

Operating, but additionally addresses arguments made by other parties to the case regarding the issue of antitrust standing. (See Defs. XTO, Permian, Jones, Huxel, Van Zandt, and Kuba's Mot. for Protective Order, Oct. 25, 2009). Additionally, Defendants XTO, Permian, Jones, Huxel, and Bryson Kuba have adopted and joined Vantage, Titan, and Caffey's Pleas to the Jurisdiction. (See Defs' Adpotion and Joinder in Vantage, Titan, and Caffey's Pleas to the Jurisdiction, Jan. 15, 2010)

This Response incorporates by reference Plaintiffs' entire *Omnibus* Motion To Compel, but more specifically the section entitled, "*Plaintiffs Have Standing to Sue for an Antitrust Cause of Action.*" (See Pls' Omnibus Mot. To Compel Produc. ¶3, Oct. 27, 2009). This Supplemental Response specifically addresses the issues and new evidence pertinent to the hearing set in this Court on January 28, 2010.

I. PROCEDURAL BACKGROUND

This case was filed to recover damages Plaintiffs sustained as a result of Defendants' conduct summarized below. Plaintiffs have alleged causes of action for breach of contract, common law fraud, statutory fraud in a real estate transaction pursuant to Section 27.01 *et. seq.* of the Texas Business and Commerce Code, negligent misrepresentation, civil conspiracy, and for violation of the Texas Free Enterprise and Antitrust Act of 1983. This Response will only address the antitrust claim because this is the only matter currently set for hearing by the Motion to Dismiss for Lack of Subject Matter Jurisdiction. The purpose of this hearing, as Defendants point out in their motions, is straightforward: Did Plaintiffs have standing to sue under the Texas Free Enterprise and Antitrust Act of 1983 at the time they filed suit on August 6, 2009? (See Defs Vantage, Titan, and Caffey's

Pleas to the Jurisdiction and Mot. To Dismiss).

The question of standing may be raised in a dilatory motion challenging jurisdiction. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Such a plea should be decided without regard to the merits of the lawsuit; however, the court may hear evidence as necessary to determine the issue of standing. *Id.* Ultimately, the decision of whether this determination should be made at the preliminary hearing stage or should wait further factual development is left to the sound discretion of the trial court. *Id.*

However, if the party challenging standing relies solely on the pleadings, without submitting evidence, the court should look solely at the pleadings. *City of Fort Worth v. Crockett*, 142 S.W.3d 550, 552 (Tex.App.—Fort Worth 2004, pet. denied). If the moving party relies solely on the pleadings, the Court must accept the allegations therein as true and construe the pleadings in a light most favorable to the plaintiff. *Id.* The Plaintiffs will rely on their pleadings at this early stage of the case, but will also briefly summarize some of the available factual evidence in order to provide context for their Response to this rather unusual Motion.

II. FACTUAL BACKGROUND

The following factual analysis will only discuss facts that are *not in dispute*. They are discussed in summary fashion for the sake of brevity.

This case is the first of many similar cases on file and to be filed, in Tarrant County, involving the actions surrounding gas company attempts to lease mineral rights from Tarrant County landowners, such as the Plaintiffs. Texas courts have seen oil and gas lease disputes for over a

century, but those disputes typically involved large tracts of agricultural and/or ranching land in wide-open regions of Texas as opposed to the highly-populated urban areas existing in Tarrant County. Previously, litigation regarding “urban drilling” similar to this case has been unprecedented because technology that permits drilling under densely populated areas, like the Newark East (Barnett Shale) Field, is relatively new.

This case, along with thousands like it, involves landowners with a relatively small tract of land (usually less than a quarter of an acre). In early 2008, individuals in and around the Plaintiffs’ neighborhood were presented with various lease offers from competing gas companies. In response, these individuals formed coalitions of homeowners and homeowners’ associations that enabled them to work together, compare notes, and share experiences. Uniting allowed the homeowners to negotiate with the gas companies from a position of strength, because together they were informed, while apart they were disjointed and inexperienced.

Numerous neighborhood coalitions were eventually formed, representing well over ten thousand individuals in southern Tarrant County alone, complete with websites, phone trees, email trees, yard signs, flyers, letters, newspaper ads, street directors, block captains, negotiating committees, online conference calls, organizational meetings, and massive public meetings with thousands in attendance. These powerful networks of neighbors, representing huge tracts of combined, united neighborhoods, were able to command lease deals with the gas companies that were far more lucrative for the landowners than anything any of the gas companies had ever experienced.

One of the most visible aspects of the lease arrangements these networks of neighbors

negotiated is the *signing bonus*, which is an “up front” payment to the landowner upon signing the mineral lease. Signing bonuses allow the gas companies to immediately provide money to the landowners and the legal consideration necessary to “seal the deal” between the two parties. Signing bonuses in Tarrant County around the time gas was discovered underneath the Barnett Shale ranged from \$300 to \$400 per acre. See Zack J. Burt, *Playing the Wildcard in the High Stakes Game of Urban Drilling: Unconscionability in the Early Barnett Shale Leases*, 15 TEX. WESLEYAN L. REV. 1, 3 (Fall 2008). The agreed signing bonus for the Booths’ lot (*less than a fifth of an acre*) was \$26,517 per acre, an increase of over six thousand percent (6,000 %) in just a couple of years!

The use of escalating signing bonuses stopped suddenly during the week of October 13, 2008, the same week the leading gas companies in Tarrant County simultaneously announced they were backing out of the deals they made with the neighborhood alliances — the very same neighborhoods they had been fighting over just days earlier. Signing bonuses went from *record-setting* one day to *virtually non-existent* the next. Landowners whose property was worth fighting over just days earlier were suddenly unable to get gas companies’ interest. The simultaneous nature of this countywide conduct was notable because it suggests that the companies acted in suspicious cooperation.

