

Defendants' Special Exceptions]."¹ With their improper fraud allegations removed, Orca Defendants passed on their scheduled hearing.

Now, on the eve of the hearing on Orca Defendants' Summary Judgment, Plaintiffs have once again amended their Petition, this time to simply reintroduce the exact same fraud claims that were previously challenged and voluntarily removed. While Orca Defendants cannot divine with certainty the exact strategy behind these actions, all indications are that Plaintiffs' new causes of action have been brought solely to muddy the waters in advance of the May 19th hearing on Orca Defendants' Motion for Summary Judgment. Regardless, Plaintiffs' perpetual pleading deficiencies must be remedied so that Orca Defendants may properly defend themselves.

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"² 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."³ Here, Plaintiffs have purposefully eluded any attempts to bring clarity to this lawsuit, mistaking verbosity for fair notice. While their Second Amended Original Petition is not short on rhetoric, it does not conform to the basic requirements of the Texas Rules of Civil Procedure and is deficient because it fails to (1) provide the Orca Defendants with fair notice of the specific allegations brought against them, (2) establish a

¹ Correspondence from counsel for Plaintiffs, Nov. 20, 2013, attached hereto as Exhibit A.

² TEX. R. CIV. P. 47(a).

³ *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982).

maximum amount of damages sought, and (3) set forth a range of expected recovery sought. On these grounds, Defendants specially except to Plaintiffs' Second Amended Original Petition.

A. Plaintiffs' claims for Fraud and Civil Conspiracy against Orca Defendants fail to meet the basic pleading requirements of Texas Law, as the claims are vague, lacking in necessary elements, and merely a reiteration of Plaintiffs' Breach of Contract allegations.

1. *Plaintiffs' claims for Statutory Fraud, Common-Law Fraud, and Fraud in the Inducement are impermissibly vague because the allegations provide no specificity.*

Orca Defendants specially except to the fraud allegations set forth in Paragraphs 23-24 of Plaintiffs' Second Amended Original Petition. Plaintiffs' amendments merely reintroduce language from their Original Petition, except now Plaintiffs state that Matador (opposed to both Matador and Orca Defendants) "made false, material representations of fact and false promises with the intent and for the purpose of inducing Plaintiffs into the Working Interest Agreement"⁴ without providing any detail whatsoever concerning these alleged representations and promises, just as they failed to do in their Original Petition. However, in the next breath, Plaintiffs' Second Amended Original Petition alleges that *both* Matador and Orca Defendants conspired to "defraud" the Plaintiffs.⁵ Orca Defendants should not be forced to guess at whether Plaintiffs assert fraud claims against them. Such anemic pleading simply fails to provide fair notice as to what Orca Defendants allegedly did—if anything—that "defrauded" Plaintiffs. Without an enumeration of more specific representations or actions, Plaintiffs' claims of fraud are deficient.⁶

⁴ Plaintiffs' Second Amended Original Petition at ¶¶ 23-24.

⁵ Plaintiffs' Second Amended Original Petition at ¶¶ 25-26.

⁶ 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.

2. *By implication, Plaintiffs' claims of Civil Conspiracy are also impermissibly vague and invalid without an underlying intentional tort.*

In their allegations of Civil Conspiracy, Plaintiffs continue their vague rhetoric, “Orca and Matador conspired to defraud Plaintiffs into paying the Drilling and Completion Costs of the Cowey 3H and 4H Wells. Orca and Matador had a meeting of the minds to unlawfully accomplish the goal of having Plaintiffs pay all the Drilling and Completion Costs of the Cowey 3H and 4H wells.”⁷ As is apparent, Plaintiffs maintain their tactic of elusiveness, avoiding any specificity in their claims as Plaintiffs broadly allege a conspiracy to “defraud” in a last-ditch effort to bolster their conspiracy claim. However, even this vague and broad pleading fails to meet the basic pleading requirements of a conspiracy claim, as the elements of conspiracy require some participation in an underlying, intentional tort.⁸

Through these vague allegations, Plaintiffs seemingly assert that the underlying, intentional tort in this case involved “defrauding” the Plaintiffs. However, “[a]n actionable conspiracy must consist of acts which would have been actionable against the conspirators individually.”⁹ In other words, Plaintiffs must be able to bring an actionable claim of fraud against the Orca Defendants in order to support their claim of conspiracy. Simply, Plaintiffs are unable to do so, and thus their claims of civil conspiracy must fail. First, Plaintiffs have waived

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”).

⁷ Plaintiffs’ Second Amended Original Petition at ¶¶ 25-26.

⁸ *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 756 (Tex. App.—Houston [14th Dist.] 2000, pet. denied.); *see also e.g., Firestone Steel Prods. v. Barajas*, 927 S.W.2d 608, 617 (Tex. 1996).

⁹ *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963); *see also Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 (Tex. App.—Dallas 1989, writ denied).

any fraud or fraudulent inducement claims related to the Working Interest Agreement because of their unequivocal, written disclaimer of reliance.¹⁰ Second, Plaintiffs' claims of fraud—if any—against Orca Defendants are subsumed by their breach of contract claims, as set forth below. Based on these deficiencies, Orca Defendants specially except to the civil conspiracy allegations set forth in Paragraphs 25-26 of the Plaintiffs' Second Amended Original Petition.

