CAUSE NO. 2013-59098

XS CAPITAL INVESTMENTS, LP and RURAL ROUTE 3 HOLDINGS, LP,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	HARRIS COUNTY, TEXAS
ORCA ICI DEVELOPMENT JV, ORCA ASSETS G.P., LLC, and MRC ENERGY CORPORATION f/k/a MATADOR RESOURCES COMPANY,	§	
Defendants.	§	234th JUDICIAL DISTRICT

ORCA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE WESLEY WARD:

COME NOW Defendants, Orca ICI Development JV ("Orca ICI") and Orca Assets, GP, LLC ("Orca Assets"), collectively referred to as "Orca Defendants," in the above-captioned cause, and pursuant to Texas Rule of Civil Procedure 166a(c), file their Motion for Summary Judgment against Plaintiffs and, in support thereof, would respectfully show this Honorable Court as follows:

I. INTRODUCTION

This case centers on a dispute over the terms of a contract, the Working Interest Purchase and Sale Agreement (hereinafter referred to as the "Working Interest Agreement") entered into between Plaintiffs and the Orca Defendants on or about February 14, 2013. The unambiguous Working Interest Agreement explicitly provides, amongst other things, that:

i) Plaintiffs would pay the Orca Defendants' working interest obligations in a portion of 2 different wells in exchange for a guaranteed repayment and an ongoing interest in the 2 wells;

ii) that Plaintiffs relied solely upon their own expertise in legal, tax and other professional counsel concerning the transaction contemplated by the Working Interest Agreement;

iii) that Plaintiffs and Orca Defendants waive their right to trial by jury;

iv) that the Working Interest Agreement constitutes the entire understanding between the Parties, superseding all negotiations, prior discussions and prior agreements and understandings; and,

v) that Plaintiffs expressly waived any and all rights to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of the Working Interest Agreement.

Plaintiffs – who bring this suit seeking to ostensibly enforce the Working Interest Agreement – ignore its express, unambiguous terms. Because Plaintiffs cannot obtain through litigation what they never were entitled to via contract, Orca Defendants ask that this Court render summary judgment on the Orca Defendants' claim for Declaratory Judgment and hold the Parties to the express, unambiguous terms of the Working Interest Agreement.

Orca Defendants further request that, as a matter of law, this Court dismiss all of Plaintiffs' claims against Orca Defendants on the basis that: (1) Plaintiffs assert, but cannot establish they are a third-party beneficiary under the PSPA, and thus are not entitled to bring a cause of action under that agreement; (2) Plaintiffs' conspiracy claim against the Orca Defendants must fail because Plaintiffs have failed to assert a single underlying actionable tort against the Orca Defendants; (3) Plaintiffs have improperly brought a "quasi estoppel" claim; (4) Plaintiffs have knowingly and intentionally waived all damages available to them arising from

Orca Defendants alleged breach of the Working Interest Agreement, and thus cannot sustain a breach of contract action.

II.
RELEVANT FACTS

On or about February 14, 2013, Plaintiffs and the Orca Defendants entered into the Working Interest Agreement.[1] By virtue of the Working Interest Agreement, Orca Defendants were to, amongst other things, assign to Plaintiffs all of their working interest in a portion of two different oil, gas, and mineral leases.[2] Per the express terms of the Working Interest Agreement, Orca Defendants' assignment to Plaintiffs was subject to the Joint Operating Agreement ("Joint Operating Agreement") and Purchase, Sale and Participation Agreement ("PSPA"), independent contracts between the Orca Defendants and Matador.[3]

The PSPA and JOA were entered into between Matador and Orca ICI in May of 2011, long before Plaintiffs' involvement with Orca Defendants.[4] Under the PSPA, Orca ICI sold an undivided interest in certain oil and gas leases to Matador, and Matador would thereafter develop the leases.[5] Under the PSPA, Orca ICI reserved the right to assign working interests in the

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1 *See* Plaintiffs' First Amended Original Petition, attached hereto and marked as Ex. 1, hereinafter referred to as "Plaintiffs' Petition," p. 3, ¶12; *see also* Working Interest Purchase and Sale Agreement, attached hereto and marked as Ex. 2, hereinafter referred to as "Working Interest Agreement," p. 7, ¶6.5.

2 Plaintiff's Petition p. 4, ¶13; Working Interest Agreement.

3 *See* Plaintiffs' Petition, p. 4, ¶15; Working Interest Agreement, p. 2, ¶1.3.