Deposition testimony obtained thus far has also shown that a network of cooperation among the gas companies co-existed among all this high-dollar leasing competition. There is already evidence in this record of “designated non-compete areas,” “friendly competition,” “non-compete agreements,” “joint operating agreements,” “lease-trading,” “joint development,” and direct customer-to-competitor referrals among the very companies who will argue that they were “highly competitive” even while referring customers to one another.

The next section will address the legal analysis that is appropriate in this case at this stage, and Section IV will provide a brief overview of some facts that are known, thus far, about these companies and their conduct in the second week of October 2008.

III.
**PLAINTIFFS HAVE STANDING TO SUE DEFENDANTS FOR VIOLATION OF THE TEXAS FREE
ENTERPRISE AND ANTITRUST ACT**

Antitrust cases have a reputation for being long and complicated affairs involving millions of pages of documents with experts using complicated economic language in an attempt to explain what it all means. However, this is not that type of case. The Antitrust allegations in this case can be distilled to their simplest terms by quoting Jay Van Zandt, an independent land man working for Defendant Permian, who acknowledged that “*the first deal is the worst deal*” is a saying he had heard before. The saying refers to the idea that value should increase as available land in that area decreases, thereby resulting in the “worst deal” for early lease signers. *See* Ex. 2 (Van Zandt Dep. 175:9-176:3). In a law review article written shortly before October 2008, one author summarized the situation in Tarrant County in early 2008 as follows:

In early 2008, lease offers to Tarrant County [sic] residents were reaching as high as \$18,250 per acre with 27.5% royalties. Furthermore, as a direct result of Tarrant County residents becoming more knowledgeable about the leasing process and neighborhoods organizing and working together, residents are now able to negotiate more favorable lease terms on top of the better bonuses and royalty payments. As fewer and fewer mineral rights are left to be leased in Tarrant County, the sky is the limit for how high lease offers will eventually go.

See Zack J. Burt, *Playing the Wildcard in the High Stakes Game of Urban Drilling: Unconscionability in the Early Barnett Shale Leases*, 15 TEX. WESLEYAN L. REV. 1, 2 (Fall 2008).

“The first deal is the worst deal” proved *untrue* here, however, because signing bonuses reached a

peak in October, 2008, and then suddenly crashed to almost nothing countywide in less than a week.

Texas courts are to construe the Texas Free Enterprise and Antitrust Act in harmony with federal judicial interpretations of comparable federal antitrust statutes. TEX. BUS. & COM. CODE ANN. § 15.04; *see also* 15 U.S.C.A. § 1 (commonly referred to as “The Sherman Act”). The purpose of the Act is “to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state.” *Id.* “Trade and commerce” is defined as:

the *sale*, purchase, lease, exchange, or distribution of any goods or services; the *offering for sale*, purchase, *lease*, or exchange of any goods or services; the advertising of any goods or services; the business of insurance; and *all other economic activity* undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services

TEX. BUS. & COM. CODE ANN. § 15.03(5) (emphasis added).

Antitrust laws are designed to increase competition and “to stop companies from colluding to raise consumer costs through set prices or allocated markets.” *Bailey v. Shell*, 555 F.Supp.2d 767, 776 (S.D. Tex., 2008). The main purpose of the laws is to protect “all who are made victims of the forbidden practices by whomever they may be perpetrated.” *Mandeville Island Farms, Inc. v. American Crystal Sugar, Co.*, 334 U.S. 219, 236 (1948). Both the federal and state statutes, and the judicial interpretations of each, evidence “a naturally broad and inclusive meaning.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982).

A. *Defendants Wrongly Contend That a Seller Cannot Have Standing to Assert an Antitrust Claim*

The Defendants’ argument that Plaintiffs lack standing to assert an antitrust claim appears to be based solely on the argument that a seller can never, as a matter of law, have standing to assert

an antitrust action. This premise is logically and demonstratively false and misleading to the Court. The United States Supreme Court has expressly held that the Federal Antitrust statute protects sellers as well as buyers. Specifically the Court has stated:

As we have recognized, '[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to *sellers* . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'

Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982), emphasis added, quoting, *Mandeville Island Farms, Inc. v. American Chrystal Sugar Co.*, 334 U.S. 219, 236 (1948).

In *Mandeville*, sugar beet farmers sued the sugar producers who purchased the beets for price fixing. The United States Supreme Court unequivocally held that these sugar beet *sellers* had standing. This unbroken line of cases has not been overruled or changed and remains the law of the land. See, e.g., *In Re: Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979)(cattle ranchers had standing to assert claims against beef processing companies); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000)(stating that milk producers had standing to assert antitrust claims against cheese producers).

Defendants' argument seems to have its origin in an out of context quote found in *Maranatha Temple, Inc. v. Enterprise Products Co.*, 893 S.W.2d 92, 105 (Tex.App.—Houston [1st Dist.] 1995, no pet.). In *Maranatha*, the court quotes a Ninth Circuit case for the proposition that to have standing, the Plaintiff "must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator." *Id.* (citing *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 539 (9th Cir. 1987)). But *Eagle*, in no way, stands for the proposition that a seller can never have an antitrust claim. In fact, the Ninth Circuit specifically recognized that a *direct* seller could have an antitrust

claim.

In *Eagle*, crew members of tuna fishing boats brought an antitrust claim against Star-Kist and others alleging a conspiracy to fix the price at which they would purchase raw tuna. These crew members did not themselves own the raw tuna; rather, the actual seller was the vessel owner. However, the crew members' compensation was determined by the price of the tuna sold. *Eagle* at 539. Ultimately, the Ninth Circuit determined that the crew members did not have standing. The Defendants rely heavily on a portion of the Court's opinion, which states: "In other words, the party alleging the injury must be either a consumer of the alleged violator's good or services or a competitor of the alleged violator in the restrained market." *Id.* at 540. However, the Defendants failed to note the following significant sentences:

In the present case, in order to be a participant in the relevant market, the class members must have been either buyers *or sellers* of raw tuna. Both sides agree that the class members are not buyers. The alleged malefactors (the canneries) were the buyers. Thus, in order for the alleged injury to be of the type that antitrust laws were intended to forestall, the class members must prove that they were *sellers* in the raw tuna market.