3. *Plaintiffs have no basis for a fraud claim against Orca Defendants in this case, and admitted as much when they removed these claims from their Petition.*

The Plaintiffs previously jettisoned their allegations of fraud as to Orca Defendants, only to now reintroduce similar allegations in this improper re-pleading. The explanation for the deficiency is clear: there is no independent fraud perpetrated by the Orca Defendants. The sole basis for Plaintiffs' alleged fraud and conspiracy claims against the Orca Defendants is identical to their alleged breach of contract action against Orca Defendants. In other words, the conduct underlying the alleged breach of contract is the very same conduct that supposedly establishes the alleged fraud. However, a breach of contract action is not a tort, and thus cannot be the basis of a conspiracy claim.¹¹ Thus, Plaintiffs have no cause of action for fraud against Orca Defendants, but merely a breach of contract action, and are thus without an intentional tort to support their charges of conspiracy. With this as the case, no amount of artful amending and re-pleading can save Plaintiffs' fraud claims, as "Texas jurisprudence has long recognized that

¹⁰ Working Interest Agreement, p. 7 ¶6.5; see *Italian Cowboy Partners, Ltd. V. Purdential Ins. Co. of Am.*, 341 S.W.3d 323, 331-37 (Tex. 2011).

¹¹ *Grizzle v. Texas Commerce Bank*, 38 S.W.3d 265, 285 (Tex. App.—Dallas 2001), *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002); *Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 760-61 (Tex. App.—Texarkana 1996), *rev'd in part on other grounds*, 938 S.W.2d, 146 (Tex. 1997).

‘mere nonfeasance under a contract creates liability only for breach of contract.’”¹² In other words, damages for fraud—and by implication civil conspiracy—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.¹³ Consequently, Plaintiffs have no basis to support their claims for Fraud and Civil Conspiracy against Orca Defendants, and those claims should therefore be dismissed.

B. Plaintiffs’ fail to plead or allege an amount of maximum damages sought.

Orca Defendants specially except to the Second Amended Original Petition because Plaintiffs continue to refuse to state the maximum amount of damages sought in this case, a deficiency raised by Orca Defendants in its November 7, 2013 Special Exceptions. 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.”¹⁴ Orca Defendants invoked this provision to trigger Plaintiffs’ obligation for such specificity on November 7, 2013. On November 20, 2013, Plaintiffs stated that they were “not able to plead a maximum amount claimed at this point, but will do so in due course.”¹⁵ The next day, Orca Defendants responded,

¹² See *Owen v. Option One Mortg. Corp.*, 2011 WL 3211081, *7, not reported in S.W.3d (Tex.App.Houston [1st 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)).

¹³ *Id.* (citing *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W. 2d 41, 45-47 (Tex. 1998)); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963); see also *Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 (Tex. App.—Dallas 1989, writ denied).

¹⁴ Tex. R. Civ. P. 47.

¹⁵ Exhibit A, correspondence from counsel for Plaintiffs, Nov. 20, 2013.

“[w]ith respect to pleading a maximum amount claimed, I trust you will not delay in so doing.”¹⁶ Now, half a year later, this deficiency has not been cured, despite Plaintiffs’ filing of two subsequent, amended petitions. Further, Plaintiffs have evaded any commitment of any type to any monetary amount of damages whatsoever, either through their pleadings, disclosures, or discovery requests specifically requesting such information. If Plaintiffs are unable to state, of all things, the maximum amount they seek to recover, then Plaintiffs should reconsider the basis for their lawsuit.

C. Plaintiffs’ Invalid Participation in Discovery.

As a final matter, Orca Defendants specially except to the Second Amended Original Petition because Plaintiffs fail to “establish the range of monetary relief” sought. Texas Rule of Civil Procedure 47(c) requires a party to establish the range of monetary relief it seeks through its petition.¹⁷ If a party fails to do so, as is the case with Plaintiffs, that party “may not conduct discovery until the party’s pleading is amended to comply.”¹⁸ Consequently, both Plaintiffs’ Request for Production to the Orca Defendants and Deposition by Written Questions to Citigroup Energy, Inc. are invalid and moot.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants, Orca ICI Development JV and Orca Assets, GP, LLC, respectfully ask that the Court sustain Defendants’ Special Exceptions to

¹⁶ Attached correspondence from counsel for Orca Defendants, Nov. 21, 2013, attached hereto as Exhibit B. This correspondence and deficiency was brought to Plaintiffs attention again via facsimile on the morning of May 12, 2014, prior to the filing of the Second Amended Original Petition by Plaintiffs. Attached correspondence from counsel for Orca Defendants, May 12, 2014, attached hereto as Exhibit C.

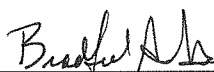
¹⁷ Tex. R. Civ. P. 47(c).

¹⁸ Tex. R. Civ. P. 47.

Plaintiffs' Second Amended Original Petition and order Plaintiffs to replead and cure the Second Amended Original 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.

Respectfully submitted,

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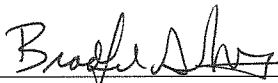
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CERTIFICATE OF SERVICE

I hereby certify that, on the 15 day of May 2014, 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:

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