

JOSEPH LEON MADDOX and wife,	§	IN THE DISTRICT COURT OF
PATTI LYNN MADDOX, DAVID	§	
RICHEY, and wife, JOYCE RICHEY,	§	
and LINDA FAYE WEBER	§	
	§	
v.	§	TARRANT COUNTY, TEXAS
	§	
VANTAGE ENERGY, LLC, and THE	§	
CAFFEY GROUP, LLC	§	67 TH JUDICIAL DISTRICT

**VANTAGE ENERGY, LLC'S AND THE CAFFEY GROUP, LLC'S
SUPPLEMENT TO THEIR TRADITIONAL AND NO-EVIDENCE MOTION
FOR SUMMARY JUDGMENT**

Defendants, Vantage Energy, LLC (“Vantage”) and The Caffey Group, LLC (“Caffey”) (collectively, “Defendants”), file this Supplement to their earlier-filed Traditional and No-Evidence Motion for Summary Judgment against Plaintiffs Joseph Leon Maddox, Patti Lynn Maddox, David Richey, Joyce Richey, and Linda Faye Weber (collectively, “Plaintiffs”), and in support thereof respectfully show as follows:

**I.
SUPPLEMENTATION IS NECESSARY TO ADDRESS
PLAINTIFFS’ FOURTH AMENDED PETITION**

In an obvious attempt to side-step arguments made in Defendants’ Traditional and No-Evidence Motion for Summary Judgment hearing, Plaintiffs have now amended their petition for a fourth time. The changes are important. In their Third Amended Petition, Plaintiffs had asserted the following claims: breach of contract, breach of unilateral contract, breach of contract under the Texas Uniform Electronic Transfers Act, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, promissory

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estoppel, and statutory fraud. Plaintiffs also claimed to be the intended third party beneficiaries of an alleged agreement between Southwest Fort Worth Alliance (“SFWA”) and Vantage.

In the recently filed Fourth Amended Petition, some causes of action are modified and others are dropped. Now, Plaintiffs only assert (1) breach of contract between Defendants and SFWA (*i.e.*, the intended beneficiary claim), (2) promissory estoppel, and (3) negligent misrepresentation. *See* Pls’ 4th Am. Pet. at ¶¶ 53-62 and 71-83. Plaintiff David Richey and Joyce Richey also now assert a direct breach of contract claim against Defendants. *See* Pls’ 4th Am. Pet. at ¶¶ 63-70.¹ Plaintiffs have abandoned their claims of: fraudulent inducement, fraudulent misrepresentation, statutory fraud, breach of contract, breach of unilateral contract, and breach of contract under the Texas Uniform Electronic Transfers Act.

The Fourth Amended Petition also includes previously unpled facts regarding the alleged contract that Defendants supposedly made with SFWA. Plaintiffs earlier described “the Contract” as a combination of the written “Memorandum of Understanding” dated August 22, 2008 that Vantage and SFWA supposedly entered into, a “lease form” template that SFWA and Vantage/Caffey allegedly agreed to, the “leasing process/method” that Vantage and SFWA allegedly employed, and emails dated August 22, 2008, to and from Vantage’s John Wehrle and SFWA representatives. [*See* Ex. B].

¹ This has been an on-again/off-again theory. It existed in the Original and Second Amended Petitions, was dropped, and now has resurfaced in the Fourth Amended Petition.

As Defendants' original motion for summary judgment noted, no map was referenced in "the Contract" as earlier described, and, importantly, "the Contract" **did not** contain a description of Plaintiffs' respective properties or even identify Plaintiffs as lessors. [See Ex. B]. "The Contract" was also not signed by Defendants or Plaintiffs. [See Ex. B]. Obviously recognizing the statute of frauds deficiencies in their supposed Contract, Plaintiffs now propose (in their Fourth Amended Petition) a new set of facts to define the supposed Contract between SFWA and Vantage and assert that they "reserve the right to supplement the contract documents in accordance with the Texas Rules of Civil Procedure if more documents and information come to light." See Pls' 4th Am. Pet. at ¶¶ 21-31.

Plaintiffs' new Contract consists of about 10 documents and emails that Plaintiffs cobble together and brand with the label "Contract Documents" (see Pls' 4th Am. Pet. at p. 8) though Defendants cannot identify with absolute certainty the documents alleged to now constitute the "Contract Documents" because Plaintiffs do not attach them to the Fourth Amended Petition or identify them by Bates number or specific description. See Pls' 4th Am. Pet. at ¶¶ 21-31.²

It is evident that Plaintiffs effort at "cherry picking" documents was intended to address Defendants statute of frauds defense. The effort fails, however, because Texas law clearly provides that a party cannot cobble up unrelated documents to manufacture a contract that satisfies the statute of frauds.

² Defendants' counsel has asked that the supposed "Contract Documents" be specifically identified, but Plaintiffs' counsel has declined to do so. Affidavit of Donald E. Herrmann, ¶ 15; see also Ex. G.

In a further effort to avoid the statute of frauds defense, Plaintiffs assert promissory estoppel and part performance as excuses. The promissory estoppel claim fails because the evidence conclusively proves that Defendants did not promise to sign an existing writing that would satisfy the statute of frauds. The part performance excuse fails because there is no evidence that Defendants took possession of Plaintiffs' minerals or that Plaintiffs suffered a detrimental change of position.

The negligent misrepresentation claim fails because (1) Defendants made no misrepresentations of existing fact and (2) Plaintiffs did not suffer out of pocket damages.

Finally, Plaintiffs David and Joyce Richey's revived claim of direct breach of contract fails because (1) there is no signed lease; (2) Defendants did not accept the lease; and (3) in any event, the document relied on does not satisfy statute of frauds requirements.

Accordingly, the Court should grant Defendants' Traditional and No-Evidence Motion for Summary Judgment, as supplemented, and enter judgment that Plaintiffs take nothing on their claims against Defendants.

II.

SUMMARY JUDGMENT EVIDENCE

In support of their Supplemental Motion, Defendants submit the additional summary judgment evidence, attached hereto:

Exhibit D: Affidavit of Donald E. Herrmann identifying the alleged "Contract Documents" described by Plaintiffs in paragraphs 21-31 of their Fourth Amended Petition, to the extent they can be identified.

- Exhibit D-1: An email chain between John Wehrle and Tolli Thomas dated August 22, 2008 attaching the Memorandum of Understanding and blank lease form.
- Exhibit D-2: The August 22, 2008 Memorandum of Understanding that Plaintiffs describe as setting forth the “pillars of the deal.”
- Exhibit D-3: An email chain between John Wehrle and Tolli Thomas dated August 22, 2008.
- Exhibit D-4: An email sent by Lucas Knickerbocker of the Caffey Group to Tolli Thomas on August 28, 2008, with a spreadsheet attached.
- Exhibit D-5: An email chain between John Wehrle and Tolli Thomas dated August 29, 2008.
- Exhibit D-6: An email chain between John Wehrle and Tolli Thomas dated September 7, 2008.
- Exhibit D-7: An email chain between John Wehrle and Tolli Thomas dated September 8, 2008, with a proposed news release drafted by Tolli Thomas attached.
- Exhibit D-8: An email chain between John Wehrle and Tolli Thomas dated September 9, 2008, with a blank lease form attached.
- Exhibit D-9: An email chain between John Wehrle and Tolli Thomas dated September 15, 2008
- Exhibit D-10: An email from John Wehrle to a third-party with a Google map attached dated September 17, 2008.

