

Appendix A

Motion for Rehearing Denied; Memorandum Opinion filed March 7, 2017 Withdrawn; Affirmed and Substitute Memorandum Opinion filed April 18, 2017

In The

Fourteenth Court of Appeals

NO. 14-15-01030-CV

DEK-M NATIONWIDE, LTD, Appellant

V.

DAVID HILL INDIVIDUALLY & D/B/A DOH OIL CO., CASSIE MOSELEY, DAVID MOSELEY AND COLORADO COUNTY CENTRAL APPRAISAL DISTRICT, Appellees

On Appeal from the 2nd 25th District Court
Colorado County, Texas
Trial Court Case No. 23,859

SUBSTITUTE MEMORANDUM OPINION

We deny appellant's motion for rehearing and its motion to supplement briefing, withdraw our

opinion of March 7, 2017, and issue this opinion in its place.

After the Colorado County Appraisal District obtained a delinquent-tax judgment against royalty-interest owner Walter Willis, Willis gave a security interest in the property to a creditor. Before the District sold the property, Willis's creditor purported to sell the property to its affiliated company DEK-M Nationwide LTD at a non-judicial foreclosure sale for a nominal sum. DEK-M then sued the District and those who bought the property at the District's sale.

DEK-M now appeals the summary judgment rendered against it on its trespass-to-try-title claims. Because DEK-M has not challenged all of the grounds on which the trial court may have rendered summary judgment against it, we affirm the trial court's judgment.

I. Background

After Walter Willis failed to pay the taxes owed on his royalty interests in three tracts, the District sued Willis to collect the delinquent taxes and to foreclose on its tax lien against the property. While the tax suit was pending, Kenneth D. Eichner, P.C. ("the Creditor") sued Willis for non-payment for its services. The Creditor won its suit and filed an abstract of judgment in Colorado County. A few months later, the District obtained a judgment against Willis.

Less than three weeks after the court rendered judgment for the District in the delinquent-tax suit, Willis purported to give the Creditor security interests in the royalty interests. The

Creditor recorded the security agreement and the deed of trust.

Nothing further happened for two years. In January 2013, however, the trustee on the Creditor's deed of trust began the nonjudicial-foreclosure process, and a few weeks later, the District obtained an order for sale. On February 5, 2013, the trustee on the Creditor's deed of trust sold the property to its affiliated company DEK-M¹. The District posted its notice of sale the next day.

About three weeks after DEK-M's deed was recorded, the District sold the royalty interests. David Hill, individually and d/b/a DOH Oil Co., bought the royalty interest in one tract, and David and Cassidy Moseley bought the royalty interests in the two remaining tracts. We refer to Hill and the Moseleys collectively as "the Buyers." Two months after DEK-M recorded its deed, the Buyers recorded their deeds to the same property.

When DEK-M attempted to collect the royalty payments and learned that the payments instead were being made to the Buyers, it sued the District and the Buyers². DEK-M asserted claims against the Buyers for trespass to title, or in the alternative, to quiet title and for an equitable lien. DEK-M also alleged that the Buyers converted the royalty payments or were unjustly enriched by receiving them. Against the District, DEK-M sought only declarations that the tax-foreclosure sale did not transfer title; that DEK-M is entitled to the royalty

¹ Kenneth D. Eichner is the president both of Kenneth d. Eichner, P.C. and of DEK-M's general partner.

² Other defendants were non-suited.

payments; and that the District failed to comply with notice provisions under the Tax Code.

The District filed a motion for traditional and no-evidence summary judgment. The Buyers adopted an earlier summary-judgment motion filed by the District, and sought summary judgment on two additional grounds. After granting the District's and the Buyer's motions without stating the grounds on which it relied, the trial court signed a final judgment.

II. Analysis

If a party successfully moves for summary judgment on multiple grounds and the trial court does not specify the grounds on which it relied, we will uphold the ruling unless the appellant negates every ground on which the judgment could have been granted. *See DeWolf v. Kohler*, 452 S.W.3d 373, 388 (Tex. App.---Houston [14th Dist.] 2014, no pet.); *Wilkinson v. USAA Fed. Sav. Bank Trust Servs.*, No. 14-13-00111-CV, 2014 WL 3002400, at *5 (Tex. App.---Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.). This rule is dispositive of DEK-M's appeal.

The District sought summary judgment on multiple grounds, not all of which were limited to specific claims:

- The District maintained that DEK-M's conversion claim must fail because conversion requires proof that the claimant owned the property or had a superior right to possession. The District reasoned that DEK-M could not make this showing because, for the reasons

stated above, DEK-M did not own the property.

- The District argued that DEK-M also could not show that it had superior right to possession because the judgment in the delinquent-tax suit had “all the force and effect of a writ of possession as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit.” TEX. R. Civ. P. 310.
- In response to DEK-M’s allegations that its lack of notice of the tax sale violated its right to due process, the District cited section 34.01 of the Tax code, under which only the defendant to the tax suit is required to be notified of the tax sale. *See* TEX. TAX CODE ANN. § 34.01(c) (West Supp. 2016). Section 34.01 further provides that lack of notice “is insufficient by itself” to invalidate the property’s sale or the conveyance of title by sale. *See id.* § 34.01(d).
- Regarding title to the royalty interests, the District sought summary judgment on the ground that the delinquent-tax suit and the tax sale were conducted in accordance with the Texas Property Tax Code, and any acquisition of the property was subject to the delinquent-tax judgment. The District pointed out that, with the exceptions inapplicable here, a tax lien takes priority over the claims

of the property owner's creditors. *See* TEX. TAX CODE ANN. § 32.05 (West 2015).

- The District similarly argued that under the doctrine of res judicata, the judgment in the tax suit precludes the claims of those in privity with Willis, and that DEK-M is in privity with Willis as his successor in interest. *See Amistadt v. United States Brass Corp.*, 919 S.W.2d 644, 652-53 (Tex. 1996).
- Finally, the District argued that all of DEK-M's claims were barred by accord and satisfaction and by the election of remedies. In support of this position,, the District asserted that DEK-M could not claim ownership of the property through Willis's Creditor because the Creditor was fully compensated for any outstanding liens against the property.³

These grounds were raised in the District's original and amended summary-judgment motions. The Buyers adopted the District's original summary-judgment motion, and additionally argued that DEK-M had waived any objection to the tax sale and was estopped to assert any such objection.

On appeal, DEK-M failed to challenge in its opening brief all of the grounds on which the trial court may have granted summary judgment. In its

³ Because DEK-M amended its position after the District and the Buyers moved for summary judgment, we do not address grounds raised in the summary-judgment motions that were responsive only to claims that DEK-M omitted from its live pleading.

opening brief, DEK-M argued that the trial court erred in granting summary judgment because (a) DEK-M acquired superior title by recording its deed before the Buyers purchased the property at the tax sale, and (b) it was deprived of due process because it was not given actual notice of the pending tax sale. But, DEK-M did not address the grounds raised in the District's and the Buyers' summary-judgment motions that their affirmative defenses of res judicata, accord and satisfaction, election of remedies, waiver, and estoppel defeat all of DEK-M's claims. *See* TEX. R. CIV. P. 94.⁴

An affirmative defense is, by definition, “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, *even if all the allegations in the complaint are true.*” *Zorilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155-56 (Tex. 2015) (quoting BLACK’S LAW DICTIONARY 509 (10th ed. 2009)) (emphasis added, alteration in original) *see also* *Heggy v. Am. Trading Emp. Ret. Account Plan*, 123 S.W.3d 770, 778 (Tex. App.----Houston [14th Dist.] 2003, pet. denied) (sub. op. on reh’g) (“An affirmative defense generally accepts the existence at one time or another of a

⁴ After the Buyers pointed out these omissions in their response brief, DEK-M filed a reply brief in which it addressed the issue of res judicata; however, we are not required to consider issues raised for the first time in a reply brief. *See DeWolf*, 452 S.W.3d at 388 n.13; *see also Dallas County v. Gonzalez*, 183 S.W.3d 94, 104 (Tex. App.----Dallas 2006, pet. denied) (“The Texas Rules of Appellate Procedure do not allow an appellant to include in a reply brief a new issue in response to some matter pointed out in the appellee’s briefs but not raised by the appellant’s original brief.”). In neither of its briefs did DEK-M address the summary judgment grounds of election of remedies, waiver, estoppel, or accord and satisfaction.

prima facie case but asserts propositions which, if established, would defeat the plaintiff's claim.") A successful affirmative defense will defeat an otherwise valid claim. *See, e.g., F.D.I.C. v. White*, 76 F. Supp. 2d 736, 739 (N.D. Tex. 1999) ("[D]uress is an affirmative defense that must be proved by the party seeking to avoid an otherwise valid contract."); *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 177 (Tex. App.----Dallas 2013, no pet.) (stating that an affirmative defense will avoid an otherwise valid arbitration provision).

Thus, even if DEK-M were correct that its title otherwise would be superior to a later-recorded deed or that DEK-M otherwise would have been entitled to notice of the pending tax sale, these arguments do not overcome the District's and the Buyers' affirmative defenses.⁵

DEK-M also argues that the judgment is overly broad in that the summary-judgment motions did not address DEK-M's later-added requests to quiet title or for an equitable lien. Although it is true that DEK-M added these requests after the summary-judgment motions were filed, the District and the Buyers argued in their motions that res judicata defeated all of DEK-M's claims. In addition, their arguments about election of remedies, accord and satisfaction, waiver, and estoppel were not

⁵ In its motion for rehearing, DEK-M asserts that its appellate federal due-process arguments would survive state court affirmative defenses. DEK-M did not raise these arguments in the trial court, and it is well-settled that even due-process claims must be properly raised in the trial court or they are waived on appeal. *See Taylor v. Bridges*, No. 14-13-00669-CV, 2014 WL 4202507, at 2* (Tex. App.----Houston [14th Dist.] Aug. 26, 2014, no pet.) (mem. op.).

limited to specific causes of action or remedies. Thus, affirmative defenses raised in the summary-judgment motions were broad enough to encompass all of DEK-M's claims and requests for relief, including those added after the motions were filed.

Because DEK-M failed to adequately challenge every ground on which the trial court may have granted summary judgment, any one of the unchallenged grounds is sufficient to support the judgment. *See Cuidado Casro Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 743-44 (Tex. App.----El Paso 2013, no pet.) ("When a summary judgment ground goes unaddressed, its validity is presumed.") We accordingly affirm the trial court's judgment on the grounds of res judicata, election of remedies, waiver, estoppel, and accord and satisfaction without further addressing DEK-M's appellate arguments.

III. Conclusion

Because DEK-M has failed to negate all of the grounds on which the trial court may have based its summary-judgment rulings, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Boyce, Christopher, and Brown

Appendix B

FILE COPY

RE: Case No. 17-0526 DATE: 9/1/2017
COA #: 14-15-01030-CV TC#: 23,859
STYLE: DEK-M Nationwide, LTD. v. Hill

Today the Supreme Court of Texas denied the
petition for review in the above-referenced case.

Appendix C

CAUSE NUMBER 23859

DEK-M Nationwide, LTD.	In the 25th Judicial
vs.	District Court of
David Hill dba	Colorado County,
DOH Oil Co., et al	Texas

Order

The Court having reviewed the pleadings, heard the arguments of Counsel and reviewed the case law is of the opinion that the Defendant's Motion for Summary Judgment is GRANTED.

Signed this the 23 day of October, 2015.

/s/
William D. Old III
Judge Presiding

Appendix D

CAUSE NO. 23,859

DEK-M Nationwide, LTD. In the 2nd 25th

vs. District Court
In and For

David Hill dba Colorado County,
DOH Oil Co., et al Texas

SUMMARY JUDGMENT

On this day, *Defendant's (Colorado County Central Appraisal District) Amended Motion for Summary Judgment* came on hand to be heard. After reviewing the motion and the pleadings, as well as arguments of counsel, it appears to the Court that the Motion is well taken and should be **GRANTED**.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that *Defendant's (Colorado County Central Appraisal District) Amended Motion for Summary Judgment* is hereby **GRANTED**.

SIGNED on this 10 day of November, 2015.

/s/
The Honorable Judge Presiding

Appendix E

Cause No. 23,859

DEK-M Nationwide,	§	IN THE DISTRICT
LTD.,	§	
Plaintiff	§	COURT OF
	§	
	§	
	§	
vs.	§	
	§	COLORADO
	§	COUNTY, TEXAS
David Hill individually	§	
& d/b/a DOH Oil Co.,	§	
Cassie Moseley,	§	
David Moseley, and	§	
Colorado County Central	§	
Appraisal District,	§	
Defendants	§	2 ND 25 TH DISTRICT

FINAL JUDGMENT

On October 14, 2015 came on to be heard and considered the Motions for Summary Judgment of all Defendants and the Responses thereto by the Plaintiff. After considering the same and the matters as came properly before the Court, the Court entered its Order dated October 23, 2015 granting Summary Judgment, and its Summary Judgment dated November 10, 2015. In order to lend finality to the same, the Court hereby ORDERS, ADJUDGES AND DECREES that the Plaintiff take nothing of its claims against the defendants herein, and that all court costs be hereby assessed against the Plaintiff

for which let execution issue if not timely paid. All relief not expressly granted is denied.

This Judgment is final and appealable.

Signed this 3 day of December, 2015.

/s/

William D. Old III, Judge Presiding

Appendix F

**Fourteenth Court of Appeals
301 Fannin, Suite 245
Houston, Texas 77002**

Tuesday, May 16, 2017

RE: Case No. 14-15-01030-CV

Style: DEK-M Nationwide, LTD
v. David Hill Individually & d/b/a DOH Oil
Co., Cassie Moseley, David Moseley and Colorado
County Central Appraisal District

Please be advised that on this date the court
DENIED APPELLANT'S motion for rehearing en
banc in the above cause.

**Panel Consists Of Chief Justice Frost, and
Justices Boyce, Christopher, Jamison, Busby,
Donovan, Brown, Wise and Jewell**

T. C. Case # 23,859

Christopher Prine, Clerk

Appendix G

**Fourteenth Court of Appeals
301 Fannin, Suite 245
Houston, Texas 77002**

Tuesday, April 18, 2017

RE: Case No. 14-15-01030-CV

Style: DEK-M Nationwide, LTD
v. David Hill Individually & d/b/a DOH Oil
Co., Cassie Moseley, David Moseley and Colorado
County Central Appraisal District

Please be advised that on this date the court
DENIED APPELLANT'S motion for rehearing in
the above cause.

**Panel Consists Of Justices Boyce, Christopher
and Brown**

T. C. Case # 23,859

Christopher Prine, Clerk

Appendix H

FILE COPY

RE: Case No. 17-0526 DATE: 12/15/2017
COA #: 14-15-01030-CV TC#: 23,859
STYLE: DEK-M Nationwide, LTD. v. Hill

Today the Supreme Court of Texas denied the motion for rehearing of the above-mentioned petition for review.

Appendix I

No. 23,859

DEK-M Nationwide, LTD	§	In the 2nd
	§	25th District
	§	Court
	§	
v.	§	
	§	
DOH Oil Company,	§	
David Hill d/b/a DOH	§	
Oil Company, David Hill,	§	
Individually, Orvel Hill,	§	Of
Individually, Cassie Moseley,	§	
David Moseley, John Banks,	§	
In His Official Capacity,	§	
Jamex, Inc., DWQ Inc.,	§	
Texline Energy, LLC, Jamex	§	
Properties, Inc., Jamex	§	
Management, Inc., DWQ	§	
Properties, Inc., Jamex	§	
Management, Inc., DWQ	§	
Properties, Inc., Windsonics,	§	Colorado
LLC, and Colorado County	§	County,
Central Appraisal District	§	Texas

PLAINTIFF'S FIRST AMENDED PETITION

Plaintiff, DEK-M Nationwide, Ltd (“DEK-M”), by its attorney, Alan R. Scheinthal, for its complaint against Defendants DOH Oil Company, David Hill d/b/a DOH Oil Company, David Hill, Orvel Hill, Cassie Moseley, and David Moseley, John Banks, in

his official capacity, Jamex, Inc, and Colorado County Central Appraisal District, states as follows:

DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 2 of the Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 because Plaintiff requests injunctive relief and monetary relief over \$100,000.

