IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
	§	
PRIMERA ENERGY, LLC,	§	**Case No. 15-51396-cag**
	§	
Debtor.	§	
	§	
	§	
FREDERICK PATEK, et al.,	§	
	§	
Plaintiffs,	§	
	§`	
VS.	§	**Adversary No. 15-05047-cag**
	§	
BRIAN K. ALFARO, et al.,	§	
	§	
Defendants.	§	

Defendants' Closing Statement,
Request for Findings and Conclusions,
and Brief in Support

Defendants Brian K. Alfaro, Kristi Michelle Alfaro, Alfaro Oil & Gas, LLC, Alfaro Energy, LLC, King Minerals, LLC, Silver Star Resources, LLC, 430 Assets, LLC, Ana & Avery's Candy Island, LLC, and the Brian and Kristi Alfaro Living Trust, hereby submit their Closing Statement, Request for Findings of Fact and Conclusions of Law, and Brief in Support.

Executive Summary

It is easy to see what happened here on the Plaintiffs' side of the case. Plaintiffs' counsel, eager to earn fees by "finding" fraud and soliciting clients to sue Primera and Mr. Alfaro, not only jumped the gun in filing the state-court lawsuit effectively shutting down the company, but then sought injunctive relief to further cripple it, and upon Primera filing bankruptcy allowed the trustee to sell off the remaining assets – most of which were positively cash-flowing – without contest.

They also fabricated a theme designed to scare Defendants with allegations of criminal behavior (i.e., paying commissions without a license) in the hopes of compelling a settlement. The problem was, Defendants knew they had done nothing wrong so they called Plaintiffs' bluff, resulting in Plaintiffs being forced to try a case built on sand.

The last thing that should happen is to adjudicate this case based on half-truths, selective parsing of all the evidence, "sloppy" use of pronouns designed to falsely implicate Mr. Alfaro personally when everyone knows the actions were done by other corporate employees,[1] and emotional "class warfare" insinuation and hyperbole.

From examining all the actual ***evidence***, the entire case is based on lies – but not any lies told by Mr. Alfaro. It is based on lies perpetrated by Plaintiffs eager for a huge payday, who selectively manipulated and cherry-picked company records to fabricate a "story" about something that never happened, all the while manipulating the legal system in – at best – an impetuous and self-defeating manner, all to the detriment of not only Mr. Alfaro but every ***other*** Primera investor as well. We know the Court is loath to find either gross incompetence or nefarious litigation conduct, but at some point, such a conclusion becomes too clear to ignore.

[1] For example, see: Transcript 041117, pp. 124, 176; 041317, pp. 190; 041717, pp. 50, 104, 145, 151, 156; 041817, pp. 33, 67, 110, 113, 118, 137 (sometimes multiple times on the same page). The Court was forced to admonish counsel over a dozen times during a six-day trial to stop using sloppy pronouns on an issue of grave importance to the case. It strains credulity to suggest this repeated "sloppiness" is merely accidental; rather, it evidences an intentional effort by counsel to misdirect attention away from the truth.

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3. There is no proof of fraud in a real estate transaction.

4. There is no proof of negligent misrepresentation.

5. There is no proof of securities fraud.

6. There is no proof of conversion.

7. There is no proof of a DTPA violation.

8. Unjust enrichment is an improper remedy in this case.

9. There is no proof of money had and received.

10. There is no proof of fraudulent transfers, and Plaintiffs do not have standing to make this claim in any event.

Abbreviations

The following abbreviations are used in order to lend consistency to the pleading and identify the documents being referenced:

PX___	Plaintiffs' trial exhibit (Bates page number)
DX___	Defendants' trial exhibit (Bates page number)
AOG	Defendant Alfaro Oil & Gas, LLC
Primera	Primera Energy, LLC, bankruptcy debtor
TR 041017, p. ___	Transcript dated (April 10, 2017), page number

Statement of the Case

This lawsuit began as a state-law case filed in Texas State District Court in April, 2015. It was removed to federal court by Defendants and became an adversary proceeding following the June 2015 bankruptcy filing of Primera, one of the original defendants in the state-court suit.[2] As such, this is not a case being adjudicated under the Bankruptcy Code, and this Court sits in the same position as a Texas State District Court adjudicating a legal proceeding under Texas state-law rules of decision. *Erie v. Tompkins*, 304 U.S. 64 (1938).

Once in federal court, Plaintiffs moved for a preliminary injunction which this Court denied based on lack of evidence and legal justification.

A bench trial was held April 10-18, 2017 in the Bankruptcy Court for the Western District of Texas, San Antonio Division, Hon. Craig A. Gargotta, presiding. Plaintiffs called a total of 23 witnesses (including only 17 of the named Plaintiffs), and then rested. Defendants rested after completion of Plaintiffs' case and did not call any witnesses. Both sides submitted exhibits during the trial.

At the conclusion of trial, the Court invited the parties to submit written closing statements, proposed findings of fact and conclusions of law, and any legal briefing they cared to submit; counsel were later informed that the deadline to do so was June 23, 2017.

[2] Primera Energy, LLC is not a plaintiff or defendant in the trial of this adversary proceeding, the Trustee having agreed to a judgment in favor of Plaintiffs early on. This refusal of Primera to participate in the trial shows Primera has no claims regarding any monies it paid to Mr. Alfaro or any other Defendant, or else Primera would have pursued those claims in the trial.

Summary of the Argument

Plaintiffs mainly complain in this lawsuit that Primera and AOG, and in particular Brian Alfaro as agent for Primera and AOG, told them:

(1) Primera and AOG were not going to pay transaction-based compensation (i.e., percentage commissions) to their salesmen, and

(2) all money Plaintiffs invested would be used to drill and complete the subject oil and gas wells.

Plaintiffs also complain that:

(3) Brian Alfaro was "overpaid" by Primera and thus was able to live an extravagant lifestyle allegedly using "their money," contrary to alleged promises otherwise, and

(4) Mr. Alfaro, AOG, and Alfaro Energy, LLC fraudulently transferred "investor monies" to other Defendants or to third parties.

As shown below, Plaintiffs' complaints (1) and (2) are belied by express language in the controlling Private Placement Memoranda (PPMs), complaint (3) is not theirs to make, but instead belongs – if to anyone – only to Primera (the company which supposedly overpaid Mr. Alfaro but has not complained about this), and complaint (4) has no merit whatsoever – even if Plaintiffs had standing to bring it – which they don't, because Plaintiffs are not creditors of any Defendant accused of transferring assets.

During trial, Plaintiffs did a great job pandering to the Court's emotions, but they did not meet their ***legal burden of proof*** as to the prima facie elements of any of their causes of action – the only thing that should be of any concern to this Court. Indeed, the trial revealed that Plaintiffs have a serious misunderstanding of how the oil & gas promotion business works, on every level. Since proving each and

every prima facie element of each cause of action is a requirement for recovery, all of Plaintiffs' claims should be dismissed and a take-nothing judgment rendered.

For fraud (proof of which is required for Plaintiffs' claims of common-law fraud, fraud in the inducement, and securities fraud), not only did Plaintiffs fail to provide evidence of any false representation of fact made by any Defendant, but they all affirmatively and expressly testified to the following:

a. They all signed PPMs which contained only ***true*** factual representations and projections/estimates of future events that are unknowable and cannot support the prima facie element of "reasonable" reliance as a matter of law;

b. In their Subscription Agreements, Plaintiffs all made representations that they ***did*** not – and they ***would*** not – rely on any statements outside of those contained in the PPMs, and if Plaintiffs had not made those representations, they agreed they would not have been allowed to invest in the ventures;

and

c. All projections and estimates of future performance found in the PPM or spoken by Primera employees were only that: projections and estimates, not promises or assurances of future events.

Even then, if any promises were made by Defendants in the written PPMs or Subscription Agreements that were not fulfilled, that would trigger only a cause of action for breach of contract, not fraud, as a matter of Texas law. Because Plaintiffs elected not to pursue any claims for breach of contract, any breaches of contract (which Defendants deny happened) have been rendered legally irrelevant.

Further, none of the Plaintiffs testified that they suffered any harm proximately caused by anything Defendants are alleged to have done or not done. Indeed, even though Plaintiffs complained that Primera mismanaged the funds they

paid to purchase their working interests in the wells (i.e., Primera supposedly paid transaction-based compensation, overpaid Brian Alfaro, etc.), there was no evidence that Plaintiffs were ever asked to pay any ***additional*** monies over and above their initial investments (the "budget"), other than for post-completion costs based on extraordinary events or conditions (e.g., the post-completion collar and casing failures on Screaming Eagle 3H), or regular, agreed, lease-operating expenses. If Primera had failed to drill and complete any of the wells with the money originally paid by Plaintiffs for their working interests, then perhaps Plaintiffs' claims would have merit. But that admittedly did not happen; all wells were drilled, and all wells with the exception of Screaming Eagle 6H and Buda Blackhawk,[3] were completed, on budget, as set forth in the AFEs that Plaintiffs and Primera agreed to be bound by.

