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July 5, 2011

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Re: Court of Appeals No. 02-10-00395-CV
(Combined with Nos. 02-10-00396-CV and 02-10-00397-CV)
Eastern Express, LP. v. XTO Energy, Inc. et al.
Our File No.: 6584.003

Dear Clerk:

Enclosed please find the original and five (5) copies of our Reply Brief of Appellants along with a CD containing a .pdf copy of the reply brief. Please return the extra file-marked copies of the Reply Brief of Appellants to our office via the enclosed self-addressed stamped envelope..

By copy of this letter all known counsel of record have been provided with a copy of this document. Thank you very much.

Sincerely,

Mark Donheiser

MMD:jb
Encls.
cc: *Via regular mail and email*
All known counsel of record

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.

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ARGUMENT

I. INTRODUCTION.

> 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.

Sherman Young to Mark Middleton, May 14, 2008; My.C.R. at 785.

As it turns out, there is nothing truthful in Mr. Young's statement quoted above. But it clearly shows that at that time, XTO understood the agreement it had made with SEACTX. But in its brief filed before this Court, XTO does not seem to know what it was doing back then. Why was XTO negotiating with SEACTX? Why did XTO care about and value SEACTX's endorsement? Why did it agree to the lease terms with SEACTX, if SEACTX had no property and the property owners (such as Appellants), had the option not to sign with XTO? XTO's brief ignores these fundamental questions. It treats the email exchanges and telephone calls between its representatives and representatives of SEACTX as if they were a mere chat room exchange—just pleasantries about oil and gas leases exchanged between people who happen to be interested. What nonsense.

The only theory before this Court which explains the behavior and conduct of these parties is the theory advanced by Appellants.

SEACTX is an unincorporated association[1] formed for the purpose of negotiating with oil and gas companies in the southeast Arlington area. My.C.R. at 591. It wanted to negotiate the best deal possible for those who wanted to lease their minerals within the SEACTX footprint in southeast Arlington, in exchange for its endorsement of a single gas developer. Id. XTO took full advantage of what SEACTX had to offer, entered into an agreement with SEACTX[2] and reaped the benefits, until it simply did not want to anymore.

On the antitrust claim, all of the Appellees ask this Court to construe the Texas Free Enterprise and Antitrust Act in a manner inconsistent with the corresponding federal laws, and become the only state in the union which denies antitrust protection to sellers. This Court should decline that invitation. Further, Quicksilver Resources has filed its own brief on the antitrust issue, asking this Court, contrary to all known Rules of Appellate Review, to affirm based on grounds, arguments, and evidence, not before the trial court. This invitation should likewise be declined.

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[1] XTO tries to denigrate SEACTX's standing as a separate legal entity by referring to it as a vaguely defined loose coalition of homeowners. But Appellants pled that SEACTX was an unincorporated association. That pleading was not challenged by special exception or by factual challenge in any of the motions for summary judgment filed. Accordingly, for purposes of this appeal, it should be taken as true. My.C.R. at 987.

[2] XTO virtually concedes that an agreement was reached, and thereby concedes that it breached the agreement, but merely argues that it was unenforceable. This conduct is hardly consistent with the "ethical manner" touted by Mr. Young.

II. THE AGREEMENT IN QUESTION IS BETWEEN SEACTX AND XTO; APPELLANTS ARE THIRD-PARTY BENEFICIARIES OF THAT AGREEMENT.

XTO acknowledges that this appeal concerns the agreement between SEACTX and XTO and Appellants' ability to enforce that agreement as third-party beneficiaries. Yet, throughout XTO's brief it makes arguments completely unrelated to that theory, arguing against a direct breach of contract action by Appellants against XTO. So, at some points of the brief, XTO seems to get the argument; but in other parts of the brief, it argues non-issues as if relevant. Whether this is a misunderstanding of the theory, or a deliberate attempt to mislead and confuse this Court, is not clear. But numerous pages of the brief are devoted to arguing about issues which are simply not in the case, such as the supposed lack of mutuality of obligation between Appellants and XTO (as opposed to between SEACTX and XTO), and similar issues. As these arguments are simply irrelevant to this appeal, they will not be individually addressed.