4 *See* First Addendum to Purchase Sale and Participation Agreement, attached hereto and marked as Ex. 4, hereinafter referred to as "First Addendum to PSPA," p.1; *see also* Plaintiffs' Petition p. 3, ¶11.

5 *See* Plaintiffs' Petition, p. 3, ¶11; First Addendum to PSPA p.1.

subject leases to third parties, but such assignment would be subject to the reasonable consent of Matador.[6]

In accordance with the PSPA and JOA, Matador gave notice to Orca ICI of Matador's intent to drill the Cowey #3H well and the Cowey #4H well.[7] Under the JOA, Orca ICI was required to fund a percentage of the drilling and completion costs, based on the working interest in the leases underlying the unit in which such wells were located. In order to fund this obligation, Orca ICI entered into negotiations with Plaintiffs, which resulted in the formation of the Working Interest Agreement.[8]

Plaintiffs would proceed to pay $8,686,244 to Defendant Matador, per the Working Interest Agreement, representing Orca ICI's funding obligations for the wells.[9] However, pursuant to its contractual rights under the PSPA, Matador withheld its consent to Orca Defendants' assignment to Plaintiffs.[10] After consent was withheld and the assignment under the Working Interest Agreement nullified, Matador returned every cent of the $8,686,244 paid by Plaintiffs to Matador.[11]

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6 *See* Plaintiffs' Petition, p. 4, ¶¶ 15-16; *see also* Purchase, Sale and Participation Agreement, attached hereto and marked as Ex. 3 hereinafter referred to as "PSPA," pp. 10-11, ¶¶ 7(b)-(c).

7 *See* Working Interest Agreement, p. 1, ¶ B.

8 *See* Working Interest Agreement, pp. 1-2; Plaintiffs' Petition, pp. 3-4, ¶¶ 12-13.

9 *See* Plaintiffs' Petition, pp. 4-5, ¶¶ 13, 17-18.

10 Plaintiffs' Petition, pp. 4-5, ¶16-17. *See also* PSPA, pp. 10-11, ¶¶ 7(b)-(c); Affidavit of Craig N. Adams, attached hereto and marked as Ex. 5, hereinafter referred to as "Craig Adams Affidavit."

11 *See* Craig Adams Affidavit.

The Working Interest Agreement is clear with respect to Plaintiffs' and Defendants' rights, duties and obligations.

There is no dispute among the Parties as to the validity or enforceability of the Working Interest Agreement; indeed, Plaintiffs contend that "[t]he Working Interest Agreement is a valid, enforceable contract."[12] Defendants bring this Summary Judgment Motion seeking a declaration of Plaintiffs' rights pursuant to the Working Interest Agreement. To that end, the Agreement provides as follows:

- ¶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]
- ¶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. . . [14]
- ¶13.9: This Agreement constitutes the entire understanding among the Parties . . . with respect to the subject matter hereof, superseding all negotiations, prior discussions and prior agreements and understandings relating to such subject matter.[15]

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12 *See* Plaintiffs' Petition, p. 6, ¶21.

13 Working Interest Agreement, p. 7, ¶6.5.

14 Working Interest Agreement, p. 11, ¶13.8.

15 Working Interest Agreement, p. 11, ¶13.9.

- ¶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.[16]

III.
SUMMARY JUDGMENT STANDARD

Texas Rule of Civil Procedure 166a(c) states that summary judgment "shall" be granted if the movant can show that no genuine issue of material fact exists in the lawsuit, and that the movant is entitled to judgment as a matter of law.[17] The purpose of traditional summary judgment is to eliminate patently unmeritorious claims and defenses.[18] To prevail on summary judgment, a plaintiff must conclusively establish each essential element of his claims.[19] With respect to a party seeking summary judgment on an action for declaratory judgment, Rule 166a(a) provides that the movant "may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."[20]

IV.
ARGUMENT AND AUTHORITIES

A. The Court's construction of the unambiguous Working Interest Agreement is a matter of law.

Whether a contract provision is ambiguous or unambiguous is a preliminary legal

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16 Working Interest Agreement, p. 11, ¶13.13.

17 *See* TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985).

18 *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972).

