17-1026(L)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SABINE OIL & GAS CORPORATION,

Debtor.

SABINE OIL & GAS CORPORATION,

Plaintiff–Appellee,

—against—

NORDHEIM EAGLE FORD GATHERING, LLC,

Defendant–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT–APPELLANT'S PETITION FOR PANEL REHEARING

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INTRODUCTION

By affirming the decision allowing Sabine Oil & Gas Corporation to reject its Gathering Agreements with Nordheim Eagle Ford Gathering, LLC based on a lack of horizontal privity between the parties, this Court chose to wade into an issue that the Supreme Court of Texas has never resolved. The decisions from that court cited by this Court do not demand horizontal privity for a covenant to run with the land; rather, they analyze and apply the distinct requirement of *vertical* privity that is not at issue here. There is also ample reason to doubt the authoritativeness of the intermediate Texas appellate decisions discussed in this Court's opinion, none of which relies on binding Texas law. And the same lack of binding Texas authority impedes the resolution of the other dispositive issue—whether the covenants "touch and concern" the land—that this Court declined to reach.

Unquestionably, both these issues are imbued with policy concerns that only the Texas Supreme Court can weigh and resolve for that State. There is also no serious dispute that these foundational property-law questions will affect many future disputes, whether they involve the hundreds of other, similar multi-million-dollar agreements between producers and midstream companies, or the numerous more personal disputes over the enforceability of covenants that may arise in various contexts. Given the far-reaching impact of these issues, respect for comity and federalism should override this Court's initial decision to make an *Erie* "guess."

This Court should grant rehearing and certify the underlying legal questions to obtain a definitive ruling from Texas's highest civil court.

ARGUMENT

I. The Lack Of Binding Texas Cases Requiring Horizontal Privity For A Covenant To Run With The Land Warrants Certifying This Issue To The Texas Supreme Court.

This Court concluded that "Texas still requires horizontal privity" for a covenant to run with the land, Slip Op. at 3 (attached as Appendix A), but the only Texas Supreme Court cases that the opinion cites neither adopt nor apply this supposed requirement. The remaining cited cases are non-binding intermediate appellate court decisions that stem from a similarly non-binding decision that relies on *non-Texas* cases. This is hardly a basis for a reasoned determination that Texas law requires horizontal privity for a covenant to run with the land. Indeed, this lack of binding Texas law on an undeniably important legal issue counsels strongly in favor of certifying the issue to the Texas Supreme Court. *See Hunt Constr. Grp., Inc. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 13 (2d Cir. 2010) (per curiam) (in determining whether to certify question to state supreme court, considering "(1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation" (quoting *O'Mara v. Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007))); *see also* 2D CIR. L.R. 27.2; TEX. CONST. art. V, § 3-c; TEX. R. APP. P. 58.1.

A. *The cited Texas Supreme Court cases address vertical privity, not horizontal privity.*

The Texas Supreme Court cases that this Court mentions apply the requirement of *vertical* privity, not horizontal privity. *See* Slip Op. at 4 (citing *Davis v. Vidal*, 151 S.W. 290, 291 (Tex. 1912); *Flanniken v. Neal*, 4 S.W. 212, 214-15 (Tex. 1887); and *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 910-11 (Tex. 1982)). Whereas horizontal privity exists between the original covenanting parties, *e.g.*, between grantor and grantee, vertical privity exists between one of those original parties and an assignee or successor. *See In re Energytec, Inc.*, 739 F.3d 215, 222 (5th Cir. 2013). All three Texas Supreme Court decisions address the latter, vertical-privity requirement, which perhaps is why Sabine avoided addressing the *holdings* of these cases. *See* Sabine Br. at 38, 41-42.

In *Davis*, "[t]he sole question of law" was whether the defendant had received an assignment of the premises from the lessee—which would have transferred the lease in its entirety—or instead received a sublease that had not transferred all the lessee's rights and obligations. 151 S.W. at 291-92. The Texas Supreme Court's holding that the defendant executed a sublease in which he did not receive the lessee's full estate plainly turns on vertical privity, not horizontal privity. *See id.* at 294 (holding that lessee's retention of a "right of re-entry" in the estate and the discretion to pay rent if the defendant failed to do so defeated "privity of estate or contract" between the plaintiff property owner and the defendant).

