

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

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

Defendants, Vantage Energy, LLC (“Vantage”) and The Caffey Group, LLC (“Caffey”) (collectively, “Defendants”), file this 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.
PRELIMINARY STATEMENT**

Plaintiffs originally filed this lawsuit against Defendants on February 19, 2010. Plaintiffs have amended their theories several times in an obvious effort to avoid application of the statute of frauds. The current pleading is Plaintiffs’ Third Amended Petition, which was filed on October 6, 2010 (“Plaintiffs’ Petition”). Essentially, Plaintiffs seek to enforce an agreement to lease their respective mineral interests that was allegedly entered into on their behalf by an unincorporated association known as Southwest Fort Worth Alliance (“SFWA”). Plaintiffs then try to avoid the statute of frauds by arguing that they are not suing to enforce an unwritten contract for the sale of real estate property, but instead are intended third-party beneficiaries to an alleged “process” agreement between SFWA and Vantage or Caffey. As shown below, this

legal “sleight-of-hand” does nothing to avoid the statute of frauds, and therefore the alleged agreement is unenforceable as a matter of law.

Plaintiffs’ breach of contract and specific performance claim fails because (1) enforcement of the alleged agreement is barred by the statute of frauds; (2) the alleged agreement fails for lack of mutuality of obligation; and (3) the alleged agreement fails because of formation defects; *i.e.*, there was no meeting of the minds or delivery.

Plaintiffs’ third party beneficiary claim fails because (1) the alleged agreement with SFWA is also subject to, yet fails to satisfy, the statute of frauds; and (2) Plaintiffs maintained ultimate control over whether to actually enter into a lease with Vantage by signing and delivering the lease, and did not do so.

Plaintiffs’ 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.

Plaintiffs’ breach of unilateral option contract claim fails because (1) there was no unilateral contract between Plaintiffs/SFWA and Defendants; and (2) the unilateral option contract is still subject to, yet fails to satisfy, the statute of frauds.

Plaintiffs’ claim under the Texas Uniform Electronic Transactions Act fails because (1) the Uniform Electronic Transactions Act does not apply to this case because the parties did not agree to transact business electronically; and (2) assuming *arguendo*, the Uniform Electronic Transactions Act applies, Plaintiffs’ claims still fail to satisfy the statute of frauds.

Plaintiffs’ promissory estoppel, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, and statutory fraud claims fail as a matter of law because (1) Plaintiffs admit that Defendants did not make any representations to them; (2) Defendants made no misrepresentations of existing fact or false promises of future performance; and (3) the statute of frauds bars the damages (and thus tort claims) sought by Plaintiffs.

Finally, Defendants assert that no evidence supports the elements of Plaintiffs' (1) third party beneficiary; (2) breach of contract; (3) breach of unilateral contract; (4) breach of contract and third party beneficiary rights under the Texas Uniform Electronic Transactions Act; (5) promissory estoppel; (6) fraudulent inducement; (7) fraudulent misrepresentation; (8) negligent misrepresentation; and (9) statutory fraud claims.

Accordingly, the Court should grant Defendants' Traditional and No-Evidence Motion For Summary Judgment as to all claims, and enter judgment that plaintiffs take nothing.

II. SUMMARY JUDGMENT EVIDENCE

In support of their Motion for Summary Judgment, Defendants submit the following summary judgment evidence, which is attached hereto and fully incorporated herein by reference:

- Exhibit A: Affidavit of Donald E. Herrmann.
- Exhibit A-1: Deposition of Plaintiff Patti Lynn Maddox, dated October 15, 2010.
- Exhibit A-2: Deposition of Plaintiff Joseph Leon Maddox, dated October 15, 2010.
- Exhibit A-3: Deposition of Plaintiff Linda Faye Weber, dated October 19, 2010.
- Exhibit A-4: Deposition of Plaintiff David Richey, dated October 18, 2010.
- Exhibit A-5: Deposition of Plaintiff of Plaintiff Joyce Richey, dated October 18, 2010.
- Exhibit A-6: Deposition of John Wehrle, former Vice President, Business Development of Vantage Energy, LLC, dated June 24, 2010.
- Exhibit A-7: Plaintiff Patti Lynn Maddox's Answers and Objections to Defendants Vantage and Caffey's First Set of Integrated Discovery.
- Exhibit A-8: Plaintiff Joseph Leon Maddox's Answers and Objections to Defendants Vantage and Caffey's First Set of Integrated Discovery.
- Exhibit A-9: Plaintiff Linda Faye Weber's Answers and Objections to Defendants Vantage and Caffey's First Set of Integrated Discovery.

Exhibit A-10: Plaintiff David Richey's Answers and Objections to Defendants Vantage and Caffey's First Set of Integrated Discovery.

Exhibit A-11: Plaintiff Joyce Richey's Answers and Objections to Defendants Vantage and Caffey's First Set of Integrated Discovery.

Exhibit B: The alleged Contract, as described by Plaintiffs in paragraph 4.10 of Plaintiffs' Petition, specifically the unsigned Memorandum of Understanding, the lease form template, and the August 22, 2008, John Wehrle emails.

Exhibit C: The alleged oil and gas lease that Plaintiffs David and Joyce Richey claim they signed and the unsigned Memorandum of Oil and Gas Lease which David and Joyce Richey claim was part of their contract with Vantage.

III. RELEVANT BACKGROUND FACTS

Plaintiffs have sued Defendants on 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 estoppel, and statutory fraud. *See* Pls.' Pet. at ¶¶ 5.0 – 13.03. Plaintiffs also claim that they are the intended third party beneficiaries of the alleged agreement between SFWA and Vantage, and as a result seek third party beneficiary rights. *See* Pls.' Pet. at ¶¶ 5.0 – 5.06.

This lawsuit now rests on an alleged agreement that Vantage supposedly entered into with SFWA. *See* Pls.' Pet. at ¶¶ 4.07 – 4.17. Plaintiffs describe SFWA as an "unincorporated coalition of homeowners, homeowners' associations and/or neighborhoods, including the Plaintiffs" that was organized to undertake negotiations with various oil and gas entities on behalf of homeowners within SFWA boundaries to secure the most economically favorable lease terms. *See* Pls.' Pet. at ¶ 4.07.

Plaintiffs claim that SFWA and Vantage made a contract whereby Vantage agreed to a set of lease terms and leasing procedures with SFWA and then allegedly promised to lease to every unleased homeowner in the purported SFWA geographical boundaries. *See* Pls.' Pet. at ¶¶

4.10 – 4.11. Plaintiffs describe “the Contract”¹ as a combination of the written Memorandum of Understanding 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 agreed to, and emails dated August 22, 2008, to and from Vantage’s John Wehrle and SFWA representatives. *See* Pls.’ Pet. at ¶ 4.10. A true and correct copy of the documents that are said to comprise the Contract—specifically the unsigned Memorandum of Understanding, the lease form template, and the August 22, 2008, emails—are collectively attached as Exhibit B. It is admitted that, no map was attached to the Contract, and more importantly, the alleged Contract **did not** contain a description of Plaintiffs’ respective properties or even identify Plaintiffs as lessors. [Ex. B]. The Contract was also not signed by Defendants or Plaintiffs. [Ex. B].

Though Plaintiffs claim that SFWA made the Contract on their behalf, they admit that they are not formal 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]. Additionally, Plaintiffs admit that they knew they were individually responsible for reading and signing their own lease with Vantage, and that they would not be entitled to a lease unless they signed a lease with Vantage. [*See* Ex. A-7 at p. 3, Ex. A-8 at p. 3, Ex. A-9 at p. 3, Ex. A-10 at p. 3, and Ex. A-11 at p. 3, *see also*, Ex. B Lease Form at ¶¶ 26(a),(b), and (c)]. More importantly, Plaintiffs admit that neither SFWA nor their specific neighborhood association had the authority to make a binding agreement on their behalf, and that SFWA’s role was only to make a non-binding recommendation to Plaintiffs. [*See* Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16; Ex. A-3 at 14:21 – 15:2, 15:24 – 16:7, 33:11-14, 44:22 – 45:7, 63:16 – 64:8;

¹ Throughout this Motion, Defendants’ refer to “the Contract” as described by Plaintiffs in paragraph 4.10 of Plaintiffs’ Petition as either “the Contract” or “the alleged Contract.”

Ex. A-4: 38:18 – 40:9; A-5 at 5:19 – 6:19]. Additionally, the “lease form” that Plaintiffs allege is part of the Contract specifically states that SFWA has no authority to make a specific oil and gas lease on behalf of any property owners. [See Ex. B Lease Form at ¶¶ 26(a),(b), and (c)]. It is also admitted that Plaintiffs were never obligated to accept or sign any particular lease offered by Vantage. [See Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16; Ex. A-3 at 14:21 – 15:2, 15:24 – 16:7, 33:11-14, 44:22 – 45:7, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; A-5 at 5:19 – 6:19; *see also* Ex. B Lease Form at ¶ 26(a),(b), and (c)].