19 *Cf. Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

20 TEX. R. CIV. P. 166a(a).

question to be resolved by the Court.[21] The test for ambiguity is whether language is subject to more than one reasonable interpretation.[22] Where no ambiguity exists, all questions relating to the interpretation of a contract become questions of law.[23] In this case, both Plaintiffs and Orca Defendants agree the Working Interest Agreement is unambiguous. Here, the Working Interest Agreement is an undisputedly binding, enforceable, unambiguous document that explicitly defines both Plaintiffs' and the Orca Defendants' rights and obligations with respect to the assignment of working interests in oil, gas, and mineral leases from the Orca Defendants to Plaintiffs.

B. The Court should enforce the Working Interest Agreement's unambiguous terms as written.

"In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument."[24] Accordingly, courts "give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning."[25] When discerning the contracting parties' intent, courts moreover must "examine the entire agreement and give effect to each provision so that none is rendered meaningless."[26] As set forth in the Orca Defendants' Counterclaim, Orca Defendants seek a declaration from this Court that:

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21 *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)

22 *Id.*

23 *See Reilly v. Rangers Management, Inc.*, 727 S .W.2d 527, 529 (Tex. 1987).

24 *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

25 *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009).

26 *Tawes v. Barnes*, 340 S .W.3d 419, 425 (Tex. 2011) (internal citations omitted).

- Per ¶6.5 that Plaintiffs relied solely upon their own expertise in legal, tax and other professional counsel concerning the transaction contemplated by the Working Interest Agreement, disclaiming any and all reliance on any statement, act, or representation of Orca Defendants other than those statements contained within the Working Interest Agreement;[27]
- Per ¶13.8 that Plaintiffs waive their right to trial by jury;[28]
- Per ¶13.8 that Texas law governs this case;[29]
- Per ¶13.9 that the Working Interest Agreement constitutes the entire understanding between the Parties, superseding all negotiations, prior discussions and prior agreements and understandings;[30]
- Per ¶13.13 that Plaintiffs expressly waived any and all rights to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of the Working Interest Agreement.[31]

This language is unambiguous. There is no possible way to interpret these clauses to mean anything other than precisely what they say. Such a declaration is proper here as "[a]

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27 Working Interest Agreement, p. 7, ¶6.5.

28 Working Interest Agreement, p. 11, ¶13.8. Trial by jury can be waived, so long as the waiver is "voluntary, knowing, and intelligent, with full awareness of the legal consequences." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132 (Tex. 2004). The language of ¶13.8 mirrors the language used by the parties in *In re Prudential Insurance Co. of America*, which was enforced by the Texas Supreme Court as a valid jury waiver. *Id.* at 127–28 ("Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.").

29 Working Interest Agreement, p. 11, ¶13.8.

30 Working Interest Agreement, p. 11, ¶13.9.

31 Working Interest Agreement, p. 11, ¶13.13.

person interested under a . . . contract may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder."[32]

C. Plaintiffs are not third-party beneficiaries to the PSPA because Orca Defendants and Matador did not expressly and clearly intend to benefit Plaintiffs in the PSPA.

Plaintiffs assert that they are third-party beneficiaries under the May 16, 2011, Purchase Sale and Participation Agreement ("PSPA") entered into by Orca Defendants and Matador.[33] However, "a contract does not confer third-party beneficiary rights unless (1) the contract plainly expresses the third-party obligation of the bargain-giver, (2) it is unmistakable that a benefit to the third party is within the contemplation of the primary contracting parties, and (3) the primary parties contemplate that the third party would be vested with the right to sue for enforcement of the contract."[34] In examining the PSPA, it explicitly states that "[u]nless expressly stated to the contrary, no third-party is intended to have any rights, benefits or remedies under this Agreement."[35] Not only does the PSPA clearly disclaim Plaintiffs—or anyone else—from asserting third-party beneficiary status, the PSPA was not intended to benefit any unnamed third-party.[36] Plaintiffs are, as a matter of both fact and law, entirely unable to overcome the

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32 TEX. CIV. PRAC. & REM. CODE § 37.004(a).

33 Plaintiffs' Petition, p. 6, ¶22.

34 *Abarca v. Scott Morgan Residential, Inc.*, 305 S.W.3d 110, 119-120 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Tabor, Chhabra & Gibbs, P.A. v. Medical Legal Evaluations, Inc.*, 237 S.W.3d 762, 773 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

35 *See* PSPA p. 23, ¶15(n).

36 Affidavit of Van H. Singleton II, attached hereto and marked as Ex. 6, hereinafter referred to as "Van Singleton Affidavit."

presumption that they are not third-party beneficiaries, and as a result, are not entitled to bring a cause of action seeking damages under the PSPA.

