

specifically below. This *Omnibus* Motion is filed, complaining of the discovery responses of virtually all Defendants, because their discovery responses all provide nothing but a litany of wholly unsupported legal arguments based on cases that actually support the Plaintiffs' claims and directly refute the Defendants' arguments. This *Omnibus* Motion will allow the Court to efficiently consider all the arguments and rule on the various Motions at one time rather than having to consider a series of Motions and make repeated rulings on essentially the exact same discovery requests and responses. Plaintiffs wish to expedite the discovery process and have filed this *Omnibus* Motion for that reason, and we respectfully show the Court as follows:

**I.
Procedural Background**

This case was filed to recover damages Plaintiffs sustained as a result of certain conduct of Defendants that is summarized below in Section II and discussed in detail in Section III below. Plaintiffs have alleged causes of action for breach of contract, fraud, real estate fraud, violation of the Texas Antitrust Act, and for civil conspiracy. Discovery in this case is governed by a Level 2 Discovery Control Plan.

As of the date of this Motion, the following is a comprehensive list of discovery-related responses from all Defendants in this case:

A. Defendants Who Have Responded to Discovery Requests:

1. Chesapeake Exploration- *Motion for Protective Order- Subject to Motion to Transfer Venue*
2. Carrizo Oil & Gas- *Motion for Protective Order and Objections to First Set of Interrogatories and First Request for Production*
3. Dale Property Services- *Motion for Protective Order and Objections to Plaintiff's First Request for Production and Objections to Plaintiff's First Set of Interrogatories*
4. The Caffey Group- *Motion for Protective Order and Supplemental Motion for Protective Order*

5. Titan Operating- *Motion for Protective Order and Supplemental Motion for Protective Order*
6. Vantage Energy- *Motion for Protective Order and Supplemental Motion for Protective Order*
7. XTO Energy- *Motion for Protective Order*
8. Permian Land- *Motion for Protective Order*
9. Fred Jones- *Motion for Protective Order*
10. Jack Huxel- *Motion for Protective Order*
11. Jay Van Zandt- *Motion for Protective Order*
12. Bryson Kuba- *Motion for Protective Order*
13. Cheaha- *Objections and Responses to Plaintiff's First Requests for Production*
14. Quicksilver Resources- *Objections to First Set of Interrogatories and Objections to First Request for Production*

B. Defendants Who Have Not Yet Responded, But Have Received an Extension

1. Trinity- Rule 11 extension until October 14, 2009. (Failed to respond)
2. Llano- Rule 11 extension until November 2, 2009.
3. Four Sevens Energy- Rule 11 extension until November 12, 2009.

C. Defendants Who Have Yet to be Served or Have Been Dismissed

1. Keystone Exploration- process service pending.
2. Red Oak Energy Partners- dismissed and Defendant has filed an unopposed request to be severed from case.
3. Chief Oil & Gas- dismissed from case.

Not one of the Defendants has provided any meaningful discovery responses.

II.

Background / Facts

On August 6, 2009, Plaintiffs served Defendants with Written Interrogatories and a Request For Production of Documents in accordance with the Texas Rules of Civil Procedure. Rather than serving discovery responses and only objecting to particular items where appropriate, multiple Defendants have simply refused to answer *any* Interrogatories, and none of the Defendants have produced even a single document in response to *any* of Plaintiffs' Requests For Production. It would be difficult to rule on these matters without some understanding of the

factual background giving rise to the conspiracy and antitrust allegations, and those will be briefly summarized here and analyzed in more detail below in Section III.

The Plaintiffs live in southeast Arlington, Texas. In early 2008, Defendant XTO Energy (“XTO”) actively sought to acquire mineral leases from Arlington homeowners such as the Booths. XTO entered into a lease agreement with a coalition of homeowners’ associations, neighborhoods, churches and businesses known as “SEACTX” (standing for Southeast Arlington Communities of Texas) in April 2008. As part of the “signing phase” of their agreement, XTO sent a confirming post card to the Booths stating, “Thank you for being a part of SEACTX and leasing your minerals to XTO Energy, Inc. . . We will be hosting signing parties several times a week for the next few weeks until all the tracts are signed. . . Thanks again for your patience and we look forward to meeting you at your signing party.” (*See Exhibit A*). XTO also sent the Booths a separate post card confirming specific terms from the agreement with SEACTX, including “\$26,517 lease bonus per net mineral acre” and “26.5% royalties upon production” as well as a “renewal” of \$26,517. (*See Exhibit B*). Then without warning, XTO withdrew its agreement to lease from the Booths and others in SEACTX in October of 2008, and the Booths have never been paid as promised.

