

JOSEPH LEON MADDOX and wife
PATTI LYNN MADDOX, DAVID
RICHEY and wife, JOYCE RICHEY,
and LINDA FAYE WEBER
Plaintiffs,

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IN THE DISTRICT COURT OF

v.

TARRANT COUNTY, TEXAS

VANTAGE ENERGY, LLC, and
THE CAFFEY GROUP, LLC
Defendants.

67th JUDICIAL DISTRICT

**PLAINTIFFS' BRIEF (THIRD-PARTY BENEFICIARY STATUS) IN OPPOSITION TO
DEFENDANTS VANTAGE ENERGY, LLC AND THE CAFFEY GROUP, LLC'S
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT**

Plaintiffs hereby submit this brief to the Court, as follows:

I. INTRODUCTION

At the summary judgment hearing in this lawsuit on February 17, 2011, Defendants exceeded the scope of their motion for summary judgment, supplemental motion for summary judgment and reply brief and, for the first time, argued that Plaintiffs are not third-party beneficiaries because they are not creditor or donee beneficiaries. This new argument is born of Defendants' realization that they cannot overcome Plaintiffs' summary judgment response, including Plaintiffs' full performance defense to the Statute of Frauds. Indeed, Defendants wholly failed to mention that defense in any of their summary judgment briefing or their oral argument in support of summary judgment.

At the conclusion of the hearing, the Court requested that Plaintiffs provide supplemental briefing on the issue of Plaintiffs' status as donee third-party beneficiaries, which Plaintiffs hereby submit.

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II. SUMMARY OF PLAINTIFFS' THIRD-PARTY BENEFICIARY ARGUMENT

Plaintiffs are donee beneficiaries of the contract between SFWA and Vantage. The intent of the contracting parties, in this case SFWA and Vantage, is the controlling issue in determining whether Plaintiffs are third-party beneficiaries to the SFWA/Vantage contract. The following facts establish that SFWA and Vantage unequivocally intended for all un-leased mineral interest owners in the neighborhoods that comprise SFWA to directly benefit from the SFWA/Vantage contract:

1. **The sole purpose of SFWA's formation was to directly benefit un-leased mineral interest owners in SFWA neighborhoods.** SFWA is an unincorporated association that was formed for the sole purpose of negotiating the best mineral lease it could obtain for the direct benefit of un-leased mineral interest owners, like Plaintiffs, who live in neighborhoods that comprise SFWA.
2. **SFWA could not obtain any benefit from the SFWA lease terms.** The economic terms and other non-economic concessions SFWA obtained from Vantage with respect to the lease form (V-300) it negotiated with Vantage inure solely to the benefit of mineral owners within SFWA who would have the opportunity to sign a Vantage lease containing those terms. SFWA did not, and does not, own any minerals. Consequently, SFWA could not benefit from the SFWA/Vantage lease terms it negotiated with Vantage.
3. **Vantage did not benefit from terms contained in the SFWA lease.** SWFA negotiated a lease form with Vantage that contained "superior" terms, including non-economic terms that benefitted the mineral owner. According to Mark Caffey, of Defendant The Caffey Group, several terms of the uniform lease were disadvantageous to Vantage. Vantage did not benefit from those terms. The terms were intended to benefit SFWA mineral interest owners, like Plaintiffs, who should have been given the opportunity to sign Vantage leases containing such terms.
4. **The documents that comprise the SFWA/Vantage contract express the intent of the parties to directly benefit unleased mineral owners in SFWA neighborhoods.** The contract documents contain three different pieces of evidence establishing the parties' intent to confer a benefit upon a class of third-party beneficiaries:

- (a) on their face, the contract documents indicate that the deal being negotiated is for the benefit of third parties to the agreement;
 - (b) the contract documents discuss the “superior” non-economic lease terms that inured only to the benefit of the un-leased mineral owners who would sign leases containing such terms; and
 - (c) the contract documents identify the class of third-party beneficiaries.
5. **Vantage promised to extend the SFWA Deal to all un-leased mineral interest owners in the neighborhoods that comprise SFWA.** Vantage sent signed writings to SFWA in which Vantage promised to extend the opportunity to accept or reject the SFWA lease to “all” neighborhoods in SFWA. The class of third-party beneficiaries was thus clearly defined.
6. **Plaintiffs live in neighborhoods that comprise SFWA.** Plaintiffs’ surveyors and Vantage’s own mapmaking company have identified Plaintiffs’ properties as being within the boundaries of SFWA; thus, Plaintiffs are entitled to receive the SFWA deal, which was made for their benefit.