In Texas, there is a presumption against conferring third-party beneficiary status on non-contracting parties.[37] "A court should not imply or create third-party beneficiary rights unless they are expressly intended by the contracting parties and plainly and fully spelled out in the four corners of the contract."[38] The fact that a third-party receives incidental benefits from a contract does not make one a third-party beneficiary because the intent to confer a direct benefit upon a third-party "must be clearly and fully spelled out or enforcement by the third-party must be denied." [39] Texas law does not recognize a third-party beneficiary contract by implication.[40] Instead, Texas requires that a third-party must prove that the contracting parties had the *clear intent* to *directly benefit* the third-party.[41] Plaintiffs simply cannot produce any such evidence.

The Working Interest Agreement, PSPA, and JOA all relate to a series of oil, gas, and mineral wells and leases. The Texas Supreme Court recently analyzed customary oil and gas agreements like the PSPA and JOA, and based on the usual language of such contracts and their general use within the oil and gas industry, held that contracts like the PSPA and JOA do *not*

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37 *South Texas Water Authority v. Lomas*, 223 S.W.3d 304 (Tex. 2007) (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.,* 995 S.W.2d 647, 652 (Tex.1999)).

38 *Tabor, Chhabra & Gibbs, P.A. v. Medical Legal Evaluations, Inc.*, 237 S.W.3d 762, 773 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *EPGT Tex. Pipeline, L.P. v. Harris County Flood Control Dist.*, 176 S.W.3d 330, 340 (Tex. App.—Houston [1st Dist.] 2004, pet. dis'd); *see also e.g., MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.,* 995 S.W.2d 647, 651 (Tex. 1999); *Whitten v. Vehicle Removal Corp.,* 56 S.W.3d 298, 311 (Tex. App.—Dallas 2001, no pet.).

39 *MCI Telecomms.,* 995 S.W.2d at 650-651; *Young Ref. Corp. v. Pennzoil Co.,* 46 S.W.3d 380, 387 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

40 *Stine v. Stewart,* 80 S.W.3d 586, 589 (Tex. 2002).

41 *See MJR Corp. v. B & B Vending Co.,*760 S.W.2d 4, 10-11 (Tex. App.—Dallas 1988, writ denied).

(without more explicit language) typically create third-party beneficiaries.[42] The PSPA here makes absolutely no mention, reference or inference to any Plaintiff.[43] In fact, to the contrary, the PSPA explicitly disclaims the existence of any third-party beneficiary: "no third-party is intended to have any rights, benefits or remedies under this Agreement."[44] Consequently, there is a clear absence of the intent that Texas law requires for Plaintiffs to qualify as third-party beneficiaries under the PSPA. Plaintiffs are thus precluded from bringing any cause of action to enforce the PSPA as third-party beneficiaries, and their breach of contract claims under the PSPA must be dismissed.

D. Plaintiffs' conspiracy claim must fail because Plaintiffs' do not assert any actionable tort claim against the Orca Defendants.

A civil conspiracy involves a combination of two or more persons with an unlawful purpose or a lawful purpose to be accomplished by unlawful means.[45] Importantly, "[a]n actionable conspiracy must consist of acts which would have been actionable against the conspirators individually."[46] The elements of conspiracy require some participation in an

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42 "We deduce from the oil and gas industry's customary purpose for using JOAs, and from the plain language of the JOA at issue here, that neither Dominion nor Moose included the JOA Royalty Provision with the intention of directly benefitting any lessor of a Baker Unit lease." *Tawes v. Barnes*, 340 S.W.3d 419, 426 (Tex. 2011) (citing *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.,* 191 S.W.2d 716, 724 (Tex. 1946) ("Not only are we to construe this contract as a whole but since it is one peculiar to the cotton export trade, and somewhat indefinite or inconsistent in its terms, we may interpret it in the light of the custom of the business . . . .' " (quoting *Perry & Co. v. Langbehn,* 113 Tex. 72, 252 S.W. 472, 474 (1923))).

43 *See* PSPA p. 23, ¶15(n).

44 *See* PSPA p. 23, ¶15(n).

45 *Ernst & Young v. Pacific Mut. Life Ins. Co.,* 51 S.W.3d 573, 583 (Tex. 2001).