Plaintiffs accuse XTO and the other Defendants of conspiring to eliminate natural gas lease marketplace competition in the Barnett Shale in Tarrant County, Texas. Plaintiffs recognize that we do not have a duty to reveal all evidence now, and could probably make technical legal arguments about how our pleadings, themselves, are sufficient to compel better discovery responses. However, it is more expedient to instead reveal evidence of the Defendants’ collusive and illegal behavior so as to remove any doubt about how the Court

should rule on this Motion. A brief summary of the facts relevant to the antitrust and conspiracy allegations will be provided here.

Defendants were actively and aggressively engaged in securing natural gas leases from Tarrant County landowners from the beginning of 2008 until October 2008. Defendants then abruptly and simultaneously abandoned new efforts and withdrew from pending written lease agreements they had with thousands of landowners like the Booths telling neighborhood organizations like SEACTX that all lease signing programs in Tarrant County were terminated. All Defendants herein engaged in essentially the same type of activity at the same time, thereby leaving thousands of Tarrant County landowners empty-handed despite Defendants' promises and written agreements.

The anti-competitive nature of Defendants' conduct is evident in part from the fact that numerous gas companies have returned to the same neighborhoods and are operating under what appears to be a single, predetermined, unified business plan. Conspicuously, none of the Defendants are negotiating with landowners' coalitions anymore; all were eagerly working with them prior to October 2008. None are offering signing bonuses in excess of \$5,000 per acre even though most had been offering them in excess of **\$25,000** per acre before October 2008. The difference in savings to XTO and increased costs for the Booths' coalition of southeast Arlington homeowners is more than **eighty million dollars (\$80 million)**, and theirs is only one of several such coalitions in Tarrant County. No one can dispute the fact that very substantial savings for the Defendants were realized countywide from the conduct that is described here. The question is not *whether* these things happened; the Defendants' past and present actions

speak for themselves. The only question is whether the conduct is illegal and whether the Plaintiffs are entitled to the requested discovery relevant to these allegations.

The Chairman and CEO of Defendant Chesapeake Exploration has proudly bragged to Chesapeake's shareholders and Wall Street analysts about how Defendant's conduct in Tarrant County last October, including imposition of a \$5,000 cap on signing bonuses, has substantially driven down the cost of acquiring leases. (See *Exhibit C, Transcript of October 31, 2008 "CHK Q3 2008 Chesapeake Energy Corporation Earnings Conference Call,"* page 12, discussed in *Section III.A.3* and *Section III.A.4* below). Another Defendant, Dale Property Resources, was publicly noted to be working in "designated non-compete areas" that exist in the Barnett Shale. (See *Exhibit E - "January 22-28 2008 Powell Barnett Shale Newsletter,"* page 2, discussed in *Section III.A.1* below).

In addition, an XTO employee involved in lease negotiations with Tarrant County homeowners told two witnesses that XTO and Chesapeake had an agreement "worked out already" whereby "Chesapeake wasn't going to come into XTO's areas and compete with them and that XTO wasn't going to come into Chesapeake's areas and compete with them." (See *Exhibit H, Tulli Thomas Affidavit, paragraph 11, page 4*). This type of cap and corner on market competition is precisely the conduct antitrust laws were intended to prevent. This would not occur in an environment where significant marketplace competition exists, because in a truly competitive environment, other gas companies would offer progressively higher bonuses than the competition *as they all did just over a year ago*.

Plaintiffs have sought carefully tailored discovery (See *Exhibits F1 and F2, Requests For Production and Written Interrogatories*) related to the very narrow allegations identified above.

In response, Defendants have complained that Plaintiffs' are asking for "everything related to the Barnett Shale." Defendant XTO's Answers and Objections to Written Interrogatories and Requests For Production of Documents represents the largest set of discovery requests, more than were served on any other Defendant, so these will be used as a representational sample rather than burdening this Court with copies of *all* Discovery Requests served on *all* Defendants. (See Exhibits F1 and F2, Plaintiffs' First Set Of Interrogatories To Defendant XTO; Plaintiffs' First Request For Production Of Document To Defendant XTO). Analyzing the Discovery Requests along with the brief factual recitation contained in Section III below can lead only to the conclusion that Plaintiffs have standing to sue under the conspiracy and antitrust allegations and are unquestionably entitled to the requested discovery.

III. Plaintiffs Have Standing to Sue for an Antitrust Cause of Action

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. 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.* "Antitrust laws are designed to increase competition – 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). Antitrust standing is the initial inquiry in an antitrust case and it is a question of law. *Maranatha Temple, Inc. v. Enterprise Products Co.*, 893 S.W.2d 92, 105 (Tex.App.-Houston [1st Dist.] 1994, writ denied).

