

CAUSE NO. 2013-59098

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

**ORCA DEFENDANTS’ REPLY TO PLAINTIFFS’ RESPONSE TO 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 file their Reply to Plaintiffs’ Response to Orca Defendants’ Motion for Summary Judgment against Plaintiffs and, in support thereof, would respectfully show this Honorable Court as follows:

**I.  
INTRODUCTION**

Only one issue raised in Orca Defendants’ Motion for Summary Judgment remains in this case—whether Plaintiffs’ can establish the essential element of damages in their Breach of Contract claim against Orca Defendants. Simply answered, they cannot.

On March 21, 2014, Orca Defendants filed their Motion for Summary Judgment addressing all claims brought against them by Plaintiffs. After full briefing by the parties, Plaintiffs have conceded the vast majority of issues raised in Orca Defendants’ Motion.

Specifically, Orca Defendants moved for the Court to render summary judgment on five grounds: (1) Orca Defendants' Request for a Declaratory Judgment regarding particular provisions of the Working Interest Agreement; (2) Plaintiffs' invalid conspiracy claim; (3) Plaintiffs' invented "Quasi Estoppel" claim; (4) Plaintiffs' lack of capacity as third-party beneficiaries under the PSPA;<sup>1</sup> and (5) Plaintiffs' Breach of Contract claim, because Plaintiffs knowingly and intentionally waived all damages available to them in this case per the express terms of the Working Interest Agreement.

Issues 1, 2, and 3 were conceded by Plaintiffs, and Issue 4 does not directly involve a claim against the Orca Defendants.<sup>2</sup> Thus, at the May 19<sup>th</sup> hearing on Orca Defendants' Motion for Summary Judgment, only the fifth and final issue is ripe for consideration. To be clear, all other claims remaining in Plaintiffs' lawsuit have been brought solely against Matador, not Orca Defendants. Consequently, when this Court grants Orca Defendants' Motion for Summary Judgment on the Breach of Contract claim, Orca Defendants will be disposed of as a Defendant in this case.

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

- A. The only issue before this Court concerns the terms of the Working Interest Agreement, which explicitly provides no available relief to the Plaintiffs in this case, therefore, Plaintiffs' breach of contract claim against Orca Defendants must be dismissed.**

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<sup>1</sup> The Purchase, Sale and Participation Agreement, attached as Exhibit 3 to Orca Defendants' Motion for Summary Judgment, is a contract between Matador and Orca Defendants.

<sup>2</sup> Plaintiffs assert they are third-party beneficiaries under the PSPA, and thus have the right to bring a breach of contract under the PSPA against Matador. Plaintiffs have brought no claims against Orca Defendants under the PSPA, and thus there is no necessity for a ruling on this issue from this Court. Matador has sufficiently briefed this topic in their Special Exceptions and Plea to Jurisdiction Regarding Standing, which is set to be heard at the same time as Orca Defendants' Motion for Summary Judgment.

Both Plaintiffs and Orca Defendants agree that the Working Interest Agreement is a valid, enforceable agreement.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

This language is unambiguous and should be interpreted and enforced as written. When a “contract is unambiguous, the court must enforce it as written.”<sup>6</sup> Thus, Plaintiffs are barred, per the express terms of the very contract they seek to enforce, from recovering any of the aforementioned damages in this case. Consequently, Plaintiffs are unable to establish the essential elements of damages, and their Breach of Contract claim must be dismissed.

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<sup>3</sup> “The Working Interest Agreement is a valid enforceable contract.” Plaintiffs’ Second Amended Original Petition, at ¶21. “Allegations contained in pleadings are conclusive against the pleader, and it is unnecessary for the opposing party to introduce evidence to obtain the benefit of the admissions.” *Schoellkopf v. Pledger*, 778 S.W.2d 897, 902 (Tex. App.—Dallas 1989, writ denied) (citing *Klein v. Dimock*, 705 S.W.2d 408, 410 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.)).