In addition, Plaintiffs testified that if there was any money left over in the budgets after the wells were drilled and completed, they understood and agreed that those extra funds would become the property of Primera.[4] Since those extra funds were Primera's money, ***Plaintiffs*** cannot complain of how those extra funds were spent. Thus, even if Primera overpaid Mr. Alfaro, or even if Primera paid transaction-based compensation to its employees (both of which are denied and contradicted by the proof in the record), no such payments proximately caused Plaintiffs any harm. Other arguments (all without proof) about certain vendors of

[3] Defendants were prevented from completing either of those two wells based on the State Court injunction and subsequent sale of the properties by the Trustee.

[4] This was fully disclosed in the PPMs and thus known to any investor that chose to read them. See, e.g., PX75, p. 8786 (3H); PX76, p. 8887 (4H); PX77, p. 9026 (6H); TR 041217. p. 75.

Primera "not being paid" are without import since there was no proof that the claims by those vendors were valid and thus should have been paid.[5]

Plaintiffs repeatedly testified that Primera and Mr. Alfaro spent "their money" improperly, but Plaintiffs admitted that no money was ever given directly to Mr. Alfaro by any Plaintiff; all of their money was paid to Primera or AOG in direct exchange for working interests, and that money then became Primera's or AOG's money. That is, Plaintiffs fail to acknowledge that once they exchanged their money for the working interests Primera and AOG sold to them (entitling them to ownership of the wells and valuable tax deductions, which all of them took), the purchase monies ceased to belong to them and instead belonged to Primera or AOG. Plaintiffs thus lack standing to assert any payment-based claims because it was not ***their*** money – but Primera's and AOG's money – that was being spent. Notably, Primera and AOG are not plaintiffs in this case and have not complained about any alleged "overpayments" or other alleged "improper" payments.

Plaintiffs' claims are all without merit, as detailed in the Argument below.

[5] Businessman Rick Reiley reasonably testified – twice – that if a vendor's claim was not valid, Primera was fully expected ***not*** to pay it. TR at 041117, pp. 64-65 and 138-39. None of the vendor claims have yet been adjudicated, so all are subject to contest at this time. Testimony about those claims not being "disputed" in the bankruptcy schedules was fully explained in the trial as relating only to whether the claims had documentary support, not whether they were valid and owing. See TR 041317, pp. 189-196 (misleading examination by Plaintiffs' counsel), pp. 243-49 (testimony about actual meaning of "disputed" designation in schedules).

Relevant Facts

Some of the following facts are not evidentiary or are not disputed and are included here for context. Record evidence of facts is provided when there is any question about their proof; record pinpoints are in the footnotes. In addition, Defendants incorporate the Pre-Trial Order submitted by the parties before trial, including all of its agreed/stipulated/uncontested facts, some of which are restated below for context. Finally, Defendants do not cite the record locations where every instance of every fact is found; obviously, the Court does not need to eat an entire sheep to know what mutton tastes like.

1. Plaintiffs are working interest owners in various oil and gas wells that were promoted and sold by Primera and AOG.[6]
2. Each Plaintiff is an "Accredited Investor," meaning they reported to Primera and AOG, before investing, that they had a minimum net worth or minimum level of income making them financially suitable to invest in the wells. But for those representations, among others, Plaintiffs would not have been able to purchase any working interests offered by Primera and AOG.[7]
3. Each Plaintiff was provided with a Confidential Private Placement Memorandum (PPM) describing in detail each investment/well they were considering participating in ***before*** they invested.

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[6] The seller of the Montague Legacy 1H and 2H (partial) wells was AOG. This entity changed its name to "Alfaro Energy, LLC" in April 2010, but for purposes of this case, we will continue to refer to it as AOG for consistency with the underlying documents. Primera sold the other interests at issue here.

[7] See, e.g., TR 041117, p. 12 (Vince Gillette); 041217, pp. 253-54 (Rick Griffey); 041217, pp.152-53 (Brian Hubler).

4. Each Plaintiff signed a Subscription Agreement for each investment in which they made representations about their financial wherewithal and expressly agreed to be bound by the PPMs.

5. Importantly, the Subscription Agreements all contained, *inter alia*, representations by Plaintiffs that if false, would have kept Plaintiffs from becoming investors, including these:

   a. they were not relying on any information, either written or verbal, other than the information contained in the PPMs in making their decisions to invest (DX 4, p. 6241, ¶f);

   b. any projections made by Primera or AOG in the PPMs were "merely estimates of possible results and not predictions of actual results" and investors would not rely on any such estimates or projections in making their investment decisions (DX 4, p. 6241, ¶h);[8]

   c. they had the opportunity to ask any questions they might have had prior to investing (DX 4, p. 6240, ¶e);[9] and

   d. they were fully aware of the high degree of risk in the investments whereby they might lose their entire investment and receive no return (DX 4, p. 6240, ¶f).[10]

6. Each well had a PPM that included an Authority for Expenditures or "AFE" setting forth the estimated cost to drill and complete the well. This cost estimate we refer to herein as the well's "budget."

[8] Estimates or projections only: TR 041017, p. 116; 041217, pp. 11, 25, 19-20, 51-52, 92, 113.

[9] Every Plaintiff who said they asked any questions testified that Primera answered all of their questions to their satisfaction, and no Plaintiff testified that the answers they received were incorrect. See, e.g., TR 041017, pp. 208-09 (David Davalos); 041117, pp. 46-47 (Rick Reiley); 041217, pp. 142, 145-46 (Hubler); pp. 181, 184-85 (Walls); p. 324 (Tom Gillette).

[10] All other Subscription Agreements contain similar or identical language to DX4 (2H). See, e.g., PX 73 (1H), p. 9629; DX106 (3H), p. 7667; DX 109 (4H), p. 7783, DX 15 (6H), P. 6358; DX 33 (Buda), p. 6532.

7. If the incurred costs to drill and complete the well were less than the budget, the extra monies in the budget not spent on such costs would become the property of Primera by agreement.[11]

8. The PPMs all provided that if the operator experienced any unanticipated events while drilling or completing the well, investors would be responsible for paying their pro rata share of any extraordinary expenses necessary to drill or complete it. That is, the budget for each well was only for the ***anticipated*** and ***estimated*** maximum costs for ordinary drilling and completion, not for unanticipated – and thus impossible to estimate – costs that might be incurred from unanticipated events.

9. Once the wells were drilled and completed on budget, investors agreed to be responsible for their pro rata share of all post-completion costs, which are usually called "Lease Operating Expenses" or LOEs. Likewise, investors were entitled to receive their pro rata share of any net revenues obtained from production and sale of oil and gas from their wells, and any tax benefits from their investments. LOEs are not part of the budget in the PPMs; the budget is only for anticipated costs up to completion.

10. Most of the wells (Montague Legacy 1H, 2H, Screaming Eagle 1H, 2H, 3H, and 4H; there was no SE 5H well) were drilled and completed, on budget.[12]

[11] See, e.g., TR 041717, p. 215-16; record citations in fn 4, *supra*.

[12] See TR 041017, pp. 81-82 (3H and 4H), 103 (6H); 171-72 (all but 6H and Buda); 041117, p. 130 (2H). In addition, the fact that all the wells except Buda were drilled does not appear to be contested in this case. TR 041017, p. 83 (Mr. Barchus).

11. The Screaming Eagle 3H well experienced post-completion collar and casing failures[13] that well investors were contractually required to pay to have repaired. However, the failures were likely attributed to the negligence of the casing company, Tejas Tubular, and Primera filed a lawsuit against Tejas Tubular to recover these costs; that lawsuit is still pending.[14]

12. Screaming Eagle 6H was drilled but not fracked and completed.[15] Plaintiffs presented no evidence as to why this well was not fracked. In fact, the 6H well was not completed because it was discovered, post-drilling, that the engineer, Brennan Short, had mis-located the well bore over the hard line for the well lease, and no production was therefore allowed from that well until the well bore was moved and correctly placed.[16] Primera has filed a lawsuit against Brennan Short to recover its expenses in moving the 6H well bore.[17] Investors in 6H have not paid the cost to move the 6H well bore, and the state-court lawsuit and bankruptcy filing prevented Primera from seeking those funds and getting the well bore correctly situated.[18]

13. Blackhawk Buda was a fairly new project at the time the state-court lawsuit was filed. It was not drilled or completed because over half of the subscriptions had not been paid at the time of the state-court lawsuit,

[13] The collar and casing failures do not appear to be contested facts. TR 041017, pp. 41-42.
[14] TR 041017, pp. 234-35; TR 041217, pp. 318-19.
[15] TR 041217, pp. 235-36.
[16] TR 041017, p. 46, TR 041717, p. 64.
[17] TR 041017, p. 46.
[18] Id. Of course now, since all of these wells have been sold by Primera's bankruptcy trustee, no further expenses or activities by the parties herein are anticipated.

which suit prevented Primera from obtaining the funds necessary to drill and complete it.[19]

14. Primera is also the defendant in several lawsuits filed by vendor companies that provided mostly post-completion work on the various wells. Primera claims that none of those lawsuits are meritorious. Whether meritorious or not, there is no proof that any of the lawsuits filed by vendor companies against Primera had any impact whatsoever on the drilling, operation, or production of oil or gas from the subject wells, or increased in any way Plaintiffs' costs to drill or complete the wells.[20]

Argument

1. The Plaintiffs who did not show up for trial or present their case may not recover on their pleaded claims, and the claims of all those Plaintiffs must be dismissed.

