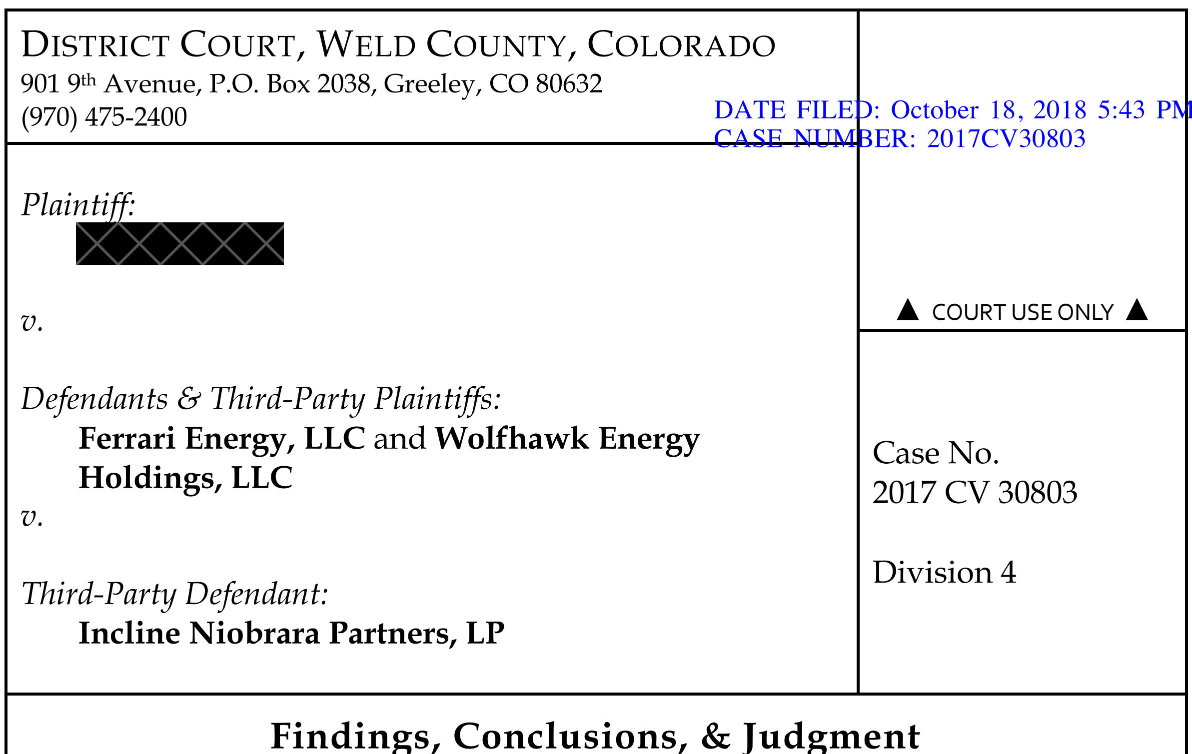

| District Court, Weld County, Colorado<br>901 9th Avenue, P.O. Box 2038, Greeley, CO 80632<br>(970) 475-2400 | DATE FILED: October 18, 2018 5:43 PM<br>CASE NUMBER: 2017CV30803<br><br>▲ COURT USE ONLY ▲ |
|---|---|
| *Plaintiff:*<br><br>*v.*<br><br>*Defendants & Third-Party Plaintiffs:*<br>**Ferrari Energy, LLC** and **Wolfhawk Energy Holdings, LLC**<br>*v.*<br><br>*Third-Party Defendant:*<br>**Incline Niobrara Partners, LP** | Case No.<br>2017 CV 30803<br><br>Division 4 |

## Findings, Conclusions, & Judgment

The court makes the following findings of fact and conclusions of law based on the testimony and evidence presented at trial. Based on these findings and conclusions, the court enters judgment in favor of  as to her breach of contract and declaratory judgment claims. The court dismisses  civil theft claim and dismisses all five counterclaims brought by the defendants.

### 1.  Breach of Contract Claim

*A. Findings of Fact*

I find these facts to be more likely true than not:

The plaintiff, , entered into a purchase and sale agreement with Defendant Ferrari Energy, related to mineral interests  owned in Weld County, Colorado. The agreement was drafted by Ferrari. It provided that Ferrari could select the closing date, so long as the closing took place no later than 45 business days after Ferrari received the signed agreement. Per the terms

of the agreement, Ferrari was required to pay [redacted] at closing "the full Purchase Price via wire transfer or check, less any credits for amounts previously paid." *Ex. 3*. The agreement is clear as to what would happen if Ferrari failed to close by the 45-day deadline: "Failure to tender full payment to [redacted] will nullify this transaction." *Id.*

[redacted] received the signed agreement on April 28, 2017, which meant that the closing date needed to occur by no later than July 3. It is undisputed that July 3 passed without Ferrari closing the transaction.