<sup>4</sup> “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.

<sup>5</sup> Working Interest Agreement, p. 11, ¶13.13.

<sup>6</sup> *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)).

Plaintiffs' arguments in their Response are unpersuasive. Plaintiff admits, and Orca Defendants agree, that the limitation of liability "limits only certain categories of damages."<sup>7</sup> However, since Plaintiffs have recovered every dollar they paid,<sup>8</sup> there are no remaining damages available to them—any consequential, special, incidental, punitive, exemplary, or loss of profit damages that Plaintiffs could otherwise seek in a breach of contract action were explicitly waived in section 13.13 of the Working Interest Agreement. The only category of damages available to the Plaintiffs are those "direct damages" that are not "lost profits." However, Plaintiffs have offered no evidence or case law in their Response, Second Amended Original Petition, or any other pleading, establishing they are owed any damages that have not been recovered or disclaimed. Thus, Plaintiffs conclusively failed to establish the essential element of damages and, as a result, their breach of contract action under the Working Interest Agreement against the Orca Defendants must be dismissed.<sup>9</sup>

**B. Plaintiffs did not address the issues raised in Orca Defendants' Motion for Summary Judgment, and thus have waived any arguments on these issues.**

Plaintiffs do not respond to Orca Defendants' Motion for Summary Judgment as to the Plaintiffs' conspiracy claims or "quasi estoppel" cause of action. Further, Plaintiffs are silent in response to Orca Defendants' request for Declaratory Judgment from this Court. Such silence has consequences. In Texas, the non-movant, in this case the Plaintiffs, must expressly present

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<sup>7</sup> Plaintiffs' Response to Orca Defendants' Motion for Summary Judgment at 7.

<sup>8</sup> See Craig Adams Affidavit.

<sup>9</sup> 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.).

to the trial court, in writing, any reasons for avoiding the movant's right to summary judgment.<sup>10</sup> Any summary judgment issues not raised in a timely, written response to the movant's summary judgment grounds are waived.<sup>11</sup>

As a result of their objective failure to address Orca Defendants arguments with respect to their conspiracy claim, their quasi estoppel cause of action, or Orca Defendants' Request for Declaratory Judgment, Plaintiffs have now waived any arguments on these issues. Accordingly, the Court should dismiss Plaintiffs' conspiracy claims against the Orca Defendants, dismiss Plaintiffs' invented "quasi estoppel" cause of action, and enter a Declaratory Judgment on all provisions identified by the Orca Defendants in their Motion for Summary Judgment.

### 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.

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<sup>10</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) (plurality op.); *Mercier v. Sw. Bell Yellow Pages, Inc.*, 214 SW.3d 770, 774–75 (Tex. App.—Corpus Christi 2007, no pet.) (op. on reh'g).

<sup>11</sup> *See* Tex. R. Civ. P. 166a(c) (“[T]he adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.... Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.”); *Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (reasoning that argument not expressly presented to trial court in response to motion for summary judgment was waived); *see also City of Houston v. Clear Creek Basis Authority*, 589 S.W.2d 671, 678 (Tex. 1979) (“With the exception of an attack on the legal sufficiency of the grounds expressly raised by the movant in his motion for summary judgment, the non-movant must expressly present to the trial court any reasons seeking to avoid movant's entitlement . . . .”); *Augusta Court Co-Owners' Ass'n v. Levin, Roth & Kasner*, 971 S.W.2d 119, 122 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (“[I]ssues a non-movant contends avoid summary judgment that are not expressly presented to the trial court by written answer or other written response to the summary judgment motion are waived on appeal.”).

Respectfully submitted,

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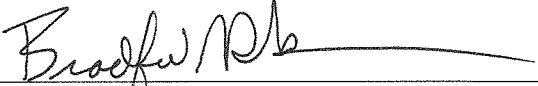
**ATTORNEYS FOR ORCA ICI  
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CERTIFICATE OF SERVICE

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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