This adversary proceeding began with over 55 Plaintiffs. Of the 28 remaining Plaintiffs at the start of trial, only 17 of them testified and provided any testimony or other evidence on the various elements of their claims.[21] Some claims required identification of alleged oral statements made to Plaintiffs by Defendants, and proof of how Plaintiffs may have reasonably relied on same.

It is axiomatic that a plaintiff called to trial is required to submit evidence and testimony in support of his causes of action. This is such a pillar of American

[19] TR 041017, p. 46.

[20] When vendor companies file lawsuits, or even file liens on the properties, that does not prevent or stop production, it only creates a possible liability to pay the charges the vendor companies claim are owing provided, of course, that the vendor's claims prove to be valid. Obviously, invalid claims impose no obligation to pay them; that is what it means to be "invalid."

[21] The 17 Plaintiffs who testified were (in order of appearance): Jim Peters, Richard Collins (for DC Oil), Buford Salmon, William Crawford, Daniel Davalos, David Davalos, James Reiley, Rick Reiley, Betty Reiley, Dieter Janzen, Vince Gillette, Brian Huber, Sharon Walls, Rick Griffey, Marjorie Gillette, Tom Gillette, and Ed Gillette.

jurisprudence it is difficult to even find a case that expressly states this. Fortunately, because of the manner in which the burden of proof is allocated, that is not needed.

Instead, what is needed is for ***Plaintiffs*** to produce a case – if they can do so – in which a plaintiff has ever recovered a judgment when that plaintiff failed and refused to support its claims at trial with evidence and testimony, relying solely on its allegations made in pleadings drafted by its attorneys. After diligent research, Defendants' counsel were unable to unearth such a case, or indeed any instance in which such a preposterous argument has even been ***advanced*** by a competent attorney.

Consider: what if there was only a single plaintiff in this case? Would that plaintiff be entitled to judgment if its attorney presented only its pleadings, but no testimony or evidence in support of its claims? The question answers itself. When a plaintiff fails to show up for trial, the court is required to dismiss its claims for want of prosecution. Thus, all claims by all Plaintiffs who did not appear and prove up their claims must be dismissed.

And for the Plaintiffs who did show up for trial, they did not provide any evidence of most of the prima facie elements of their various and sundry causes of action, and thus their claims also warrant dismissal as detailed below.

2. There is no proof of the prima facie elements of fraud.

a. The prima facie elements of fraud are not supported by evidence.

To prove fraud, a plaintiff must prove, with admissible evidence, each of these elements:

1. The defendant made a representation of fact to the plaintiff;

2. The representation was material;

3. The representation was false;

4. When defendant made the representation, the defendant:

    a. knew the representation was false, or

    b. made the representation recklessly, as a positive assertion, and without knowledge of its truth;

5. The defendant made the representation with the intent that the plaintiff would act on it;

6. The plaintiff reasonably relied on the representation and acted on it; and

7. The representation and action it induced proximately caused the plaintiff's injury.

Zorrilla v. Aypco Constr. II, LLC, 469 S.W.3d 143, 153 (Tex.2015).

A plaintiff's reliance must be both actual and justified (i.e., reasonable) before it can be said to suffer a compensable injury. *Miller Global Props, LLC v. Marriot Int'l, Inc.*, 418 S.W.3d 342, 347-48 (Tex.App.—Dallas 2013, rev. denied). "To vitiate a contract, the alleged fraud must be something more than oral representations

that conflict with the terms of the written contract. … A party that enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement." *Id.* at 348; *D.R.C. Parts and Accessories, LLC v. VM Motori, S.P.A*, 112 S.W.3d 854, 859 (Tex.App.—Houston [1st Dist.] 2003, rev. denied)(*en banc*).[22]

For a fraud-in-the-inducement claim, a plaintiff must prove each of these same elements, ***plus*** its "reliance" burden is heightened in that it must prove it entered into a binding agreement based on the defendant's false representation. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex.2001).

For statutory fraud in a real estate transaction, a plaintiff must prove all the elements of common law fraud ***plus*** prove that the transaction involved the purchase and sale of real property.[23]

Also applicable to our case, when the only damages or harm to a plaintiff results from breach of a duty found in a contract, the plaintiff's claim may not be "artfully" pleaded into a tort/fraud action. *Metropolitan Life Ins. Co. v. Haden & Co.*, 158 F.3d 584, 1998 WL 648603 at *6 (5th Cir. 1998)(finding statute of frauds bars fraud claim in the presence of a written contract).[24]

If Plaintiffs are allowed a fraudulent inducement claim based on allegations of statements that are directly contradicted by express language in the PPMs, it will

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[22] Defendants anticipate that Plaintiffs will make the exact same counter-argument to this law that was made by the ***dissent*** in *D.R.C. Parts*. Obviously, that dissent is not the law.

[23] In Texas, the sale of oil & gas working interests is considered a sale of real property, triggering the statute of frauds, Tex.Bus.&Comm. Code, Chapters 26 and 27. *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 266-67 (Tex.App.–Corpus Christi 1994, writ denied).

[24] The *Met Life* case provides a good primer on many of the reasons why Plaintiffs' fraud claims lack merit.

be the first such result in U.S. history. Indeed, that result would render the doctrine of parol evidence and the statute of frauds complete nullities, portending a dangerous mutation of commercial/contract law as we know it.

The statute of frauds, Texas Business & Commerce Code §26.01, requires all material terms of most contracts (including the contracts here in question; see TB&C Code §26.01(b)(4)) to be in writing in order to be enforced. *Id*. Here, the terms Plaintiffs rely upon for their fraud claims were not included in their written contracts and thus will not support a cause of action as a matter of law.

Because Plaintiffs failed to prove several of the prima facie elements of a common law fraud action, all claims requiring that proof must be dismissed.

b. No evidence exists that any false statements of fact were made by Defendants; indeed, every Plaintiff testified that all statements contained in the PPMs were (a) factually true, (b) projections of uncertain future events, or (c) sales "puffing," none of which support a claim of fraud.

All Plaintiffs who were asked testified that all statements contained in the PPMs were factually true.[25] Thus, logically, any statements Plaintiffs claim to be false must have been ***verbal*** statements, made by Primera employees, ***outside of*** the contracts, and because the law only considers statements made about issues not expressly addressed in the contract language, those statements must have been on issues ***not*** addressed in the PPMs.

But Plaintiffs did not testify that any Primera employee, including Mr. Alfaro, ever verbally made any false statements of fact to them, or statements

[25] TR 041117, pp. 136, 140-41 (Ms. Reiley); TR 041217, pp. 145-46 (Mr. Huber); p. 190 (Ms. Walls). No Plaintiffs testified contra.

outside of PPM issues. The only statements Plaintiffs point to made by Mr. Alfaro or Primera employees involved projections and estimates of future events such as how compensation would be paid and expected production.[26] As a matter of law, projections and estimates of future happenings will not provide the basis for a fraud claim because it is unreasonable as a matter of law to rely on such statements in making investment decisions. *Lake v. Cravens*, 488 S.W.3d 867, 891 (Tex.App.—Fort Worth 2016, pet. pending)(case contains a good survey of the law applicable to claims of fraud based on projections or estimates of future events)(emphasis added):

> An actionable representation is one concerning a material ***fact***; a pure expression of opinion will not support an action for fraud. *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex.1995). "A material fact is one in which a reasonable person would attach importance to and would be induced to act on in determining their choice of actions." *Tukua Invs., LLC v. Spenst*, 413 S.W.3d 786, 798 (Tex.App.–El Paso 2013, pet. denied). "An honest but erroneous expression of opinion or belief is not fraud.... Since a statement concerning a matter not susceptible of exact knowledge by the speaker is no more than the expression of a belief, one making such a statement ***in good faith*** is not liable for its falsity." *Harris v. Sanderson*, 178 S.W.2d 315, 319 (Tex.Civ.App.–Eastland 1944, writ ref'd w.o.m.) (emphasis in original). Whether a statement is an actionable statement of "fact" or merely one of "opinion" often depends on the circumstances in which the statement is made. *Transp. Ins. Co.*, 898 S.W.2d at 276. Relevant circumstances include the statement's specificity, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future. *Id.*

[26] TR 041217, pp. 255-56 (Mr. Rick Griffey), is a good example of this testimony. Every other witness who testified about "false statements" qualified his or her testimony by confirming that those statements were estimates or projections of future, unknown events. TR 041017, pp. 116, 162, 165; TR 041117, p. 178; TR 041217, pp. 19-20, 27, 51-52, 59-60, 130-31 (Mr. Huber candidly admits he knew he could NOT rely on such estimates which, of course, is expressly spelled out in the PPMs and thus binds all Plaintiffs), 134-35, 153.

Not only did Plaintiffs not point to any false statements of ***fact***, but there is no evidence that anything any Primera employee ever said was said in bad faith.

c. No evidence exists that any representations made by Defendants were "material" as that term is defined by law.

The "materiality" element in a fraud claim is sometimes overlooked but is actually vitally important. It requires a plaintiff to prove that ***a reasonable person*** would attach importance to, and be induced to act on, the information in determining whether to make a transaction. *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W.3d 323, 337 (Tex.2011). In *Italian Cowboy*, the Supreme Court cautioned courts to use the "reasonable man" standard rather than the self-professed materiality opinions of a biased plaintiff.