The enforceability of the covenant in *Flanniken* also did not depend on horizontal privity. *See* 4 S.W. at 214. Rather, it hinged on whether subsequent purchasers who acquired property under a quitclaim deed (without warranty of title) could nevertheless assert a general warranty given by sellers earlier in the chain of title. *See id.* (reciting defendants' contention). Under settled Texas law, a general warranty can be enforced by both grantees *and their assigns* because it is "a continuing obligation and a covenant which runs with the land." *Id.* The court thus held that the covenant "pass[ed] from one purchaser to another through each successive link in the chain of title," such that the subsequent purchasers could enforce the covenant. *Id.* This focus on successive rights involves solely a vertical-privity analysis.

Even this Court's parenthetical to *Westland* reflects that horizontal privity is not required. Slip Op. at 4 (quoting *Westland*, 637 S.W.2d at 910-11). This Court quotes a passage from *Westland* stating that privity "must be a mutual or successive relationship to the same rights of property." *Id.* But this description applies both to vertical and horizontal privity, and thus does not manifest a horizontal privity requirement. Indeed, *Westland* concluded that "[p]rivity of estate exist[ed]" by virtue of an assignment of land from the original covenantee to a successor seeking to enforce the covenant—not the relationship between the original covenanting parties. 637 S.W.2d at 911; *see also* Nordheim Reply Br. at 16-17. Far from holding

that horizontal privity was necessary, the *Westland* court looked to vertical privity alone.

In short, none of these Texas Supreme Court cases can justify a decision demanding proof of horizontal privity for a covenant to run with the land under Texas law.

B. *The reasoning in the other, non-binding intermediate Texas appellate decisions is suspect.*

The Court's reliance on a handful of intermediate Texas appellate decisions only underscores the dearth of binding authority that requires horizontal privity for covenants to run with the land. *See* Slip Op. at 4 (citing *Wayne Harwell Props. v. Pan Am. Logistics Ctr., Inc.*, 945 S.W.2d 216, 218 (Tex. App.—San Antonio 1997, writ denied); *Clear Lake Aptmts., Inc. v. Clear Lake Utils. Co.*, 537 S.W.2d 48, 51 (Tex. Civ. App.—Houston [14th Dist.] 1976), *modified sub nom. Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977); *Panhandle & S.F. Ry. Co. v. Wiggins*, 161 S.W.2d 501, 505 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.)).

None of these courts cited Texas Supreme Court decisions for a horizontal-privity requirement. *Wayne Harwell* relied on *Clear Lake*, *see Wayne Harwell*, 945 S.W.2d at 218 (citing *Clear Lake*, 537 S.W.2d at 51), and the Texas Supreme Court did not address horizontal privity when affirming the judgment in *Clear Lake*, *see* 549 S.W.2d at 388 (addressing equitable servitude requirements only). Both *Clear*

Lake and *Wayne Harwell* also cite the earlier decision in *Panhandle*, which relies on *non-Texas* cases for the notion that a covenant "must be contained in a grant of the land or of some interest or estate therein."[1] *Panhandle*, 161 S.W.2d at 505 (citing North Dakota and Wisconsin cases for this principle); *see also Wayne Harwell*, 945 S.W.2d at 218 (citing *Panhandle*); *Clear Lake*, 537 S.W.2d at 51 (same). In reviewing the *Panhandle* decision, the Texas Supreme Court declined to adopt the court of appeals' reasoning because it was "not satisfied that the opinion has correctly declared the law." TEXAS LAW REVIEW, THE GREENBOOK: TEXAS RULES OF FORM, Appendix E (12th ed. 2010) (explaining the meaning and effect of "writ ref'd w.o.m." between Sept. 1, 1941 and Feb. 1, 1946). This Court should decline to rely on such a tenuous basis for engrafting a horizontal privity requirement onto Texas property law.

[1] The *Panhandle* court also cited *Gulf Colorado & Santa Fe Railway v. Smith*, 9 S.W. 865 (Tex. 1888), but for a different proposition: that for a covenant to run with the land, it must relate to a thing "in esse," *i.e.*, a thing that existed when the covenant was created. 161 S.W.2d at 505; *see also Gulf Colo. & Santa Fe Ry.*, 9 S.W. at 866 ("[T]he rule is said to be that, when the covenant extends to a thing *in esse*, part of the demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, though he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being."). Sabine has not disputed that this requirement was met here.

