

AMOS R. MCCLUNEY and wife, CATHERINE	§	IN THE DISTRICT COURT OF
MCCLUNEY, et al.	§	
Plaintiffs,	§	
v.	§	
	§	TARRANT COUNTY, TEXAS
TITAN OPERATING, LLC, and, THE CAFFEY	§	
GROUP, LLC,	§	
Defendants.	§	
	§	
	§	
	§	67TH JUDICIAL DISTRICT
	§	

**PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
AND DEPOSITIONS FROM DEFENDANTS  
TITAN OPERATING, LLC and THE CAFFEY GROUP, LLC**

Plaintiff KAREN D. MCPHERSON (hereinafter "Plaintiff") files this her Motion to Compel Documents and Depositions from Defendants Titan Operating, LLC ("Titan") and The Caffey Group, LLC ("Caffey"), and shows the Court the following:

**I. INTRODUCTION**

1. The Bedford Colleyville Mineral Rights Coalition ("BC-MRC") was formed to negotiate the terms of a mineral lease opportunity *en masse* for Intended Beneficiaries (the "Intended Beneficiaries") in a defined geographic region of the Bedford/Colleyville area in Tarrant County, Texas. In September 2008, BC-MRC and Titan reached an agreement pursuant to which Titan agreed to extend to all Intended Beneficiaries the opportunity to accept or reject a mineral lease with certain economic and non-economic terms. In exchange for the promise that every un-leased BC-MRC mineral estate owner would have the opportunity to accept or reject a lease with Titan containing pre-negotiated terms, BC-MRC agreed to (1) endorse Titan to Intended Beneficiaries in BC-MRC as the winning gas producer for BC-MRC; (2) communicate with its thousands of Intended Beneficiaries about the dealings and agreement with Titan; (3) help with the substantial logistics challenge of arranging signing events for its thousands of Intended Beneficiaries; and (4) urge its Intended Beneficiaries not to sign a gas lease with

THOMAS A. HILL  
 DISTRICT CLERK  
 2011 MAR 1 PM 4:06  
 FILED  
 TARRANT COUNTY

any of Titan's competitors. After BC-MRC fully performed its obligations under the agreement, and Titan reaped the benefit of that performance by obtaining over 1,000 leases, Titan breached the agreement by refusing to extend the opportunity to all Intended Beneficiaries. Plaintiff is an Intended Beneficiary of the BC-MRC/Titan agreement and has filed suit against Titan for Titan's breach.

## II. SUMMARY

2. Defendants refuse to provide any discovery to Plaintiff. Defendants' refusal is predicated on the fallacious argument that their Statute of Frauds defense is a threshold legal issue for the Court to decide before any discovery should be conducted in the case. As the Court heard previously, in a Southwest Fort Worth Alliance case (*Maddox*), Defendants are wrong. The performance of an agreement by the parties removes the agreement from the Statute of Frauds. BC-MRC fully performed its obligations under the BC-MRC/Titan agreement by (1) endorsing Titan to Intended Beneficiaries in BC-MRC as the winning gas producer for BC-MRC; (2) communicating with its thousands of Intended Beneficiaries about the dealings and agreement with Titan; (3) helping with the substantial logistics challenge of arranging signing events for its thousands of Intended Beneficiaries; and (4) urging its Intended Beneficiaries not to sign a gas lease with any of Titan's competitors. Titan benefitted from BC-MRC's performance by snapping up thousands of mineral leases. Titan's benefit (obtaining signed leases from BC-MRC Intended Beneficiaries) is also evidence of its own partial performance of the BC-MRC/Titan agreement. Whether BC-MRC fully performed its obligations to Titan, whether the parties both partially performed and whether such performance removes the BC-MRC/Titan agreement from the Statute of Frauds are all factual questions for the jury. Texas law is clear that the jury must decide these critical questions of fact that determine whether Titan even has a Statute of Frauds defense in this case. Only after those factual questions are answered can the Court make a determination regarding whether the Statute of Frauds is available to Titan. Fundamentally, the Defendants take the position that they will provide no discovery based on a defense, the availability of which, cannot be determined until AFTER trial. Such a position is indefensible.