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.

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 *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)(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 value of the tuna sold. *Id.* at 539. The Ninth Circuit found they did not have standing. In reaching that conclusion, the court made the statement the Defendants rely upon in this case: "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. But, the Defendants failed to note the next 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 then concluded that they were not sellers; the vessel owners were the sellers. *Id.* at 541. Nevertheless, the quote above shows that the case the Defendants rely on states in so many words that a *seller* can have standing in this type of case.

Nor is Defendants' reliance on *Bailey v. Shell Western E.& P., Inc.*, 555 F.Supp.2d 767 (S.D.Tex. 2008) persuasive. In *Bailey*, owners of royalty interests brought suit against the working interest owners regarding the calculation of the royalties. *Id.* at 769-70. The 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 776 (emphasis added). This quote from *Bailey v. Shell* also says in so many words that a *seller* can have standing in a case like this.

The Booths are clearly sellers of an interest in real estate, but they are also buyers of XTO's drilling, exploration, and marketing expertise and services in countless ways. XTO is clearly a buyer as well as a provider of services. To the extent XTO conspired with others to illegally decrease the amount it pays and the Booths receive, the Booths have antitrust standing. Nevertheless, a more detailed review of the facts of this case and the applicable law will be undertaken in order to more conclusively show that antitrust standing exists in this case.

A two pronged test is used in Texas to examine whether a plaintiff has antitrust standing. *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex.App.- Fort Worth 1994, writ denied). First, the court should determine whether the plaintiff suffered an antitrust injury. Second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires analysis of the directness or remoteness of plaintiff's injury. *Id.* These factors will be considered separately below.

A. An "Antitrust Injury" Exists Here

The first 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). As will be shown below, the antitrust injury the Booths suffered when Defendants simultaneously reneged on their binding lease agreements with thousands of landowners countywide 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 market for natural gas leases in Tarrant County, and the quotations below *from the Defendants themselves* provide ample evidence that such conduct was probably unlawful. Therefore, at the expense of lengthening this Motion, Plaintiffs will devote the next few pages to a brief recitation of just some of the factual evidence that will clearly show that we can easily meet both prongs of this threshold two prong test.

1. “Designated Non-Compete Areas.”

One of the clearest examples of anti-competitive, concerted conduct comes from Defendant Dale Property Resources, one of the Dallas Defendants that some have suggested was joined in this case solely to create venue in Dallas. The following public statement was made about Dale 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*:

“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-competite areas*, and other shale plays throughout the

country.”

(*See Exhibit E*)(*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 Exhibit G, Chad Pierce Affidavit, paragraph 7, page 2*). 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 Exhibit H, Tolli Thomas Affidavit, paragraph 11, page 4*). Perhaps there is a legitimate explanation for these types of agreements, but on their face they certainly present some evidence of a seemingly improper arrangement for “designated non-compete areas.”

2. “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 Exhibit H, Tolli Thomas Affidavit, paragraph 6, page 2*). 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 day previous, 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 *Exhibit H, Tolli Thomas Affidavit, paragraph 6, page 3*). 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 *Exhibit G, Chad Pierce Affidavit, paragraph 6, page 2*).

3. An Immediate "New Rate" of \$5,000 Per Acre.

The "signing bonus" is the most visible portion of the lease agreement for the average homeowner, because that is the "up front" cash portion of the deal, and it is the only guaranteed portion of the entire deal. It is also the part of the lease package where the gas companies could save millions of dollars if the signing bonus amounts could be controlled. A notable set of facts that should 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 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 ceiling 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 *Exhibit J, Friday, October 7, 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.” This article is can also be found at <http://www.star-telegram.com/804/v-print/story/980594.html>.

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 *Exhibit I, Razzano Affidavit, paragraph 14, page 4*).

Months later, Chesapeake’s CEO and Chairman, Aubrey McClendon, bragged to a group of Wall Street analysts that his company had successfully lead the effort to “dramatically push[. . .] down” lease acquisition costs in part by announcing a countywide \$5,000 cap on signing bonuses in the Barnett Shale. (See *Exhibit C, Transcript of Chesapeake “Earnings Conference Call,” page 12*). Chesapeake, Four Sevens, XTO, and probably many other gas companies thereby simultaneously created exactly the type of “allocated market” that the Antitrust laws were intended to try to punish and prevent. See *Bailey v. Shell*, 555 F.Supp.2d 767, 776 (S.D. Tex., 2008).