Here, the two alleged factual representations that Plaintiffs claim support their fraud claims are that Primera would not pay transaction-based compensation to its salesmen, and that Primera would only use the invested funds to drill and complete the wells and not to otherwise benefit Primera. Taking these one at a time reveals their lack of merit and immateriality to a reasonable man.

First, Plaintiffs' selective "cherry picking" of the actual compensation data borders on fraud on the Court. Plaintiffs claimed that "over 100 times" during a three-year period Primera paid compensation or draws to its employees that were at or near 10%, apparently hoping to get the Court to believe all salesmen were paid

commissions of 10% in violation of the PPM representation that no "transaction-based compensation" would be paid.[27] But the truth is far different.

Actually, during an 18-month period (January 2, 2013 to June 23, 2014), over 1,150 individual investor deposits were made. Of those, there were less than 80 compensation and draw payments made that were within plus or minus 1% of 10%. That means over 1,000 investor deposits were made where there was either no corresponding payment/draw made ***at all***, or the payments/draws were for an amount nowhere near 10%. All Plaintiffs' "10% numbers" prove is that someone can cherry pick any data to support any claim they care to make – as long as they are not too interested in telling the whole truth.

It makes perfect sense that the salesforce would be paid their salaries ***after*** investor monies hit Primera's bank account because those funds were Primera's primary source of revenue to pay ***all*** of its expenses, including the salaries of its employees. But the way in which Primera calculated those salaries and bonuses is not material. The onus of "transaction based compensation" is not about how the salesmen were paid, but whether those commissions would be paid ***in addition to*** the amount being invested by investors.[28] That is, if an investor paid $100,000 for his percentage WI, as long as he was not then tagged another 10% on top of that for "sales commissions," why does he care how Primera calculated the salaries of its

[27] If Plaintiffs argument were valid, we would see a 10% commission paid for each and every transaction Primera engaged in during the entire time it was selling interests in the wells. But of course, that is not what we see; we only see carefully-selected and coincidental 10% numbers for a very small percentage of the revenues generated over the course of the three years at issue.

[28] In other words, true commissions are defined as the amount paid to a salesman that does not translate into the value of the investment. For instance, if I buy a $100,000 investment and pay a 10% commission, I am actually required to pay the seller a total of $110,000, of which $100,000 is for the investment and the other $10,000 is the commission. There is no evidence that any such transactions occurred with Primera.

salesmen (percentage, hourly, weekly, bi-weekly, monthly, etc.)? An average, reasonable investor is only interested in what he pays in total and what he gets in return, and as long as money he parts with is used for its intended purposes – as it was here – other accounting details are irrelevant.

Not to be forgotten, Plaintiffs admit that all funds in the budgets that were not used to pay for the expenses of drilling and completion became the property of Primera, even if the AFEs did not have a separate line item for those monies.[29] Accordingly, all of those funds could be spent by Primera as it deemed fit ***because any such expenditures did not impact Plaintiffs in any way financially***. An accounting detail that does not financially impact a reasonable investor is, by definition, not material.[30]

Also, true commissions are monies earned as soon as the income is received, and they are a binding contractual obligation of the company to pay to the salesman.[31] Here, there is zero testimony that the bonuses paid to Primera employees were obligations of the company or tied solely to sales. Indeed, the evidence in the case is that all bonuses were discretionary and based on many factors other than the amount of money the salesmen raised for the company.[32] Mr.

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[29] See Record references, fns. 4 and 11, *supra*.

[30] It is obvious that all claims related to "commissions" were made by Plaintiffs only to insinuate that Mr. Alfaro violated securities law in paying commissions without a broker license, and that such arguments have nothing to do with the merits of Plaintiffs' claims but were made only to scare Mr. Alfaro into settlement. Indeed, this insinuation is the only reason Plaintiffs brought up the default FINRA ruling in the first place. To be confused about this is to be confused about the quintessential truth of this entire case: it is and always was a shakedown.

[31] See TR 041317, pp. 215 and 261, where a CPA – called as a witness by the Plaintiffs – explains what "commissions" really are, and that they were ***not*** paid in this case. See also TR 041317, p. 162, where salesman Hundley denies commissions were paid. In fact, no Primera salesman testified he was ever promised, or paid, commissions.

[32] TR 041317, p. 175; TR 041717, pp. 167-68 (indeed, some of the paperwork showing bonuses was inaccurate as to what was actually paid out), 173; TR 041817, pp. 20-21, 57.

Alfaro, the person at Primera who approved all salaries[33] and bonuses, was clear that there were a whole range of factors that went into his decisions on bonuses, and none of those factors were tied directly to the success of the sales force.[34] Instead, they were based – as are all such discretionary bonuses – not only on sales but on other factors such as client development, help with marketing, help with training, public/community service, charity, client servicing, and professional growth by the salesmen.[35]

Second, Plaintiffs contend that Primera represented it would use AFE funds identified in the PPMs to drill and complete the wells. But Primera did exactly that and there is no proof otherwise. Plaintiffs were not charged any additional monies for standard drilling and completion expenses that were not outlined and agreed to in the AFE budgets. Thus, even if a reasonable investor would expect Primera to honor its promise to use invested funds to drill and complete the wells, ***that is exactly what happened.***[36]

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[33] Plaintiffs conveniently leave out of their calculus the undisputed fact that Primera salesmen were paid ***salaries*** in addition to (maybe) discretionary bonuses. Would a rational commission salesman ever agree to such an arrangement, where he received his "commissions" for sales he makes on a ***discretionary***, as opposed to a fixed and binding, basis? Similarly, would a salary-only salesman ever agree to an arrangement where payment of his salary was purely ***discretionary***? These questions answer themselves.

[34] Obviously, since Primera's main source of revenue was from investors buying shares in the wells, Primera's monies were not available to spend on ***anything*** until after the investors paid for their working interests. But that is a far cry from saying there is a one-to-one correlation between investor payments and the monies paid to Primera salesmen, and all the actual evidence in the case proves that such commissions were ***not*** paid.

[35] TR 041817, pp. 20-21. This testimony was uncontroverted, even though Plaintiffs put three different Primera salesmen (Hundley, Rodriguez, and Alfaro) and two of its accounting personnel (Perez and Turner) on the stand. Since Plaintiffs and Plaintiffs' counsel were not employed by Primera, their guesses about how the compensation was calculated and paid are just that: guesses.

[36] Let's say a well's budget was $10,000,000. If it cost only $9,000,000 to drill that well, the remaining $1,000,000 belonged to Primera. So whether Primera paid its employees part of the $1,000,000 on a percentage or hourly or weekly or monthly basis, what possible difference could that make to a reasonable investor? The investors paid $10,000,000 either way, and they were not entitled to return of any funds *below* that $10,000,000 number no matter how that extra money was calculated, so why do they care (i.e., why is it "material")?

d. No evidence exists of any knowledge by Defendants that anything they said was untrue or misleading.

To prove fraud, the plaintiff must show that the defendant knew his statements were false at the time they were made, or made them recklessly without knowledge of their truth and as positive assertions. However, Plaintiffs in this case offered no proof of either of these required elements (knowledge or recklessness) regarding any statements made.

e. No evidence exists that Defendants intended for Plaintiffs to rely on anything that was not contained in the PPM and other project documents.

Not only was there no proof that Defendants intended for Plaintiffs to rely on anything they said outside of the statements found in the PPMs, but every Plaintiff expressly and affirmatively stipulated that they were ***not*** relying on any such statements in making their investment decisions ***and*** the PPMs themselves confirm this understanding.[37] This is conclusive evidence that Defendants intended ***exactly the opposite*** of what Plaintiffs are required to prove: Defendants intended that Plaintiffs would ***not*** rely on any such non-contract statements and contractually prohibited them from doing so.

Texas law is clear: contract provisions in which plaintiffs stipulate that they will not, and have not, relied on statements outside those written in a contract are enforceable and preclude any claim for fraud or fraudulent inducement. This is shown in binding Texas law:

[37] All of the Subscription Agreements signed by the Plaintiffs contained identical or substantively-similar language, and all witnesses who were asked confirmed they knew they could not rely on extra-PPM information in deciding to invest. See DX7, p. 6260 (M1H); DX9, p. 6285 (M2H); DX10, p. 6296 (SE2H); DX14, p. 6345(SE3H); DX16, p. 6369 (SE4H); DX15, p. 6359 (SE6H); DX 33, p. 6522 (BUDA).