III. ARGUMENT & AUTHORITIES

A. Third-Party Beneficiary Law.

"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 et. al.*, 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 (in this case, SFWA). *MCI Telecommunications Corp. v. Texas Utilities Electric Company*, 995 S.W.2d 647, 651 (Tex. 1999).

The Texas Supreme Court has relied upon 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)(relying on Section 302 of the Restatement (Second) of Contracts). 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, SFWA stands in the shoes of the husband. Vantage stands in the shoes of the insurance company. And, the Intended Beneficiaries stand in the shoes of the wife. SFWA promised to give its endorsement, communication and coordination (analogous to the insurance premiums paid by the husband) to Vantage. Vantage wanted SFWA's endorsement. The endorsement was valuable to Vantage. (Wehrle Dep., p. 171: lines 5-7). In exchange for that consideration, SFWA required that Vantage promise to extend to all Intended Beneficiaries the opportunity to accept or reject the SFWA deal (analogous to the payment of insurance proceeds). SFWA was under no legal obligation to obtain the opportunity for the Intended Beneficiaries. The opportunity was a pure gift to the Intended Beneficiaries.

B. Plaintiffs are donee beneficiaries of the SFWA/Vantage contract.¹

The following evidence establishes that Plaintiffs are donee beneficiaries of the SFWA/Vantage contract:

¹ Plaintiffs do not claim that they are creditor beneficiaries of the SFWA/Vantage Agreement. SFWA did not owe the Plaintiffs any legal obligation that SFWA was trying to satisfy by obtaining the SFWA deal.

1. The sole purpose of SFWA's formation was to directly benefit un-leased mineral interest owners in SFWA neighborhoods.

In June of 2008 the nonprofit association known as SFWA was formed (Thomas Aff. ¶ 3)². A small group of volunteer mineral estate owners formed SFWA in response to increased natural gas leasing and drilling efforts in their Fort Worth neighborhoods (Thomas Aff. ¶ 3). The group's purpose was to negotiate the best possible lease terms *en masse* for the benefit of the un-leased mineral estate owners, neighborhood associations, and homeowners' associations within SFWA's geographic boundaries ("Intended Beneficiaries") (Thomas Aff. ¶ 3). SFWA's purpose was not to benefit itself, rather, it existed to serve the interests of the people who would directly benefit from the efforts of its negotiating committee, the Intended Beneficiaries.

2. SFWA could not obtain any benefit from the SFWA lease terms.

The economic terms and other non-economic concessions SFWA obtained from Vantage with respect to the lease form (V-300) it negotiated with Vantage inure solely to the benefit of the Intended Beneficiaries. SFWA did not, and does not, own any minerals. Consequently, SFWA could not benefit from the SFWA/Vantage lease terms it negotiated with Vantage.

3. Vantage did not benefit from terms contained in the SFWA lease.

SWFA negotiated a lease form with Vantage that contained "superior" terms, including non-economic terms benefiting the Intended Beneficiaries. According to the senior landman for The Caffey Group, Mark Caffey, several terms of the uniform lease were disadvantageous to Vantage:

² The Thomas affidavit is attached for the Court's convenience, without exhibits.

15 Q. All right. You may have seen it -- and I'll
16 find it if you need to see it; but in those fliers, did
17 you know they referred to this as a superior lease? Do
18 you notice that?