C. *The importance of this bedrock property-law issue counsels heavily in favor of certification to the Texas Supreme Court.*

The lack of binding Texas Supreme Court authority on the horizontal-privity requirement, standing alone, warrants certification. This is doubly true given the possibility that the Texas Supreme Court "may be swayed by persuasive authority from other states" that have abandoned such a requirement. *See Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218, 228 (2d Cir. 2010) (relying on this rationale to certify question to New York Court of Appeals); *see also, e.g.*, *Gallagher v. Bell*, 516 A.2d 1028, 1037 (Md. Ct. Spec. App. 1986) (adopting "[t]he modern view ... that no more than vertical privity is required"); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4, reporter's note (2000) (collecting authorities abandoning or expressly doubting vitality of horizontal-privity requirement). Because the issue is laden with policy concerns, certification honors the principles of comity and federalism by allowing the Texas Supreme Court an opportunity to resolve it. *See Parrot v. Guardian Life Ins. Co. of Am.*, 338 F.3d 140, 144 (2d Cir. 2003) (when questions implicate "the weighing of policy concerns, principles of comity and federalism strongly support certification") (internal quotation marks omitted).

The question of whether Texas law requires horizontal privity is as important as it is unsettled. As the industry amici explain, the legal framework for this case implicates hundreds of existing multi-million-dollar contracts between Texas

producers and midstream companies, not to mention the negotiation of similar contracts going forward. *See* Amicus Br. of GPA Midstream Ass'n at 14; Amicus Br. of Texas Pipeline Ass'n at 9. These companies commonly structure their transactions just as Nordheim and Sabine did here, thereby ensuring that the producer can forgo having to front the costs of developing the pipeline infrastructure, which instead the gatherer will bear and recoup over the life of the agreement. Amicus Br. of GPA Midstream Ass'n at 8, 13-14. The Court's approach has sown doubt regarding the viability of all these arrangements in the event the producer files for bankruptcy—which has happened many times—or decides to transfer its mineral interests—which also commonly occurs. *See id.* The serious ramifications of this issue for the entire industry deserve a definitive holding from the Texas Supreme Court. *See Hunt Constr. Grp., Inc.*, 607 F.3d at 16-17 (certifying to Vermont Supreme Court question that impacted "multimillion dollar" modified form contracts and would "likely affect many similar agreements").

Moreover, the horizontal-privity question impacts *all* Texas property disputes involving the enforceability of real covenants, not just those between producers and gatherers. Indeed, none of the cases that this Court discussed involves a gathering agreement. Those cases show that the privity question commonly arises when parties debate whether a covenant can be enforced by or against a subsequent transferee. It cannot be seriously disputed that the proper standard for the privity

requirement in Texas has "significance beyond the interests of the parties" in this suit. *See Kidney v. Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir. 1987) (holding certification especially appropriate in such an instance).

In short, this Court should not deprive the Texas Supreme Court of the opportunity to define such a significant issue of Texas law, *see Gutierrez v. Smith*, 702 F.3d 103, 116 (2d Cir. 2012) (certification is "especially important" when failure to certify would "substantially deprive[]" state courts of the "opportunity to define state law"), particularly when doing so will cast a cloud over so many agreements in similar contexts and beyond. The appropriate course is to certify to the Texas Supreme Court the question of whether Texas law requires horizontal privity for a covenant to run with the land.

II. To Resolve All The Issues, This Court Should Also Certify The Question Of Whether The Covenants In The Gathering Agreements "Touch And Concern" The Land.

By resolving this appeal on the basis of horizontal privity alone, this Court chose not to address the other threshold requirement for the Gathering Agreements to run with the land: whether the covenants dedicating all of Sabine's production to Nordheim's gathering facilities, and requiring Sabine to pay related gathering fees, "touch and concern" the land. *See* Slip Op. at 3 (declining to reach this question). This issue should also be certified to the Texas Supreme Court.