Exhibit E: December 6, 2010, Deposition of Carter Vaughan, former independent “landman” contractor for Caffey.

Exhibit F: October 20, 2008, Email from Carter Vaughan to Tom Foster with “Lease Clean-Up-October.xls” attachment.

Exhibit G: January 21, 2011, Letter from Donald E. Herrmann to Kip Petroff.

III. ARGUMENT AND AUTHORITIES

A. The Statute of Frauds is Patently Applicable to this Case.

If ever there was doubt about application of the statute of frauds to Plaintiffs’ claims, it is totally erased by Plaintiffs’ Fourth Amended Petition, which prays for the following relief:

- a. That the Court award Plaintiffs *specific performance* and give Plaintiffs the opportunity to accept or reject the negotiated lease, as described herein, including but not limited to by issuing bonus checks to Plaintiffs in the full amount owed for the bonus payments of Twenty Seven Thousand Five Hundred and no/100 Dollars (\$27,500.00) per net mineral acre (pending a precise measurement of the property and any strips, gores, easements, roadways or other land that may be properly included in the lease)...³

In short, Plaintiffs ask the Court to order the execution of a mineral lease on specific terms—*i.e.*, to enforce a mineral lease that was never reduced to writing and not signed by the Defendants (the parties to be charged) or the Plaintiffs. Oddly, Plaintiffs also ask to be given the choice to “accept or reject” the agreement they wish to have enforced.

Under Texas law, an oil and gas lease is a conveyance of real property. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982); *see also Avis v.*

³ See Plts.’ 4th Am. Pet. at p. 20.

First Nat'l Bank of Wichita Falls, 174 S.W.2d 255, 258 (Tex. 1943); *W.T. Waggoner Estate v. Sigler Oil Co.*, 19 S.W.2d 27, 28-29 (Tex. 1929); *Stephens Cnty. V. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 295 (Tex. 1923). Therefore, an agreement to make an oil and gas lease must satisfy the requirements of the statute of frauds to be enforceable. See *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (citing *Minchen v. Fields*, 345 S.W.2d 282, 287-88 (Tex. 1961)); see also *Sun-Key Oil Co., Inc. v. Whealy*, No. 2-06-198-CV, 2006 WL 3114466, at * 3 (Tex. App.—Fort Worth 2006, not pet.) (“Because the Gray lease conveys an interest in real property, it must comply with the statute of frauds to be valid.”); *Paine v. Moore* 464 S.W.2d 477, 479 (Tex. Civ. App.—Tyler 1971, no writ).

Plaintiffs will argue that the agreement to be enforced is really between SFWA and Vantage, and merely requires Vantage to enter into a future contract with Plaintiffs to lease their minerals. The argument goes nowhere because “[a] contract to enter a contract covered by the statute of frauds **must also meet the statute of frauds.**” *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 778 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (emphasis added).

B. Plaintiffs’ Contract Documents do not Satisfy the Statute of Frauds.

The statute of frauds requires that an oil and gas lease (and any contract to enter into an oil and gas lease) must: (a) be in writing and signed by the party to be charged with its enforcement; (b) describe the land with reasonable certainty; and (c) contain within itself or by reference to some other existing writing *all* essential terms of the

agreement being sued upon. TEX. BUS. & COM. CODE ANN. § 26.01(a) (Vernon 2009); see also *Quigley v. Bennett*, 227 S.W.3d 51, 54 (Tex. 2007) (citing *Consol. Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966)); *Dixon v. Amoco Prod., Co.*, 150 S.W.3d 191, 194 (Tex. App.—Tyler 2004, pet. denied); *Wilson v. Fisher*, 188 S.W.2d 150, 152 (Tex. 1945); *Cohen v. McCutchin*, 554 S.W.2d 844, 848 (Tex. Civ. App.—Waco 1977), *aff'd*, 565 S.W.2d 230 (Tex. 1978).

The property description and identification of the parties **may not** be supplied by extrinsic or parol evidence. *Morrow v. Shotwell*, 477 S.W.2d 538, 571 (Tex. 1972). The essential terms must be contained in a single writing, or in a series of writings which expressly refer to one another. *Owens v. Hendricks*, 433 S.W.2d 164, 167 (Tex. 1968); *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 435 (5th Cir. 2001) (stating that where a “contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together”); *Gray & Co. Realtors, Inc. v. Atlantic Housing Foundation, Inc.*, 228 S.W.3d 431, 436 (Tex. App.—Dallas 2007, no pet.) (stating that it is required that the “the incorporated document be referenced by name”); *Boddy v. Gray*, 497 S.W.2d 600, 603-04 (Tex. Civ. App.—Amarillo 1973, writ ref’d n.r.e.) (holding that three separate writings were insufficient to satisfy the statute of frauds because the documents did not contain internal references to each other).

In the most recent version of their petition, Plaintiffs cobble together various unrelated documents to form the “Contract Documents” (attached as exhibits to the Donald E. Herrmann Affidavit) that supposedly form an enforceable agreement. The

effort is a failure because Texas law does not allow a party to simply pick-and-choose documents from a pile, piece them together, and create an enforceable contract that is statute of frauds compliant. *Owens*, 433 S.W.2d at 167; *Conner*, 267 F.3d at 435 (stating that where a “contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together”); *Gray & Co. Realtors, Inc.*, 228 S.W.3d at 436 (stating that it is required that the “the incorporated document be referenced by name”); *Boddy*, 497 S.W.2d at 603-04 (holding that three separate writings were insufficient to satisfy the statute of frauds because the documents did not contain internal references to each other).

The Texas Supreme Court decision in *Owen v. Hendricks* is particularly instructive on this point. In *Owen*, plaintiff sued to recover a real estate dealer’s commission, alleging that two letters (combined) constituted the enforceable contract. 433 S.W.2d at 166.⁴ The first letter was written and signed by the plaintiff. The second letter was written and signed by the defendant (the property owner) and related to the same subject matter as the first letter. *Id.* The two letters did not specifically reference one another. *Id.* The court assumed that the first letter written by the plaintiff contained an adequate description of the land but declined to merge them, stating: “[t]he two letters obviously relate to the same subject matter, but there is nothing in the letter signed by [the defendant] that even remotely suggests the existence of another writing.” *Id.* at 167.