Plaintiffs also allege that they relied upon representations of Defendants that Vantage “would lease Plaintiffs’ mineral interests and that Plaintiffs would receive the agreed upon bonuses,” and therefore Plaintiffs allegedly did not seek or accept other offers to lease their respective property. *See* Pls.’ Pet. at ¶ 4.20. However, Plaintiffs admit that each independently decided to refuse other offers to lease their respective minerals due to the advice of their respective neighborhood association or SFWA, not Defendants, and that Defendants **did not** make any representations to them. [See Ex. A-1 at 48:6-9, 61:8-13, 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, 39:8 – 40:5; Ex. A-4 at 31:6-13, 36:16-20, 52:5-9; Ex. A-5 at 5:19 – 6:19].

Plaintiffs' allegations are essentially that Vantage promised, but failed, to enter into oil and gas leases with Plaintiffs. *See* Pls.' Pet. at ¶¶ 4.06-4.21. Plaintiffs Joseph and Patti Maddox and Linda Weber admitted that they never executed an oil and gas lease with Defendants.² [*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,

² 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]. A true and correct copy of the lease that Plaintiffs David and Joyce Richey claim they signed and the Memorandum of Oil and Gas Lease are attached hereto as Exhibit C. 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. [Ex. C]. Additionally, it appears neither David nor Joyce Richey signed the Memorandum of Oil and Gas Lease, which was to be part of their contract with Vantage. [Ex. C; Ex. A-4 at 44:7-21; Ex. A-5 at 5:19 – 6:19]. More importantly, despite the fact that the lease contained a signature block for “The Caffey Group, LLC” to accept the lease, neither the lease nor the Memorandum of Oil and Gas Lease contain the signature of Vantage or Caffey. [Ex. C; Ex. A-4 at 43:7-9; A-5 at 5:19 – 6:19]. Although Plaintiffs David and Joyce Richey testified that they have a signed lease with Vantage, they do not seek specific performance of that lease. In paragraph 6.02 of the Petition, which sets forth the breach of contract claim, Plaintiffs David and Joyce Richey plead that “Plaintiffs, by and through their agent SFWA, have entered into a contractual agreement with Defendants...[and] Plaintiffs by and through the SFWA accepted Vantage/Caffey’s offer, creating a contractual agreement with Vantage/Caffey and Plaintiffs are entitled to specific performance of the terms and conditions of the Contract...” Thus, Plaintiffs David and Joyce Richey are not seeking to enforce the lease that they allegedly signed but rather are seeking to enforce “the Contract,” as described by Plaintiffs. *See* Pls.' Pet. at ¶¶ 4.10, 6.00 – 6.03.

However, even if Plaintiffs David and Joyce Richey are making a separate claim, it too fails. First, the alleged lease was nullified. Paragraph one of the purported lease unambiguously provides that should “Lessee fail to ensure and/or fulfill legal tender for said rendered order of payment within thirty (30) banking days and/or further fail to legally execute this lease document in a timely manor, [sic] **the lease document and agreement between the Lessor and Lessee shall be considered completely nullified.** [*See* Ex. C (emphasis added)]. This unambiguous provision clearly provides that if Defendants failed to either tender an offer of payment within thirty banking days or chose not to execute the lease then the lease is completely nullified, *i.e.*, there is no lease. [*See* Ex. C]. Here, the evidence conclusively proves that Defendants did not execute the lease as evidenced by the lack of signature by Defendants. [*See* Ex. C.] Additionally, Plaintiffs David and Joyce Richey admit that Defendants did not tender payment, which also evidences the fact that Defendants did not approve or accept the lease. [*See* Ex. A-4 at 22:11-20; Ex. A-5 at 5:19 – 6:19]. Therefore, there is no lease as a matter of law. Second, Defendants did not accept and/or approve of the lease as evidenced by their lack of signature on the lease. The presence of a signature line for the lessee (The Caffey Group, LLC) evidences the fact that the lease would not be properly executed/accepted unless 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; thus, there is no acceptance or approval of the lease by Defendants, *i.e.*, there is no lease. Finally, the lease is unenforceable because of the statute of frauds. As noted below, oil and gas leases are subject to the statute of frauds. The statute of 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) (Vernon 2009). Here, despite the fact, the lease contained a signature block for The Caffey Group, LLC to accept the lease; it **was not** signed by either Caffey or Vantage. *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). Thus, to the extent that Plaintiffs David and Joyce Richey seek to enforce the lease, that lease is unenforceable because it is not signed by the party to be charged and therefore, is not in compliance with the statute of frauds.

44:22 – 45:7]. In fact, these Plaintiffs admit that they had not even seen a lease regarding their respective properties. [*See id.*].

In sum, all plaintiffs have failed to produce a memorandum adequate to satisfy the statute of frauds, and their respective claims are consequently barred.

IV. SUMMARY JUDGMENT STANDARD

A. Traditional Standard.

Summary judgment is proper when the evidence presented shows there are no genuine issues as to any material fact such that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). To determine whether there are any disputed issues of material facts, every doubt must be resolved in favor of the non-movant and evidence favorable to the non-movant must be taken as true. *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). “A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim.” *East Hill Marine, Inc. v. Rinker Boat Co., Inc.*, 229 S.W.3d 813, 815 (Tex. App.—Fort Worth 2007, pet. denied) (citing *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004)); *see also* TEX. R. CIV. P. 166a(b), (c).

B. No Evidence Standard.

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the non-movant’s claim or defense. *See* TEX. R. CIV. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *See Blackburn v. Columbia Med. Ctr.*, 58 S.W.3d 263, 269 (Tex. App.—Fort Worth 2001, pet. denied). The trial

court must grant the motion unless the non-movant produces summary judgment evidence that raises a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i). If the non-movant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). “More than a scintilla” exists when the evidence would enable reasonable and fair-minded people to reach different conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). “Less than a scintilla” exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

V.
TRADITIONAL MOTION FOR SUMMARY JUDGMENT

As a matter of law, the alleged Contract is not an enforceable agreement to convey real property under Texas law; thus all breach of contract claims and related claims that depend upon the enforceability of the Contract must be dismissed.

Plaintiffs’ fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and statutory fraud claims are nothing more than attempts to improperly recast their breach of contract claims in order to avoid the statute of frauds. Plaintiffs essentially seek only one remedy—specific performance of the Contract and payment of the lease bonus. Because benefit of the bargain damages are not recoverable when based on extra-contractual claims, Plaintiffs’ tort claims must be dismissed on these grounds as well.

A. The Contract is Subject to the Statute of Frauds.

In the latest version, Plaintiffs’ primary theory is that they are intended beneficiaries to a contract that Vantage supposedly made with SFWA, and that the alleged Contract “gave Plaintiffs a right to an irrevocable offer from Defendants to lease their mineral interests.” *See*

Pls.’ Pet. at ¶ 4.15. Plaintiffs are essentially arguing that the alleged Contract between SFWA and Vantage is a contract that requires Vantage to enter into a future contract with Plaintiffs to lease their minerals. However, “[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). Thus, the alleged Contract, as described by Plaintiffs, must also satisfy requirements of the statute of frauds. *Id.*

1. Contracts to make an oil and gas lease must meet the requirements of the statute of frauds because the subject matter is the conveyance of an interest in real property.

The statute of frauds requires certain contracts to be in writing to be enforceable. TEX. BUS. & COM. CODE ANN. § 26.01(a) (Vernon 2009); *see Fed. Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Whether a contract sued upon is within the requirements of the statute of frauds is a question of law. *See, e.g., Bratcher v. Dozier*, 346 S.W.2d 795, 796 (Tex. 1961); *Haines v. McLean*, 276 S.W.2d 777, 781-82 (Tex. 1955) (explaining that the sufficiency of the legal description in any instrument transferring a property interest is a question of law). A contract to convey real property must comply with the statute of frauds to be enforceable. *See* TEX. BUS. & COM. CODE § 26.01(b)(4), (5) (Vernon 2009).

Under Texas law, an oil and gas lease is considered a conveyance of real property. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982); *see also Avis v. 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 pertaining to an oil and gas lease must comply with 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, no 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). Additionally, “[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.). Therefore, the Contract, as described by Plaintiffs, must comply with the requirements of the statute of frauds because it contemplates making an oil and gas lease.

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). A contract to make an oil and gas lease is patently unenforceable unless evidenced by a writing or memorandum signed by the party to be charged with its enforcement, which contains an adequate description of the property made subject to the prospective oil and gas lease,³ and identifies the parties to the

³ *See, e.g., Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972); *Minchen v. Fields*, 345 S.W.2d 282, 287-88 (Tex. 1961) (stating that the Texas statute of frauds applies to any transfer of an interest in land, including oil and gas leases).

contract.⁴ The description of the property or the identification of the parties may never be supplied by parol evidence. *Morrow*, 477 S.W.2d at 541.

