

ORAL ARGUMENT REQUESTED

NO. 02-10-00395-CV, NO. 02-10-00396-CV and NO. 02-10-00397-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

EASTERN EXPRESS, L.P., Appellant,
v.
XTO ENERY, INC., ET.AL., Appellees.
and
VICKIE ANNE MAKEHAM, ET. AL., Appellants,
v.
XTO ENERGY, INC., ET.AL., Appellees.
and
VELMA ANN MYLES, Appellant,
v.
XTO ENERGY, INC., ET.AL., Appellees.

JOINT BRIEF OF APPELLANTS

Appeals from the 67th District Court, Tarrant County, Texas, Hon. Don Cosby presiding

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Llano Operating Corp.

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STATEMENT OF THE CASE:

EASTERN EXPRESS, L.P.

Nature of the Case: Claims of breach of contract, promissory estoppel, negligent misrepresentation, antitrust violations, etc., against gas company and its agents arising out of an agreement between the gas company and an incorporated neighborhood association regarding mineral estate leases. E.E.C.R. at 175.²

Course of Proceedings: Antitrust claims dismissed for lack of standing; motions for summary judgment as to all other claims.

Trial Court: 67th District Court, Tarrant County
Hon. Don Cosby, presiding

Parties in the Trial Court: Plaintiff:
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of Devonian Enterprises, Inc., and
Fred W. Jones, Individually and/or
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Trial Court Disposition: Plea to the jurisdiction granted as to antitrust claim; motions for summary judgment granted on all other claims.

² These three appeals are consolidated for purposes of briefing. The respective Clerk's Records will be distinguished by the initials of the first named parties: Eastern Express's Clerk's Record will be E.E.C.R.; Makeham's will be Ma.C.R.; and Myles' will be My.C.R.

STATEMENT OF THE CASE:

VICKIE ANNE MAKEHAM

Nature of the Case: Claims of breach of contract, promissory estoppel, negligent misrepresentation, antitrust violations, etc., against gas company and its agents arising out of an agreement between the gas company and an incorporated neighborhood association regarding mineral estate leases. Ma.C.R. at 537.

Course of Proceedings: Antitrust claims dismissed for lack of standing; motions for summary judgment as to all other claims.

Trial Court: 67th District Court, Tarrant County
Hon. Don Cosby, presiding

Parties in the Trial Court: Plaintiffs:
Vickie Ann Makeham, Steven D. Nguyen and wife, Y. Minh Nguyen, Rick Scivally and wife, Jeneth Scivally, Romeo Sun and wife, Marisel Sun, and Flordeliza Sun
Defendants:
XTO Energy, Inc., Permian Land Company, a Division of Devonian Enterprises, Inc., and Fred W. Jones, Individually and/or d/b/a Devonian Enterprises, Inc.

Trial Court Disposition: Plea to the jurisdiction granted as to antitrust claim, Ma.C.R. at 66; motions for summary judgment granted on all other claims, Ma.C.R. at 776, 789.

STATEMENT OF THE CASE:

VELMA MYLES

Nature of the Case: Claims of breach of contract, promissory estoppel, negligent misrepresentation, antitrust violations, etc., against gas company and its agents arising out of an agreement between the gas company and an incorporated neighborhood association regarding mineral estate leases. My.C.R. at 985.

Course of Proceedings: Antitrust claims dismissed for lack of standing; motions for summary judgment as to all other claims.

Trial Court: 67th District Court, Tarrant County
Hon. Don Cosby, presiding

Parties in the Trial Court: Plaintiff:
Velma Ann Myles
Defendants:
XTO Energy, Inc., Chesapeake Exploration Company, LLC, Vantage Energy, LLC, Titan Operating, LLC, Quicksilver Resources, Inc., Keystone Exploration, Ltd., Carrizo Oil & Gas, Inc., Trinity East Energy, LLC, Permian Land Company, a Division of Devonian Enterprises, Inc., Fred W. Jones, Individually and/or d/b/a Devonian Enterprises, Inc., Dale Property Services, LLC, The Caffey Group, LLC, Four Sevens Energy Co., LLC, Bryson Kuba, LP, Llano Operating, Corp., and Cheaha Land Services, LLC

Trial Court Disposition: Plea to the jurisdiction granted as to antitrust claim, My.C.R. at 414; motions for summary judgment granted on all other claims, My.C.R. at 1104, 1122.

ISSUES PRESENTED

1. Is there a genuine issue of material fact as to whether there was an enforceable contract between SEACTX and XTO?
2. Is there a genuine issue of material facts as to whether Appellants were third-party beneficiaries of the contract between SEACTX and XTO?
3. Does the statute of frauds even apply to the agreement between SEACTX and XTO?
4. Is there a genuine issue of material fact as to whether SEACTX fully performed its agreement with XTO, taking that agreement out of the statute of frauds?
5. Is there a genuine issue of material fact as to whether both SEACTX and XTO partially performed the contract between them, taking the agreement out of the statute of frauds?
6. Is there a genuine issue of material fact as to whether XTO is estopped to assert the statute of frauds?
7. Is there a genuine issue of material fact as to whether Appellants are entitled to specific performance or benefit of the bargain damages for XTO's breach of its contract with SEACTX?
8. Are there genuine issues of material fact on each of the elements of Appellants' claim for the independent tort of promissory estoppel?
9. Is there a genuine issue of material fact on each of the elements of Appellants' claim of negligent misrepresentation?

10. Is there a genuine issue of material fact as to whether Eastern Express' property is in SEACTX?

11. As potential sellers of mineral interest estates, do Appellants have standing to bring a claim under the Texas Free Enterprise & Antitrust Act?

STATEMENT OF FACTS

Attempting to obtain oil and gas leases in an urban area, such as the Barnett Shale, where there may be four or five lots owned by different people in a single acre, posed problems which one experienced oil and gas man described as unique in his 30 years of experience. My.C.R. at 865, 869³. These consolidated cases involve landowners in southeast Arlington, in an area that came to be known as the South East Arlington Communities of Texas (“SEACTX”). Numerous gas companies, their land men and brokers, were out in the neighborhoods seeking to obtain leases from property owners. The competition became quite heated. Fred Jones of Permian, XTO’s “broker,” described it as a “leasing frenzy.” My.C.R. at 864. Sherman Young of XTO described the competition as “frothy hot” in the summer of 2008. My.C.R. at 849. There was competition for leases throughout the relevant time period. My.C.R. at 813, 827, 829, 867.

SEACTX is an unincorporated association that had its origins beginning in January 2008. My.C.R. at 591. It was comprised of homeowners, homeowner’s associations, and businesses that came together “to negotiate the best possible oil and gas lease for all participating members.” *Id.* Linda Razzano, the lead negotiator for SEACTX, believed that SEACTX could get the gas companies to make proposals that

³ Most of the summary judgment evidence is contained in the Clerk’s Record in the *Myles* case, and was incorporated by reference in the other two cases, without objection. E.E.C.R. at 212; Ma.C.R. at 579, 621, 669, 716.

offered protections to the homeowners and which offered the best deals. *Id.* SEACTX held informational meetings in the neighborhoods, posted flyers, and walked the neighborhoods. My.C.R. at 592-93. During this period in the spring of 2008, other neighborhoods and subdivisions were added to the coalition and eventually the name of the group coalesced as Southeast Arlington Communities of Texas. My.C.R. at 593. “It was truly a community effort.” *Id.*

A negotiating committee was formed, comprised of ten people elected from the steering committee, and one representative from each community. My.C.R. at 594. After a call from the Caffey Group asking about leasing in SEACTX, the members of the negotiating committee were immediately elected. My.C.R. at 595.

Again, volunteers walked the streets, “having one neighbor inform the other about our plan to unite forces for the good of the community.” *Id.* Over 3,500 flyers were distributed throughout the neighborhoods. *Id.* An announcement was posted on the SEACTX website inviting gas companies to submit bids for the SEACTX area. *Id.* Letters were sent to gas companies known to be active in the area, asking for those companies to send proposals, electronically, to SEACTX. My.C.R. at 597. At least three gas companies responded with terms of offers, including XTO Energy, Inc., Dale Property Services, LLC on behalf of Chesapeake Exploration Co., LLC and Antero. My.C.R. at 598. Ms. Razzano told each of these three companies about the proposal from the others “making it clear that there were multiple offers on the table.” *Id.* “We wanted the gas companies to understand that our endorsement was necessary if they

expected to lease large numbers of landowners in SEACTX. We explained that we were able to mobilize the masses in favor of one company but only if that company met our terms and worked with us in the signing phase once the terms were agreed on.” My.C.R. at 597-98.