III. SEACTX AND XTO REACHED AN AGREEMENT.

XTO argues that there was no binding agreement with SEACTX. It acknowledges a meeting of the minds, but asserts that materials terms were left out of the agreement, specifically property descriptions and the names of the lessors. This argument fundamentally ignores the nature of the agreement between SEACTX and XTO.

SEACTX was not attempting to lease any minerals to XTO. SEACTX has no minerals. It is not a landowner. The agreement was for SEACTX to endorse XTO (which endorsement allowed it to lease thousands of parcels of land) in exchange for

XTO agreeing to offer the agreed upon lease form and bonus to all members of SEACTX. The specific property descriptions, and the specific names of individual property owners, were not material terms of this agreement. If XTO had abided by its agreement, and made an offer to these Appellants of the SEACTX deal, then property description and the names of the property owners would have been material to those contracts; but that is not the agreement being sued upon here.

The Appellants are third-party beneficiaries of the agreement between SEACTX and XTO. The names of the beneficiaries of a third-party beneficiary contract need not be included in the third-party contract—it is not an essential term of the third-party contract.

> It is not necessary that the person to be benefited by the contract be named therein, if he is otherwise sufficiently described or designated, and the fact that the particular person who is to benefit from a promise is not known when the promise made is immaterial, if he can be identified. He may even be one of a class of persons if the class is sufficiently described or designated.

Knox v. Ball, 191 S.W.2d 17, 25 (Tex. 1945). XTO had no trouble identifying these people during the period when it wanted to obtain leases in the geographical area comprising SEACTX. It entered into over four thousand leases based on the SEACTX deal. My.C.R. at 835.

Third-party beneficiary contracts often work this way. One of the most common would be an employer group health policy. The employer and the insurance company agree that the insurance carrier will extend coverage to each and every employee who

desires to sign up. The insurance carrier does not need to know the names, ages and gender of each employee for that contract to be binding. Only when the employee signs up, is his or her identity relevant. New employees, the identity of whom the employer does not even know at the time the agreement is reached, are also allowed to join.

XTO argues that the Appellants never promised to lease their minerals to XTO and so there is no mutuality of obligation with the Appellants. This misses the point of a third-party beneficiary contract.[3] XTO breached its agreement with SEACTX before the Appellants were offered the opportunity to lease their minerals. To go back to the group health insurance analogy, it is as if the insurance company announced that it was breaching its agreement with the employer and would no longer accept new employees as insureds. As third-party beneficiaries, the employees, who were not given an opportunity to sign up, would have a breach of third-party beneficiary contract action.

XTO also argues that the consideration given by SEACTX, the endorsement, is illusory because it is revocable. They cite no evidence to support that proposition. Nor do they cite any authority for the proposition that an endorsement that can be revoked is no consideration during the time in which the endorsement has not been broken. If Nike is selling athletic shoes based on Michael Jordan's endorsement, the fact that in the future Mr. Jordan may revoke his endorsement is immaterial to whether there is consideration during the time when the endorsement is in effect. XTO affirmatively testified that the

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[3] In fact, as to Ms. Myles, XTO did so promise. My.C.R. at 520.

endorsement was valuable. My.C.R. at 839, 869. It leased over a thousand acres based on that endorsement. My.C.R. at 812, 835. The endorsement was never revoked prior to XTO's breach.

The final argument in this section is a plea for mercy to this Court by XTO (a wholly owned subsidiary of the Exxon Mobil Corporation). It begs this Court not to hold it to its promises because the price of gas went down. Combined Brief of Appellees at 22. But XTO refuses to acknowledge the equities lying with Appellants. Via XTO's contract with SEACTX, the Appellants were promised leases, in a certain form, and at a certain price, and assured that XTO would sign each and every person wishing to do so. These Appellants cannot speak for all of the hundreds of other southeast Arlington residents who did not receive leases, but each of these Appellants testified, without contradiction, that they relied on this agreement and did not sign with other companies, or seek other opportunities, because of XTO's repeated assurances that it would abide by its agreement with SEACTX. Eastern Express even turned down a higher offer! My.C.R. at 937. Each of these Appellants testified that they would have sought other opportunities if XTO had not made these promises. XTO itself acknowledges that there were competitors out there, trolling the southeast Arlington neighborhoods, seeking to lease mineral rights. My.C.R. at 849-50.