Id. at 540-41 (emphasis added). The Court ultimately concluded that crew members were not sellers, but more importantly implied that *sellers* can have standing in this type of case and, therefore, the Defendants have placed improper reliance on this case. *Id.* at 541, *see also, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

B. Plaintiffs are the Most Efficient Enforcers Available to Bring an Antitrust Claim

The first prong of the antitrust standing test is that a plaintiff must be a proper "enforcer" of the laws. *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App.- Fort Worth, 1994, writ denied). The

antitrust laws were created in order to “create a private enforcement mechanism to deter violators... and provide ample compensation to the victims of antitrust violations.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982). The Plaintiffs are the most efficient enforcers of the antitrust statute since their injury was “so integral an aspect of the conspiracy alleged that there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.” *Id.* at 479.

Who else is an enforcer? The simultaneous withdrawal from leasing and the price ceiling for bonus payments for future oil and gas leases led to a removal of competition in the marketplace and a significant drop in gas company overhead expenses that were driven up by free-market forces. This only injures the mineral rights owner. Neither competitors in the gas production business nor downstream purchasers of gas related products were injured by this antitrust violation. Courts have followed *McCready*, holding that plaintiffs have standing even when plaintiffs are neither consumers nor competitors as long as plaintiffs have suffered a direct injury. *Hairston v. Pac-10 Conference*, 893 F.Supp. 1485, 1491 (W.D. Wash. 1994)(stating that student-athletes were direct victims of sanctions placed on football program by Pac-10 Conference even though individually they were not consumers or competitors with the Pac-10 Conference).

C. An “Antitrust Injury” Exists Here

The second prong requires that an antitrust injury be an “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, (1977). Even a casual or incidental injury will qualify as an “antitrust” injury when it is “attributable to the anti-competitive

aspect of the practice under scrutiny.” *Roberts v. Whitfill*, 191 S.W.3d 348, 355 (Tex.App.- Waco 2006, no pet.). Further, it is a well-established rule that a “plaintiff does not have antitrust standing to prosecute an economic injury to himself unless that injury corresponds to an injury of the same type to the relevant market.” *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App.- Fort Worth, 1994, writ denied). Conversely, standing exists if the economic injury to the Plaintiff is substantially the same as the economic injury to the relevant market.

As will be shown below, the antitrust injury the Booths suffered when Defendants simultaneously reneged on their binding lease agreements is the same as the injury the market suffered when signing bonuses plummeted after the conduct occurred. That injury is not unique to them or anyone else in the Barnett Shale region. Defendants’ simultaneous conduct in October 2008 dramatically and immediately affected the entire natural gas lease market in Tarrant County. The evidence discussed briefly below provides ample evidence that such conduct was unlawful.

D. Other Defendants Have Challenged Plaintiffs’ Standing

Several Defendants in this case have filed separate Motions for Protective Order wherein they seek protection from written discovery requests based on the same principles discussed above in Section III (A.-C.), but two alternative and misguided arguments have also been offered.

1. Some Defendants Argue Plaintiffs Must be Competitors in Order to Achieve Antitrust Standing

As previously argued in *Plaintiffs’ Omnibus Motion*, Defendants’ reliance on this proposition through *Bailey v. Shell Western E&P, Inc.* is misplaced, at best. *See* 555 F. Supp.2d 767 (S.D. Tex 2008); (*see also* Pls’ Omnibus Mot., 15; Defs. XTO, Permian, Jones, Huxel, Van Zandt, and Kuba’s Mot. for Protective Order, 15). In *Bailey*, owners of royalty interests brought suit against

the working interest owners regarding the calculation of the royalties. *Id.* at 769-70. Plaintiffs were not attempting to sell their royalty interests; they were just complaining about the calculation of the payments. The court held that the plaintiffs lacked antitrust standing.

Further, Bailey is not a competitor of Shell. Bailey does not buy gas, *sell gas*, or otherwise participate in the carbon-dioxide market in competition with Shell. He lacks standing to bring an antitrust claim.

Id. at 779 (emphasis added). This quote from *Bailey* expressly says that a *seller* can have standing, contrary to Defendants' claims. In addition, the United States Supreme Court expressly held that antitrust statutes protect "all who are made victims of the forbidden practices." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

2. Defendants Claim "Plaintiffs Have a Lease" While Failing to Acknowledge That a Binding Lease Has Existed for the Past Seventeen (17) Months

Defendants argue that Plaintiffs "cannot have it both ways," but in reality, it is the Defendants who are trying to have it both ways. XTO's continual denial of a binding and enforceable lease has left Plaintiffs with numerous valid alternative tort claims against Defendants, including the antitrust claim. (Defs. XTO, Permian, Huxel, Van Zandt, and Kuba's Mot. for Protective Order, 15). The Texas Supreme Court has long held that "if a defendant's conduct... would give rise to liability independent of the fact that a contract exists, the plaintiff's claim may also sound in tort." *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)(discussed by, *D'Lux Movers & Storage v. Fulton*, 2007 WL 1299400 p. 3 (Tex. App.-Fort Worth, 2007, pet. denied)). Clearly the antitrust claims, along with other torts claims, are independent and outside the lease contract itself and Defendants' arguments to the contrary are misplaced.

Plaintiffs anticipate the Court easily concluding that standing exists here, allowing the Court

to focus on the numerous pending discovery requests that have gone unanswered for months. Plaintiffs will devote the next few pages to a brief recitation of some of the factual evidence that meets both parts of this threshold two-prong test. Analysis of these facts will clearly demonstrate that the Defendants should have answered the Plaintiffs' discovery requests long ago, and this Court should order the Defendants to answer such discovery without further delay.