2. The alleged Contract does not satisfy the statute of frauds.

The alleged Contract, as described by Plaintiffs, plainly does not meet the requirements of the statute of frauds. Plaintiffs assert that the alleged Contract consists of a combination of the written Memorandum of Understanding that Vantage and SFWA allegedly entered into, a “lease form” template that SFWA and Vantage/Caffey allegedly agreed to, the “leasing process/method” that Vantage and SFWA allegedly agreed to, and emails dated August 22, 2008, to and from John Wehrle and SFWA representatives. *See* Pls.’ Pet. at ¶ 4.10. However, this alleged Contract **did not** contain a description of Plaintiffs’ respective properties, nor did it identify Plaintiffs as lessors. [*See* Ex. B]. Moreover, the writings that supposedly memorialize the terms of the Contract are not signed by Defendants or by Plaintiffs. [*See* Ex. B].

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. “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).

⁴ *Cohen*, 554 S.W.2d at 848 (citing *Grafton v. Cummings*, 99 U.S. 100 (1878); *Johnson v. Granger*, 51 Tex. 42, 45 (1879); *Walker Ave. Realty Co. v. Alaskan Fur Co.*, 131 S.W.2d 196, 198 (Tex. Civ. App.—Galveston 1939, writ ref’d) (holding lease invalid under statute of frauds because it failed to identify the lessor); *Watson v. Brazelton*, 176 S.W.2d 216, 218 (Tex. Civ. App.—Waco 1943, no writ)).

Here, the Contract does not identify Plaintiffs' properties. [See Ex. B]. The Memorandum of Understanding does not mention, much less describe Plaintiffs' properties. [See Ex. B]. The same is true with the blank lease form template. [See Ex. B]. Because the alleged Contract does not contain a property description of Plaintiffs' properties, the Contract does not satisfy the statute of frauds.

The Contract also fails to comply with the statute of frauds requirement that it identify Plaintiffs as lessors. [See Ex. B]. See, e.g., *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 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 cannot be supplied by parol evidence. See, e.g., *Morrow*, 477 S.W.2d at 541.

Finally, the Contract, as described by Plaintiffs, is not signed by Defendants or by Plaintiffs. [See Ex. B]. The written Memorandum of Understanding, which Plaintiffs assert sets forth the terms of the alleged Contract, is not signed by Vantage's CEO Roger J. Biemans even though there is a line for his signature. [See Ex. B]; see also *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). Additionally, Plaintiffs did not sign the alleged Contract.⁵ [See Ex. B].

As a result of an inadequate property description, non-identification of Plaintiffs as lessors, and the absence of Defendants' and Plaintiffs' signatures on the Contract, the Contract is unenforceable under the statute of frauds. Defendants request that the Court dismiss Plaintiffs breach of contract claims and all other related claims which depend on the enforceability of the alleged Contract, such as Plaintiffs' third party beneficiary, breach of unilateral option contract, breach of contract and third party beneficiary rights under the Texas Uniform Electronic Transfers Act claims.

B. Promissory Estoppel Does not Except 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.' Pet. at ¶¶ 9.01 - 9.04. 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)).

⁵ Although 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. [Ex. C]. Additionally, it appears neither David nor Joyce Richey signed the Memorandum of Oil and Gas Lease, which was to be part of their contract with Vantage. [Ex. C; Ex. A-4 at 44:7-21; Ex. A-5 at 5:19 - 6:19]; see also *supra* note 2. More importantly, Plaintiffs David and Joyce Richey do not seek enforcement of this alleged lease, and even if they did, that claim would also fail as a matter of law. See *supra* note 2.

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, Plaintiffs allege that the Contract consists of an August 2008 written Memorandum of Understanding between SFWA and Vantage, a “lease form” template, the “leasing process/method” that SFWA and Vantage/Caffey allegedly agreed to, and emails dated August 22, 2008, to and from John Wehrle and SFWA representatives. *See* Pls.’ Pet. at ¶ 4.10. However, as of August 22, 2008, there was no written agreement that specifically identified Plaintiffs as lessor 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 Plaintiffs admit that 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.⁶

Plaintiff Linda Weber also had the same exact testimony. [See Ex. A-3 at 27:1-11, 34:15 – 35:2].

The Richey Plaintiffs claim to have seen a lease on September 13, 2008, but do not sue on the basis of that document.⁷ The summary judgment evidence conclusively demonstrates that Plaintiffs cannot use the doctrine of promissory estoppel to avoid the application of the statute of frauds. Accordingly, Plaintiffs' promissory estoppel claims should be dismissed as a matter of law.⁸

⁶ [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].

⁷ See *supra* note 2.

⁸ 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.); *Petras 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).

C. Plaintiffs Cannot Rely on the Doctrine of Part Performance to Avoid the Statute of Frauds.

Plaintiffs also claim that they “engaged in partial performance of the contract by not seeking and/or accepting competing offers to lease their mineral estates, and waiting patiently in accordance with the instructions from Vantage/Caffey and/or its agents until notified to attend a signing event.” *See* Pls.’ Pet. at ¶ 10.03. In substance, Plaintiffs are claiming that, by doing nothing, they partially performed the alleged Contract.

Under Texas law, non-activity is insufficient to establish partial performance. In order for one to partially perform a contract in Texas, the performance “must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.” *Breezevale*, 82 S.W.3d at 439. In addition, the partial performance must “have been done with **no other design than to fulfill the particular agreement sought to be enforced...**” *Id.* at 439-40 (emphasis added). In other words, the partial performance must be indicative of nothing other than the existence of the parties’ agreement. “[T]he relevant issue is not whether there is evidence that the performance could be referable to the contract which the party is trying to enforce; rather, it is whether there is evidence that the performance is *solely* referable to the contract.” *Id.* at 440.

Plaintiffs allege that they performed by not seeking and/or accepting competing offers to lease their respective mineral interests, and waiting patiently in accordance with the instructions from Defendants until notified to attend a signing event. *See* Pls.’ Pet. at ¶ 10.03. 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 advise 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?

A. No.⁹

Plaintiff Linda Weber's testimony is illustrative of the other Plaintiffs' testimony regarding this issue. [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].

Indeed, to the extent Plaintiffs' inaction is regarded as performance at all, it is plainly not related to the alleged Contract with Defendants. See *Breezevale*, 82 S.W.3d at 439. Plaintiffs' refusal to accept other lease offers—which occurred before a Vantage/Caffey lease was even available—is not unequivocally indicative of a lease or agreement to lease from Vantage. In any event, Plaintiffs' inaction by not leasing their minerals is far from performance that “could have been done with no other design than to fulfill the particular agreement sought to be enforced...” *Breezevale*, 82 S.W.3d at 439-40. Accordingly, any claim that Plaintiffs' partial performance of

⁹ [Ex. A-3 at 33:23 – 34:14; see also Ex. A-3 at 28:16-24, 31:1-6, 33:15-22].

an alleged agreement is sufficient to remove the alleged agreement from the statute of frauds fails as a matter of law.

D. Plaintiffs' Breach of Contract Claim Fails as a Matter of Law on Contract Formation Principles.

Plaintiffs state in their second cause of action, "Breach of Contract and Specific Performance," that "Plaintiffs, by and through their agent SFWA, have entered into a contractual agreement with Defendants Vantage/Caffey...[and] [t]he Plaintiffs, by and through the SFWA leadership accepted Vantage/Caffey's offer, creating a contractual agreement with Vantage/Caffey, and Plaintiffs are entitled to specific performance of the terms and conditions of the Contract for leasing their mineral interests to Vantage/Caffey..." See Pls.' Pet at ¶ 6.02. These claims also fail because the alleged Contract lacks mutuality of obligation, lacks mutual assent, and was never delivered.

1. There was no mutuality of obligation.

Texas law holds that "[a] contract that lacks mutuality of obligation is illusory and void and thus unenforceable." *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 725 (Tex. App.—Fort Worth 2008, pet. dismissed); see also *In re C&H News Co.*, 133 S.W.3d 642, 647 (Tex. App.—Corpus Christi 2003, no pet.). The alleged Contract is not enforceable as an instrument of conveyance or as an oil and gas lease as a matter of law because there is no mutuality of obligation; *i.e.*, the Contract does not obligate Plaintiffs to enter into an oil and gas lease with Vantage. [See Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-3 at 14:21 – 15:12, 15:24 – 16:7, 27:1-11, 33:11-14, 34:15 – 35:2, 44:22 – 45:7, 53:10-12, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; Ex. A-5 at 5:19 – 6:19]. Simply put, when the alleged Contract was purportedly "accepted" by SFWA, Plaintiffs did not promise or agree to lease their minerals to Vantage under the Contract.

In fact Plaintiffs admit that SFWA or their respective neighborhood association lacked the authority to bind Plaintiffs to an oil and gas lease. [*see id.*]. Plaintiff Patti Maddox testified:

Q. And if you never saw it, then you never signed it or you never authorized anyone to sign on your behalf, did you?

A. I did not ever physically sign a lease.

Q. And you did not ever authorize anyone to sign a lease on your behalf, did you?

A. That's correct.

Q. And you did not ever authorize anyone to commit you legally to the terms of a particular oil and gas lease or mineral lease, did you, prior to mid October of 2008?