⁴ Although *Owen* dealt with a real estate broker’s commission, the analysis is the same as that used in cases arising under the Statute of Frauds. *Id.* at 166. (stating that “the written memorandum must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land may be identified. The sufficiency of the description is determined by the test that is used in cases arising under the Statute of Frauds and the Statute of Conveyances”).

The court held that “[s]ince the contents of such letter do not show that it is based on an adoption of the letter written by petitioner, we hold that the two letters cannot be taken together as constituting the signed memorandum...” *Id.*

Plaintiffs’ collection of so-called “Contract Documents” also fails other statute of frauds tests, such as the requirement of an adequate property description. The property description may never be supplied by parol or extrinsic evidence. The property description must be contained in either the contract itself or, under limited circumstances, in a referenced document. *Morrow*, 477 S.W.2d at 539. In order for the property description to be contained in a referenced document, two additional requirements must be satisfied: (1) the document must be in existence at the time the contract is formed, and (2) the contract itself must reference the document. *Wilson*, 188 S.W.2d at 152; *Morrow*, 477 S.W.2d at 539 (recognizing that “[t]o be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty”) (emphasis added); *Mayor v. Garcia*, 104 S.W.3d 274, 280 (Tex. App.—Texarkana 2003, pet. dismiss’d w.o.j.) (recognizing that when essential terms are missing from a contract for the sale of real property, “[t]he next step is to determine whether the contract sufficiently references another writing supplying the missing terms” and that “[i]f it does, the referenced writing must have been in existence at the time the parties signed the contract”); *Ford Dev. Corp. v. Town & Country Dev. at Stonebriar, Inc.*, No. 05-98-01561-CV, 2001 WL 399304, at *3 (Tex. App.—Dallas 2001, pet. denied) (recognizing the “long held rule that

subsequent documents cannot be used to aid in supplying a sufficient description”); *Dunworth Real Estate Co. v. Chavez Prop.*, No. 04-07-00237-CV, 2008 WL 36222, at *5 (Tex. App.—San Antonio 2008, no pet.) (holding that extrinsic emails which were not referenced in the signed memorandum and did not exist until after the memorandum was signed “cannot be considered as an aid to clarify the common name description, even if we were to conclude that it constituted a sufficient nucleus description”).

Remarkably, the so-called Contract Documents in this case do not even identify the Plaintiffs as potential lessors. As explained below, these documents—viewed individually or collectively—simply fail to make an enforceable agreement under Texas law.

1. The documents described in paragraphs 21, 22 and 23 of Plaintiffs’ Fourth Amended Petition do not satisfy statute of frauds requirements.

In paragraphs 21, 22, and 23 of the Fourth Amended Petition, Plaintiffs describe the core documents that allegedly constitute the “Contract Documents.” Those include (1) an email chain between John Wehrle and Tolli Thomas, dated August 22, 2008; (2) the Memorandum of Understanding, dated August 22, 2008; and (3) a follow-up e-mail also dated August 22, 2008, from John Wehrle to Ms. Thomas. [See exs. D-1, D-2 and D-3]. According to Plaintiffs, the Memorandum of Understanding provides the basic understanding Plaintiffs seek to enforce. See Pls.’4th Am. Pet. at ¶ 22. This is because the Memorandum of Understanding sets forth the bonus amount that Plaintiffs hope to recover. [See Ex. D-2]; see also Pls.’4th Am. Pet. at p. 20 (stating that “Plaintiffs hereby respectfully request the following relief...[t]hat the Court award Plaintiffs specific

performance...including but not limited to by issuing bonus checks to Plaintiffs in the full amount owed for the bonus payments of...(\$27,500.00) per net mineral acre....”). And, according to Plaintiffs, the Memorandum of Understanding contains “the essential terms of the deal.” *See* Pls.’4th Am. Pet. at ¶ 21.

The documents Plaintiffs rely on, however, simply do not satisfy the statute of frauds requirements, as a matter of law.

The August 22, 2008, email from John Wehrle to Tolli Thomas states:

Tolli — per our recent discussions, Vantage is thrilled to work with SWFAW [sic] and make the enclosed leasing offer. Please review the memorandum of understanding as well as the lease form (clean and redline versions attached) that contains our most recently revised comments. Combined with the previously distributed points below, we hope to move quickly in finalizing the lease and beginning the process of organizing the lease signings.

[Ex. D-1]. This document admittedly refers to a memorandum of understanding and a “lease form” but this is not sufficient to constitute an enforceable contract under the statute of frauds.

The August 22, 2008, email from John Wehrle contains absolutely no property description. Similarly the referenced memorandum of understanding and “lease form” also do not have a property description. [See Exs. D-1 and D-2]. (Other documents mentioned by Plaintiffs show that a mutually acceptable “lease form” did not even exist on August 22, 2008.) [Ex. D-8]

The so-called Memorandum of Understanding deserves greater discussion because it allegedly sets forth the “pillars of the deal,”⁵ and describes the deal terms (the bonus amount) Plaintiffs seek to specifically enforce.

As noted, this foundation document does not contain any property description whatsoever, nor does it identify Plaintiffs as lessors, and it is not signed by Plaintiffs or Defendants. [See Ex. D-2]. These are fatal shortcomings.

The well-settled rule to test sufficiency of a property description in a deed is that “the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty.” *Morrow*, 477 S.W.2d at 539 (emphasis added). “The legal description in the conveyance must not only furnish enough information to locate the general area as in identifying it by tract survey and county, it **need contain information regarding the size, shape, and boundaries.**” *Reiland v. Patrick Thomas Props., Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (emphasis added).

Here, the Memorandum of Understanding does not mention, much less describe Plaintiffs’ properties. [See Ex. D-2]. Nor does it “reference some other **existing writing.**” *Morrow*, 477 S.W.2d at 539 (emphasis added). The Memorandum of Understanding also fails to identify Plaintiffs as lessors. [See Ex. D-2]. See *Walker Ave. Realty Co.*, 131 S.W.2d at 198 (holding lease invalid under statute of frauds because it failed to identify the lessor); *Cohen*, 554 S.W.2d at 848 (recognizing that elements of an

⁵ See Pls.’ 4th Am. Pet. at ¶ 22.

enforceable contract under the statute of frauds include an identification of parties to the contract); *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65 (Tex. App.—Dallas 1990, no writ) (stating that an identification of the parties to the contract is required under a statute of fraud). This information cannot be supplied by parol evidence. *See, e.g., Morrow*, 477 S.W.2d at 541.

The Memorandum of Understanding is also not signed by Defendants or by any of the Plaintiffs. [See Ex. D-2]. The document bears a signature line for Vantage’s CEO, Roger J. Biemans, but no signature. *See Koons v. Impact Sales & Mktg. Group, Inc.*, No. 2-07-001-CV, 2007 WL 4292423, at *2 (Tex. App.—Fort Worth Dec. 6, 2007, no. pet.) (mem. op.) (holding where defendant included a signature line in the contract but never signed the signature line, the contract was unenforceable because it failed to comply with the statute of frauds even though it was the defendant who drafted the contract).