Moreover, XTO's conduct belies its contention. It did not ask SEACTX to renegotiate based on changed conditions. It unilaterally 'suspended its project,' without any advance notice. And when it did come back into the SEACTX neighborhoods

seeking leases at a reduced dollar amount, it also abandoned the negotiated lease form which was much more favorable to the lessor in terms of surface use and environmental protections, issues unrelated to the change in price.

The "rubber hits the road," when you consider that Exxon Mobil got the four thousand leases it wanted, asking thousands of other southeast Arlington residents to wait their turn, and promising that each would get an opportunity to accept or reject the SEACTX deal, until it realized that the agreement it had made was no longer as profitable.[4]

IV. SEACTX'S ENDORSEMENT WAS CONSIDERATION.

XTO argues that the endorsement by SEACTX does not qualify as consideration because nothing shows that it was exclusive. The summary judgment evidence is directly contrary to that assertion.

Ms. Razzano explained that in the negotiations, SEACTX offered to endorse one company. "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 598 (emphasis added). XTO acknowledged that the endorsement was exclusive. "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." My.C.R. at 600 (emphasis added). Ms.

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[4] XTO produced no evidence that the SEACTX deal would be unprofitable even at lower gas prices or any evidence supporting an impossibility (economic or otherwise) defense.

Razzano confirmed this in the email telling XTO that it had won SEACTX's endorsement. "Congratulations! XTO has been selected as **the** official recipient of the oil and gas leases for SEACTX." My.C.R. at 715 (emphasis added).[5]

There is no evidence whatsoever to support the assertion that SEACTX's endorsement was not exclusive. There is no evidence that SEACTX ever endorsed any other company other than XTO. This argument is without merit.

V. APPELLANTS ARE THIRD-PARTY BENEFICIARIES OF THE SEACTX AND XTO CONTRACT.

"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." *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

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[5] Note: In English, the word "the" is single, i.e., refers to one thing.

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.).

XTO makes essentially two arguments for why Appellants are not third-party beneficiaries. First, it argues that Appellants are simply not identified or otherwise expressly mentioned in the agreement. That is not a requirement to be a third-party beneficiary. As discussed above, a class of persons, even if unknown at the time, can be third-party beneficiaries if they can be identified at the time the contract is to be enforced. *Knox v. Ball*, 191 S.W.2d at 25.

But more importantly, who was this agreement for? Why did SEACTX endorse XTO? SEACTX, as a separate entity, had nothing to gain. It has no mineral rights to lease. The agreement makes no sense unless it was for the benefit of people like Appellants. The Supreme Court has recently addressed a third-party beneficiary contract which did not specifically mention the names of the third-party beneficiaries. In that case, the Supreme Court held that the plaintiffs were third-party beneficiaries because the contract made no sense otherwise. There was no other reason for the agreement, except to benefit the plaintiffs. "If Dynex and Basic did not intend the Commitment to benefit ART and TCI directly, then the Commitment had no purpose whatsoever." *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 54 Tex.Sup.Ct.J. 781, 2011 Tex. LEXIS

247 at *14 (April 1, 2011). The Court went on to note that the parties probably did not spell out exactly who was benefited "because it seemed to go without saying." *Id.* The exact same analysis applies here.

Next, XTO argues that someone in privity with a contracting party cannot be an intended third-party beneficiary. XTO takes the meaning of the word privity, which is used in a very narrow sense in the opinions it cites, and then defines privity in the broadest sense to include Appellants. Obviously, many third-party beneficiary contracts involve beneficiaries who are in some sense in privity with one of the contracting parties. Spouses often name each other as beneficiaries in life insurance policies. Employers often buy group policies for their employees. In the broadest sense, there is some privity present. But the direct contractual relationship of principal and agent contemplated by XTO's authority does not exist.