CLAIM FOR RELEIF

2. Plaintiff seeks monetary relief of over \$200,000 but no more than \$1,000,000 and nonmonetary relief.

PARTIES

3. Plaintiff is a resident of Harris County, Texas.
4. Upon information and belief, Defendant DOH Oil Company ("DOH") is a Texas partnership whose office is located in Nolan County at P.O. Box 1342, Sweetwater, Texas 79556. Defendant may be served with process by serving its partners as follows:
 - a. David Hill, in Nueces County at 511 Sea Oats Dr., Port Aransas, Texas 78373.
 - b. Orvel Hill, in Fayette County at 761 E Milam St., La Grange, Texas 78945

Or wherever else he may be found or in any manner authorized by law.

5. Upon information and belief, Defendant David Hill d/b/a DOH Oil Company is a resident of Nueces County, Texas. David Hill d/b/a DOH Oil Company who may be served with process at: 511 Sea Oats Dr., Port Aransas, Texas 78373. Or wherever else he may be found or in any manner authorized by law.
6. Upon information and belief, Defendant Cassie Moseley is the wife of David Moseley and is a resident of Matagorda County, Texas. Cassie Moseley is an individual who may be served with process at: P.O. Box 376, Cedar Lane, Texas 77415. Or wherever else she may be found or in any manner authorized by law.
7. Upon information and belief, Defendant David Hill is a resident of Nueces County, Texas. David Hill is an individual who may be served with process at: 511 Sea Oats Dr., Port Aransas, Texas 78373. Or wherever else he may be found or in any manner authorized by law.
8. Upon information and belief, Defendant Orvel Hill is a resident of Fayette County, Texas. Orvel Hill is an individual who may be served with process at: 761 E Milam St., La Grange, Texas 78945. Or wherever else he may be found or in any manner authorized by law.

9. Upon information and belief, Defendant David Moseley is the husband of Cassie Moseley and is a resident of Matagorda County, Texas. David Moseley is an individual who may be served with process at: P.O. Box 376, Cedar Lane, Texas 77415. Or wherever else he may be found or in any manner authorized by law.
10. Upon information and belief, Defendant John Banks (“Banks”) is the attorney for the Colorado County Central Appraisal District and may be served with process at 3301 Northland Drive, Suite 505, Austin, Texas 78731.
11. Defendant, Colorado County Central Appraisal District (“CCAD”), a special-purpose authority located in Colorado County, Texas, may be served with process by serving its attorney, John Banks, at 3301 Northland Drive, Suite 505, Austin, Texas 78731.
12. Jamex, Inc. (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.
13. DWQ, Inc. (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.
14. Texline Energy, LLC (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.

15. Jamex Properties, Inc. (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.
16. Jamex Management, Inc. (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.
17. DWQ Properties, Inc. (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.
18. Windsonics, LLC (“Jamex”), Douglas W. Quebe, Registered Agent and President at 2871 Lake Vista Drive, Suite 200, Lewisville, TX 75067.

JURISDICTION

19. The subject matter of this litigation is certain real property, mineral royalty interest, in 3 tracts of property in Colorado County, Texas (“Property” or “Plaintiff’s Property”), more particularly described as follows:

Tract 2: The 0.08000000 royalty interest in well #1 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. &H. R.R. Co. survey; said interest being derived from the royalty deeds recorded at volume 381, page 782

et seq and volume 544, page 766 et seq of the Official Records of Colorado County, Texas said interest being identified on the tax and appraisal rolls as account no. 50565.

Tract 3: The 0.08000000 royalty interest in well #2 for the Webb lease in N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the Official Records of Colorado County, Texas; said interest being identified on the tax and appraisal rolls as account no. 50827.

Tract 4: The 0.02545500 royalty interest in the Kaechele No 2 Gas unit in the Kaechele lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 698, section 24 of the George McCormick Survey; identified on the tax and appraisal rolls as account no. 67425.

20. Jurisdiction is proper in this Court pursuant to subject matter jurisdiction, personal jurisdiction, and in rem jurisdiction.

GENERAL FACTS

21. Plaintiff realleges the allegations of paragraph 1 through 6 of this Petition as if fully repeated in this paragraph 14.

22. Plaintiff incorporates all arguments presented in the First Amended Motion to Set Aside Order of Sale and Vacate and Void Tax Sale (“Motion”) which is attached as Exhibit “A” and is incorporated here by reference.
23. On or about February 5, 2013, Plaintiff, a good faith purchaser, purchased the property in a Trustee Foreclosure Sale from Deed of Trust holder Kenneth D. Eichner, P.C. and Trustee Alan R. Scheinthal (Plaintiff’s Grantors”). A true and correct copy of the recorded deed from Plaintiff’s Grantors to Plaintiff for Property is attached as Exhibit “B” and is incorporated here by reference.
24. Plaintiff’s Grantors obtained the Deed of Trust which was signed by the Property’s original owner, Walter Willis, on December 31, 2010.
25. Walter Willis gained title to the Property by a royalty deed dated August 28, 2001. A true and correct copy of the royalty deed is attached as Exhibit “C” and is incorporated here by reference.
26. Attorney for Plaintiff has contacted Jamex several times and asked for records regarding the amount of money being placed in suspense. Jamex has not responded to such requests at this time.

ARGUMENTS

27. Redemption is not necessary as DEK-M was the owner of the Property and did not owe the taxes on the Property that DEK-M purchased at a foreclosure sale. A law is void if it makes DEK-M pay for its own asset.

ADVERSE POSSESSION

28. Defendants, DOH Oil, Inc., Cassie Moseley, and David Moseley, are adversely possessing the property owned by DEK-M as they are not the title holder and are trying to collect on royalties belonging to DEK-M.
29. Defendants, DOH Oil, Inc., Cassie Moseley, and David Moseley, believe they purchased the title at a purported tax sale on March 5, 2013.
30. The purported tax sale should not have occurred as the property was not owned by Walter Willis at the time and been already foreclosed upon prior to the date of the purported tax sale. See Exhibit "A."
31. Upon such foreclosure sale, pursuant to the operation of Tex. Tax Code §32.02, the tax lien of the Tax Authority expired, and the Tax Authority lacked any interest in the property as of the date that the District Court entered the tax Sale Order. Tex. Tax Code §32.02(a) provides the following applicable rules (emphasis supplied).

Sec 32.02. RESTRICTIONS ON A MINERAL INTEREST TAX LIEN. (a) If a mineral estate is severed from a surface estate and if a different persons own the mineral estate and surface estate, the lien resulting from taxes imposed against each interest in the mineral estate exists only for the duration of the interest it encumbers. **After an interest in the mineral estate terminates, the lien encumbering it expires and is not enforceable:**

(1) against any part of the surface estate not owned by the owner of the interest encumbered by the lien;

(2) against any part of the mineral estate not owned by the owner of the interest encumbered by the lien; or

(3) against the owner of the surface estate as a personal obligation, unless he also owns the interest encumbered by the lien.

(b) Taxes imposed on a severed interest in a mineral estate that has terminated remain the personal liability of the person who owned the interest on January 1 of the year for which the tax was imposed.⁶

The interest(s) of Willis in the Property (a mineral estate) terminated upon the deed of trust foreclosure sale to satisfy the lien(s) of

⁶ See Tax Code §32.02 (Lexis 2015)

KDEPC, whereupon by operation of the statute the lien(s) of the Tax Authority expired and thereafter was not enforceable upon the mineral estate owned by DEK-M, which of course was a different entity from Willis who was the subject of the original tax lien in question.

Following KDEPC's enforcement of its lien rights and the purchase of the Property by DEK-M, the taxes due were and/or remained the personal responsibility of Willis by operation of §32.02(b).

32. DEK-M acted as the real property owner, when DEK-M filed notice of Division Order with Jamex, Inc., the operating company for the property in interest, in accordance with the UCC Business Commerce Code §9.343(a) for the Mineral Royalties associated with the property in interest. Letters sent to Jamex, Inc. are attached as Exhibit "G" and Exhibit "H" and incorporated herein by reference.

33. DEK-M was only made aware of the purported tax sale and the purported purchasers when attempting to act as the real property owner.

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

34. Defendants, DOH Oil, Inc., Cassie Moseley, and David Moseley, tried to collect royalty payments based on the purchase at the purported tax sale; however, those royalty

payments are the rightful property of the Plaintiff.

35. Upon discovery of this claim of Defendants, DOH Oil, Inc., Cassie Moseley, and David Moseley, Plaintiff filed a Motion to Set Aside Order of Sale and Vacate and Void Tax Sale. Plaintiff sent Defendants, DOH Oil, Inc., Cassie Moseley, and David Moseley, a contractual obligation. Letters attached as Exhibit "D" and are incorporated here by reference.
36. DEK-M acted as the real property owner, when DEK-M filed notice of Division Order with Jamex, Inc., the operating company for the property in interest, in accordance with the UCC Business Commerce Code §9.343(a) for the Mineral Royalties associated with the property in interest. Letters sent to Jamex, Inc. are attached as Exhibit "G" and "H" and incorporated herein by reference.
37. DEK-M was only made aware of the purported tax sale and the purported purchasers when attempting to act as the real property owner.
38. Defendants' had knowledge by recorded deed that DEK-M was the owner of the Property.
39. Because of Defendants' wrongful acts, Plaintiff has been and continues to be deprived of the full and quiet enjoyment of the Property, sustaining great and irreparable harm.

40. Jamex should be placing the royalties in suspense until this matter is resolved.

CONVERSION

41. Plaintiff owns the property in question.
42. Defendants intentionally interfered with Plaintiff's property and attempted to exercise dominion and control over it.
43. The Defendants interference deprived Plaintiff of possession and use of the property in question.
44. The interference by Defendants caused Plaintiff damages.

TRESPASS TO TRY TITLE

45. A person claiming adversely to such deed cannot recover title until the deed is set aside. Therefore an action in trespass to try title will not lie to recover the land. The proper action is one to cancel the deed, and that being done, the court may then do justice by entering judgment vesting title as a consequence of the relief primarily granted *Neill v. Oure Oil Co.*, Tex.Civ.App., 101 S.W.2d 402 (writ re.); *Harrison v. Craddock*, Tex.Civ.App., 178 S.W.2d 296.
46. Defendants are interfering with the DEK-M's actual ownership of the property by clouding DEK-M's title to the property.

UNJUST ENRICHMENT

47. Defendants may be receiving royalties that are not theirs if Jamex is not placing royalties in suspense until this matter is settled.
48. Plaintiff is entitled to recover legal fees.

WRONGFUL SALE OF PROPERTY

49. Colorado County Appraisal District did not have authority to sell the property in question at a Tax Sale as Walter Willis was no longer the owner of the property when it was sold. The Constitution states that one cannot sell something that was not theirs to sell.
50. On March 5, 2013, the purported Tax Sale occurred; a month after title to the Property in question had been sold to DEK-M. The County cannot sell something, unless it has a right to sell it. The Tax Authority had an equity interest and not a title interest in the property.⁷ The equity interest sold is no more than a failure to convey a title interest in accordance with Property Code section 5.002. Therefore, as to the Property which is the basis of this suit it is void per 5.206.
51. Notice was not given to KDEPC or to DEK-M, the real parties in interest, of the purported Tax Sale prior to the purported Tax Sale. The

⁷ See *Flag-Redfern Oil Co. v. Humble Exploration Co., Inc.*, 744 S.W.2d 6 (Tex. 1987)

legislature mandated in Section 33.25 of the Tax Code that taxing authorities make at least a reasonable effort to locate and notify interest holders before property is disposed of at a summary sale. *County of Burleson, et al v General Electric Capital Corporation* 831 S.W. 2d 54 (1992). Further, Section 33.25 of the Tax Code states that “**after** [emphasis added] a seizure of personal property, the collector shall make a reasonable inquiry to determine the identity and address of any person having an interest in the property other than the person whom the tax warrant is issued”, and deliver as soon as possible a written notice stating the time and place of the sale. In this case, the County failed to give reasonable notice to DEK-M. Texas courts have always required the taxing authorities to strictly comply with the statutory requirements. It has been the uniform policy of the courts of Texas to construe such statutes strictly, and require scrupulous observance of their every requirement. *Anaimo v Carter*, 212 S.W.2d 950, 956 (Tex.Civ.App.- Beaumont 1948, writ ref’d n.r.e.), *citing City of Henrietta v. Eustis*, 87 Tex. 14, 26 S.W. 619, 620 (1894.). “Not only must each thing prescribed by law be done in advance, and at the time, of the exercise of the power to sell, but it must be done exactly as prescribed.” *Brown v. Bonough*, 111 Tex. 275, 232 S.W. 490, 491 (1921).

52. Texas has long recognized that one can recover damages by proof that it was inflicted

with special injury such as will “practically deprive [it] of the ordinary use and enjoyment” of its property. *G., E. & Santa Fe R.R. Co. v. Eddins*, 60 Tex. 656, 663 (1884). The County has damaged DEK-M and deprived it of a valuable property interest without due process or compensation. *County of Burleson, et al v General Electric Capital Corporation* 831 S.W. 2d 54 (1992).

The Texas Constitution provides in pertinent part: “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.” Tex. Const. art. Sec. 17. While the County has the right to take, damage or destroy private property for public use, that power is subject to the right of the owner to adequate compensation for the taking, damaging or destruction. *State v Hale*, 136 Tex. 29, 146 S.W. 2d 731, 734 (1941). The County’s duty to compensate for damaging property for public use, after 1876, is not dependent upon the transfer of property rights; substantial deprivation of benefits or use is sufficient. *Steele v City of Houston*, 603 S.W. 2d 786, 790 (Tex. 1980) *citing Eddins*, 60 Tex. at 663.

In The Texas Constitution, Article 1, Section 29 states that “to guard against transgressions of the high powers herein delegated, we declare that everything in this “Bill of Rights” is excepted out of the general powers of government, and shall forever

remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.” This means that the Colorado County Appraisal District cannot make a law which deprives DEK-M of property rights when DEK-M has the deed.

53. DEK-M was a Bona Fide purchaser of the Property. DEK-M did not have any notice from a third party claim or interest in the Property and acquired the Property in good faith at a foreclosure sale for value.

54. A party has a constructive notice of instruments properly recorded in the proper county. Tex. Prop. Code Ann. §13.002.

SOVEREIGN IMMUNITY

55. When a governmental entity is a necessary party to a statutory cause of action.. sovereign immunity is expressly waived.”⁸

NEGLIGENCE

56. There is an element of trust in the County that it will protect the public. That trust is more important than the function of collecting the tax.

57. When Banks allowed Willis to have an installment agreement for more than the

⁸ See *Lottery Comm’n v First State Bank of Dequeen*, 325 S.W.3d, 628, 637-38(Tex. 2010)

statute allowed, Banks was negligent in protecting the public. Banks' misuse of his relationship to the public breached his fiduciary duty. The Tax Authorities had an obligation to act in good faith with every contract it made with Willis. According to Texas Business and Commerce Code Section 2.209(d) the multiple contracts the Tax Authorities gave to Willis can act as a waiver, *Tenneco* was inactive for over a period of three years which established an intentional waiver of any rights concerning the First Transfer⁹. Furthermore, when Banks neglected to give proper notice to the Deed of Trust Holder and DEK-M, it violated its due process.

58. US Constitution Fifth Amendment states that, 'Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.' It also states that "guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout litigation." KDEPC and DEK-M had no knowledge of the foreclosure.

59. The US Constitution Fourteenth Amendment requires service of process is required. As shown in *Mennonite Bd. of Missions v Adams*, 462 U.S. 791 (1983) which says that personal service or notice by mail is required for

⁹ *Tenneco, Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 643 (Tex. 1996)(silence or inaction may establish waiver if it is for so long a period that it shows an intent to yield the known right.)

mortgagee of real property subject to a tax sale. The Fourth Court of Appeals in San Antonio, Texas, adds to the notice issue to include notice of the subsequent tax sale and the lack of notice violates due process and renders the tax sale void.¹⁰

60. Texas has long recognized that one can recover damages by proof that it was inflicted with special injury such as will “practically deprive [it] of the ordinary use and enjoyment” of its property. *G., E. & Santa Fe R.R. Co. v. Eddins*, 60 Tex. 656, 663 (1884). The County has damaged DEK-M and deprived it of a valuable property interest without due process or compensation. *County of Burleson, et al v General Electric Capital Corporation* 831 S.W. 2d 54 (1992).