Finally, the Memorandum of Understanding **does not** reference any other document that Plaintiffs contend constitute the “Contract Documents.” [See Ex. D-2]. This, too, is fatal. *Conner*, 267 F.3d at 435 (stating that where a “contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together”); *Gray & Co. Realtors, Inc.*, 228 S.W.3d at 436 (stating that it is required that the “the incorporated document be referenced by name”); *Mayor*, 104 S.W.3d at 280 (recognizing that when essential terms are missing from a contract for the sale of real property, “[t]he next step is to determine whether the contract sufficiently **references another writing** supplying the missing terms” and that “[i]f it

does, the referenced writing must have been in existence at the time the parties signed the contract”).

The August 22, 2008, email from John Wehrle to Tolli Thomas, described in paragraph 23 of the Fourth Amended Petition, does not cure any of the fatal defects in Plaintiffs’ so-called “Contract Documents.” John Wehrle wrote the email in response to an earlier email from Tolli Thomas, wherein Ms. Thomas wrote:

can the Southwest Fort Worth Alliance have Vantage’s written authorization to release the following statement within our neighborhoods, “The Southwest Fort Worth Alliance is pleased to announce that is [sic] has received a superior offer and lease from Vantage, LLC.” and further, may we announce that it has been accepted?

[Ex. D-3]. In response, John Wehrle wrote back:

Yes, Tolli — the statement... is acceptable to Vantage and we are agreeable to announcing that the offer has been accepted. Congratulations — we are very excited to work with everyone!

[Ex. D-3]. This email does nothing to clear the statute of frauds defects. There is no property description; and there is no cross-reference to another existing writing that contains a property description. There is also no reference to Plaintiffs by name or designation of them as lessors.

In sum, the writings that form the core of Plaintiffs’ “Contract Documents” are fatally deficient.

2. The documents described in paragraph 24 of Plaintiffs' Fourth Amended Petition do not help overcome the statute of frauds defects.

In paragraph 24 of their Fourth Amended Petition, Plaintiffs identify an August 28, 2008, email between an employee of The Caffey Group and Tolli Thomas as an additional "Contract Document." The email simply states:

Tolli,

This is the priority list that Roger created.

Thanks,

Lucas

[See Ex. D-4]. Attached to the email is a spreadsheet which Plaintiffs allege "systematically identified all SFWA neighborhoods..." See Pls.'4th Am. Pet. at ¶ 24. It is obvious that Plaintiffs hope to use this spreadsheet as a means to satisfy the property description requirement of the statute of frauds. However, the email and the spreadsheet fail to satisfy the statute of frauds for multiple reasons.

Significantly, these documents are not referenced in and do not reference any other document. See *Conner*, 267 F.3d at 435 (stating that where a "contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together"); *Gray & Co. Realtors, Inc.*, 228 S.W.3d at 436 (stating that it is required that the "the incorporated document be referenced by name"); *Boddy*, 497 S.W.2d at 603-04 (holding that three separate writings were insufficient to satisfy the statute of frauds because the documents did not contain internal references to each other); *Ford Dev. Corp.*, 2001 WL 399304, at *3 (recognizing the "long held rule

that subsequent documents cannot be used to aid in supplying a sufficient description”); *Dunworth Real Estate Co.*, 2008 WL 36222, at *5 (holding that extrinsic emails which were not referenced in the signed memorandum and did not exist until after the memorandum was signed “cannot be considered as an aid to clarify the common name description, even if we were to conclude that it constituted a sufficient nucleus description”). These documents do not reference the Memorandum of Understanding, which Plaintiffs allege sets forth the “pillars of the deal,” nor does the Memorandum of Understanding reference them. [See Ex. D-2]. Also these documents do not mention Plaintiffs by name, much less identify them as lessors. Finally, merely listing various neighborhood associations does not constitute an adequate property description under the statute of frauds.

The statute of frauds requires that the property description provide the “means or data by which the land to be conveyed may be identified with reasonable certainty.” *Morrow*, 477 S.W.2d at 539. Caselaw examples below are illustrative on this point.

In *Jones v. Mid-State Homes, Inc.*, the Texas Supreme Court held the following property description inadequate:

“[a] certain lot in the Oltorf Addition of Marlin, Falls County, Texas, and being recorded in the City Hall at Marlin, Texas, and said lot being in Block No. 7 of said addition and being north of Roosevelt Street south of the City of Marlin, and being west of the Sally Dunbar property. Said property is about 52 by 150 feet in size.”

356 S.W.2d 923, 925 (Tex. 1962). The description contained in *Jones* is certainly more specific than merely referencing a general area by listing the various neighborhood associations that supposedly comprise it.

In *Wilson v. Fisher*, the Texas Supreme Court likewise found the following property description to be inadequate: “brick duplex & garage apt located at 4328-30 Cedar Springs...Room at back not included.” 188 S.W.2d 150, 152 (Tex. 1945). While this description is less specific than in *Jones*, it is more specific than merely referring to property by neighborhood associations that allegedly comprise it.

It is not enough for the legal description to merely identify the general area in which the property is located (by tract survey and county). *Reiland*, 213 S.W.3d at 437. The description must contain information regarding the size, shape, and boundaries of the property. *Id.*

Merely referencing an abstract area by naming neighborhood associations that supposedly comprise it is wholly insufficient. That simple reference does not even identify the tract, survey and county in which the property is located; much less identify the size, shape, and boundaries of the property.

3. The email chain in paragraph 25 of Plaintiffs’ Fourth Amended Petition does not help satisfy the statute of frauds.

In paragraph 25 of their Fourth Amended Petition, Plaintiffs identify an August 29, 2008 email chain between John Wehrle and Tolli Thomas as another “Contract Document.” In that email chain, Tolli Thomas wrote:

John:

What has been decided or done about Overton Woods?
-Tolli Thomas

[See Ex. D-5]. In response, John Wehrle wrote:

Tolli and Lucas — Mark and I just spoke and we agreed to make the SFWA offer available to all neighborhoods, including Overton Woods and Tanglewood Park Homes.

[See Ex. D-5]. This email chain includes absolutely no reference to any other document. There is no reference to the Memorandum of Understanding, and more importantly the Memorandum of Understanding does not reference it. None of the essential terms of the contract are contained within the emails or in a referenced writing. For example, terms regarding bonuses, royalties, and the length of the lease are not addressed at all in these emails. Again, the emails do not mention Plaintiffs by name or identify them as lessors. And, there is no property description contained in the emails. Thus, this email chain is insufficient to help cure the statute of frauds defects.

4. The document described in paragraph 26 of Plaintiffs' Fourth Amended Petition does not help satisfy the statute of frauds.

In paragraph 26 of their Fourth Amended Petition, Plaintiffs loosely describe discussions between Defendants and SFWA which apparently occurred on September 7, 2008, as "Contract Documents." These discussions are embodied in an email chain dated September 7, 2008. [See Ex. D-6].