> "[A] disclaimer of reliance on representations, 'where the parties' intent is clear and specific, should be effective to negate the element of reliance.'" *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex.2008) (quoting *Schlumberger*, 959 S.W.2d at 179). "[P]arties who contractually promise not to rely on extra-contractual statements—***more than that, promise that they have in fact not relied upon such statements***—should be held to their word." *Forest Oil*, 268 S.W.3d at 60 (emphasis in orig.). When knowledgeable parties expressly discuss material issues during contract negotiations, but nevertheless elect to include a waiver-of-reliance provision, courts will generally uphold the contract. See *id*. at 58. An all-embracing disclaimer of any and all representations shows the parties' clear intent. *Id*. However, "facts may exist where the disclaimer lacks 'the requisite clear and unequivocal expression of intent necessary to disclaim reliance' on the specific representations at issue." *Id*. at 60 (quoting *Schlumberger*, 959 S.W.2d at 181). As a result, when determining whether a waiver-of-reliance provision is binding, courts must always examine the contract itself and the totality of the surrounding circumstances, including whether: (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties discussed the issue which has become the topic of the dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear. *See Forest Oil*, 268 S.W.3d at 60. "If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties[, who were] advised by the most knowledgeable legal counsel, is grievously impaired." *Id*. at 61.

Worldwide Asset Purchasing, LLC v. Rent-A-Center East, Inc., 290 S.W.3d 554, 566 (Tex.App.—Dallas 2009, no pet). If this were not the law, written contracts would be meaningless, which would cause all of the world's business to grind to a screeching

halt and open the courts to all sorts of he said-she said, after-the-fact, self-serving, and nefarious assertions – just like we have here!

The non-reliance provision signed by Plaintiffs could not be more clear (this paragraph is representations made by investors):

> **m.** I have relied solely on the information contained in the Confidential Private Placement Memorandum and the attachments thereto furnished to me by the Company, and further, I hereby warrant that no representations or warranties have been made to me by the Company of its agents as to the tax consequences of this investment, or as to any profits, losses or cash flow which may be received or sustained as a result of this investment, other than those contained in the Confidential Private Placement Memorandum. My decision to invest in the Program has been based solely upon the information found within the Confidential Private Placement Memorandum and not upon oral statements by the Company, its agents or employees;[38]

Further, Plaintiffs testified that they were able to ask questions about the PPMs and in fact did ask questions relating to both the "transaction based compensation" and the use-of-funds issues, and then chose to execute the waiver provisions asserting that they made their investment decisions without relying on these discussions.

> **e.** I have had the opportunity to ask questions of, and receive answers to those questions from officers and employees of the Company, concerning the terms and conditions of the Program, and the proposed business of the Company, and that all such questions have been answered to my full satisfaction.[39]

[38] DX15, p. 6359.
[39] DX15, p. 6358.

Even more, when the parties to the contract are sophisticated, "accredited" investors in oil & gas ventures, such non-reliance provisions are fully enforceable and preclude later claims based on alleged reliance that has been disclaimed:

> When knowledgeable parties expressly discuss material issues during contract negotiations, but nevertheless elect to include a waiver-of-reliance provision, courts will generally uphold the contract.

Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 58 (Tex.2008).

Here, Plaintiffs warranted in their Subscription Agreements that they are "accredited" investors, meaning they have a level of financial wherewithal and sophistication to understand these investments, which must include understanding the relevant documents:

> **n.** I have knowledge and experience in financial and business matters and am capable of evaluating the merits and risks of an investment in the Program, and am able to bear the economic risks of my purchase, and, furthermore, I have had the opportunity to consult with my own attorney, accountant and/or purchaser representative regarding an investment in the Program[40]

To allow Plaintiffs to make the representations and warranties they would not rely on outside statements in order to be allowed to make these investments and obtain the benefits therefrom (revenues, tax deductions, etc.), but then disclaim those same representations and warranties when it suits them to do so, is inherently unjust and contrary to Texas law.

[40] DX 15, p. 6359. This representation was in addition to the entirety of the Subscription Agreements, wherein Plaintiffs all certified their suitability for the investment.

f. No evidence exists that Plaintiffs relied to their detriment on anything Defendants are accused of saying.

Even if Plaintiffs reasonably relied on non-contractual statements made by Defendants (which they couldn't, as a matter of law and their agreement), and even if Defendants were shown to have intended such reliance (which is the opposite of what, in fact, happened), any such reliance has not been proven to have harmed Plaintiffs in any way.

Plaintiffs claim they "relied" on statements made by Defendants not to pay transaction-based compensation to salesmen, and that Primera would use all invested funds to drill and complete the wells. But as shown above, claims related to paying transaction-based compensation could not have impacted the decision to invest because all such compensation was paid, if at all, only from Primera's assets and not from Plaintiffs' funds and long after the investments were made, and Primera ***did*** use the invested funds to drill and complete the wells; Plaintiffs were never asked for any monies over the budget and LOEs for any purpose, so their understanding of what would become of the purchase money they invested (drill and complete the wells, with any extra going to Primera to do with as it pleased) was 100% fulfilled.[41]

[41] Are Plaintiffs seriously arguing that they somehow maintained some sort of control over what Primera did with monies they agreed would belong to Primera? No buyer of any product believes it may dictate to the seller what becomes of the purchase-price money once it is paid and the transaction is completed. As absurd as that sounds, it appears to be Plaintiffs' entire argument here.

g. Even if statements or promises exist in the PPMs that Primera or AOG did not fulfill, that would only be actionable as a breach of contract under Texas law, not fraud, and Plaintiffs chose not to bring a breach of contract claim.

Under Texas law, if a promise is made in a contract, and the action promised is not a duty otherwise found in common law, then a breach of that promise will only support a cause of action for breach of contract, not tort/fraud.[42] Even if Plaintiffs showed transaction-based compensation, that would only be a breach of contract.

Additionally, the only loss Plaintiffs assert was to the economic value of the subject contract, and thus the economic loss and independent injury rules limits Plaintiffs' cause of action to one for breach of contract. *Conocophillips Co. v. Koopman*, 2016 WL 2967689 at *15-16 (Tex.App.—Corpus Christi 2016, no pet.). Plaintiffs' fraud claims thus fail as a matter of law.

3. There is no proof of fraud in a real estate transaction.

For this claim, the plaintiff must prove all the elements of common law fraud ***plus*** prove that the transaction involved "real estate" as that term is defined in

[42] While some courts describe the law of contorts as "a muddy area, devoid of bright line rules" (*Total E & P USA, Inc. v. Mo-Vac Service Co., Inc.*, 2012 WL 3612505 (Tex.App.—Corpus Christi 2012)), the law is crystal clear in the context of ***this*** case: if the only injury to the plaintiff is the economic loss arising from the subject matter of the contract, then the action sounds only in contract, not in tort. *SW Bell Tele. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex.1991). This is known as the "economic loss rule." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex.1998). "[M]ere nonfeasance under a contract creates liability only for breach of contract." *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 213 (Tex.1996).

Because Plaintiffs have not alleged damages or harm over and above the value of the contracts they signed, they do not qualify to bring a fraudulent inducement claim under *Formosa*. That is, fraudulent inducement is not merely a plaintiff alleging that he was told something that was not true before entering into a contract; the claim also requires proof of harm or damages separate from, and in addition to, the loss occasioned by the defendant's contract breach. *Crawford,* 917 S.W.2d at 13. If the only harm alleged is benefit of the bargain, as it is here, then plaintiff is limited to a breach of contract claim; this is called the "independent injury" rule. *D.S.A, Inc. v. Hillsboro ISD*, 973 S.W.2d 662, 663-64 (Tex.1998, *per curiam*).

Texas law. But since Plaintiffs cannot prove the threshold elements of fraud, their claims for fraud in a real estate transaction likewise fail.

4. There is no proof of negligent misrepresentation.

The elements of a negligent misrepresentation claim are:

1. The defendant made a representation to the plaintiff in the course of the defendant's business or in a transaction in which the defendant had an interest;

2. The defendant supplied false information for the guidance of others;

3. The defendant did not exercise reasonable care or competence in obtaining or communicating the information;

4. The plaintiff justifiably relied on the representation; and

5. The defendant's negligent misrepresentation proximately caused the plaintiff's injury.

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex.1999). Here, Plaintiffs have not provided any proof that the statements they claim were made to them were made "for their guidance" or that they justifiably relied on those statements before investing.

The "independent injury" rule applies in negligent misrepresentation claims. *Plano Surgery Center. v. New You Weight Mgmt. Ctr.*, 265 S.W.3d 496, 503 (Tex.App.—Dallas 2008, no pet.). That rule provides that if the plaintiff's losses are calculated from the terms of a contract breach, then they are not "independent" and may not be recovered in tort. Since Plaintiffs did not allege and did not prove an independent injury, they may not recover for negligent misrepresentation.

Further, a plaintiff may not recover benefit-of-the-bargain damages for negligent misrepresentation, but rather only out-of-pocket (or extraneous) damages. *D.S.A.*, 973 S.W.2d at 663-64. Here, Plaintiffs are not asserting any claims for out-of-pocket damages, so their negligent misrepresentation claim is invalid on this basis as well.

5. There is no proof of securities fraud.

The elements of securities fraud include proof of all elements of common law fraud ***plus*** proof that a "security" was involved in the transaction. *R.D. Tips, Inc. v. Jett*, 2015 WL 1612025 at *3 (Tex.App.—Austin 2015, rev. denied). Therefore, because Plaintiffs cannot prove all threshold elements of common-law fraud, their securities fraud claim is also without merit and must be dismissed.[43]

6. There is no proof of conversion.

The elements of a conversion claim are:

1. The plaintiff owned, possessed, or had the right to immediate possession of property;

2. The property was personal property;

3. The defendant wrongfully exercised dominion or control over the property;

4. The plaintiff made a demand for return of the property that the defendant refused; and

5. The plaintiff suffered injury, usually the market value of the converted property.

[43] Because Plaintiffs have not crossed the threshold of proving fraud, Defendants need not address the question of whether these offerings were "securities" under either Texas or federal law, and reserve that issue for another day.