IV. FACTUAL OVERVIEW OF ANTI-COMPETITIVE CONDUCT

As with most antitrust cases, the illegal anti-competitive conduct herein probably began with legitimate competition. The anti-competitive activity occurred simultaneously *countywide* in October 2008, but the focus in this particular case at this time is on a Southeast Arlington neighborhood group who reached a nine figure lease agreement with XTO Energy in April 2008.

In the beginning, the gas companies publicly competed against one another for leases in the Barnett Shale. Landmen went door to door seeking leases from individuals, churches, and businesses. Informed networks of homeowners soon formed, increasing competition and causing bonuses to skyrocket. As competition continued to increase and as the available unleased land decreased, bonuses reached record levels.

The Booths' neighborhood alliance reached an agreement on lease terms with XTO in April 2008. Competition at the time was so fierce that XTO asked them to delay publicly announcing the deal for a few weeks because XTO did not want "companies show[ing] up from everywhere trying to pressure the residents in the HOA [homeowner's association] into a lease." *See* Ex.1 (Young Dep. 68:12-15). XTO even warned the Booths' alliance about the "other companies" when homeowners expressed initial reservations about XTO's willingness to promptly perform its part of

the deal. *See* Ex. 3 (Young, May 14, 2008, email).

Then, in October 2008, without notice, the leading gas companies in the Barnett Shale simultaneously backed out of lease agreements with thousands of landowners countywide. Defendant Chesapeake “lead the way” by slashing their signing bonuses and announcing that Chesapeake would “not [be] willing to pay more than \$5,000 per net acre” and the rest of the industry “followed suit.” *See* Ex. 4 (CHK Conference Call, 12, Oct. 31, 2008). This simultaneous conduct resulted in the signing bonuses being “dramatically pushed down.” *Id.* The gas companies were “quite pleased” with what “[They have] been able to do in terms of driving current leasehold costs down” because lower signing bonuses mean lower lease acquisition costs. *See* Ex.5 (CHK Conference Call, 16, Dec. 8, 2008).

One does not need a degree in economics to understand that “driving down” or “pushing down” the market prices, as was done here, cannot occur without some sort of coordinated, cooperative effort. Without cooperation from all the gas companies, the competition would swoop in like XTO had warned earlier and sign the unleased landowners the minute big companies like XTO and Chesapeake exited the market. But the companies *did* cooperate, and as a result, today’s “good, competitive signing bonus” today is less than a tenth of what it was in 2008. *See* Ex. 1 (Young Dep. 233:20-23).

The brief factual overview that follows will examine the abundant factual evidence in this record indicating that these companies must have acted together, or at least acquiesced, in a scheme that caused signing bonuses to drop like a rock in a one-week period in October 2008.

A. A DEAL WAS REACHED IN A HIGHLY COMPETITIVE ATMOSPHERE

“Congratulations! XTO has been selected as the official recipient of the oil and gas leases for SEACTX.”

-Linda Razzano to Sherman Young, Division Landman, XTO Energy (Apr. 13, 2008)

The neighborhood alliance that the Booths joined was known as “SEACTX” (Southeast Arlington Communities of Texas). In an email dated April 13, 2008, SEACTX lead negotiator Linda Razzano informed XTO that SEACTX had “selected” XTO as “the official recipient of the oil and gas leases for SEACTX.” *See* Ex. 6 (Razzano, Apr. 13, 2008, email). This agreement was reached during a time when SEACTX had numerous other companies showing significant interest in leasing the SEACTX area. In fact, SEACTX negotiators referred to the fact that “other companies have already accepted our [lease] clauses” when negotiating final terms of the lease agreement with XTO in April 2008. *See* Ex. 7 (Razzano, Apr. 24, 2008, email). The fact there was significant competition for SEACTX property when the deal was made in April 2008 becomes very important as we examine what transpired after the deal was made.

B. XTO MADE BIG PROMISES IN THE BEGINNING

“XTO is committed to ... treating you and your SEACTX members in a professional and ethical manner until everyone who is interested in executing a lease with XTO has been contacted and leased.”

-Sherman Young, Division Landman, XTO Energy to Mark Middleton (May 14, 2008)

SEACTX leadership was concerned from the outset that XTO would not act quickly enough to secure leases from the thousands of interested landowners who were eligible to sign with XTO. In May 2008, in response to concerns that XTO was not moving fast enough to lease and pay the SEACTX residents, XTO assured SEACTX leadership that everyone in SEACTX who wanted to lease their minerals to XTO would eventually get the chance to do so. *See* Ex. 3 (Young, May, 14,

2008 email). The “Division Landman” for XTO assured SEACTX that XTO would do things better than the competition:

[O]ther companies may do it quicker but, I can’t tell you how many complaints we receive daily about how some of the other leasing companies are treating mineral owners . . . XTO is committed to doing this leasing project right the first time and treating you and your SEACTX members in a professional and ethical manner until everyone who is interested in executing a lease with XTO has been contacted and leased.

See Id. Despite XTO’s promise that it was “committed” to providing a lease to “everyone who is interested in executing a lease with XTO”, between 500 and 1,000 landowners were left unsigned in October 2008 when XTO decided to go along with the scheme to “drive down” or “push down” lease prices in the region.

C. COMPETITION WAS FIERCE WHEN SEACTX DEAL WAS ANNOUNCED

“[W]e don’t want other companies getting this info and jump in the areas.”

-Jack Huxel, Lease Acquisition Manager, Permian Land to Jalise Middleton (May 27, 2008)

When the XTO deal was first announced, competition for the SEACTX property was so great that Permian actually requested SEACTX not to publicly announce Permian’s exact lease signing plans because “we don’t want other companies getting this info and jump [sic] in the areas.” *See Ex. 9* (Huxel, May 27, 2008, email). Permian’s warning about competition reinforced Sherman Young’s earlier request to “hold off on making any announcement” because other “companies [would] show up from everywhere trying to pressure the residents in the HOA’s into a lease.” *See Ex. 8* (Young, Apr. 24, 2008, email).

