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CAUSE NO. 2013-59098

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

PLAINTIFFS' RESPONSE TO ORCA'S MOTION FOR SUMMARY JUDGMENT

COME NOW XS Capital Investments, L.P. and Rural Route Holdings, L.P. ("Plaintiffs) and file this response to Orca's motion for summary judgment.[1] In support thereof, Plaintiffs would respectfully show unto the Court as follows:

I.
Background

This is an oil and gas case. On or about May 16, 2011, in exchange for $34,000,000 and a promise by Matador to drill ten initial wells, Orca sold to Matador a portion of its interests in several oil and gas leases in DeWitt, Karnes, Gonzales, and Wilson Counties. Purchase, Sale and Participation Agreement at ¶ 1(a), 2 (hereafter, "PSPA"). Both parties anticipated, and the PSPA expressly contemplates, the drilling of subsequent wells and the future assignment by Orca to third parties of its right to participate in those subsequent wells. *Id.* at ¶ 7.

Approximately two years later, on or about February 14, 2013, Plaintiffs and Orca entered into a Working Interest Purchase and Sale Agreement (hereafter, the "Working Interest Agreement"). Because Orca lacked the funds necessary to participate in the drilling and completion of two subsequent wells proposed by Matador, the Cowey 3H and Cowey 4H wells,

[1] As part of this response, Plaintiffs incorporate the attached Motion to Strike Orca's Summary Judgment Evidence, attached as Exhibit 1.

Orca contracted with Plaintiffs to pay those costs. In exchange for the payment of the drilling and completion costs of the two proposed wells, Orca agreed to assign to Plaintiffs its 50% working interest in leases related to the Cowey 3H and Cowey 4H wells. Article 1.3 of the Working Interest Agreement expressly states it is subject to the terms and provisions of both the Joint Operating Agreement ("JOA") between Orca and Matador, as well as the PSPA. Working Interest Agreement at 1.2. While the JOA has no limitations on transfer, the PSPA does require the consent of Matador for any assignment or transfer of rights. The PSPA specifically provides, however, that the consent of Matador "may not be unreasonably withheld." PSPA at ¶ 7(b).

In February 2013, Mr. Adam Sinn, the owner of the Plaintiffs personally met with Orca and Matador representatives in Matador's offices in Dallas, Texas to introduce himself and to discuss his intent and agreement to pay Orca's 50% share of the cost of the Cowey 3H well. After that meeting and in accordance with the terms of the Working Interest Agreement, on February 13, 2013, Plaintiffs paid directly to Matador (the operator under the JOA) $4,343,122 for the drilling and completion costs of the Cowey 3H well. This payment was made expressly for the benefit of Orca so that Orca would remain a Drilling and Consenting Party under the JOA. *Id.* at 11.2. Matador accepted directly from Plaintiffs and used these monies to drill and complete the Cowey 3H well.

The next day, on February 14, 2013, Orca assigned to Plaintiffs its 50% working interest in the leases related to the Cowey 3H well (the "Assignment"). Working Interest Agreement at Exhibit F. A true and correct copy of the Assignment is attached hereto as Exhibit 2 and incorporated herein.[2] The Assignment vested Plaintiffs with an undivided 50% fee simple determinable interest in the leases related to the Cowey 3H well, subject to the right of reversion to Orca of an undivided 25% working interest at Payout. As a consequence of the Assignment to

[2] *See also* Affidavit of Adam Sinn, attached hereto as Exhibit 3 and incorporated for all purposes.

Plaintiffs, no other party has a property right to the undivided 50% interest in the leases that is superior to the fee simple determinable interest of Plaintiffs.

On April 18, 2013, two months after their payment of the Cowey 3H well costs, Plaintiffs paid an additional $4,343,122 directly to Matador for the drilling and completion costs of the Cowey 4H well. Matador likewise accepted the monies directly from Plaintiffs and used those monies to drill and complete the Cowey 4H well. The total payments of drilling and completion costs for the Cowey 3H and 4H wells, paid by Plaintiffs directly to Matador for the 50% working interest share, were $8,686,244. The Cowey 4H well is located on the same leases as the Cowey 3H and the same lands described in the Assignment.