Much like the horizontal-privity issue, no binding Texas cases resolve whether these types of dedication covenants touch and concern the land. The parties have instead relied on non-binding authorities that address different covenants arising in different contexts, against the backdrop of the Texas Supreme Court's broad, general tests for the touch-and-concern requirement. *See, e.g.*, *Westland*, 637 S.W.2d at 911 (covenants touch and concern the land if they "affect[] the nature, quality or value" of the burdened property interests, independent[] of collateral circumstances, or "affect[] the mode of enjoying" those interests).

The stakes on this issue are just as high as those on the horizontal-privity issue. As the amici compellingly explain, the lower courts' refusals to conclude that these dedication covenants touch and concern the land "threaten and have the potential to disrupt the foundational principles underpinning the midstream industry," harming producers and gatherers alike. Amicus Br. of GPA Midstream Ass'n at 13. Indeed, producers have repeatedly cited the bankruptcy court's decision when attempting to avoid similar covenants. *See, e.g.*, *In re Quicksilver Res.*, No. 15-10585 (LSS) (Bankr. D. Del. filed March 17, 2015); *In re Magnum Hunter Res.*, No. 15-12533 (KG) (Bankr. D. Del. filed Dec. 15, 2015); *In re Emerald Oil*, No. 16-10704 (KG) (Bankr. D. Del. filed March 22, 2016)).

Such an important question, with ramifications for hundreds of other multi-million-dollar agreements, warrants giving the Texas Supreme Court "the

opportunity to define state law." *Gutierrez*, 702 F.3d at 116; *see also Hunt Constr. Grp., Inc.*, 607 F.3d at 16-17. And given the strong reasons for certifying the privity issue, this Court should certify both dispositive questions together.

CONCLUSION

For these reasons, Appellant Nordheim Eagle Ford Gathering, LLC respectfully requests that this Court grant its petition for panel rehearing and certify the underlying legal questions to the Supreme Court of Texas. Appellant also prays for such further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this Petition for Panel Rehearing in electronic form on counsel of record by filing it using the Court's CM/ECF system on the 8th day of June, 2018 as follows:

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volumes limitations of FED. R. APP. P. 40(b)(1) because it consists of 2567 words, excluding the parts of the petition exempted by FED. R. APP. P. 32(f).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the typestyle requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Office Word 2013, in 14-point Times New Roman font for text and footnotes.

/s/ *Yvonne Y. Ho*
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APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 25th day of May, two thousand eighteen.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
CHRISTOPHER F. DRONEY,
Circuit Judges.

IN RE: SABINE OIL & GAS CORPORATION,

Debtor.

SABINE OIL & GAS CORPORATION,

Plaintiff-Appellee,

v. 17-1026

NORDHEIM EAGLE FORD GATHERING, LLC,

Defendant-Appellant.[1]

Appearing for Appellant: Yvonne Y. Ho, Bracewell LLP (Robert G. Burns, *on the brief*) Houston, TX

[1] The Clerk of Court is respectfully directed to amend the caption as above.

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Appearing for Appellee:	Erin E. Murphy, Kirkland & Ellis, LLP (Christopher Landau, Anna G. Rotman, Kenneth A. Young, James H.M. Sprayregen, Ryan Blaine Bennett, Jeremy M. Feigenbaum, *on the brief*), Washington, D.C.
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	James E. Mann, Duggins Wren Mann & Romero, LLP, Austin, TX, *amicus curiae Texas Pipeline Association in support of Defendant-Appellant Nordheim Eagle Ford Gathering, LLC*

Appeal from the United States District Court for the Southern District of New York (Rakoff, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Nordheim Eagle Ford Gathering, LLC appeals from the March 13, 2017 judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*), affirming the orders of the United States Bankruptcy Court for the Southern District of New York (Chapman, *Bankr. J.*) authorizing the rejection of agreements between appellee Sabine Oil & Gas Corporation and Nordheim under 11 U.S.C. § 365(a). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Bankruptcy court decisions are subject to appellate review in the first instance by the district court, pursuant to the statutory scheme articulated in 28 U.S.C. § 158. The same section of the code grants jurisdiction to the circuit courts to hear appeals from the orders of the district court. 28 U.S.C. § 158(d). Because this scheme requires district courts to operate as appellate courts, we engage in plenary, or de novo, review of the district court decision. *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1388 (2d Cir. 1990). We then apply the same standard of review employed by the district court to the decision of the bankruptcy court. Accordingly, "[w]e review the bankruptcy court's factual determinations for clear error and its legal conclusions *de novo*." *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 107 (2d Cir. 2006).