4. Today’s Lease Prices Are A Tiny Fraction of Last Year’s Prices.

No one can dispute the fact that the current market for gas leases in the Barnett Shale is dramatically different from what it was last year. Some may dispute *why* that is, but no one can

dispute that it is totally different now. Even the Chairman and CEO of Chesapeake, Mr. Aubrey McClendon, has been heard publicly telling a group of investors and Wall Street analysts that lease prices are down “substantially” from where they were before the companies’ simultaneous actions in October 2008:

... we have seen a dramatic reduction in leasehold values in the Haynesville and in the Barnett, I guess I shouldn’t use the word values, I should say costs because the values remain very attractive to us, but in the Barnett, we, I think, led the way by saying that in this gas price environment, it no longer made sense to pay \$15,000, \$20,000, \$25,000 an acre, and we’re on public record in Fort Worth as not being willing to pay more than \$5,000 per net acre there, and I think the rest of the industry has followed suit. And while we’re still all acting independently and competitively of each other, it is an absolute truth that leasehold values have been dramatically pushed down – not values, sorry, leasehold costs, acquisition costs have been dramatically pushed down in the Barnett.

(See Exhibit C, Transcript of Chesapeake “Earnings Conference Call,” page 12). Mr. McClendon made it clear in a subsequent conference call 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 Exhibit D, December 8, 2008, “CHK – Chesapeake Energy Corporation Conference Call” page 16).

It is also undisputed that lease signing bonuses in southeast Arlington (where the Booths live) are *currently* only a fraction of what they were before the companies simultaneously reneged on their lease signing agreements, but the *Affidavit of James Townsend*,(see Exhibit K),

is provided in order to establish that obvious fact for the record. This Affidavit establishes that Defendants XTO and Permian are back in the Arlington neighborhoods right now (i.e., October 9, 2009), boldly offering people *no signing bonuses at all* for a lease on the exact same land where a \$26,517 per acre signing bonus was offered as part of the “signing phase” of the XTO deal in October of 2008. (*See Exhibit K, Affidavit of James Townsend, paragraph 4*).

Other parts of Tarrant County have seen similar bold tactics from the gas companies now that the competition problem is solved. For example, one witness, Chad Pierce, noted how the current lease being offered in his community in Fort Worth included a signing bonus of ten percent of what was agreed to last year along with terms inferior to what had been agreed to the previous year. (*See Exhibit G, Chad Pierce Affidavit, paragraph 9, page 2*). When Pierce questioned Vantage executives John Wehrle and Roger Biemans about these new lease terms, he was told that the “lease was in line with what was now being offered by everyone else in the area” and that they were “going to offer this lease and were not going to get into a competition for leases.” They also stated “they did not see a need to or wish to negotiate with the larger alliance of homeowners (SFWA) anymore.” (*See Id.*).

As Chesapeake’s McClendon said, “the industry has followed suit” and no one seems to be offering signing bonuses in excess of what was announced last October. (*See Exhibit C, Transcript of Chesapeake “Earnings Conference Call,” page 12*). These facts prove that the landowners have suffered an injury that did not exist until the gas companies simultaneously engaged in acts that immediately and without warning changed the Barnett Shale market to the severe disadvantage of the landowners.

The foregoing establishes that land like the Booths is still “quite attractive” to the gas

companies, but the costs are down substantially as a result of the Defendants' successfully "driving down" (Mr. McClendon's word) the gas lease signing bonuses in a way that they are "quite pleased with" but which they cannot explain further for "competitive" reasons. (See Exhibit D, December 8, 2008, "CHK – Chesapeake Energy Corporation Conference Call" page 16). This record literally cries out for a finding that something is seriously amiss in the urban gas leasing business in Tarrant County, but it unquestionably establishes the bare elements necessary to compel a ruling that "an antitrust injury" probably occurred and that discovery about it should be permitted.

B. The Booths Are Adequate "Enforcers" of The Antitrust Statute.

The second 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, 951 (Tex.App.- Fort Worth 1994, writ denied). Almost every Defendant points to the *Marantha* case stating that "a party bringing an antitrust claim must be a consumer of the alleged violator's goods or services *Marantha Temple, Inc. v. Enterprise Products Co.*, 893 S.W.2d 92, 105 (Tex.App.- Houston [1st Dist.] 1994, no pet.) (The reasons why the Defendants are completely wrong to rely on this case are discussed above in Section III, pages 8- 9). Multiple Defendants also point to the valid gas lease the Booths signed with XTO and contend the Booths are *sellers, not buyers*, so standing is not appropriate in this case. Plaintiffs agree that they are indeed sellers with regard to the *leasing* of their subsurface minerals, but there are several reasons why that fact alone doesn't end the standing inquiry.