A. When you say – I'm a little unclear on what you're asking.

Q. I'm asking you did – prior to mid October of 2008, did you authorize anyone as your representative or your attorney-in-fact-or your attorney to bind you legally to the terms of a specific oil and gas lease or mineral lease?

A. I – I did not authorize someone else.

Q. You reserved to yourself the privilege to make the final decision and to sign or not sign any particular oil and gas lease; correct?

A. Yes.¹⁰

The other Plaintiffs have similar testimony. [*See* Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-3 at 14:21 – 15:12, 15:24 – 16:7, 27:1-11, 33:11-14, 34:15 – 35:2, 44:22 – 45:7, 53:10-12, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; Ex. A-5 at 5:19 – 6:19]. SFWA did not have the authority to bind Plaintiffs or to sign Plaintiffs name to any contractual instrument. [*See id.*]. The “lease form” that Plaintiffs

¹⁰ [Ex. A-1 at 29:4 – 30:11.]

allege is part of the Contract, specifically states that SFWA cannot enter into an oil and gas lease on behalf of property owners. [See Ex. B Lease Form at ¶ 26(a),(b),and (c)]. Thus, even if Defendants made a promise to lease, it was not supported by a binding reciprocal obligation. [See Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-3 at 14:21 – 15:12, 15:24 – 16:7, 27:1-11, 33:11-14, 34:15 – 35:2, 44:22 – 45:7, 53:10-12, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; Ex. A-5 at 5:19 – 6:19; Ex. B Lease Form at ¶ 26(a),(b),and (c)]. Accordingly, any “agreement” between SFWA and Defendants for Defendants to lease interests in SFWA lacked mutuality of obligation and was illusory because SFWA was not obligated to anything and had no power or authority to bind anyone. *See City of The Colony*, 272 S.W.3d at 725 (“A promise is illusory when it fails to bind the promisor who retains the option of discontinuing performance”). This was clearly understood by Plaintiffs, who admitted that SFWA was merely making a non-binding recommendation to them. Plaintiff Linda Weber testified:

Q. And what your neighborhood association was doing was negotiating terms, and at the end of the day they would make a recommendation to you regarding a particular lease; is that right?

A. Yes.

Q. And having received that recommendation, it would then be your decision to sign or not sign, right?

A. Right.¹¹

The other Plaintiffs have similar testimony. [See Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-4: 38:18 – 40:9; A-5 at 5:19 – 6:19; *see also* Ex. B Lease Form at ¶ 26(a),(b),and (c)].

¹¹ [Ex. A-3 at 63:25 – 64:8].

Plaintiffs could, at any time, prior to signing a Vantage/Caffey lease, decide to not lease at all or to lease to another company. [See Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-3 at 14:21 – 15:12, 15:24 – 16:7, 27:1-11, 33:11-14, 34:15 – 35:2, 44:22 – 45:7, 53:10-12, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; A-5 at 5:19 – 6:19; Ex. B Lease Form at ¶ 26(a),(b),and (c)]. This important fact renders any supposed lease obligation illusory. See *City of The Colony*, 272 S.W.3d at 725. When illusory promises are all that support an alleged contract, there is no mutuality of obligation and therefore, no contract. See *In re C&H News Co.*, 133 S.W.3d at 647 (holding that where party retained right to unilaterally amend the types of claims covered by an arbitration agreement, the arbitration agreement was illusory and unenforceable).

2. There was no meeting of the minds and/or delivery.

The alleged Contract also fails for lack of mutual assent and delivery. Contracts require mutual assent to be enforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (“*Sonnichsen I*”); see also *English v. Mann*, 284 S.W.2d 281, 285, 286 (Tex. Civ. App.—Galveston 1955, no writ). Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind. *Id.* In *Sonnichsen II*, the Texas Supreme Court held that no contract had been formed between Baylor University and its women’s volleyball coach (Sonnichsen), despite evidence establishing that Baylor promised to prepare a contract, then prepared the contract, and even signed the contract, but had not delivered it to Sonnichsen to sign. *Sonnichsen II*, 221 S.W.3d at 635.

In this case, the elements of mutual assent and delivery are also conclusively negated by the summary judgment evidence as to Plaintiffs Joseph and Patti Maddox and Linda Weber. Plaintiffs Joseph and Patti Maddox and Linda Weber admit that they never executed an oil and

gas lease with Defendants. [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; 44:22 – 45:7]. Plaintiff Patti Maddox testified:

Q. And if you never saw it, [the oil and gas lease] then you never signed it or you never authorized anyone to sign on your behalf, did you?

A. I did not ever physically sign a lease.

Q. And you did not ever authorize anyone to sign a lease on your behalf, did you?

A. That's correct.¹²

Plaintiff Linda Weber gave similar testimony. [See Ex. A-3 at 27:1-11, 34:15 – 35:2; 44:22 – 45:7]. In fact, these Plaintiffs admit they never even saw a lease regarding their respective properties. [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; 44:22 – 45:7]. Further, there was no delivery of any executed lease by Vantage to Plaintiffs or SFWA and no delivery of an executed lease by Plaintiffs or SFWA to Vantage. [See *id.*]. As for Plaintiffs David and Joyce Richey, who claim to have signed an oil and gas lease, *see supra* note 2, the lease form they present is only signed by David Richey and is **not signed** by any of the Defendants, despite the fact that the alleged lease contained a line for Caffey's signature to accept the lease, *i.e.* there still is no evidence of mutual assent or a meeting of the minds. [See Ex. C].

Here there was no mutual assent to any lease manifested by a written agreement signed by the parties and/or any delivery of an agreement with intent to bind by either party. Accordingly, there was no binding contract between Defendants and Plaintiffs or SFWA, and Defendants are entitled to judgment as a matter of law on Plaintiffs' breach of contract claim. *See Sonnichsen II*, 221 S.W.3d at 635.

¹² [Ex. A-1 at 29:4-10].

E. Plaintiffs are not Intended Beneficiaries of any Agreement with SFWA.

Plaintiffs claim that they are intended beneficiaries to an alleged agreement entered into between SFWA and Vantage. *See* Pls.' Pet. at ¶¶ 4.11; 4.13-4.14; 5.01-5.06. However, the third party beneficiary claim fails because (1) the Contract Plaintiffs state they are intended beneficiaries to fails to satisfy the statute of frauds; and (2) Plaintiffs maintained ultimate control over whether to actually enter into a lease with Vantage by signing and delivering the lease.

It is axiomatic that third party beneficiaries cannot enforce an otherwise unenforceable agreement, including one unenforceable under the statute of frauds. *See Paragon Sales Co., Inc. v. N.H. Ins. Co.*, 774 S.W.2d 659, 660 (Tex. 1989) (“A third person not a party to a contract may have a cause of action to enforce the contract if the contract was made for that person’s benefit. In such a case, the third party must establish the existence of a contract and his right to recover thereunder.”); *see also James v. CPR Corp.*, 623 S.W.2d 733, 739-40 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.) (holding that a third-party beneficiary’s breach of contract claim failed because the underlying agreement violated the statute of frauds); *Young Ref. Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 387 (Tex. App.—Houston [1st Dist.] 2001 pet. denied) (“We agree that, under Mississippi law, a third party beneficiary has standing to sue to enforce a contract. The same is also true under Texas law. However, there must first be an enforceable agreement between the parties.”) (internal citations omitted).

As discussed above, the supposed Contract in this case does not comply with the statute of frauds because it is not signed by the persons to be charged, does not contain an adequate description of the property made subject to the prospective oil and gas lease, and does not specifically identify Plaintiffs as lessors.

Additionally, Plaintiffs ultimately controlled whether they would enter into the alleged Contract they seek to enforce. [*See* Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 76:19-21; Ex. A-2

at 10:4-7, 12:11-16; Ex. A-3 at 14:21 – 15:2, 15:24 – 16:7, 33:11-14, 44:22 – 45:7, 63:16 – 64:8; Ex. A-4 at 38:18 – 40:9; Ex. A-5 at 5:19 – 6:19]. Thus, Plaintiffs are not like the typical third-party beneficiary of a life insurance contract, a trust, or other instrument designed for the benefit of a third party, who is generally a passive recipient of the benefit. That is not the case here; Plaintiffs ultimately controlled whether or not they entered into a lease with Vantage. Thus, this Court must dismiss Plaintiffs’ third party beneficiary claim.¹³

F. Plaintiffs’ Unilateral Contract Theory also Fails and Should be Dismissed.

Plaintiffs also assert a meritless breach of unilateral contract claim against Defendants. Plaintiffs claim that either they or SFWA “have a valid and existing unilateral contract requiring Vantage/Caffey to specifically perform by offering the agreed upon lease form and lease terms to all mineral owners in SFWA.” *See* Pls.’ Pet. at ¶ 7.02. Plaintiffs further claim that this alleged unilateral Contract was created by Defendants’ alleged promise to offer to lease to all mineral owners in SFWA and the Contract became enforceable when SFWA performed by endorsing Defendants. *Id.* Plaintiffs seek specific performance of the alleged unilateral Contract or their alleged third party beneficiary rights under the unilateral option Contract. *Id.* at ¶ 7.02. Plaintiffs’ breach of unilateral contract fails because (1) the evidence conclusively shows that there was no unilateral contract; and (2) even assuming *arguendo*, that there was a unilateral contract, such contract is unenforceable because it fails to comply with the statute of frauds.