These emails suffer all the infirmities of the earlier ones discussed above. They do not identify Plaintiffs by name nor identify them as lessors. No other document references this email chain. These emails do not contain any of the essential terms of the

purported contract. And, there is no property description contained in the email chain. In short, this email chain is insufficient to satisfy the statute of frauds.

5. The documents described in paragraphs 27 and 28 of Plaintiffs' Fourth Amended Petition do not help satisfy the statute of frauds.

In paragraphs 27 and 28 of the Fourth Amended Petition, Plaintiffs identify two September 8, 2008 emails between John Wehrle and Tolli Thomas as "Contract Documents." In the first email, Tolli Thomas sends John Wehrle a proposed Vantage News Release for his review. [See Ex. D-7]. John Wehrle responded by supposedly making revisions to the proposed news release. [See Ex. D-7].

Again, the email chain (and the attached proposed news release) does not reference any other documents. Likewise, no other document references the email chain or proposed press release. Again, none of the documents identify Plaintiffs as lessors, and there is no adequate property description. Although the proposed news release mentions various neighborhoods associations, as is explained above, merely listing various neighborhood associations does not provide a sufficient property description. *See Reiland*, 213 S.W.3d at 437 ("The legal description in the conveyance must not only furnish enough information to locate the general area as in identifying it by tract survey and county, it **need contain information regarding the size, shape, and boundaries**").

On this point, it is also noteworthy that Plaintiffs admit that they are not "members" of SFWA. [See Ex. A-1 at 15:9-16; Ex. A-2 at 9:9-14; Ex. A-3 at 12:21 – 13:9; Ex. A-4: at 13:2-10; Ex. A-5 at 5:19 – 6:19]. Plaintiff Linda Weber testified:

Q. Did you pay — did you consider yourself a member of the Southwest Fort Worth Alliance?

A. I never considered either way. I didn't know really much about that group.

Q. Do you know whether you ever paid an initiation fee or dues or anything of that character to Southwest Fort Worth Alliance?

A. No.

Q. You did not?

A. I don't believe I did.

Q. Okay. Did you execute a letter of intent or membership agreement or application with respect to Southwest Fort Worth Alliance?

A. No.

[See Ex. A-3 at 12:21 – 13:9; see also Ex. A-1 at 15:9-16; Ex. A-2 at 9:9-14; Ex. A-4: at 13:2-10; Ex. A-5 at 5:19 – 6:19].

6. The lease form mentioned in paragraph 29 of Plaintiffs' Fourth Amended Petition does not help satisfy the statute of frauds.

In paragraph 29 of their Fourth Amended Petition, Plaintiffs identify the final, SFWA blank "lease form" as a "Contract Document." This document is unequivocally insufficient to satisfy the statute of frauds. [See Ex. D-8]. The lease form is truly "blank." It does not mention Plaintiffs, much less identify them as lessors. It does not contain a property description at all. It was not signed by any party.

The email chain discussing the SFWA blank lease form also does not provide any of the missing information. [See Ex. D-8]. It does not mention Plaintiffs, nor identify them as lessors. The email chain does not contain any property description whatsoever.

In short, the emails and the blank lease form, taken together or separately, do not satisfy the statute of frauds.

7. The email chain described in paragraph 30 of Plaintiffs' Fourth Amended Petition does not help satisfy the statute of frauds.

In paragraph 30 of the Fourth Amended Petition, Plaintiffs state “[o]n September 15, 2008, Defendants unequivocally agreed that they were ‘making the offer to all of the Alliance neighborhoods.’” Plaintiffs are apparently referring to an email chain dated September 15, 2008, between John Wehrle and Tolli Thomas. [See Ex. D-9].

For all the reasons stated above, these emails are insufficient to help satisfy the statute of frauds. This email chain includes absolutely no reference to any other document. There is no reference to the “Memorandum of Understanding” and the “Memorandum of Understanding” does not reference it. None of the essential terms of the contract are contained within the emails. For example, terms governing bonuses, royalties, and the length of the lease are not mentioned at all. The emails do not identify Plaintiffs as lessors. And, there is no property description contained in the emails.

Although the email references “Alliance neighborhoods” that description (if it can be called one) is not adequate to satisfy the statute of frauds. *See Reiland*, 213 S.W.3d at 437 (“The legal description in the conveyance must not only furnish enough information to locate the general area as in identifying it by tract survey and county, it **need contain information regarding the size, shape, and boundaries**”). “Alliance neighborhoods” does not even identify the tract, survey or county in which the property is located; much

less identify the size, shape, and boundaries of the property. Thus, this email chain is insufficient to satisfy the statute of frauds.

8. The documents described in paragraph 31 of Plaintiffs' Fourth Amended Petition do not help satisfy the statute of frauds.

In paragraph 31 of their Fourth Amended Petition, Plaintiffs identify a September 17, 2008 email between John Wehrle and a third-party as a "Contract Document." This email has a Google map attached to it. [*See* Ex. D-10].

It first bears noting that this email was between John Wehrle and a non-party. [*See* Ex. D-10]. The email and attached map do not reference any other document. [*See* Ex. D-10]. And, no other documents refer to the email or map. *See Owens*, 433 S.W.2d at 167; *Conner*, 267 F.3d at 435 (stating that where a "contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together"); *Mayor*, 104 S.W.3d at 280 (recognizing that when essential terms are missing from a contract for the sale of real property, "[t]he next step is to determine whether the contract sufficiently references another writing supplying the missing terms" and that "[i]f it does, the referenced writing must have been in existence at the time the parties signed the contract"); *Boddy*, 497 S.W.2d at 603-04 (holding that three separate writings were insufficient to satisfy the statute of frauds because the documents did not contain internal references to each other); *Dunworth Real Estate Co.*, 2008 WL 36222, at *5 (holding that extrinsic emails which were not referenced in the signed memorandum and did not exist until after the memorandum was signed "cannot be considered as an aid to clarify the common name description, even if we were to conclude that it constituted a

sufficient nucleus description”). The email and map do not contain any of the terms of the purported contract (such as lease term, bonuses, or royalties). [See Ex. D-10]. The email and map do not identify Plaintiffs as lessors. [See Ex. D-10].

In sum, the documents and emails that Plaintiffs have cherry picked, taken together or separately, do nothing to satisfy the statute of frauds defects in their case. Even the Memorandum of Understanding, which purportedly sets forth the “pillars of the deal”⁶ and the terms Plaintiffs are seeking to have specifically enforced, does not contain a property description, does not identify Plaintiffs as lessors, and is not signed by Plaintiffs or Defendants. [See Ex. D-2]. Equally important, it **does not** reference a single document that can save Plaintiffs case from the statute of frauds. [See Ex. D-2]; *see also Conner*, 267 F.3d at 435 (stating that where a “contract is memorialized in more than one writing, one of the writings must refer to the others in order for the writings to be read together”); *Mayor*, 104 S.W.3d at 280 (recognizing that when essential terms are missing from a contract for the sale of real property, “[t]he next step is to determine whether the contract sufficiently references another writing supplying the missing terms” and that “[i]f it does, the referenced writing must have been in existence at the time the parties signed the contract”). Thus, Plaintiffs intended beneficiary contract claim fails as a matter of law and should be dismissed.