XTO cites to each of Appellants' live pleadings in which each of these parties asserted that SEACTX was acting as its agent in negotiating. See, e.g., My.C.R. at 993. But each of these Appellants also pled that they were third-party beneficiaries of the contracts between SEACTX and XTO. Id. XTO takes a position that this conclusively negates the possibility that these Appellants are third-party beneficiaries, because of the pleading of agency. XTO completely ignores Tex.R.Civ.P. 48 which allows for pleading of alternative claims for relief. "A party may also state as many separate claims or defenses as he has **regardless of consistency** and whether based upon legal or equitable grounds or both." *Id.(emphasis added).* Appellants are entitled to assert that SEACTX

was its agent and that SEACTX was not its agent in the same pleading. They may not be able to recover on both theories but they are entitled to plead them both, and pleading one does not negate the other. This argument is without merit.

VI. SEACTX'S PERFORMANCE TAKES THE AGREEMENT OUTSIDE THE STATUTE OF FRAUDS.

Even assuming that the statute of frauds applies to the agreement between SEACTX and XTO, in which the agreement does not, in any sense of the word, transfer an interest in real property, SEACTX's full performance of its obligations takes the agreement outside the statute of frauds.

XTO raises essentially four arguments against the performance doctrine. First, it argues that Appellants' did not plead performance. Appellants do not necessarily concede that they did not plead it. Texas is a notice pleading state and Appellants plead that SEACTX performed. *See, e.g.,* My.C.R. at 989, 996.

But in any event, Appellants raised performance in their response to XTO's Motion for Summary Judgment. *See, e.g.,* My.C.R. at 571. XTO filed a reply to this response, but did not raise any perceived pleading defect. *See, e.g.,* My.C.R. at 1036. The issue of performance was therefore before the trial court. *See, e.g., Basic Capital Management, Inc.*, slip op. at *9 (claim that defense improperly pled, despite being raised in summary judgments and responses, overruled as issue was squarely before trial court).

Second, XTO argues that SEACTX's performance cannot take the agreement out of the statute of frauds as to Appellants. Not surprisingly, XTO cites no authority for this

proposition. Simply thinking about a third-party beneficiary contract would lead the Court to the inescapable conclusion that this argument is without merit. The life insurance analogy is a perfect example. If the insured person fully performs, pays the premiums and does all the paperwork necessary, then that person's full performance will inure to the benefit of the intended beneficiary, even if the intended beneficiary does nothing in reliance. This argument, as discussed in the introduction, is a perfect example of XTO ignoring the third-party beneficiary nature of the claims.

Third, XTO claims that for performance to be a defense to the statute of frauds there must be an unearned benefit to the party asserting the statute of frauds. XTO claims that the summary judgment establishes, as a matter of law, that it received no unearned benefit.

This argument is truly amazing. As Sherman Young put it, "I think the SEACTX project, for XTO, was a success." My.C.R. at 839. XTO leased over a thousand acres in SEACTX because of this project. My.C.R. at 812, 835. This amounts to over four thousand individual tracts of land leased. My.C.R. at 835.

Lastly, XTO argues that Appellants' forbearance was not sufficient, because forbearance is not the type of conduct which suffices and that Appellants' forbearance was not sufficiently referable to the promises made. In regard to the assertion that forbearance is not sufficient, the Texas Supreme Court seems to disagree. *See, e.g., Wheeler v. White*, 398 S.W.2d 93, 95 (Tex. 1966).

As to the argument that the forbearance was not referable to XTO's promises and agreements, the summary judgment evidence is directly contrary to that assertion. Each of these Appellants relied upon XTO's agreement with SEACTX and its repeated promises, and did not seek out other offers for their mineral rights. 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. Whether performance was "unequivocally referable" is generally a question of fact. *Bookout v. Bookout,* 165 S.W.3d 904, 908 (Tex.App.—Texarkana, no pet.). The summary judgment evidence more than raises a fact issue.

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

XTO makes two main arguments that it should not be estopped to assert the statute of frauds—neither of which is persuasive. First, it argues that the promise to sign a written contract must necessarily refer to a written agreement already in existence that the time the promise is made, citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 940 (Tex. 1972). The opinion says no such thing. It simply does not. This Court can read the opinion on rehearing in *"Moore" Burger* and easily see that there is no such requirement. *"Moore" Burger* stands for the proposition that a promise to reduce an agreement in writing may give rise to an estoppel. *See* generally Joint Brief of Appellants at 30-33.