The Texas Constitution provides in pertinent part: “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.” Tex. Const. Art. § 17. While the County has the right to take, damage or destroy private property for public use, that power is subject to the right of the owner to adequate compensation for the taking, damaging or destruction. *State v Hale*, 136 Tex. 29, 146 S.W.2d 731, 734 (1941). The County’s duty to

¹⁰ See *Sec. Security State Bank & Trust v. Bexar County*, 397 S.W.3d 715 (Tex. App. ----San Antonio, December 21, 2012, pet. Denied).

compensate for damaging property for public use, after 1876, is not dependent upon the transfer of property rights; substantial deprivation of benefits or use is sufficient. *Steele v City of Houston*, 603 S.W. 2d 178, 790 (Tex. 1980) citing *Eddins*, 60 Tex at 663.

61. DEK-M is the owner of the real property, mineral royalty, at interest by virtue of a Trustee's Deed recorded in Colorado County, Texas on February 13, 2013. A true and correct copy of the Trustee's Deed is attached hereto as Exhibit "E" and B&P Consulting property research is attached as Exhibit "F" and incorporated herein by reference.

Upon such foreclosure sale, pursuant to the operation of Tex. Tax Code §32.02, the tax lien of the Tax Authority expired, and the Tax Authority lacked any interest on the property as of the date that the District Court entered the tax Sale Order.

Tex. Tax Code §32.02(a) provides the following applicable rules (emphasis supplied).

Sec 32.02. RESTRICTIONS ON A MINERAL INTEREST TAX LIEN. (a) If a mineral estate is severed from a surface estate and if a different persons own the mineral estate and surface estate, the lien resulting from taxes imposed against each interest in the mineral estate exists only for the duration of the interest it encumbers. **After an interest in the mineral estate terminates, the lien**

encumbering it expires and is not enforceable:

(1) against any part of the surface estate not owned by the owner of the interest encumbered by the lien;

(2) against any part of the mineral estate not owned by the owner of the interest encumbered by the lien; or

(3) against the owner of the surface estate as a personal obligation, unless he also owns the interest encumbered by the lien.

(b) Taxes imposed on a severed interest in a mineral estate that has terminated remain the **personal liability of the person who owned the interest on January 1 of the year for which the tax was imposed.**¹¹

Section 32.02 is clear language and even if it was not the Court is not empowered to “fix” the mistake by disregarding direct and clear statutory language that does not create absurdity.¹²

62. The property taxes owed as of January 1 are only conditionally perfected until the date of

¹¹ See *Tex. Tax Code* §32.02 (Lexis 2015).

¹² See *Lottery Comm’n v First State Bank of Dequeen*, 325 S.W.3d, 628, 637-38 (Tex. 2010) (explaining that even when it appears that the legislature may have made a mistake, courts are not empowered to “fix” the mistake by disregarding direct and clear statutory language that does not create an absurdity).

judgment, similar to a mechanics lien¹³, and no other action was needed for that perfection. However, once the judgment was rendered, the County had a duty, particularly, after giving the debtor extensions for payment, had a duty to file a lis pendens before the judgment and an Abstract after judgment. Banks had previously filed a lis pendens on this property for a previous tax matter. Nowhere does it say that the perfection will continue until paid.

63. The Texas Civil Practice and Remedies Code Section 61.062(b) states that the “sale vests in the purchaser all of the estate of the defendant in the land at the time of the levy.” DEK-M purchased the property at judgment foreclosure sale and therefore all of the estate was vested in DEK-M and the County did not have the property to foreclose on.

BREACH OF FIDUCIARY DUTY

64. Banks breached his fiduciary duty by permitting Willis to exceed the maximum period of time allowed for a property tax payment plan. Specifically, following the commencement of the Tax Lawsuit, the Tax Authorities entered into a 36-month installment payment plan to Willis, as is contemplated by Tex. Tax Code §33.02.¹⁴

¹³ See *US v Home Federal Sav. & Loan Ass’n of Tulsa*, 418 P.2d 319 (Okla. 1996)

¹⁴ Section 33.02(a) of the Texas Tax Code provides the following rules (emphasis supplied).

Willis missed one or more installment payments under the agreement with the Tax Authorities, and upon which defaults the Tax Authorities granted one or more extensions to Willis and readjusted the payment plan, moving the final payment date beyond the maximum 36 month timeframe permitted by Tex. Tax Code §33.02(a)(4). These unauthorized extensions were to the detriment of other interest holders in the property, particularly KDEPC and DEK-M by waiver, estoppel, and/or laches, negated the right of the Tax Authorities to seek and/or act under the Sale Order.

DECLARATORY RELIEF

Sec. 33.02. INSTALLMENT PAYMENT OF DELINQUENT TAXES. (a) The collector for a taxing unit may enter into an agreement with a person delinquent in the payment of the tax for the payment of the tax, penalties, and interest in installments. The collector for a taxing unit shall, on request by a person delinquent in the payment of the tax on a residence homestead, enter into an agreement with the person for payment of the tax, penalties, and interest in installments if the person has not entered into an installment agreement with the collector for the taxing unit under this section in the preceding 24 months. An installment agreement under this section:

- (1) must be in writing;
- (2) must provide for payments to be made in equal monthly installments;
- (3) must extend for a period of at least 12 months; and
- (4) may not extend for a period of more than 36 months.**

65. DEK-M asks the Court for declaratory relief that the Tax Sale conducted is void and DEK-M is the rightful owner of the Property.
66. DEK-M asks the Court for declaratory relief that the Royalty payments held in suspense and as well as any further payments rightfully belong and are owed to DEK-M.
67. DEK-M asks the Court for declaratory relief that the County waived its right to sovereign immunity for the following actions: negligence, breach of fiduciary duty, and wrongful sale of property by not providing notice to the Deed of Trust holder nor to DEK-M.

PRAYER

68. WHEREFOR, Plaintiff prays this Court grant the following relief:
 - a. That this Court issue its injunction compelling Defendants to immediately to cease and desist from any actions concerning the property that would interfere with the rights of DEK-M as the “owner” of this property.
 - b. That this Court issue a permanent injunction enjoining Defendants, their agents, servants, representatives, family, guests, invitees, licensees, contractors, tenants, employees, successors or assigns (“Defendants”), or anyone acting in concert with

Defendants, from interfering with Plaintiff's quiet enjoyment of Tract 2: The 0.08000000 royalty interest in well #1 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. &H. R.R. Co. survey; said interest being derived from the royalty deeds recorded at volume 381, page 782 et seq and volume 544, page 766 et seq of the Official Records of Colorado County, Texas said interest being identified on the tax and appraisal rolls as account no. 50565, Tract 3: The 0.08000000 royalty interest in well #2 for the Webb lease in N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the Official Records of Colorado County, Texas; sad interest being identified on the tax and appraisal rolls as account no. 50827., and Tract 4: The 0.02545500 royalty interest in the Kaechele No 2 Gas unit in the Kaechele lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 698, section 24 of the George McCormick Survey; identified on the tax and appraisal rolls as account no. 67425;

- c. DEK-M asks the Court for declaratory relief that the County waived its right to sovereign immunity for the following actions; negligence, breach of fiduciary duty, and wrongful sale of property by

not providing notice to the Deed of Trust holder nor to DEK-M.

- d. DEK-M asks the Court for declaratory relief that the Tax Sale conducted is void and DEK-M is the rightful owner of the property.
- e. Royalty payments held in suspense and as well as any other future payments rightfully belong and are owed to DEK-M.
- f. Attorney's fees;
- g. Unspecified Damages:
- h. That this Court enter its order compelling Defendants to make Plaintiff whole in money damages for impairment of its Property rights and for all other injury which Plaintiff has suffered or may suffer because of the wrongful and unlawful acts, trespass to try title, tortuous interference with contractual relationships; and,
- i. That Plaintiff may have whatever other and further or different relief as this Court deems lawful and proper.

Respectfully submitted,

SCHEINTHAL & KOUTS, LLP

/s/ _____
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on _____, a true and correct copy of Plaintiff's First Amended Petition was forwards to all parties by certified mail, return receipt requested.

Colorado County Appraisal District
John T. Banks
Perdue, Brandon, Fielder, Collins & Mott, LLP
3301 Northland Drive, Suite 505
Austin, Texas 78731

David Moseley
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Cassie Moseley

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Cedar Lane, Texas 77415

/s/_____
Alan R. Scheinthal

1. Plaintiff, DEK-M Nationwide, Ltd., sued defendant, Colorado County Central Appraisal District (CCAD), John Banks in his official capacity, DOH Oil Co., David Hill, David Moseley, and Cassie Moseley (DOH) for Adverse Possession, Tortious Interference with Contractual Relations, Conversion,

Trespass to Try Title, Unjust Enrichment, Wrongful Sale of Property, Negligence, and Breach of Fiduciary Duty.

2. This response is filed subject to the Motion for Continuance which has not yet been ruled upon by the Court. Plaintiff asks that in the event the Motion for Continuance is granted, that Plaintiff additionally be given an opportunity to substitute, amend, or omit items in this response after Plaintiff conducts additional discovery with the assistance of legal counsel, who is not available until mid September. Plaintiff asks for leave of the Court for similar reasons as raised in the Motion for Continuance so that justice may be served.
3. Defendant, CCAD, filed its Motion for Summary Judgment on Plaintiff's Original Petition and not on Plaintiff's First Amended Petition and did not address several other causes of actions. Therefore this is a response to a Partial Motion for Summary Judgment.
4. Defendant, CCAD's Statement of Facts are not all correct. Defendant states in #9 that the mineral interests were foreclosed upon by the judgment and are described in that judgment. However, the judgment states "shall have foreclosure of said tax lien(s) on each of said tracts of land against the Defendant(s)... and said tracts of land are ORDERED SOLD to satisfy the amounts secured by such tax lien(s)." The judgment does not state that the

tracts of land are foreclosed or sold or that title has passed. The order did not restrict Walter M. Willis from encumbering the property and did not restrict from selling the property. The order of sale was not issued until January 29, 2013, which is into the third year after the tax judgment.

5. Defendant, CCAD, states in #16 that Kenneth D. Eichner, P.C. (KDEPC) applied to the court that signed the delinquent tax judgment and ordered the sale of the property in order to obtain excess proceeds to satisfy the lien it obtained on the property after the judgment was signed. KDEPC's lien originated from a Judgment granted on June 22, 2010 and an Abstract of Judgment properly filed by KDEPC on July 23, 2010 in the Real Property Records of Colorado County. KDEPC may have applied for excess funds, with all that being said; the Plaintiff in this instant case is DEK-M Nationwide, Ltd. (DEK-M) and not KDEPC. KDEPC was still owed money on its lien after the foreclosure sale in which DEK-M purchased the property.

BACKGROUND

6. Plaintiff, DEK-M, filed suit asserting claims regarding certain mineral interest property which it had previously purchased at a foreclosure sale that subsequently were allegedly sold a month later at a tax foreclosure sale. Defendant claims that Plaintiff claims an interest in the property

through the prior owner who was a Defendant in the delinquent tax suit which was the basis of the alleged tax sale. Plaintiff does not claim its interest through the defendant of the tax suit but from a purchase made at a foreclosure sale based upon the Abstract of Judgment filed by KDEPC. Defendant, CCAD, claims that “because the judgment in the delinquent tax suit is binding on a person who is in privity with a Defendant to the Judgment. Plaintiff is bound by the judgment foreclosing the tax liens and authorizing the sale of the property, just as if Plaintiff had been a party to the judgment.” Plaintiff, DEK-M, has never been in privity with the Defendant, Walter M. Willis, of the underlying tax suit and is not bound by the judgment. Therefor, Defendant’s claim that Plaintiff is bound by the judgment fails and res judicata does not apply and Plaintiff is able to raise these arguments.

SUMMARY JUDGMENT PROOF

Exhibit 1: Lis Pendens filed by Colorado County in previous lawsuit against Walter M. Willis

Exhibit 2: KDEPC’s Judgment against Walter M. Willis.

Exhibit 3: KDEPC’s Recorded Abstract of Judgment

Exhibit 4: Affidavit of Kenneth D. Eichner, P.C.

Exhibit 5: Affidavit of DEK-M Nationwide, Ltd.

Exhibit 6: Court Order allowing DEK-M to answer disclosures for KDEPC.

JUDICIAL NOTICE

7. Plaintiff, DEK-M Nationwide, Ltd. asks the Court to take judicial notice of the contents of its file and the pleadings contained therein. Plaintiff also asks the court to take judicial notice of the contents of Tax Suit 4362.

ARGUMENT AND CITATION TO AUTHORITY

8. In order for CCAD or DOH to prevail on their motion for summary judgment, CCAD and DOH, each, must establish each element of their claims as a matter of law. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). CCAD and DOH must conclusively establish all the elements necessary to their causes of action. *Wesson v. Jefferson S&L Ass'n*, 641 S.W.2d 903, 906 (Tex. 1982). There are issues of fact and law for all of CCAD and DOH's claims, therefor CCAD and DOH are not entitled to summary judgment on any of its claims.
9. In reviewing a no-evidence summary judgment, the same legal sufficient standard that is applied in reviewing directed verdicts apply. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003); *Zapata v.*

Children's Clinic, 997 S.W.2d 745, 747 (Tex. App.----Corpus Christi 1999, pet.. denied). Therefore, the evidence is reviewed in the light most favorable to the nonmovant and disregard all contrary evidence and inferences. *King Ranch*, 118 S.W.3d at 750; *Zapata*, 997 S.W.2d at 747 (citing *Merrell Dow Pharms., Incd v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Moore v. Lmart Corp.*, 981 S.W.2d 266, 269 (Tex. App.----San Antonio 1998, pet. denied)).

10. Furthermore, evidence offered to prove a vital fact needs to be more than a scintilla of evidence and must conclusively establish a vital fact. *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573 (Tex. App.---Houston [1 Dist.] 2007) As professor McCormick emphasized, “a brick is not a wall.” (quoting Charles T. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 152 (WEST ED. 1954)).
11. In summary, CCAD had an opportunity to foreclose on the property, but they either waived their rights to priority, foreclosure, or waited so long that allowed KDEPC to sell the property to DEK-M. At worst, DEK-M may be subject to the tax liens.

STATEMENT OF FACTS

12. The following facts are clear from the evidence attached to Plaintiff's First Amended Petition:

- a. March 1, 2010, Colorado Central Appraisal District (CCAD) filed its delinquent tax suit against Walter M. Willis.
- b. April 16, 2010, Kenneth D. Eichner, P.C. (KDEPC) filed suit against Walter M. Willis.
- c. June 22, 2010, KDEPC was granted judgment in the suit against Walter M. Willis. (Exhibit 2)
- d. July 23, 2010 KDEPC filed its Abstract of Judgment. (Exhibit 3)
- e. KDEPC was not joined in the Tax Suit, had no notice of the tax suit and no notice of past due taxes.
- f. December 13, 2010 CCAD was granted judgment in the tax suit against Walter Willis. KDEPC had no notice of the tax suit judgment.
- g. A Lis Pendens was not filed by CCAD, even though CCAD had previously filed a Lis Pendens on the same property and defendant in a previous lawsuit. (Exhibit 1)
- h. January 4, 2011, Walter granted KDEPC a Deed of Trust to secure payment of the Judgment and to prevent foreclosure by KDEPC against Walter M. Willis' royalties and property subject to the suit.
- i. January 7, 2013, KDEPC posted a Notice of Trustee Foreclosure Sale.
- j. January 29, 2013, KDEPC the Court issued an Order of Sale in the Tax Suit.