46 *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).

underlying tort; "if the underlying act is not an intentional tort, the conspiracy claim must fail."[47] If no intentional tort was committed, there is no claim for conspiracy.[48] A breach of contract action is not a tort, and thus cannot be the basis of a conspiracy claim.[49]

Plaintiffs allege causes of actions against the Orca Defendants based on breach of contract, quasi estoppel, and the aforementioned improper conspiracy claim. Plaintiffs have pled no intentional tort against Orca Defendants, and thus summary judgment on Plaintiffs' conspiracy claim against Orca Defendants is proper.[50]

E. Plaintiffs cannot bring a "Quasi Estoppel" action to enforce the written Working Interest Agreement.

Plaintiffs also seek to recover under the Working Interest Agreement through a "Quasi Estoppel" claim, in which they allege:

> Defendants accepted the benefits of the Working Interest Agreement and subsequently took an inconsistent position regarding the Working Interest Agreement to avoid their corresponding obligations to Plaintiffs.

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47 *Gordon v. Clemons*, 2010 WL 3518515 at *8 (Tex. App.—Beaumont 2010, no pet.) (mem. op.) (citing *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).

48 *Firestone Steel Prods. v. Barajas,* 927 S.W.2d 608, 617 (Tex. 1996).

49 *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).

50 In their Original Petition, Plaintiffs improperly alleged fraud against Orca Defendants, but have since amended their Petition to remove such claim. The only remaining tort alleged in Plaintiffs' Petition is a claim for tortious interference with a contract asserted against only Defendant Matador. Any alleged conspiracy involving the Orca Defendants with respect to Matador's alleged tortious interference with the Working Interest Agreement cannot survive against the Orca Defendants because "an actionable conspiracy must consist of wrongs that would have been actionable against the conspirators individually . . .[and the Defendants] as a matter of law, cannot be held liable for interfering with the contract between [Plaintiffs] and themselves." *Schoellkopf,* 778 S.W.2d at 900 and 902; *see also In re Vesta Ins. Group, Inc.* 192 S.W.3d 759, 761 (Tex. 2006) ("a party cannot tortiously interfere with its own contract.") (internal citations omitted).

> Defendants are stopped from taking such an inconsistent position, as allowing them to do so would be unconscionable.[51]

These allegations—even if somehow true (which they are not)—support no discernible cause of action. "Quasi Estoppel," the claim asserted by Plaintiffs, is a defensive doctrine.[52] Quasi Estoppel alone does not create a cause of action or establish a contract right that does not otherwise exist.[53] As the Houston Court of Appeals stated, "estoppel is not an independent cause of action. . . [it] is defensive in character, and its function is to preserve rights, and not to bring into being an independent cause of action."[54] Thus, Plaintiffs' improper "Quasi Estoppel" cause of action should be dismissed.

Regardless, even if Plaintiffs' allegations of "Quasi Estoppel" somehow created a quasi-contractual cause of action, the existence of an express, written agreement would bar any recovery under "Quasi Estoppel," or any quasi-contractual theory. Under Texas law, "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory."[55] Parties are to be bound by their express agreements,[56] and

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51 Plaintiffs' Petition, p. 7, ¶29.

52 *Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 136 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd); *see also Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 734 (Tex. 1981) ("Estoppel . . . is a defensive theory."); *Watson v. Nortex Wholesale Nursery, Inc.,* 830 S.W.2d 747, 751 (Tex. App.—Tyler 1992, writ denied) ("Equitable estoppel is defensive in character.").

53 "It [quasi estoppel] does not create a contract right that does not otherwise exist." *Sun Oil Co.*, 626 S.W.2d at 734 (citing *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965); *Southland Life Insurance Co. v. Vela*, 217 S.W.2d 660 (Tex. 1949)).

54 *Hermann Hosp. v. Nat'l Standard Ins. Co.*, 776 S.W.2d 249, 254 (Tex.App.-Houston [1st Dist.] 1989, write denied)(internal citations omitted).

55 *See Fortune Prod. Co. v. Conoco, Inc.,* 52 S.W.3d 671, 684 (Tex. 2000).

56 *Id.*

cannot recover under a quasi-contractual theory where an express contract exists.[57] Thus, even if Plaintiffs' "Quasi Estoppel" cause of action was proper, Plaintiffs would be barred from recovery under any quasi-contractual theory because any dispute involving the written Working Interest Agreement is properly addressed through a breach of contract action.