To get around this problem, Ferrari invokes language that permitted Ferrari to extend the closing under certain conditions. The agreement provided that, in the event Ferrari discovered a title defect that needed to be cured, "then FERRARI shall have the right to either extend the Closing Date accordingly or terminate [the agreement] in its entirety." *Id.* Ferrari's employee, Sean Goodnight, testified that he informed [redacted] over the telephone that the closing would take longer than 45 days because of perceived title problems. But he also testified that he never provided [redacted] with a new closing date. He also never informed [redacted] that Ferrari was electing to exercise its right under the agreement to extend the original 45-day closing date. Merely mentioning title difficulties did not notify [redacted] that Ferrari had elected to extend the closing date.

[redacted] testified that she doesn't recall Goodnight mentioning title problems before July 3. [redacted] also testified that Goodnight, nor anyone else from Ferrari, told her that Ferrari had elected to extend the closing date. While the note that Goodnight made about his telephone call to [redacted] on May 11 mentioned title problems, it makes no mention about extending the closing date. Based on this discrepancy and weighing the other evidence in conjunction

with my assessment of each witness's demeanor and manner while testifying, I find testimony to be more credible than Goodnight's as to what happened during this call. So, while it is likely than Goodnight mentioned title problems, I find it more likely that Goodnight did *not* discuss extending the closing.

Ferrari's principal, Adam Ferrari, testified that a new closing date of July 19 was not selected until after July 3. But even after the new closing date of July 19 was selected, no one from Ferrari informed . Instead, Ferrari attempted to close the transaction by delivering full payment to via a FedEx package. But Ferrari made no attempt at any time to inform in writing that it had elected to extend the closing date.

On July 20—before any attempt to deliver Ferrari's FedEx package had occurred— sent an email to Ferrari's employee, Goodnight, informing him that she considered the agreement to be terminated under its own terms because of Ferrari's failure to close within the initial 45-day period.

*B. Conclusions of Law*

The primary goal of contract interpretation is to give effect to the intent of the parties. *Ad Two, Inc. v. City & Cty. of Denver*, 9 P.3d 373, 376 (Colo. 2000). A court determines the parties' intent by looking to the plain and generally accepted meaning of the contractual language. *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009). A court should not view clauses or phrases in isolation, but instead interpret the contract in its entirety and attempt to give effect to all provisions so that none will be rendered meaningless. *Id.*

A written contract that is complete and free from ambiguity expresses the intention of the parties and must be enforced according to the plain language in the contract. *Ad Two*, 9 P.3d at 376.

If a party breaches a material term of the contract, it cannot claim the contract's benefit. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 63 (Colo. 2005). Materiality is a question of fact dependent upon the context of the parties' expectations at the time of contract formation. *Id.* The trier of fact should consider the importance or seriousness of the breach and the likelihood that the injured party will nonetheless receive substantial performance. *Id.* A breach is material if it concerns the "root of the matter or essence of the contract." *Id.* at 64.

The plain language of the agreement at issue here required Ferrari to make full payment to [redacted] by July 3. When Ferrari failed to do so, Ferrari materially breached the essence of the contract. The plain language of the agreement explicitly specifies that the transaction was nullified at that point.

While Ferrari had the right to unilaterally extend the closing under certain conditions, nothing in the agreement permitted Ferrari to extend the closing to an indefinite point in time. Nor did anything in the agreement permit Ferrari to exercise this option without first notifying [redacted]. The agreement was therefore nullified when Ferrari failed to pay [redacted] in full and failed to give proper notice that it was exercising its option to extend the closing date.

Even if Ferrari had orally informed [redacted] in explicit terms that it was electing to exercise its right to extend the closing, an oral communication does not suffice. The statute of frauds requires that a contract for the conveyance of an interest in land to be in writing. § 38-10-108, C.R.S. 2018. A contract subject to the statute of frauds may be orally modified by the parties, but only if the oral modification does not relate to a material condition of that contract. *James H. Moore & Associates Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 372 (Colo. App. 1994); *see also Burnford v. Blanning*, 540 P.2d 337, 340 (Colo. 1975) (the general

rule is "that a contract for the sale of land required to be in writing cannot be validly changed or modified as to a material condition (i.e., purchase price), by a subsequent oral agreement, without more, so as to make the original written agreement, as orally modified, an enforceable obligation).

Because the contract at issue here called for the contract to automatically terminate if Ferrari did not perform by the 45-day closing date, both Ferrari's timely performance and a fixed closing date are material terms. In addition to the agreement, Ferrari sent an email to Ramage in which it promised, "You will receive the entire payment within a 45-day grace period." *Ex. 31*. Thus, the context of the parties' expectations at the time the contract was formed shows the importance of this 45-day period, making time of the essence and making the 45-day period a material term. *See Commonwealth Petroleum Co., Inc. v. Billings*, 759 P.2d 736, 738 (Colo. App. 1987) ("consideration of extrinsic circumstances may result in the conclusion that time is of the essence for the performance by one party, but is not essential for the other party's performance"); *see also Deep Nines, Inc. v. McAfee, Inc.*, 246 S.W.3d 842, 846 (Tex. Ct. App. 2008) (to make time a material term in the absence of an express provision to that effect, "there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence").

Because the timing of the closing date was a material term under the circumstances here, Ferrari was required by the statute of frauds to give written notice to Ramage that it had elected to extend the closing date. Further, a "unilateral right to extend the closing date must be interpreted to be a *reasonable* extension." *Chaleunphone v. Slater Rd. Associates*, CV 89-0437207S, 1991 WL 112860, at *1 (Conn. Super. Ct. May 17, 1991), *aff'd*, 602 A.2d 47 (Conn. App. Ct.

1992). Ferrari also did not validly exercise its right to extend because it failed to select a reasonable extension for the closing date *before* the initial closing date had passed.

The court therefore enters judgment in favor of and against the defendants as to breach of contract claim. does not seek damages related to this claim, so the court does not address this issue.

**2. Declaratory Judgment Claim**

When the initial closing date of July 3 passed without Ferrari making full payment, the agreement was nullified under its own terms. Ferrari therefore lost its right to record the mineral interest deed that had provided at the time she entered into the agreement.

Under C.R.C.P. 57, the court declares the deed recorded by Ferrari with the Weld County Clerk & Recorder on July 19, 2017, at reception no. 4319435, to be null and void.

**3. Civil Theft Claim**

After she concluded that the agreement with Ferrari was no longer in effect, entered into an agreement to sell her mineral interests to the third-party defendant, Incline Niobrara Partners. signed a mineral deed to Incline on July 21, 2017, and Incline recorded this deed six days later.

Consequently, as of July 21, 2017, no longer owned the mineral interest. Thus, had no ownership interest in the minerals she alleges that the defendants stole from her at the time she filed her *Complaint* on September 29, 2017.

"Standing is a threshold issue that must be satisfied … for a court to decide a case on the merits." *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). To establish standing, a plaintiff must first establish that she suffered an injury-in-fact to a

"'legally protected interest as contemplated by statutory or constitutional provisions.'" *Id.* (quoting *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 538 (1977)).

A civil theft claim is established upon showing that (1) "the defendant knowingly obtained control over the *owner's property* without authorization" and (2) "did so with the specific intent to permanently deprive *the owner* of the benefit of [the] property." *Itin v. Ungar*, 17 P.3d 129, 134 (Colo. 2000) (emphasis added); *see also* §§ 18-4-401(1) & 18-4-405, C.R.S. 2018. So a plaintiff must have an ownership or property interest in the stolen property to establish an injury-in-fact and thus have standing to sue. *See Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 509 (Colo. App. 2009).

Because [redacted] no longer has an ownership interest in the minerals she alleges that the defendant stole from her, she lacks standing to bring a civil theft claim based on those minerals. Consequently, [redacted] civil theft is dismissed.

**4. The Defendants' Counterclaims for (1) Breach of Contract, (2) Quiet Title, (3) Declaratory Judgment, (4) Tortious Interference with Contract, and (5) Filing a Spurious Document**

Based on the foregoing findings and conclusions, the defendants have failed to prove the necessary elements of their five counterclaims.

Because the agreement between [redacted] and Ferrari was nullified after July 3 based on Ferrari's failure to make full payment or extend the closing date, no contract existed for [redacted] to breach when she transferred her mineral interests to Incline. For the same reason, Ferrari has no basis upon which to quiet title to those minerals. Because the court has declared Ferrari's mineral deed to be null and void, Ferrari is not entitled to the declaratory judgment it seeks and cannot assert a property interest in the minerals. Consequently, Ferrari has no basis upon which to base its spurious document claim. And

because Ferrari's contract with [redacted] was nullified after July 3, no contract existed for Incline to tortiously interfere with when its representatives started communicating with [redacted] beginning on July 14, 2017.

The court therefore enters judgment in favor of [redacted] and Incline, and against the defendants, as to all five counterclaims.

## 5. Judgment

Accordingly, under C.R.C.P. 58(a), judgment enters in favor the plaintiff, Joyce [redacted], and against the defendants as to the plaintiff's claims for breach of contract and declaratory judgment. Based on Ferrari's breach of contract, the court DECLARES the deed recorded by Ferrari with the Weld County Clerk & Recorder on July 19, 2017, at reception no. 4319435, to be null and void. [redacted] may record a copy of this document, or if she prefers, may apply for a separate court order invalidating the deed for recording.

Judgment enters in favor the defendants and against [redacted] as to the plaintiff's civil theft claim, which is DISMISSED WITH PREJUDICE.

Judgment enters in favor of [redacted] and Incline, and against the defendants, as to all five of the defendants' counterclaims, which are DISMISSED WITH PREJUDICE.

[redacted] and Incline are the prevailing parties under C.R.C.P. 54(d) and have 21 days from today to submit a bill of costs under the procedures set forth in C.R.C.P. 121, § 1-22.

*So Ordered:*
October 18, 2018

BY THE COURT:

Todd Taylor
District Court Judge