¹³ Also, even if Plaintiffs’ third party beneficiary claim is factually supported, it would still fail because they would be in privity and would not be eligible as a third party beneficiary. The person seeking to enforce an agreement as a third-party beneficiary must not be a person in privity to the agreement. *See Wells v. Dotson*, 261 S.W.3d 275, 284 (Tex. App.—Tyler 2008, no pet.); *Hellenic Inv., Inc. v. Kroger Co.*, 766 S.W.2d 861, 864 (Tex. App.—Houston [1st Dist.] 1989, no writ). Plaintiffs claim that SFWA entered into an agreement with Defendants on Plaintiffs’ behalf as their representative and agent. *See* Pls.’ Pet. at ¶ 6.02; [Ex. A-1 at 44:9-18; Ex. A-2 at 9:22 – 10:7; Ex. A-3 at 33:8-10, 38:16-22; Ex. A-4 at 39:8-13, 54:18 – 55:2; A-5 at 5:19 – 6:19]. Thus, Plaintiffs would have been privy to any alleged agreement SFWA entered or negotiated on their behalf. *See* Restatement (Third) of Agency § 6.01 (2006) (“When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise”). Accordingly, Plaintiffs cannot be third party beneficiaries. *See Wells*, 261 S.W.3d at 284; *Hellenic Inv.*, 766 S.W.2d at 864.

“A unilateral contract is created by the promisor promising a benefit if the promisee performs. The contract becomes enforceable when the promisee performs.” *Plano Surgery Ctr. v. New You Weight Mgmt. Ctr.*, 265 S.W.3d 496, 503 (Tex. App.—Dallas 2008, no pet.). Such is not the case here.

Assuming *arguendo*, that there was a unilateral contract—and the evidence proves otherwise—such contract is still unenforceable because it fails to comply with the statute of frauds. Plaintiffs allege that this unilateral contract requires Vantage to enter into a future contract with Plaintiffs to lease their minerals. *See* Pls.’ Pet. ¶ at 7.01-7.03. However, “[a] contract to enter a contract covered by the statute of frauds **must also meet the statute of frauds.**” *See 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); *Hitchcock Props., Inc. v. Levering*, 776 S.W.2d 236, 238 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (holding that an option contract to transfer real property is subject to the statute of frauds); *East v. Garcia*, 295 S.W. 239, 241 (Tex. Civ. App.—San Antonio 1927, writ ref’d) (“An option to lease land for oil, gas, and other minerals to be enforceable must be in writing and must contain all of the essential terms of the proposed oil and gas lease expressed with such certainty that it may be understood without recourse to parol evidence to show the intention of the parties...”). Thus, the unilateral contract must also meet the statute of frauds. *Id.* As stated above, the unilateral contract does not meet the statute of frauds because it does not contain a description of Plaintiffs’ respective properties, does not identify Plaintiffs as lessors, and is not signed by the persons to be charged. Therefore, Plaintiffs’ unilateral contract claim fails as a matter of law and must be dismissed.

G. Plaintiffs' Claim Under the Texas Uniform Electronic Transactions Act ("UETA") also Fails Because (1) UETA Does not Apply; and (2) Assuming *Arguendo*, UETA Applies, Plaintiffs' Claim Still Fails Because of the Statute of Frauds.

Plaintiffs assert that they have a valid existing contract with Vantage as set forth pursuant to the Uniform Electronic Transactions Act ("UETA"). *See* Pls.' Pet. ¶ 8.0 – 8.03. However, Plaintiffs UETA claim fails because the evidence conclusively establishes that Defendants did not agree to conduct business and enter into agreements by email; and (2) even assuming, without admitting, UETA applies, UETA offers no exception to the statute of frauds.

UETA is contained in chapter 322 of the Texas Business and Commerce Code, and explicitly provides that UETA "applies only to transactions between parties *each of which has agreed to conduct transactions by electronic means.*" TEX. BUS. & COM. CODE § 322.005(b) (Vernon 2009) (emphasis added). "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." *Id.* Here, the evidence conclusively establishes that Plaintiffs and Defendants did not agree to conduct business and enter into agreements by email. In fact, Defendants required property owners to sign individualized lease agreements for their respective properties in order to have a valid executable lease. [*See* Ex. A-6 at 105:23 – 106:7; 126:20 -127:6].

Assuming *arguendo*, that UETA applies, Plaintiffs' UETA breach of contract claim still fails because of the statute of frauds. UETA "must be construed and applied...to facilitate electronic transactions consistent **with other applicable law...**" TEX. BUS. COM. CODE ANN. § 322.006(1) (Vernon 2009) (emphasis added). Transactions subject to the UETA are "also subject to **other applicable substantive law.**" *Id.* at § 322.003(d) (emphasis added). Whether an electronic signature or electronic document has legal consequences is determined by Chapter 322 "and other applicable law." *Id.* at § 322.005(e).

The statute of frauds is the “other applicable law” and “other applicable substantive law” that applies in this case. Therefore, Plaintiffs’ claim under the UETA fails as a matter of law and must be dismissed.

H. Plaintiffs’ Fraudulent Inducement, Fraudulent Misrepresentation, Negligent Misrepresentation, and Statutory Fraud Claims Should be Dismissed.

Defendants are also entitled to judgment as a matter of law on Plaintiffs’ claims for fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and statutory fraud because the undisputed facts conclusively disprove that (1) Defendants made representations to Plaintiffs, and (2) Plaintiffs’ suffered any actionable 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 Petition, Plaintiffs claim that Defendants made representations that (1) Plaintiffs would have a chance to sign a lease with Defendants in accordance with the terms of the alleged Contract; (2) Defendants would lease Plaintiffs’ mineral interests; and (3) Plaintiffs would receive the agreed upon bonuses. *See* Pls.’ Pet at ¶¶ 4.13, 4.20, and 10.04.

However, the evidence overwhelmingly establishes that Defendants did not make any representations 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]. Additionally, these allegations, even if proven to be true, do not support a claim for fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, or statutory fraud, each of which require a misrepresentation of existing fact, justifiable reliance on that misrepresentation, and damages resulting from such reliance. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (setting forth the elements for

fraudulent misrepresentation); *West v. Northstar Fin. Corp.*, No. 2-08-447-CV, 2010 WL 851415, at *5-6 (Tex. App.—Fort Worth Mar. 11, 2010, pet. denied) (holding that fraudulent inducement is a particular species of fraud that arises only in the context of a contract, and the elements of fraud **must be** established as they relate to a binding agreement between the parties); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999) (setting forth the elements for negligent misrepresentation); TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 2009) (setting forth the elements for statutory fraud in a real estate transaction).

Given that there were no misrepresentations of existing fact (or of a promise of future performance), these claims should be dismissed. 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, *i.e.* the Contract, is unenforceable under the statute of frauds. Furthermore, these tort causes of action are nothing more than Plaintiffs' attempt at recasting their breach of contract claims.

1. Plaintiffs admit that Defendants did not make any representations to them.

Claims for fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, and statutory fraud, require that the defendant make a representation to the plaintiff. *Ernst & Young, L.L.P.*, 51 S.W.3d at 577 (fraudulent misrepresentation); *West*, 2010 WL 851415, at *5-6 (fraudulent inducement); *F.E. Appling Interests*, 991 S.W.2d at 791 (negligent misrepresentation); TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 2009) (statutory fraud). Here, Plaintiffs admit that Defendants did not make any representations to them.

Plaintiff Patti Maddox testified:

- Q. In this paragraph 6.02, you say that “These Defendants,” meaning Vantage and Caffey, “made representations to the Plaintiffs which they knew to be [sic; were] false at the time they were made....” What representations did representatives of Vantage or Caffey make to you or your husband that you believe were false?

A. I believe those representations are in this paragraph 6.02 here, and those representations were made to us via the channel of the neighborhood association and the Fort Worth – Southwest Fort Worth Alliance.

Q. Okay. Well, let's clear that up. Vantage and Caffey never made any representations to you or your husband, did they, direct?

A. Not directly.¹⁴

Plaintiff Joseph Maddox testified that he never had any direct dealings with Defendants:

Q. Did you personally have any direct dealings with individuals you believed to be associated with either Vantage or Caffey?

A. I personally did not.¹⁵

Plaintiff Linda Weber also testified that she also never received any representations from Defendants:

Q. If you would, continue down on that page, there's a paragraph 6.0, and it says "Second Cause of Action – Fraud." And in that paragraph 6.02, there's a statement that "These defendants" – again, it's referring to Vantage and Caffey – "made representations to the Plaintiffs which they knew were false at the time they were made..." You never received any direct statement or representation from any person that you believe to be associated with Vantage or Caffey, did you?