- k. February 5, 2013, KDEPC sold the property to DEK-M at the foreclosure sale.
 - l. February 6, 2013 CCAD sent notice of Tax Foreclosure Sale to other lien holders, but not KDEPC or DEK-M. DEK-M owned the property at this time, but the deed was not recorded yet.
 - m. February 8, 2013, DEK-M recorded the Trustee's Deed.
 - n. March 5, 2013, CCAD held the tax foreclosure sale.
 - o. April 11, 2013, the Sheriff's Deed was signed.
 - p. April 18, 2013, the Sheriff's Deed was filed.
 - q. April 19, 2013, the Sheriff's Deed was recorded.
 - r. KDEPC provided notice to Jamex of its ownership of the property in question.
 - s. DEK-M, CCAD, and DOH agreed a court order was necessary for DEK-M to respond to discovery with regards to KDEPC.
 - t. Jamex deposited the royalties in the registry of the Court.
13. CCAD stated that Kenneth D. Eichner is the sole officer and sole director of DEK-M Nationwide, Ltd. and he is also the president of DEK-M management, Inc., general partner of DEK-M Nationwide, Ltd. These facts are not disputed, but each entity operates on its own and is separate from one another. DEK-M Management, Inc. also manages and is

general partner to DEK-M Collection, Ltd. Each of these entities are solvent, have their own businesses, accounting, assets, and liabilities. KDEPC and DEK-M are completely separate and even insisted on, and CCAD agreed to a court order allowing DEK-M to answer interrogatories and production requests for KDEPC. (Exhibit 7). There must be more than a scintilla of evidence to pierce the corporate veil of the entities. *Castleberry v. Branscum*, 721 S.W.2d 270 (1986). This by itself raises an issue of law or fact in regards to Defendants Motion for Summary Judgment because it is a vital part.

RESPONSE TO TRADITIONAL SUMMARY JUDGMENT

A. The delinquent tax suit and the subsequent tax sale were not conducted properly and as dictated by the Texas Property Code.

14. CCAD failed to provide notice to all interested parties. KDEPC was an interested party prior to the tax suit judgment being entered. KDEPC and DEK-M were interested parties in the tax foreclosure sale. As is *Davis*, a reviewing court must “balance[e] the ‘interest of the State’ and ‘the individual interest sought to be protected by the Fourteenth Amendment.’... The Court made it clear, whether a particular method notice is reasonable depends upon the particular circumstances.” The court determined that a

reasonable diligent effort is required to identify and provide notice to parties having an interest in the subject property. According to *Security State Bank*, any action that will affect a protected property interest, due process requires “notice reasonably calculated, under all circumstances, to apprise interested parties...” *Security State Bank & Trust v. Bexar County*, 397 S.W.3d 715 (Tex. App.---- San Antonio 2012). CCAD did not take reasonable diligent steps to protect *every* interested party’s property. CCAD relied solely on searching the Deed Records prior to the tax suit and did not attempt to join an interested party who had a lien on file and did not provide notice to that interested party of the tax foreclosure sale. Unlike in *Davis*, the court determined that it was too burdensome for the foreclosing party (CCAD) to search through mineral leases, but in this instant case it was an easy task for CCAD to do since it was take virtually no more effort that what CCAD incurred when it first filed the tax suit. CCAD should have easily seen that KDEPC had an interest in the property and should have joined KDEPC prior to the rendition of the judgment in the tax suit and certainly prior to the tax foreclosure sale. *Davis Oil Co. V. Mills*, 873 F.2d 774 (C.A.5(La.), 1989).

15. The Texas Constitution Article 1 Section 17 states that when a person’s property is taken compensation as by subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of

special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof and The Texas Constitution Article 1 Section 19 states that no citizen of this State shall be deprived of life, liberty, property, privilege or immunities, or in any manner disenfranchised, except by the due course of law of land. CCAD refers to 34.01 on the Tax Code saying that the only persons entitled to notice of the tax sale are those persons who were party to the judgment, however; under the Texas Business and Commerce Code section 1.102 states that the Code should be liberally construed "to make uniform the law among various jurisdictions." The Tax Code is not uniform within its own provisions. Texas courts have stated, at least generally, that "a lien holder must be joined in a delinquent tax suit in order to be bound by it." Section 32.05 of the Tax Code, provides that a property owners' association is not a necessary party to an action to enforce the collection of a delinquent tax against property, unless, at the time the action is commenced, notice of the lien in a liquidated amount is evidence by a sworn instrument duly executed by an authorized person and recorded with the clerk of the county in which the property is located. It does state anywhere, other than property owners' association, who should get notice before a tax foreclosure sale for real property. However, under Tax code section 33.25 which is a provision relating to personal property,

requires the collector, after seizure of personal property, to “make a reasonable inquiry to determine the identity and to ascertain the address of any person having an interest in the property other than the person against who the tax warrant is issued... and requires the peace office to “deliver as soon as possible a written notice stating the time and place of the sale.” There is no provision regarding the real estate except for the provision specifically for property owners’ associations and parties first served. KDEPC should have been joined in the tax suit prior to judgment and given actual notice of the tax foreclosure sale which would have allowed KDEPC to forward the notice to DEK-M, the owner of the property at the time the notice would have been sent, of a pending action against its property. KDEPC or DEK-M could have obtained a tax certificate to pay off the outstanding taxes due, if any were due. *Kothari v. Oyervidez*, 373 S.W.3d 801, (2012). Due process is required to preserve KDEPC and DEK-M’s right to the property. The Texas Constitution Article 1 Section 29 guards against transgressions of the high powers herein delegated, and that everything in this “Bill of Rights” is excepted out of the general powers of government, and shall forever remain invoidable, and all laws contrary thereto, or to the following provisions shall be void. Therefor any provision of Texas law that violates 1.102 and the Fifth Amendment is void per the Fifth Amendment and Section 29 of the Bill of Rights. By the Judge signing an order in the tax suit,

essentially backdating to the beginning of the suit, violated the rights of KDEPC and that portion of the order is void. The tax sale is also void, since was not given to KDEPC.

16. The Federal Rules of Civil Procedure Rule 54(b) states “any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” A judgment foreclosing a tax lien is good against the parties in interest joined in the suit, and the parties not joined are not bound by any such judgment. *First State Bank-Keene v. Metroplex Petroleum Inc.*, 155 F.3d 732, 737 (5th Cir. 1998). KDEPC was not joined in the tax suit so, therefor; is not bound by the judgment.

B. Plaintiffs lawsuit is not barred by res judicata.

17. Plaintiff does not claim ownership in the mineral interest through Walter M. Willis, but through a foreclosure sale conducted by KDEPC. DEK-M nor KDEPC were parties to the original delinquent tax lawsuit and, therefor, are not bound by the judgment.

18. Plaintiff is not and was not in privity with Walter M. Willis, the defendant in the underlying tax suit. DEK-M has no relationship with Water M. Willis and, therefore, is not bound by the judgment or the tax sale. People can be in privity in at least three different ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; (3) they can be successors in interest, deriving their claims through a party to the prior action. *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 800(Tex. 1992); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). It has been emphasized that privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts. *Coleman v. Bosworth*, 180 Iowa 975, 164 N.W. 238 (1917)....But it also recognized that there is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata and the determination of who are privies requires careful examination in to the circumstances of each case as it arises. 50 C.J.S. Judgments § 788(1947).” To have privity parties must be mutually aligned. *Ground Improvement Techniques, Inc. v United States* (C.C., 2012). In *Benson*, it was the courts view, that although the parties may have all had notice and there was a prior judgment, Mrs. Benson and her husband were not in privity and she was not bound by the prior judgment. Mrs.

Benson's interest were vexed and not represented in the prior suit. There is no mutual relationship between Walter M. Willis and DEK-M. In *Shore*, there were three contracts which Texaco was involved with. Texaco was in privity with a party who it specifically made a contract with but was not in privity with the parties whose contract Texaco assumed from Exxon. *Shore Exploration & Prod. Corp. v. Exxon Corp.*, 976 F. Supp. 514 (N.D. Tex. 1997). Therefore, DEK-M was not in privity with Walter M. Willis and just because we may be dealing with the same property, it does not make DEK-M and Walter M. Willis in privity. There is not more than a scintilla of evidence that DEK-M and KDEPC are one and the same.

C. Plaintiff did have ownership interest in the mineral interests and can prevail as a matter of law on its claims.

19. It is well established in Texas law that lien holder only has an equitable interest and not a title interest. Nowhere in the prior order from the tax suit, which CCAD refers to, does it say that Walter M. Willis cannot sell or encumber his interest in the property. The prior order only gave a writ of possession and an order to foreclose on the property in this case.
20. On March 5, 2013, the purported Tax Sale occurred; a month after title to the property in question had been sold to DEK-M. The County

cannot sell something, unless it has a right to sell it. CCAD had an equity interest and not a title interest in the property. *Flag-Redfern Oil Co. v Humble Exploration Co., Inc.*, 744 S.W.2d 6 (Tex. 1987).

21. Until the sale is confirmed, the rights of the execution debtor are not certainly divested. *Lucian Woodsworth v. Northwestern Mutual Life Insurance Company*, 186 U.S. 354, 22 S.Ct. 676, 46 L.Ed. 945(1902). Therefore, Walter M. Willis, had the authority to encumber the property with a Deed of Trust to prevent KDEPC from foreclosing on the already filed and recorded Abstract of Judgment. CCAD's claim constituted a quitclaim deed and has no title to the property in question as KDEPC's Abstract of Judgment and Deed of Trust are an equitable interest in the property until there is a disposition of collateral after default. Tex. Bus. & Com. Code Section 9.610(d) states that when a contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of property of the kind subject to the contract. When KDEPC sold the property at a trustee sale, a month prior to the tax foreclosure sale, in accordance with BC&C Section 9.109(e)... a sale and is not a secured transaction and that title, legal and equitable, has passed to the party characterized as the purchaser of those assets regardless of whether the secured party has any recourse

against the debtor, whether the debtor is entitled to any surplus, or any other term of the parties' agreement. CCAD had an opportunity, in the several years after the judgment, to foreclose on the property before KDEPC, but CCAD either acquiescence or waived their rights to foreclose since they had knowledge of KDEPC's Abstract of Judgment. CCAD could only sell their equitable interest and since DOH had knowledge of KDEPC's Abstract they are not good faith purchaser's and are subject to KDEPC's Abstract, Deed of Trust, and DEK-M's purchase.

22. DEK-M as good faith, bona fide purchaser is protected from other interested parties for the title of the property. Therefore, according to BC&C Section 9.203, DEK-M provided Jamex with notice of its ownership of property in question to present.

**RESPONSE TO TRADITIONAL
SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR
ADVERSE POSSESSION**

23. A defendant is entitled to summary judgment on a plaintiff's cause of action if the defendant can disprove at least one element of the cause of action as a matter of law. *Sw. Elec. Power Co. v Grant*, 73 S.W.3d 211, 2015 (Tex. 2002); *see Tello v. Bank One, N.A.*, 218 S.W.3d 109, 113 (Tex. App.----Houston [14th Dist.] 2007, no pet.)

24. The elements of plaintiff's cause of action for adverse possession are the following: (1) actual possession of the disputed property, (2) that is open and notorious, (3) that is peaceable, (4) under a claim of right, (5) that is adverse or hostile to the claim of the owner, and (6) consistent and continuous for the duration of the statutory period. Defendant claims that it disproved none of the elements as they claim that adverse possession does not apply in this instant case.
25. The Court should deny defendant's motion for summary judgment on plaintiff's cause of action because defendant did not disprove any of the elements, nor attempt to disprove any of the elements of adverse possession so therefore summary judgment should be denied.
26. CCAD only had authority to go after Walter M. Willis for the delinquent taxes once the property was sold to DEK-M.

**RESPONSE TO TRADITIONAL
SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR
TORTIOUS INTERFERENCE
WITH A CONTRACT**

27. A defendant is entitled to summary judgment on a plaintiff's cause of action if the defendant can disprove at least one element of the cause of action as a matter of law. *Sw. Elec. Power Co., v Grant*, 73 S.W.3d 211, 2015 (Tex. 2002);

see Tello v. Bank One, N.A., 218 S.W.3d 109, 113 (Tex. App.----Houston [14th Dist.] 2007, no pet.)

28. The elements of plaintiff's cause of action for adverse possession are the following: (1) actual possession of the disputed property, (2) that is open and notorious, (3) that is peaceable, (4) under a claim of right, (5) that is adverse or hostile to the claim of the owner, and (6) consistent and continuous for the duration of the statutory period. Defendant claims that it disproved that DOH did not interfere with a contractual right of DEK-M.
29. The Court should deny defendant's motion for summary judgment on plaintiff's cause of action because defendant did not disprove all elements of tortious interference as a matter of law. There is a genuine issue of material fact on whether there is a contract to be interfered with. DOH admittedly states they did attempt to collect the royalties that are property of DEK-M. CCAD states that DEK-M does not have ownership to the property so attempting to collect royalties would not be tortious interference. However, the question of ownership is the underlying issue in this case and cannot be used to disprove an element of this case.

**RESPONSE TO TRADITIONAL
SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION
FOR CONVERSION**

30. A defendant is entitled to summary judgment on a plaintiff's cause of action if the plaintiff's pleading affirmatively demonstrates that no cause of action exists. *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 805 (Tex. 1989). If the pleading demonstrates that no cause of action exists, the Court can grant summary judgment without first giving the plaintiff an opportunity to amend its pleading. *Id.*; *Toles v. Toles*, 113 S.W.3d 899, 909 (Tex. App.---- Dallas 2003, no pet.). However, if the pleading could be amended so that it does allege a viable cause of action, the Court cannot grant summary judgment without first giving the plaintiff an opportunity to amend. *See Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 54-55 (Tex. 2003); *Pietila v. Crites*, 851 S.W.2d 185, 186 n.2 (Tex. 1993).
31. Defendant claimed that it is entitled to summary judgment because plaintiff's pleadings show on their face that plaintiff's cause of action is not viable.
32. The Court should deny defendant's motion for summary judgment on Plaintiff's cause of action for conversion because, contrary to defendant's allegations, plaintiff has pleaded a viable claim. Defendants, CCAD and DOH, both rely on the assumption that DEK-M does not own the property in question. As stated above, the question of ownership is the underlying issue in this case and until that has been ruled on, assumptions to the

contrary cannot be viable. DOH, by attempting to collect royalties DEK-M is entitled to, is conversion of personal property of DEK-M.

**RESPONSE TO TRADITIONAL
SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR
UNJUST ENRICHMENT**

33. A defendant is entitled to summary judgment on a plaintiff's cause of action if the plaintiff's pleading affirmatively demonstrates that no cause of action exists. *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 805 (Tex. 1989). If the pleading demonstrates that no cause of action exists, the Court can grant a summary judgment without first giving the plaintiff an opportunity to amend its pleading. *Id.*; *Toles v. Toles*, 113 S.W.3d 899, 909 (Tex. App.---Dallas 2003, no pet.). However, if the pleading could be amended so that it does allege a viable cause of action, the Court cannot grant summary judgment without first giving the plaintiff an opportunity to amend. *See Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 54-55 (Tex. 2003); *Pietila v. Crites*, 851 S.W.2d 186 n.2 (Tex. 1993).
34. Defendant claimed that it is entitled to summary judgment because plaintiff's pleadings show on their face that plaintiff's cause of action is not viable.

35. The Court should deny defendant's motion for summary judgment on Plaintiff's cause of action for unjust enrichment because, contrary to defendant's allegations, plaintiff has pleaded a viable claim. Defendants, CCAD and DOH, both rely on the assumption that DEK-M does not own the property in question. As stated above, the question of ownership is the underlying issue in this case and until that has been ruled on, assumptions to the contrary cannot be viable. DOH, by attempting to collect royalties DEK-M is entitled to, is conversion of personal property of DEK-M.

36.

**RESPONSE TO TRADITIONAL
SUMMARY JUDGMENT
PLAINTIFF'S CAUSE OF ACTION FOR
TRESPASS TO TRY TITLE AND
WRONGFUL SALE OF PROPERTY**

37. A defendant is entitled to summary judgment on a plaintiff's cause of action if the defendant can disprove at least one element of the cause of action as a matter of law. *Sw. Elec. Power. Co. v Grant*, 73 S.W.3d 211, 2015 (Tex. 2002); *see Tello v. Bank One, N.A.*, 218 S.W.3d 109, 113 (Tex. App.----Houston [14th Dist.] 2007, no pet.)

38. The elements of plaintiff's cause of action for trespass to try title and wrongful sale of property are the following: 1. Prove a regular chain of conveyances from the sovereign; 2.

Establish superior title out of a common source; 3 prove title by limitations; or 4. Prove title by prior possession. Defendant claims that it disproved none of the specific elements only that DEK-M does not have ownership of the property.