As none of these companies had met the terms set out on the SEACTX website, SEACTX amended its terms and asked each company to resubmit its bid, again electronically. My.C.R. at 598. Sherman Young, on behalf of XTO, responded asking if SEACTX wanted to use a “community lease” or “individual lease.” *Id.* Ms. Razzano responded that this was not a community lease “since each homeowner had the right to lease or not lease, but it was a lease that SEACTX was negotiating for the benefit of each of its members.” *Id.*

On April 13, 2008, SEACTX notified XTO that the negotiating committee had unanimously agreed to accept the proposal from XTO, including the terms set out in Mr. Young’s email of April 9, 2008. *Id.* Win Ryan of XTO described these as the “essential financial terms” of the agreement. My.C.R. at 410. These terms included the amount of the lease bonus, the primary term, the royalty, etc. *Id.* Razzano and Young then exchanged emails concerning the actual language of the proposed lease to be offered to the SEACTX homeowners. My.C.R. at 598-99. During this exchange, XTO was again specifically told that all correspondence had to be sent by email. My.C.R. at 599. XTO also asked for a list of the current homeowner’s associations and subdivisions that were

included within SEACTX. My.C.R. at 599. Razzano provided a list of almost fifty, noting that other groups were interested in joining. *Id.*

On April 24, 2008, XTO and SEACTX agreed on the terms of the form lease to be used. *Id.* SEACTX sent an email announcement to its members informing them of the deal, and telling them not to mistakenly sign with anyone but XTO. *Id.* This announcement was sent to Sherman Young the same day. *Id.* He never objected to any of the language in this announcement. My.C.R. at 599-600. On April 28, 2008, XTO provided SEACTX with the revised lease form containing the final changes that had been agreed to on April 24, 2008. My.C.R. at 600. XTO told SEACTX that it could put the contact information for its broker, Permian Land Company, on the SEACTX website. My.C.R. at 741.

Even after the announcement of the SEACTX and XTO deal, other gas companies continued to try to obtain leases from SEACTX homeowners. My.C.R. at 849-50. Both SEACTX and XTO knew this was going to happen. My.C.R. at 882. It continued throughout the leasing, up until the time XTO breached its agreement on October 15, 2008. My.C.R. at 827, 829, 842. Throughout all of this, XTO never questioned SEACTX's authority to negotiate on behalf of homeowners in SEACTX. My.C.R. at 600.

XTO hired Permian to perform services related to the signing process. My.C.R. at 601. XTO admitted that Permian's involvement was not necessary "until the deal was done with SEACTX." My.C.R. at 830. Fred Jones of Permian agreed. My.C.R. at 865.

As the signing period progressed, concerns were raised about whether XTO was moving fast enough. My.C.R. at 892. Sherman Young of XTO explained some of the complications and that XTO did not want to “hurry up” the critical steps. My.C.R. at 891. He reassured SEACTX that XTO was “committed to doing this leasing project right” and “until everyone who is interested in executing a lease with XTO has been contacted and leased.” My.C.R. at 891. On June 6, 2008, Jack Huxel of Permian sent SEACTX an email containing an announcement from XTO about the leasing issues. My.C.R. at 894. “XTO continues to offer our SEACTX lease proposal to all those remaining unleased tracts, that were part of the original SEACTX group, including those unleased tracts and subdivisions that have been heavily leased by competitors.” *Id.* In forwarding this to SEACTX to distribute to its members, Mr. Huxel stated as follows: “Sorry for the misunderstanding and as I thought XTO will work with everyone in your group. It will just take some time to get to everyone. Thank you for working so hard for us and your group.” *Id.*

Just a few days later Permian again asked one of the leaders of SEACTX to send another email blast asking people not to come to signing events until they were told to do so. My.C.R. at 897. “This is only the beginning and that no one will be left out.” *Id.* As late as October 4, 2008, eleven days before XTO reneged on its promises, Huxel made the following promise: “We will be in the area for a 6 more months picking up straglers[sic].” My.C.R. at 901. On October 8, 2008, just a week before XTO breached

its agreement with SEACTX, Huxel was telling SEACTX leaders “I can assure you that no one will go without a lease within seactx.” My.C.R. at 903.

The purpose of SEACTX was to present the gas companies with a united front, making them realize that in order to successfully lease in southeast Arlington, they would need the endorsement of SEACTX. “I was confident that we could honestly tell the gas companies that we would strongly endorse the company we chose and we would mobilize the entire community behind us once a suitable company was chosen.” My.C.R. at 594. “Our continued presence and involvement increased community confidence, thereby further enhancing our bargaining power and negotiating leverage.” My.C.R. at 593.

It was our desire to join forces with our neighbors, to become a massive group of neighborhoods who could use our numbers to command greater lease terms than any individual could obtain on their own. Volunteers walked the streets, one neighbor informed the other about our plan to unite forces for the good of the community. We informed the community about the ‘many landmen snooping around.’ We assured our neighbors they could count on us to negotiate a good, neighborhood-friendly lease, and we agreed to help them avoid signing a lease from any company other than the one we would eventually endorse.

My.C.R. at 595. Mass emails were sent, over 3,500 flyers distributed and a website created. *Id.* “We wanted the gas companies to understand that our endorsement was necessary if they expected to lease large numbers of landowners in SEACTX. We explained that we were able to mobilize the masses in favor of one company but only if

that company met our terms and worked with us in the signing phase once the terms were agreed upon.” My.C.R. at 597-98.

“I always made it clear to Mr. Young that SEACTX was a cohesive group that agreed to work with XTO and its members would endorse XTO in the XTO lease form.” My.C.R. at 600. “Mr. Young told me that these assurances were important because XTO wanted to work with a group that would endorse one specific company with one specific lease.” *Id.* In one of those email blasts to the residents of southeast Arlington, SEACTX told its members as follows:

Sign nothing unless you hear from us on the website or by personal email, or phone call. You should know your street rep, or neighborhood organizer, or one of the SEAC organizers. If you don't see us, it's not our contract. We have committed to be with you until the end. Don't be fooled by the landmen. You will be called to a signing party at a specific location at a specific time to sign the lease we agree upon when the time comes. It won't be at their office, or on your front porch, and even if it's a flyer saying signing party at ABC location, if we didn't contact you, it isn't our lease. God bless, Jalise Middleton

My.C.R. at 684-85. The announcement of the XTO deal, which was sent to XTO, who voiced no objection to the announcement's language, stated as follows:

Now that we have secured this deal, the landmen will no doubt come back into our neighborhoods. They will try, as they always do, to get you to sign with them. They may go door to door, claiming that they are representatives of our group. That is false. We will hold signing parties at an off-site location; we will not come to your door telling you to sign the lease. If you receive anything in the mail, please check with your street representative, neighborhood

spokesperson, or the SEACTX website first to confirm if we sent anything out; it may be a ruse.

My.C.R. at 739.

“SEACTX leadership and members were capable of mobilizing the SEACTX neighborhoods to support the XTO deal and to attend signing events. We were successful in everything we agreed to do up until XTO decided to back out.” My.C.R. at 602.

As a practical matter, XTO acknowledges that it had to deal with these neighborhood groups. My.C.R. at 869. It knew that other companies were trying to lease in this area during this period. My.C.R. at 849-50.

And as Ms. Razzano promised, SEACTX was successful. Ms. Myles repeatedly stated, under aggressive, hostile cross-examination, that she believed SEACTX was negotiating on her behalf. My.C.R. at 515-518. Otherwise, she would have looked into other offers. My.C.R. at 924. Mr. Chau, on behalf of Eastern Express, even turned down a higher monetary offer from another gas company, because of his belief that SEACTX was looking out for his neighborhood’s best interests. My.C.R. at 937.

XTO performed under its agreement with SEACTX for months. For XTO, its deal with SEACTX was a success. My.C.R. at 839. It leased over 1,000 acres in SEACTX. My.C.R. at 812, 835. This amounts to over 4,000 individual tracts. My.C.R. at 835.

On October 15, 2008, XTO breached its agreement with SEACTX.