⁶ See Pls.’ 4th Am. Pet. at ¶ 22.

C. Promissory Estoppel does not Excuse the Alleged Contract From the Statute of Frauds.

Plaintiffs allege that the doctrine of promissory estoppel prevents Defendants from raising the statute of frauds as a defense to their lease claims. *See* Pls.'4th Pet. at ¶¶ 37-38, and 71-76. Plaintiffs' reliance on promissory estoppel is misguided, as the promissory estoppel exception to the statute of frauds only applies when a party promises to sign an existing writing that would satisfy the statute of frauds, refuses to do so, and then asserts the statute of frauds in defense of a claim to recover on that contract. *See Exxon Corp. v. Breezevale, Ltd.*, 82 S.W.3d 429, 438 (Tex. App.—Dallas 2002, pet. denied) (citing "*Moore*" *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936, 940 (Tex. 1972)).

In a well-known and widely-cited case, the Texas Supreme Court emphasized that the statute of frauds can be avoided by promissory estoppel **only if** the party promises to sign a written contract **which is in existence at the time the promise is made**. "*Moore*" *Burger*, 492 S.W.2d at 938–40 (emphasis added). A promise to prepare an agreement that satisfies the statute of frauds is not sufficient. "*Moore*" *Burger*, 492 S.W.2d at 940; *Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739, 741 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("A promise to prepare a written contract is not sufficient [to establish promissory estoppel]. The defendant must have promised to sign a particular agreement which was in writing at the time."); *Breezevale*, 82 S.W.3d at 438 ("To invoke the application of promissory estoppel where there is an oral promise to sign an agreement, as in this case, the agreement that is the subject of the promise must comply with the

statute of frauds... **That is, the agreement must be in writing at the time of the oral promise to sign it.**") (emphasis added); *Sonnichsen v. Baylor Univ.*, 47 S.W.3d 122, 125-26 (Tex. App.—Waco 2001, no pet.) ("*Sonnichsen I*").

In this case, there is no evidence of a written agreement that specifically identified Plaintiffs as lessors or described any particular piece of Plaintiffs' respective properties with reasonable certainty. [See Ex. A-1 at 28:8 – 29:22, 43:14 – 44:8; Ex. A-2 at 14:11-24; Ex. A-3 at 27:1-11, 34:15 – 35:2; Ex. A-4 at 15:22 – 16:10; Ex. A-5 at 5:19 – 6:19]. The Maddox and Weber Plaintiffs admit they never saw a written lease, much less a lease containing their name or a description of their respective properties during this time. [See *id.*]. Plaintiff Patti Maddox testified:

Q. Prior to mid October of 2008, had you ever received an oil and gas lease or a mineral lease regarding the 4645 Highgrove property, a written oil and gas lease or a mineral lease?

A. From...

Q. From Vantage.

Q. Vantage. No.

Q. Or from Caffey?

A. No.

Q. And just so we're clear about your contentions in this lawsuit, you in this lawsuit are asking to be allowed to enforce the terms of an oil and gas lease and mineral — and/or mineral lease that you never saw prior to October — mid October of 2008; is that right?

A. That's correct.⁷

Plaintiff Linda Weber gave similar testimony. [See Ex. A-3 at 27:1-11, 34:15 – 35:2]. Plaintiffs also assert that they relied on Defendants' alleged promise to give Plaintiffs the opportunity to accept or reject the alleged "SFWA deal" by "turning down lease offers from other gas produces and/or not soliciting alternative mineral leases." See Pls.' 4th Am. Pet. at ¶ 73. However, Plaintiffs admit that they waited to sign, not at the instruction of Defendants, but instead at the advice of their respective neighborhood associations. [See Ex. A-1 at 61:8 – 62:9, 66:18-21, 72:16-25, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-3 at 28:16-24, 31:1-6, 33:15 – 34:14; Ex. A-4 at 31:6-16, 36:16-20, 57:7-20; Ex. A-5 at 5:19 – 6:19]. Plaintiff Linda Weber testified:

Q. Also do you recall that your neighborhood association in the summer of 2008 was circulating fliers or other printed material that encouraged the residents not to sign oil and gas mineral leases?

A. Yep.

Q. Did you see those?

A. Yes.

Q. And were you following the advice or suggestion of your neighborhood association in the summer of 2008 when you chose not to sign mineral lease offers?

A. Yes.

Q. Nobody from Vantage or Caffey ever encouraged you or instructed you not to sign a mineral lease offer from Chesapeake or Dale or any other of the companies, did they?

⁷ [Ex. A-1 at 28:8-23; *see also* Ex. A-1: 28:24 – 29:22, 43:14 – 44:8; Ex. A-2 at 14:11-24].

A. No.⁸

Plaintiff Linda Weber's testimony is illustrative of the other Plaintiffs' testimony on the point. [See Ex. A-1 at 48:6-9, 61:8 – 62:9, 66:18-21, 72:16-25, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-4 at 31:6-13, 36:16-20, 57:7-20; Ex. A-5 at 5:19 – 6:19].

The summary judgment evidence conclusively demonstrates that Plaintiffs cannot rely on the doctrine of promissory estoppel to avoid the application of the statute of frauds. Accordingly, Plaintiffs' promissory estoppel claim should be dismissed as a matter of law.⁹

D. Partial Performance also does not Save Plaintiffs' Case from the Statute of Frauds.

The part performance exception to the statute of frauds applies where the partial performance is “unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.” *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied). “The acts of performance relied upon to take a parol contract out of the statute of frauds must be such as could have been done with no other design than to fulfill the particular agreement sought to be reinforced.” *Id.* When the alleged contract at issue is for real property, courts look for specific events to determine the existence of part performance. A seller must show “performance of the

⁸ [Ex. A-3 at 33:23 – 34:14; see also Ex. A-3 at 28:16-24, 31:1-6, 33:15-22].