In addition to being *sellers* of real estate (i.e., mineral rights), the Booths were *also* purchasers and consumers of gas exploration, exploitation, transportation, and marketing goods and services. In a mineral rights lease situation like we have here, the landowner sells the

minerals, but being ignorant in such matters, the landowner also *purchases* (at a cost of 73.5% of the minerals) the gas company's expertise, experience, and other technical services in order to actually produce the minerals that are the subject of the lease. The Plaintiffs in this case are not the only parties that recognize that the signing bonus element of the lease transaction is not the most important part of the transaction; Chesapeake makes a similar statement in its website where it declares that "the initial bonus offer is actually irrelevant over the life of the well; the important factor is getting the royalties for decades to come." (*See Exhibit L, page 2*). These facts suggest that the dominant factor in the lease transaction involves the landowner being a consumer of the gas company's expertise as opposed to the landowner being a seller of mineral rights.

Prior to the existence of the lease, the Booths, along with thousands of other homeowners in SEACTX, banded together (in the spirit of the free-market competition that is protected by the Sherman Antitrust Act, Clayton Antitrust Act and Texas Free Enterprise and Antitrust Act) and searched for the best company from which to purchase these highly technical gas exploration, production, transportation, and marketing goods and services. (*See Exhibit I, Razzano Affidavit paragraph 9, page 3*). The SEACTX Negotiating Committee made the decision to use XTO Energy, Inc. as a result of numerous considerations besides the dollars being offered, including "the credentials, experience, and commitment" of each company as well as whether the company was "willing and able to fulfill the commitments, both financial and geotechnical, that it was making to us when we made a deal with them." (*See Exhibit I, paragraph 9, page 3*).

The Court does not need to take our word for it when considering whether landowners entering into leases act as consumers with respect to certain essential goods and services that the

homeowners actually purchase from Defendants. If the only thing that mattered was the dollar value of the lease, then Defendants would never advertise their *goods and services* as being superior to their competitors. The quality of Defendants' good and services wouldn't matter if price was everything and if the landowners weren't purchasing anything from the gas companies. But advertise they do. The Defendants market themselves in part by touting the very factors that the negotiators for the homeowners' coalitions considered essential when deciding who to entrust with the management and exploration of their subsurface mineral estates. One example of this type of advertising is the way Defendant Dale Resources is lauded as a company with "full-time operational expertise" and a company with an excellent "drilling/completion/operational 'track record.'" (*See Exhibit E*). Similarly, Defendant Chesapeake makes the following claim on its website about its superior experience and track record:

"Well-established companies with proven track records and drilling success rates will generally produce a better well, which means more royalty income for you. It's also important to choose an operator with the financial strength to hire the best people and provide the best equipment, with the durability to maintain the well for the next several decades. There are several excellent operators in the Barnett Shale, but there are also young start-up companies with little expertise or capitalization."

(*See Exhibit L, page 3*). Again, these companies wouldn't say these things unless there were customers in the marketplace who were making decisions about who to *purchase* these goods and services from.

There are countless other examples of advertisements, websites, and flyers that contain comments and statements touting one company's services, experience, equipment, and/or expertise as being superior to the competition, but we attach the following examples just to show

that these companies competed with one another last year right up to the time they decided they could save millions of dollars in signing bonuses if they reneged on their promises and declared there was a “new rate” like they tried to do here:

1. *Exhibit M* and *N*, are copies of the Barnett Shale Energy Education Council’s website (www.bseec.org) where member companies (including some of the Defendants herein) claim to:

(a) be “dedicated to promoting energy education and best practices as they relates [sic] to oil and gas leasing, drilling, production, transportation and marketing in the Barnett Shale.” (*See Exhibit N*);

(b) “Never promise what we cannot deliver and always deliver what we promise” (*See Exhibit M*)

(c) be committed to “comply with all applicable federal, state, county, and city regulations” (*See Exhibit M*);

(d) minimize “impacts to the environment and the surrounding neighborhoods” (*See Exhibit M*); and

(e) operate in a manner that will “emphasize safety,” etc. (*See Exhibit M*).

2. *Exhibit L*, which is a copy of Chesapeake’s website where they make similar claims about their qualifications and expertise to those that several other Defendants make through their touted membership in the Barnett Shale Energy Education Council.

3. *Exhibit I*, which is the *Affidavit of Linda Razzano*, where she states that she considered it part of her duty to the neighborhoods she represented to:

“examine the credentials, experience, and commitment of each of the companies who showed an interest in making a deal with SEACTX, and to try to ensure that the company we chose to do business with would be able to fulfill the commitments, both financial and geotechnical, that it was making to us when we made a deal with them”. (*See Exhibit I, paragraph 9, page 3*).