SUMMARY OF THE ARGUMENT

XTO and SEACTX entered into a contract regarding mineral leases in southeast Arlington. SEACTX agreed to endorse XTO, as the natural gas development company of choice for that area, and to assist XTO in obtaining mineral leases from landowners within the geographic boundaries of SEACTX. In exchange, XTO agreed to the financial terms that would be offered, the lease form that would be used, and that it would give the opportunity to sign a lease to anyone within SEACTX who wished to take advantage of the opportunity. For months, SEACTX and XTO operated under this agreement. SEACTX endorsed XTO, assisted in getting the word out to the neighborhoods and organized signing events. XTO obtained over four thousand leases from members of SEACTX, leasing over a thousand acres of land in southeast Arlington. During this time, XTO repeatedly represented to Appellants, SEACTX, and everyone else in SEACTX's area, that everyone within SEACTX would be given the opportunity to lease under the agreed upon terms.

XTO breached this contract. Appellants were the necessary, intended beneficiaries of this agreement. As such, they can maintain an action for breach of contract.

The agreement between SEACTX and XTO does not transfer any interest, of any type, in real property. Therefore, the statute of frauds does not apply. In any event, the doctrines of promissory estoppel, full performance, and part performance prevent XTO from relying on the statute of frauds.

Appellants' promissory estoppel and negligent misrepresentation claims are not barred because of the type of damages sought. In addition to specific performance and benefit of the bargain damages, and in the alternative, Appellants seek reliance damages. The evidence is undisputed that during the period in which XTO was making its representations, other gas companies were actively seeking to lease in the area on financial terms substantially similar to XTO but that these Appellants, in reliance on XTO's representations, did not accept or seek out these other opportunities. After XTO breached, the summary judgment evidence is undisputed that such offers were either not available at all, or at a much reduced financial benefit to the mineral estate owners. The only summary judgment evidence is that this reliance was reasonable and substantial and based solely on XTO's representations.

Eastern Express is within SEACTX. XTO's reliance on an email from one person at SEACTX, incorrectly stating that Eastern Express's property was not within SEACTX, is misplaced.

Appellants' have standing to assert claims under the Texas Free Enterprise & Antitrust Act as sellers of interests in their mineral estates. The sole case upon which Appellees relied is based on a misunderstanding of cases interpreting the federal act. A seller has standing to bring claims for antitrust violations.

ARGUMENT

I. INTRODUCTION.

Obtaining gas leases in the Barnett Shale presented new and unusual challenges for gas companies such as Appellee XTO Energy, Inc. (“XTO”). Never before had the gas industry had to deal with leasing in an urban environment, where a single acre might be owned by five or more land owners. Unincorporated associations, such as SEACTX, that could mobilize multiple neighborhoods, endorse a particular deal with a specific gas company, proved to be a blessing to the gas companies. Groups like SEACTX allowed a single company to gain a dramatic competitive advantage over competitors, by endorsing and assisting the gas company with which the association reached an agreement. This allowed one company to sign up hundreds, if not thousands, of mineral estate owners, based on a single deal.

That is just what happened in this case. XTO and SEACTX reached an agreement. SEACTX endorsed XTO and assisted it in signing up over four thousand land owners, covering over a thousand acres of southeast Arlington. Despite numerous representations made to SEACTX, and directly to the landowners within SEACTX, that everyone would get the opportunity to lease who wanted to, XTO, without advance warning or notice, breached its agreement and refused to offer the agreed upon lease to these Appellants, and hundreds of other landowners in southeast Arlington.

In the trial court, XTO and its broker, Permian Land Company, a division of Devonian Enterprises, Inc. and Fred Jones, individually and/or d/b/a Devonian

Enterprises, Inc. (the “Permian Defendants”), moved for summary judgment on each and every element of each and every cause of action asserted. But the thrust of the argument made was that any such agreements needed to comply with the statute of frauds, did not comply, and that none of the defenses to the statute of frauds were applicable. The attendant tort claims, promissory estoppel and negligent misrepresentations, allegedly failed because they were supposedly based on an agreement which does not meet the statute of frauds. The trial court granted summary judgment on all grounds.

The trial court also dismissed the antitrust claim brought against XTO, the Permian Defendants, and others active in leasing in the Barnett Shale. Despite allegations of price fixing among these entities, the trial court accepted the argument that a seller of goods or services has no standing to assert a claim under the Texas Free Enterprise & Antitrust Act. That legal conclusion is simply incorrect.

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENTS⁴.

This Court is familiar with the well-established standard for a traditional motion for summary judgment. The moving party bears the burden of proving that no material fact issue exists and it is entitled to judgment as a matter of law. *Jacobson v. DP Partners Ltd. Partnership*, 245 S.W.3d 102, 106 (Tex. App.—Dallas, 2008, no pet.); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In this context, all evidence must be viewed in the light most favorable to the non-movant, with

⁴ All of the issues, except the last issue on the plea to the jurisdiction regarding standing, are based on this standard.

all conflicts in evidence disregarded and evidence supporting the position of non-movant accepted as true. *Nixon*, 690 S.W.2d at 548-49. All doubts as to the existence of a genuine issue of material fact are resolved in favor of the non-movant and every reasonable inference must be indulged in the non-movant's favor. *Jacobson*, 245 S.W.3d at 106; *Nixon*, 690 S.W.2d at 548-49. In order to prevail on a motion for summary judgment Defendant bears the burden to conclusively establish all elements of an affirmative defense to the plaintiff's claim. *Garza v. CTX Mortg. Co., LLC*, 285 S.W.3d 919, 922 (Tex.App.—Dallas 2009, no pet.); *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003).

No evidence motions for summary judgment, like a traditional motion, require the court to review the evidence in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). If there is more than a scintilla of probative evidence raising a general issue of material fact, the no evidence summary judgment is not proper. *Moore v. K-Mart Corp.*, 981 S.W.2d 266, 269 (Tex.App.—San Antonio 1998, pet. denied).

III. THERE WAS A CONTRACT BETWEEN SEACTX AND XTO.

In *City of The Colony v. North Texas Municipal Water District*, 272 S.W.3d 699, 720 (Tex.App.—Fort Worth 2008, pet. dism'd), this Court succinctly summarized the law regarding contract formation as follows:

Parties enter into a binding contract when the following elements exist: an offer; an acceptance in strict compliance with the terms of the offer; a meeting of the minds; each party's consent to the terms; and execution and delivery of the contract with the intent that it be mutual and binding. *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App.—San Antonio 1999, pet. denied). "Meeting of the minds" describes the mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract. *Weynand v. Weynand*, 990 S.W.2d 843, 846 (Tex. App. —Dallas 1999, pet. denied). Mutual assent, concerning material, essential terms, is a prerequisite to formation of a binding, enforceable contract. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). Parties, however, may agree to the material terms of a contract but leave other matters open for later negotiation; it is only when an essential term is left open for future negotiation that no binding contract exists. *Kelly v. Rio Grande Computerland Group*, 128 S.W.3d 759, 766 (Tex. App. —El Paso 2004, no pet.); *Komet v. Graves*, 40 S.W.3d 596, 602 (Tex. App. —San Antonio 2001, no pet.). The determination of whether there is a meeting of the minds, and thus offer and acceptance, is based upon objective standards of what the parties said and did and not on their subjective state of mind. *Copeland*, 3 S.W.3d at 604.

A contract, to be enforceable, must be sufficiently definite in its material terms so as to enable the court to ascertain the parties' intentions. *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). What terms are material is determined on a case by case basis. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

There can be no question that SEACTX and XTO reached an agreement. On April 24, 2008, Sherman Young emailed Linda Razzano "Do I assume that we have

agreed on everything?” My.C.R. at 752, 758.⁵ That same day Linda Razzano responded as follows:

Dear Sherman,

We will need the finalized lease back at your earliest. Over a hundred people attended the Steering Committee meeting; the vote to proceed was unanimous. They already have their marching orders to lock their streets – HOAs – neighborhoods down and to be prepared for the onslaught.

I’m glad we are able to work this through!

My.C.R. at 764. Attached to this email was a copy of the announcement that she sent to the people in SEACTX (addressed to “Dear Friends and Neighbors”): “It is our sincere pleasure to announce that the Steering Committee has unanimously approved the deal with XTO Energy.” *Id.* She also warned that having “secured this deal,” people should be wary of other companies trying to obtain leases. *Id.* Sherman Young never objected to this announcement. My.C.R. at 599-600.

XTO, and its broker, Permian, repeatedly referred to the SEACTX deal. *See, e.g.*, My.C.R. at 830, 865, 870. XTO admitted that the announcement email contained the “essential financial terms.” My.C.R. at 810.