19 A. I don't remember in the fliers, but I remember
20 the word.

21 Q. Superior?

22 A. Yes.

23 Q. For some reason, Tolli called it a superior
24 lease?

25 A. Yes, she did.

1 Q. Did you think it was a superior lease?

2 MR. HERRMANN: Object to the form.

3 A. Superior for a landowner, yes.

4 Q. (BY MR. PETROFF) Okay. Why do you say -- you
5 almost smiled. What do you mean --

6 A. I thought it was too tough of a lease,
7 personally.

8 Q. Too tough of a lease for who?

9 A. For an oil-and-gas company.

10 Q. So it was -- it was -- it was better for the
11 landowner than it was for the company?

12 A. In my opinion.

13 MR. HERRMANN: Object to the form.

14 A. Sorry.

15 Q. (BY MR. PETROFF) Why did you think that the
16 Vantage lease was a superior lease?

17 A. Superior. I didn't use the word "superior."

18 Q. All right.

19 A. "Tough." Let's just use the word "tough."

20 Q. Tough. Why did you think it was a tough lease?

21 A. It's a tough lease. There were a lot of tough
22 provisions in there.

23 Q. Explain. I've never had a lease. I don't know
24 what a tough -- what you mean by "tough."

25 A. As I recall, it was a tough royalty provision.

1 I haven't seen it in years; but, I mean, tough royalty
2 provision, tough environmental-issue provisions.

3 Q. Okay. So when you say it's tough, a royalty
4 provision or tough environmental provision, that's
5 another way of saying, from the homeowner's perspective,
6 those are very good environmental provisions and royalty
7 provisions, right?

8 A. Not if a lease would actually prevent somebody
9 from operating a well.

10 Q. Well, do you think that the lease that was made
11 available at least to some of these neighborhoods was
12 going to prevent Vantage from being able to operate a
13 well?

14 MR. HERRMANN: Object to the form.

15 A. I can't say.

16 Q. (BY MR. PETROFF) Well, why did you mention
17 that just now?

18 A. Because it just -- I remember reading part of
19 the lease and thought it was very tough.

20 Q. Did you think it was going to make it difficult
21 or impossible to -- for Vantage to drill in those areas?

22 A. I don't think about it either way at the time.

23 Q. All right. So one way or another, though, the
24 Alliance ended up with, if not a superior lease, at
25 least a very good lease for homeowners, true?

1 MR. HERRMANN: Object to the form.

2 You can answer, if you can.

3 A. I don't know. That's just my opinion. I
4 thought there was some very good things about the lease
5 for the homeowners.

(Caffey Dep. p. 292-295, ln. 15-5); *see also* V-300.

Many of the lease terms were disadvantageous to Vantage. The terms were intended to benefit the Intended Beneficiaries, like Plaintiffs, who should have the opportunity to sign Vantage leases containing such terms.

4. The documents that comprise the SFWA/Vantage contract express the intent of the parties to directly benefit the Intended Beneficiaries.

The contract documents contain three different pieces of evidence establishing the parties' intent to confer a benefit upon a class of third-party beneficiaries:

(a) On their face, the contract documents contemplate that the deal being negotiated is for the benefit of third parties to the agreement;

(b) the contract documents discuss the "superior" non-economic lease terms that inured only to the benefit of the Intended Beneficiaries who would sign leases containing such terms; and

(c) the contract documents identify the class of the Intended Beneficiaries.

a. The Memorandum of Understanding (V-21)(the "MOU").

On its face, the terms of the MOU clearly express that its purpose is to discuss the terms of Vantage's promise to extend an opportunity to lease minerals owned by individuals who are not parties to the MOU. The performance called for in the MOU would be rendered meaningless without the existence of third-party beneficiaries like Plaintiffs. Without third-party beneficiaries, to whom would Vantage extend the opportunity to accept or reject the lease terms? To whom would SFWA announce its endorsement?³

b. Email from SFWA to Vantage regarding identity of class of Intended Beneficiaries and superior lease terms (V-18).

In Exhibit V-18, SWFA asks Vantage if it can release to its neighborhoods the news that SFWA received a "superior offer and lease" from Vantage and that it had been accepted. This statement is important for two reasons. First, the reason it was necessary for SFWA to make an announcement was to get the news out to the Intended Beneficiaries who would receive the leasing opportunity that a deal had been reached. Without the existence of the Intended

³ Plaintiffs hereby provide the Court with courtesy copies of charts from its oral presentation that depict the SFWA/Vantage/Intended Beneficiaries Agreement (V-307).

Beneficiaries, like Plaintiffs, there would have been no need to announce the binding contract. Second, the “superior” nature of the lease and offer did not benefit SFWA or Vantage—only the Intended Beneficiaries, like Plaintiffs, would benefit from those terms. That is particularly true of the non-economic lease terms.

c. Emails regarding identity of class of the Intended Beneficiaries (V-22, V-26, V-57).

Exhibits V-22, V-26 and V-57 demonstrate the combined intent of SFWA and Vantage to directly benefit the un-leased mineral interest owners in “all” SWFA neighborhoods, which V-57 systematically identifies, by extending to them the opportunity to accept or reject the SFWA deal. These documents make it clear that the SFWA deal was not being extended to SFWA i.e. the unincorporated association that was formed to negotiate with Vantage, but rather, to the mineral interest owners in neighborhoods that comprise SFWA.

d. News Release regarding superior lease terms and identity of class of Intended Beneficiaries (V-301 & V-302).

