiver is a "high" hurdle. *Id.* at 590; *see J.M. Davidson*, 128 S.W.3d at 227 (noting that after party establishes existence of valid arbitration agreement, "a

strong presumption favoring arbitration" arises). A party may waive its right to arbitration expressly or impliedly. *See G.T. Leach Builders*, 458 S.W.3d at 511–12. A party asserting implied waiver as a defense to enforcing an arbitration agreement has the burden to prove that (1) the other party has "'substantially invoked the judicial process,' which is conduct inconsistent with a claimed right to compel arbitration," and (2) the inconsistent conduct has caused the party opposing arbitration to suffer detriment or prejudice. *Id.* at 512.

Whether a party has substantially invoked the judicial process depends on the totality of the circumstances and is decided on a case-by-case basis. *Id.*; *Perry Homes*, 258 S.W.3d at 590. In making this determination, courts consider a "wide variety" of factors, including:

- how long the party moving to compel arbitration waited to do so;
- the reasons for the movant's delay;
- whether and when the movant knew of the arbitration agreement during the period of delay;
- how much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits;
- whether the movant requested the court to dispose of claims on the merits;
- whether the movant asserted affirmative claims for relief in court;
- the extent of the movant's engagement in pretrial matters related to the merits (as opposed to matters related to arbitrability or jurisdiction);

- the amount of time and expense the parties have committed to the litigation;
- whether the discovery conducted would be unavailable or useful in arbitration;
- whether activity in court would be duplicated in arbitration; and
- when the case was to be tried.

G.T. Leach Builders, 458 S.W.3d at 512; *Perry Homes*, 258 S.W.3d at 590–92.

"Merely taking part in litigation is not enough unless a party has substantially invoked the judicial process to its opponent's detriment." *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006) (quoting *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam)); *In re Vesta Ins. Grp.*, 192 S.W.3d at 763 ("Delay alone generally does not establish waiver."). However, "[s]ubstantially invoking the judicial process may occur when the party seeking arbitration actively has tried, but failed, to achieve a satisfactory result in litigation before turning to arbitration." *Nw. Constr. Co. v. Oak Partners, L.P.*, 248 S.W.3d 837, 848 (Tex. App.—Fort Worth 2008, pet. denied); *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 534 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("An attempt to resolve the merits and still retain the right to arbitration is clearly impermissible.").

The party asserting waiver of arbitration must also prove that it suffered unfair prejudice as a result of the opposing party's litigation conduct. *G.T. Leach Builders*, 458 S.W.3d at 515. "Detriment or prejudice, in this context, refers to an 'inherent

unfairness caused by a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.'" *Id.* (quoting *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 625 (Tex. 2008) (per curiam)); *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam) (stating that prejudice is "inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue"). A party should not be allowed "purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." *Perry Homes*, 258 S.W.3d at 597 (quoting *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46 n.5 (1st Cir. 2005)).

Prejudice may result when the party seeking arbitration "first sought to use the judicial process to gain access to information that would not have been available in arbitration, but propounding discovery will not, in and of itself, result in waiver of a right to compel arbitration." *G.T. Leach Builders*, 458 S.W.3d at 515. Delay may be a factor in determining whether the movant has substantially invoked the litigation process as well as whether the nonmovant has suffered prejudice, but "mere delay is not ordinarily enough, even if it is substantial." *Id.* "Waiver can be implied from a party's unequivocal conduct, but not by inaction." *Id.* (quoting *In re ADM Inv'r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (stating same in context of whether party waived forum-selection clause)).

B. Analysis

The 1919 Assignment provides as follows with respect to arbitration:

> Should there exist at any time a good-faith dispute as to whether or not a default in the performance of any obligation has occurred, then grantors herein [Japhet et al.] or their successors in interest shall jointly appoint an arbitrator and grantee herein [Humble Oil] shall appoint an arbitrator and the two so chosen shall select a third arbitrator, and the matter at issue as set forth in the notice from grantors to grantee above provided for shall be submitted to said arbitration committee for decision. . . .

The 1919 Assignment then sets out procedures for the hearing, requires the arbitration committee to render a decision in writing, provides that the committee's written decision "shall be final and binding upon both parties," and provides for a mechanism for the parties to bring errors in the decision to the arbitrators' attention.

The Japhets first filed suit against Lyle and Warbonnet in October 2004. In 2007, the parties began conducting discovery on the merits of the Japhets' claims, including conducting depositions and propounding subpoenas to ExxonMobil, Humble Oil's successor, and other discovery requests. Both parties moved for summary judgment on the Japhets' claims and sought a ruling on the merits and on Lyle's affirmative defenses. In 2008, the trial court rendered a partial summary judgment order, ruling that the Japhets had a Net Profits Interest under the 1919 Assignment, that Lyle was bound by the 1919 Assignment, and that the 1919 Assignment required Lyle to account to the Japhets for his proportional share of their Net Profits Interest. This summary judgment order was interlocutory, and both Lyle

and the Japhets filed an agreed motion with the trial court to allow an interlocutory appeal of this ruling. The trial court signed the motion and allowed the interlocutory appeal to this Court.

In 2010, this Court issued its opinion in the interlocutory appeal. We affirmed the trial court's 2008 summary judgment ruling, holding, in relevant part, that the Japhets had a Net Profits Interest under the 1919 Assignment, that Humble Oil's obligation to pay this interest was a covenant running with the land, that Lyle was a successor-in-interest of Humble Oil, and that Lyle was bound by the 1919 Assignment and was required to account to the Japhets for their Net Profits Interest. *See Lyle*, 365 S.W.3d at 350–54. Lyle sought further review before the Texas Supreme Court, which denied his petition for review in 2011.

While the interlocutory appeal was pending, in March 2009, the Japhets added several new defendants: Lyle Engineering, Houston Bluebonnet, E&H, and American Universal Investment Company, all of which are working interest holders in the Hogg-Japhet Lease and are similarly situated to Lyle. At Lyle's request, the trial court stayed all proceedings in that court pending this Court's ruling on the interlocutory appeal. Thus, no action occurred in the trial court while the interlocutory appeal was pending.

In 2012, after the Texas Supreme Court denied Lyle's petition for review and the case resumed in the trial court, Lyle and the new defendants moved to compel

arbitration under the 1919 Assignment.[15] The trial court denied this motion. We conclude that the trial court correctly declined to compel arbitration because Lyle waived the right to compel arbitration by substantially invoking the litigation process. By the time the parties moved to compel arbitration, the case had been pending for nearly eight years. Lyle had been involved in substantial discovery, and, by filing a motion for summary judgment, he sought a ruling on the merits of the case. The key factor in concluding that Lyle substantially invoked the judicial process is the fact that Lyle did not move to compel arbitration until after he received an adverse ruling on his liability from the trial court, a ruling that was upheld on appeal by this Court and was denied review by the Texas Supreme Court. *See Nw. Constr. Co.*, 248 S.W.3d at 848 ("Substantially invoking the judicial process may occur when the party seeking arbitration actively has tried, but failed, to achieve a satisfactory result in litigation before turning to arbitration."); *Interconex*, 224 S.W.3d at 534 ("An attempt to resolve the merits and still retain the right to arbitration is clearly impermissible.").

Lyle cannot participate in litigation for years, obtain an adverse ruling on liability, and then seek to avoid that adverse ruling by moving to compel arbitration.

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[15] The two defendants added in 2014, C.G. Enterprises and Esther Suckle, Trustee of the Suckle 1999 Living Trust, were not yet parties to the lawsuit at the time the defendants moved to compel arbitration. These two parties never filed a motion to compel arbitration.

At the absolute latest, Lyle became aware of the arbitration provision in the 1919 Assignment when the Japhets attached the Assignment to their motion for partial summary judgment, which was filed in October 2007. Lyle never asserted the arbitration provision during the summary judgment proceedings, which continued for more than a year before the trial court rendered its ruling in December 2008. It was only after the adverse ruling against him was upheld on appeal that Lyle moved to compel arbitration. We conclude that, under these facts, Lyle waived his right to compel arbitration because he substantially invoked the litigation process. *See G.T. Leach Builders*, 458 S.W.3d at 512; *Perry Homes*, 258 S.W.3d at 590–92; *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating that party can substantially invoke judicial process by actively trying, but failing, to achieve result in litigation before turning to arbitration and listing moving for summary judgment and seeking final resolution of dispute as examples).

The prejudice to the Japhets as a result of Lyle's litigation conduct is apparent from the record itself. In addition to expenses the Japhets incurred in responding to Lyle's discovery requests, they also incurred expenses related to Lyle's interlocutory appeal to this Court.[16] Furthermore, it is clear that Lyle, in waiting to move to compel

[16] Appellate counsel testified at trial that the Japhets incurred approximately $70,000 in attorney's fees for the interlocutory appeal.

arbitration until after the adverse liability ruling against him was affirmed on appeal, "attempt[ed] to have it both ways by switching between litigation and arbitration to [his] own advantage." *See Perry Homes*, 258 S.W.3d at 597. Lyle should not be allowed "purposefully and unjustifiably to manipulate the exercise of [his] arbitral rights simply to gain an unfair tactical advantage over the opposing party." *See id.* We therefore conclude that the record establishes that the extreme delay and Lyle's litigation conduct resulted in substantial prejudice to the Japhets. *See Kennedy Hodges, L.L.P.*, 433 S.W.3d at 545 (stating that prejudice is "inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue").