Both the Cowey 3H and the Cowey 4H were successful wells. To date, the leases covering the Cowey 3H and Cowey 4H wells have produced in excess of $15,000,000 worth of oil and gas.[3] On May 28, 2013, after the Cowey 3H and Cowey 4H wells both had been drilled and both were producing oil and gas, Orca notified Plaintiffs by email that the "deal was dead" and that Matador had decided not to consent to the assignment.

Thereafter, on June 12, 2013, in an attempt to justify their behavior, Orca and Matador entered into the First Amendment to the PSA (hereafter, the "Amended PSPA"). In that document, Orca instructs Matador to refund the $8,686,244 of Plaintiffs' funds utilized to drill and complete the Cowey 3H and 4H wells. Orca also falsely represents in that document that the Working Interest Agreement had been "rightfully terminated" with Plaintiffs. Additionally, Orca agreed in the Amended PSPA to indemnify Matador for all claims brought by Plaintiffs related to the Cowey 3H and Cowey 4H wells. Three days later, on June 17, 2013, Matador sent monies totaling $8,686,244 to Plaintiffs. Plaintiffs have not negotiated the two checks received from Matador.

[3] These estimates are derived from production information filed by Matador with the Texas Railroad Commission.

As a consequence of the Defendants' wrongful actions, instead of Plaintiffs owning 50% of the working interest in the Cowey 3H and 4H wells before Payout and 25% after Payout, Defendants claim that Matador owns a 100% working interest before Payout. After Payout, Defendants claim Orca will own a 25% working interest, Matador will own as 75% working interest, and Plaintiffs—who paid a full 50% ($8,686,244) of the drilling and completion costs—own and will own nothing.

II.
Response to Orca's Motion for Summary Judgment
Third Party Beneficiary

In its motion for summary judgment, Orca contends that "Plaintiffs assert, but cannot establish, that they are a third-party beneficiary under the PSPA." Orca Defendants' Motion for Summary Judgment at 2 (hereafter, "Orca MSJ").[4] This contention should be rejected for at least five reasons: First, because Plaintiffs are assignees of Orca's working interest in the Cowey 3H well and the associated leases; second, because Plaintiffs are sufficiently identified in the PSPA to qualify as third-party beneficiaries; third, because Matador met with Plaintiffs and on two subsequent occasions dealt directly with Plaintiffs by accepting from Plaintiffs the payments used to drill and complete the Cowey 3H and 4H wells; fourth, because a fact issue exists as to whether Matador consented to the assignment; and fifth, because a fact issue exists as to the reasonableness of Matador's alleged decision not to consent.

A. Plaintiffs are assignees

On February 14, 2013, Orca assigned its 50% working interest in the Cowey 3H well to Plaintiffs. Working Interest Agreement at Exhibit F. As a consequence of this assignment, Plaintiffs, as assignees, "stepped into the shoes" of Orca, the assignor. It is axiomatic that "[A]n

[4] Orca's Motion is more accurately a motion for partial summary judgment, as it does not address all causes of action pled (e.g., the breach of contract claim against Orca, as well as the fraud, tortuous interference, and money had and received claims against Matador.

assignee receives the full rights of the assignor...." Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994). Thus, as assignees, Plaintiffs can assert the rights of Orca under the PSPA related to the Cowey 3H well. *See* Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 420 (Tex. 2000); *see also* Southwestern Bell Tel. Co. v. Marketing on Hold, Inc., 308 S.W.3d 909, 916 (Tex. 2010).

B. Plaintiffs are third-party beneficiaries

Plaintiffs are third party beneficiaries of the PSPA. A contract confers third-party beneficiary rights if: (1) it 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. 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 dism'd)).