### III. FACTUAL BACKGROUND

#### 1. Facts giving rise to lawsuit.

##### A. The BC-MRC/Titan Agreement.

3. On or about September 18, 2008, BC-MRC and Titan agreed to pillars of a lease deal, as follows: Titan agreed that every single un-leased mineral owner within the boundaries of BC-MRC would have an opportunity to accept or reject a mineral lease with the following terms: (1) a \$25,000 signing bonus per acre; (2) a 25.5% royalty; (3) a 3-year term with 2-year extension option by paying an additional \$25,000 per net mineral acre; and (4) other terms favorable to the property owners. Thereafter, BC-MRC and Titan continued negotiating other details of the deal. Late in September 2008, BC-MRC and Titan agreed to the final form of the pre-negotiated lease, as well as the final geographical boundaries of BC-MRC. (Wollin Aff. ¶ 6).

4. In exchange for the promise that every un-leased BC-MRC mineral estate owner would have the opportunity to accept or reject a lease with Titan containing the foregoing negotiated terms, BC-MRC agreed to (1) endorse Titan to Intended Beneficiaries in BC-MRC as the winning gas producer for BC-MRC; (2) communicate with its thousands of Intended Beneficiaries about the dealings and agreement with Titan; (3) help with the substantial logistics challenge of arranging signing events for its thousands of Intended Beneficiaries; and (4) urge its Intended Beneficiaries not to sign a gas lease with any of Titan's competitors. (Wollin Aff. ¶ 7).

##### B. Performance of the BC-MRC/Titan agreement by BC-MRC and Titan.

5. BC-MRC fully performed its obligations under the BC-MRC/Titan agreement by (1) endorsing Titan to Intended Beneficiaries in BC-MRC as the winning gas producer for BC-MRC; (2) communicating with its thousands of Intended Beneficiaries about the dealings and agreement with Titan; (3) helping with the substantial logistics challenge of arranging signing events for its thousands of Intended Beneficiaries; and (4) urging its Intended Beneficiaries not to sign a gas lease with any of Titan's competitors. For example, the BC-MRC website contained the following posting:

We have a DEAL!!

**\*\*BC-MRC ENDORSES TITAN/CAFFEY\*\***

Bedford/Colleyville/Grapevine, TX, September 29, 2008—The leadership team of the Bedford Colleyville Minerals Rights Coalition (BC-MRC) has unanimously agreed to accept and recommend an oil and gas lease proposal from Titan Operating, LLC and the Caffey Group, LLC, which will be made available to all property owners within the coalition boundaries.

(Wollin Aff. ¶¶ 8-12).

**C. Titan confirms the agreement between itself and BC-MRC.**

6. Neither BC-MRC nor its Intended Beneficiaries had any control over when they would get to attend a signing event to accept or reject the lease. Defendants alone had control<sup>1</sup> over the signing process. On or about October 15, 2008, news of other gas producers breaching their contracts with other homeowner alliances in the Barnett Shale was spreading through BC-MRC. (Wollin Aff. ¶ 14). The BC-MRC leadership was concerned that Titan might follow the pack and breach their agreement. (Wollin Aff. ¶ 14). On October 15, 2008, facing uneasiness from Intended Beneficiaries, a representative of the alliance sent the following email message to Defendants:

Guys-

In response to member emails and phone calls after the Titan report yesterday, I have distributed the following statement to our Area Coordinators to use. Nothing will be posted on our website except information about our signing sessions, etc..

'Media reports over the past several days have indicated that several companies have curtailed or stopped their leasing efforts in the Barnett Shale. We have had no indication whatsoever that Titan Operating will not fulfill its existing agreement with BC-MRC and its members, and we are continuing with the signing schedules posted on our website. Further subdivisions and dates for additional signing sessions are expected to be scheduled in the next several days, and we look forward to continuing to work with our partners in this long term endeavor.

(Wollin Aff. ¶ 14).

Mark Schumacher, of Titan Operating, responded with the following reassurance to BC-MRC:

---

<sup>1</sup> For example, on September 17, 2008, Mark Caffey told a BC-MRC representative that with respect to signing events "I will make the ultimate decision when and who will come."

I would prefer the following:

‘Recent media reports have indicated that several companies have curtailed or stopped their leasing efforts in the Barnett Shale. **Titan Operating, LLC has indicated they will honor all commitments made to BC-MRC, its members and all other coalitions and groups with which they are currently working.** All signing schedules posted on our website will continue as scheduled. Further subdivisions and dates for additional signing sessions are expected to be scheduled in the next several days. Titan and BC-MRC look forward to completing the lease signings and moving into the development phase of the program.’

*(emphasis added)*(Wollin Aff. ¶ 14).