39. The Court should deny defendant's motion for summary judgment on Plaintiff's cause of action for trespass to try title and wrongful sale of property because defendants have not disproved any elements and the simply stating that DEK-M does not have ownership does not prove that the property was wrongfully sold or that there is no claim for trespass to try title. this entire lawsuit revolves around the issue that DEK-M is the owner and CCAD could not have sold something that they did not have the right to sell.

D. Governmental Immunity

40. When a "governmental entity is a necessary party to a statutory cause of action... sovereign immunity is expressly waived." See *Lottery Comm'n v First State Bank of Dequeen*, 325 S.W.3d, 628, 637-38 (Tex. 2010) The County and its attorney waived sovereign immunity.

E. Attorney's Fees

41. DEK-M is seeking attorneys fees under the cause of action for unjust enrichment and for the trespass to try title cause of action. Unjust

enrichment allows for the request of attorney fees to be paid.

F. Injunctive Relief

42. As previously stated, DEK-M is not barred by res judicata and is not in privity with Walter M. Willis and therefore is not bound by that judgment and is entitled to ask for injunctive relief to prevent the execution of that judgment until this matter is resolved. Although an action was filed to set aside the tax foreclosure sale, that motion has been dismissed due to lack of plenary power of the original court. However, the issues of joinder and notice enable DEK-M to collaterally attack the original judgment and ask for a bill of review in that case.

G. Accord and Satisfaction; Election of Remedies

43. KDEPC did seek excess proceeds insofar as to protect the amount still owed to KDEPC. KDEPC has not deposited the check received from the request of said funds and will return the check to the registry of the Court. As no money has been deposited into any account of KDEPC in regards to the excess funds from the sale of property, there is nothing fraudulent and will not leave DOH victims of fraud. DEK-M did not waive any objection to any part of the sale nor did KDEPC as KDEPC has not actually received any monies from the Court registry.

**RESPONSE TO DOH'S REQUEST FOR
DECLARATORY RELIEF TO BE DENIED**

44. Defendants have not proven as a matter of law or fact any issue they have raised in their motion for summary judgment. Defendants have not proven that DEK-M is not the title owner of the property in question and therefore the declaratory relief should not be denied.

**RESPONSE TO NO EVIDENCE
SUMMARY JUDGMENT**

45. A no-evidence motion for summary judgment must be specific in challenging the evidentiary support for an element of a claim or defense. Tex. R. Civ. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The rule does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Tex. R. Civ. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). When a no-evidence motion for summary judgment does not challenge specific elements, it should be treated as a traditional motion for summary judgment under Texas Rule of Civil Procedure 166a(c). See *Muchael v. Dyke*, 41 S.W.3d 746, 751-52 (Tex. App.---Corpus Christi 2001, no pet.); *Amouri v. Sw. Toyota, Inc.* 20 S.W.3d 165, 168 (Tex. App.---Texarkana 200, pet. denied); *Weaver v. Highlands Ins Co.*, 4 S.W.3d 826, 829 n.2 (Tex. App.---Houston [1st Dist.] 1999, no pet.). This

switches the burden of proof from the nonmovant to the movant. *See* Tex R. Civ. P. 166a(c),(i).

46. The Court should deny defendant's no-evidence motion for summary judgment, which must be treated as a traditional motion for summary judgment, because defendant did not disprove or attempt to disprove elements relating to DEK-M's cause of action. Defendant's motion for summary judgment alleges generally that there is no evidence to support plaintiff's cause of action for adverse possession, tortious interference with a contract, conversion, trespass to try title, and unjust enrichment. Because defendant motion does not challenge specific elements of plaintiff's cause of action, the Court must treat defendant's motion as a tradition motion for summary judgment.

CONCLUSION

47. Defendants, CCAD and DOH, each, do not disprove any elements of DEK-M's cause of actions and there are issues of fact and law relating to each one of CCAD and DOH's claims.

PRAYER

48. For these reasons, Plaintiff asks the Court to deny defendant's, CCAD and DOH, motion for summary judgment and grant plaintiff leave to amend its pleading. If the Court grants

defendant's motion for summary judgment, plaintiff asks the Court to overrule plaintiff's objections so they will be preserved for appeal.

Respectfully submitted,

/s/

Kenneth D. Eichner, President
DEK-M Management Inc.,
General Partner for
DEK-M nationwide, Ltd.
11200 Westheimer, Suite 740
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(713) 781-8892
(713) 781-4205

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing instrument has been sent to all counsel of records by certified mail, return receipt requested, hand delivery and/or facsimile on the 6th day of August, 2015.

Cassie Moseley, David Moseley, and David Hill
d/b/a DOH Oil Co. c/o
Michael T. Morgan
Freeman Mills PC
400 W. Illinois, Suite 120
Midland, Texas 79701
(432) 683-5501

Colorado Central Appraisal District c/o
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3301 Northland Dr., Suite 505
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Jamex, Inc. c/o
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Houston, Texas 77057
(713) 977-5165
(713) 977-5198 (fax)

/s/ _____
Kenneth D. Eichner

Appendix K

Cause No. 23,859

DEK-M Nationwide,	§	IN THE DISTRICT
LTD.,	§	
Plaintiff	§	COURT OF
	§	
	§	
	§	
vs.	§	
	§	COLORADO
	§	COUNTY, TEXAS
David Hill individually	§	
& d/b/a DOH Oil Co.,	§	
Cassie Moseley,	§	
David Moseley, and	§	
Colorado County Central	§	
Appraisal District,	§	
Defendants	§	2 ND 25 TH DISTRICT

**PLAINTIFF’S SECOND AMENDED
ORIGINAL PETITION**

COMES NOW, DEK-M Nationwide, LTD. (“DEK-M”), plaintiff in the above titled and captioned matter complaining of David Hill individually & d/b/a DOH Oil Co., Cassie Moseley, David Moseley, and Colorado County Central Appraisal District and it makes and files this its Plaintiff’s Second Amended Original Petition and in support thereof would respectfully show unto the Court the following:

**I.
DISCOVERY**

1. Plaintiff intends to conduct discovery under Level 2 in accordance with Texas Rule of Civil Procedure 190.3.
2. Pursuant to Tex. R. Civ. P. 47, Eichner sues for monetary relief of \$100,000 or less and non-monetary relief.

II. PARTIES

3. DEK-M Nationwide, LTD. is a Texas Limited Company with its principal place of business in Harris County, Texas.
4. David Hill individually & d/b/a DOH Oil Co.¹⁵ (“Hill”) is a natural person who transacts business under a trade name. He has answered and appeared in this matter.
5. Cassie Moseley is a natural person. She has answered and appeared in this matter.
6. David Moseley is a natural person. He has answered and appeared in this matter.
7. Colorado County Central Appraisal District (“CCCAD”) is a special purpose authority district located in Colorado County. It has answered and appeared in this matter.

¹⁵ Defendant Hill stated in his answer that he is a partner in a Texas Partnership operating under the name of DOH Oil Company; however, the Texas Secretary of State has no record of any such company ever being created or operating in the state of Texas. DEK-M intends this defendant to be the person or entity who purportedly purchased Tract 4 on March 5, 2013.

**III.
JURISDICTION & VENUE**

8. The district courts of Colorado County have jurisdiction because the relief sought exceeds the jurisdictional minimum but does not exceed the jurisdictional maximum.
9. Colorado County is proper venue for this action because it involves an interest in real property and that property is located in Colorado County. Tex. Civ. Prac. & Rem. Code § 15.011.

**IV.
FACTUAL BACKGROUND**

10. DEK-M has superior title to royalty interests in a mineral lease on 3 tracks of land in Colorado County, more particularly described as follows:

Tract 2: The 0.08000000 royalty interest in well #1 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. & H. R.R. Co. survey; said interest being derived from the royalty deeds recorded at volume 381, page 782 et seq. and volume 544, page 766 et seq. of the Official Records of Colorado County, Texas said interest being identified on the tax and appraisal rolls as account no. 50565.

Tract 3: The 0.08000000 royalty interest in well #2 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. & H. R.R. Co. survey, said interest being derived from the royalty deeds recorded at volume

381, page 782 et seq. and at volume 544, page 766 et seq. of the Official Records of Colorado County, Texas; said interest being identified on the tax and appraisal rolls as account no. 50827.

Tract 4: The 0.02545500 royalty interest in the Kaechele No 2 Gas unit in the Kaechele lease in the N. Chesterville Field; operator: Jamex, Inc.; abstract 698, section 24 of the George McCormick Survey; identified on the tax and appraisal rolls as account no. 67425.

11. DEK-M obtained its superior title through a Trustee's foreclosure sale from Kenneth D. Eichner, P.C. ("KDEPC"). KDEPC obtained a judgment against the previous record owner of the royalty interest, Walter Willis ("Willis"), on June 22, 2010. KDEPC recorded an abstract of judgment on July 23, 2010.
12. On January 4, 2011 Willis granted KDEPC a Deed of Trust for his royalty interest in the above referenced tracts of land to secure payment of the judgment and to prevent KDEPC from foreclosing on the property. Willis failed to make his payments towards the judgment and on January 7, 2013 KDEPC posted a Notice of Trustee Foreclosure sale.
13. On February 5, 2013 the Trustee's sale occurred and DEK-M purchased the royalty interests. DEK-M recorded the Trustee's Deed on **February 8, 2013** becoming the new record owner and giving constructive notice to all other

would be purchasers of its ownership rights to the property.

14. On December 13, 2010 CCCAD obtained a judgment against Willis for delinquent taxes on his royalty interest. That judgment required CCCAD to obtain an Order of Sale in order to foreclose on the tax lien, but the judgment did not contain any provisions forbidding Willis from selling or encumbering his interest. No abstract of judgment or *lis pendens* was ever filed to provide notice to third parties of CCCAD's judgment.
15. For more than 2 years, CCCAD failed to pursue any collection remedy against Willis's royalty interest. It was not until January 29, 2013 that an Order of Sale was issued allowing CCCAD to sell the property. Pursuant to the terms of the order, a Sheriff's sale occurred on March 5, 2013 – 25 days after DEK-M filed its deed – and the Sheriff's Deed was signed on April 11, 2013. The deed was not recorded until ***April 18, 2013*** – 69 days after DEK-M filed its deed.
16. DEK-M contacted the operator of the mineral lease to arrange to have DEK-M listed as the owner of the royalty interest and to collect all the payments that occurred since February 8, 2013. DEK-M was informed that Hill and the Moseleys were also claiming they were the owner of the royalty interest and that it was unable to issue the payments to DEK-M.

17. DEK-M has been unable to collect any royalty payments on the royalty interest it received title to on February 8, 2013.

**V.
CAUSES OF ACTION**

Trespass to Try Title

18. DEK-M incorporates paragraphs 10 through 17 by reference as if fully restated herein.
19. Under Tex. Prop. Code § 22.002 DEK-M sues Hill and the Moseleys for trespass to try title. DEK-M purchased the royalty interest of the mineral estate at a Trustee's foreclosure sale on February 5, 2013. On February 8, 2013 DEK-M recorded the Trustee's Deed granting it clear title to the royalty interest in the mineral estate referenced above and granting it superior title. Tex. Prop. Code § 13.001. On or about April 18, 2013 Hill and the Moseleys filed an invalid deed claiming ownership of DEK-M's royalty interest in the mineral estate. Hill and the Moseleys have unlawfully taken possession of DEK-M's property by claiming they own the royalty interest. DEK-M has been damaged by Hill and the Moseleys. DEK-M has not received any of the royalties paid since it obtained title on February 5, 2013.
20. DEK-M is therefore entitled to a judgment finding that it owns the royalty interest free and clear of any other claims. DEK-M asks the Court to enter a judgment awarding DEK-M title to the possession of the royalty interest and damages

for the lost royalty payments. DEK-M sues for reasonable attorney's fees, costs of courts, and pre-judgment and post-judgment interest as allowed by law.

Quiet Title/Equitable Lien

21. DEK-M incorporates paragraphs 10 through 17 reference as if fully restated herein.
22. In the alternative, DEK-M asks the court to declare that Defendants' purported title is invalid. DEK-M purchased and recorded its royalty interest on the property on February 8, 2013. This granted DEK-M clear title to the royalty interest and put all parties, including Hill and the Moseleys, constructive notice of DEK-M's ownership. Hill and the Moseleys recorded a deed on the same royalty interests on April 18, 2013. This deed asserts an interest that interferes with DEK-M's title, although appearing valid on its face, is in fact invalid and of no force or effect since DEK-M properly purchased and recorded its title 69 days prior to Hill and the Moseleys. DEK-M is entitled to possession of the royalty interests at issue. Moreover, DEK-M is entitled to the profits and payments earned on the royalty interest since it obtained title on February 5, 2013.
23. DEK-M asks the Court to declare that Hill and the Moseley's Deed is invalid, order it removed from the property at issue in this suit, and quiet title in DEK-M.

Conversion/Unjust Enrichment

24. DEK-M incorporates paragraphs 10 through 17 by reference as if fully restated herein.

25. In the alternative, DEK-M sues Hill and the Moseleys for conversion of the royalty payments between February 5, 2013 and April 18, 2013. DEK-M purchased the royalty interest in the mineral estate from Willis on February 5, 2013 and was entitled to the royalty payments due pursuant to the terms of the mineral lease for that time period. The royalty payments are the personal property of DEK-M. Hill and the Moseleys have wrongly exercised control over the property by asserting their claim to the royalty interests and preventing DEK-M from receiving those payments. As a result, DEK-M has been deprived of the money it should have received in royalty payments. Additionally, Hill and the Moseleys have been unjustly enriched by accepting royalty payments that should rightly be paid to DEK-M under its deed.

26. DEK-M sues for actual damages in the amount of the lost royalty payments between February 5, 2013 and April 18, 2013. DEK-M sues for attorney's fees, all costs of court, and pre-judgment and post-judgment interest as allowed by law.

Declaratory Judgment Against CCCAD

27. DEK-M incorporates paragraphs 10 through 17 by reference as if fully restated herein.

28. DEK-M seeks a declaratory judgment pursuant to Texas Civil Practice & Remedies Code §§ 37.001 *et. seq.*
29. DEK-M is a party interested under a deed, whose rights are affected by statute and is seeking a determination of its rights pursuant to the terms of the deed. CCCAD obtained a delinquent tax judgment against Willis on January 29, 2010. CCCAD failed to record an abstract of judgment or lis pendens that would provide notice to other parties of its interest in the royalties. After more than 2 years, CCCAD attempted to foreclose on the judgment without providing notice to all lienholders or the recorded owner, DEK-M. In that time, DEK-M purchased the interest at a nonjudicial foreclosure of a deed of trust.
30. DEK-M is only asserting claims for declaratory relief and not for monetary liability against CCCAD. Since no imposition of monetary liability is sought, consent to the suit is not required and sovereign immunity does not apply. *City of San Benito v. Ebarb*, 88 S.W.3d 711, 720-21 (Tex.App.—Corpus Christi, 2002, pet. denied).
31. DEK-M requests that the Court declare that CCCAD's tax foreclosure sale did not transfer title as the property no longer belonged to Willis and that DEK-M is entitled to the royalty payments owed for this property. CCCAD's invalid transfer of title has prevented DEK-M from receiving the royalty interest payments it is due as the record owner.

32. Moreover, under Texas Tax Code § 33.94 KDEPC was entitled to receive notice of the tax foreclosure sale. No notice was ever received. This failure prevented DEK-M from finding out about this other claim and from doing anything to perfect its deed. When DEK-M purchased the royalty interest on February 5, 2013 it was in good faith and without knowledge or notice of any pending claims. As such, the deed issued pursuant to the tax foreclosure sale on March 5, 2013 was a nullity and is invalid. DEK-M requests that the Court declare that CCCAD failed to comply with the notice provisions under the Tax Code.

**VI.
CONDITIONS PRECEDENT**

33. All conditions precedent to filing this lawsuit have been performed.

**VII.
PRAYER**

34. WHEREFORE, PREMISES CONSIDERED, DEK-M prays that the Court enter this Plaintiff's Second Amended Original Petition and that the Court, upon trial of this case, enter a judgment in favor of DEK-M and against Defendants and award to DEK-M all relief to which it may show itself justly entitled.

Respectfully submitted,
The Andresen Firm, PLLC

By: /S/ Jonathan C. Andresen _____

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby affirm that a true and correct copy of Plaintiff's Second Amended Original Petition was served on all counsel of record pursuant to Tex. R. Civ. P. 21 & 21a on this 6th day of October 2015.