As mentioned above, both Orca and Matador anticipated, and the PSPA expressly contemplates, the drilling of subsequent wells and the assignment by Orca to third parties of its right to participate in those subsequent wells. By way of example, Paragraph 7 of the PSPA states:

> The Parties hereby agree that they and any of their successors, transferees, and assigns are bound by and subject to the joint operating agreement attached hereto as Exhibit "D" ("JOA"). It is contemplated herein that there will be only one JOA between the Parties with respect to the Leases. The Parties agree to amend Exhibit "A" to such JOA by inserting from time to time addenda in which the working interests of Seller, its designees, successors, transferees, and/or assigns and Buyer, its designees, successors, transferees, and/or assigns in each well drilled thereunder shall be duly noted.

Not only are successors, transferees, and assignees contemplated by the PSPA, they are made expressly subject to the JOA and the rights and obligations enumerated therein. The JOA contains numerous covenants running with the land which also bind the heirs, successors and assigns of the covenanting parties. Montfort v. Trek Resources, Inc., 198 S.W.3d 344 (Tex. App.—Eastland 2006, no pet.); First Permian, L.L.C. v. Graham, 212 S.W.3d 368 (Tex. App.—Amarillo 2006, pet. denied). As a consequence, the heirs, successors, and assigns (*i.e.*, Plaintiffs) are in a privity of estate relationship with the other signatories of the JOA (*i.e.*, Orca and Matador). There is mutuality of obligations between Plaintiffs, Orca, and Matador under the JOA, an express benefit conferred, as well as the right to sue for enforcement.

C. A fact issue exists regarding whether Matador consented to the assignment

Matador accepted more than four million dollars from Plaintiffs, on two different occasions, over a two month period, and utilized those funds to drill and complete the Cowey 3H and the Cowey 4H wells. A fact issue therefore exists as to whether this conduct and course of dealing constitutes express or implied consent to the assignment. At a minimum the doctrine of quasi estoppel prevents Orca and Matador from now taking inconsistent positions regarding the Working Interest Agreement and PSPA to avoid their corresponding obligations to Plaintiffs.

D. A fact issue exists regarding the reasonableness of Matador's failure to consent

The PSPA does require the consent of Matador for any assignment or transfer of rights. The PSPA specifically provides, however, that the consent of Matador "may not be unreasonably withheld." PSPA at ¶ 7(b). The question of "reasonableness" is inherently a question of fact and is "rarely appropriate for summary judgment." Capshaw v. Texas Dep't. of Transp., 988 S.W.2d 943, 945 (Tex. App.—El Paso, pet. denied); Zambory v. City of Dallas, 838 S.W.2d 580, 583 (Tex. App.—Dallas 1992, writ denied).

Damages

In its motion for summary judgment, Orca also contends that Plaintiffs cannot recover any damages. Specifically, Orca states, "Plaintiffs have knowingly and intentionally waived *all* damages available to them arising from Orca Defendants alleged breach of the Working Interest Agreement...." Orca MSJ at 2-3 (emphasis added). Plaintiffs concede limitation of liability provisions generally are enforceable in Texas; however, Orca reads the provision at issue too broadly.

The limitation of liability provision does not limit *all* damages (and would be unenforceable if it did). Rather, it limits only certain categories of damages. Absent from those categories of damages for which recovery is limited is the category of damages Plaintiffs seek—direct damages. As a consequence, Plaintiffs are entitled to recover the primary damages they seek, recognition of Plaintiffs' undivided 50% working interest before Payout and a 25% working interest after Payout, and payment of the associated production revenues attributable to the working interests in the Cowey 3H and 4H wells.

III.
Conclusion

Orca's motion for summary judgment should be denied. Plaintiffs are entitled to enforce the PSPA as both assignees and as third party beneficiaries. Fact questions also exist regarding whether Matador's conduct constitutes consent and whether the consent was withheld reasonably. Notwithstanding the limitation of liability provision, Plaintiffs are entitled to recover the direct damages they seek.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2014, all counsel of record have been served with the foregoing by electronic filing and/or by electronic mail, fax, hand delivery, or certified mail, return receipt requested, as follows:

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