Clearly, Plaintiffs were direct consumers of these services and SEACTX negotiated the

best deal it could for consumers like the Booths in the open market. Unlike a large south or west Texas ranch owner, Plaintiffs, like their many thousands of Tarrant County neighbors, have little to no knowledge of the oil and gas industry. In fact, the coalition of homeowners agreed to pay XTO exactly seventy-three and-a-half percent (73.5%) of their royalties for this expertise and service.

The fact pattern in this case is the exact type of consumer and injury situation that the Supreme Court has said is required in order to attain standing in an antitrust violation case. *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Plaintiffs here are not only consumers of the very goods and services at issue, but they are actually the *targets* of the anti-competitive scheme. There is nothing indirect about what happened here; the Defendants conspired to save money by setting prices and allocating markets, and the tens of millions of dollars the Defendants saved are the exact same dollars that the coalition of owners in SEACTX are losing as a result of the allocated market. It is hard to imagine a more direct purchaser than the party that is the actual target of the illegal scheme. The Booths and all landowners in SEACTX were targets of Defendants' concerted action, and they clearly are the exact type of party the antitrust laws were intended to be protect.

IV. Plaintiffs Have Standing As To The Other Causes Of Action

Lastly, while Defendants have focused on the Antitrust cause of action as a reason for refusing to provide any legitimate discovery responses, it is important to note that there has been no challenge to the Plaintiffs' standing to assert the other five (5) causes of action alleged in Plaintiffs' Original Petition. (*See Exhibit O*). Unlike the statutory standing requirements mentioned above, the common law standing doctrine requires only that: (1) there must be "a real

controversy between the parties”; and (2) that controversy “will be actually determined by the judicial declaration sought.” *Mazon Associates, Inc. v. Comerica Bank*, 195 S.W.3d 800, 803 (Tex.App.-Dallas, 2006, no pet.) The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a “justiciable interest” in its outcome. *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). The facts in Section III above clearly establish the contours of the antitrust allegations sufficient to establish standing under the Antitrust statute. Nevertheless, Plaintiffs also clearly have standing to pursue the several other causes of action pled in Plaintiffs’ Original Petition along with the overlying tort of civil conspiracy. (See *Exhibit O*). Thus, Defendants’ challenges to standing under one cause of action do not permit Defendants to flatly deny and avoid all discovery. *Southwestern Apparel, Inc. v. Bullock*, 598 S.W.2d 702, 703 (Tex.App.- Austin, 1980, no pet.).

V.

Response to Defendants’ Objections To Discovery Requests

The foregoing has established that the Plaintiffs have standing to pursue the antitrust claims as well as all the other claims they have asserted. That means this case now essentially involves a dispute concerning (a) XTO and its agents breaching a lease for natural gas under the BOOTH’s real property and (b) the surrounding fraud, Antitrust, and conspiracy actions leading to the mass withdrawal of leasing operations in the Barnett Shale. Common to all of the Defendants’ discovery responses is the fact that none of them have provided any documents or meaningful answers. Defendants apparently want this Court to completely shut down the Plaintiffs’ efforts to seek discovery from Defendants regarding *anything and everything* they seek in this case. Such extraordinary relief at this early stage of the case demands extraordinary proof, but Defendants’ multiple motions and countless objections fall far short of what the law

requires for such extraordinary relief.

A. Burden is on Party Resisting Discovery.

The purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed. *Axelson, Inc. v. McIlhanny*, 798 S.W.2d 550, 555 (Tex. 1990). Trial courts must make an effort to impose reasonable discovery limits. *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667, 668 (Tex. 2007). A party may obtain discovery regarding *any matter* that is not privileged and is relevant to the subject matter of the pending action. TEX. R. CIV. P. 192.3. Similarly, it is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Methodist Home v. Marshall*, 830 S.W.2d 220, 228 (Tex.App.-Dallas 1992, pet. denied).

The party objecting to discovery must make a specific objection for each item it wishes to exclude from discovery. TEX. R. CIV. P. 193.2(a). Once a hearing is set, the burden is on the party resisting discovery to produce evidence necessary to support the objections or claim of privilege. TEX. R. CIV. P. 193.4(a), 199.6. If, at the hearing, neither party produces evidence, the party resisting discovery will be required to disclose the discovery in dispute. *In re Continental Ins. Co.*, 990 S.W.2d 941, 942 (Tex. App.-Waco 1999, orig. proceeding). Defendants' discovery responses and their Motions For Protective Orders, Motions For Summary Judgment and their Pleas To The Jurisdiction must be viewed under the well-settled principles set forth above. Analyzing the Defendants Motions as the law requires will clearly demonstrate that Defendants' objections should all be overruled and their Motions should all be denied.