In the court below, XTO argued that there was no mutuality of obligation between SEACTX and XTO, i.e., that in exchange for XTO agreeing to the financial terms, and

⁵ The trial court sustained an objection to this email as it appears at My.C.R. at 752 on the grounds that it was inadmissible parole evidence. My.C.R. at 1084 (number 52). But the same email is contained in Exhibit 1PP, for which the objection was overruled. *Id.* (number 51). It is therefore before this Court for all purposes.

the form of the lease to be offered homeowners in SEACTX, XTO received nothing in return. But the summary judgment evidence shows otherwise. SEACTX agreed to endorse XTO to its members and to discourage them from signing with XTO's competitors. My.C.R. at 599-600. The announcement itself, to "Dear Friends and Neighbors" was part of the consideration for XTO's agreement. My.C.R. at 738-39. Based on SEACTX's endorsement and cooperation, XTO obtained 4,000 leases covering over 1,000 acres. My.C.R. at 812, 835, 839.

XTO also argued that the contract between SEACTX and XTO was "illusory," because SEACTX could not and did not purport to bind any individual homeowner/landowner. XTO knew up front that any homeowner had the right to lease or not lease. My.C.R. at 598. But SEACTX's endorsement was a thing of value in itself. XTO obtained 4,000 leases. Just because everyone who sees a Nike ad does not buy their shoes, does not mean Michael Jordan's endorsement is of no value. Eastern Express's rejection of a higher offer in reliance on SEACTX's endorsement shows just how valuable it was. My.C.R. at 937.

IV. APPELLANTS WERE THIRD-PARTY BENEFICIARIES OF THE SEACTX AND XTO CONTRACT.

XTO argued that these Appellants are not intended third-party beneficiaries of the agreement between SEACTX and XTO. Who then were the beneficiaries of this agreement? SEACTX had no property to lease.

Moreover, the summary judgment record clearly shows that XTO knew that SEACTX was negotiating on behalf of its members.

On April 7, 2008, Sherman Young sent an email asking if SEACTX wanted to use a 'community lease' or 'individual lease.' I responded that this was not a community lease since each homeowner had the right to lease or not lease, **but it was a lease that SEACTX was negotiating for the benefit of each of its members.**

My.C.R. at 598 (emphasis added). Furthermore, the lease form agreed to by XTO specifically acknowledges SEACTX's role.

The South East Arlington Communities of Texas is a group of Arlington residents consisting of homeowners in Colson Estates, Hunter's Trail, Eden Creek HOA, Eden Creek/Emma Court, Brookmeadows, Brownleigh, Ridgecrest, and other subdivisions. The group's purpose is to unite in hopes of negotiating the best terms possible with respect to an oil and gas lease with Lessee.

My.C.R. at 749.

"A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." *See In re Citgo*, 248 S.W.3d 769, 775-776 (Tex. 2008). A third-party beneficiary may enforce a contract to which it is not a party, as if it were a party, if the parties to the contract intended to secure a benefit for that third party and entered into the contract directly for the third party's benefit. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). The intention of the contracting parties is controlling. *See Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975). A beneficiary is not required to

show that the parties executed the contract solely for its benefit. *See Stine v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002).

To qualify as one for whose benefit a contract was made, the third party must show that he or she is either a donee or creditor beneficiary of, and not one who is benefited only incidentally by the performance of, the contract. *Id.* One is a donee beneficiary if the performance promised will, when rendered, come to him or her as a pure donation. *Id.* A person is a donee beneficiary only if a donative intent expressly or impliedly appears in the contract. *See Allan v. Nersesova*, 307 S.W.3d 564, 571 (Tex.App.—Dallas 2010, no pet.). If, on the other hand, that performance will come to him in satisfaction of a legal duty owed to him by the promisee, he is a creditor beneficiary. *Id.* This duty may be an "indebtedness, contractual obligation or other legally enforceable commitment" owed to the third party by the promisee (i.e. SEACTX). *MCI Telecommunications Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 651 (Tex. 1999)

The Texas Supreme Court relied on the Restatement (Second) of Contracts when analyzing third-party beneficiary issues, and specifically, the issue of donee beneficiaries. *See, e.g., Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002). Section 302 provides an instructive discussion about donee beneficiaries, including illustrations of situations where a party is a third-party, donee beneficiary:

c. Gift promise. Where the promised performance is not paid for by the recipient, discharges no right that he has against anyone, and is apparently designed to benefit him, the promise is often referred to as a "gift promise."

The beneficiary of such a promise is often referred to as a "donee beneficiary"; he is an intended beneficiary under Subsection (1)(b)[*donee beneficiary subsection*]. The contract need not provide that performance is to be rendered directly to the beneficiary: a gift may be made to the beneficiary, for example, by payment of his debt. Nor is any contact or communication with the beneficiary essential.

Illustrations:

4. A, an insurance company, promises B in a policy of insurance to pay \$ 10,000 on B's death to C, B's wife. C is an intended beneficiary under Subsection (1)(b)[*donee beneficiary subsection*].

The agreement in this case is strikingly similar to Illustration No. 4. In the illustration, the husband pays insurance premiums to the insurance company, who promises to pay life insurance proceeds to the husband's wife on his death. The husband is not legally obligated to purchase the policy for his wife. The policy is purely a gift to his wife. In this case, SEACTX stands in the shoes of the husband. XTO stands in the shoes of the insurance company. And, the Appellants stand in the shoes of the wife. SEACTX promised to give its endorsement, communication and coordination (analogous to the insurance premiums paid by the husband) to XTO. XTO wanted SEACTX's endorsement. The endorsement was valuable to XTO. In exchange for that consideration, SEACTX required that XTO promise to extend to all homeowners of SEACTX the opportunity to accept or reject the SEACTX/XTO deal (analogous to the payment of insurance proceeds). SEACTX was under no legal obligation to obtain the opportunity for homeowners in SEACTX. The opportunity was a pure gift to them.

In its supplemental motions, XTO argued that there could be no third-party beneficiary status for a person in privity with one of the contracting parties. XTO argued

that testimony by Ms. Myles, that SEACTX represented her, meant that she was in privity with SEACTX. XTO places much too much weight on this testimony. Ms. Myles acknowledged that SEACTX negotiated for her, but that she was not obligated to sign the SEACTX/XTO lease. My.C.R. at 527. There is no evidence in the summary judgment record that SEACTX had the ability to bind Ms. Myles as an agent. Ms. Myles is not a lawyer. My.C.R. at 515. There is no indication or testimony that she was using the term “represent” to have any specific legal meaning. XTO did not ask her what she meant or whether there was any degree of control by Velma Myles over SEACTX, such as to make it her agent. This point is wholly without merit.

V. THE STATUTE OF FRAUDS DOES NOT APPLY TO THE AGREEMENT BETWEEN SEACTX AND XTO.

The agreement between SEACTX and XTO is not hard to understand. SEACTX agreed to endorse XTO as the gas leasing company of choice for the SEACTX geographical area and to assist XTO in marshalling the neighborhoods, to get those who wanted to accept XTO’s offer. XTO promised to offer the terms agreed upon, on the lease form agreed upon, to those people within SEACTX who wished to lease their minerals. SEACTX did not lease any minerals to XTO. SEACTX did not promise that anyone would accept the offer. The agreement was simply that an opportunity would be made available to mineral interest owners in exchange for SEACTX’s endorsement. The portion of the statute of frauds upon which XTO relies states that it “applies to...a

contract for the sale of real estate...” Tex. Bus. & Comm. Code §26.01(b)(4)(West 2010).

The agreement between SEACTX and XTO is not a contract for the sale of real estate.

There is nothing ambiguous about the phrase “a contract for the sale of real estate.” When a statute is clear and unambiguous, the intent of the legislature must be found in the plain and common meaning of the words and terms used. *In Re K.L.V.*, 109 S.W.3d 61, 65 (Tex.App.—Fort Worth 2003, pet. denied). The words used in a statute have their ordinary meaning unless the statute defines them differently. *Id.*

The agreement between SEACTX and XTO does not transfer title in any sense, to any portion of real estate. XTO was not offering SEACTX any money or royalty interest for its endorsement. No title, legal, equitable, or otherwise, was changing hands. The legislature could have said that the statute of frauds applied to any contract in any way relating to the sale of real estate. It did not.

Where the main purpose of a contract is not the transfer of an interest in real estate, i.e., the sale of real estate, the statute of frauds does not apply even though a real estate transaction may be incidentally involved. For example in *Mangum v. Turner*, 255 S.W.3d 223, 226-27 (Tex.App.—Waco 2008, pet. denied), the Court held that an oral settlement agreement of a lawsuit trying to rescind three deeds, which undeniably transferred interest in real property, did not implicate the statute of frauds. The court noted that the statute of frauds generally applies when the performance of the contract will transfer property in land. *Id.* It does not apply when a real estate transaction is

merely incidentally involved. *Id. See Bridewell v. Pritchett*, 526 S.W.2d 956, 958 (Tex.Civ.App.—Fort Worth 1978, writ ref'd n.r.e.).