The Working Interest Owners contend that even if Lyle waived his right to compel arbitration based on his litigation conduct, that conduct cannot be imputed to the other defendants, who were added as defendants after the interlocutory appeal was already pending and who did not engage in discovery or obtain an adverse ruling against them prior to moving to compel arbitration. Under the unique circumstances of this case, we do not agree. The Japhets' claims against all of the Working Interest Owners are virtually identical. All of the Working Interest Owners are successors-in-interest to Humble Oil. The only differences between the Working Interest Owners is the percentage of working interest that each of them owned, when they

acquired their working interest, and when they became defendants in the underlying litigation, which implicated the date of calculating the Japhets' damages. If one of the Working Interest Owners, such as Lyle, is liable to the Japhets, all of the other Working Interest Owners are liable to the Japhets, as they are all equally bound by the covenants contained in the 1919 Assignment.[17]

The Japhets' claims against the Working Interest Owners are not severable because they are inextricably intertwined with one another. *See, e.g.*, *RSL-3B-IL, Ltd. v. Prudential Ins. Co. of Am.*, 470 S.W.3d 131, 140 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (stating that claims are properly severable if, in addition to two other factors, "severed claim is not so interwoven with the remaining action that it involves the same facts and issues"). All of the Japhets' claims against the Working Interest Owners involve the same facts and issues. Allowing the Working Interest

[17] The Working Interest Owners acknowledge that under the Joint Operating Agreement that governed operation of the Hogg-Japhet Lease, they were required to reimburse Warbonnet—the operator for the majority of time this litigation has been pending—for their proportionate share of any legal fees Warbonnet incurred defending claims brought against it. They argue that their contractually-required payment of legal fees did not substantially invoke the judicial process, that Warbonnet was sued in its own capacity and was not acting as a "representative" of any Working Interest Owner, and that the Working Interest Owners did not exercise control over the litigation by paying Warbonnet's legal fees. However, Warbonnet's counsel represented it and all of the Working Interest Owners—with the exception of C.G. Enterprises—and the legal fees that Warbonnet incurred on a monthly basis benefitted all of the Working Interest Owners. The Working Interest Owners' payment of Warbonnet's legal expenses under the Joint Operating Agreement underscores the fact that these defendants were all in virtually identical positions and were—and still are—pursuing a coordinated legal strategy.

Owners added in 2009 to proceed to arbitration on the Japhets' claims, after Lyle has already obtained an adverse liability ruling against him and has waived his right to compel arbitration, runs the risk of inconsistent judgments and improperly splits claims that should be heard together. Under the facts of this case, we conclude that Lyle's litigation conduct has waived all of the Working Interest Owners' rights to compel arbitration. We therefore hold that the trial court did not err by denying the Working Interest Owners' motion to compel arbitration.

We overrule the Working Interest Owners' first issue.

Judgment for Plaintiffs Added to Suit in 2017

In their second issue, the Working Interest Owners argue that four plaintiffs added to the lawsuit in 2017—the Gayle F. Bentsen GST Non-Exempt Trust, the Dan J. Flannery GST Non-Exempt Trust, the John J. Flannery, Jr. GST Non-Exempt Trust, and Jill Baucum Flannery, as Independent Executor of the Estate of Dan Japhet Flannery—cannot recover on their claims because (1) they never obtained a summary judgment or directed verdict in their favor on liability; (2) they did not obtain jury findings on the Working Interest Owners' liability and their interest in the Hogg-Japhet Lease; and (3) the evidence does not conclusively establish the Working Interest Owners' liability to these plaintiffs or their interest in the Hogg-Japhet Lease. We disagree that these plaintiffs cannot recover on their claims against the Working Interest Owners.

The Jane Guinn Revocable Trust, through its trustee, JPMorgan Chase Bank, was an original plaintiff in the underlying lawsuit. Jane Guinn passed away in 2007, and the executors of her estate, JPMorgan Chase Bank and Lloyd Bentsen III, were substituted as parties in place of the trust. In 2008, when the trial court entered its first summary judgment ruling on liability against Lyle, the Jane Guinn Revocable Trust was still listed as a party, and the trial court ruled that the Trust had a 1/6 interest in the Japhet Net Profits Interest. In the 2015 summary judgment order, in which the trial court ruled that all of the Working Interest Owners were bound by the 1919 Assignment and were liable to the Japhets, the order listed JPMorgan Chase Bank and Bentsen, as executors of the Estate of Jane Guinn, as the owners of 1/6 of the Net Profits Interest. Then, in 2017, in response to the Working Interest Owners' special exceptions, in which they argued that JPMorgan Chase Bank and Bentsen could not recover in their capacity as co-executors of Jane Guinn's Estate because the actual successors-in-interest of the Jane Guinn Revocable Trust were three trusts that she had created for her children, the Japhets amended their pleadings to name these three trusts and the executor of the Estate of Dan Japhet Flannery, who had passed away in 2016, as plaintiffs.

At trial, the trial court admitted Exhibit 19, an exhibit that contained documents demonstrating the Japhets' chain of title from Dan A. Japhet. These documents establish that Jane Guinn, one of Dan A. Japhet's grandchildren, obtained

her interest in the Japhet Net Profits Interest from her father, that she conveyed her interest to the Jane Guinn Revocable Trust, and that, upon her death, the executors of her estate assigned her interest to trusts that had been established in her will for the benefit of her three children. The liability of the Working Interest Owners to the Jane Guinn Revocable Trust and its immediate successor-in-interest, the Estate of Jane Guinn, was established by the 2008 and 2015 summary judgment orders. The evidence at trial, specifically Exhibit 19, conclusively established that the plaintiffs added to the lawsuit in 2017 are the successors-in-interest of the Jane Guinn Revocable Trust and the Estate of Jane Guinn.

Because the documentary evidence conclusively established that the Gayle F. Bentsen GST Non-Exempt Trust, the Dan J. Flannery GST Non-Exempt Trust, the John J. Flannery, Jr. GST Non-Exempt Trust, and Jill Baucum Flannery, as Independent Executor of the Estate of Dan Japhet Flannery, were successors-in-interest to the Jane Guinn Revocable Trust and had succeeded to the Trust's interest, the Working Interest Owners' liability to these plaintiffs was also conclusively established, and these plaintiffs were not required to obtain a separate jury finding on the issue of liability. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814–15 (Tex. 2005) (stating that "undisputed evidence that allows of only one logical inference" can be viewed only in one light and reasonable jurors can reach only one conclusion from it, that jurors are "not free to reach a verdict contrary to such evidence," and

that "uncontroverted issues need not be submitted to a jury at all"); *Int'l Bus. Machines Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019) (stating that, to conclusively establish fact, "the evidence must leave 'no room for ordinary minds to differ as to the conclusion to be drawn from it'") (quoting *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982)); *Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 847 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("[I]f a fact is 'conclusively established,' then a jury finding is not required."); *see also* TEX. R. CIV. P. 279 ("Upon appeal all independent grounds of recovery or of defense *not conclusively established under the evidence* and no element of which is submitted or requested is waived.") (emphasis added).

We overrule the Working Interest Owners' second issue.

Judgment With Respect to Lots 17 and 18

In their third issue, the Working Interest Owners argue that the trial court erred in awarding both monetary damages and non-monetary relief to the Japhets based on Lots 17 and 18 of the Hogg-Japhet Lease because Dan A. Japhet never acquired an interest in those two lots. Specifically, the Working Interest Owners assert that Dan A. Japhet purportedly acquired his interest in Lots 17 and 18 through an April 1918 assignment from Sutherland Oil Company, but this assignment did not actually transfer any interest in Lots 17 and 18 because the Hoggs did not have title to those two lots when they executed the original contract in 1913. They argue that the Hoggs

did not acquire title to Lots 17 and 18 until February 1918 and December 1919 and that they did not convey these interests to Dan A. Japhet. They argue that because Dan A. Japhet never owned an interest in Lots 17 and 18, he was unable to pass any interest in these lots to his successors-in-interest, and therefore the Japhets cannot recover any proceeds derived from wells located on Lots 17 and 18.