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VIA ELECTRONIC SERVICE

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VIA ELECTRONIC SERVICE

ATTORNEY FOR JAMEX, INC.

/S/ Jonathan C. Andresen
Jonathan C. Andresen

Appendix L

Cause No. 23,859

DEK-M Nationwide,	§	IN THE DISTRICT
LTD.,	§	
Plaintiff	§	COURT OF
	§	
	§	
	§	
vs.	§	
	§	COLORADO
	§	COUNTY, TEXAS
David Hill individually	§	
& d/b/a DOH Oil Co.,	§	
Cassie Moseley,	§	
David Moseley, and	§	
Colorado County Central	§	
Appraisal District,	§	
Defendants	§	2 ND 25 TH DISTRICT

**PLAINTIFF’S AMENDED OBJECTIONS AND
RESPONSE TO DEFENDANTS’ MOTIONS FOR
SUMMARY JUDGMENT**

COMES NOW, DEK-M Nationwide, LTD. (“DEK-M” or “Plaintiff”), in the above titled and captioned matter and it makes and files this, its Plaintiff’s Amended Objections and Response to Defendants’

Motions for Summary Judgment¹⁶ and in support thereof would respectfully show unto the Court the following:

I. SUMMARY OF RESPONSE

1. This is a trespass to try title case regarding certain oil and gas leases. DEK-M has superior title to defendants in this matter by virtue of its earlier recording. DEK-M obtained its title to receive royalties on certain oil and gas interests on February 5, 2013 at a trustee's sale. That deed was recorded on February 13, 2013. Defendants DOH and the Moseleys did not obtain their deeds until March 5, 2013 and did not record them until April 19, 2013. Because DEK-M recorded its deed first it has superior title and prevails on its trespass to try title action.
2. Defendants' argument that it performed its sale correctly is irrelevant to these proceedings. Texas law states that a sheriff's sale (tax sale) can only transfer an interest that is actually owned by the defendant to the prior tax suit on the date of the sale. Because that property was previously sold at a trustee's sale nothing was transferred at the tax sale. Texas law also states that in this

¹⁶ All defendants have moved for summary judgment. Since the arguments raised in the various motions are the same, and in some cases are carbon copies of each other, DEK-M combines its response to both motions into this single document. This document therefore responds to the motion filed by CCCAD and the motion filed by DOH and the Moseleys.

circumstance the tax liability remains with the individual tax payer. As such, CCCAD's tax sale to DOH and the Moseleys did not transfer title because title had already properly transferred when DEK-M purchased the royalty interests. Willis is still liable for his taxes.

3. Likewise, Defendants' arguments that DEK-M cannot maintain its action because of *res judicata* fail because none of the claims made by DEK-M could have been made in the prior suit. All of DEK-M's claims arise in 2013. The prior tax lawsuit against Willis occurred in 2010. It was not possible for them to have been made 3 years before they arose. Additionally, no privity exists between DEK-M and Willis for the same reasons. Defendants' arguments here fail as well.
4. Finally, all of DEK-M's causes of action have substantial evidence supporting them. DEK-M only has a claim against CCCAD for declaratory judgment which stands because the March 2013 tax sale did not transfer title to any interest. Similarly, CCCAD failed to file any notice of its interest in the royalties in a manner that satisfies the Texas law regarding constructive notice, nor did CCCAD provide actual notice of its tax sale to Kenneth D. Eichner, P.C., the trustee, or DEK-M under Texas Tax Code Chapter 33 as they were ordered to do. Since CCCAD failed in these respects, and since DEK-M has attached

competent evidence of the same, CCCAD's no evidence challenge fails as a matter of law.

II. OBJECTIONS

5. DEK-M objects to Defendants David Hill individually & d/b/a DOH Oil Co., David Moseley, and Cassie Moseley's Motion for Summary Judgment on the basis that proper notice was not given for the hearing. Notice of a motion for summary judgment hearing must be served on all parties at least 21 days prior to the hearing. Tex. R. Civ. P. 166a. Defendants David Hill *et al* sent DEK-M a letter notifying them of the hearing on September 29, 2015, only 15 days before the October 14, 2015 hearing.¹⁷ As such, Defendants' motion is not properly before the Court. DEK-M respectfully requests that the Court rule on this objection prior to considering Defendants David Hill *et al*'s Motion for Summary Judgment.
6. DEK-M objects to Defendant CCCAD's request for judicial notice of the contents of its file and the pleadings contained therein and the contents of Tax Suit No. 4362 to the extent that CCCAD is attempting to incorporate documents that have not been properly authenticated. Judicial notice is to be used to take notice of specific facts that are not subject

¹⁷ See Letter dated September 29, 2015 attached hereto as Exhibit "1" and incorporated by reference for all purposes as if fully set forth herein.

to reasonable dispute, not to admit evidence that must be authenticated to be competent summary judgment evidence.¹⁸ Moreover, statements contained in a litigant's pleading cannot be used by that litigant in a summary judgment proceeding to prove or raise an issue of a fact.¹⁹ The documents contained in Tax Suit 4362 are CCCAD's own pleadings and are not competent summary judgment evidence. DEK-M respectfully asks the Court to rule on this objection prior to considering the merits of the motion.

7. DEK-M objects to the entirety of CCCAD's Motion on the basis that it is premature. DEK-M obtained new counsel who first appeared on the matter on October 1, 2015. As such, DEK-M has not had adequate time to conduct adequate discovery. To date, there have been no depositions of the parties taken. Additionally, new counsel has not had the opportunity to subpoena any records, including records relating to the royalty payments. Moreover, DEK-M's new counsel has had no opportunity to follow up with or send out any written discovery. DEK-M objects to the timing of this motion and requests the Court deny this motion outright or continue it until discovery in this matter is more substantially completed. DEK-M respectfully requests that the Court rule on

¹⁸ See Tex. R. Evid. 201; Tex. R. Civ. P. 166a.

¹⁹ *Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143, 143 (Tex. 1980).

this objection before considering the merits of the Motions for Summary Judgment.²⁰

8. To the extent that David Hill individually & d/b/a DOH Oil Co., David Moseley, and Cassie Moseley incorporated Defendant Colorado County Central Appraisal District's summary judgment evidence into their Motion for Summary Judgment, DEK-M objects to the following exhibits being used as summary judgment evidence for either motion.
9. DEK-M objects to Exhibit 1 on the basis that CCCAD cannot use its own pleadings as summary judgment evidence and the exhibit is not properly authenticated. Exhibit 1 is an Original Petition filed by CCCAD against Walter Willis. Statements contained in a party's pleading cannot be used by that party in a summary judgment proceeding to prove or raise an issue of a fact.²¹ CCCAD is offering its Original Petition to support its summary judgment. Therefore, the Original Petition is improper summary judgment evidence and must be struck. Additionally, Court records from other cases are acceptable summary judgment evidence, however, they must be certified or attested to under oath as authentic.²² "Sworn or certified copies of all

²⁰ See "Declaration of Jonathan C. Andresen" attached hereto as Exhibit "8" and incorporated by reference for all purposes as if fully set forth herein.

²¹ *Id.*

²² *Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274, 276-77 (Tex. 1961).

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”²³ Exhibit 1 is from another case and is referenced in Paragraph 4 of John T. Banks’s affidavit. The petition is not a certified copy and the petition is not authenticated by affidavit or declaration. As such, CCCAD has not properly authenticated this document and Exhibit 1 is not competent summary judgment evidence and must be struck. DEK-M respectfully requests that the Court rule on this objection before considering the merits of the Motions for Summary Judgment.

10. DEK-M objects to Exhibit 2 on the basis that it is not properly authenticated. Exhibit 2 is a Judgment CCCAD received against Walter Willis on December 13, 2010. Court records from other cases are acceptable summary judgment evidence, however, they must be certified or attested to under oath as authentic.²⁴ “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”²⁵ Exhibit 2 is a judgment rendered in another case and is not a certified court copy. Moreover, it is not authenticated by affidavit or declaration. As such, Exhibit 2 is not competent summary judgment evidence and must be struck. DEK-M respectfully

²³ Tex. R. Civ. P. 166a(f).

²⁴ *Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274, 276-77 (Tex. 1961).

²⁵ Tex. R. Civ. P. 166a(f).

requests that the Court rule on this objection before considering the merits of the Motions.

11. DEK-M objects to Exhibit 6 on the basis that it is not properly authenticated. Exhibit 6 is an Order of Sale issued in CCCAD's prior case against Walter Willis. Court records from other cases are acceptable summary judgment evidence, however, they must be certified or attested to under oath as authentic.²⁶ "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."²⁷ Exhibit 6 is not a certified court copy. Moreover, it is not authenticated by affidavit or declaration. As such, Exhibit 6 is not competent summary judgment evidence and must be struck. DEK-M respectfully requests that the Court rule on this objection before considering the merits of the Motions.
12. DEK-M objects to Exhibit 11 on the basis that it is not properly authenticated. Exhibit 11 is an Order issued in CCCAD's case against Walter Willis. Court records from other cases are acceptable summary judgment evidence, however, they must be certified or attested to under oath as authentic.²⁸ "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or

²⁶ *Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274, 276-77 (Tex. 1961).

²⁷ Tex. R. Civ. P. 166a(f).

²⁸ *Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274, 276-77 (Tex. 1961).

served therewith.”²⁹ Exhibit 11 is not a certified court copy and is not accompanied by an affidavit or declaration authenticating it. As such, Exhibit 11 is not competent summary judgment evidence and must be struck. DEK-M respectfully requests that the Court rule on this objection before considering the merits of the Motions.

III. NOTICE OF INTENT TO RELY ON DISCOVERY NOT ON FILE

13. Plaintiff hereby gives notice that it intends to rely on discovery not previously filed with the clerk of the Court. Tex. R. Civ. P. 166a(d). These discovery products are attached hereto as Exhibits 7 – 13.

IV. SUMMARY JUDGMENT EVIDENCE

14. Plaintiff's Objections and Response to Defendant Colorado County Central Appraisal District's Amended Motion for Summary Judgment is based on upon the following competent summary judgment evidence. Plaintiff incorporates this evidence by reference as if fully set forth herein. The evidence establishes that there are genuine issues of material fact. The evidence incorporated by reference into this response is as follows:³⁰

²⁹ Tex. R. Civ. P. 166a(f).

³⁰ DEK-M also hereby incorporates by reference its prior response and all exhibits previously filed with this Court on August 6, 2015 into this document for all purposes as if it has been fully restated herein.

Exhibit 7: Letter dated September 29, 2015
Exhibit 8: Declaration of Jonathan C. Andresen
Exhibit 9: Plaintiff's Second Amended Original
Petition
Exhibit 10: August 5, 2013 Email from Rollin
Fischer
Exhibit 11: February 19, 2014 Letter to David Hill
Exhibit 12: February 19, 2014 Letter to David and
Cassie Moseley
Exhibit 13: Affidavit of Kenneth D. Eichner

V. STATEMENT OF FACTS

15. This is a simple case about determining superior title between two competing deeds to certain oil and gas royalty interests. On February 13, 2013 DEK-M recorded its trustee's deed. On April 19, 2013 – sixty five days later – a competing deed was recorded by DOH Oil Co. and Cassie and David Moseley.

The Royalty Interests

16. There are 3 royalty interests at issue in this case. All of them are in Colorado County and legally described as follows:

Tract 2: The 0.08000000 royalty interest in well #1 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. & H. R.R. Co. survey; said interest being derived from the royalty deeds recorded at volume 381, page 782 et seq. and volume 544, page 766 et seq. of the Official Records of Colorado County,

Texas said interest being identified on the tax and appraisal rolls as account no. 50565.

Tract 3: The 0.08000000 royalty interest in well #2 for the Webb lease in the N. Chesterville field; operator: Jamex, Inc.; abstract 250, section 25 of the G.H. & H. R.R. Co. survey, said interest being derived from the royalty deeds recorded at volume 381, page 782 et seq. and at volume 544, page 766 et seq. of the Official Records of Colorado County, Texas; said interest being identified on the tax and appraisal rolls as account no. 50827.

Tract 4: The 0.02545500 royalty interest in the Kaechele No 2 Gas unit in the Kaechele lease in the N. Chesterville Field; operator: Jamex, Inc.; abstract 698, section 24 of the George McCormick Survey; identified on the tax and appraisal rolls as account no. 67425.

For the purposes of this lawsuit, the immediate record owner of these 3 royalty interests prior to the parties was a man named Walter Willis ("Willis"). The 3 interests are for the royalties only, not for the surface rights.

DEK-M's Superior Deed

17. On or about April 16, 2010 an entity named Kenneth D. Eichner, PC ("Eichner") filed a collection lawsuit against Willis for nonpayment of money. Eichner obtained final summary judgment against Willis on or about June 22, 2010. Eichner recorded an abstract

of judgment on July 23, 2010 in Colorado County.³¹

18. Several months later, on January 4, 2011, Willis gave Eichner a deed of trust to the 3 royalty interests to prevent Eichner from foreclosing on its abstract and to secure payment of Eichner's judgment. That deed of trust was filed for record in Colorado County on January 14, 2011.³²
19. Willis failed to make his payments to Eichner, so, on January 7, 2013 Eichner filed and posted a notice of trustee's sale pursuant to the deed of trust. Eichner conducted its trustee's sale on February 5, 2013 which was the first Tuesday of the following month. Plaintiff DEK-M was the purchaser at that sale.
20. DEK-M filed the Trustee's Deed with Colorado County on February 8, 2013 and it was recorded in the property records on February 13, 2013.³³

³¹ See Exhibit 3 of Plaintiff's Response to Defendant's Motion for Summary Judgment incorporated by reference for all purposes as if fully set forth herein.

³² See Defendant CCCAD's Exhibit 3 Certified copy of Deed of Trust from Walter Willis to Kenneth D. Eichner, P.C. incorporated by reference for all purposes as if fully set forth herein.

³³ See Defendant CCCAD's Exhibit 4 Certified copy of Trustee's Deed from Trustee Alan Scheinthal to DEK-M incorporated by reference for all purposes as if fully set forth herein.

DOH & Moseley Purported Deed

21. In March of 2010 the Colorado County Central Appraisal District (“CCCAD”) filed a lawsuit against Willis for collection of unpaid property taxes on the 3 royalty interests. CCCAD eventually obtained a final judgment against Willis on or about December 13, 2010.
22. Over the next 2+ years CCCAD did not take any action to collect on their judgment. At no time did they ever file an abstract of judgment or even file a *lis pendens* on the 3 royalty interests.
23. On January 29, 2013 CCCAD finally obtained an order authorizing it to enforce its judgment by selling the 3 royalty interests. On February 6, 2013 – the day after DEK-M purchased the royalty interests at the trustee’s sale – CCCAD first posted its notice of sale of the same 3 royalty interests. CCCAD set a sale date of March 5, 2013 (28 days after DEK-M purchased the interests). CCCAD did not send notice to either DEK-M or Eichner of this sale.
24. On or about March 5, 2013 CCCAD conducted its sale of the 3 royalty interests. David Hill, individually and d/b/a DOH Oil Company (“DOH”) was the high bidder for Tract 4 and the Moseleys were the high bidders for the other tracts. These deeds were filed on April 18, 2013 and recorded in the property records

of Colorado County on April 19, 2013 – 65 days after DEK-M's deed was recorded.

VI. RELEVANT PROCEDURAL HISTORY TO THIS MOTION

25. Defendant CCCAD initially filed its motion for summary judgment on May 27, 2015. It filed its amended motion and notice of hearing on September 23, 2015. Defendants DOH and the Moseleys filed their motion for summary judgment on May 26, 2015. Defendants DOH and the Moseleys did not serve a notice of hearing on their motion for summary judgment until September 29, 2015.³⁴

26. DEK-M's present counsel filed their notice of appearance on October 1, 2015 and filed its Plaintiff's Second Amended Original Petition on October 6, 2015. This Second Amended Original Petition clarified the causes of action that had been previously raised in an attempt to streamline these proceedings. Several causes of action were also dropped. This document is filed pursuant to the current live pleadings.