**D. Titan breaches the BC-MRC/Titan agreement.**

7. In or around the middle of October 2008, Titan breached the BC-MRC/Titan Contract by terminating the leasing program and refusing to extend to all Intended Beneficiaries the opportunity to accept or reject the negotiated lease terms. (Wollin Aff. ¶ 15).

**2. Facts giving rise to motion to compel.**

8. This case was filed on or about October 21, 2010.

9. On November 17, 2010, Plaintiff served Defendants with Plaintiff’s First Set of Requests for Production of Documents. *See* Plaintiff’s First Set of Discovery to Defendants Titan and Caffey, true and correct copies of which are attached hereto and incorporated herein by reference as Exhibits 1 and 2.

10. Pursuant to an agreement between the parties, Defendants responded to this first set of discovery on February 14, 2011. *See* Titan and Caffey’s Responses to McPherson’s First Set of Requests for Production of Documents, true and correct copies of which are attached hereto and incorporated herein by reference as Exhibits 3 and 4.

11. On February 10, 2011, Defendants wrote to Plaintiff announcing their position that they would not provide any discovery until plaintiffs defeat their affirmative defense of the Statute of Frauds.

The letter states, in pertinent part:

Until the plaintiffs can demonstrate a viable legal theory to support recovery, I do not intend to voluntarily schedule and produce witnesses for depositions and, if depositions are noticed, I will seek protection from the Court.

\*\*\*

The reasoning behind my position is simple: the plaintiffs' theory in the Titan Operating, LLC cases is not fundamentally different from that proffered in the *Myles v. XTO* case (now on appeal) and the *Maddox v. Titan* case (where summary judgment is currently pending). I believe the theory—that the statute of frauds does not apply or, alternatively can be satisfied by cobbling together various unrelated documents—is patently invalid. That conclusion is implicit in the final judgment rendered in *Myles*.

If the Fort Worth Court of Appeals (in *Myles*) or Judge Cosby (in *Maddox*) disagree with my legal conclusion, the plaintiffs in the Titan Operating, LLC cases obviously should be entitled to move forward with discovery. However, until that occurs—or until your clients can demonstrate a *prima facie* basis for avoiding the statute of frauds defense—it is unreasonable to require my clients to spend time and money responding to the burdensome discovery you have requested and will surely continue to request.

See Exhibit 5.

#### IV. ARGUMENT AND AUTHORITY

##### 1. Full Performance.

12. Noticeably absent from Defendants' February 10, 2011 letter (as well as from their summary judgment briefing and argument in the *Maddox* Southwest Fort Worth Alliance case) is any discussion of the full performance exception to the Statute of Frauds.

13. The Statute of Frauds may not be raised as a defense by a party that accepted the benefits of a party that has fully performed. *Estate of Kaiser v. Gifford*, 692 S.W.2d 525, 526 (Tex. App.-Houston [1<sup>st</sup> Dist.] 1985, writ ref'd n.r.e.). The Dallas Court of Appeals recently rejected the defense of the Statute of Frauds in a full performance case by stating that:

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

*Davis v. Insurtek*, 2010 WL 5395668, p. 3-4 (Tex. App.-Dallas 2010, no pet.).<sup>2</sup> Other Courts have unquestionably agreed that “when one party fully performs a contract, the Statute of Frauds is unavailable to the other who knowingly accepts the benefits and partly performs.” *Texas Nom Limited Partnership v. Akuna Matata Investments, Ltd.*, 2005 Tex. App. LEXIS 535, 2005 WL 159459 (Tex. App.—San Antonio 2005, pet. denied)(affirming award for plaintiff in action for breach of oral agreement to develop oil and gas wells).

14. There is evidence that BC-MRC fully performed its obligations under the BC-MRC/Titan agreement by endorsing Titan to Intended Beneficiaries in BC-MRC and by helping in numerous ways to implement it.

15. It is likewise clear that Titan accepted BC-MRC’s performance, capitalized on it and benefited from it. The BC-MRC endorsement was valuable to Titan. Titan exploited BC-MRC’s contracted-for endorsement and benefited from BC-MRC’s efforts to communicate with the Intended Beneficiaries and coordinate their attendance at Titan’s BC-MRC signing events. With BC-MRC’s endorsement and help, Titan obtained over 1,000 leases from BC-MRC mineral rights owners at BC-MRC signing events in just a matter of weeks. (Wollin Aff. ¶ 13).