⁹ Plaintiffs are also not entitled to recover on any claim for benefit of the bargain damages (*i.e.*, for any alleged lost signing bonus or royalty) based upon its promissory estoppel claim, as only reliance damages are recoverable. See *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 734 (Tex. 1981); *Esty v. Beal Bank, S.S.B.*, 298 S.W.3d 280, 305 (Tex. App.—Dallas 2009, no pet.); *Petrus v. Criswell*, 248 S.W.3d 471, 476 (Tex. App.—Dallas 2008, no pet.). Texas courts do not permit the recovery of expectancy damages. *Esty*, 298 S.W.3d at 305. Thus, Plaintiffs are only entitled to reliance damages, if any are required to restore them to their former position. *Fretz Constr. Co. v. S. Nat'l Bank*, 626 S.W.2d 478, 483 (Tex. 1981).

contract by delivery of possession to the purchaser and a detrimental change of position, for which the vendor has no adequate remedy.” *Davis v. Campbell*, 524 S.W.2d 790, 793 (Tex. Civ. App.—Dallas 1975, no writ); *see also Preston Exploration Co. v. Chesapeake Energy Corp.*, No. CIV.A. H-08-3341, 2010 WL 596358, at *6, *6 n.3 (S.D. Tex. Feb. 16, 2010) *adhered to on reconsideration*, 716 F. Supp. 2d 656 (S.D. Tex. 2010); *see also Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 875, 882 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (addressing an assignment of an interest in an oil and gas lease); *Cowden v. Bell*, 293 S.W.2d 611, 615 (Tex. Civ. App.—San Antonio 1956), *aff’d*, 157 Tex. 44, 300 S.W.2d 286 (Tex. 1957).

Oil and gas leases are considered contracts for real property. *See Cherokee Water Co.*, 641 S.W.2d at 525; *Avis*, 174 S.W.2d at 258; *W.T. Waggoner Estate*, 19 S.W.2d at 28-29; *Stephens Cnty.*, 254 S.W. at 295. As such the foregoing rules apply in this case. *See Preston Exploration Co.*, 2010 WL 596358, at *6, n.3; *see also Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 882-883 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (addressing an assignment of an interest in an oil and gas lease); *Cowden v. Bell*, 293 S.W.2d 611, 615 (Tex. Civ. App.—San Antonio 1956), *aff’d*, 157 Tex. 44, 300 S.W.2d 286 (Tex. 1957). Consequently, Plaintiffs, as lessors, must be able to show delivery of possession and a detrimental change of position for which they have no remedy in order to rely on the excuse of partial performance to defeat the statute of frauds.

Here, there is no allegation nor evidence that Defendants took possession of Plaintiffs' minerals. Additionally, Plaintiffs did not suffer detrimental change of position. Plaintiffs assert that they had passed up opportunities to sign leases with oil and gas companies. However, Plaintiffs admit that the offers were received and rejected before Defendants became involved, and they waited to sign, not at the instruction of Defendants, but instead at the advice of their respective neighborhood associations. [See Ex. A-1 at 61:8 – 62:9, 66:18-21, 72:16-25, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-3 at 28:16-24, 31:1-6, 33:15 – 34:14; Ex. A-4 at 31:6-16, 36:16-20, 57:7-20; Ex. A-5 at 5:19 – 6:19].

Plaintiffs also assert that that SFWA's alleged performance unequivocally refers to the contract and corroborates its existence. Even if SFWA's acts were relevant to Plaintiffs' excuse of part performance, Plaintiffs must still demonstrate that Defendants took possession of Plaintiffs' minerals, which they did not. *See Preston Exploration Co.*, 2010 WL 596358, at *6. Plaintiffs partial performance defense fails as a matter of law.

E. Plaintiffs' Negligent Misrepresentation Claims Fail as a Matter of Law Because (1) Defendants Made no Misrepresentations of Existing Fact and (2) Plaintiffs Have not Suffered out of Pocket Damages.

Defendants are also entitled to judgment as a matter of law on Plaintiffs' negligent misrepresentation claim because (1) Defendants made no misrepresentations of existing fact and (2) Plaintiffs have not suffered out of pocket damages. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) ("A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively

establishes all of the elements of an affirmative defense is entitled to summary judgment”).

In their Fourth Amended Petition, Plaintiffs claim that Vantage represented that it would give Plaintiffs “the opportunity to accept or reject the SFWA Deal.” *See* Pls.’ 4th Am. Pet. at ¶ 44. The evidence, on the other hand, overwhelmingly establishes that Defendants did not make any such representation to Plaintiffs. [*See* Ex. A-1 at 48:6-9, 61:8 – 62:9, 66:18-21, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-3 at 28:16-24, 39:8-19; Ex. A-4 at 36:16-20, 52:1-9, 52:22 – 53:7; 57:7-20; Ex. A-5 at 5:19 – 6:19].

More importantly, this alleged misrepresentation, even if it were proven to be true, is a mere promise of future action that cannot support a claim for negligent misrepresentation. Additionally, Plaintiffs have only incurred (and essentially only seek) benefit-of-the-bargain damages, which cannot be recoverable in this matter as a matter of law because the bargain Plaintiffs seek to enforce is unenforceable under the statute of frauds.

1. Plaintiffs do not allege misrepresentations of existing fact.

Plaintiffs’ negligent misrepresentation claim is based upon an alleged promise to **do something in the future**, not a misrepresentation of **existing fact**. The alleged representation in this case—that Vantage would give Plaintiffs “the opportunity to accept or reject the SFWA Deal”—is a promise of future action, not existing fact.

A promise of future performance **cannot** serve as the basis of a negligent misrepresentation claim as a matter of law. *See Brown v. Am. Fid. Assurance Co.*, No.

2-09-042-CV, 2010 WL 144384, at *3 (Tex. App.—Fort Worth Jan. 14, 2010, pet. denied); *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding representations defendant would provide all equipment necessary to start Louisiana plant and would pay plaintiff \$55,000 annually were promises of future conduct and not misrepresentations of existing fact); *Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding alleged oral promise not to terminate plaintiff was not misrepresentation of existing fact but was promise to refrain from taking action in future). Importantly, Plaintiffs admit that Defendants did not make any representations to them. [See Ex. A-1 at 48:6-9, 61:8 – 62:9, 66:18-21, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-3 at 28:16-24, 39:8-19; Ex. A-4 at 36:16-20, 52:1-9, 52:22 – 53:7; 57:7-20; Ex. A-5 at 5:19 – 6:19].

2. Plaintiffs have not suffered out of pocket damages.

It is clear that Plaintiffs seek one primary remedy in this lawsuit, “specific performance” of the terms set forth in the Memorandum of Understanding. However, Texas law bars a claim for negligent misrepresentation that is made in an attempt to circumvent the statute of frauds. *See Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (holding that the statute of frauds bars a claim for negligent misrepresentation that is pled in an attempt to circumvent the statute of frauds). Damages for negligent misrepresentation are limited to out-of-pocket expenses; benefit-of-the-bargain damages are not available. *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663-64 (Tex. 1998). “Out-of-pocket damages, which derive from a

restitutionary theory, measure the difference between the value of that which was parted with and the value of that which was received.” *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (“*Sonnichsen II*”). “Benefit-of-the-bargain damages, which derive from an expectancy theory, evaluate the difference between the value that was represented and the value actually received.” *Id.* Out-of-pocket damages therefore require some expenditure by Plaintiffs in reliance on the alleged misrepresentation. *See Formosa Plastics v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 49-50 (Tex. 1998); *see also Beckham Res., Inc. v. Mantle Res. L.L.C.*, No. 13-09-00083-CV, 2010 WL 672880, at *14 (Tex. App.—Corpus Christi Feb. 5, 2010, pet. denied) (“In fact, Beckham’s own contention that **it refrained from taking any action** because of Mantle’s alleged misrepresentation **militates against a finding that it suffered any reliance or out-of-pocket damages**”).