These early references to the “other companies” in competition for the SEACTX property continually reminded SEACTX leadership that the SEACTX property was a choice block of highly

desirable property amid an ever shrinking area of available tracts. Whereas Permian was never able to feel like they were “safe from the competition,” the very presence of that “competition” from the “other companies” undoubtedly emboldened and reassured SEACTX leadership. *See* Ex. 10 (Jones Dep. 72:23-73:1). XTO, through repeated assurances to the landowners, actively encouraged SEACTX folks to stick with the pack and wait for the XTO lease to the exclusion of the competitors who were in the neighborhoods throughout this entire time. XTO never did anything to change that perception throughout the summer and early fall of 2008.

D. XTO CONTINUED TO ASSURE SEACTX THAT EVERYONE WOULD GET LEASED

“No one is being overlooked ... I can assure you that no one will go without a lease within seactx.”

-Jack Huxel, Lease Acquisition Manager, Permian Land to Michael Fields (Oct. 8, 2008)

SEACTX residents continued to receive lease offers and inquiries from XTO’s competitors throughout the summer of 2008. Residents in those areas were understandably curious about whether they should go with those eager, persistent suitors or wait for XTO. In response, Permian’s Lease Acquisition Manager, Jack Huxel, repeatedly reassured the SEACTX leadership that, “no one will be left out.” *See* Ex. 11 (Huxel, Jun. 12, 2008, email). This first assurance was made in June 2008, shortly after Sherman Young said it in May 2008 [“XTO is committed ... until everyone who is interested in executing a lease with XTO has been contacted and leased”]; *see* Ex. 3 (Young, May 14, 2008, email)] and similar assurances were made right up until October 8, 2008. On October 4, 2008, Huxel told SEACTX leadership that “We will be here for at least six more months picking up stragglers.” *See* Ex. 12 (Huxel, Oct. 14, 2008, email). Huxel again assured SEACTX leadership on October 8, 2008 that “No one is being overlooked...I can assure you that no one will go without a

lease in seactx.” See Ex 13 (Huxel, Oct. 8, 2008, email). These oft-repeated statements had the effect of reassuring the unsigned SEACTX residents that XTO would take care of them even though the SEACTX deal had been reached almost six months earlier. These statements all were proven false when XTO backed out and left more than 500 SEACTX residents unsigned.

E. RECORD SIGNING BONUSES COMMONPLACE DURING SUMMER OF 2008

“Lease it all. It was a lease frenzy...there were a lot of people to lease, and we’re in competition...”

-Fred W. Jones, President, Permian Land

Fred Jones, President of Defendant Permian Land, described the situation in 2008 as a “lease frenzy.” See Ex. 10 (Jones Dep. 52:2-8). He agreed that the “signing bonuses being paid to SEACTX people were just way, way, way out of proportion” and were “more than ten times what [he had] ever seen before.” See Ex.10 (Jones Dep. 125:14-22). Similarly, Sherman Young, “Division Landman” with XTO, who had more than fifteen years mineral lease experience, testified that this was by far the largest signing bonus that he had ever agreed to pay. See Ex.1 (Young Dep. 82:4-9). The signing bonus alone for SEACTX was over one hundred million dollars. See Ex.1 (Young Dep. 81:8-11). Young and other witnesses deposed readily agreed that competition among the gas companies was what drove the signing bonuses to record levels in 2008.

Q: What do you mean by ‘it was remarkable’?

A: These were prices I hadn’t seen previously, at least not prices paid.

Q: What made – what made this happen?

A: Competition.

Q: You mean competition among the gas companies for Barnett Shale leasing?
Is that what you’re talking about?

A: Yes.

See Ex.1 (Young Dep. 222:19-223:2). Fierce competition and escalating bonus prices made the

SEACTX project an “expensive ordeal [and] an expensive play that [XTO] chose to get into.” *See* Ex.10 (Jones Dep. 125:5-13). It was also an expensive play that XTO wrongly chose to get out of, thereby leaving hundreds of people unsigned, despite constant assurances they would never do that to the trusting landowners.

F. COMPANIES SIMULTANEOUSLY WITHDREW AGREEMENTS COUNTYWIDE

“XTO, Chesapeake, others rescind high-bonus gas-drilling offers”
-Fort Worth Star-Telegram (October 17, 2008)

One striking aspect of the undisputed facts in this case is the fact that the companies all acted in concert in the course of less than a week in October 2008. For example, XTO notified SEACTX that they were “suspending” lease signing operations on October 15, 2008. *See* Ex.14 (Huxel, Oct. 15, 2008, email). On October 14, 2008, Vantage Energy informed the homeowners’ coalition known as the Southwest Fort Worth Alliance (SFWA) that “it is no longer possible to lease acreage on a broad scale in the SFWA area at the current terms being offered.” *See* Ex.15 (Pierce Aff. ¶ 8). Another competitor in the region, Titan Operating, LLC, announced that it was withdrawing from the agreement reached with BC-MRC (Bedford Colleyville Mineral Rights Coalition) on October 22, 2008. The Fort Worth Star-Telegram reported on October 17, 2008 that representatives of two gas companies told multiple people that the “new rate” and “new top” on signing bonuses would now be \$5,000. *See* Ex. 16 (Fort Worth Star-Telegram, Oct. 17, 2008).

The mere fact the companies all acted at the same time *suggests* that there was some planning involved. However, there are additional facts that *prove* this county-wide concerted conduct was planned in advance. For example, Fred Jones testified that “we had a couple of days [to prepare],”

but he couldn't explain what preparation occurred or why it was needed. *See* Ex. 10 (Jones Dep. 203:11-12). Sherman Young, XTO's land man in charge of the SEACTX job, testified that he didn't know about the decision to withdraw from the SEACTX deal until October 15, 2008. *See* Ex. 1 Young Dep 152:20-25). That was the same day SEACTX leadership was informed of XTO's decision, contradicting Mr. Jones' testimony that Permian had a "couple of days" to prepare for this event. Young also had no explanation for how Permian's Independent Petroleum Landman Robin Bayci predicted this dramatic price drop before it was announced publicly, but on October 14, 2008, Ms. Bayci sent a letter dated "October, 2008" to at least two SEACTX homeowners, informing them that "the price per acre that we are now offering will be dropping soon" and she reminded them that, "as I said the price will be dropping." *See* Ex. 17 (Bayci, Oct. 2008, letter). These facts prove that Robin Bayci, a landman several layers of responsibility under Sherman Young, knew about the lease prices "dropping soon" several days before Mr. Young admits knowing it.