16. It is indisputable that BC-MRC’s performance was solely referable to its contract with Titan. There is no other explanation. Likewise, the acquisition by Titan of leases from BC-MRC mineral estate owners at BC-MRC signing events arranged in conjunction with and coordinated by BC-MRC on the uniform lease document negotiated by Titan and BC-MRC is solely referable to the agreement between Titan and BC-MRC.

---

<sup>2</sup> The Dallas Court in *Davis* also made special note that: “Although full performance and partial performance are considered to be distinct exceptions to the statute of frauds, Texas courts have used the terms interchangeably, particularly when one party has fully performed and the other has only partly performed. There is a fundamental difference in the principle involved, however, in that part performance is ordinarily regarded as a strictly equitable doctrine, available in equity courts only, whereas complete performance by one party is frequently regarded as taking the contract out of the statute, even in an action at law.” 41 TEX. JUR. 3d *Statute of Frauds* § 115 (2007).

**2. Partial Performance.**

17. As set forth above, BC-MRC's conduct (endorsing Titan, communicating the Titan offer to BC-MRC landowners, coordinating BC-MRC landowner attendance at Titan BC-MRC signing events) is clearly conduct unequivocally referable to the agreement between BC-MRC and Titan and corroborative of the fact that a contract actually was made. In such circumstances, the partial performance exception to the Statute of Frauds applies. The acts of performance relied upon to take a parol contract out of the Statute of Frauds must be as could have been done with no other design than to fulfill the particular agreement sought to be reinforced. *Francis v. Thomas*, 106 S.W.2d 257, 260 (Tex. 1937). Besides the contract between BC-MRC and Titan, there is no plausible explanation for BC-MRC's conduct.

18. BC-MRC performed and Titan took what BC-MRC could give only once--BC-MRC's endorsement. Titan accepted that performance, benefitted from it, exploited its value to the tune of over 1,000 BC-MRC leases, and then reneged, leaving BC-MRC with no adequate remedy. Even if BC-MRC's performance was not complete, the partial performance doctrine removes the contract from the Statute of Frauds.

**A. Full and Partial Performance are Questions of Fact for the Jury that must be answered before any Statute of Frauds defense can be considered.**

19. Whether performance is sufficient to take the contract out of the Statute of Frauds is a question of fact for the jury. *Vermont Information Processing, Inc. v. Montana Beverage Corp.*, 227 S.W.3d 846, 853 – 855 (Tex. App. - El Paso 2007, no writ); *see also Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 705 (Tex.App.-Houston [1st Dist.] 1988, writ denied) (whether exception to Statute of Frauds applies is generally question of fact). The parties' partial performance under the agreement removes it from the requirements of the Statute of Frauds. *Bookout v. Bookout*, 165 S.W.3d 904, 907(Tex. App.-Texarkana, no pet.). The partial performance must be "unequivocally referable to the agreement and corroborative of the fact that a contract actually was made." *Id.* Whether the performance was

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

20. The performance exceptions to the Statute of Frauds are clearly at issue in this case. As such, there is absolutely no basis to support Defendants' position that the Statute of Frauds is a threshold legal issue that Plaintiff must overcome before being able to conduct discovery in this case.<sup>3</sup> The availability of the Statute of Frauds as a defense, is in fact, one of the last issues that can be decided in this case.

**3. Defendants' refusal to produce discovery.**

**A. Multiple documents pertaining to the same transaction may be construed together to meet the requirements of the Statute of Frauds.**

21. Even if factual questions concerning the performance exceptions to the Statute of Frauds were not at issue, Plaintiff is still entitled to conduct discovery on what written documents may constitute the contract or written memoranda of a contract that meets the requirements of the Statute of Frauds.

22. Courts may construe multiple documents pertaining to the same transaction together to comprise a single written contract, and to satisfy the Statute of Frauds, even if those documents were prepared at different times and do not expressly reference each other. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000):

---

<sup>3</sup> Plaintiff has also asserted the promissory estoppel exception to the Statute of Frauds. This exception may apply when a party promises to sign an existing written contract that, but for lack of a signature, would satisfy the statute of frauds, or when a party promises to sign a proposed contract that has not yet been reduced to writing but on which the parties have reached agreement concerning all material terms. *See Levine v. Loma Corp.*, 661 S.W.2d 779 (Tex. App.--Fort Worth 1983, no writ); *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 268-269 (Tex. App.—Corpus Christi 1994, writ denied). For judicial efficiency, Plaintiff will not discuss this exception in depth, but Plaintiff wanted to let the Court know that this exception is also at issue in this case and its applicability is a fact issue on which Plaintiff should be entitled to conduct discovery.