In 1913, the Hoggs and John Hamman entered into the original contract, a mineral lease for certain tracts of land in Brazoria County. The Hoggs, as grantors, agreed to "transfer and set over, sell and convey (under the terms and conditions hereof, and for the period and purpose herein set forth) all the gas, oil, sulphur and other minerals and mineral substances whatsoever on, in and under the hereinafter described land . . . ." Among the tracts described in the original contract were Lots 17 and 18 "out of the J.H. Bell League, being a part of the J.S. Hogg 160 acre subdivision of the Patton Place, said subdivision lying almost equally in the Bell and Varner Leagues." The 1919 Assignment described a series of conveyances beginning with the original contract. In October 1913, the Hammans transferred the Lease to Producers Oil Company and reserved a royalty interest. In May 1917, Producers Oil Company transferred the Lease to F. N. Bullock "in so far as portions of the land described in said original contract are concerned, such portions of said land including lots 17, 18, 19, and 20 of the J.S. Hogg 160-acre subdivision out of the Martin Varner and J.H. Bell Leagues of land situated in Brazoria County." Later

in May 1917, Bullock transferred the Lease to Tyndall-Wyoming Oil & Development Company, which transferred the Lease to Sutherland Oil Company in April 1918. The 1919 Assignment recited that both of these conveyances included "said lots 17, 18, 19, and 20" of the J.S. Hogg 160-acre subdivision. Later in April 1918, Sutherland Oil Company transferred the Lease "upon said lots 17, 18, 19 and 20, hereinbefore described" to Dan A. Japhet, who then assigned the Lease to Humble Oil.

As evidence that the Hoggs did not own Lots 17 and 18 at the time they executed the original contract, and thus title to those lots did not pass to Dan A. Japhet under the series of conveyances described in the 1919 Assignment, the Working Interest Owners proffered several deeds, none of which were admitted into evidence by the trial court at trial. In one deed, executed on February 6, 1918, S.H. Robertson and others "granted, sold and conveyed" Lot 17 to the Hoggs, "being the same property conveyed by J.S. Hogg to James H. Robertson by deed recorded in Volume 134, page 95 of the deed records of Brazoria County, Texas." The Working Interest Owners' exhibit also reflected that, while J.S. Hogg executed a deed for Lot 17 to J.H. Robertson in August 1901, that deed was not recorded in the Brazoria County property records until June 1916, three years after the Hoggs executed the original contract. In another deed, executed on December 10, 1919, W.C. Lyne and others conveyed several tracts, including Lots 17 and 18, to the Hoggs. However,

this deed also recited that Lyne and the other grantors, "for and in consideration of the sum of ten dollars ($10.00), and the further consideration of the fact that Will C. Hogg, Miss Ima Hogg, Mike Hogg and Tom Hogg *have acquired title to the hereinafter described lots, tracts, or blocks of land, under the Statute of Limitation of the State of Texas,* and being desirous of vesting the title in them without the expense of litigation," conveyed the land to the Hoggs. (Emphasis added.)

As the Japhets point out, the December 1919 deed from Lyne to the Hoggs recited that the Hoggs "have acquired title to the hereinafter described lots," including Lots 17 and 18, by adverse possession. That deed therefore acknowledged that, at the time that deed was executed in December 1919, the Hoggs had already acquired title to Lots 17 and 18, but the grantors were executing the deed to "vest[] the title in [the Hoggs] without the expense of litigation."

Furthermore, with respect to the February 1918 deed from Robertson, as the Japhets point out, the 1901 deed purporting to convey Lot 17 from J.S. Hogg to James H. Robertson was not recorded in the Brazoria County property records until 1916, three years after the Hoggs entered into the original contract and leased tracts, including Lots 17 and 18, to Hamman. "A conveyance of real property or an interest in real property . . . is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law." TEX. PROP. CODE ANN.

§ 13.001(a). The Working Interest Owners have provided no evidence that, at the time the Hoggs and Hamman executed the Original Contract in 1913, Hamman had actual or constructive notice of the 1901 conveyance of Lot 17, which was unrecorded at the time. *See Dorsey v. Temple*, 103 S.W.2d 987, 993 (Tex. App.—El Paso 1937, writ dism'd by agr.) ("One who purchases the legal title to the land, for value and without notice of undisclosed equities, takes free of such equities, and is protected in his rights of ownership, including the right to sell and convey perfect title; and a purchaser from him takes good title, even though he may have actual or constructive notice of such outstanding equities."); *Kinard v. Sims*, 53 S.W.2d 803, 806 (Tex. App.—Amarillo 1932, writ ref'd) ("It is equally well settled that, if a subsequent purchaser with notice acquires title from a former purchaser, who bought for value and without notice, such subsequent purchaser succeeds to all the rights of his grantor. When land once becomes freed from equities by a bona fide purchase by one having no notice of the equities, such purchaser obtains a complete jus disponendi, and [anyone] who takes title from him takes it free from said prior equities, notwithstanding he may have notice thereof at the time he buys.").

We conclude that the Working Interest Owners have not established that the Hoggs did not have title to Lots 17 and 18 at the time that they executed the original contract to Hamman in 1913, nor have they established that Hamman was not a bona fide purchaser at the time of the original contract. We therefore hold that the trial

court did not err by entering judgment for the Japhets with respect to Lots 17 and 18.

We overrule the Working Interest Owners' third issue.

Entering Judgment Based on Liability Determination

In their fourth issue, the Working Interest Owners argue that the trial court erred in entering judgment for the Japhets because the evidence conclusively established that the Working Interest Owners have no liability to the Japhets. Specifically, the Working Interest Owners argue that, based on *Hogg v. Sheffield* and *Estate of Japhet v. Commissioner of Internal Revenue*, res judicata and collateral estoppel apply because those two cases judicially determined that Dan A. Japhet had no royalty or property interest in the Hogg-Japhet Lease, but instead had a "mere contractual obligation" owed by Humble Oil, which is not a covenant running with the land. The Working Interest Owners also argue that they owe no obligations to the Japhets under the 1919 Assignment or the 1923 Settlement Agreement because the 1923 Settlement Agreement settled all disputes between Dan A. Japhet and Humble Oil and because the Working Interest Owners never agreed to assume Humble Oil's contractual obligations. They also argue that the Japhets' claims are barred by limitations and that the law-of-the-case doctrine does not apply.

A. Res Judicata and Collateral Estoppel

Res judicata, or claim preclusion, bars the re-litigation of claims that have been finally adjudicated or that could have been litigated in the prior action. *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017). "The policies behind res judicata 'reflect the need to bring litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery.'" *Id.* (quoting *Barr v. Resolution Tr. Corp.*, 837 S.W.2d 627, 629 (Tex. 1992)); *Peterson, Goldman & Villani, Inc. v. Ancor Holdings, LP*, 584 S.W.3d 556, 563 (Tex. App.—Fort Worth 2019, pet. filed). Res judicata is an affirmative defense, and the party asserting it must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). "The judgment in the first suit precludes a second action by the parties and their privies on matters actually litigated and on causes of action or defenses arising out of the same subject matter that might have been litigated in the first suit." *Id.* (quoting *Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984)).

With respect to the third element of res judicata, whether a claim or cause of action should have been raised in the prior action, Texas follows the transactional

approach, in which "a subsequent suit is barred if it arises out of the same subject matter as the prior suit, and that subject matter could have been litigated in the prior suit." *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). A final judgment on an action "extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose." *Id.* (quoting *Barr*, 837 S.W.2d at 631). Determining the scope of the subject matter or transaction of the prior suit requires courts to analyze "the factual matters that make up the gist of the complaint, without regard to the form of action." *Id.* (quoting *Barr*, 837 S.W.2d at 630). "This should be done pragmatically, 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.'" *Id.* (quoting *Barr*, 837 S.W.2d at 631); *Ancor Holdings*, 584 S.W.3d at 563 ("Where claims arise at different times through separate transactions not made in the context of a continuing legal relationship, res judicata may not apply, even where the parties and subject matter of the transactions are the same.") (quoting *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 497 (Tex. App.—Texarkana 2002, pet. denied)).

Collateral estoppel, or issue preclusion, bars the re-litigation of certain issues between parties which have already been decided. *Mendoza v. Bazan*, 574 S.W.3d

594, 605 (Tex. App.—El Paso 2019, pet. denied); *see In re Team Rocket, L.P.*, 256 S.W.3d 257, 260 (Tex. 2008) (original proceeding) (stating that purpose of res judicata and collateral estoppel is to "promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation" of matters that have already been decided or could have been decided in prior suit). The party asserting collateral estoppel must prove (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Mendoza*, 574 S.W.3d at 605. "Strict mutuality of parties is no longer required" to prevail on a collateral estoppel defense; instead, "it is only necessary that the party *against whom* the doctrine is asserted was a party or in privity with a party in the first action." *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801–02 (Tex. 1994).