Lawyer's Title Co. v. J.G. Cooper Dev., Inc., 424 S.W.3d 713, 718 (Tex.App.—Dallas 2014, writ denied). Money only constitutes "personal property" if it is a specific chattel, but not if it is only general indebtedness that can be discharged by the payment of money. To qualify as a "specific chattel," the money involved must be (a) delivered for safekeeping; (b) intended to be kept segregated from other monies; (c) substantially in the form in which it was received or in an intact fund; and (4) not the subject of a title claim by its keeper. *Id.* Money that cannot be identified as a specific chattel cannot be converted. *Rente Co. v. Truckers Express, Inc.*, 116 S.W.3d 326, 332 (Tex.App.—Houston [14th Dist.] 2003, no pet.).

Here, Plaintiffs cannot fulfill ***any*** of the prima facie elements of a conversion claim. First, the only "property" they claim to have been converted was the money they invested with Primera for which they received a quid pro quo in the form of working interests. That means that not only was a specific chattel not involved, but those funds were not substantially in the form tendered, they did not remain a discrete fund, and Primera had a superior title/ownership claim to the funds once they were exchanged for Plaintiffs' working interests. Plaintiffs' claims for conversion must be dismissed.

Primera also did not "wrongfully" exercise dominion and control over the money; Plaintiffs willingly gave it to Primera in exchange for a quid pro quo working interest. Further, there is no evidence in the record that Plaintiffs ever made any unrequited demands on any Defendant to "return" the subject funds.

Because Plaintiffs cannot prove even a single prima facie element of conversion, the claim fails.

7. There is no proof of a DTPA violation.[44]

To recover under the DTPA, a plaintiff must plead and prove:

1. It is a "consumer" as defined by TB&C Code §17.45;
2. The defendant qualifies to be sued under the DTPA;
3. The plaintiff sought by purchase or lease a qualifying good or service that forms the basis for the claim;
4. In the transaction it is alleging violated the DTPA, the defendant committed one or more of the following acts:
    a. A false, misleading or deceptive act or practice that is specifically enumerated in TB&C Code §17.46(b);
    b. A breach of an express or implied warranty; or
    c. Any unconscionable action or course of action;
    d. A violation of the "tie in" consumer statutes under TB&C Code §17.50(b); and
5. The defendant's action was a producing cause of the plaintiff's actual damages.

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 823 (Tex.2012).

Taking the elements one at a time reveals that none of the Plaintiffs has met their burden of proving all elements of their DTPA claims.

First, there is no evidence from all Plaintiffs that they qualify as "consumers" under the DTPA, either having purchased their working interests as individuals or

[44] Texas Business & Commerce Code (TB&C), §17.41 et seq.

as businesses with less than $25 million in assets.[45] All DTPA claims by the others must be dismissed because they have failed to prove standing.

Second, even if all Plaintiffs were "consumers," the good or service they acquired must qualify as a DTPA "good or service," ***and*** that good or service must form the basis for their claim. *Sherman Simon Enters. v. Lorac Services*, 724 S.W.2d 13, 15 (Tex.1987). That is, they must be complaining about some aspect of the actual good or service acquired, either that it was misrepresented or that the defendant engaged in unconscionable practices while selling or leasing it that somehow affected the good's value to the plaintiff. *Id*.

Here, the only "good" Plaintiffs acquired was their working interests in the wells, which does not qualify as a "good or service" as a matter of law. *See Hendricks v. Thornton*, 774 S.W.2d 348, 356 (Tex.App.—Beaumont 1998, pet. denied)(securities are not "goods" under the DTPA); *C.M. Berquist v. Onisiforou*, 731 S.W.2d 577, 579-80 (Tex.App.—Houston [14th Dist.] 1987, no writ)(oil & gas working interests are not DTPA "goods"). Also, Plaintiffs testified that these working interests are exactly what they were represented to be, and they were purchased for the agreed amount of money, hence they do not fulfill the requirement that something about the value of the good or service form the basis for their claims.[46]

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[45] Even then, Plaintiffs' counsel asked the wrong question, asking about "net value" or "personal value" of assets and not gross asset value. See, e.g., TR 041017, p. 53 (Peters).

Only Mr. Collins provided the correct value number, TR 041017, p. 97-98, and Mr. Crawford knocked himself out with his own testimony, TR 041017, p. 181.

[46] See, e.g., TR 041117, pp. 168-69; TR 041217, p. 18, 143. No Plaintiff testified that it did not get what it paid for.

As for any claims that they purchased "operator services," again there is no claim that those services were provided in anything other than proper form, and the value or quality of those operator services do not form the basis of their DTPA claims in any event.

What Plaintiffs are really trying to do, which is unfortunately pretty common, is get DTPA remedies for what is really a mere (albeit unpleaded and unproven) breach of contract claim. This is not permitted. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex.2006) (if the same facts support breach of contract and DTPA, the plaintiff's claim is for only breach of contract); *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14-15 (Tex.1996) (same).

Because Plaintiffs have not shown themselves to be "consumers," because the working interests that form the basis of their claim and working interests are not qualifying "goods or services," because they do not complain about the interests themselves or the quality of the operator services provided by Primera or AOG, and because Plaintiffs' actual assertions are supportive only of a breach of contract claim, their DTPA claims are without merit and must be dismissed.

8. Unjust enrichment is an improper remedy in this case.

A plaintiff has a claim for unjust enrichment if he pleads and proves the defendant obtained a benefit from him by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992). However, sensing that the perceived broadness of that definition may be abused, the Court in *Heldenfels* also cautioned:

> Unjust enrichment is not a proper remedy merely because it "might appear expedient or generally fair that some recompense be afforded for an unfortunate loss" to the claimant, or because the benefits to the person sought to be charged amount to a windfall.

Those cautionary words seem to have been written for this very case. Plaintiffs have done nothing but pander to the emotions of the Court and attempt to paint Mr. Alfaro as a rich, jet-setting playboy wildly spending Plaintiffs' money on fancy houses and nice toys. In fact, Plaintiffs' counsel repeatedly referred to the Alfaros' automobiles as "toys."[47]

But the money Mr. Alfaro spent he obtained not from the Plaintiffs but from Primera. Plaintiffs only gave any money to Primera, never to Mr. Alfaro. Thus, if Plaintiffs claim that someone obtained their money improperly, it had to be the person/entity to whom they gave that money: Primera, not Mr. Alfaro. Plaintiffs lack standing to allege unjust enrichment against someone to whom they gave no money and who possesses none of their money.

For the Court to allow Plaintiffs to merely claim emotional justification for their perceived "losses" would be a travesty of justice. Not only did they not lose anything in their investments from anything done by the Defendants (all completed wells were actively producing at the time bankruptcy was filed, which meant Plaintiffs may have fully recovered their investments in time if their attorneys had not intervened), but the eventual loses of the wells was caused by Plaintiffs' counsel, who solicited this lawsuit by violating barratry law, then charged Plaintiffs over

[47] TR 041017 at 34, 37.

$400,000 in fees to prosecute it, and then allowed the wells to be sold by the bankruptcy trustee without a word of protest. If anything, the other 85%-plus of investors in these wells were harmed ***by the actions of these Plaintiffs*** in filing the state-court lawsuit and forcing Primera into bankruptcy.

9. There is no proof of money had and received.

To prove this claim, "a plaintiff must prove that the defendant holds money which in equity and good conscience belongs to him." *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 814 (Tex.App.—Dallas 2012, no pet.); *Amoco Prod. Co. v. Smith,* 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no writ).

First, as with their unjust enrichment claim, Plaintiffs all testified that their money was paid to Primera, not to Mr. Alfaro or the other Defendants. This means that if they have a claim for money had and received, that claim would be against Primera, the entity who "received" their money, not Mr. Alfaro, and Plaintiffs already have their judgment against Primera.

Second, Plaintiffs all testified that they received exactly what they paid for: the amount of working interest percentages they thought they were purchasing with their money for the agreed price.[48] That the investment did not pay them back in full is a function of both the inherently-risky nature of such investments (which Plaintiffs all testified they knew even without being warned, and they were warned over 50 times in each of the PPMs), and their own self-defeating actions in derailing Primera by filing the state-court lawsuit and forcing Primera into bankruptcy.

[48] TR 041117, pp. 168-69; TR 041217, p. 18, 143.

Plaintiffs cannot point to any funds that they can legitimately claim the Defendants "hold" which in "equity and good conscience belongs to" them.[49] Therefore, this claim must be denied and dismissed.

10. There is no proof of fraudulent transfers, and Plaintiffs do not qualify to make this claim in any event.

Under the Texas Uniform Fraudulent Transfer Act (Texas Business & Commerce Code, §24.001, et seq.), a transfer made with the actual or constructive intent to defraud any creditor may be avoided to the extent necessary to satisfy the creditor's claims. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 562 (Tex.2016). Only creditors of the defendant have standing to bring a TUFTA claim. TB&C C ode §24.008. Plaintiffs cannot show they were "creditors" of any of the Defendants.[50] To be a creditor, a person must be owed a debt. What debt do the Plaintiffs claim was owed to them? And by whom? The answers are "nothing" and "no one."