Moreover, what is the rationale for this rule? Neither XTO nor the cases it cites explain why there should be a pre-existing writing for promissory estoppel to apply. The

rules that have evolved over the centuries concerning contracts, including the statute of frauds and the defenses thereto, are not just random rules like a game – they have been adopted for specific, identifiable reasons. XTO offers no explanation for why Texas should adopt a rule contrary to the Restatement and most common law jurisdictions.

Second, XTO asserts that Appellants' reliance damages are not the proper damages for promissory estoppel. XTO does nothing to refute the argument contained in the Joint Brief of Appellants' at 36-40, distinguishing between promissory estoppel as a defense to the statute of frauds and promissory estoppels as a separate tort. These are two different concepts and XTO attempts to treat them as one.

But the alternative theory of damages asserted by Appellants is not the economic loss of the mineral lease with XTO. Appellants' injury is the damage they suffered by keeping their mineral interests off the market after relying on XTO's repeated assurances that everyone who wanted to lease their mineral interests to XTO would have the opportunity to do so. These are consequential reliance damages, not benefit of the bargain damages. *See, e.g., Formosa Plastics Corp. USA v. Presidio Engineers & Contractors*, 960 S.W.2d 41, 49 n.1 (Tex. 1998); *Lesikar v. Rappaport*, 33 S.W.3d 282, 303-06 (Tex.App.—Texarkana 2000, pet. denied).

Accordingly, summary judgment should be reversed.

VIII. EASTERN EXPRESS HAS RAISED A FACT ISSUE ON WHETHER IT IS WITHIN SEACTX.

That XTO continues to assert this position strains credibility. Its argument is as follows. One person says Eastern Express's property is not within SEACTX. Another person testifies that it is. Therefore, according to XTO, summary judgment is appropriate that Eastern Express's property is not within SEACTX.

When two people testify to opposite versions of the same fact, a fact issue for the jury is created. There could be no clearer example of when a fact issue is created.

IX. APPELLANTS HAVE STANDING UNDER THE TEXAS ANTITRUST STATUTES.

XTO forthrightly admits that its argument that Appellants do not have standing, as sellers, to assert an antitrust claim under Texas law, is based solely upon one Houston Court of Appeals case. As discussed in much greater detail in the Joint Brief of Appellants, that case relies on federal antitrust cases, which it clearly misunderstood. *See Maranatha Temple, Inc. v. Enterprise Products Co.*, 893 S.W.2d 92 (Tex.App.—Houston [1st Dist.] 1994, writ denied). *See also* Joint Brief of Appellants at 44-46.

Quite simply, XTO is asking this Court, as it asked the trial court, to create a new rule of law under the Texas Antitrust Act, directly contrary to parallel federal authority, that sellers do not have antitrust claims. This theory is completely contrary to the very nature and purpose of antitrust laws. This Court should follow relevant federal authority and refuse to make such a radical change to Texas law.

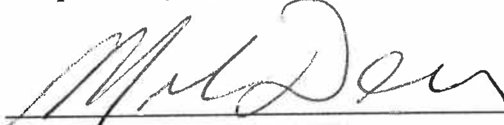
X. QUICKSILVER'S ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT.

Appellee Quicksilver Resources, Inc. filed its own brief on the antitrust issue. But instead of solely relying upon the standing issue which was properly raised in the trial court (as XTO properly does), Quicksilver spends many pages arguing issues never raised, supporting it with references to the summary judgment evidence, all of which was filed long after the standing issue had been determined. As XTO properly notes, in determining a plea to the jurisdiction, the court looks solely at the pleadings or at the evidence submitted with the plea to the jurisdiction. Combined Brief of Appellees at 15. This is the proper standard. Quicksilver completely ignores the appropriate standards of the plea to the jurisdiction itself, and this Court's review thereof.

But most of its argument can be summarized as asking this Court to apply federal procedural rules to a Texas statutory claim filed in Texas state court. Counsel for Appellants is unaware of any instance in which a Texas court has adopted federal procedure rules as applied to a Texas state law claim. It is simply unprecedented. This argument should be summarily rejected.

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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