Here, Plaintiffs have not alleged that they parted with anything of value as a result of the alleged representations/promises of Defendants. In fact, Plaintiffs essentially admit that all they want is to enforce the Contract. [Ex. A-1 at 27:21 – 28:7; Ex. A-2 at 17:7-20; Ex. A-4 at 52:5-15; Ex. A-5 at 5:19 – 6:19]. Plaintiffs ask that “the Court award economic reliance damages based on both SFWA and Plaintiffs’ forbearance and rejections of offers to lease from competing gas companies.” However, Plaintiffs admit that they turned down offers at the advice of their respective neighborhood association, not Defendants. [See Ex. A-1 at 61:8 – 62:9, 66:18-21, 72:16-25, 87:10-14; Ex. A-2 at 14:25 – 15:3; Ex. A-3 at 28:16-24, 31:1-6, 33:15 – 34:14; Ex. A-4 at 31:6-13, 36:16-20,

57:7-20; Ex. A-5 at 5:19 – 6:19]. Indeed, Plaintiffs’ inaction demonstrates a lack of reliance. *See Beckham Res., Inc.*, 2010 WL 672880, at *14 (“In fact, Beckham’s own contention that it refrained from taking any action because of Mantle’s alleged misrepresentation militates against a finding that it suffered any reliance or out-of-pocket damages”). As such Plaintiffs’ negligent misrepresentation claims fail as a matter of law.

F. David and Joyce Richey’s Breach of Contract Claim Fails as a Matter of Law Because (1) There is no Lease; (2) Defendants did not Accept the Lease; and/or (3) Assuming *Arguendo*, that there is a Lease, it is not Enforceable Because of the Statute of Frauds.

Unlike the other Plaintiffs, Plaintiffs David and Joyce Richey assert a direct breach of contract claim on the theory that they have a valid lease with Defendants. However, that claim fails as a matter of law because (1) there is no lease; (2) Defendants did not accept the purported lease; and (3) assuming, without admitting, there is a lease as alleged, it would be unenforceable because of the statute of frauds defense.

1. David and Joyce Richey failed to cooperate in efforts to validate their lease.

Plaintiffs David and Joyce Richey testified that they attended a signing event and signed an oil and gas lease with Vantage. [Ex. A-4 at 15:15-21; Ex. A-5 at 5:19 – 6:22]. While both David and Joyce Richey claim to have signed various documents including an oil and gas lease, [Ex. A-4 at 16:11-19, 17:6-15, 19:9-12; Ex. A-5 at 6:23 – 7:6], the oil and gas lease presented by them is only signed by David Richey, and not by Joyce Richey. [See Ex. C]. Additionally, Defendants did not sign the lease. [See Ex. C].

Additionally, David Richey signed on the wrong signature line. [*See id.*]. His signature was also not properly notarized. [*See id.*].

A Caffey representative, Carter Vaughan, was assigned to cure David and Joyce Richey's lease, but was rebuffed. Carter Vaughan testified:

- Q. Tell me about the conversation.
- A. Okay.
- Q. With as much detail as you remember.
- A. All right. I received Mr. Richey's – and Mrs. Richey's file I believe in late September of 2008. I called the phone number — I don't remember where I got this phone number, it either would have either been from the file or off of the whitepages.com. It would have been one of the two; I couldn't tell you which. I called the number, a man answered. I said, Mr. Richey? He said, Yes. I said, My name is Carter Vaughan with the Caffey Group. I said something to the effect of I need to talk to you about your lease or something to that — or there's a problem with the lease you signed. And the person on the other end said, I don't want any of this, and hung up.

[*See Ex. E at 83:17 – 84:8*]. Carter Vaughan kept a telephone call spreadsheet during the time period, and it confirms his testimony that David Richey refused to cooperate and validate his lease. [*See Ex. F*]. The inescapable conclusion from these facts is: there never was and is not now an enforceable lease.

2. Defendants did not accept or approve of the lease as evidence by their lack of signature on the lease.

Additionally, the lease requires the signatures of the lessors and the lessee in order for the agreement to be binding. [*See Ex. C*]. The last paragraph of the lease provides as follows:

IN WITNESS WHEREOF, this Lease is executed to be effective as of the date first written above, **but upon execution shall be binding on each signatory** and the signatory's heirs, devisees, executors, administrators, successors and assigns...

[*see id.*]. This clause and the presence of a signature line for the lessee (The Caffey Group, LLC) evidences the fact that the lease would not be properly executed or accepted unless and until the lessee signed the lease. [*See Ex. C*]. As indicated on page ten of the lease, the lease lacks the signature of The Caffey Group, LLC. Without acceptance of the lease by Defendants, there simply is no lease. [*See Ex. C*].

3. Assuming *arguendo* that Defendants orally accepted the Richey lease, it remains unenforceable under the statute of frauds.

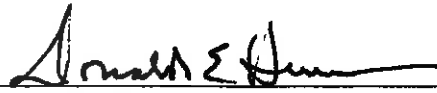
As noted above, oil and gas leases are subject to the statute of frauds. *See Vela*, 723 S.W.2d at 206 (citing *Minchem*, 345 S.W.2d at 287-288); *see also, Sun-Key Oil Co.*, 2006 WL 3114466, at * 3 (“Because the Gray lease conveys an interest in real property, it must comply with the statute of frauds to be valid”); *Paine*, 464 S.W.2d at 479. The statute frauds requires, among other things, that the oil and gas lease be in writing and signed by the party charged with its enforcement. *See TEX. BUS. & COM. CODE ANN.* § 26.01(a). Here, despite the fact the lease contained a signature block for The Caffey Group, LLC to evidence acceptance, it was not signed by either Caffey or Vantage. *See Koons*, 2007 WL 4292423, at *2 (holding where defendant included a signature line in the contract but never signed the signature line, the contract was unenforceable because it failed to comply with the statute of frauds even though it was the defendant who drafted the contract). Thus, the lease that David and Joyce Richey seek to enforce, is

unenforceable because it is not signed by the party to be charged and therefore, is not in compliance with the statute of frauds. As a result, David and Joyce Richey's breach of contract claim fails as a matter of law.

IV
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Vantage and Caffey pray that their Motion for Traditional and No-Evidence Summary Judgment be granted and that the Court enter final judgment as a matter of law that Plaintiffs take nothing on the claims stated in the Fourth Amended Petition. Defendants also respectfully request that the Court award them all such other and further relief to which they may be justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing document was forwarded to all counsel of record via Certified Mail, Return Receipt Requested, on January 26, 2011.

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