VII. STANDARD OF REVIEW

27. Defendants have moved for summary judgment under the traditional "Rule 166a(c)" standard. In reviewing a motion for summary judgment there are three presumptions that

³⁴ Exhibit 7.

exist: first, the non-movant is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law.³⁵ Second, the court is to assume that all evidence favorable to the non-movant is true.³⁶ Third, the court must indulge every reasonable inference and resolve all doubts in favor of the non-movant and view all evidence in the light most favorable to the non-movant.³⁷

28. Additionally, CCCAD has moved for summary judgment under the no-evidence standard. When a party moves for summary judgment under Tex. R. Civ. P. 166a(i) and identifies the element of the claim or defense that they are challenging, the “court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.”³⁸

VIII. ARGUMENT & AUTHORITIES

29. Defendants’ Motions must be denied. Defendants’ entire argument is premised on the incorrect legal assumption that DEK-M is not the true record owner of the 3 royalty

³⁵ *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989)

³⁶ *Nixon* at 548-49; *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 491 (Tex. 1996).

³⁷ *Nixon* at 549; *Specialty Retailers* at 491.

³⁸ *Id.*

interests at issue. Texas law explicitly states the opposite. When CCCAD conducted its tax sale in March 2013 it could not transfer any title to any royalty interest because the prior owner of the property – Willis – did not have any interest to transfer because it had previously been foreclosed upon, sold, and recorded. DEK-M is the record owner.

A. Texas Is A “Pure Notice” State When It Comes To Recording Deeds. DEK-M Recorded Its Deed First and Therefore has Superior Title. Moreover, a Tax Sale Only Transfers the Interest Owned by the Defendant to the Tax Suit. Since Willis Owned No Interest in March 2013, CCCAD Transferred Nothing to DOH or the Moseleys.

Texas Recording Act Puts Subsequent Purchasers On Notice

30. As a threshold matter, Texas is considered a “Pure Notice” state when it comes to the recording of instruments affecting real property.³⁹ The Texas Recording Act provides that “[a] conveyance of real property...is void as to...a subsequent purchaser for a valuable consideration without notice.”⁴⁰ A party is considered to have constructive notice of every

³⁹ Tex. Prop. Code § 13.001(a).

⁴⁰ *Id.*

instrument that has been properly recorded in the chain of title as well as every recital, reference, reservation, provision, and attachment included in or with those instruments.⁴¹ This means that if a deed of trust (or other conveyance instrument) is properly recorded then no subsequent purchaser can claim superior title.⁴²

31. The 3 royalty interests at issue in this case relate to oil and gas interests. From a legal standpoint, oil and gas interests are considered to be “real property” so long as they are in place and have not been produced.⁴³ Only once minerals have been produced are they then considered to be personal property.⁴⁴ This means that oil and gas leases and interests fall directly within the Texas Recording Act and its notice provisions.⁴⁵

32. Pursuant to the same, when DEK-M recorded its trustee’s deed to the 3 royalty interests on February 13, 2013, every subsequent potential purchaser was put on notice of that transfer.⁴⁶

⁴¹ *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982); *see also* Tex. Prop. Code § 13.002(1).

⁴² *Id.*

⁴³ *Humble Oil & Ref. Co., v. West*, 508 S.W.2d 812 (Tex. 1974).

⁴⁴ *Id.*

⁴⁵ *See id. supra.* *See also, Mem’l Park Med. Ctr. Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810 (Tex.App.—Eastland, 2008, no pet.).

⁴⁶ Tex. Prop. Code § 13.002(1).

A Sheriff's Deed Can Only Transfer The Defendant's
Real Property Interest

33. The Texas Tax Code expressly limits what can be transferred in a deed acquired through a tax sale or sheriff's sale. Specifically, "[t]he deed vest good and perfect title...**to the interest owned by the defendant in the property** subject to the foreclosure..."⁴⁷ In this context the term "defendant" refers to the defendant to a tax suit.⁴⁸ It follows that if the defendant does not hold any interest at the time of the sale then nothing is transferred. As this section applies to the instant matter, Willis's 3 royalty interests were previously transferred to DEK-M in February 2013. When the Sheriff conducted its sale in March 2013 there was no property to convey because it had already been conveyed.
34. This principle is best illustrated and explained in *Memorial Park v. River Bend*.⁴⁹ In *Memorial Park* the court was faced with the identical factual situation that is before this Court. That case concerned a trespass to try title matter where a deed of trust was foreclosed on after a tax foreclosure judgment had been issued but before the tax sale occurred.⁵⁰ In 1978 George Day ("Day") purchased property with a deed of trust securing a promissory note. Day failed to pay taxes and the school district filed suit for back

⁴⁷ Tex. Tax Code § 34.001(n). (emphasis added).

⁴⁸ Tex. Tax Code § 34.001(a).

⁴⁹ 264 S.W.3d 810.

⁵⁰ *Id.* at 812.

taxes. A judgment was entered on June 22, 1989.⁵¹

35. Around the same time, Day defaulted on his promissory note and on September 5, 1989 the trustee foreclosed on that loan and the trustee's deed was recorded on December 14, 1989. Despite obtaining a judgment in June 1989, the Sheriff's sale did not occur until January 1990 and was not recorded until January 25, 1990.⁵²

36. The court there upheld summary judgment in favor of the party who received title through the trustee's deed (the Puetts). The court reasoned that "the sheriff's deed conveyed only [the defendant's] interest in the twenty-two acres; at that time, the Puetts were the record owners and [the tax sale purchaser] had no interest."⁵³ The court there then went on to examine Texas Tax Code § 34.01(n).⁵⁴ It interpreted this section as correctly stating a sheriff's deed cannot pass title if the defendant to the tax suit no longer owns the property at the time of the tax sale.⁵⁵

37. The law applied in *Memorial Park* also applies to the purchases in this matter. DEK-M acquired and recorded its trustee's deed prior to any sheriff's or tax sale (and indeed prior to

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 814.

⁵⁴ *Id.* at 814-15.

⁵⁵ *Id.*

any notice of the same). Willis not only defaulted on his payments to Eichner, but Willis also apparently failed to pay some taxes. CCCAD obtained a judgment in December 2010 but did not proceed with the sale until more than 2 years later. Between the time the of judgment and the time of the sherriff's sale, Eichner foreclosed on the 3 royalty interests based on a valid deed of trust and sold the property at foreclosure sale to DEK-M in February 2013. When CCCAD finally got around to moving forward with the tax sale, Willis no longer had an interest in the property to be sold and nothing was available to be legally transferred to DOH and the Moseleys.⁵⁶ Just as in *Memorial Park*, DEK-M acquired and perfected its deed prior to the property being sold at the tax foreclosure/sheriff's sale.

38. As a matter of law, DEK-M has superior title. Defendants' assertions to the contrary are without any legal basis or support. Because DEK-M has established its superior right to the 3 royalty interests the Defendants' motions for summary judgment fail and must, accordingly, be denied.

B. Under the Tax Code the Tax Liability (and Liens) Stayed with Willis After DEK-M Purchased the 3 Royalty Interests. Because CCCAD did not Sell the Property First it is Wholly Irrelevant Whether their Sale was

⁵⁶ *Id.*

Performed Properly. Defendants’ Primary Argument Therefore fails.

39. Defendants’ “lien priority” argument is inapplicable to this case and, legally speaking, misses the point. Defendant CCCAD argues that they conducted their sale properly and that therefore any other lien that existed at the time of the tax sale was extinguished. For support CCCAD cites the *Kothari v. Oyervidez* case.⁵⁷ *Kothari* is an example of CCCAD’s reliance on cases that either have no application to the legal issue before this Court, or if they apply, actually support DEK-M’s position.

40. The key point that Defendant CCCAD misses in its argument is the timing of the sale. *Kothari* was a tax suit where judgment was rendered on May 13, 2009. Notice of the sale was issued in August of 2009. In September of 2009 a competing party filed a notice of *lis pendens*, however, before the competing party could conduct any foreclosure or trustee’s sale the tax sale was completed.⁵⁸ As such, any other competing lien that might have existed at the time of the tax sale was extinguished because the tax sale was conducted first.⁵⁹ None of this is in dispute in this matter. What makes *Kothari* wholly irrelevant to this case is the fact that in the instant matter DEK-M received and recorded a trustee’s deed **before**

⁵⁷ 373 S.W.3d 801 (Tex.App.—Houston [1st Dist.] 2012, pet. denied).

⁵⁸ *Id.* at 807.

⁵⁹ *Id.*

CCCAD ever conducted its sale – indeed, DEK-M purchased the 3 royalty interests before CCCAD even posted notice of its sale. Defendant CCCAD is confusing a lien with a deed.

41. Whether any lien existed to be extinguished by the tax sale is irrelevant because the tax sale did not transfer any title since DEK-M already owned the 3 royalty interests.⁶⁰

42. Moreover, the Texas Tax Code specifically provides for circumstances where a mineral interest owner owes taxes and later transfers the interest prior to payment of any tax. Section 32.02 titled “Restriction on a Mineral Interest Tax Lien” specifically states:

(a) If a mineral interest is severed from a surface estate and if different persons own the mineral estate and surface estate, the lien resulting from taxes imposed against each interest in the mineral estate exists only for the duration of the interest it encumbers. After an interest in the mineral estate terminates, the lien encumbering it expires and is not enforceable...

(2) against any part of the mineral estate not owned by the owner of the interest encumbered by the lien;

⁶⁰ See *Mem'l Park Med. Ctr. Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810 discussed herein above.

(b) Taxes imposed on a severed interest in a mineral estate that has terminated remain the personal liability of the person who owned the interest on January 1 of the year for which the tax was imposed.

(emphasis added) This provision **expressly** provides that once a person's interest in a severed mineral interest expires they remain personally liable for the taxes and the tax lien is NOT enforceable against the new owner of the mineral estate.

43. Under these express code provisions, the moment that Willis's interest was foreclosed upon at the trustee's sale to DEK-M the tax lien that existed expired.⁶¹ Willis is – and remains – personally liable for any unpaid taxes on the 3 royalty interests.⁶²

44. In short, once a severed mineral interest is sold then any tax lien is expressly extinguished on the property and the liability for the taxes stays with the defendant. Defendant's argument that the manner of its conduct of the tax sale divested DEK-M of any property interest is without merit. Summary judgment should therefore be denied.

**C. *Res Judicata* is Inapplicable to this Case
Because DEK-M's Causes of Action did not**

⁶¹ Tex. Prop. Code § 32.02(a).

⁶² *Id.* at § 32.02(b).

Arise Until After Defendants Conducted a Void Tax Sale. Defendants Do Not Establish Privity or that the Claims are the Same as in the Tax Suit. As a Result, Defendants Fail to Establish *Res Judicata* as a Matter of Law.

45. Defendants' *res judicata* argument fails before it even starts. The elements of *res judicata* are: (1) a prior final judgment 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 raised or could have been raised in the first action.⁶³ For the purposes of this response only, DEK-M will not address the first element and instead focus its response on the second and third as an analysis there is dispositive on the issue. DEK-M will address the third issue first.

DEK-M's Claims Could not have been Raised in any Prior Action

46. The third element necessary to establish *res judicata* is that the claims raised in a second, or subsequent, action are the same as those raised in the first action or that could have been raised in the first action. Defendants argue that the first action was a tax suit in the 25th District Court of Colorado County, Texas between CCCAD and Willis and which

⁶³ *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

had Cause No. 4362.⁶⁴ However, they completely fail to explain how the claims in this suit are the same as, or could have been brought, in that 4-year-old tax suit.

47. According to its content, the only claim in this 2010 suit was whether certain taxes had been paid by Willis.⁶⁵ Conversely, DEK-M has brought suit in this case against CCCAD for declaratory relief on 2 grounds related to what title, if any, was passed at the March 2013 tax sale and whether CCCAD complied with Chapter 33 of the Texas Tax Code in providing notice of its sale.⁶⁶ As pled, both of these claims arise from actions taken (or not taken) by CCCAD in 2013. Neither claim could have existed in 2010 when the tax suit was filed by CCCAD against Willis because they both relate to the conduct (or non-conduct) of CCCAD following the completion of that case. As a matter of temporal impossibility, DEK-M's declaratory judgment actions against CCCAD did not exist in 2010 and could not have been brought by any party to that

⁶⁴ DEK-M has objected to CCCAD's Exhibit 1 and does not waive its objection by discussing that exhibit here. Any discussion of the exhibit is made subject to DEK-M's prior objection(s). If DEK-M's objection(s) are sustained and the exhibit is struck then the Defendants have not established any evidence regarding whether a prior lawsuit existed or what its content/subject was and fact issues therefore abound preventing summary judgment on this issue.

⁶⁵ See Defendant CCCAD's Exhibit 1 at ¶ 2.

⁶⁶ See Plaintiff's Second Amended Original Petition attached hereto as Exhibit 9 at p. 8. and incorporated by reference for all purposes as if fully set forth herein.

action.⁶⁷ As a matter of law, CCCAD has not established the third element of *res judicata* and summary judgment on this argument must be denied.

48. With respect to the DOH and Moseley claims, they likewise did not exist in 2010. DEK-M has raised actions against DOH and the Moseleys for Trespass to Try Title and Quiet Title to establish the superiority of its deed. Neither of these claims existed until after DEK-M purchased the 3 royalty interests in February 2013 and DOH and the Moseleys purportedly acquired title to the same real estate in April 2013. Neither DEK-M, nor DOH nor the Moseleys had any claim to any deed in 2010 to assert in that initial tax suit. As a result, DOH and the Moseleys have failed to establish the third element of *res judicata* on these claims and their summary judgment must be denied.
49. Similarly, DEK-M's alternative claims against DOH and the Moseleys for conversion and unjust enrichment relate solely to their receipt of any royalty payments for the time period following DEK-M's purchase of the 3 royalty interests at the February 2013 trustee's sale. Because the trustee's sale took place 3 years after CCCAD's tax suit and more than 2 years after that a judgment in that suit was

⁶⁷ DEK-M is aware that previous iterations of its petition exist that raised other claims against CCCAD, but upon retention of its current counsel DEK-M has amended those claims leaving only the declaratory judgment action.

obtained, DEK-M had no interest in 2010 that could have been asserted or joined in that prior lawsuit. As a result, summary judgment as to the third element of *res judicata* on these claims cannot be established and must likewise be denied.

Privity Between Willis and DEK-M is Irrelevant
Because DEK-M's Claims Could not have been
Brought in the Tax Suit

50. “People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.”⁶⁸ Defendants CCCAD, DOH and the Moseleys only argue privity through the third option – successors in interest. DEK-M does not dispute that Willis is in the prior chain of title. However, Defendants’ privity arguments fail because they do not take the next step and determine whether there is any commonality between DEK-M’s affirmative claims in this lawsuit and Willis’s defense to the prior lawsuit.

51. Ordinarily “[t]o determine whether a prior and later lawsuit involve the same basic subject matter, [the court] focus on the factual basis of the complaint.”⁶⁹ “If the second plaintiffs seek

⁶⁸ *Amstadt* at 653.

⁶⁹ *Id.*

to relitigate the matter which was the subject of the earlier litigation, *res judicata* bars the suit even if the second plaintiffs do not allege causes of action identical to those asserted by the first.”⁷⁰ By way of example, in *Amstadt* homeowners brought suit against the defendants because of defective plumbing systems in their house. They prevailed at trial. Subsequent purchasers of the same home brought a lawsuit for the same causes of action as the first. The Supreme Court there ruled that the second homeowners were successors in interest because they acquired the basis of their claim (defective plumbing) from the prior owner. As such, they were barred by *res judicata* from re-litigating the case.⁷¹

52. We do not have that situation here. First, Willis was a defendant to the tax suit, the purpose of which was to determine whether or not he owed and had paid certain ad valorem and property taxes.⁷² At no point in time did Willis ever assert any affirmative claims against CCCAD. DEK-M, on the other hand, is not, and never has been, a defendant to any tax suit for the 3 royalty interests. Moreover, DEK-M is a plaintiff who has asserted various claims (described in detail above) all of which relate to the superiority of its deed and all of which arose 3 years after the initial suit was

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CCCAD’s Exhibit 1.

filed. DEK-M's claims could not have been asserted in the prior case and as such it cannot be in privity with Willis.⁷³ Defendants' motions for summary judgment on *res judicata* grounds must be denied.