F. The terms of the Working Interest Agreement provide no relief for the Plaintiffs and therefore Plaintiffs' breach of contract claim against Orca Defendants must be dismissed.

Both Plaintiffs and Orca Defendants agree that the Working Interest Agreement is a valid, enforceable agreement. Both agree that the terms are unambiguous and the contract should be enforced as written. The Working Interest Agreement says what it says, and the parties should be held to the agreement they struck.

Specifically, in ¶13.13 of the Working Interest Agreement, Plaintiffs waived any and all rights to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of the Working Interest Agreement.[58] Section 13.13 of the Working Interest Agreement provides:

> ¶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.[59]

This language is unambiguous and should be interpreted and enforced as written. When a "contract is unambiguous, the court must enforce it as written."[60] Thus, Plaintiffs are barred, per

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57 *See Truly v. Austin,* 744 S.W.2d 934, 936 (Tex. 1988); *see also Fortune Prod. Co.*, 52. S.W.3d at 684.

58 "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." Working Interest Agreement, p. 11, ¶13.13.

59 Working Interest Agreement, p. 11, ¶13.13.

the express terms of the contract they seek to enforce, from recovering any of the aforementioned damages in this case.

Finally, since Plaintiffs have recovered every dollar they paid,[61] there are simply no damages available to Plaintiffs that they did not explicitly waive. Thus, Plaintiffs conclusively fail to establish the essential element of damages and, as a result, their breach of contract action under the Working Interest Agreement must be dismissed.[62]

V.
CONCLUSION

Pursuant to the Texas Declaratory Judgments Act, Defendants are entitled to a declaration that:

1. Plaintiffs disclaimed any and all reliance on any statement, act, or representation of Orca Defendants other than those statements contained within the Working Interest Agreement;
2. Plaintiffs waived their right to trial by jury;
3. Texas law governs this case;
4. The Working Interest Agreement constitutes the entire understanding between the Plaintiffs and Orca Defendants, superseding all negotiations, prior discussions and prior agreements and understandings between them;

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60 *Transcon. Gas Pipeline Corp. v. Texaco, Inc.,* 35 S.W.3d 658, 665 (Tex.App.-Houston [1st Dist.] 2000, pet. denied) *citing Heritage Resources, Inc. v. Nationsbank,* 939 S.W.2d 118, 121 (Tex. 1996).

61 *See* Craig Adams Affidavit.

62 The essential elements of a breach of contract: (1) the existence of a valid contract; (2) performance of tendered performance by the plaintiff; (3) breach of contract by the defendant; and (4) damages sustained as a result of the breach. *Simien v. Unifund CCR Partners,* 321 S.W.3d 235, 247 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Williams v. Unifund CCR Partners,* 264 S.W.3d 231, 235–36 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

5. Plaintiffs expressly waived any and all rights to consequential, special, incidental, punitive or exemplary damages, or loss of profits resulting from any breach of the Working Interest Agreement.

Plaintiffs' remaining claims must be dismissed outright because the Orca Defendants have conclusively established that Plaintiffs are not third-party beneficiaries to the PSPA; Plaintiffs' conspiracy claim against the Orca Defendants fails because Plaintiffs cannot assert any actionable tort against the Orca Defendants; Plaintiffs' "Quasi Estoppel" claim—even if such a claim existed—fails here because Plaintiffs entered into a valid, enforceable written contract with the Orca Defendants; and, lastly, Plaintiffs have knowingly and intentionally waived any and all damages that they could be entitled to resulting from the Orca Defendants alleged breach of the Working Interest Agreement.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Orca Defendants respectfully ask that the Court grant this summary judgment, declare the rights and terms under the Working Interest Agreement, grant all relief requested herein, and any such other and further relief the Court deems appropriate.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of March 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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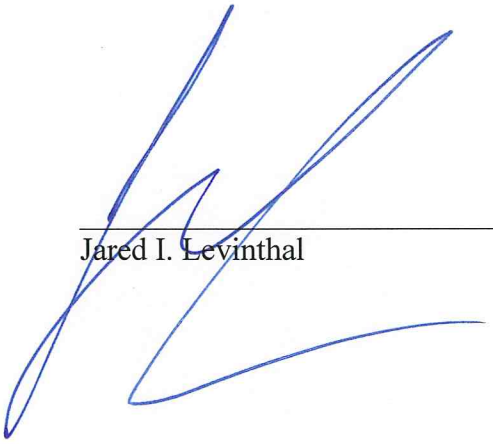

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