[I]nstruments pertaining to the same transaction may be read together to ascertain the parties' intent,<sup>14</sup> even if the parties executed the instruments at different times and the instruments do not expressly refer to each other,<sup>15</sup> and ...a court may determine, as a matter of law, that multiple documents comprise a written contract.<sup>16</sup> In appropriate instances, courts may construe all the documents as if they were part of a single unified instrument.<sup>17</sup>

14 *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327 (Tex. 1984); *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex. 1981).

15 *Board of Ins. Comm'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 239 S.W.2d 803, 809 (Tex. 1951).

16 *Jones*, 614 S.W.2d at 98; *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62, 65 (Tex. 1959); *Veal v. Thomason*, 138 Tex. 341, 159 S.W.2d 472, 475 (1942); *Braniff Inv. Co. v. Robertson*, 124 Tex. 524, 81 S.W.2d 45, 47 (Tex. 1935).

17 See *Kansas City Life Ins. Co. v. Duvall*, 129 Tex. 287, 104 S.W.2d 11, 11 (Tex. 1937) (treating two deeds of trust, plus various bonds and notes, as "the loan contract").

*Fort Worth I.S.D. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000); see also *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex. 1981). As long as a court has "written evidence, signed by the party to be charged, of the obligation to be enforced against him," a series of writings fulfills the purpose of the Statute of Frauds-avoiding resort to oral testimony to establish the contract's existence and terms. *Cent. Power & Light Co. v. Del Mar Conservation Dist.*, 594 S.W.2d 782, 790 (Tex. Civ. App.-San Antonio 1980, writ ref'd n.r.e.).

**It is well-established law that instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times and the instruments do not expressly refer to each other, and . . . a court may determine, as a matter of law, that multiple documents comprise a written contract; *Padilla v. LaFrance*, 907 S.W.2d 454, 460-61 (Tex. 1995) (noting that written memorandum required to satisfy Statute of Frauds need not be contained in one document, and holding that series of letters satisfied rule requiring binding settlement agreement to be in writing); *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex. 1981) (holding that four documents related to the sale of real property could be construed together as one contract which provided a sufficient property description satisfying the Statute of Frauds); *Adams v. Abbott*, 151 Tex.**

601, 254 S.W.2d 78, 79-80 (1952) (series of letters formed a contract for sale of farm and contained sufficient property description of land).

*Dunworth Real Estate Co. v Chavez Props.*, No. 04-07-00237-CV, 2008 LEXIS 5079, 2008 WL 36222 (Tex. App.--San Antonio, no pet.) at 5, citing *Fort Worth I.S.D.*, supra. (*emphasis added*).

23. In the *Fort Worth ISD* case, the Texas Supreme Court construed a series of city ordinances and contemporaneously executed documents together to find a valid and enforceable contract between the School District and the City. 22 S.W.3d at 834. And, in *Jones v. Kelley*, the Texas Supreme Court held that two separately executed earnest money contracts, a Veteran's Land Board Application and Contract for Sale, and an affidavit executed by one party could be construed together as one contract in order to satisfy the property description requirements of the Statute of Frauds. 614 S.W.2d at 97-98. The documents constituting a contract need not even be communications between the parties. "Instruments have been construed together or treated as one contract even though they were not between the same parties.

...[A] memorandum of the contract may consist of letters and telegrams signed by the party to be charged and addressed to his agent or the other party to the contract, **or even to a third person not connected with the transaction.**

*Biko v. Siemens*, 246 S.W.3d 148, 158-59 (Tex. App.—Dallas 2007, pet. denied)(citing to *Adams v. Abbott*, 254 S.W.2d 78, 80 (Tex. 1952)(action to try title to land and for specific performance of contract for sale of land))(emphasis added); *Key v. Stewart Pierce*, supra. The documents constituting a contract need not even be communications between the parties. Instruments have been construed together or treated as one contract even though they were not between the same parties. See *Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W. 2d 989 (Tex. 1947); *Veal v. Thomason*, 159 S.W. 472 (Tex. 1942); *Miles v. Martin*, 321 S.W.2d 62, 66 (Tex. 1959).