B. Plaintiff's Requests Were Specifically Tailored to This Case

The Texas Rules provide that a party objecting to written discovery “must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.” *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 798 (Tex. 2008), *see also* TEX. R. CIV. P. 193.2(a). Moreover, an objection obscured by numerous unfounded objections is waived unless the court excuses such waiver for good cause shown. *See* TEX. R. CIV. P. 193.2(e). Defendants’ Motions and objections lack the specificity that is required under Texas law. Moreover, the Plaintiffs’ discovery requests all seek production of very specifically identified documents. These requests can easily fit into thirteen (13) basic categories of requests:

1. Memos and Documents Regarding Plans for Obtaining Mineral Leases in Barnett Shale (Request numbers 1 through 18);
2. Memos and Documents Reflecting Potentially Anti-Competitive Actions (Request numbers 19 through 25);
3. Details on Natural Gas Production (Request numbers 26 through 92);
4. Documents To and From Texas Regulatory Agencies (Request numbers 93 through 114);
5. Documents To and From Federal Regulatory Agencies (Request numbers 115 through 126);
6. Documents Regarding Financing for Barnett Shale Exploration and Production (Request numbers 127 through 133);
7. Joint Venture Agreements for Barnett Shale Exploration and Production (Request numbers 134 through 136);
8. Documents Regarding Insurance Coverage for Barnett Shale Exploration (Request numbers 137 through 138);
9. Correspondence with Homeowners Associations and Homeowners Coalitions in Barnett Shale (Request numbers 139 through 147);
10. Documents To and From News Organizations (Request numbers 148 through 155);
11. Miscellaneous Requests (Request numbers 156 through 163);
12. SEACTX Related Documents (Request numbers 164 through 178);
13. Communications with Non-Governmental Oil and Gas Entities (Requests 179 through 265).

(See Exhibit F). Plaintiffs submit that the requests are worded as narrowly and specifically as possible. Moreover, the Plaintiffs have repeatedly offered to make discovery agreements with Defendants in order to avoid the necessity of this Motion being brought, *and we again offer now to meet and confer about all these matters*, but no Defendant has agreed to meet with Plaintiffs as of the date this Motion was filed. While the Court has wide discretion to control discovery, a postponement of all discovery without specific assertions or objections to the particular discovery requests would be unwarranted and improper at this early stage of the proceedings. *In re Edge Capital Group, Inc.*, 161 S.W.3d 764, 767-78 (Tex. App.– Beaumont 2005, pet. cond. granted).

Plaintiffs contend that every single one of their Requests For Production and Written Interrogatories have been carefully tailored to the specific facts and allegations of this case. Defendants should be ordered to answer them all. At a minimum, Defendants should be ordered to answer all the Requests For Production where they did not bother to “state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.” *See* TEX. R. CIV. P. 193.2(a).

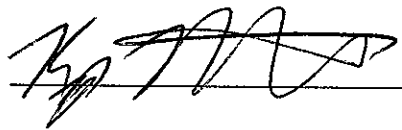
VI. Conclusion

Based on the foregoing, it is clear that Plaintiffs’ discovery requests seek information that is discoverable because the Plaintiffs have proper standing to raise an antitrust cause of action as well as the other five causes of action they have alleged. The information requested is relevant to the subject matter of the case and is not privileged; the discovery requests themselves are not overbroad, vague, or burdensome; and legitimate, good faith discovery responses would be

reasonably calculated to lead to the discovery of admissible evidence. *See* TEX. R. CIV. P. 192.3. Accordingly, Defendants' objections are without merit and Defendants should be ordered to produce the requested documents and fully respond to Plaintiffs' Requests For Production and Written Interrogatories without further delay.

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 email and pre-paid U.S. mail, on this the 27th day of October, 2009.

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Kip A. Petroff

CERTIFICATE OF CONFERENCE

Pursuant to *Dallas County Local Rule 2.07*, the undersigned hereby certifies that he has conferred with counsel for the Defendants regarding the substance of this Motion, and despite best efforts, Counsel have not been able to resolve those matters presented.

Certified on this 27 day of October, 2009.