G. COMPANIES DID THIS INTENDING TO AFFECT THE MARKET

"We are completely capable of driving down a lease price."

-Aubrey McClendon, CEO, Chesapeake Energy

Chesapeake CEO Aubrey McClendon has repeatedly boasted about Chesapeake's power in the market place by stating he is "completely capable of driving down a lease price." *See* 18 (CHK Conference Call, 17, Oct. 15, 2008). He has made no secret of the fact that Chesapeake lead the way when it decided to change the market price for lease bonuses in the fall of 2008.

[I]n the Barnett, we led the way by saying that . . . It no longer made sense to pay \$15,000, \$20,000, \$25,000 an acre, and we're on public record in Ft. Worth as not being willing to pay more than \$5,000 per net acre . . . and I think that the rest of the industry has followed suit.

See Ex. 4 (CHK Conference Call, 12, Oct. 31, 2008). Chesapeake's McClendon predicted on October 15, 2008 that future lease prices "may be half to a quarter where they are today [10/15/2008]. That is our goal going forward. I think we can do it." See Ex. 18, (CHK Conference Call, 14, Oct. 15, 2008). This confident prediction on October 15th about the bonus prices dropping by a "half to a quarter" was made to Chesapeake investors even *before* XTO had notified SEACTX of its decision to withdraw from the SEACTX deal. It is difficult to imagine one competitor making such an incredible prediction about a volatile market without having some assurance that Chesapeake's competitors would go along with the scheme.

H. SIGNING BONUSES DROP OR EVEN DISAPPEAR OVERNIGHT

"[W]ow – down to \$2,000/acre – it has really become a free for all..."

-John Wehrle, President, Vantage Energy to Tolli Thomas (Oct. 24, 2008)

As a result of orchestrated efforts to suspend or end leasing programs, signing bonus amounts quickly plummeted. In response to the success of the scheme to obliterate the Tarrant County gas lease market, Vantage's President, John D. Wehrle, less than two weeks after the gas companies terminated the signing programs, stated: "Wow, \$2,000 an acre. This has become a real free for all." See Ex. 19 (Wehrle, Oct. 21, 2008, email). Even today, after more than a year, the "free for all" continues with a bonus of merely \$2,500 per acre considered a "pretty good, competitive number" for "the same property that was \$26,500 fifteen months earlier." See Ex. 1 (Young Dep. 233: 20-23).

Chesapeake's McClendon observed in the company's third quarter 2008 earnings conference call that Chesapeake was "on public record in Ft. Worth as not being willing to pay more than \$5,000 per net acre" and that "the rest of the industry [had] followed suit." See Ex. 4 (CHK Conference Call, 12, Oct. 31, 2008). McClendon went on to note that it was an "absolute truth that . . . leasehold

costs, acquisition costs [were] dramatically pushed down in the Barnett.” *See Id.* This dramatic push led to signing bonuses in the SEACTX area disappearing altogether, as XTO initially advised Permian to “sign leases in the area but not to offer a signing bonus.” *See Ex.2* (Van Zandt Dep.137:20-23). Currently, lease bonuses for the SEACTX area amount to less than ten percent of the 2008 amounts as “areas that [Permian] is trying to lease in now, [they are] giving people \$2,500 bonuses.” *See Ex.10* (Jones Dep. 233:1-3).

I. COMPETITION AFFECTED SIGNING BONUS SIZE

“Sign on bonuses are raised when competition comes in and jeopardizes the unit...”

- Carra Allen, Landman, Wyldfire Energy to SEACTX resident (Apr. 11, 2008)

There is no mystery about what caused the signing bonuses to skyrocket in 2008. Carra Allen, Landman for Wyldfire, succinctly explained the phenomenon when she said, “sign on bonuses are raised when competition comes in and jeopardizes the unit.” *See Ex. 20* (Allen, Apr. 11, 2008, email). Numerous other witnesses agreed with that assessment. Jay Van Zandt, landman for Permian, stated that escalating bonus prices in 2008 were the result of “the all-time-record natural gas prices, along with multiple, multiple, multiple competitions in all areas.” *See Ex. 2* (Van Zandt Dep. 266:21-23). And Sherman Young had no doubt that competition caused bonus prices to escalate in 2008, “Competition definitely influenced the lease-bonus price.” *See Ex. 1* (Young Dep. 235:25-236:3).

J. EVIDENCE OF NON-COMPETITIVE CONDUCT AND AGREEMENTS ALREADY EXISTS IN THIS RECORD

It probably is not necessary to present actual evidence of anti-competitive conduct or anti-competitive agreements among the Defendants at this early stage of the case, but abundant evidence

of both types of illegal conduct exists already, and that evidence will be summarized briefly here. The evidence summarized below will show that these companies work together for their common economic interest far more than they actually “compete” with one another.

1. “Designated Non-Compete Areas”

One of the clearest examples of anti-competitive, concerted conduct comes from the following public comment about Defendant Dale Property Resources in the “People In The News” section of the January 22 to 28, 2008 edition of an industry magazine entitled the *Powell Barnett Shale Newsletter* (and a similar statement is on its website even today):

The fulltime operations expertise of Schein, Taliferro and their geological team is projected to source E&P opportunities for Dale Resources in the Barnett Shale, ***outside designated non-compete areas***, and other shale plays throughout the country.

See Ex. 21 (<http://www.dale-energy.com/daleinthenews.html>)(emphasis added).