Creditors are defined as those who have a claim against the defendant, a claim being defined as a "right to payment or property." TB&C Code §24.002(3) and (4). Because only creditors have standing to bring a TUFTA claim, and because Plaintiffs are not creditors, their TUFTA claims must be dismissed for lack of standing. *Hoffman v. AmericaHomekey, Inc.*, 2015 WL 12698389 at *2 (N.D. Tex. 2015)("As the language of the UFTA makes evident, '[o]nly creditors have standing under the UFTA to seek relief from a fraudulent transfer or obligation'") (citing

[49] Schedule B(2) in Primera's case reflected more than $77,000 held in a RBFCU account for Black Hawk (Buda) #1 and $306,000 in a RBFCU "revenue distribution account **5759." But there is no record of any of the Plaintiffs seeking relief from the automatic stay in the Primera case to recover those funds (Docket No. 57).

[50] Plaintiffs could potentially (albeit spuriously) argue that they were creditors of ***Primera***, however, they have their judgment against Primera (Docket No. 202).

Davis v. J.P. Morgan Chase Bank, N.A., 2014 WL 2854671 at *4 (N.D. Tex. 2014)). Having an unproven cause of action for unliquidated damages against a defendant does not a creditor make.

In addition to proving standing as "creditors" (which Plaintiffs cannot do), the elements of a TUFTA claim a plaintiff must plead and prove are:

1. The defendant is "insolvent" when the transfer is made or the transfer renders the defendant insolvent;

2. The defendant made a transfer of property without receiving reasonably equivalent value;

3. Defendant had the intent to hinder, delay, or defraud his creditors;

4. The plaintiff is a current creditor of the defendant when the transfer is made or became a creditor within a reasonably short time after the transfer is made; and

5. The defendant engaged in or was about to engage in a business or a transaction for which his remaining assets were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Here, even if we concede standing (which we do not), Plaintiffs submitted zero evidence on any of the ***other*** five prima facie elements of a TUFTA claim.

First, none of them were creditors of any of the Defendants, ever. Indeed, through the date of this brief, none of the Plaintiffs are creditors of any of the Defendants, and all of the suspect transfers were made many years ago. Plaintiffs thus lack standing to make this claim.

Second, the "transfers" Plaintiffs point to are set out in the Pretrial Order, p. 3, "Plaintiffs' Contentions":

> Mr. Alfaro, individually and as the sole member of Alfaro Oil & Gas, LLC and Alfaro Energy, LLC transferred investor moneys (sic) to Defendants 430 Assets LLC to purchase a Lamborghini and Range Rover, to SilverStar (sic) Resources to purchase an oil and gas asset in Montague County, to Alfaro Energy LLC to pay for expenses related to other offerings, to Kristi Alfaro and to the Brian and Kristi Alfaro Living Trust to purchase real estate and pay mortgages, taxes and expenses on such real estate, and upon information and belief, to King Minerals LLC and Ana & Avery's Candy Island LLC to shield investors from getting their investments back.

Note: in the case-controlling Pretrial Order, Plaintiffs are not alleging that ***Primera*** was the transferring entity, either itself or by its agent Brian Alfaro; only AOG and Alfaro Energy, LLC are named as transferring entities and as the corporate entities through which Mr. Alfaro was acting. Therefore, any transfers made by Primera or Mr. Alfaro are not at issue in this case.[51]

Then, even if we include Primera as a "transferring entity," Plaintiffs never identify what "investor monies" they are alleging were transferred. It is undisputed that once Plaintiffs paid for and received their working interests, the funds used to purchase those working interests no longer belonged to them, and thus cannot be deemed "investor monies" after that point.[52] That is, those funds were ***not*** being

[51] Plaintiffs make vague allegations of Mr. Alfaro's connection with the other Defendant entities, then assert that Mr. Alfaro was the "alter ego" of those entities. Pretrial Order, p. 1-2. This is nonsensical: corporations are the alter egos of individuals, not the other way around. Even then, Plaintiffs never sought an alter ego finding of any kind.

Further, Plaintiffs claim that the Defendants received "fraudulent funds," but that term is unknown to the law. Pretrial Order, p. 2. It is thus not entirely clear what Plaintiffs are actually asserting here.

[52] If Plaintiffs would like to admit to federal tax fraud, they may certainly do so. But they have all represented to the IRS in their tax filings that they owned the working interests they purchased, or else they would not have been

held in trust for Plaintiffs; Plaintiffs admittedly received the intended quid pro quo for their funds. After those sales, the purchase funds belonged to Primera or AOG. Therefore, Plaintiffs do not show how "their money" was transferred anywhere other than as they intended: to Primera or AOG in exchange for working interests in the wells at agreed values.

Finally, there is no evidence in this record that transfers made by AOG, Alfaro Energy, LLC, Brian Alfaro, or any of the other Defendants were made at a time when those entities were insolvent or that they were rendered insolvent by any transfer; there is no evidence that any of the Defendants transferred any funds for the purpose of delaying, hindering, or defrauding any of their creditors; and there is no evidence that any transfer was made for anything other than reasonably equivalent value.

Because Plaintiffs cannot prove even a single element of a TUFTA claim – much less ***every*** element – all such claims must be dismissed.

RELIEF SOUGHT

Defendants seek judgment that Plaintiffs take nothing by their claims herein. Defendants also seek such other and further relief as is just.

allowed to take the tax deductions which that ownership allowed. This means they either lied to the IRS about their ownership status, or they are misrepresenting to this Court that the funds they gave to Primera and AOG are still "their money." Plaintiffs cannot have it both ways.

RESPECTFULLY SUBMITTED:

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ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on opposing counsel via the CM/ECF filing system.

/s/ James A. Pikl

Appendix

The following are the proposed Findings of Fact and Conclusions of Law submitted by Defendants following trial on the merits.

FINDINGS OF FACT

Counts 1, 2, 3, and 6:
Common Law Fraud,
Fraud in a Real Estate Transaction,
Negligent Misrepresentation, and
Securities Fraud

Each of these counts requires proof of the elements of common-law fraud.

No facts exist to support Plaintiffs' contentions that a material misrepresentation of fact was made at any time by any of the Defendants to any of the Plaintiffs, or that Defendants made any such representations to any of the Plaintiffs recklessly without knowledge of their truth or falsity and as positive assertions.

All representations Defendants made to Plaintiffs regarding these investments were either factually true and accurate, were projections or estimates of unknowable future events, or were statements of opinion or "sales puffing" only.

Even if material misrepresentations were made, no facts exist to support Plaintiffs' contentions that any Defendant took any action, or failed to take any action, in reliance on any such misrepresentations.

Even if material misrepresentations were made, and even if Plaintiffs relied on same, no facts exist to support Plaintiffs' contentions that their reliance was reasonable, and the Court finds that such reliance, if any, was unreasonable.

Even if a material misrepresentation was made, and even if Plaintiffs relied on same, and even if Plaintiffs reasonably relied on same, no facts exist to support Plaintiffs' contentions that they suffered any harm, detriment, or damages as a proximate result of their reliance on the misrepresentation(s).

Even if a material misrepresentation was made, no facts exist to support Plaintiffs' contention Defendants intended for Plaintiffs to rely upon it in making their decisions to invest.

No facts exist to support Plaintiffs' contentions that Defendants made any representations to Plaintiffs, or any of them, in the course of Defendants' business or in a transaction in which Defendants had an interest.

To the extent any such representations were made, Defendants did not supply false information for the guidance of others.

To the extent any such representations were made, and if Defendants supplied false information for the guidance of others, Defendants exercised reasonable care or competence in obtaining or communicating the information.

To the extent any such representations were made or if Defendants supplied false information for the guidance of others, and if Defendants did not exercise reasonable care or competence in obtaining or communicating the information, Plaintiffs did not justifiably and reasonably rely on the representations or information in making their investment decisions.

To the extent any such representations were made or if Defendants supplied false information for the guidance of others, and if Defendants did not exercise reasonable care or competence in obtaining or communicating the information, and if Plaintiffs justifiably relied on the representations or information, Plaintiffs were not proximately injured by the representations or information.

Rescission is not available as a remedy because Plaintiffs no longer have the ability to return the subject property to Defendants.

Count 4: Violation of the DTPA

Plaintiffs are not all consumers as that term is defined in the DTPA.

Even if Plaintiffs are consumers under the DTPA, they did not seek or acquire by purchase or lease any qualifying goods or services from Defendants.

Even if Plaintiffs are consumers under the DTPA, and even if they sought or acquired by purchase or lease any qualifying goods or services from Defendants, Defendants did not commit any of the following acts:

i. breach of an implied or express warranty;

ii. any unconscionable act or course of action;

iii. the use or employment of an act or practice in violation of Texas Insurance Code, chapter 541; or

iv. a violation of one of the "tie in" statutes as authorized by Texas Bus. & Comm. Code §17.50(h), which was classified as "false, misleading, or deception act or practice."