To determine, for collateral estoppel purposes, whether the facts were fully and fairly litigated in the first lawsuit, we consider "(1) whether the parties were fully heard, (2) that the court supported its decision with a reasoned opinion, and (3) that the decision was subject to appeal or was in fact reviewed on appeal." *BP Auto. LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 200 (Tex. App.—Texarkana 2017, no pet.) (quoting *Mower v. Boyer*, 811 S.W.2d 560, 562 (Tex. 1991)). In determining whether a fact issue is essential to the judgment, "we look to

the factual determinations made by the trier of fact that are 'necessary to form the basis of a judgment.'" *Id.* Collateral estoppel "requires that the issue decided in the first action be identical to the issue in the second action." *In re Estate of Howard*, 543 S.W.3d 397, 401 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

1. Sheffield v. Hogg

In this case, the Hoggs brought suit against the tax assessor of Brazoria County, several taxing entities, and several oil companies, including Humble Oil, to "enjoin the collection of taxes levied and assessed upon one-eighth of the oil and other minerals in lands owned by [the Hoggs] in [Brazoria] [C]ounty for the year 1927." *Hogg v. Sheffield*, 38 S.W.2d 353, 354 (Tex. App.—Galveston 1931), *rev'd*, 77 S.W.2d 1021 (Tex. 1934). The Hoggs, in rendering for taxation their real and personal property for the 1927 tax year, did not render any of the minerals covered by the Lease because they "had conveyed such minerals to John Hamman in 1913" and that "by virtue of assignments or subleases from John Hamman, the several oil company defendants held different portions of said property on January 1, 1927." *Id.* The Hoggs alleged that the taxing entities in Brazoria County had improperly assessed taxes based on an undivided one-eighth interest in the minerals under the Lease that the Hoggs had reserved in the original contract with Hamman in 1913, and they sought to enjoin the taxing entities from collecting taxes based on this interest. *Id.* at 355. The Hoggs did not "pray for any specific relief against the

defendant oil companies, who had been taxed jointly with [the Hoggs] in 1927." *Id.* at 356. The trial court found, among other things, that the Hoggs had executed the original contract with Hamman in 1913 and, in this document, reserved "the following royalty of the gross production of all oil or gas wells on said lands, to-wit: one-eighth of all oil and one-eighth of all gas." *Id.* at 355, 357. The trial court refused to grant the injunction requested by the Hoggs.

On appeal, the Galveston Court of Civil Appeals addressed whether, as of January 1, 1927, the Hoggs had title to a "one-eighth interest in the oil and other minerals underlying their lands," such that they were properly taxed on this interest. *Id.* at 358. The Galveston court, after examining the language of leases in other cases, concluded that the Hoggs, in the original contract, "conveyed to Hamman all of the oil in and under the land, and only became the owners of a one-eighth royalty interest in the oil after it was produced." *Id.* at 359. The court stated:

> So long as the oil remained in place in the land and the lessees complied with the provisions of the lease, they [the oil companies] held the legal fee title to that part of the realty and the exclusive possession and dominion thereover, and the mere fact that after it was physically severed from the land and became personal property they were obligated, as a consideration for their lease, to deliver one-eighth thereof to [the Hoggs], did and could not change or limit their title to all of the oil as long as it remained unsevered from the land.

Id. at 359–60. The court also noted that "[n]one of the defendant oil companies were necessary parties to the suit, and no relief was asked against them by [the Hoggs]."

Id. at 360. The Galveston court reversed the judgment of the trial court and rendered judgment for the Hoggs. *Id.*

The taxing entities appealed to the Texas Supreme Court. After summarizing the Galveston court's opinion, the supreme court stated the issue before it:

> The main question to be decided in the Hogg Case is the correctness of the proposition in the argument for [the Hoggs that]: "The rule of construction applicable to the Hogg-Hamman instrument should be this: Because of the fact that the parties thereto did use apt words of conveyance of all of the minerals in place, and because there is no ambiguity in such language in the instrument, and because there is no language in the instrument that can fairly be construed, either as an exception of any of the minerals expressly conveyed, or as a reservation of title by [the Hoggs] of any such minerals, therefore no other fair construction of such instrument can be made than that the parties thereto meant what they clearly stated in the granting clause of the instrument, wherein [the Hoggs] 'do transfer and set over, sell and convey . . . *all* of the gas, oil, sulphur and other minerals and mineral substances whatsoever . . . ."

Sheffield v. Hogg, 77 S.W.2d at 1023. The court stated that the typical oil and gas lease "operates to invest the lessee [the oil company] with a determinable fee in oil and gas in place" and that the lessor has "an interest in land, subject to taxation as such" in the county in which the tract of land is located. *Id.* at 1024.

The court, in construing the original contract, noted that a clause in the contract provided that the Hoggs, as lessors, "'*shall have*' a certain royalty, being one-eighth of the oil produced and one-eighth of the gas produced on the lands." *Id.* The court concluded that a lessor who reserves "the right to a portion of the proceeds or profits derived from the lessee's . . . authorized sale of the minerals" owns "a fee-

simple interest in land." *Id.* The supreme court therefore held "that all the property interests of ascertainable value, secured to the lessors or their assigns under the Hogg-Hamman lease, are subject to taxation as real estate in the county wherein the land lies, as adjudged by the district court." *Id.* Ultimately, the Texas Supreme Court reversed the judgment of the Galveston Court of Civil Appeals and affirmed the district court's ruling that the Hoggs were not entitled to enjoin the Brazoria County taxing authorities from taxing their royalty interest in the property. *Id.* at 1031.

The Working Interest Owners argue that because the Galveston Court of Civil Appeals' opinion and the Texas Supreme Court's opinion reference the Hoggs owning a 1/8 royalty interest and the oil companies, including Humble Oil, owning a 7/8 mineral interest, the courts judicially determined that Dan A. Japhet owned no property interest in the Hogg-Japhet Lease and, therefore, he had no interest in the land to pass to his heirs. We do not agree that the opinions in *Hogg v. Sheffield* and *Sheffield v. Hogg* can be read this broadly. The narrow question before the courts in those cases was whether the Hoggs, in the original contract with Hamman in 1913, reserved a royalty interest that was an interest in land subject to taxation. The Texas Supreme Court ultimately answered this question in the affirmative. Neither its opinion nor the Galveston court's opinion mentioned the 1919 Assignment or Dan A. Japhet's connection to the Hogg-Japhet Lease. Whether Dan A. Japhet had an interest in the Lease by virtue of the 1919 Assignment was not a question that any

party raised in *Sheffield v. Hogg*, and it is not a question that either court answered. The Working Interest Owners have not established that *Sheffield v. Hogg* is res judicata of any claims raised in the underlying litigation, nor have they established that *Sheffield* fully and fairly litigated any issue that is relevant to the underlying litigation. *See Travelers Ins. Co.*, 315 S.W.3d at 862 (stating that elements of res judicata include prior final determination on merits by court of competent jurisdiction and second action is based on claims that were or could have been raised in prior action); *Mendoza*, 574 S.W.3d at 605 (stating that party asserting collateral estoppel must prove that facts sought to be litigated in second action were fully and fairly litigated in prior action).

2. Estate of Japhet v. Commissioner of Internal Revenue

In this case, the Commissioner of Internal Revenue determined that the Estate of Dan A. Japhet and his three sons owed deficiencies in their federal income taxes for the 1940 tax year. *See Estate of Dan A. Japhet v. Commissioner of Internal Revenue*, 3 T.C. 86 (1944). During the 1940 tax year, Humble Oil paid to the Estate and to Dan A. Japhet's sons certain sums pursuant to the 1919 Assignment and their "undivided interests retained" in the Assignment. *Id.* at 88. That year, the Estate and each individual taxpayer "claimed depletion with respect to the amounts received by him from" Humble Oil," but the Internal Revenue Commissioner disallowed the depletions. *Id.* At the time, the Internal Revenue Code provided that, in the case of

oil and gas wells, taxpayers could take a deduction for depletion in a specified percentage of "the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." *Id.* at 90 n.1.

In determining whether the disallowance of the depletions was proper, the Tax Court of the United States addressed Dan A. Japhet's interest in the Hogg-Japhet Lease:

> By reading the written instrument which is in evidence it will be observed that in the assignment by petitioners of their interest in the oil lease to Humble they did not reserve any oil royalty as that term is usually understood. They had a contract with Humble whereby in addition to the cash consideration which was paid to them for the assignment of their interests in the sublease they were to have a working interest of one-fourth of the net money profit realized by Humble from its operations upon said tracts of land, accountings to be had monthly once profits began to accrue.

Id. at 90. The Tax Court construed Dan A. Japhet's arrangement "to share profits with Humble Oil from its operations of the sublease as contractual and not a reservation by [Japhet] of an interest in the oil in place." *Id.* at 91. The Tax Court stated, "[W]e do not find that [Japhet] reserved any specific royalty or right to share in any specific part of the gross income from the property, but a right to share only in the profits obtained from operating the property." *Id.* at 93.