Vantage approved a news release that provided the following, in pertinent part:

The Southwest Fort Worth Alliance (SFWA), Vantage Energy, and Caffey Group are pleased to announce The Southwest Fort Worth Alliance’s acceptance of Vantage Energy’s proposed and accepted offer and lease and that Vantage Energy is the Alliance’s preferred and endorsed Natural Gas Developer.

Vantage Energy has won the bid for endorsement of The Southwest Fort Worth Alliance’s twenty-five member neighborhoods, with an initial three-year term bonus offer of \$27,500.00 and an optional two year term for a matching \$27,500.00 per acre.

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Vantage Energy, singularly, met SFWA’s expectations and needs with regard to fair lease terms, making Vantage’s offer not only superior to other bids received from a financial perspective, but also in its considerate provisions addressing terms, rights, safety and environment....[discussion of numerous superior provisions follows]

The following neighborhoods are CONGRATULATED in receiving Vantage Energy’s/Caffey Group’s Superior Offer:

Signing Events Begin This Week and residents will be contacted with their scheduled date.

Candleridge West	Foster Park	Hallmark Camelot
Meadow Creek	Meadow Creek South	Meadow Creek Southgate
Meadows of Candleridge	Overton Park	Overton South
Overton West	Overton Woods	Ridgeview Estates
South Hills Gas Group	Summer Creek Meadows	Summer Creek Ranch
Tanglewood Park	Trail Lake Estates	Villages of Sunset Pointe
Wedgwood	Wedgwood Central	Wedgwood East
Wedgwood Middle	Wedgwood West	Wedgwood Square N.E.Z.
Westcliff	Westcliff West	

This document is important because (1) it discusses the superior non-economic lease terms Vantage conferred upon the third-party beneficiaries (and which were disadvantageous to Vantage as an operator); and (2) it identifies the SFWA neighborhoods in which the donee beneficiaries live.

e. The final lease form (V-300).

As discussed above, the final lease form contained terms that were disadvantageous to Vantage. Those “superior” provisions are intended to directly benefit the Intended Beneficiaries.

5. Vantage promised to extend the SFWA deal to all un-leased mineral interest owners in the neighborhoods that comprise SFWA.

As set forth in subparagraph 4.c. above, Vantage agreed to give all un-leased mineral interest owners in the neighborhoods that comprise SFWA the opportunity to accept or reject the SFWA deal. That promise defined the class of donee third-party beneficiaries—by neighborhood.

6. Plaintiffs live in neighborhoods that comprise SFWA.

Plaintiffs’ surveyors have identified Plaintiffs’ properties as being within the boundaries of SFWA. For example, Plaintiffs have provided the following summary judgment evidence on

this issue:

- Plaintiffs' surveyor experts have testified that they can identify with reasonable certainty that Plaintiffs' properties are within the boundaries of SFWA (Arthur and Murley Affs. ¶¶ 6)⁴

Additionally, Vantage's own mapmaking company has identified Plaintiffs' properties as being within the boundaries of SFWA:

- Vantage's mapmaker, Jacob Patrylick, created a spreadsheet from the map of SWFA that was on the SFWA website.
- The spreadsheet contained information about every parcel of property in SFWA. The information included, but was not limited to, the street address of the individual parcel, the city in which it is located, the county in which it is located, the five digit zip code of the area in which it is located, the four digit zip code extension unique to each such parcel, the TAD Map location, the Mapsco map location, the legal description of the parcels (Addition, Lot, Block), the acreage of the parcel (calculated to the thousandths of an acre) and the square footage of the parcel. (Patrylick Dep. p. 204, line 15, to p. 206, line 5)(Ex. V-269 & V-269A).
- Notably, Row 7132 of the spreadsheet contains the information regarding the Maddox Plaintiffs' property including all of the information set forth above, while rows 9694 and 7230 contain the information for Linda Faye Weber's and the Richeys' properties. (Ex. V-269-A).

There is no other reason that Vantage's mapmaker would have this information about the Plaintiffs unless Vantage intended to confer a direct benefit on Plaintiffs by giving them the opportunity to accept or reject the SFWA lease terms.

IV. CONCLUSION

Defendants' motions for summary judgment should be denied for the reasons set forth in Plaintiffs' summary judgment briefing, which includes the following reasons:

1. There are eleven documents that comprise the written contract between Vantage and SFWA, or memoranda of that contract, that satisfy the Statute of Frauds.