A. I received – I – not directly to me, but through my association.¹⁶

Q. But you never had any direct communication with anyone associated with Vantage or Caffey, did you?

A. No.¹⁷

Plaintiff David Richey testified that his claim was for breach of contract, not fraud:

Q. Do you know that you are alleging that someone defrauded you in connection with this case?

¹⁴ [See Ex. A-1 at 47:19 - 48:9].

¹⁵ [Ex. A-2 at 14:25 – 15:3].

¹⁶ [Ex. A-3 at 39:8-19].

¹⁷ [Ex. A-3 at 40:2-5; *see also* 28:16-24].

- A. That sounds like something that my lawyer might have done, yes.
- Q. Okay. But as you sit here today, without just looking at this, were you aware that you were suing someone for fraud in this case?
- A. Not for fraud; for not paying my – not fulfilling the contract.¹⁸

Plaintiff David Richey further testified that he did not receive any misrepresentations from Defendants:

- Q. Okay. Well, fraud is usually based upon a misrepresentation of some sort that's made intentionally. Is there anything that Vantage or Caffey intentionally misrepresented to you that you can recall today?
- A. Well, apparently what they did, they did represent to our neighborhood association or the southwest neighborhood association that they would allow anybody and all other persons that wanted to sign to sign.¹⁹

In order to support their tort claims, Plaintiffs must prove that Defendants made a representation to them. *See Ernst & Young*, 51 S.W.3d at 577; *West*, 2010 WL 851415, at *5-6; *F.E. Applying Interests*, 991 S.W.2d at 791; TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 2009). In this case, the testimony from the Plaintiffs conclusively establishes that Defendants did not make any representations to Plaintiffs. As such, Plaintiffs' claims for fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, and statutory fraud fail as a matter of law and must be dismissed.

2. There are no alleged misrepresentations of existing fact.

All of Plaintiffs' tort claims are based upon alleged representations *to do something in the future*, not a misrepresentation of *existing* fact. Claims of fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and statutory fraud require an actionable misrepresentation of existing fact. The alleged representations in this case—that (1) Plaintiffs

¹⁸ [Ex.A-4 at 52:1-9].

¹⁹ [Ex. A-4 at 52:22 – 53:6]. Plaintiff Joyce Richey concurred with her husband's testimony. [Ex. A-5 at 5:19 – 6:19].

would have a chance to sign a lease with Defendants in accordance with the terms of the alleged Contract; (2) Defendants would lease Plaintiffs' mineral interests; and (3) Plaintiffs would receive the agreed upon bonuses—are all promises of future action, not existing fact.

Under Texas law, fraudulent misrepresentation and statutory fraud can be supported by promises of future performance if, and only if, the defendant had no intention of performing at the time the promises were made. *See Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009); *Formosa Plastics v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998); TEX. BUS. & COM. CODE ANN. § 27.01(a)(2)(A), (B) (Vernon 2009). 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).

While the alleged representations made to Plaintiffs were promises of future performance, there is no evidence establishing that at the time these alleged promises were made, Defendants did not intend to fulfill such promises. Consequently, these alleged promises are not actionable as a matter of law. More importantly, Plaintiffs admitted that Defendants did not make 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].

3. Plaintiffs' tort claims are barred as a matter of law because the only damages Plaintiffs seek are benefit-of-the-bargain damages.

In regards to their fraudulent misrepresentation, negligent misrepresentation, and statutory fraud claims, Plaintiffs state that they “sue for all actual, reliance, consequential, exemplary and other damages.” *See* Pls.’ Pet. at ¶¶ 11.03, 12.03, and 13.03. Plaintiffs seek the following relief for their fraudulent inducement claim: “**specific enforcement** of the promise to lease, as well as recovery of all legal, equitable, actual, reliance, consequential, exemplary and other damages permitted for such fraudulent inducements...” *See* Pls.’ Pet. at ¶10.07 (emphasis added). “Texas recognizes two measures of direct damages for common-law fraud: out-of-pocket damages and benefit-of-the bargain.” *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (“*Sonnichsen I*”). 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.” *Sonnichsen II*, 221 S.W.3d at 636. “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).

Under Texas law, the statute of frauds bars claims for fraud, statutory fraud, and negligent misrepresentation to the extent the plaintiff/claimant seeks benefit-of-the-bargain damages when the claims arise from a contract that is unenforceable. *See Sonnichsen II*, 221 S.W.3d at 636 (stating that the statute of frauds bars a fraud claim for benefit-of-the-bargain damages when the claim arises from a contract that has been held to be unenforceable); *Hawkins*

v. *Walker*, 233 S.W.3d 380, 396 (Tex. App.—Fort Worth 2007, no pet.) (same); *see also Fed. 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).

By this lawsuit, Plaintiffs essentially seek only the lease signing bonus they claim they should have received under the alleged Contract between Vantage and SFWA; *i.e.*, the alleged benefit-of-the-bargain. *See* Pls.’ Pet. at ¶10.07; [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]. Because the “bargain” upon which Plaintiffs’ claims depend is unenforceable under the statute of frauds, the type of damages Plaintiffs seek is dispositive of their claims. *Sonnichsen II*, 221 S.W.3d at 636 (stating, “[t]he viability of [plaintiff’s] fraud claim depends upon the nature of the damages he seeks to recover”); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (holding that when the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone).

As the Texas Supreme Court held in *Haase v. Glazner*:

The statute [of frauds] exists to prevent fraud and perjury in certain kinds of transactions by requiring agreements to be set out in a writing signed by the parties. But that purpose is frustrated and the Statute easily circumvented if a party can use a fraud claim essentially to enforce a contract the Statute makes unenforceable. We therefore hold that the Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds.

Haase v. Glazner, 62 S.W.3d 795, 799 (Tex. 2001). In other words, if Plaintiffs are allowed to recover the benefit of the bargain that is barred by the statute of frauds, the statute of frauds would become meaningless. *Sonnichsen v. Baylor Univ.*, 47 S.W.3d 122, 127 (Tex. App.—Waco 2001, no pet.) (“*Sonnichsen I*”).

Here, Plaintiffs have not alleged that they parted with anything as a result of the alleged representations/promises of Defendants. In fact, Plaintiffs essentially admit that all they want is to enforce the Contract. *See* Pls.' Pet. at ¶ 10.07; [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]. Accordingly, Plaintiffs have not suffered any direct damages as a result of any conduct by Defendants. *See Sonnichsen II*, 221 S.W.3d at 636 (noting that the only measures of direct damages are out-of-pocket damages and benefit-of-the-bargain damages); *Transcon. Realty Investors, Inc. v. John T. Lupton Trust*, 286 S.W.3d 635, 646-47 (Tex. App.—Dallas 2009, no pet.) (holding party that asserted no out-of-pocket losses failed to assert a viable theory of recovery because the agreement on which it relied did not comply with the statute of frauds).

Plaintiffs also do not have a claim for consequential damages. Consequential damages must be foreseeable and must be directly traceable to the defendants' wrongful act and result from such act. *Arthur Andersen & Co v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Here, Plaintiffs allege that they turned down other offers to lease their minerals based on the alleged representation that Defendants would lease Plaintiffs' minerals. However, Plaintiffs admit that they turned down offers at the advise 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]. Additionally, Plaintiffs' inaction demonstrates their lack of reliance. *See 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”).

Given that Plaintiffs seek only benefit-of-the-bargain damages under the unenforceable Contract, it follows that Plaintiffs' fraudulent inducement, fraudulent misrepresentation, statutory fraud, and negligent misrepresentation claims fail as a matter of law.

4. The tort claims are mere recasting of breach of contract claim.

It is clear under Texas law that a party cannot repackage a breach of contract claim and present it as a claim for fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, or statutory fraud. A mere breach of contract cannot give rise to tort liability. If the plaintiff's only harm in an action for negligent misrepresentation is damage to the subject matter of an alleged contract, as it is here, the plaintiff's action is for breach of contract, not negligent misrepresentation – there must be an independent injury, other than a breach of contract, to support a negligent misrepresentation finding. *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663-64 (Tex. 1998).

In *Haase*, the Texas Supreme Court considered whether a plaintiff should be permitted to recast a breach of contract case in order to circumvent the statute of frauds. The Court held, “the Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds.” See *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001); see also *Alattar v. Ganim*, No. 14-08-00756-CV, 2010 WL 547032, at * 4 (Tex. App.—Houston [14th Dist.] Feb. 18, 2010, pet. filed); *Ambulatory Infusion Therapy Specialist, Inc. v. N. Am. Adm’rs, Inc.*, 262 S.W.3d 107, 112 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007, no pet.); *Harrison v. Bass Enters. Prod. Co.*, 888 S.W.2d 532, 536-37 (Tex. App.—Corpus Christi 1994, no pet.).

When the Court considers the allegations made by Plaintiffs, the essence of the fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, and statutory fraud

claims can be properly stated as follows: Defendants failed to lease Plaintiffs' minerals per the terms of the alleged Contract. This recasting of a breach of contract claim is impermissible under Texas law, as to hold otherwise would render the statute of frauds meaningless. Plaintiffs' four tort claims should therefore be dismissed.

