



- a. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' failure to mitigate damages.
- b. Plaintiffs' claims are barred, in whole or in part, by payment.
- c. Plaintiffs' claims are barred, in whole or in part, by release.

### **III. COUNTERCLAIM**

3. The Working Interest Purchase and Sale Agreement (the "Agreement") between Orca ICI and counter-Defendant XS Capital Investments, LP and Rural Route 3 Holdings, LP is unambiguous. It clearly provides for the following:

- 6.5: Buyer is an experienced and knowledgeable investor in the oil and gas business . . .[and has] been advised by and has relied solely upon its own expertise in legal, tax and other professional counsel concerning the transaction contemplated by this Agreement . . .
- 13.8: Each of the Parties hereby knowingly, voluntarily and intentionally waives any right it may have to a trial by jury in respect of any litigation based hereon, arising out of, under or in connection with this Agreement. . .
- 13.9: This Agreement constitutes the entire understanding among the Parties . . . with respect to the subject matter hereof, superseding all negotiations, prior discussion and prior agreements and understandings relating to such subject matter.
- 13.13: The Parties hereto expressly waive any and all rights to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of this Agreement.

4. Pursuant to TEX.CIV.PRAC.&REM.CODE §37.001, Orca Defendants seek the following declaration:

- A. Counter Defendants have disclaimed any and all reliance on any statement, act, or representation of Orca Defendants other than those statements contained within the Agreement;
- B. Counter Defendants have waived their right to trial by jury in this matter;
- C. The Agreement constitutes the entire agreement between the Parties and supersedes all negotiations, prior discussions, prior agreements and prior understandings between the Parties; and,
- D. Counter Defendants have waived any right to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of this Agreement.

All conditions precedent to recovery have been met, waived or excused.

5. Pursuant to TEX.CIV.PRAC.&REM.CODE §37.009, Orca Defendants are entitled to recovery of their reasonable and necessary attorneys' fees and costs.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED Defendants Orca ICI Development JV and Orca Assets, GP, LLC, pray that this Honorable Court dismiss all of Plaintiffs' claims and deny all such relief requested by Plaintiffs against Orca Defendants, that Orca Defendants obtain the Declarations they seek, and recover attorneys' fees and costs, and any such further relief, at law or in equity, to which these Orca Defendants may show themselves justly entitled.

Respectfully submitted,

LEVINTHAL WILKINS & NGUYEN, PLLC

By: \_\_\_\_\_

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**ATTORNEYS FOR ORCA ICI  
DEVELOPMENT JV AND ORCA  
ASSETS, GP, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 7<sup>th</sup> day of November 2013, a true and correct copy of the above and foregoing was served in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure on the following:

Carlton D. Wilde, Jr.  
Matthew R. Begley  
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\_\_\_\_\_  
Jared I. Levinthal