

XS CAPITAL INVESTMENTS, LP and  
RURAL ROUTE 3 HOLDINGS, LP,

Plaintiffs,

vs.

ORCA ICI DEVELOPMENT JV,  
ORCA ASSETS G.P., LLC,  
and MRC ENERGY CORPORATION  
f/k/a MATADOR RESOURCES  
COMPANY,

Defendants.

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

234<sup>th</sup> JUDICIAL DISTRICT

**ORCA DEFENDANTS'**  
**SPECIAL EXCEPTIONS TO PLAINTIFFS' PETITION**

TO THE HONORABLE WESLEY WARD

COME NOW Defendants, Orca ICI Development JV and Orca Assets, GP, LLC, collectively referred to as “Orca Defendants”, in the above-captioned cause, and file their Special Exceptions to Plaintiffs’ Petition and would respectfully show this Honorable Court as follows:

**I.**  
**INTRODUCTION**

Plaintiffs’ Petition fails to provide fair notice of the numerous fraud allegations brought against the Orca Defendants. Indeed, a review of Plaintiffs’ Petition quickly reveals that the alleged fraud –and related parade of alleged horrors perpetrated by the Orca Defendants- constitutes nothing more than the Plaintiff’s alleged breach of contract.

Filed 13 November 07 P2:14  
Chris Daniel - District Clerk  
Harris County  
ED101J017811109  
By: Charleta Johnson

## **II.** **ARGUMENT AND AUTHORITIES**

Texas Rule of Civil Procedure 47 requires that a petition setting forth a claim for relief be “sufficient to give fair notice of the claim involved . . . .”<sup>1</sup> The Texas Supreme Court has recognized that “[t]he purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense.”<sup>2</sup> Here, Plaintiffs have mistaken verbosity for fair notice: while their Petition is not short on rhetoric, it fails to provide Orca Defendants with fair notice of the specific allegations brought against them. Defendants therefore specially except to it.

### **A. Plaintiffs’ Claims for Statutory Fraud, Common-Law Fraud and Fraud in the Inducement are Impermissibly Vague.**

Orca Defendants specially except to the fraud allegations set forth in Paragraphs 23-24 of Plaintiffs’ Petition, which lump all Defendants together and casually state that they all “made false, material representations of fact and false promises with the intent and for the purpose of inducing Plaintiffs into the Working Interest Agreement”<sup>3</sup> without providing any detail whatsoever concerning these alleged representations and promises. Such anemic pleading simply fails to provide fair notice to Orca Defendants of what alleged statement they made that Plaintiffs consider fraudulent. Without an enumeration of such specific representations, Plaintiffs’ Petition is deficient.<sup>4</sup>

The explanation for this deficiency is clear: there is no independent fraud perpetrated by the Orca Defendants. The sole basis for Plaintiffs’ alleged fraud claims must be the Orca

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<sup>1</sup> TEX. R. CIV. P. 47(a).

<sup>2</sup> *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982).

<sup>3</sup> See Plaintiffs’ Petition at ¶¶ 23-24.

<sup>4</sup> See *Perry v. Cohen*, No. 03-05-00786-CV, 2009 WL 790204, at \*1 (Tex. App.—Austin Mar. 26, 2009, no pet. h.) (affirming the trial court’s granting of special exceptions in shareholder-derivative suit because the plaintiffs “had failed to plead with specificity the allegations supporting each cause of action by each shareholder against each defendant”); *Cornelius v. American E&S Ins. Texas, Inc.*, No. 14-97-00901-CV, 2000 WL 19240, at \*1 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet. h.) (affirming the trial court’s granting of special exceptions, which required the plaintiffs “to plead with specificity the acts or omissions of each defendant [and] . . . to plead specific acts, if any, that gave rise to specific claims against each defendant”).

Defendants' alleged breach of contract. In other words, the conduct underlying the alleged breach of contract is the very same conduct that establishes the alleged fraud. With this as the case, no amount of re-pleading can somehow save Plaintiffs' fraud claims, as "Texas jurisprudence has long recognized that 'mere nonfeasance under a contract creates liability only for breach of contract.'"<sup>5</sup> In other words, damages for fraud are not recoverable unless the plaintiff suffered an injury that is independent and separate from the economic losses recoverable under a breach of contract claim.<sup>6</sup> Plaintiffs have no basis to support their fraud claims and same should therefore be dismissed.

#### **B. Plaintiffs' Alleged Damages**

As a final matter, Defendants specially except to the Petition because Plaintiffs do not state the maximum amount of their alleged damages. Texas Rule of Civil Procedure 47 provides that, upon special exception, a plaintiff is required to amend his pleadings "so as to specify the maximum amount claimed." TEX. R. CIV. P. 47. Orca Defendants invoke this provision to trigger Plaintiffs' obligation for such specificity.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendants, Orca ICI Development JV and Orca Assets, GP, LLC, respectfully ask that the Court sustain Defendants' Special Exceptions and order Plaintiffs to replead and cure the Petition's pleading defects, and if Plaintiffs do not cure its defects, strike the paragraphs of the Petition specially excepted to above; and grant Defendants such other relief to which they are justly entitled.

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<sup>5</sup> See *Owen v. Option One Mortg. Corp.*, 2011 WL 3211081, \*7, not reported in S.W.3d (Tex.App.Houston [1<sup>st</sup> Dist. 2011], reh'g denied) citing *Esty v. Beal Bank SSB*, 298 S.W.3d 280, 301 (Tex.App.-Dallas 2009, no pet)(quoting *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 13, 13 (Tex. 1996).

<sup>6</sup> *Id.* citing *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W. 2d 41, 45-47 (Tex. 1998).

Respectfully submitted,

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

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

**CERTIFICATE OF CONFERENCE**

I hereby certify that I have spoken to counsel for Plaintiffs and at this point, he is OPPOSED to this filing.

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Jared I. Levinthal

**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.  
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