I. Plaintiffs' Statutory Fraud Claim Fails as a Matter of Law Because There was no Conveyance of Real Estate.

Additionally, Plaintiffs' statutory fraud claim fails as a matter of law because there was no conveyance of real estate. Texas courts have narrowly construed the scope of section 27.01 of the Texas Business & Commerce Code. As stated in *Evans v. Wilkins*:

It is clear from § 27.01 that, as a threshold matter, a viable claim of fraud must relate to a transaction involving real estate. Courts have consistently interpreted this requirement strictly, holding that for a fraud in a transaction to be actionable under § 27.01, the contract in question **must actually effect the conveyance of real estate between the parties and cannot merely be tangentially related or a means for facilitating a conveyance of real estate.**

No. 14-00-00831-CV, 2001 WL 1340356, at *3 (Tex. App.—Houston [14th Dist.] Nov. 1, 2001, no pet.) (emphasis added). Here there was no conveyance of real property. In fact, Plaintiffs admit that they were not bound to the alleged Contract that Plaintiffs seek to enforce. [*See* Ex. A-1 at 23:3-8, 29:4-10, 29:17 – 30:11, 60: 20-22, 76:19-21; Ex. A-2 at 10:4-7, 12:11-16, 14:11-24; Ex. A-3 at 14:21 – 15:12, 15:24 – 16:7, 27:1-11, 33:11-14, 34:15 – 35:2, 44:22 – 45:7, 53:10-12, 63:16 – 64:8; Ex. A-4: 38:18 – 40:9; A-5 at 5:19 – 6:19].²⁰ Because there was no conveyance of real property between the parties at any time, Plaintiffs' statutory fraud claim fails as a matter of law and must be dismissed.

²⁰ Although Plaintiffs David and Joyce Richey claim that they were induced to execute an oil and gas lease, as discussed *supra* in note 2, they do not seek enforcement of this alleged lease, and even if they did, that claim would also fail as a matter of law. *See supra* note 2.

J. Plaintiffs' Fraudulent Inducement Claim Fails as a Matter of Law Because There is no Binding Contract Between the Parties.

Additionally, Plaintiffs' fraudulent inducement claim fails as a matter of law because there is no binding contract between Plaintiffs or SFWA and Defendants. In addition to establishing the fraud elements, a fraudulent inducement claim requires proof of a binding agreement resulting from the misrepresentation. *See Haase v. Glazner*, 62 S.W.3d 795, 798-99 (Tex. 2001). Absent a legally enforceable agreement, a plaintiff cannot show detrimental reliance, and thus no fraudulent inducement. *Id.*

Plaintiffs assert that they accepted the Contract allegedly entered into by SFWA and Defendants. *See* Pls.' Pet. at ¶¶ 10.03-10.05. As stated above, the alleged Contract is subject to the statute of frauds. The Contract fails to satisfy the statute of frauds because it is not signed by Defendants or Plaintiffs, does not contain an adequate property description, and fails to identify Plaintiffs as lessors. Thus, Plaintiffs' fraudulent inducement claim fails as a matter of law.

VI.
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

Defendants are further entitled to summary judgment because there is no evidence supporting Plaintiffs' (1) third party beneficiary; (2) breach of contract; (3) breach of unilateral contract; (4) breach of contract and third party beneficiary rights under the UETA; (5) promissory estoppel; (6) fraudulent misrepresentation; (7) fraudulent inducement; (8) negligent misrepresentation; and (9) statutory fraud claims.

A. There is no Evidence that the Alleged Contract Complies with the Statute of Frauds.

As is discussed above, the Contract that Plaintiffs seek to enforce must comply with the statute of frauds because the subject matter of the Contract deals with the conveyance of an interest in real property. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982); *see also Avis v. 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); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.); *Sun-Key Oil Co., Inc. v. Whealy*, No. 2-06-198-CV, 2006 WL 3114466, at * 3 (Tex. App.—Fort Worth 2006, no pet.). Additionally, “[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.). Therefore, in order for Plaintiffs to succeed on their third party beneficiary, breach of contract; breach of unilateral contract; and breach of contract under the UETA claims, Plaintiffs must prove the alleged Contract complies with 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) contain a description of the property made subject to the prospective oil and gas lease, which describes the property with reasonable certainty; and (c) the writing must identify the parties to the contract. *See* 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); *Walker Ave. Realty Co. v. Alaskan Fur Co.*, 131 S.W.2d 196, 198 (Tex. Civ. App.—Galveston 1939, writ ref'd); *Watson v. Brazelton*, 176 S.W.2d 216, 218 (Tex. Civ. App.—Waco 1943, no writ). There is no evidence of a contract meeting these requirements. There is no evidence that (1) there is a writing signed by the Defendants or by Plaintiffs; (2) the alleged writing contains a description of Plaintiffs’ property; and (3) the alleged writing identifies Plaintiffs as lessors. As a result, Defendants are entitled to summary judgment on

Plaintiffs' third party beneficiary, breach of contract; breach of unilateral contract; and breach of contract and third party beneficiary rights under the UETA claims.

B. There is no Evidence Supporting Plaintiffs' Third Party Beneficiary Claim.

“Parties are presumed to contract for themselves and it follows that a contract will not be construed as having been made for the benefit of a third person unless it clearly appears that such was the intention of the contracting parties.” *White v. Mellon Mortgage Co.*, 995 S.W.2d 795, 802 (Tex. App.—Tyler 1999, no pet.) Therefore, “Texas law imposes a heavy burden on a person claiming third-party beneficiary status.” *Id.* To prove such status, the plaintiff must prove that (1) that it was not a party to the contract; (2) the contract was made for its direct benefit; and (3) that the contracting parties intended that the plaintiff so benefit. *Id.* Here, there is no evidence that (1) demonstrates that Plaintiffs were not a party to the contract; (2) the contract was made for Plaintiffs' direct benefit; and (3) the supposed contracting parties intended that Plaintiffs benefit.

As is discussed above in section “A”, there is also no evidence that the alleged Contract, which Plaintiffs claim they are third party beneficiaries to, complies with the statute of frauds. *See Paragon Sales Co., Inc. v. N.H. Ins. Co.*, 774 S.W.2d 659, 660 (Tex. 1989) (“A third person not a party to a contract may have a cause of action to enforce the contract if the contract was made for that person’s benefit. In such a case, the third party must establish the existence of a contract and his right to recover thereunder.”); *see also James v. CPR Corp.*, 623 S.W.2d 733, 739-40 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.) (holding that a third-party beneficiary’s breach of contract claim failed because the underlying agreement violated the statute of frauds); *Young Ref. Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 387 (Tex. App.—Houston [1st Dist.] 2001 pet. denied) (“We agree that, under Mississippi law, a third party beneficiary has standing to sue to enforce a contract. The same is also true under Texas law. However, there

must first be an enforceable agreement between the parties.”) (internal citations omitted). As such, Plaintiffs’ third party beneficiary claim fails as a matter of law and must be dismissed.

C. There is no Evidence Supporting Plaintiffs’ Breach of Contract Claim.

“The elements of a breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages to the plaintiff.” *Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 825 (Tex.App.—Fort Worth 2008, no pet.). In order to have a valid/enforceable contract, the following elements must exist: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party’s consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 720 (Tex. App.—Fort Worth 2008, pet. denied). Additionally, as discussed above, the statute of frauds requires that an oil and gas lease (and any contract to enter into an oil and gas lease) must comply with the statute of frauds. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982); *see also Avis v. 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); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 206 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); *Sun-Key Oil Co., Inc. v. Whealy*, No. 2-06-198-CV, 2006 WL 3114466, at * 3 (Tex. App.—Fort Worth 2006, no pet.).

Here, there is no evidence that:

1. There exists a valid enforceable contract between Plaintiffs and Defendants. Specifically there is no evidence that:
 - a. Defendants made an offer to Plaintiffs;
 - b. that there was an acceptance in strict compliance with the terms of the offer;

- c. there was a meeting of the minds between Defendants **and** Plaintiffs;
 - d. Plaintiffs **and** Defendants consented to the terms;
 - e. Plaintiffs executed and delivered the contract with the intent that it be mutual and binding; and
 - f. the contract complies with the statute of frauds. *See* section “A” *supra*;
2. Plaintiffs performed on the contract;
 3. Defendants breached the contract; and
 4. Plaintiffs suffered damages.

As such, Plaintiffs’ breach of contract claim fails as a matter of law and must be dismissed.

D. There is no Evidence Supporting Plaintiffs’ Breach of Unilateral Contract Claim.

“A unilateral contract is created by the promisor promising a benefit if the promisee performs. The contract becomes enforceable when the promisee performs.” *Plano Surgery Ctr. v. New You Weight Mgmt. Ctr.*, 265 S.W.3d 496, 503 (Tex. App.—Dallas 2008, no pet.). Here there is no evidence supporting Plaintiffs’ unilateral contract claim. There is no evidence that (1) Defendants promised a benefit to SFWA or Plaintiffs and (2) Plaintiffs or SFWA performed. Additionally, because this alleged unilateral contract requires Vantage to enter into a future contract with Plaintiffs to lease their minerals, it too must also comply with the statute of frauds. *See Hartford Fire Ins. Co.*, 287 S.W.3d at 780 (“A contract to enter a contract covered by the statute of frauds **must also meet the statute of frauds.**”) (emphasis added); *Hitchcock Props, Inc. v. Levering*, 776 S.W.2d 236, 238 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (holding that an option contract to transfer real property is subject to the statute of frauds). As discussed in section “A” above, there is also no evidence that the alleged Contract, unilateral or

not, complies with the statute of frauds. Therefore, Plaintiffs' breach of unilateral contract claim fails as a matter of law and must be dismissed.