In the spring of 2008, several Four Sevens employees were overheard when they used the term “leasing halo” when referring to areas that had been established for leasing on behalf of Chesapeake. One homeowner was told that “Chesapeake had set up these ‘halos’ between the companies and Dale and Four Sevens were no longer allowed to compete for leases within each others’ halos.” See Ex. 15 (Pierce Aff. ¶ 7). In fact, Defendant Four Sevens even showed one witness a map that had these non-compete “halos” designated in various colors. See *Id.* An XTO employee involved in lease negotiations, Mr. Win Ryan, has even used the Chesapeake/XTO geographic non-compete agreements as a bargaining chip against other energy companies by arguing that such companies might not be able to “develop the minerals under some parts of [the] land in light of the Chesapeake/XTO agreement.” See Ex. 22 (Thomas Aff, ¶ 11). Even XTO’s Division

Landman acknowledged the presence of “non-compete” agreements in Barnett Shale operations. *See* Ex. 1 (Young Dep. 45:12-46:1). Perhaps there is a legitimate explanation for these types of agreements, but on their face they certainly present some evidence of seemingly improper arrangements for “designated non-compete areas”.

2. *Monopolistic Behavior*

Chesapeake Energy Chairman and CEO Aubrey McClendon, stated in the company’s fourth quarter 2009 earnings conference call, “I see a steadily widening gap between the Big 4 shale ‘haves’ ... and the Big 4 shale ‘have nots’.” *See* Ex. 28 (CHK Conference Call, 3, Feb. 18, 2009). He goes on to say, “[t]he differences can be discerned by close observers of the industry, however, in years ahead, the differences between the ‘haves’ and the ‘have nots’ will be there for all to see plain as day.” *See Id.* It may now be that time. In a recent article in the Fort Worth Star-Telegram one Dallas money manager was quoted as saying, “This demonstrates the *first-mover* advantage. Chesapeake locked up the land and created a barrier to entry for the other players. *If they wanted in, they had to pay the asking price.*” *See* Ex. 29 (Fort Worth Star-Telegram, January 8, 2010) (emphasis added). The exact contours of this arrangement and how the “other players” paid Chesapeake’s “asking price” will need to be explored in future discovery proceedings, but one of the largest companies demanding an “asking price” from the “other players” certainly smacks of monopolies, price-fixing, and allocated markets, just like the other evidence has suggested so far.

3. *“Friendly” Competition*

Other comments attributable to at least one Defendant include the statement in front of a group of homeowners that “XTO and Chesapeake weren’t nearly as competitive with each other as

was widely believed, that theirs was a ‘friendly competition’” and that employees of some of the companies “spoke with each other about Barnett Shale issues on a daily basis.” *See* Ex. 22 (Thomas Aff. ¶ 6). One of the XTO representatives at a homeowner’s meeting in July 2008 was Mr. Win Ryan, who was heard saying that he had spoken with a Chesapeake employee involved in lease acquisition activities about ongoing negotiations with the homeowners’ group as early as the previous day, and it was believed he only was half-joking when he said he would “compare notes” with that person after the homeowners’ association meeting was concluded.. *See* Ex. 22 (Thomas Aff. ¶ 6). That same XTO employee was also heard complaining about the fact Vantage Energy, a relative newcomer to the Barnett Shale, was “interfering with Chesapeake and XTO plans.” *See* Ex. 15 (Pierce Aff. ¶ 6).

4. An Immediate “New Rate” of \$5,000 Per Acre Maximum

Another notable set of facts that, at least, raise suspicion is the way the signing bonus went from various amounts ranging from \$20,000 to \$27,500 per acre one day to a “rate” or “figure” or “new top” of exactly \$5,000 virtually overnight. For example, on Friday, October 17, 2008, in an article entitled “*XTO, Chesapeake, others rescind high-bonus gas-drilling offers*” the Fort Worth Star-Telegram reported that XTO and Chesapeake simultaneously announced they were terminating lease signing programs. Significantly, numerous representatives from XTO and Chesapeake simultaneously told five separate homeowners’ alliances that the “new bonus figure”, or what they called “today’s rate”, would be capped at *exactly* \$5,000. The Star-Telegram even quoted a Chesapeake executive who predicted that the “new top” for signing bonuses would be \$5,000:

Julie Wilson, Chesapeake's top executive in the Barnett Shale, said Thursday that the company is 'still very much active but at lower rates and in selected areas. . . . I suspect \$5,000 is going to be the new top, not the new bottom,' Wilson said.

See Ex. 16 (Oct. 17, 2008, Fort Worth Star-Telegram). Numerous other people were quoted in this article saying the gas companies told them the same thing about the "new rate."

Word spread fast about this "new rate". At least one unhappy homeowner contacted Four Sevens Energy Company, an agent for Chesapeake, who told that resident on or before October 16, 2008 (the day *before* the Star-Telegram article just quoted) that "they are waiting until the dust settles and planning to come back into our neighborhood and offer leases at a signing bonus of five thousand dollars (\$5,000)." *See* Ex. 23, (Razzano Aff. ¶ 14). Even today, the highest that is being offered as a signing bonus in the Barnett Shale is below \$5,000.

5. "Saying No" To SEACTX Property

There are several additional examples of significant anti-competitive conduct on XTO's part that still remain a mystery even after five depositions have been completed. For example, at least two of Permian's land men, despite allegedly doing their level best to lease as much of SEACTX as possible, actually told SEACTX residents they should lease with XTO's competitors. *See* Ex. 24 (Huxel, Jun. 5, 2008, email). Another Permian land man, Dylan C. Allen, told a different SEACTX resident in a different neighborhood that it would be better if that person leased with a competitor of XTO's. *See* Ex. 25 (Wood, Jun. 25, 2008, email). This conduct was completely inconsistent with the "marching orders" allegedly given to Permian. XTO's Division Landman, Sherman Young, candidly admitted he could not think of any "situation where it would be consistent with Permian's marching orders to go tell people to lease with Chesapeake if they're in SEACTX." *See* Ex. 1 (Young Dep. 204:25-205:7). XTO agents telling SEACTX residents to lease with a company other

than XTO is “just never going to be consistent with what XTO wants.” *See* Ex. 1 (Young Dep. 205:5-7).