None of the cases cited by XTO in the court below are applicable. None involve an even remotely similar situation. The cases involving real estate upon which they rely, in each and every instance, involve the transfer of an interest in real estate. For example, in *Hitchcock Properties, Inc. v. Levering*, 776 S.W.2d 236 (Tex.App.—Houston [1st Dist.] 1989, writ denied), the court held that an option to purchase real property was a contract conveying an interest in real property, because an option does convey an equitable interest in real estate. The statute of frauds does not state that it only applies to legal interests. Therefore an equitable interest is covered as well. 776 S.W.2d at 238-239. Clearly, there is no interest, equitable or legal or otherwise, being transferred by the agreement between XTO and SEACTX.

The purpose of the statute of frauds is to prevent perjury and to ensure certainty in land title. As to perjury, there is no serious dispute as to what the agreement between SEACTX and XTO was. XTO does not deny that a “deal” was reached, but rather argues that it was unenforceable or too vague to constitute a contract. It does not deny that it performed under the contract for months and obtained over 4,000 leases. Perjury is not a factor here.

Nor does enforcement of the SEACTX and XTO agreement implicate title to property. No one is claiming that any one has an interest in any property that is not as currently reflected in the Tarrant County deed records. No one is saying, as in *Hitchcock*

Properties, that there exists an equitable interest in real estate that is not reflected in the deed records. For XTO to live up to its promise to SEACTX, it will have to offer the same lease, on the same terms as it did to those other 4,000 landowners, to these Appellants. Only after that point, once XTO has lived up to its promise, will “a contract for the sale of real estate” be involved. Of course, once XTO lives up to its promise, a signed contract meeting the statute of frauds, transferring an interest in real estate, will be signed.

VI. SEACTX FULLY PERFORMED ITS AGREEMENT WITH XTO, TAKING IT OUT OF THE STATUTE OF FRAUDS.

The statute of frauds may not be raised as a defense by a party that accepted the benefits of a party that has fully performed. *Estate of Kaiser v. Gifford*, 692 S.W.2d 525, 526 (Tex. App. —Houston [1st Dist.] 1985, writ ref’d n.r.e.)(citing to *Williston on Contracts*, which states, “a great majority of jurisdictions agree with the rule that full performance by one party to an oral contract removes the contract from the prohibitions of the Statute; see 3 S. Williston, A Treatise on the Law of Contracts, sec. 504 (3d ed. 1970 and Supp. 1983)). The Dallas Court of Appeals recently rejected the defense of the statute of frauds by stating that:

The rationale of the full performance doctrine is that when one party, in reasonable reliance on the contract, performs all of its obligations, it would be unfair to allow the other party to accept the benefits under the contract but to avoid its reciprocal obligation by asserting the Statute of Frauds.

Davis v. Insurtek, 2010 WL 5395668, p. 3-4 (Tex. App. —Dallas 2010, no pet.)

Equity will not permit a party to accept the benefit of another's performance and then claim there is no enforceable agreement. "When one party fully performs a contract, the statute of frauds may be unavailable to the second party if he knowingly accepts the benefits and partly performs." *Callihan v. Walsh*, 49 S.W.2d 945, 948 (Tex.App.—San Antonio 1932, writ ref'd). "The doctrine is well established that where either party, in reliance upon the verbal promise of the other, has been induced to do or forbear to do any act, and thereby his position has been so changed for the worse that he would defraud it by a failure to carry out the contract, equity will enforce a performance." *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927).

It is indisputable that SEACTX fully performed its obligations. The announcement of the deal itself to homeowners in SEACTX, i.e., SEACTX's endorsement, may amount to full performance. "It is our sincere pleasure to announce that the Steering Committee has unanimously approved a deal with XTO Energy." My.C.R. at 764. "We will host signing parties at an offsite location; we will not come door to door telling you to sign the lease. If you receive anything in the mail please check with your street representative, neighborhood spokesperson, or the SEACTX website to confirm if we sent anything out . . . it may be a ruse." *Id.* Remember, this announcement was shown to Sherman Young immediately after it was sent and he offered no objection. My.C.R. at 599-600.

In forwarding this announcement to Mr. Young, Ms. Razzano told him that SEACTX was ready to assist in marshalling their members. "They already have their

marching orders to lock their streets / HOAs / Neighborhoods down and be prepared for the onslaught.” My.C.R. at 764. Appellants contend that SEACTX agreed to do more than just endorse XTO, also agreeing to assist in hosting the signing parties, making the arrangements and getting the lease out. “We then focused on presenting the lease to thousands of individual homeowners. SEACTX agreed from the onset to take responsibility for most of the procedures that would be employed for the signing phase.” My.C.R. at 600. “SEACTX agreed to help XTO by organizing signing events, contacting the homeowners, and actively trying to dissuade homeowners from signing with other gas companies.” *Id.* XTO admits that it was SEACTX’s obligation to get its people to the signing parties. My.C.R. at 871.

And SEACTX did just that. “SEACTX leadership and its members were capable of mobilizing neighborhoods to support the XTO deal and to attend signing events. We were successful in everything we agreed to do right up until XTO decided to back out.” My.C.R. at 602.

The trial court inexplicably sustained an objection to that testimony on the grounds of the parole evidence rule. My.C.R. at 1082. The parole evidence rule prevents a party from offering extrinsic evidence to vary or contradict the terms of an integrated written contract. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981).

XTO’s parole evidence objection, therefore, presupposes that there was a written contract between XTO and SEACTX. Otherwise, a parole evidence objection has no basis. But it was XTO’s position in the court below that there was no contract at all between XTO and

SEACTX or, in the alternative, in the event there was a contract, that it violated the statute of frauds because it was **not** in writing! The objections were without merit and the trial court erred in sustaining them.

There is undeniable, undisputed evidence, that XTO sought and obtained SEACTX's endorsement. If, as XTO's parole evidence objection presupposes, that was all of the consideration given by SEACTX, then it is indisputable that SEACTX fully performed. If, as Ms. Razzano testified, SEACTX agreed to assist, then the evidence is also indisputable that SEACTX fully performed.

It is also beyond question that XTO partially performed and benefited from SEACTX's performance. Mr. Young described the SEACTX project as a success for XTO. My.C.R. at 839. XTO leased over a thousand acres of land in SEACTX. My.C.R. at 812, 835. This amounted to over 4,000 individual leases. My.C.R. at 835.

Accordingly, the statute of frauds, even if it applies to this type of agreement, does not apply to this case because of SEACTX's full performance.

VII. PARTIAL PERFORMANCE BY SEACTX TAKES THE AGREEMENT OUT OF THE STATUTE OF FRAUDS.

As discussed above, SEACTX did everything it promised to do pursuant to the agreement with XTO. It endorsed XTO. It announced that endorsement to its members. It helped organize and host the signing events. It helped XTO, in Mr. Young's terminology "beat back the competition." My.C.R. at 882.

Why did SEACTX do these things? No explanation has been given except for the agreement with XTO. As such, these acts take the agreement out of the statute of frauds. *Francis v. Thomas*, 106 S.W.2d 257, 260 (Tex. 1937). XTO does not, and cannot, dispute that partial performance can take an agreement out of the statute of frauds, but argued that only delivery of possession to the purchaser and a detrimental change of position, for which there is no other adequate remedy, must be shown, citing the four cases discussed below. That position itself shows why the SEACTX and XTO contract is not subject to the statute of frauds. Neither party to that agreement, XTO or SEACTX, could possibly have provided for the delivery or possession of a mineral estate. The contract between SEACTX and XTO gives neither party the opportunity to deliver possession of any realty. SEACTX owns none. XTO is not selling, it is buying. The very argument that this is the law shows the contract is not subject to the statute of frauds. There is no realty at issue in that contract. The property SEACTX did have, its endorsement, was delivered. SEACTX did detrimentally rely. There is no remedy for the intended beneficiaries of the contract, except specific performance or damages.