Even if Defendants' conduct otherwise qualifies as a violation of the DTPA, no facts support Plaintiffs' contention that those violations were a producing cause of any damages to Plaintiffs.

Count 5: Breach of Fiduciary Duty

This count was dismissed by the Court in an earlier order.

Count 7: Conversion

No facts show that Plaintiffs owned, possessed, or had the right of immediate possession of any relevant personal property, nor that Defendants exercised wrongful dominion and control over any such property to the exclusion of, and inconsistent with, the Plaintiffs' rights.

No facts show that Plaintiffs ever demanded return of any personal property from Plaintiffs, nor that Defendants failed to return any personal property to Plaintiffs upon request that they do so, indeed, no such requests were ever made.

No facts show the value of any alleged property supposedly converted by Defendants, so there is no basis for the Court to award damages on this count, even if it were proved.

Count 8: Fraudulent Transfer

No facts support Plaintiffs' contention that Plaintiffs are creditors of any Defendant.

No facts support Plaintiffs' contention that Defendants made any transfers of assets with the actual intent to hinder, delay, or defraud any Plaintiff.

No facts support Plaintiffs' contention that they were proximately harmed by anything Defendants, or any of them, did with the subject assets.

Count 9: Unjust Enrichment

No facts support Plaintiffs' contentions that any of the Defendants has been unjustly enriched by obtaining a benefit from any Plaintiff by fraud, duress, or taking an undue advantage of them.

Count 10: Money Had and Received

No facts support Plaintiffs' contention that any of the Defendants obtained money from them that in equity and good conscience belongs to any of the Plaintiffs.

Count 11: Civil Conspiracy

No facts support Plaintiffs' contentions that any of the Defendants were engaged in a conscious plan or scheme, arrived at through a meeting of their minds, to conduct any illegal activities or to conduct legal activities by illegal means.

CONCLUSIONS OF LAW

Counts 1, 2, 3, and 6

Each of these counts requires Plaintiffs to prove all of the elements of a common-law fraud action.

In order to prove a cause of action for common law fraud, a plaintiff must prove facts supporting each of the following prima facie elements:

A. the defendant made a false representation of material fact;

B. the defendant knew the representation was false when made, or made it recklessly, as a positive assertion, and without knowledge of its truth;

C. the defendant made the representation with the intent that the plaintiff would rely on it;

D. the plaintiff reasonably relied on the false representation; and

E. the representation proximately caused actual damages to plaintiff.

Zorrilla v. Aypco Constr. II, LLC, 469 S.W.3d 13, 153 (Tex. 2015).

Statements of fact do not include opinions or statements that are known as "sales puffing."

Italian Cowboy Partners v. Prudential Ins., 341 S.W.3d 323, 337-38 (Tex.2011); *Securities and Exchange Comm. v. Mapp*, ___ F.Supp.2d ___, 2016 WL 5870576 at *4-5 (E.D. Tex. 2016).

Statements regarding future events, such as projections of estimates, may not be reasonably relied upon in support of a fraud cause of action. *Lake v. Cravens*, 488 S.W.3d 867, 891 (Tex.App.—Fort Worth 2016, pet. pending).

Plaintiffs have failed to support their fraud allegations with facts proving each prima facie element of a common-law fraud cause of action under Texas law, and accordingly, counts 1, 2, 3, and 6 are DISMISSED.

Schlumberger Tech. v. Swanson, 959 S.W.2d 171, 182 (Tex. 1997).

Count 4: Violation of the DTPA

In order to prove a cause of action for violation of Texas Deceptive Trade Practices Act, a plaintiff must prove facts supporting each of the following prima facie elements:

plaintiff must be a "consumer";

defendant must be a defendant who may be sued under the DTPA;

plaintiff must seek or acquire, by purchase or lease, a qualifying good or service from defendant;

defendant must have committed one or more of the following acts:

i. a breach of an implied or express warranty;

ii. any unconscionable act or course of action;

iii. the use or employment of an act or practice in violation of Texas Insurance Code, chapter 541; or

iv. a violation of one of the "tie in" statutes as authorized by Texas Bus. & Comm. Code §17.50(h), which was classified as "false, misleading, or deception act or practice;"

v. defendant's action must be a producing cause of damages to plaintiff.

Texas Bus. & Comm. Code, §17.41 et seq.; *Amstad v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex.1996). In addition, a plaintiff must give the defendant sixty days' notice of its claim before filing suit, which Plaintiffs did not do.

Plaintiffs have failed to support their DTPA allegations with facts proving each prima facie element of such a cause of action under Texas law, and accordingly, all such claims are DISMISSED.

Count 5: Breach of Fiduciary Duty

The Court affirms its Order (Doc. 165) in all things which, in part, dismissed all claims for breach of fiduciary duty.

Count 7: Conversion

In order to prove a cause of action for conversion, a plaintiff must prove facts supporting each of the following prima facie elements:

plaintiff owned, possessed, or had the right of immediate possession;

of a piece of personal property;

defendant exercised wrongful dominion and control over the property to the exclusion or and inconsistent with the plaintiff's rights;

plaintiff demanded return of the property; and

defendant failed to return the property to plaintiff.

Plaintiffs have failed to support conversion allegations with facts proving each prima facie element of such a cause of action under Texas law, and accordingly, all such claims are DISMISSED.

Count 8: Fraudulent Transfer

The Court affirms its Order (Doc. 165) in all things.

In order to prove a cause of action for fraudulent transfer, a plaintiff must prove facts supporting each of the following prima facie elements:

plaintiff is a creditor of defendant and the plaintiff's claim arose before or within a reasonable time after defendant's obligation or transfer occurred;

defendant incurred an obligation or made a transfer of assets with the actual intent to hinder, delay, or defraud any creditor of defendant or without receiving reasonably

equivalent value in exchange for the obligation or transfer; and

plaintiff was proximately harmed by the defendant incurring the obligation.

Texas Bus. & Comm. Code §§24.010, 24.005; *Walker v. Anderson*, 232 S.W.3d 899, 913 (Tex.App.–Dallas 2007, no pet.).

Plaintiffs have failed to support their fraudulent transfer allegations with facts proving each prima facie element of such a cause of action under Texas law, and accordingly, all such claims are DISMISSED.

Count 9: Unjust Enrichment

Plaintiffs have failed to support their claims for unjust enrichment, factually or legally, and accordingly, all such claims are DISMISSED.

Count 10: Money Had and Received

In order to prove a cause of action for money had and received, a plaintiff must prove facts supporting each of the following prima facie elements:

defendant obtained money that in equity and good conscience belongs to plaintiff; and

the justice of the case compels that defendant return the money to plaintiff.

Plaintiffs have failed to support their claims for money had and received, and accordingly, all such claims are DISMISSED.

Count 11: Civil Conspiracy

Civil conspiracy is not an independent cause of action under Texas law. Rather, it is a method by which joint and several liability is imposed on multiple defendants. Before a defendant may be held liable as part of a conspiracy, there must be a meeting of the minds between defendants as to the outcome of the scheme, and one of defendants must perform an illegal act or perform a legal act in an illegal manner for the purpose of furthering tortious conduct against the plaintiff.

Plaintiffs have failed to support their claims for civil conspiracy, and accordingly, all such claims are DISMISSED.

Damages and Attorney's Fees

In order for a plaintiff to recover money damages, it must prevail on a cause of action for which money damages are a remedy. Here, Plaintiffs have not prevailed on any of their causes of action, and hence are not entitled to recover any damages, either actual or punitive.

All of Plaintiffs' claims for money damages are therefore DENIED.

Under Texas and federal law, a plaintiff may only recover attorney's fees from an opponent if a statute or contract allows or permits such a recovery. *Holland v. Wal-mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex.1999); *Baker Botts L.L.P. v. ASARCO LLC*, ___ U.S. ___, 135 S.Ct. 2158, 2164, 192 L.Ed.2d 208 (2015)(citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010)). Here, Plaintiffs have asserted only two causes of action for which attorney's fees are permitted (the DTPA and Securities Act claims), but Plaintiffs have failed to prevail on either of those causes of action, and hence Plaintiffs have no legal basis for recovery of their attorney's fees.

In addition, under Texas law a plaintiff must recover affirmative money damages before it is entitled to an award of attorney's fees, which Plaintiffs have not done. *Long v. Griffin*, 442 S.W.3d 253 (Tex.2014)(per curiam). Since Plaintiffs have not recovered money damages, they may not recover attorney's fees as a matter of law. *Id.*

All of Plaintiffs' claims for attorney's fees are DENIED.

Sanctions

Plaintiffs and their counsel have violated Federal Rule of Civil Procedure 11 (and Bankruptcy Rule 7011) by filing and prosecuting a lawsuit against Defendants that lacks any factual or legal support, was filed solely for purposes of harassment, and is not based on current law or a good-faith argument for the extension, modification, or reversal of existing law.

As sanctions for their violation, Plaintiffs and their counsel, should pay to Defendants the amount of money Defendants hereafter demonstrate they incurred in defending this lawsuit, including all attorney's fees, expert expenses, travel costs, court costs, and any other expenses Defendants propose and the Court adopts.

Defendants will make proof of all such fees and expenses to the Court at a later date and in the form to be determined by the Court.