E. There is no Evidence Supporting Plaintiffs' Breach of Contract and Third Party Beneficiary Rights Under the UETA.

UETA "applies only to transactions between parties *each of which has agreed to conduct transactions by electronic means.*" TEX. BUS. & COM. CODE ANN. § 322.05(b) (Vernon 2009). Additionally, UETA "must be construed and applied...to facilitate electronic transactions consistent **with other applicable law...**" *Id.* at § 322.006(1) (emphasis added). Transactions subject to the UETA are "also subject to **other applicable substantive law.**" *Id.* at § 322.003(d) (emphasis added). Whether an electronic signature or electronic document has legal consequences is determined by Chapter 322 "and other applicable law." *Id.* at § 322.005(e). The statute of frauds is the "other applicable law" and "other applicable substantive law" that applies in this case.

Plaintiffs' breach of contract claim and third party beneficiary rights under UETA fails as a matter of law because there is no evidence that (1) UETA applies to the transaction at issue, *i.e.*, there is no evidence that Plaintiffs and Defendants agreed to conduct transactions by electronic means; and (2) the alleged Contract, under UETA, complies with the statute of frauds (this is discussed in section "A" above). As such Plaintiffs' breach of contract claim and third party beneficiary claim under UETA must also be dismissed.

F. There is no Evidence Supporting Plaintiffs' Promissory Estoppel Claim.

"The elements of promissory estoppel are: (1) a promise, (2) foreseeability of reliance on the promise by the promisor, and (3) substantial detrimental reliance by the promisee." *Rice v. Metropolitan Life Ins. Co.*, No. 2-09-248-CV, 2010 WL 3433058, at * 8 (Tex. App.—Fort Worth Aug. 31, 2010, no pet.). Where the doctrine is used to bar the application of the statute of frauds,

as it is used in this case, Plaintiffs must also demonstrate that Defendants promised to sign a written contract **which was in existence at the time the alleged promise was made.** “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 938-40 (Tex. 1972) (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).

Here there is no evidence: (1) that Defendants made a promise; (2) there was foreseeability of reliance on the alleged promise by Plaintiffs, and (3) there was substantial detrimental reliance by Plaintiffs. More importantly, there is no evidence that Defendants promised to sign a written contract **that was in existence** at the time Defendants’ alleged promise was made. Thus, Plaintiffs’ promissory estoppel claim fails as a matter of law and must be dismissed.

G. There is no Evidence Supporting Plaintiffs’ Fraudulent Misrepresentation Claim.

To establish fraudulent misrepresentation, a plaintiff must prove: (1) the defendant made a material misrepresentation to the plaintiff that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce plaintiff to act upon the representation; (4) the

plaintiff actually and justifiably relied upon the representation; and (5) the plaintiff suffered injury. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

Here Plaintiffs' fraudulent misrepresentation claim fails as a matter of law because there is no evidence that:

1. Defendants made a material misrepresentation to Plaintiffs that was false;
2. Defendants knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth;
3. Defendants intended to induce Plaintiffs to act upon the representation;
4. Plaintiffs actually and justifiably relied upon the representation; and
5. Plaintiffs suffered injury.

Therefore, Plaintiffs' fraudulent misrepresentation claim fails as a matter of law and must be dismissed.

H. There is no Evidence Supporting Plaintiffs' Fraudulent Inducement Claim.

Fraudulent inducement is a particular species of fraud that arises only in the context of a contract, and the elements of fraud must be established as they relate to a binding agreement between the parties. *West v. Northstar Fin. Corp.*, No. 2-08-447-CV, 2010 WL 851415, at *5-6 (Tex. App.—Fort Worth Mar. 11, 2010, pet. denied). Therefore, for Plaintiffs to succeed on their fraudulent inducement claim, Plaintiffs must prove: (1) the defendant made a material misrepresentation to the plaintiff that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce plaintiff to act upon the representation; (4) the plaintiff actually and justifiably relied upon the representation; and (5) the plaintiff suffered injury. *Ernst & Young, L.L.P.*, 51 S.W.3d at 577. Additionally, these elements must relate to a binding contract between the parties. *West*, 2010 WL 851415, at *5-6.

Here, Plaintiffs' fraudulent inducement claim fails as a matter of law because there is no evidence that:

1. Defendants made a material misrepresentation to Plaintiffs that was false;
2. Defendants knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth;
3. Defendants intended to induce Plaintiffs to act upon the representation;
4. Plaintiffs actually and justifiably relied upon the representation;
5. Plaintiffs suffered injury; and
6. There is a binding agreement between the parties. As discussed in section

"A" above, the alleged Contract must comply with the statute of frauds. There is no evidence that the alleged Contract complies with the statute of frauds. *See* section "A." Therefore, there is no evidence that there is a binding enforceable agreement between the parties.

Thus, Plaintiffs' fraudulent inducement claim fails as a matter of law and must be dismissed.

I. There is no Evidence Supporting Plaintiffs' Negligent Misrepresentation Claim.

To successfully establish negligent misrepresentation, a plaintiff must prove: (1) the defendant made a representation to the plaintiff in the course of the defendant's business or in a transaction in which the defendant had an interest; (2) the defendant supplied false information for the guidance of others; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; (4) the plaintiff justifiably relied on the misrepresentation; and (5) the defendant's negligent misrepresentation proximately caused the plaintiff's injury. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

Here, Plaintiffs' negligent misrepresentation claim must be dismissed because there is no evidence that:

1. Defendants made a representation to Plaintiffs in the course of Defendants' business or in a transaction in which Defendants had an interest;
2. Defendants supplied false information for the guidance of others;
3. Defendants did not exercise reasonable care or competence in obtaining or communicating the information;
4. Plaintiffs justifiably relied on the misrepresentation; and
5. Defendants' negligent misrepresentation proximately caused Plaintiffs' injury.

As such, Plaintiffs' negligent misrepresentation fails as a matter of law and must be dismissed.

J. There is no Evidence Supporting Plaintiffs' Statutory Fraud Claim.

To successfully establish statutory fraud, the plaintiff must prove (1) there was a transaction involving real estate or stock; (2) during the transaction, the defendant either made a false representation of fact, made a false promise, or benefited by not disclosing that a third party's representation or promise was false; (3) the false representation or promise was made for the purpose of inducing the plaintiff to enter into a contract; (4) the plaintiff relied on the false representation or promise by entering into the contract; and (5) the reliance caused the plaintiff injury. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 2010).

Here Plaintiffs' statutory fraud claim fails as a matter of law because there is no evidence that:

1. There was a transaction involving real estate or stock;
2. During the transaction, Defendants either made
 - a. a false representation of fact,

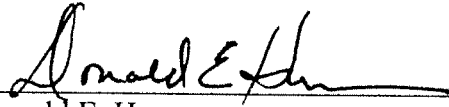
- b. made a false promise, or
- c. benefited by not disclosing that a third party's representation or promise was false;
3. The false representation or promise was made for the purpose of inducing Plaintiffs to enter into a contract;
4. Plaintiffs relied on the false representation or promise by entering into the contract; and
5. The reliance caused Plaintiffs' injury.

Thus, Plaintiffs' statutory fraud claim fails as a matter of law and must be dismissed.

VII.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Vantage and Caffey pray that this Motion for Traditional and No-Evidence Summary Judgment be granted that the Court enter final judgment as a matter of law that Plaintiffs take nothing on their third party beneficiary, breach of contract, breach of unilateral contract, breach of contract and third party beneficiary rights under the UETA, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and statutory fraud claims. Defendants also respectfully request that the Court award them any and all such other and further relief to which they may be justly entitled.

Respectfully submitted,



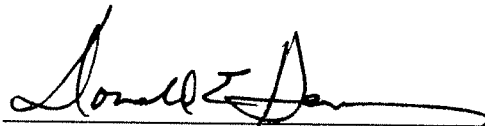
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**ATTORNEYS FOR DEFENDANTS VANTAGE
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LLC**

CERTIFICATE OF CONFERENCE

On December 3, 2010, I conferred with counsel for Plaintiffs on the merits of this Motion. A reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed. Therefore, it is presented to this Court for determination.



Donald E. Herrmann

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 December 3, 2010.

PETROFF & ASSOCIATES

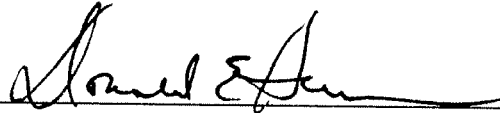
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