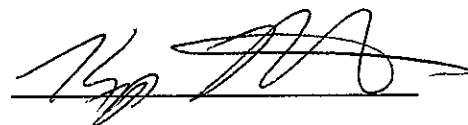

Kip A. Petroff

Exhibit A

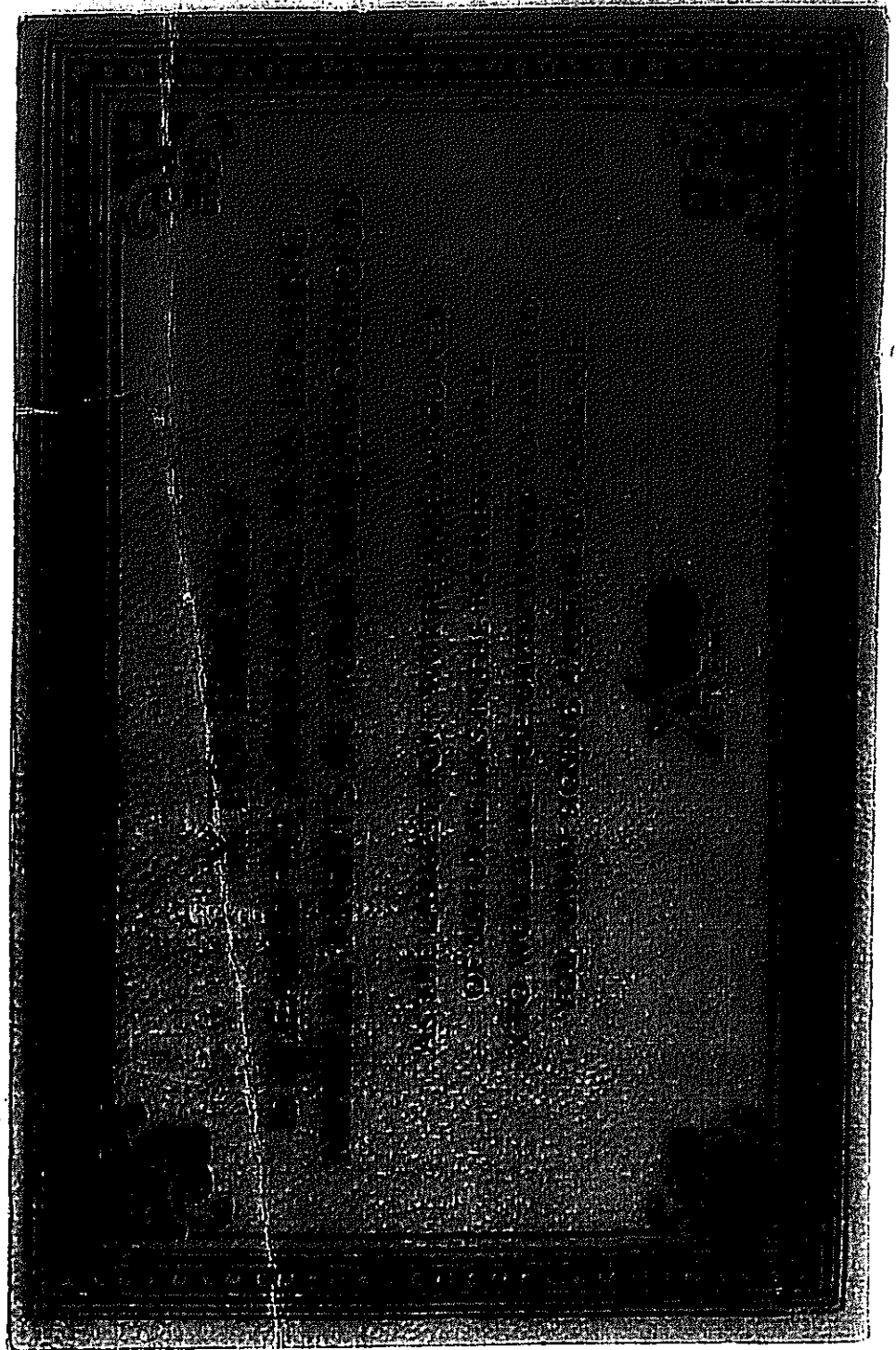


EXHIBIT
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A

EXHIBIT
A

Exhibit B

Permian Land Company
PO Box 1226
Fort Worth, TX 76101

Meadow Vista Estates Addition Neighborhood

www.seactx.org Terms:

- \$26,517 lease bonus per net mineral acre
- 26.5% royalties upon production
- 3 year primary term
- 2 year option at \$26,517 per net mineral acre


For more information on leasing your mineral rights with XTO Energy, please contact:

Permian Land Company
(817) 334-0964
leasing@permianland.com
or visit
www.xtoenergy.com

[Handwritten signature]

IF YOU HAVE ALREADY SENT IN YOUR W-9 FORM
PLEASE DISREGARD.

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New
5-26-03


Hand-drawn barcode

Booth, Willie G. Eaux Carrien M
6919 Raven Meadow Dr.
Arlington, TX 76002-3451

**EXHIBIT
B**