Not only did XTO’s agents in the field actively direct SEACTX business away from XTO, but XTO itself also rejected some SEACTX residents by returning their W-9 forms along with a memorandum explaining that XTO simply wasn’t interested in their SEACTX property. *See* Ex. 26, (XTO, Sept. 2, 2008, Memorandum). Permian sent a similar letter to at least one other resident in SEACTX. *See* Ex. 27, (Tran, Sept. 27, 2008, email). Sherman Young, XTO’s Division Landman, simply had no explanation for why XTO and its agents were turning their backs on people that XTO had fought so hard to include in the record-setting SEACTX deal just weeks earlier. Young testified that such conduct simply “doesn’t make sense” because “in September of ’08, XTO was still trying as hard as it could to get all of SEACTX leased.” *See* Ex. 1 (Young Dep. 267:13-25).

Repeated conduct that is inherently inconsistent with a company’s financial self-interest should raise suspicion when revealed in the context of an antitrust case, especially in light of all the other examples of anti-competitive conduct and anti-competitive agreements referred to herein. The totality of the evidence described above clearly suggests that the leading Barnett Shale gas companies must have acted together when they simultaneously backed out of their deals countywide. The fact that signing bonuses are still a fraction of last year’s prices, despite “values remain[ing] very attractive” in between. *See* Ex. 4 (CHK Conference Call, 12, Oct. 31, 2008). This also strongly suggests that something decidedly unnatural is occurring in the Barnett Shale natural gas market today.

Chesapeake’s own McClendon has clearly stated that this unnatural market force consists of something the companies have done to the market as opposed to something the market has done to

them. Mr. McClendon made it clear that some *active force* had driven down gas lease prices for the gas companies in the Barnett Shale, but he also suggested that the prices were lower as a result of the gas companies' *conduct* and not some natural market force like, for example, reduced gas prices. McClendon said: "I really don't want to reveal from a competitive perspective what we've been able to do in terms of driving current leasehold costs down, but they're down substantially, and we're quite pleased with that." *See* Ex. 5 (CHK Conference Call, 16, Dec. 8, 2008). Of course, the gas companies have not yet openly admitted that they made an illegal, collusive deal to drive down lease prices in the Barnett Shale in the fall of 2008. Some of the above statements certainly *suggest* very strongly that there were some very suspicious transactions and other dubious activity occurring, but clear, undeniable evidence of an actual horizontal price-fixing agreement has not been uncovered yet.

It is impossible to know how much the companies actually worked together or when they began this dubious anti-competitive practice. Only the production of documents responsive to Plaintiffs' discovery requests will reveal the extent of this cooperative conduct. However, we have evidence that at least three of the Defendants were communicating with each other about Barnett Shale matters at least three years ago. Exhibit 30 is a copy of a January 25, 2007 email from a representative of Defendant Four Sevens to high level employees of XTO, Chesapeake, and others. *See* Ex. 30 (Four Sevens, Jan. 25, 2007, email). The email refers to Texas House Bill 689, which was a House Bill intended to provide enhanced state regulation of land men in the Barnett Shale. *Id.* Two of the people receiving that email are Cliff Merritt from Chesapeake and XTO's Win Ryan. *Id.* Both of those individuals are referred to in the Affidavits of Tólli Thomas (*see* Ex. 22) and Chad Pierce (*see* Ex.15). Mr. Merritt and Win Ryan both made comments during the fall of 2008

indicating that XTO and Chesapeake were working together on numerous lease issues, including “comparing notes” (*see* Thomas Aff. ¶ 6) with each other, geographically dividing areas so XTO and Chesapeake “would not be competing” in such areas (*see* Thomas Aff. ¶ 8), and references to “understandings” between XTO and Chesapeake that were being interfered with when Vantage came in and started making lease offers that still further drove up lease signing bonuses. The attached January 25, 2007 email provides some additional evidence that some of these Defendants have been working together behind the scenes long before they allegedly started “competing” with one another for gas leases in 2008. *See* Ex. 30 (Four Sevens, Jan. 25, 2007, email).

V. CONCLUSION

The foregoing has shown that the Defendants are just plain wrong when they argue that the antitrust claims should be dismissed for lack of standing. The Plaintiffs unquestionably have standing to pursue these claims and any suggestion otherwise must be rejected. Having proven they have standing, Plaintiffs are clearly entitled to discovery pertaining to the antitrust claims.

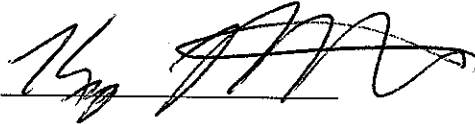
Maybe Chesapeake and the “other players” can somehow explain away all the evidence discussed above, and maybe all the Defendants can eventually convince the Court that the Plaintiffs are on an antitrust witch hunt or fishing expedition. But the foregoing analysis clearly shows that Plaintiffs at least deserve the chance to try to prove this case. Defendants have hidden behind their dilatory pleas long enough. Their effort to use the antitrust claims as a vehicle to avoid answering discovery has completely failed. Justice demands discovery in this case now. Denying the Plaintiffs the chance to obtain any discovery concerning these important issues would reward the Defendants

for their anti-competitive conduct and create a grave injustice which would undoubtedly constitute reversible error.

Defendants' Motions, and each and every one of them, must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing instrument was served on all counsel for Defendants via certified mail, return receipt requested, on this the 21st day of January, 2010.

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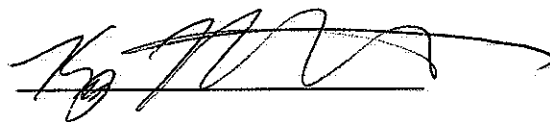
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