24. The Ft. Worth Court of Appeals has unquestionably adopted this rule of law. *Key v. Stewart Pierce*, 8 S.W.3d 704, 708 (Tex. App. - Fort Worth 1999, pet. denied)(holding a valid

memorandum of the contract may consist of numerous communiqués signed by the party to be charged and addressed to his agent or the other party to the contract, or even to a third party not connected with the transaction).

25. The negotiations between BC-MRC and Titan occurred largely over electronic mail. (Wollin Aff. ¶ 4). Plaintiff is entitled to obtain Defendants' emails and other communications regarding the BC-MRC/Titan agreement (including internal communications of Defendants and communications between Defendants and third-parties) in order to have a fair opportunity to respond to Defendants' Statute of Frauds defense.

26. With this legal framework in mind, Plaintiff now turns to the specific discovery requests at issue.

**B. Discovery standards in Texas.**

27. The standards for determining discoverability of information under Texas law are well known to the Court, but are mentioned briefly in order to demonstrate how heavy the Defendants' burden is at this stage of the proceedings to completely refuse to produce any discovery to Plaintiff. The purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed. *Axelson, Inc. v. McIlhanny*, 798 S.W.2d 550, 555 (Tex. 1990). A party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action. TEX. R. CIV. P. 192.3; *see also Ford Motor Co. v. Castillo*, 297 S.W.3d 656, at 664 (Tex. 2009) (holding that the phrase 'relevant to the subject matter' [in TEX. R. CIV. P. 192.3] is to be liberally construed). The burden is on the party resisting discovery to produce evidence necessary to support the objections or claim of privilege. TEX. R. CIV. P. 193.4(a), 199.6.

**C. Plaintiff's discovery requests are tailored to relevant issues in the case, including the negotiations between BC-MRC and Titan, the performance exceptions to the Statute of Frauds and Defendants' affirmative defenses.**

28. It is important to remember that this is not a situation where a party has objected to producing certain information or categories of information. This is a situation where Defendants have made a blanket refusal to produce a single document. A party's asserted defenses in a case help establish the limits of what is discoverable in that case. The Defendants here have made a general denial of "each and every" material allegation made by Plaintiff, and they have asserted the following affirmative defenses:

1. Plaintiffs' claims are barred, in whole or in part, by the Statute of Frauds;
2. Plaintiffs' claims are barred, in whole or in part, by the doctrine of waiver, laches, and/or unclean hands;
3. Plaintiffs' claims are barred, in whole or in part, by estoppel.

*See* Defendants Titan and Caffey's Answers to Plaintiffs' Original Petition, pp. 2-3.

29. Defendants answered every single document request with the following boilerplate objections (or some nearly identical variation thereof):

Defendant objects to the foregoing request on the grounds it is overly broad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's time period request is overly broad. The 2008 calendar year is the relevant time period of this lawsuit. Defendant objects to this request to the extent that Plaintiff seeks documents before or past the 2008 calendar year on the basis that such a request is overly broad. Plaintiff is engaging in a fishing expedition, which is impermissible under Texas law. Defendant further objects to this request as it is unduly burdensome given the fact that Plaintiff can retrieve these documents directly from BC-MRC. Defendant also objects to this request to the extent it seeks documents protected by the attorney client privilege and the attorney work product privilege.

*See, e.g.*, Titan Operating, LLC's Responses to Requests for Production Nos. 44-77, attached hereto as Ex. 3.

30. Plaintiff will review some of the most basic discovery requests here. Plaintiff has served Defendants with specific discovery requests regarding documents sent to or received from witnesses with

knowledge of relevant facts, including persons intimately involved with the drafting, formation, performance and breach of the BC-MRC/Titan Agreement. For example, Requests for Production Nos. 52, 54, 55, 56, 65, 66, and 67 request Titan to produce the following documents:

52. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Mark Caffey**.<sup>4</sup>

54. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Chris Hammack**.

55. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Mark Schumacher**.

56. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **William “Butch” Ford**.

65. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Janie Van Zandt**.

66. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Lucas Knickerbocker**.

67. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Whitney Kane**.

31. Five of the above-listed witnesses (Mark Caffey, William “Butch” Ford, Janie Van Zandt, Lucas Knickerbocker, and Whitney Kane) were identified **by Defendants** in their Responses to Requests for Disclosure as persons having knowledge of relevant facts. *See* Defendants’ Global Responses to All Plaintiffs’ Request for Disclosure, at pp. 8-11 (Ex. 6). Written communications relating to the issues in this case that were sent to and from fact witnesses are clearly discoverable. The relevancy of these requests is self-evident under the Texas Rules of Civil Procedure including, but not limited to,

---

<sup>4</sup> “THE PROPERTY” is defined specifically by Plaintiff in her Requests for Production to mean the neighborhoods and subdivisions in the Bedford-Colleyville Mineral Rights Coalition (BC-MRC) in Tarrant County.