The cases relied upon by XTO do point out that parting with possession of real property is a *typical* indicia of performance in the context of actions among buyer and sellers, but they do not stand for the proposition that parting with possession is the only way a party can perform. Indeed, the argument is just a clever sleight of hand by which XTO attempts to graft an additional requirement into the law. *Davis v. Campbell*, 524 S.W.2d 790 (Tex.Civ.App.—Dallas 1975, no writ) was reversed after remand. *Davis v.*

Campbell, 572 S.W.2d 660 (Tex. 1968). A requirement that the complaining party part with possession of his or her real property is nowhere to be found in *Preston Exploration Co. v. Chesapeake Energy Corp.*, 2010 WL 596358 (S.D. Tex. Feb. 16, 2010). The third and fourth cases XTO cited, *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.* 48 S.W.3d 865 (Tex App—Houston [14th Dist.] 2001) and *Cowden v. Bell*, 293 S.W.2d 611 (Tex. Civ. App.—San Antonio 1956), discuss what a *seller* seeking to invoke the partial performance exception may need to show—they have no application to this case. The parties to the agreement at issue here are XTO and SEACTX. SEACTX had no mineral rights to part with. The argument is a complete red herring.

SEACTX performed up until the time XTO breached the agreement. XTO fully reaped the benefits of SEACTX's performance and obtained over a thousand acres of valuable mineral rights in Arlington from over 4,000 families. Even if SEACTX's performance was not complete (which it was), partial performance removes the agreement from the statute of frauds.

Further, whether partial performance sufficient to take the contract out of the statute of frauds exists is a question of fact and summary judgment is therefore improper. *Vermont Information Processing, Inc. v. Montana Beverage Corp.*, 227 S.W.3d 846, 853 – 855 (Tex. App. —El Paso 2007, no writ). The parties' partial performance under the agreement removes it from the requirements of the statute of frauds. *Bookout v. Bookout*, 165 S.W.3d 904, 907(Tex. App—Texarkana, no pet.). The partial performance must be "unequivocally referable to the agreement and corroborative of the fact that a contract

actually was made." *Id.* Whether the performance was "unequivocally referable" is generally a question of fact. *Id.* at 908 (citing *Barbouti v. Munden*, 866 S.W.2d 288, 295 (Tex. App. —Houston [14th Dist.] 1993, writ denied)). In addition, whether the performance that has occurred is sufficient to establish the exception is a question of fact. *Id.* at 910 (citing *Fluellen v. Young*, 664 S.W.2d 776, 781 (Tex. App. —Dallas 1983, no writ)).

VIII. XTO IS ESTOPPED TO ASSERT THE STATUTE OF FRAUDS.

The doctrine of promissory estoppels bars the application of the statute of frauds when (1) a promise is made that the promisor should have expected would lead to some definite and substantial injury to the promisee; (2) that injury occurred; and (3) the court must enforce the promise to avoid that injury. *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982). XTO made numerous promises to provide the SEACTX form lease to everyone within SEACTX who wanted to sign. "XTO is committed to doing this leasing project right the first time and treating you and your SEACTX members in a professional and ethical manner until everyone who is interested in executing a lease with XTO has been contacted and leased." My.C.R. at 891. "XTO will continue to offer our SEACTX lease proposal to all those remaining unleased tracts, that were part of the original SEACTX group, including those unleased tracts in subdivisions that have been heavily leased by competitors." My.C.R. at 894. "If at all possible can you send another email out stating that if you have not received an invitation to a signing party not to come until they do. This is only the beginning and that no one will be left out." My.C.R. at 897.

“We will be in the area for at least a 6 more months picking up stragglers.” My.C.R. at 901. “I can assure you that no one will go without a least within seactx.” My.C.R. at 903. Clearly promises were made and reinforced.

And, equally clearly, XTO intended for Appellants not to sign with other gas companies based on the promise that the SEACTX lease would be made available.

Each of these Appellants relied upon those promises and did not seek out other gas companies. My.C.R. at 924, 937, 944-45; Ma.C.R. at 597, 639, 642, 687, 690, 735. In fact, Eastern Express turned down a higher monetary offer from another gas company. My.C.R. at 937. Without enforcing the contract, the injury to these Appellants cannot be remedied. XTO admits that after it breached the contract, signing bonuses and royalty provisions for mineral interest owners dropped dramatically. My.C.R. at 848. Lease signing bonuses dropped to between \$0 and \$2500. My.C.R. at 851-52. The lease forms being offered are substantially less valuable in terms of property owner protection. My.C.R. at 846-47. Quite simply, Appellants cannot now get the same deal, either in financial terms, or in terms of lease provisions protecting their homes.

In the court below, XTO argued that for the doctrine of promissory estoppel to apply, at the time the promises were made, there had to be an existing contract document, meeting the statute of frauds, in existence. As discussed below, there are several poorly reasoned Court of Appeals decisions which seem to support that position. But this Court, the Texas Supreme Court, the Restatement of the Law of Contracts section adopted by the Supreme Court, logic, equity, and common sense say otherwise.

In support of its position of the law, XTO relies on one Texas Supreme Court case (“*Moore*” *Burger, Inc., v. Phillips Petroleum Co.*, discussed below) and three Court of Appeals cases, none of which are from this Court.⁶ Notably absent was *Levine v. Loma Corp.*, 661 S.W.2d 779 (Tex. App. —Fort Worth 1983, no writ), a case that is directly on point and which contradicts XTO’s statement of the law.

In *Levine*, this Court defined the promissory estoppel exception to the statute of frauds as follows:

Before the equitable doctrine of promissory estoppel may be applied, the one relying thereon (in this case *Levine*) to avoid the consequences of the Statute of Frauds, must show first, that there was a promise to put the oral agreement into writing, and second, that the party seeking enforcement of the oral contract relied on the promise to put the agreement in writing to his detriment. **Put another way, the promise to put the oral agreement in writing must have been made by one party specifically to induce action or forbearance by the other party, and the second party must have relied on the promise in taking the action or forbearance.**

See Levine, 661 S.W.2d at 781 (*emphasis added*) citing “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972); *Cooper Petroleum Co. v. LaGloria Oil & Gas Co.*, 436 S.W.2d 889 (Tex. 1969); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965).

Clearly, the Court flatly rejected the argument that the promissory estoppel exception to

⁶ XTO relies on *Exxon Corp. v. Breezevale, Ltd.*, 82 S.W.3d 429, 438 (Tex. App.—Dallas 2002, pet. denied); *Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739, 741 (Tex. App.—Houston [14th Dist.] 1992, writ denied); and *Sommichsen v. Baylor Univ.*, 47 S.W.3d 122 (Tex. App.—Waco 2001, no pet.). These cases are based on misapplications of Texas law. In any event, at the most, these cases establish a split among Texas Courts of Appeals regarding the application of this exception to the statute of frauds, directly contrary to this Court’s opinion.

the statute of frauds applies as XTO argues, as have other Texas Courts of Appeal. *Levine* 661 S.W.2d at 781; *see also EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 268-269 (Tex. App.—Corpus Christi 1994, writ denied)(“Accordingly, promissory estoppel may apply when a party promises to sign an existing written contract that, but for lack of a signature, would satisfy the statute of frauds, **or when a party promises to sign a proposed contract that has not yet been reduced to writing but on which the parties have reached agreement concerning all material terms.**”)(*emphasis added*); *see also Cobb v. West Texas Microwave Co.*, 700 S.W.2d 615, 616-17 (Tex. App.—Austin 1985, writ ref’d n.r.e.). *Levine* is also important because this Court relied on “*Moore*” *Burger, Inc.* for its statement of the law on this issue, obviously interpreting that case differently than XTO.

XTO relied on “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). But XTO mischaracterized the holding in “*Moore*” *Burger*. First, the agreement at issue in “*Moore*” *Burger* had already been reduced to writing at the time the promise to sign that agreement was made. By virtue of that undisputed fact, there was no discussion in that case about whether a written agreement must exist at the time the promise to sign it is made. Notably, the analysis in the *Levine* case is on point because the Plaintiff in that case relied on an *oral* promise to reduce an agreement to writing. As such, it was necessary for the *Levine* court to consider that issue. Second, the “*Moore*” *Burger* court relied on the Restatement of Contracts § 178(f) in its analysis. That canon of law provides the following:

Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; *and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud. (Emphasis added).*

This provision leaves little doubt that the Supreme Court acknowledged that an oral promise to make a writing in the future that satisfies the statute of frauds can be sufficient to avoid the statute. Lastly, “*Moore*” *Burger* cited to earlier Texas Supreme Court case, *Cooper Petroleum Co. v. La Gloria Oil & Gas Co.*, 436 S.W.2d 889, 896 (Tex. 1969), another case XTO ignores.