⁴ The Arthur and Murley Affidavits are attached for the Court's convenience, without exhibits.

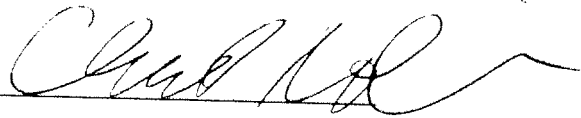
2. As set forth herein, Plaintiffs are third-party beneficiaries of that contract:
 - a. The summary judgment evidence is clear that SFWA was formed solely for the benefit of un-leased mineral interest owners in its neighborhoods in SFWA.
 - b. SFWA owned no minerals, and therefore, could not benefit from the “superior” economic and non-economic lease terms it negotiated with Vantage.
 - c. Likewise, those “superior” lease terms were disadvantageous to Vantage; those provisions were intended to inure to the benefit of un-leased mineral interest owners in SFWA.
 - d. Additionally, the evidence establishes that the contract documents express the parties’ intent to confer a direct benefit on un-leased mineral interest owners who lived in neighborhoods that comprise SFWA and that Plaintiffs are members of that class of beneficiaries.
3. Nevertheless, the SFWA/Vantage agreement does not have to comply with the Statute of Frauds because the Vantage/SFWA agreement itself is not a transfer of minerals. It is merely a contract whereby Vantage agreed to give all un-leased mineral interest owners in the neighborhoods that comprise SFWA the opportunity to accept or reject the SWFA lease.
4. Even if the Court concludes that the eleven documents that Plaintiffs submit as the SFWA/Vantage contract must comply with the Statute of Frauds, and do not, Plaintiffs are nevertheless entitled to enforce the contract as SFWA fully performed under the agreement and that full performance makes the Statute of Frauds unavailable as a defense for Defendants. Additionally, Plaintiffs have established other bars to the Statute of Frauds, including promissory estoppel and the partial performance of Vantage.

V. PRAYER

WHEREFORE, in accordance with the foregoing facts, cases and authorities, Plaintiffs respectfully request that this Honorable Court **DENY** the Defendants’ motions for summary judgment in all respects and grant the Plaintiffs such other and further relief as it deems just and appropriate under the circumstances.

Respectfully submitted,

RIDDLE & WILLIAMS, P.C.

By: 

Dean A. Riddle
State Bar No. 16888960
Chad E. Robinson
State Bar No. 24037373

3710 Rawlins Street
Suite 1400 - Regency Plaza
Dallas, Texas 75219
Telephone: (214) 760-6766
Facsimile: (214) 760-6765
Email: driddle@riddleandwilliams.com
Email: crobinson@riddleandwilliams.com

PETROFF & ASSOCIATES

Kip Petroff
State Bar No. 15851800
Carlos A. Fernandez
State Bar No. 24036555

3838 Oak Lawn Avenue
Suite 1124
Dallas, TX 75219
Telephone: (214) 526-5300
Facsimile: (214) 526-5354

MATHIS & DONHEISER, P.C.

Randal Mathis
State Bar No. 13194300
Mark Donheiser
State Bar No. 05974800

2575 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
Telephone: (214) 303-1919

Facsimile: (214) 303-0399

CHARLES E. DORR, P.C.

Charles E. Dorr
TX Bar No. 00797921
GA Bar No. 225983
4203 Montrose Blvd., Suite 600
Houston, TX 77066
Telephone: (713) 443-7030
Facsimile: (805) 669-4996
Email: ced@cedpc.com

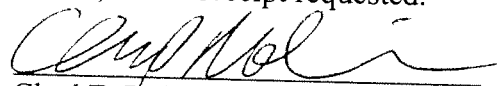
**Law Offices of
Christopher A. Payne, PLLC**

Christopher A. Payne
State Bar No. 15651500

5055 Addison Circle, Unit 428
Addison, TX 75001
Telephone: (214) 484-6598
Facsimile: (214) 484-6598
Email: cpayne@cappc.com

CERTIFICATE OF SERVICE

Pursuant to Rule 21 and 21a of the Tex. R. Civ. P., I hereby certify that on the 25th day of February, 2011, a true and correct copy of this document has been forwarded to all counsel of record by e-mail and/or hand delivery and/or certified mail, return receipt requested.


Chad E. Robinson