The Tax Court, citing prior cases involving the ability of taxpayers who retained a net profits interest to take a depletion allowance, drew a distinction

between "contracts made in consideration of cash and a share of the profits from the operation of the properties which result in a sale and contracts whereby an economic interest in the oil is reserved." *Id.* The first kind of contracts "resulted in sales of the entire interest which the [taxpayers] had in the leases and any oil covered thereby," and, as a result, the taxpayers "had no depletable interest thereafter and [were] not entitled to any deductions for depletion." *Id.* The Tax Court also cited United States Supreme Court cases holding that depletion is allowable for holders of royalty interests—which the Court defined as "a right to receive a specified percentage of *all* oil and gas produced during the term of the lease"—who have an "economic interest in the oil in place which is depleted by severance." *Id.* at 91 (quoting *Prichard v. Helvering*, 310 U.S. 404, 409 (1940)) (emphasis added). A taxpayer who has a "share in the net profits derived from development and operation," however, is not entitled to take a depletion allowance. *Id.* at 92. Ultimately, the Tax Court ruled that the Japhets could not take a depletion allowance on the payments received from Humble Oil as their share of the profits from the Hogg-Japhet Lease. *Id.* at 93.

The Working Interest Owners cite *Estate of Japhet v. Commissioner of Internal Revenue* for the proposition that the Tax Court judicially determined that Dan A. Japhet owned "no royalty interest or property interest in the Hogg-Japhet Lease" and that the Japhets, as Dan A. Japhet's successors-in-interest, were barred by res judicata and collateral estoppel from claiming that they owned a royalty or

property interest in the Hogg-Japhet Lease or that Humble Oil's obligations under the 1919 Assignment were covenants running with the land. The Working Interest Owners also assert that this Court's 2010 opinion in the interlocutory appeal, which did not address *Estate of Japhet v. Commissioner of Internal Revenue* and which held that Japhet's reserved interest under the 1919 Assignment was a royalty interest and constituted a covenant running with the land, was clearly erroneous and thus not entitled to deference under the law-of-the-case doctrine.

We disagree that *Estate of Japhet* has preclusive effect on this case. *Estate of Japhet* construed the 1919 Assignment in the context of a particular provision of the Internal Revenue Code which allowed taxpayers to take a depletion deduction in a specified percentage of the gross income from the property during the taxable year. It is undisputed that Dan A. Japhet's interest in the 1919 Assignment was not an interest in gross income from the Hogg-Japhet Lease but was instead an interest in net profits realized by Humble Oil from its operations on the Lease. The Tax Court also addressed only federal law and did not consider Texas law concerning royalty interests and covenants running with the land. Texas law broadly defines "royalty," and, "[i]n its broadest aspect," the term means "a share of profit reserved by the owner for permitting another the use of the property." *Lyle*, 365 S.W.3d at 351 (quoting *Alamo Nat'l Bank v. Hurd*, 485 S.W.2d 335, 338 (Tex. App.—San Antonio 1972, writ ref'd n.r.e.)). A royalty is "the right to receive . . . a stipulated fraction of

the oil or gas produced and saved from property covered by the lease, free of all costs of development and production." *Id.* This Court concluded that Dan A. Japhet's interest—one-fourth of the profit realized from operating the Hogg-Japhet Lease—was "clearly a reservation of 'the right to receive . . . a stipulated fraction of the oil or gas produced and saved from the property . . . free of all costs of development and production." *Id.* (quoting *Alamo Nat'l Bank*, 485 S.W.2d at 338). We therefore concluded that, as a matter of state law, Dan A. Japhet's interest was a royalty interest.

We also concluded that the covenants in the 1919 Assignment—specifically, the covenant that Humble Oil would pay Dan A. Japhet and his successors one-fourth of the net money profit realized—was a covenant running with the land because the covenant "touch[ed] and concern[ed]" the land. *Id.* at 353 (quoting *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982)). We stated, "If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land." *Id.* (quoting *Westland Oil*, 637 S.W.2d at 911). We held that Humble Oil's promise to pay Dan A. Japhet one-fourth of the net money profits realized from operations of the Hogg-Japhet Lease "clearly touches and concerns the land as it affects the value of the [L]ease." *Id.* The Tax Court's conclusion in *Estate of Japhet v. Commissioner of Internal Revenue* that

Japhet did not own a royalty interest on which he was entitled to take a depletion allowance, as construed under federal law, is not inconsistent with this Court's holding in the 2010 interlocutory appeal that Dan A. Japhet's reservation of a one-fourth net profits interest—and Humble Oil's covenant to pay that interest—constituted a covenant running with the land under Texas law that Lyle (and the other Working Interest Owners), as Humble Oil's successor-in-interest, was bound to honor.

We conclude that the Tax Court's opinion in *Estate of Japhet v. Commissioner of Internal Revenue* does not have preclusive effect on this litigation under the doctrines of res judicata or collateral estoppel.

B. Effect of the 1923 Settlement Agreement

The Working Interest Owners argue that they are not bound by the 1919 Assignment because any obligations that Humble Oil owed to Dan A. Japhet were "purely contractual in nature" and were not covenants running with the land. As discussed above, this Court has already rejected that argument in the 2010 interlocutory appeal. *See Lyle*, 365 S.W.3d at 352–53. In that opinion, we noted that "a purchaser is bound by *every* recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims." *Id.* at 352 (quoting *Westland Oil*, 637 S.W.2d at 908). The 1919 Assignment itself clearly provided that "all the conditions and terms hereof

shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto." Beginning with Humble Oil's assignment of its interest in the Hogg-Japhet Lease to Salmon in 1969, nearly all of the documents transferring the working interests recited that they were subject to the 1919 Assignment, which the documents specifically identified. Lyle, and all of the other Working Interest Owners, are all successors-in-interest to Humble Oil, and they are all bound by the covenants contained in the 1919 Assignment. *See id.* at 353 (concluding that the covenants in the 1919 Assignment are covenants that run with land and that Lyle "has a 'successive relationship to the same rights of property' as Humble Oil" and is bound by covenants in 1919 Assignment).

The Working Interest Owners also argue that the 1923 Settlement Agreement amended the 1919 Assignment and resolved "all preexisting obligations owed by Humble [Oil]" to Dan A. Japhet. Based on the plain language of the 1923 Settlement Agreement, we disagree.

The 1923 Settlement Agreement began by reciting that Japhet and the other assignors "are the joint owners of a one-fourth net profits working interest in an oil and gas lease . . . [that] covers and includes what is known as the Japhet 20 acres, being Lots 17, 18, 19, and 20 of the J.S. Hogg 160 acre subdivision of the Martin Varner and J.H. Bell leagues of land situated in Brazoria County, Texas." The 1923 Settlement Agreement then stated that "controversies have arisen" between Japhet

and Humble Oil "regarding the accounts between the parties relating to credits for oil and charges for rig rent, house rent, warehouse expense, water, pumping oil, and other matters in connection with said premises." It then provided that the parties had settled their differences, the accounts had been adjusted "up to and including December 31, 1922," and the parties had arrived at an agreement "with a view to avoiding similar differences in the future."

The parties then agreed that Humble Oil would make a credit to Japhet's account in the amount of $80,157.95. The parties agreed that

> the debits and credits as now shown upon the books of [Humble Oil] for the period to and including December 31, 1922, correctly state the accounts between the parties hereto and reflect the settlement made of all the issues and differences of every kind between the parties as to the accounts between them in reference to the Japhet 20 acres above described up to and including said date; it being the intention of the parties hereto that all issues and matters between them in connection with said property shall be and they are hereby settled for the period up to and including December 31, 1922, and the accounts are closed in accordance with the debits and credits now shown on the books of [Humble Oil] for such period.

Japhet specifically ratified an accounting method with respect to certain expenses, the parties agreed that oil produced from the property "shall be credited to the lease at the posted field price of [Humble Oil] for coastal crude of the same grade and quality on the day such oil is produced," and the parties agreed that if, within ninety days of Humble Oil's issuance of monthly statements of accounts, Japhet did not

make a written objection to the correctness of a specific item in the statement, "it will be conclusively presumed to be a proper charge or credit."

We agree with the Japhets that the 1923 Settlement Agreement clearly contemplated a continuing and ongoing relationship between Japhet, the other assignors, and Humble Oil, rather than ending Humble Oil's obligation to pay Japhet the Net Profits Interest reserved in the 1919 Assignment. The Working Interest Owners argue that the 1923 Settlement Agreement "establish[ed] a sum certain to be paid out of production by Humble—$80,157.95" and argue that, upon payment of this amount, Humble Oil's payment obligation to Dan A. Japhet ceased. We do not agree that the language of the 1923 Settlement Agreement supports this construction of the agreement. As the Japhets argue, the payment of $80,157.95 was intended to settle account disputes that had arisen prior to December 31, 1922; the 1923 Settlement Agreement does not state that this payment was intended to resolve Humble Oil's obligation to Japhet.

We conclude that the 1923 Settlement Agreement amended the 1919 Assignment in minor respects and did not affect the 1919 Assignment's requirement that Humble Oil pay Japhet a one-fourth Net Profits Interest. After the 1923 Settlement Agreement, Humble Oil remained obligated to pay the Net Profits Interest to Japhet, an obligation that was binding on Humble Oil's successors-in-interest.

C. Statute of Limitations

The Working Interest Owners further argue that the evidence conclusively establishes that the Japhets' claims are barred by the four-year statute of limitations. They argue that it was undisputed that no payments had been made to any of the Japhets or their predecessors-in-interest since 1990 and that their suit to recover damages, filed fourteen years later in 2004, was barred by limitations.

In the 2010 interlocutory opinion, this Court addressed Lyle's argument that the trial court should have granted summary judgment based on limitations. We noted that the statute of limitations for a breach of contract claim and a claim for specific performance of a contract to convey real property is four years, but we also noted that if the parties' contract contemplates a continuing contract for performance, "the limitations period does not usually commence until the contract is fully performed." *See Lyle*, 365 S.W.3d at 354–55 (quoting *Davis Apparel v. Gale-Sobel*, 117 S.W.3d 15, 18 (Tex. App.—Eastland 2003, no pet.)). We also noted that, if the contract calls for periodic payments during the course of the contract, "a cause of action for such payments may arise at the end of each period, before the contract is complete." *Id.* at 355 (quoting *Intermedics*, 683 S.W.2d at 845). We concluded, "[T]he statute of limitations here, where the 1919 Assignment contemplated a monthly accounting and payment for the one-fourth royalty, only bars recovery of the royalty payments accruing more than four years prior to the filing of the suit."

Id. We therefore held that the trial court's 2008 summary judgment order, which ruled that Lyle was required under the 1919 Assignment to account to the Japhets for their interest "from and after four years prior to the filing of this suit," was correct. *Id.*

The trial court's final judgment required each Working Interest Owner to account to the Japhets for their Net Profits Interest beginning four years from the date the Japhets sued the particular Working Interest Owner. This ruling is in accordance with our 2010 opinion, and the Working Interest Owners have not presented a convincing argument that our prior holding on the effect of the statute of limitations is incorrect. We therefore conclude that the Japhets' recovery of damages, which is limited to four years before each Working Interest Owner became a defendant, is not barred by the statute of limitations.

D. Law of the Case Doctrine

Finally, in their fourth issue, the Working Interest Owners argue that the law of the case doctrine does not preclude consideration of any of the foregoing issues because the 2008 summary judgment and the 2010 interlocutory opinion are clearly erroneous based on *Sheffield v. Hogg*, *Estate of Japhet*, and the 1923 Settlement Agreement, and that the record, which has developed since the 2010 interlocutory opinion, demonstrates that the Working Interest Owners have no liability to the Japhets under the 1919 Assignment.

Under the law of the case doctrine, an appellate court is ordinarily bound by its initial decision if there is a subsequent appeal in the same case. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). The doctrine provides:

> The "law of the case" doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. By narrowing the issues in successive stages of the litigation, the law of the case doctrine is intended to achieve uniformity of decision as well as judicial economy and efficiency. The doctrine is based on public policy and is aimed at putting an end to litigation.

Id. (quoting *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986)). However, a prior decision by the appellate court does not absolutely bar re-consideration of the same issue on a second appeal. *Id.* Application of the doctrine is discretionary and depends on the particular circumstances of the case. *Id.* One exception to the law of the case doctrine is when the appellate court's original decision is clearly erroneous. *Id.* Additionally, the doctrine "does not necessarily apply when either the issues or the facts presented at successive appeals are not substantially the same as those involved on the first trial." *Hudson*, 711 S.W.2d at 630.

We do not agree with the Working Interest Owners that *Sheffield v. Hogg*, *Estate of Japhet v. Commissioner of Internal Revenue*, and the 1923 Settlement Agreement—none of which had been raised to the trial court or to this Court on original submission of the 2010 interlocutory appeal—render the trial court's 2008 and 2015 summary judgment rulings or this Court's 2010 opinion clearly erroneous

for the reasons stated above. Although the record has developed factually since the 2008 summary judgment order and the 2010 opinion, none of the additional facts require changing our previous conclusion that the Japhets have a Net Profits Interest under the 1919 Assignment, that Humble Oil and its successors are bound by the covenants contained in the 1919 Assignment, and that the statute of limitations bars only net profits accruing more than four years before the Japhets filed suit. We therefore hold that we will continue to follow our prior decision in *Lyle v. Jane Guinn Revocable Trust*.

We overrule the Working Interest Owners' fourth issue.

Damages Award

In their fifth issue, the Working Interest Owners argue that the damages award to the Japhets was excessive. Specifically, they argue that the jury charge improperly defined "working interest expenses" to exclude overhead expenses and legal fees, which is contrary to Texas law and is not supported by either the 1919 Assignment or the 1923 Settlement Agreement. The Working Interest Owners also argue that the damages calculations failed to deduct well-overhead expenses, monthly well-supervision expenses, and the 1/8 Hamman net profits interest. Finally, they argue that the jury awarded damages to each of the Japhets "for the four-year period prior to the date they joined the lawsuit, regardless of whether they actually had an ownership interest during that time period." According to the Working Interest

Owners, the Japhets' damages calculations, which the jury accepted, were not based on the date that each plaintiff acquired an alleged interest.

A. Exclusion of Overhead Expenses and Legal Fees

Question One of the jury charge asked the jury to determine the sum of money that would compensate the Japhets for their damages resulting from the Working Interest Owners' failure to comply with their obligations under the 1919 Assignment. The charge instructed the jury on how the Japhet Net Profits Interest is calculated: Working Interest revenues minus Working Interest Expenses from operations on the Hogg-Japhet Lease, multiplied by 13/60 (which is 52/60 times ¼), and then, for each Working Interest Owner, multiply that number by that defendant's working interest percentage. The court instructed the jury that "Working Interest Expenses" does not include "overhead expenses, such as head-office superintendence, bookkeeping, or cost of rendering accounts," and it does not include "any of the operators' or working interest owners' legal fees."

The Working Interest Owners argue that defining "Working Interest Expenses" as excluding overhead expenses is "contrary to Texas law and has no basis in the 1919 Assignment or the 1923 Settlement Agreement." This argument ignores the plain language of the 1919 Assignment, in which Humble Oil agreed "to carry [Japhet and the other assignors] for a working interest of one-fourth (1/4) of the net money profit realized by it from its operations upon said tracts of land . . . and

no expense commonly known as over-head expense, such as head-office superintendence, book-keeping, cost of rendering accounts, etc. to be charged against said land or against assignors." The 1923 Settlement Agreement did not alter the 1919 Assignment in this respect; the Settlement Agreement mentioned nothing about how to calculate Japhet's Net Profits Interest, and it did not state that overhead expenses could be included in calculating what was owed to Japhet. Because the 1919 Assignment expressly states that overhead expenses are not to be included in calculating Japhet's interest, we conclude that the trial court did not err by excluding overhead expenses from the definition of "Working Interest Expenses."

The Working Interest Owners also argue that the 1919 Assignment did not specifically mention legal fees in discussing how to calculate Japhet's Net Profits Interest, and they argue that legal fees do not constitute the kind of expenses commonly known as overhead expenses, but are, instead, "a necessary, direct expense of operations and constitute a permissible working-interest expense." As support, the Working Interest Owners cite the Texas Supreme Court's opinion in *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 424–25 (Tex. 2008), for the proposition that a lessee can properly deduct certain types of legal fees, including landman fees, recording fees, and title opinion expenses, from a lessor's share of production because the fees were necessary to production.

Here, there is no indication that the legal fees the Working Interest Owners sought to have included in the definition of "Working Interest Expenses" were the types of legal fees that could be considered necessary to oil and gas production, such as recording fees or title opinion expenses. The Working Interest Owners' counsel testified at trial concerning the legal fees that the Working Interest Owners incurred as a result of the underlying litigation. We do not read *Wagner & Brown* as supporting the proposition that legal fees that an operator incurs in the course of conducting litigation is a "necessary, direct expense of operations" and may be considered a "working interest expense." Therefore, in the absence of evidence of legal fees necessary to the operation of the wells on the Hogg-Japhet Lease, we conclude that the trial court did not err in instructing the jury not to include legal fees in calculating "Working Interest Expenses."

B. Exclusion of Hamman Net Profits Interest

In 1913, John Hamman and others assigned the Hogg-Japhet Lease to Producers Oil Company and they reserved "one eighth (1/8) of the net proceeds from the sale of the products so produced from said lands." The 1919 Assignment referred to this reservation of a royalty interest, Humble Oil agreed to honor that obligation, and this interest was mentioned in all assignments to Humble Oil's successors. It is undisputed, however, that the Working Interest Owners have not paid the Hamman interest since 1990. The Working Interest Owners argue that, regardless of whether

the Hamman interest is actually paid, it must be taken into consideration in calculating the Japhets' damages, while the Japhets argue that this interest may be considered an expense, but only if the Working Interest Owners actually pay it. Otherwise, they contend, the Hamman interest should not be included as a "Working Interest Expense."

The trial court provided as follows in the final judgment:

> It is further ORDERED, ADJUDGED, DECREED and DECLARED that the Hamman net profits or net proceeds interest, being that interest reserved to the Assignors in the 1913 Assignment from John Hamman et al to Producers Oil Company, recorded in Volume 125, Page 84, Deed Records of Brazoria County, Texas, shall not be counted as an expense in the net profits accounting due the [Japhets] by Defendants unless and until the Hamman net profits interest is actually paid by the Defendants, and then only to the extent actually paid by Defendants.

Under the facts of this case, in which the Working Interest Owners have not been paying the Hamman interest despite the 1919 Assignment and subsequent assignments obligating them to do so, we agree with the Japhets that the Working Interest Owners should not get the benefit of considering the Hamman interest as an expense for the purpose of calculating the amount due to the Japhets without actually paying the Hammans their interest. We conclude that the trial court appropriately determined that the Hamman interest can be considered as an expense when calculating the amount due to the Japhets only if the Working Interest Owners actually pay that interest to the Hammans.

C. Timing of Award to Each Plaintiff

Finally, the Working Interest Owners argue that the jury awarded damages to each of the Japhets for the four-year period prior to the date they joined the lawsuit, regardless of whether the particular plaintiff had an ownership interest during that time period. They argue that the damages calculation should, instead, be based on when each plaintiff acquired their alleged interest because the plaintiffs "lack standing to recover damages suffered by another person or entity." The Working Interest Owners argue that the Japhets were improperly "awarded damages going back to October 2000, even though no Plaintiff acquired an interest for several years."

As the Japhets point out, however, all of the plaintiffs, or their predecessor-in-interest, in the case of the trusts established in Jane Guinn's will, owned either record title to the Net Profits Interest or beneficial title to the Net Profits Interest, through a trust set up for the plaintiffs' benefit. Occasionally, during the pendency of the litigation, assignments of the interest were made involving individual plaintiffs and trusts set up for their benefit. The Jane Guinn Revocable Trust was an original plaintiff, but after Jane Guinn passed away in 2007, the trusts that she set up for the benefit of her children succeeded to her portion of the Net Profits Interest. The plaintiffs are entitled to recover their full interest, even if they were substituted

later in the proceedings. We conclude that the trial court did not err in awarding damages to the Japhets.

We overrule the Working Interest Owners' fifth issue.

Award of Prejudgment Interest

In their sixth issue, the Working Interest Owners argue that the trial court erroneously awarded the Japhets $254,734.50 in prejudgment interest because there is no basis to support the award. Specifically, they argue that the Japhets cannot recover prejudgment interest under Natural Resources Code Chapter 91 because the 1919 Assignment and the 1923 Settlement Agreement predate the enactment of Chapter 91 and are not subject to that Chapter. They further argue that, even if Chapter 91 applied, the "safe harbor" provision in section 91.402(b)(1) applies and bars the Japhets' recovery of prejudgment interest. The Working Interest Owners also argue that the Japhets cannot recover prejudgment interest under Finance Code section 302.002 because that section does not apply under the circumstances of this case, and equitable pre-judgment interest is not available to the Japhets.

Prejudgment interest is "compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Ventling v. Johnson*, 466 S.W.3d 143, 153 (Tex. 2015) (quoting *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998)); *Fortitude Energy, LLC v. Sooner Pipe LLC*,

564 S.W.3d 167, 188 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *see Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 812 (Tex. 2006) ("Prejudgment interest is awarded to fully compensate the injured party, not to punish the defendant."). An award of prejudgment interest serves two purposes: (1) encouraging settlements and (2) expediting settlements and trials by removing incentives for defendants to delay without creating such incentives for plaintiffs. *Johnson & Higgins of Tex.*, 962 S.W.2d at 529; *Fortitude Energy*, 564 S.W.3d at 188.

Texas law provides two sources for an award of prejudgment interest: (1) general principles of equity, and (2) an enabling statute. *Fortitude Energy*, 564 S.W.3d at 188; *Hand & Wrist Ctr. of Houston, P.A. v. Republic Servs., Inc.*, 401 S.W.3d 712, 717 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Johnson & Higgins of Tex.*, 962 S.W.2d at 528). The Texas Finance Code includes three enabling statutes relevant for prejudgment interest, but these statutes only apply to credit transactions, *see* TEX. FIN. CODE ANN. § 302.002, claims for wrongful death, personal injury, or property damage, *see id.* § 304.101, and condemnation cases, *see id.* § 304.201. When the claims asserted do not fall within an enabling statute, as is the case with breach of contract claims, an award of prejudgment interest is governed by equitable principles. *Siam v. Mountain Vista Builders*, 544 S.W.3d 504, 513 (Tex. App.—El Paso 2018, no pet.); *Trevino v. City of Pearland*, 531 S.W.3d 290, 297

(Tex. App.—Houston [14th Dist.] 2017, no pet.) (stating that because breach of contract claims does not fall within enabling statute, equitable principles govern award of prejudgment interest). When no statute controls the award of prejudgment interest, the decision to award such interest is within the trial court's discretion, and we review the trial court's decision concerning prejudgment interest for an abuse of discretion. *See Fortitude Energy*, 564 S.W.3d at 188; *Hand & Wrist Ctr. of Houston*, 401 S.W.3d at 717.

Texas Natural Resources Code Chapter 91 contains provisions governing the payment of proceeds derived from the sale of oil and gas. Section 91.402(a) provides that "[t]he proceeds derived from the sale of oil and gas production from an oil or gas well located in this state must be paid to each payee by payor on or before 120 days after the end of the month of first sale of production from the well" and that, after that time, "payments must be made to each payee on a timely basis according to the frequency of payment specified in a lease or other written agreement between payee and payor." TEX. NAT. RES. CODE ANN. § 91.402(a). Section 91.402(b) provides:

> Payments may be withheld without interest beyond the time limits set out in Subsection (a) if:
>
> (1) there is:
>
> (A) a dispute concerning title that would affect distribution of payments;
>
> (B) a reasonable doubt that the payee:

> (i) has sold or authorized the sale of its share of the oil or gas to the purchaser of such production; or
>
> (ii) has clear title to the interest in the proceeds of production; or
>
> (C) a requirement in a title opinion that places in issue the title, identity, or whereabouts of the payee and that has not been satisfied by the payee after a reasonable request for curative information has been made by the payor . . . .

Id. § 91.402(b). If a payor does not timely make payment to the payee, "the payor must pay interest to a payee beginning at the expiration of [the] time limits" set out in section 91.402. *Id.* § 91.403(a). "A payee has a cause of action for nonpayment of oil or gas proceeds or interest on those proceeds as required in Section 91.402 or 91.403 of this code in any court of competent jurisdiction in the county in which the oil or gas well is located." *Id.* § 91.404(c). The Texas Supreme Court has held that although section 91.404(c) "provides a cause of action for a payee if the payor does not comply with the requirements set out in section 91.402," the statute does not "abrogate[] a common law claim for breach of contract when there is a controlling lease between the parties." *ConocoPhillips Co. v. Koopman*, 547 S.W.3d 858, 879 (Tex. 2018).

Although the Japhets, as holders of the Net Profits Interest on the Hogg-Japhet Lease, were entitled to seek recovery of proceeds under Natural Resources Code section 91.402, they were also entitled to bring a common-law cause of action for breach of contract against the Working Interest Owners for breaching the 1919

Assignment. The Japhets asserted both claims against the Working Interest Owners. Beginning in their second amended petition and in every petition thereafter, the Japhets sought the recovery of prejudgment interest, and, in the 2015 summary judgment order, the trial court ruled that the Japhets were entitled to prejudgment interest, although it deferred making a ruling on the exact amounts each defendant would be obligated to pay in prejudgment interest. The trial court was within its discretion to award equitable prejudgment interest to the Japhets, as one of their claims was a claim for breach of contract. *See Fortitude Energy*, 564 S.W.3d at 188; *Hand & Wrist Ctr. of Houston*, 401 S.W.3d at 717. We conclude that the trial court did not abuse its discretion when it awarded prejudgment interest to the Japhets.

We overrule the Working Interest Owners' sixth issue.

Attorney's Fees Award

In their seventh issue, the Working Interest Owners contend that the trial court erred in awarding attorney's fees to the Japhets because such an award is not supported by contract or statute. They argue that because the Japhets cannot recover on the merits of their claims, they are not entitled to damages and thus cannot recover attorney's fees under Civil Practice and Remedies Code Chapter 38. They also argue that the Japhets cannot recover attorney's fees from Houston Bluebonnet—a limited liability company—or E&H—a limited partnership—because section 38.001 does not allow the recovery of attorney's fees against these entities. The Working Interest

Owners argue that because Natural Resources Code Chapter 91 does not apply to the agreements at issue here, the Japhets cannot recover attorney's fees under that statute. They further argue that the Japhets cannot recover attorney's fees under Civil Practice and Remedies Code Chapter 37—the Texas Declaratory Judgments Act—because the Japhets' requests for declaratory relief were simply recast from their breach of contract claim and the Working Interest Owners' counterclaims.

It is well-established that, in Texas, generally each party must pay their own attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019). There are, however, certain circumstances in which the prevailing party can recover attorney's fees from the opposing party, including when such recovery is authorized by statute. *Id.* at 484; *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017) ("Texas follows the American rule on attorney's fees, which provides that, generally, 'a party may not recover attorney's fees unless authorized by statute or contract.'") (quoting *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 n.4 (Tex. 2016) (per curiam)). In this case, three statutes are applicable and allow the Japhets to recover their attorney's fees.

Civil Practice and Remedies Code section 38.001 provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for," among other things, "an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8). The

Texas Declaratory Judgments Act also allows the recovery of attorney's fees, providing that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* § 37.009. Finally, Natural Resources Code section 91.406 provides that "[i]f a suit is filed to collect proceeds and interest under this subchapter, the court shall include in any final judgment in favor of the plaintiff an award of . . . reasonable attorney's fees." TEX. NAT. RES. CODE ANN. § 91.406.

The Working Interest Owners argue that because the Japhets cannot recover damages on their claims for breach of the 1919 Assignment they cannot recover attorney's fees. They further argue that the declaratory relief sought by the Japhets "merely duplicated issues already before the trial court" and were "recast" contract claims. They argue that the Japhets cannot use the Declaratory Judgments Act "merely as a vehicle to recover attorney's fees." The Texas Supreme Court has held that "a party cannot use the [Declaratory Judgments] Act as a vehicle to obtain otherwise impermissible attorney's fees." *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669–70 (Tex. 2009) (holding, in case in which party did not recover damages on its breach of contract claim, and therefore could not recover attorney's fees under Chapter 38, party could not use Chapter 37 and "a claim for declaratory relief [that] is merely tacked onto a standard suit based on a matured breach of contract"). We disagree with the Working Interest Owners that

the Japhets merely "recast" or "tacked on" their requests for declaratory relief to their breach of contract action, such that the Japhets were using the Declaratory Judgments Act to recover attorney's fees that they could not recover on their breach of contract claims.

First, as we have held above, the Japhets were entitled to, and did, recover money damages on their breach of contract claim. This is, therefore, not a situation in which the Japhets were not entitled to any award of attorney's fees under Chapter 38 and therefore used the Declaratory Judgments Act as a method to recover attorney's fees to which they were otherwise not entitled. The Japhets, as prevailing parties, are entitled to attorney's fees under Chapter 38 for their breach of contract claim. Furthermore, while the Japhets sought declarations that they owned the Net Profits Interest and that the 1919 Assignment was binding on the Working Interest Owners, declarations relevant to their breach of contract claims, they also sought, and obtained, additional declarations (1) relating to each plaintiff's share of the Net Profits Interest, (2) that the 1923 Settlement Agreement did not materially alter the 1919 Assignment and did not authorize the charging of overhead expenses or legal fees, (3) that the Hamman net profits interest should not be counted as an expense in the accounting to the Japhets unless and until the Working Interest Owners began paying that interest to the Hammans, (4) that the 1919 Assignment had terminated as to the Working Interest Owners' interests, with the exception of a retention area

around each of the two wells on the Hogg-Japhet Lease, (5) relating to the extent of Lyle's interest, (6) that some named defendants did not own a working interest, and (7) that the funds on deposit in the registry of the court did not reduce the amount of prejudgment interest owed to the Japhets.

The Japhets' declaratory relief claims were more than "recast" contract claims, and we agree with the Japhets that they did not seek recovery of attorney's fees under the Declaratory Judgments Act simply because they could not obtain attorney's fees on any other basis. Because the Japhets obtained an award of damages and declaratory relief, they are entitled to attorney's fees under both section 38.001 and 37.009, and the trial court did not err in awarding attorney's fees to the Japhets.[18] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (providing that plaintiff may recover reasonable attorney's fees, in addition to amount of valid claim, if claim is for oral or written contract); *id.* § 37.009 (providing that, in proceeding under Declaratory Judgments Act, court may award reasonable and necessary attorney's fees as are equitable and just).

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[18] While section 38.001 has, as the Working Interest Owners contend, been interpreted to bar the recovery of attorney's fees from limited liability companies and limited partnerships, section 37.009 of the Declaratory Judgments Act contains no such restriction. *See Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 214 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that section 38.001 does not permit recovery of attorney's fees from limited partnerships); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452–55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (holding that section 38.001 does not permit recovery of attorney's fees from limited liability company).

We overrule the Working Interest Owners' seventh issue.

Award of Non-Monetary Relief

In their eighth issue, the Working Interest Owners argue that the trial court erred in granting declaratory relief to the Japhets. They argue that the trial court erred in declaring that the 1923 Settlement Agreement did not materially alter Humble Oil's obligations under the 1919 Assignment and that the trial court erred in declaring that the Hamman net profits interest "shall not be counted as an expense in the net profits accounting due the [Japhets] by [the Working Interest Owners] unless and until the Hamman net profits interest is actually paid by" the Working Interest Owners. They argue that the trial court should modify its judgment to delete the reference to Lots 17 and 18 in the definition of the Hogg-Japhet Lease and to include overhead expenses and legal fees in the definition of "working interest expenses." Finally, they argue that the trial court erred in ordering termination of the 1919 Assignment because not all conditions precedent to termination had occurred. Specifically, no final arbitration decision has been issued, and the Working Interest Owners argue that this is a condition precedent to terminating the 1919 Assignment.

We have already addressed the first four arguments elsewhere in this opinion, concluding that the 1923 Settlement Agreement did not materially alter the 1919 Assignment, holding that the trial court did not err in declaring that the Hamman interest should not be included in the definition of "Working Interest Expenses"

unless and until the Working Interest Owners actually pay that interest to the Hammans, holding that the trial court did not err by excluding overhead expenses and legal fees from the definition of "Working Interest Expenses," and holding that the trial court did not err by entering judgment for the Japhets with respect to Lots 17 and 18.

With respect to the trial court's ordering partial termination of the 1919 Assignment, the Working Interest Owners argue that this was improper because a condition precedent to termination had not yet occurred: specifically, the arbitrators had to issue a final decision that Humble Oil (or its successors) defaulted in performance of a material obligation under the 1919 Assignment and that Humble Oil must fail to comply with that obligation within thirty days of the arbitrator's final decision. They argue that, here, no arbitration has occurred, and therefore termination of the 1919 Assignment is premature and improper. Because we hold that the trial court did not err in denying the Working Interest Owners' motion to compel arbitration and ample evidence exists in the record to support the trial court's rulings on liability—namely, that the Working Interest Owners were obligated under the 1919 Assignment to account to the Japhets for their Net Profits Interest and that they breached a material obligation of the Assignment by failing to do so—we hold that the trial court did not err when it terminated the 1919 Assignment except for an area around each remaining producing well, as the Assignment provides.

We overrule the Working Interest Owners' eighth issue.

Refusal to Award Relief to Working Interest Owners

Finally, the Working Interest Owners argue that the trial court erred by granting the Japhets' directed verdict and entering a take-nothing judgment on the Working Interest Owners' counterclaim for declaratory relief. They contend that they are entitled to declaratory relief "sought in regard to the legal effect of *Sheffield*, *Estate of Japhet*, and the 1923 Settlement Agreement" and a declaration that they are entitled to the funds in the court's registry. They also argue that the trial court erred by refusing to remove the Japhets' notice of lis pendens.

All of the Working Interest Owners' arguments with respect to this issue are premised on their contention that the Japhets cannot recover on their claims. However, we have concluded that the Japhets are entitled to damages and declaratory relief and that the trial court did not err by entering judgment for the Japhets on the jury's verdict. With respect to the Japhets' notice of lis pendens, the Working Interest Owners argue that a lis pendens should not have been filed because the Japhets' claims "involve[] an alleged breach of a contractual payment obligation, not a dispute regarding ownership of real property."

"Lis pendens provides a mechanism for putting the public on notice of certain categories of litigation involving real property." *Cty. Inv., LP v. Royal W. Inv., LLC*, 513 S.W.3d 575, 578 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (quoting

Prappas v. Meyerland Cmty. Improvement Ass'n, 795 S.W.2d 794, 795 (Tex. App.—Houston [14th Dist.] 1990, writ denied)). "A lis pendens is a notice of litigation, placed in the real property records, asserting an interest in the property, and notifying third parties that ownership of the property is disputed." *Id.* (quoting *In re Miller*, 433 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding)).

We have held, both in the 2010 opinion and in this opinion, that the Japhet Net Profits Interest is not merely a contractual obligation but is a real property interest. *See Lyle*, 365 S.W.3d at 351 (stating that the Japhets' "royalty interest is also, as a matter of law, a property interest"). We conclude that the trial court did not err by refusing to remove the notice of lis pendens.

We overrule the Working Interest Owners' ninth issue.

Conclusion

We affirm the judgment of the trial court. All pending motions are denied.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.