The Texas Supreme Court established the promissory estoppel exception to the statute of frauds in *Cooper Petroleum*. That case is important for at least two reasons. First, in that case, the promise to sign a writing that would satisfy the statute of frauds was made two weeks before the writing was drafted. *Cooper Petroleum*, 436 S.W.2d at 893. The Court held that the promise supported the promissory estoppel exception to the statute of frauds. Second, as in “*Moore*” *Burger*, the Court relied on the promissory estoppel exception as stated in Section 178(f) of the Restatement of Contracts, which clearly states that promises to sign future memoranda that satisfy the statute of frauds are sufficient to avoid the statute of frauds. *Id.*

In any event, at least for the Appellants in this case, there was a writing in existence yet to be signed, which satisfied the statute of frauds. The SEACTX form lease, which XTO agreed to provide to these Appellants, contains all of the necessary terms, except the name of the mineral interest owner and the property description. But, in response to XTO's affirmative request, each of these Appellants provided XTO, through its broker Permian, a W-9 containing that information. My.C.R. at 515, 930; Ma.C.R. at 172, 312, 395, 475. A contract satisfying the statute of frauds consists of multiple writings. *Padilla v. LaFrance*, 907 S.W. 2d 454, 460 (Tex. 1995). The form lease and the W-9 contain all of the information necessary to satisfy the statute of frauds.

For Velma Myles, XTO had fully prepared a lease which included the name of the mineral interest owner and the property description. My.C.R. at 518. The only problem was that they had added the name of her ex-husband, who was not an owner, to both the lease and the check for the signing bonus. *Id.* XTO promised Ms. Myles, in person, that they would correct that error. My.C.R. at 520. XTO did not.

XTO also argues that Appellants' acts taken or forbearance was not a substantial or definite action. Then what were these forbearance and actions taken for? Why did Appellants not negotiate or seek out other gas companies? Why did Eastern Express turn down a different offer? Why did the Appellants send in W-9's, containing personal information, to Permian? The summary judgment evidence shows that this was solely in reliance on XTO's promises. There is no other explanation. This is not something the Appellants would have done otherwise.

IX. APPELLANTS ARE ENTITLED TO SPECIFIC PERFORMANCE OR BENEFIT OF THE BARGAIN DAMAGES FOR BREACH OF CONTRACT.

A. Introduction.

In the court below, XTO argued that even if Appellants are successful in establishing the defenses to the statute of frauds of partial performance⁷ or promissory estoppel, it is still entitled to summary judgment because if those defenses are established, Appellants are not entitled to specific performance or benefit of the bargain damages, and that they have no other damages.

Appellants will show this Court that if Appellants establish either defense to the statute of frauds, XTO cannot assert the statute of frauds, the breach of contract action is allowed to go forward, and so Appellants are entitled to traditional breach of contract damages including either specific performance or benefit of the bargain damages. As to both defenses, the Texas Supreme Court has specifically so ruled. Appellants will show, in the alternative, that they did raise a genuine issue of material fact as to whether they suffered reliance damages. Accordingly, XTO is not entitled to summary judgment on this theory.

B. The Defense of Partial Performance Allows Traditional Breach of Contract Damages.

Since the 19th century, Texas has allowed specific performance and benefit of the bargain damages for breach of contracts otherwise barred by the statute of frauds, based

⁷ XTO did not raise this issue as to the full performance defense to the statute of frauds.

on the doctrine of past performance. *See, e.g., Guest v. Guest*, 74 Tex. 664, 12 S.W. 831 (1889); *Morris v. Gaines*, 82 Tex. 255, 17 S.W. 538, 539 (1891)(“Where either party in reliance upon the verbal promise of the other, has been induced to do...any act, and thereby his position has been so changed for the worse that he would be defrauded by failure to carry out the contract, equity will enforce a performance.” (emphasis added)) *See also Davis v. Campbell*, 524 S.W.2d 790, 793 (Tex.Civ.App.—Dallas 1975, no writ.)

In fact, the only authority upon which XTO relies is *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 441 (Tex.App.—Dallas 2002, pet. denied). But that case only relied on cases involving promissory estoppel as a defense to the statute of frauds, and cited no authority whatsoever as to partial performance. As discussed below, those Court of Appeals cases are directly contrary to controlling Supreme Court authority. But more importantly, the court in *Breezevale* never cited any of the controlling Supreme Court authority discussed above or even its own earlier opinion in *Davis v. Campbell*.

Accordingly, if Appellants successfully establish partial performance, then partial performance takes the contract out of the statute of frauds, and Appellants are entitled to either specific performance or benefit of the bargain damages.

C. Appellants are Entitled to Traditional Breach of Contract Damages if Promissory Estoppel Prevents XTO from Asserting the Statute of Frauds.

Appellants pled “promissory estoppel” in two different ways in this case. First, they pled promissory estoppel as a defense to the application of the statute of frauds. In this sense, it is a plea in confession and avoidance to an affirmative defense. If

successful, it removes that affirmative defense from consideration in the case. But Appellants also pled promissory estoppel as a separate and distinct cause of action, as recognized by Texas law.

Unfortunately, this dual use of the term promissory estoppel has led to some confusion in the case law. As a separate and distinct tort, there is authority for the proposition that the plaintiff cannot recover traditional contract damages, such as benefit of the bargain, but can only recover reliance damages. Appellants' tort claim of promissory estoppel and their reliance damages, will be discussed.

But several Court of Appeals decisions have confused the two concepts, and have held that the limitation on damages for the tort of promissory estoppel, should for some inexplicable reason be grafted on the breach of contract claim which is allowed to go forward if the plea in confession and avoidance of promissory estoppel prevents the application of the affirmative defense of the statute of frauds. There is no logical reason for confusing the two distinct concepts of promissory estoppel and the Texas Supreme Court has not done so.

The seminal case on the tort of promissory estoppel is *Wheeler v. White*, 389 S.W.2d 93 (Tex. 1966). In *Wheeler*, the Supreme Court was faced with an allegation of breach of contract, but found that the alleged contract was not enforceable because it did not contain the essential elements of an agreement. 398 S.W.2d at 95. But the Supreme Court allowed the case to go forward on the tort of promissory estoppel. It adopted Sec. 90 Restatement of Contracts which provides as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character of the promisee in which it does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

398 S.W.2 at 96. But the Supreme Court was very specific that if the elements of Sec. 90 are established, no contract is established. “This does not create a contract were none existed before...” *Id.* Because there is no contract, contract damages are not appropriate.

[W]here there is actually no contract the promissory estoppel theory may be invoked, thereby supplying a remedy which will enable the injured party to be compensated for his foreseeable, definite and substantial reliance. Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained.

398 S.W.2d at 97. Thus, only reliance damages are allowed for the tort of promissory estoppel because there has been no proof of an existing contract. In fact, promissory estoppel is not available if there is an enforceable contract.

Promissory estoppel as a plea in confession and avoidance, in stark contrast, is based on the enforceability of a contract. In this context, promissory estoppel flows from Sec. 178 of the Restatement of Contract which provides as follows:

Though there has been no satisfaction of the Statute, an estoppel may preclude an objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a writer if defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the

representation that it was false; and a promise to make a memorandum if similarly relied upon, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

Restatement of Contracts §187, Comment F. This section, and this comment, were relied upon by the Supreme Court in “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1973). On rehearing, the Supreme Court took pains to clarify that it was basing its decision on this section and this comment. 492 S.W.2d at 940. In the court below, XTO argued that the Supreme Court in “*Moore*” *Burger* declined to determine whether breach of contract damages, or only tort damages, could be recovered. That is simply a misreading of the case, taking one sentence out of context, whether intentional or not. The entire, non-selectively quoted, portion of the opinion is as follows:

We need not, and do not, decide at this stage of the suit what relief may be granted if “*Moore*” *Burger* established the defendant’s liability in a conventional trial – whether specific performance, loss of profit damages and exemplary damages, or only reliance damages. “*Moore*” *Burger*’s petition seems primarily to allege a cause of action for fraud and deceit, but we have treated the case on this appeal, as have the parties, as strictly one for damages for breach of contract or specific performance. The nature of the relief to be granted will become important only if liability is established.

492 S.W.2d at 939-40. The Supreme Court states that “*Moore*” *Burger* alleged breach of contract, which promissory estoppel may allow to go forward, and the torts of fraud and deceit. Whether “*Moore*” *Burger* could recover breach of contract damages, or only tort damages, would depend upon which theory it prevailed upon at trial. The Supreme Court

did not state that the issue is unresolved in the law, it stated it was unresolved in that case because the court did not know upon which theory “Moore” Burger would prevail. In other words, if “Moore” Burger prevailed on its contract claim, and the statute of frauds did not prevent enforcement of the contract, it was entitled to damages for breach of contract or specific performance; if it only prevailed on its fraud and deceit claims, it would only be entitled to reliance damages.