TEX. R. CIV. P. 192.3 and 193.7; *see also In re Weekley Homes, L.P.*, 295 S.W.3d 309, 313-314 (Tex. 2009) (holding Tex. R. Civ. P. 192.3(b) “provides for discovery of documents, [including] electronic information that is relevant to the subject matter of the action”). Defendants’ refusal to produce a single responsive document is clearly improper and should not be permitted.

32. Plaintiff has requested information concerning communications between Defendants and an attorney who represented BC-MRC during negotiations with Titan and Caffey in 2008:

43. Any and all emails or other written documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from the following person or entity at any time since January 1, 2008: **Mark Nastri, Attorney, Munsch Hardt Kopf & Harr, P.C.**

Similarly, Request for Production No. 43 was met with the identical litany of objections along with two additional sentences inserted into the same boilerplate response:

Defendant objects to the foregoing request on the grounds it is overly broad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Plaintiff’s time period request is overly broad. The 2008 calendar year is the relevant time period of this lawsuit. Defendant objects to this request to the extent that Plaintiff seeks documents before or past the 2008 calendar year on the basis that such a request is overly broad. **Additionally, this document request seeks information that is not relevant to the ultimate issue in this case, whether Plaintiff or BC-MRC have a valid enforceable contract with Defendant. Emails or other written documents that Defendant allegedly sent to or received from Mark Nastri, Attorney, Munsch Hardt Kopf & Harr, P.C. are not relevant to this case.** Plaintiff is engaging in a fishing expedition, which is impermissible under Texas law. Defendant further objects to this request as it is unduly burdensome given the fact that Plaintiff can retrieve these documents directly from BC-MRC. Defendant also objects to this request to the extent it seeks documents protected by the attorney client privilege and the attorney work product privilege.

*See* Titan Operating, LLC’s Response to Request for Production No. 43 (*emphasis added*), attached hereto as Ex. 5; *see also* The Caffey Group, LLC’s Response to Requests for Production No. 38 (Ex. 4). Certainly, there can be no legitimate question that emails Defendants sent to the attorney who represented BC-MRC in the contract negotiations are discoverable.

33. Plaintiff also served Defendants with Requests for Production which seek production of specifically identified documents that pertain to Defendants’ affirmative defenses and Plaintiff’s counter-

defenses, including those pertaining to the Statute of Frauds. Despite the specificity and relevance of Plaintiff's requests, Defendants objected to **everything** and again failed to produce a single document. For example, Requests for Production Nos. 16, 22, 29-30, 44, 79, 80, 83, 88 and 91 request that Titan produce the following documents:

16. Any and all documents, including emails, memos, faxes, or letters that describe in any way **YOUR plans or business strategy for trying to obtain natural gas leases from PROPERTY landowners or from BC-MRC or from BC-MRC Mineral Owners during the second half of 2008** that YOU sent to or received from any association of homeowners, landowners, or businesses claiming to represent or include people, churches, or businesses who owned land in Tarrant County.<sup>5</sup>

22. For the period from January 1, 2008 to the present, please produce all **documents identifying the landowners YOU or anyone acting on YOUR behalf contacted for purposes of obtaining a lease or leases within the PROPERTY or within BC-MRC.**

29. Any and all emails or other written communication that YOU have sent to or received from the following person or entity, or anyone acting on their/its behalf: **the BEDFORD-COLLEYVILLE MINERAL RIGHTS COALITION ("BC-MRC").**

30. Any and all emails or other **written communication that YOU have sent to or received from the following persons** or anyone acting on their behalf: **mineral interest owners within BC-MRC or the PROPERTY.**

44. Any and all emails or other written **documents pertaining in any way to the PROPERTY, to BC-MRC or to leasing within the PROPERTY or BC-MRC that YOU sent to or received from** the following person or entity at any time since January 1, 2008: **Rick Wollin, BC-MRC.**

79. Any and **all maps pertaining to** the PROPERTY, to **BC-MRC**, or to leasing within the PROPERTY or BC-MRC.

80. Any and all documents provided to YOU or CAFFEY by any PROPERTY homeowner or BC-MRC Mineral Owner **reflecting what parcels of land were available to be leased** within the PROPERTY or BC-MRC.