D. CCCAD did not have any Interest to Transfer at the Time of its Tax Sale and it Failed to Provide Proper Notice to DEK-M or Eichner. Therefore, DEK-M has Established that it is Entitled to a Declaratory Judgment and Defendants' Motions Must be Denied.

53. CCCAD's tax foreclosure sale was invalid because it attempted to sell a property it could not legally sell and because it failed to provide proper notice to required interested parties and must be declared void. CCCAD claims that DEK-M is not entitled to a declaratory judgment solely because its foreclosure sale was properly conducted.⁷⁴

54. As DEK-M established herein above, "[a sheriff's deed] vests good and perfect title in the purchaser or the purchaser's assigns to the interest owned by the defendant in the property subject to the foreclosure."⁷⁵ The tax foreclosure sale on the royalty interests did not occur until April 11, 2013. At that time Willis no longer had an interest in the

⁷³ *Id.*

⁷⁴ See Defendant's Amended Motion for Summary Judgment at p. 22 and already on file with the Court.

⁷⁵ Tex. Tax Code § 34.01.

property CCCAD was attempting to sell. Willis's interest had been properly foreclosed upon and sold to DEK-M on February 5, 2013. Since the sheriff's deed only transfers the interest owned at the time of sale and as Willis no longer had an interest, there was no title to sell.⁷⁶ Therefore, the title transferred by CCCAD at the sheriff's sale was void and transferred no interest.

55. Additionally, neither DEK-M nor Eichner received notice of the tax sale and CCCAD failed to provide notice as required under Texas Tax Code. CCCAD's judgment against Willis required that any sale of Willis's property be conducted "pursuant to the provisions of Chapters 33 and 34 of the Texas Property Tax Code."⁷⁷ Chapter 33 requires that after the seizure of the property, notice must be sent to any person that has an interest in the property.⁷⁸ Eichner recorded an abstract of judgment against Willis on July 23, 2010. Additionally, Eichner received and recorded a deed of trust from Willis on his royalty interest on January 14, 2011. Seizure of Willis's property did not occur until well

⁷⁶ Tex. Tax Code § 34.01(n).

⁷⁷ DEK-M has objected to CCCAD's Exhibit 2 and does not waive its objection by discussing that exhibit here. Any discussion of the exhibit is made subject to DEK-M's prior objection(s). If DEK-M's objection(s) are sustained and the exhibit is struck then the Defendants have not established any evidence regarding the judgment or what its content/subject was and fact issues therefore abound preventing summary judgment on this issue. *See* CCCAD's Exhibit 2.

⁷⁸ Tex. Tax Code § 33.94.

into 2013. Therefore, Eichner was entitled to notice of the sale pursuant to the Tax Code.⁷⁹ CCCAD failed to do so and proceeded with the foreclosure sale without providing Eichner actual notice.

56. Moreover, 812 days passed between when CCCAD obtained a judgment and when the tax sale occurred. During that time, CCCAD failed to take any steps that would provide prospective purchasers with constructive notice of its interest in the 3 royalty interests. A properly filed *lis pendens* is not itself a lien, but rather it operates as constructive notice "to the world of its contents."⁸⁰ Additionally, an abstract of judgment constitutes a lien on and attaches to any real property of the defendant that is located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing.⁸¹ CCCAD could have filed and recovered costs for filing a *lis pendens* that would have put DEK-M on notice.⁸² For whatever reason CCCAD chose not to do this. A purchaser of land is charged with information contained in instruments of record that are in the chain of title at the time he purchases the property.⁸³ Had CCCAD filed an abstract judgment or a *lis pendens*

⁷⁹ *Id.*

⁸⁰ Tex. Prop. Code § 13.004.

⁸¹ Tex. Prop. Code § 52.001.

⁸² See Tex. Tax Code § 33.48.

⁸³ *Saravia v. Benson*, 433 S.W.3d 658, 666 (Tex.App.—Houston [1st Dist.] 2014).

Eichner, the trustee, and eventually DEK-M would have had notice that the judgment was still active and that there was a cloud on the title of this property. Instead, CCCAD took no action in order to protect its judgment.

57. CCCAD argues that the pending tax suit was sufficient to put DEK-M and Eichner on notice and that they “could have easily discovered the delinquent tax suit with a phone call to the tax collector or a search of the District court records.”⁸⁴ However, DEK-M had no way of knowing that a search was necessary as there was no notice in the property records. Additionally, litigation record alone is insufficient to put potential purchasers of notice of interests in real property.⁸⁵ Absent ambiguities on the face of a deed, a subsequent purchaser is “not required to look any further than his own chain of title to determine whether or not he was acquiring good title to his property.”⁸⁶ DEK-M had no reason, and was not required, to search the court’s records to determine the status of the property.

⁸⁴ See Defendant’s Amended Motion for Summary Judgment at p.9 and already on file with the Court.

⁸⁵ *Noble Mortg. & Invs. LLC v. D&M Vision Invs., LLC*, 340 S.W.3d 65, 79 (Tex.App.—Houston [1st Dist.] 2011, no pet.) (recording on the execution docket pursuant to Tex. R. Civ. P. 656 is insufficient to put potential purchasers on notice of pending claims to the property).

⁸⁶ *Id.*

58. Ultimately, CCCAD failed to file any records in the property records and argues – without authority – that it should be the responsibility of the prospective purchaser to search for unrecorded tax liens. CCCAD failed to provide DEK-M or Eichner with notice as required by the Tax Code and also failed to take any steps that would provide constructive notice of its interest.

59. DEK-M has established that CCCAD no longer had the ability to sell the 3 royalty interests at the time of the tax sale and therefore its sheriff's deed is invalid. Moreover, CCCAD failed to provide proper notice to Eichner, DEK-M or any prospective purchasers of its interest or intent to foreclose on the property. As such, DEK-M is entitled to a declaratory judgment against CCCAD and its motion must be denied.

E. DOH and the Moseleys' Challenge to DEK-M's Trespass to try Title Action Fails. DEK-M has Established Superior Title to the 3 Royalty Interests as a Matter of Law. Defendants' Motion for Summary Judgment must be Denied.

60. In DOH and Moseleys' Motion for Summary Judgment they challenge DEK-M's Trespass to Try Title claim on traditional grounds. That challenge fails. A party may establish superior title under trespass to try title in one of four methods: (1) a regular chain of conveyances from the sovereign, (2) superior

title out of a common source, (3) title by limitations, or (4) title by prior possession coupled with proof that possession was not abandoned.⁸⁷ The second option establishes DEK-M as the holder of superior title.

DEK-M has Superior Title out of a Common Source

61. Both DEK-M and defendants DOH and the Moseleys acquired their competing titles at a trustee's sale and a tax sale respectively. DEK-M obtained its through a trustee that foreclosed on a deed of trust given by Willis. DOH and the Moseleys obtained their title through a subsequent tax sale to satisfy a debt owed by Willis. As such, both DEK-M and Defendants can trace their titles to a common source. However, DEK-M's is superior.

62. As set forth in greater detail in subsection A herein, DEK-M acquired its title before DOH and the Moseleys did. DEK-M purchased its title at a trustee's sale on February 5, 2013 and filed it for record on February 8, 2013. It was recorded on February 13, 2013. DEK-M's title was perfected and all persons legally had constructive notice of DEK-M's title as of that day.⁸⁸

⁸⁷ *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004) (citing *Plumb v. Stuessy*, 617 S.W.2d 667, 668 (Tex. 1981)); *Ellis v. Buentello*, 2012 Tex. App. LEXIS 6803 (Tex.App.—Houston [1st Dist.] Aug. 16, 2012).

⁸⁸ Tex. Prop. Code § 13.001(a); 13.002(1).

63. DOH and the Moseleys bought their purported titles a month later on March 5, 2013 and their deeds were recorded of record on April 19, 2013. This means that at time they attended their sale they were on notice that DEK-M was the record holder of the 3 royalty interests. Under the Tax Code a tax sale can only “vest good and perfect title...**to the interest owned by the defendant in the property** subject to the foreclosure...”⁸⁹ As explained by the caselaw herein above, since Willis (who is the “defendant” under § 34.001(n)) no longer owned the 3 royalty interests on the date of the March 2013 tax sale, nothing was transferred to defendants DOH and the Moseleys. Therefore, DEK-M has superior title to the 3 royalty interests and they have a common source. DEK-M therefore meets the second method for prevailing under a trespass to try title action. Defendants DOH and the Moseleys’ motion for summary judgment must therefore be denied.

F. DEK-M has Established that it has Superior Title to the 3 Royalty Interests and is Entitled to the Royalty Payments. DOH and the Moseleys have Converted DEK-M’s Property by Claiming those Payments and Preventing DEK-M from Receiving Future Royalty Payments. In So Doing They Have Also Been Unjustly Enriched.

⁸⁹ Tex. Tax Code § 34.001(n). (emphasis added)

64. Conversion is the unauthorized and unlawful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner's rights.⁹⁰ DOH and the Moseleys have wrongfully exercised control over DEK-M's royalty payments and have prevented DEK-M from receiving payments.

65. As explained in detail in Subsection A above, DEK-M acquired superior title prior and was entitled to the benefits of owning the 3 royalty interests. When DOH and the Moseleys attempted to purchase the 3 royalty interests, there was no longer an interest in the property to be sold and they therefore did not receive any title to the 3 royalty interests or any of the benefits of ownership.⁹¹

66. DOH and the Moseleys have wrongfully exerted control over DEK-M's royalty payments, which are its personal property. While oil and gas beneath the surface of the land are considered part of the real property, once removed from the land they become personal property, therefore, the profits of the sale of oil and gas are personal property.⁹² DEK-M contacted the operator of the mineral

⁹⁰ *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex. 1971); *Freezia v. IS Storage Venture, LLC*, 2015 Tex. App. LEXIS 8745 (Tex.App.—Houston [14th Dist.] Aug. 20, 2015).

⁹¹ *Mem'l Park Med. Ctr. Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810, 814 (Tex.App.—Eastland, 2008, no pet.).

⁹² *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 817 (Tex. 1974).

estate in an attempt to receive its payments and discovered that DOH and the Moseleys were wrongfully claiming the rights to those royalty payments.⁹³ DEK-M notified DOH and the Moseleys of its superior right to the royalty payments and they failed to retract their wrongful claims to the royalty payments.⁹⁴ As a result of DOH and the Moseley's claims, DEK-M has been unable to receive any payments on its interest. Moreover, DOH and the Moseleys have been unjustly enriched by claiming the rights to royalty payments that should rightly be paid to DEK-M under its deed.⁹⁵

67. DOH and the Moseleys argue that DEK-M's conversion and unjust enrichment claim fails because DEK-M has no claim to the 3 royalty interests. However, as the superior titleholder DEK-M is the rightful recipient of any royalties generated by the 3 royalty interests. At a bare minimum, there are genuine issues of material fact as to whether DOH and the Moseleys have converted DEK-M's property and have been unjustly enriched. As such, their Motion must be denied.

⁹³ See Email dated August 5, 2013 attached hereto as Exhibit "10" and incorporated by reference for all purposes as if fully set forth herein.

⁹⁴ See February 19, 2014 Letter to David Hill attached hereto as Exhibit "11" and February 19, 2014 Letter to Cassie and David Moseley attached here to as Exhibit "12" both of which are incorporated by reference for all purposes as if fully set forth herein.

⁹⁵ Exhibit 10.

G. CCCAD's Sovereign Immunity Claim Fails Because DEK-M is not Seeking Monetary Damages from CCCAD.

68. CCCAD also makes an assertion in its amended motion that it is immune from suit because of sovereign immunity. This is not so. DEK-M is not making claims against CCCAD for monetary damages. DEK-M is only seeking a declaratory judgment against CCCAD. In claims in which no imposition of monetary liability is sought, consent to the suit is not required and sovereign immunity does not apply. *City of San Benito v. Ebarb*, 88 S.W.3d 711, 720-21 (Tex.App.—Corpus Christi, 2002, pet. denied). DEK-M is only asking the Court to declare CCCAD's transfer of the 3 royalty interests invalid and to find that CCCAD failed to provide DEK-M with proper notice. As DEK-M is not claiming monetary damages, its claims are not barred by sovereign immunity.

IX. PRAYER

69. WHEREFORE, PREMISES CONSIDERED, DEK-M prays that the Court deny Defendants' respective motions and amended motions for summary judgment and, upon consideration of the evidence, find in favor of DEK-M and against Defendants and award to DEK-M all relief to which it may show itself justly entitled in law or in equity.

Respectfully submitted,
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby affirm that a true and correct copy of Plaintiff's Amended Objections and Response to Defendants' Motions for Summary Judgment was served on all counsel of record pursuant to Tex. R. Civ. P. 21 & 21a on this 7th day of October 2015.

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Appendix M

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Appendix N

Reporter's Record
Volume 1 of 1 Volumes

Trial Court Cause No. 23,859
Court of Appeals No. 14-15-01030-CV

DEK-M Nationwide,	)	In the District Court
LTD	)	
Plaintiff,	)	
	)	
v.	)	25th Judicial
	)	District
David Hill individually	)	
& d/b/a DOH Oil Co.,	)	
Cassie Moseley,	)	
David Moseley, and	)	
Colorado County	)	
Central Appraisal	)	
District	)	
	)	Colorado County,
Defendant.	)	Texas

DEFENDANT COLORADO COUNTY CENTRAL
APPRAISAL DISTRICT'S
MOTION FOR SUMMARY JUDGMENT
DEFENDANT DOH OIL CO. AND
CASSIE AND DAVID MOSELEY'S
MOTION FOR SUMMARY JUDGMENT

October 14, 2015

On the 14th day of October, 2015, the following proceedings that came on to be heard in the above-entitled and numbered cause before the Honorable William D. Old, III Judge presiding, held in Columbus, Colorado County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

8

1 amended his suit to really get down to two issues
against

2 the appraisal district. So I will just focus on those
3 two issues.

4 He has filed for a motion for declaratory
5 judgment – I'm sorry. He's filed a dec action,
6 declaratory judgment action, against the appraisal
7 district. He is not seeking any damages against the
8 appraisal district, but seeking a declaration that
the

9 tax sale was invalid and that his client or KDE,
P.C. was

10 entitled to some notice of the tax sale.

11 The notice issue is the one that's the most
12 easy to deal with so let me skip to that one and
deal

13 with that first. Plaintiff is alleging that KDE,
P.C.,

14 or DEK-M, was entitled to notice of the tax sale.
the

15 tax code is very clear about who gets notice of a
tax

16 sale. Section 34.01, which is in your notebook that

I

17 gave you, and I'll be happy, if you would like me
to, to

18 hand you my notebook –

19 THE COURT: No, that's okay. I know

20 exactly – I can tell you exactly where it is –

21 MS. GRIFFIN: It's under tab –

22 THE COURT: -- like right there.

23 MS. GRIFFIN: Right there. It's under Tab

24 7 in your notebook, 34.01, and that section clearly
says

25 that the only folks that get notice of a tax sale are

9

1 those that were defendants in the lawsuit, and we
2 notified all those folks. KDE, P.C. was not a
defendant

3 in the lawsuit, and DEK-M certainly wasn't a
defendant in

4 the lawsuit. They weren't – they had no lien at the
5 time we filed that suit. And so they were never
entitled

6 to any notice.

7 They also allege, absolutely and correctly,
8 that DEK-M or KDE, P.C., was entitled to some
notice

9 under Section 33.94 of the tax code. That's just
simply

10 wrong. 33.94 of the tax code deals with seizures
of

11 assets. We did not seize this property. That's a
12 completely different procedure for us to collect

13 delinquent taxes. We didn't do a seizure here. We
filed

14 suit, and we went through judicial foreclosure.

And so

15 Section 33.94 that Plaintiff refers to that would
allow

16 them some notice, allegedly, doesn't apply here.

So that

17 deals – I think that deals very squarely with the
notice

18. issue. DEK-M was never entitled to any notice
and KDE,

19 P.C. was never entitled to any notice of that tax
sale.

20 Okay. So the bigger issue is, their request

21 for declaratory judgment that the tax foreclosure
sale

22 did not transfer title because KDE, P.C. had sold
the

23 property to DEK-M. So let me – let me address
that

24 issue. The entity that didn't have anything to sell
was

25 KDE, P.C. because at the time that they
attempted to sell