The seminal case on promissory estoppel as a defense to the statute of frauds is *Cooper Petroleum Co. v. La Gloria Oil & Gas Co.*, 436 S.W.2d 889 (Tex. 1969). In *Cooper*, the Supreme Court held that promissory estoppel could prevent the application of the statute of frauds. “On the present record it is clear that injustice can be avoided only by enforcing the promise.” 436 S.W.2d at 896. In other words, the Supreme Court enforced the actual promise made.

Breezevale, and the other Court of Appeals cases cited therein, 82 S.W.3d at 441, simply misunderstood the distinction between promissory estoppel as a tort and promissory estoppel as a plea in confession and avoidance. They imposed doctrines applicable to tort, on a breach of contract action. This is directly contrary to the sections of the Restatement adopted by the Supreme Court of Texas and the Supreme Court’s own application of those sections.

Accordingly, summary judgment was improper on this ground.

X. APPELLANTS RAISED GENUINE ISSUES OF MATERIAL FACT ON THEIR CLAIMS FOR PROMISSORY ESTOPPEL AND NEGLIGENT MISREPRESENTATION

A. Introduction.⁸

XTO's⁹ no-evidence motions for summary judgment in this matter attacked each and every element of these claims. Therefore, each element must at least be briefly discussed, even if it means pointing out, once again, all of the representations XTO and its agents made.

But the main thrust of XTO's argument is that the claims of promissory estoppel and negligent misrepresentation do not give rise to benefit of the bargain damages if based on an agreement that does not meet the statute of frauds and that Appellants suffered no other type of reliance damages. This argument is without merit.

B. XTO made Numerous Promises to Lease Everyone in SEACTX.

The evidence that XTO promised, repeatedly, that the SEACTX offer would be made to everyone in SEACTX is not even disputed by XTO. My.C.R. at 891, 897, 901, 903. XTO asked SEACTX leaders to forward on these representations. *See, e.g.*, My.C.R. at 897. The fact that these representations were made cannot be disputed.

⁸ Appellants also pled common law fraud and statutory fraud, but are not pursuing those claims in this appeal.

⁹ These claims were asserted against XTO and the Permian defendants.

C. Appellants Reasonably Relied on these Representations.

XTO also claims there is no evidence that the Appellants reasonably relied on these statements. But each Appellant testified that he or she did not look into other offers that were open in the neighborhoods, because of these representations. My.C.R. at 924, 944-45; Ma.C.R. at 597, 639, 642, 687, 690, 735. Each waited for the announcement of a signing party for their neighborhood in accordance with the instructions given by XTO. *Id.* Each sent in a W-9 containing their address and social security number (i.e., critical information for anyone concerned with identity theft, that few, if any, would send to a stranger for no reason). My.C.R. at 515, 937; Ma.C.R. at 172, 312, 389, 475. Eastern Express even turned down a higher offer. My.C.R. at 937.

D. Appellants Forbearance was Sufficiently Definite.

XTO seemed to argue below that Appellants forbearance from seeking other offers was not sufficiently definite and substantial. But as discussed above, each refrained from seeking out other offers, which were clearly available during the relevant time period, because of XTO's repeated promises. See above. There is nothing indefinite about this forbearance.

XTO also seemed to argue, that forbearance alone is insufficient. However, the Supreme Court in *Wheeler* specifically cited Restatement §90 in adopting the independent tort of promissory estoppel, which directly addresses forbearance. *Wheeler*, 398 S.W.2d at 96.

Clearly there is a fact issue on this element.

E. Appellants Suffered Reliance Damages.

XTO's main argument is that forbearance damages cannot be recovered under promissory estoppel or negligent misrepresentation, i.e., that Appellants would have leased their minerals to another company.

Damages recoverable are "the amount necessary to restore [the promisee] to the position he would have been in had he not acted in reliance on the promise." *Fretz Construction Co. v. Southern National Bank of Houston*, 626 S.W.2d 478, 483 (Tex. 1981), citing *Wheeler*, 398 S.W.2d at 97.

Appellants cannot get specific performance under the tort of promissory estoppel or negligent misrepresentation. But they should be able to get back to the position they would have been in, had they not relied on XTO's promises.

F. There is More than Sufficient Evidence to Raise a Fact Issue on Damages.

The evidence for Appellants' damages comes mainly from XTO itself. Win Ryan, Sherman Young and Fred Jones, all acknowledged that there was competition for leases throughout SEACTX that continued even after the SEACTX/XTO deal was announced, right up to the time XTO breached its agreement. My.C.R.at 813, 829, 842, 849-50, 865-67.

But afterwards, these signing bonuses dropped to between \$0 and \$2,500. My C.R. at 851-52. The lease form being offered after XTO breached its agreement was undisputedly not as favorable to the homeowner. My.C.R. at 846-47.

Clearly, the summary judgment evidence shows that if XTO had not made its promises, Appellants could have leased their mineral interests with other companies, at a higher price than they could have after XTO breached its agreement. Accordingly, summary judgment was improper.

XI. EASTERN EXPRESS' PROPERTY IS IN SEACTX.

XTO also moved for summary judgment on the ground that Eastern Express' property is not in SEACTX. However, Mr. Chau testified repeatedly, over aggressive cross-examination, that Eastern Express' property was within the geographical boundaries of SEACTX. E.E.C.R. at 136-39, 146. This repeated testimony was in the very summary judgment evidence submitted by XTO in support of its motion! Clearly, there is a fact issue as to whether Eastern Express's property is within SEACTX.

XII. APPELLANTS HAVE STANDING TO ASSERT THEIR ANTITRUST CLAIMS.

Appellants asserted claims under the Texas Free Enterprise & Antitrust Act against all of the Appellees for their conduct in the Barnett Shale. The trial court determined that Appellants, as sellers of mineral interests, did not have standing to assert such a claim.

The trial court's decision is based on one quote, taken out of context from *Maranatha Temple Inc. v. Enterprise Products Co.*, 893 S.W.2d 92 (Tex.App.—Houston [1st Dist.] 1994, writ denied). In *Maranatha*, the court held that a seller had no standing to assert an antitrust claim because a party bringing such a claim “must be either a

consumer of the alleged violator's goods or services or a competitor of the alleged violator..." 893 S.W.2d at 105, quoting, *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987).

But it is undeniable that Appellants are sellers of mineral interests. The above quote from *Eagle v. Star-Kist*, is taken out of context by Appellees. The isolated quote clearly does not reflect the law. In *Eagle*, crew members of tuna fishing boats brought an antitrust claim against Star-Kist and others alleging a conspiracy to fix the price at which they would purchase raw tuna. These crew members did not themselves own the raw tuna. Rather, the actual seller was the vessel owner. However, the crew members compensation was determined by the value of the tuna sold. 812 F.2d at 539. The Ninth Circuit found they did not have standing. In reaching that conclusion, the court made the statement relied upon by the defendants in this case: "In other words, the party alleging the injury must be either a consumer of the alleged violator's good or services or a competitor of the alleged violator in the restrained market." 812 F.2d at 540. But, the Appellees failed to note the next sentences.

In the present case, in order to be a participant in the relevant market, the class members must have been either buyers *or sellers* of raw tuna. Both sides agree that the class members are not buyers. The alleged malefactors (the canneries) were the buyers. Thus, in order for the alleged injury to be of the type that antitrust laws were intended to forestall, the class members must prove that they were *sellers* in the raw tuna market.

812 F.2 at 540-41 (emphasis added). The court then concluded that they were not sellers; the vessel owners were the sellers. 812 F.2d at 541.

The Texas Antitrust Act specifically provides that it is to be construed “in harmony with federal judicial interpretations comparable federal antitrust statutes to the extent consistent with this purpose.” Tex. Bus. & Comm. Code §15.04. Federal courts, including the United States Supreme Court, have long held that sellers have standing to bring antitrust claims. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), in which the United States Supreme Court stated: “it is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim were sellers, not customers or consumers.” 334 U.S. at 235 (footnotes omitted). *See also In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979)(cattle ranches had standing to assert claims against beef processing companies); *In Re Lease Oil Antitrust Litigation*, 1998 WL 469840 (S.D. Tex. Apr. 28, 1998).

The trial court clearly erred in determining that Appellants had no standing to assert antitrust claims.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully pray that the judgments of the trial court be reversed and remanded for trial on the merits, that they recover their costs in this Court and in the court below, and for such other and further relief to which they may be justly entitled at law or in equity.

Respectfully submitted,



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