Nordheim argues on appeal that the district court and the bankruptcy court each erred by misconstruing the relevant agreements as "personal obligations" as opposed to "real covenants that run with the land." Appellant's Br. at 25. This distinction is significant, because if the agreements constitute real covenants that run with the land they are not "executory contracts" and the Bankruptcy Court does not have authority to approve their rejection under 11 U.S.C. § 365(a). *See Gouvela v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994) (observing that "[w]hile distinguishing between contracts and property rights might seem elusive," it is possible for a

court to determine that the terms of the agreement create a personal obligation, as opposed to "an interest in real property" and when the agreement is determined to be a personal obligation as opposed to an interest in real property, "§ 365 of the bankruptcy code is inapplicable").

The bankruptcy court and the district court each reviewed the relevant agreements under Texas state law, which was selected in the choice of law provision in each agreement. In addition to the forum selection clause, bankruptcy courts must apply state law when reviewing questions of property law. *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

The parties agree that for a real covenant to run with the land under Texas law, it must: 1) touch and concern the land, 2) relate to a thing in existence or specifically bind the parties and their assigns, 3) be intended by the original parties to run with the land; and 4) the successor to the burden must have notice. *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) (citing *Westland Oil Devel. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 910–11 (Tex.1982)). The parties do not dispute that the agreement satisfies prongs 2-4, but disagree on whether the agreement "touches and concerns" the land and whether the legal test includes a requirement of horizontal privity.

We need not determine whether the agreement "touches and concerns" the land, because we find that Texas still requires horizontal privity and that it was not satisfied in this case. The bankruptcy court declined to decide whether horizontal privity remains a requirement under Texas law, but concluded that even if it were, the requirement was not met by Nordheim. *In re Sabine*, 550 B.R. 59, 68-70 (Bankr. S.D.N.Y. 2016).

In order for the parties to the original agreement to have been in horizontal privity with one another, there must have been some common interest in the land other than the purported covenant itself at the time it was executed. "'Horizontal privity' typically exists when the original covenanting parties make their covenant in connection with the conveyance of an estate in fee from one of the parties to the other. The covenant and the conveyance must be made at the same time, although no continuing mutual relationship to the affected land is needed." 9 Powell on Real Property § 60.04(3)(c)(iii). The trend across the country is towards abolition of the horizontal privity requirement, as reflected in the Restatement (Third) of Property, which has eliminated the requirement. See Restatement (Third) of Property (Servitudes) § 2.4. The parties dispute whether Texas has followed this trend.

The bankruptcy court found that horizontal privity remains a requirement under Texas law and that the agreement between Sabine and Nordheim failed to satisfy that requirement.[2] *In re Sabine*, 550 B.R. at 68-70. On the first point, the bankruptcy court observed that

[2] The district court did not reach the issue of horizontal privity because it determined that the agreement failed to "touch and concern" the land. *In re Sabine*, 567 B.R. 869, 877 n. 5 (S.D.N.Y. 2017).

> [N]either [party] has identified any authority affirmatively indicating that horizontal privity of estate between the covenanting parties is no longer a requirement for a covenant to run with the land. Therefore, absent any actual authority to the contrary, the Court considers horizontal privity of estate in its analysis under Texas law.

Id. at 68. When applying state law, we are tasked with applying the law of the state as it exists. It would be improper for us to read a traditional requirement of real covenants out of Texas state law when there is no Texas law instructing courts to do so. *See SimplexGrinnell LP v. Integrated Sys. & Power, Inc*., 642 F. Supp. 2d 206, 213 (S.D.N.Y. 2009) ("Binding precedent is not established by silence."). Accordingly, we agree with the bankruptcy court and find that horizontal privity remains a requirement of Texas real covenants. *See Davis v. Vidal*, 151 S.W. 290, 291 (Tex. 1912) (requiring privity of estate "between the original lessor and the undertenant"); *Flanniken v. Neal*, 4 S.W. 212, 214-15 (Tex. 1887) (concluding covenant ran with land because it "entered into and formed a part or parcel of the contract by which, and of the consideration for which, the grant of land was made."); *see also Westland*, 637 S.W.2d at 910-11 (explaining that required privity between parties "must be a mutual or successive relationship to the same rights of property").