83. Any and all documents reflecting charges to YOU for **work performed by The Caffey Group in connection with** any activities (whether carried out or merely planned) within or relating to the PROPERTY or **BC-MRC.**

88. A copy of **any lease form used to lease any mineral estate interest in the PROPERTY, BC-MRC or any BC-MRC Mineral Owners.**

---

<sup>5</sup> "THE PROPERTY" was defined specifically by Plaintiff in her Requests for Production to mean the neighborhoods and subdivisions in the Bedford-Colleyville Mineral Rights Coalition in Tarrant County.

91. Any and all drafts of or finalized versions of web postings, web pages, emails, memos, announcements, **flyers, signs, letters, posters or any other communications that were created, reviewed or approved by YOU or YOUR co-defendants relating to the PROPERTY, to BC-MRC or to leasing with the PROPERTY or BCMC that were intended for or were distributed to PROPERTY homeowners or to BC-MRC or to BC-MRC Mineral Owners.**

See Request for Production of Documents to Titan (*emphasis added*), attached hereto as Ex. 1.

34. These above requested documents are relevant to this litigation for numerous reasons, including because they will bear on critical issues in the case, including the performance of the parties. Letters, faxes, electronic mail, and other written documents evidencing the performance by parties to the BC-MRC/Titan Contract can only be fully investigated through discovery. Ultimately, facts evidenced in written documents could completely negate Defendants' alleged affirmative defenses, including allegations that "Plaintiffs' claims are barred, in whole or in part, by the Statute of Frauds...by the doctrine of waiver, laches, and/or unclean hands ... [and] by estoppel." *See supra*, Sect. III, p. 4 (quoting Defendants Titan and Caffey's Answers to Plaintiffs' Original Petition, p. 3).

35. Defendants, however, have refused to exchange **any** discovery. Such a litigation strategy is impermissible under the Texas Rules. Before the Court can assess the applicability of the Statute of Frauds to the BC-MRC/Titan agreement, facts must be gathered, discovery must be exchanged, and genuine issues of material fact must be resolved by the jury including, without limitation: whether BC-MRC and/or Titan performed under the BC-MRC/Titan agreement.

## V. EVIDENCE

36. Plaintiff hereby relies on the following evidence, true and correct copies of which are attached hereto and incorporated herein by reference:

- |           |  |
|-----------|--|
| Exhibit 1 | Plaintiff's First Set of Requests for Production of Documents to Titan             |
| Exhibit 2 | Plaintiff's First Set of Requests for Production of Documents to Caffey            |
| Exhibit 3 | Titan's Responses to McPherson's First Set of Requests for Production of Documents |

- Exhibit 4 Caffey's Responses to McPherson's First Set of Requests for Production of Documents
- Exhibit 5 Defendants' February 10, 2001 correspondence regarding discovery issues
- Exhibit 6 Defendants' Responses to Requests for Disclosure
- Exhibit 7 Affidavit of Richard Wollin, BC-MRC negotiating committee member, including exhibits.

## VI. PRAYER

Plaintiff requests the Court to overrule Titan and Caffey's objections and to order Defendants to produce the requested documents and depositions. Plaintiff requests the Court to order that, within thirty (30) days of the date the Court signs an order granting this Motion, Defendants shall (1) produce responsive documents; and (2) confer with counsel for Plaintiff regarding mutually agreeable dates for depositions in this case. Plaintiff also asks the Court to grant Plaintiff such additional relief that the Court finds Plaintiff is entitled to receive.

Respectfully submitted,

### PETROFF & ASSOCIATES

Kip A. Petroff  
State Bar No. 15851800  
Carlos A. Fernandez  
State Bar No. 24036555  
3838 Oak Lawn Avenue  
Suite 1124  
Dallas, Texas 75219  
Telephone: 214.526.5300  
Facsimile: 214.526.5354

**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

**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


**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

**ATTORNEYS FOR PLAINTIFF**


**CERTIFICATE OF CONFERENCE**

Counsel for Plaintiff has conferred in good faith with opposing counsel with respect to resolving this discovery dispute, but counsel have been unable to reach an accord so the matter is being submitted to the Court.

  
Chad E. Robinson

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11 day of March, 2011 a true and correct copy of the foregoing document was forwarded to all counsel of record via email and Certified Mail, Return Receipt Requested.

  
Chad E. Robinson