Nordheim argues that horizontal privity of estate is established through the separate agreements conveying the pipeline easement and a separate parcel of land. The bankruptcy court determined that this separate conveyance was insufficient to establish horizontal privity of estate. *In re Sabine*, 550 B.R. at 68-69. The bankruptcy court explained that Nordheim failed to identify

> any authority for the proposition that the horizontal privity of estate prong is satisfied if the covenanting parties have horizontal privity of estate only with respect to property separate from the property burdened by the covenant at issue. Instead, Nordheim . . . argue[s], without support, that horizontal privity of estate exists through the conveyance of any land 'involved' in the covenants at issue. Again, this overly broad conception of the horizontal privity of estate requirement is inconsistent with the historical paradigm as well as the very caselaw Nordheim . . . cite[s].

Id. at 69. We agree with the bankruptcy court that this separate conveyance cannot establish horizontal privity of estate between the parties. Indeed, both cases cited by Nordheim are cases in which Texas courts found there was no privity of estate. In *Panhandle & S.F. Ry. Co. v. Wiggins*, the Texas Court of Appeals explicitly held that "[t]here is no contention that any portion of the land involved . . . was conveyed by the contract or otherwise, and there was, therefore, no privity of estate between the parties." 161 S.W.2d 501, 505 (Tex. App. 1942); *see also Wayne Harwell Props. v. Pan Am. Logistics Ctr., Inc.*, 945 S.W.2d 216, 218 (Tex. App. 1997) ("For a covenant to run with the land at law, and so be enforceable at law so as to bind successors in title, the covenant must be made between parties who are in privity of estate at the time the covenant is made, and must be contained in a grant of the land or in a grant of some property interest in the land."). The Texas Appeals Court case *Clear Lake Apartment, Inc. v. Clear Lake Utils. Co.*, is on point. 537 S.W.2d 48 (Tex. App. 1976). In that case, the Texas court held that the contract at issue "did not create any privity of estate: it was not part of any transaction conveying the land involved, or any easement in it, between the parties." *Id*. at 51. The contract at issue in *Clear Lake* involved agreements to construct facilities "to serve Said

Land in existing easements adjoining Said Land." *Id*. Regarding the horizontal privity requirement, there is no meaningful legal distinction between the contract in *Clear Lake* and the one at issue here. Neither contract conveyed a property interest in subject land (in this case, the mineral estate). Accordingly, both fail to establish horizontal privity of estate and therefore both fail to create a real covenant.

Nordheim argues in the alternative that even if the agreements did not create real covenants, they created equitable servitudes that nonetheless create a property interest that cannot be rejected under 11 U.S.C. § 365. The parties rely on the same case for the definition of equitable servitudes under Texas law:

> [A] covenant that does not technically run with the land can still bind successors to the burdened land as an equitable servitude if: (1) the successor to the burdened land took its interest with notice of the restriction, (2) the covenant limits the use of the burdened land, and (3) the covenant benefits the land of the party seeking to enforce it.

Reagan Nat. Advert. of Austin, Inc. v. Capital Outdoors, Inc., 96 S.W. 3d 490, 495 (Tex. App. 2002) (internal citations omitted).

There is simply no colorable argument that these agreements created an equitable servitude because there is no benefit to real property of Nordheim. It is Nordheim as an entity—not its real property—that is benefited by the agreement. The district court offered the same analysis when it held there was no equitable servitude created by the agreements. *In re Sabine*, 567 B.R. 869, 877 (S.D.N.Y. 2017) ("[T]he Agreements benefit only appellants, not their land. Through the Agreements, appellants are entitled to receive fees for processing delivered gas and condensate, regardless of where that process takes place, and thus the Agreements themselves do not render more valuable the land on which appellants have located their processing facilities.").

We have considered the remainder of Nordheim's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk