IMPORTANT WHYS, WHENS, AND HOWS IN THE USE OF LETTERS OF INTENT FOR LEASING AND FOR SALES, ALONG WITH ILLUSTRATIVE CASES

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CHAPTER 2

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Co-Author for TexasBarCLE 2018 Advanced Real Estate Law Course (Chapter 2; Presented by David W. Tomek):

David W. Tomek & Reed A. Standly, *Important Whys, Whens, and Hows in the Use of Letters of Intent for Leasing and for Sales, Along with Illustrative Cases*, TexasBarCLE 2018 Advanced Real Estate Law Course, Chapter 2.

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Connecting Point Park Cities, *Charitable Advisory Board Member, 2017 – Present.*

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J. Andrew Holten, *Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance*, 162 U. Pa. L. Rev. 1237 (2014) 1

IMPORTANT WHYS, WHENS, AND HOWS IN THE USE OF LETTERS OF INTENT FOR LEASING AND FOR SALES, ALONG WITH ILLUSTRATIVE CASES

I. INTRODUCTION

A. Scope of Article

This article discusses how to use Letters of Intent in commercial real estate leasing and sales transactions in order to efficiently and effectively advance the transaction to execution of legally binding documentation. This article only addresses Letters of Intent that are expressly either predominantly non-binding, but with select aspects to be binding (*e.g.*, confidentiality, exclusivity, allocation of costs), or wholly non-binding. The article will offer answers to answer the following questions:

What is a Letter of Intent?
Who drafts a Letter of Intent?
Why use a Letter of Intent?
When to use a Letter of Intent?
How to draft well a Letter of Intent?
Where will a Letter of Intent take you?

B. Acknowledgement; *Enterprise* Case

Reid Wilson, a preeminent Texas land use attorney and Chairman of the Houston firm of Wilson Cribbs + Goren, submitted the proposed topic of Letters of Intent at the planning committee meeting for this course held in December at the Texas Law Center, principally due to the implications for use of Letters of Intent in Texas commercial real estate arising out of the importance of the *Enterprise* case[1]. Many around the table at the planning committee meeting nodded knowingly about the case; your presenter was not among them. Reid had also offered for this topic the use of a paper he had prepared a while back for leasing Letters of Intent. Having quite a bit of experience in recent years with Letters of Intent, especially for ground leasing and for sales, your presenter pounced on the opportunity to start with Reid's paper, update it as warranted, and add to it sales Letters of Intent and coverage of the *Enterprise* case. I just needed to get Reid's permission to start with his paper (which he promptly and graciously granted) … and then learn what the heck all the fuss over the *Enterprise* case was about.

Subsequently, your presenter learned that the *Enterprise* case may well turn out to be the *Texaco v Pennzoil*[2] for our times. As of the date of submission of this article to TexasBarCLE in early June, the Texas Supreme Court had yet to rule on the petition for review filed by Energy Transfer Partners (which won a $536 million judgment (including prejudgment interest) against Enterprise Products Partners in the trial court in Dallas in 2014, only to have the Dallas Court of Appeals reverse and render judgment against it in July 2017). I am grateful to Reid for allowing me to start with his paper to prepare this one and for bringing the *Enterprise* case to my attention.

Note: For those interested in setting up an email alert to be notified of the action the Supreme Court takes on Energy Transfer Partners' Petition for Review, my co-author has furnished "how-to information," which is attached as Appendix F.

C. Mood-setting Quotes about Letters of Intent

"It's no wonder that LOIs have been described as the contractual equivalent of being 'almost pregnant.'" J. Andrew Holten, *Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance*, 162 U. Pa. L. Rev. 1237, 1238 (2014).

> "LOIs [are] "an invention of the devil [that] should be avoided at all costs." *Id*.
>
> "'It would be difficult to find a less predictable area of contract law.'" *Id*. at 1239.
>
> "LOIs are fraught with contradiction. They are loved, yet hated; binding, yet nonbinding; beneficial, yet 'ruinous.'" *Id*. at 1259.
>
> "In sum, an LOI pushes parties closer to a final deal by fundamentally changing their relationship with one another. Through the exchange of uncertain legal entitlements, the parties intentionally create a state of reciprocal exposure to uncertain legal outcomes. In doing so, the parties align their interests, communicate credible commitments to each other, and reduce their ability to act strategically. Ultimately, LOIs allow parties to use legal uncertainty to their mutual benefit." *Id*. at 1260.

II. WHAT IS A LETTER OF INTENT?

A. Title

A Letter of Intent may be entitled with many other terms, including:

[1] *Enter. Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. filed), *reh'g overruled* (Sept. 13, 2017).

[2] *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App—Houston [1st Dist.] 1987 writ ref'd, n.r.e.).

"Memorandum of Understanding;"
"Gentlemen's Agreement;"
"Agreement in Principle;"
"Letter of Understanding;"
"Term Sheet;" or
"Transaction Outline."

The title is not important. The term "Letter of Intent" is used to cover all non-binding preliminary agreements between parties to a transaction. The leasing Letter of Intent is distinguished from the RFP generated by the tenant's broker to outline the tenant's needs and expectations, and to solicit landlord offers. However, the leasing Letter of Intent should address all issues in the RFP.

B. Preliminary Non-Binding Agreement

In almost every instance in a commercial real estate setting, a Letter of Intent is intended not to be a legally binding lease or purchase agreement. Instead, it sets forth "understandings" that are written in order to expedite the subsequent process of drafting, negotiating, and finalizing definitive agreements.

C. Outline of Material Business Terms

The Letter of Intent's primary purpose is to outline the non-binding agreement of the parties to material business terms without which the parties would not proceed to spend further time, energy and money on a transaction. What terms are "material" for the purpose of proceeding with the transaction depends on the parties and the property.

D. Outline of Material Legal Terms

Particularly with sophisticated parties, the Letter of Intent may outline material legal terms necessary to be understood and accepted by the parties as a condition to proceeding with the transaction. Sometimes this involves the "AS IS" lease or sale of property, disclosure of unusual property conditions/defects or acceptance of certain procedures of an institutional owner.

III. WHO DRAFTS A LETTER OF INTENT?

A. Attorney

Attorneys usually draft the Letter of Intent for complex transactions or those with unusual legal issues. Sometimes the parties' attorneys will be engaged to review and revise a Letter of Intent drafted by a non-lawyer. Some parties have "standard" Letter of Intent forms drafted by attorneys for use in particular transactions by a non-lawyer.

B. Principal

Where no outside broker is involved in a transaction, the principal may 'draft' a Letter of Intent. Clients that themselves issue term sheets to purchase, often masquerading as Letters of Intent, will understandably not have foremost in mind the legal considerations about Letters of Intent found in this article as they prepare and issue their offers in this format. Nevertheless, your clients will be well-served to be made aware by you of the material legal considerations herein, especially about being intentional and express about how binding their Letters of Intent are to be, if at all, and then express that the rest be non-binding. And if you routinely receive from your clients what are represented to be Letters of Intent 'final' enough for you begin drafting or reviewing and revising the contemplated definitive agreement(s) (whether or not the Letters of Intent are fully executed) --- that also contain recurring drafting mistakes that will or could disadvantage the clients in the definitive agreement(s) --- you may wish to raise those mistakes and make proposals for how those provisions might be written instead.

C. Broker

Many Letters of Intent are drafted by a broker, generally for the buyer in a sale transaction, but either the tenant or landlord in a leasing transaction. This does not constitute the unauthorized practice of law in Texas when the Letter of Intent is non-binding. However, if a Letter of Intent is binding, at least in part, a broker may be violating the statutory prohibitions against the unauthorized practice of law as well as the prohibitions of the Texas Real Estate License Act (and its implementing rules and regulations) relating to drafting legal documents. Where there are legally binding provisions in a Letter of Intent, attorneys should remind clients to have the brokers focus on business points and let the attorney draft or at least review the legal aspects, especially the expressly binding ones.

D. Signing a Letter of Intent

A Letter of Intent is typically signed by either the principal itself or the principal's broker. The fact that a fully non-binding Letter of Intent is not signed by a party is not legally relevant. However, the morally binding character of a Letter of Intent is enhanced if both parties sign and if a principal of each party, rather than its broker, signs. The failure to have a Letter of Intent signed by both parties will likely result in the Letter of Intent being non-binding. Where there are legally binding provisions in a Letter of Intent, all parties must sign, preferably by the principals.

IV. WHY USE A LETTER OF INTENT?

A. Efficiency

Letters of Intent are often an economical and efficient manner to move transactions forward. Letters of Intent are shorter and more informal than a formal, legally binding definitive agreement (lease or purchase agreement). For this reason, they can usually be drafted quickly, and because they are usually non-binding (or at least predominantly so), tedious drafting is usually unnecessary. With lawyers being routinely omitted from the drafting process, legal fees and delay are not incurred at this stage.

B. Establish Deal Points

Leasing Letters of Intent will establish business agreements on material lease points such as:

1. Rent (base; additional; percentage[retail]);
2. Expense issues, including exclusions and caps;
3. Tenant improvements and landlord allowances;
4. Term;
5. Timing of lease commitment;
6. Permitted use;
7. Renewal and other special rights (*e.g.*, cancellation; expansion; contraction; first refusal/offer);
8. Brokers commissions;
9. Parking rights;
10. Assignment/subletting; and
11. Tenant inducements.

Sales Letters of Intent will establish business agreements on material sales points such as:

1. Best available legal description of property to be sold;
2. Material reservations from conveyance (*e.g.*, mineral estate; access easements benefitting adjoining property owner by seller or its affiliates) and any easement rights appurtenant to the property to be sold of which buyer or its broker is aware;
3. Purchase price (whether fixed or, for acreage, based on a price per [net/gross] square foot) and the means of payment at closing (*i.e.*, all cash; third party financing; assumption; seller financing);
4. Amount of earnest money (initial and additional, if any) and any circumstances for any of it to be non-refundable from the outset;
5. Title company and closer;
6. Timeframes for feasibility period; other contingency periods, including title and survey review and necessary platting, permit or rezoning approvals; closing; and rights to extend those time periods, if any;
7. Assignability of PSA by buyer (*e.g.*, free assignability to affiliates; consent of seller to third party assignments);
8. Any atypical allocation between seller and buyer of customary costs;
9. Any material limitations on customary seller representations for type of property being sold;
10. For income-producing properties, any known requirements by buyer or its lender for tenant estoppel certificates and SNDAs;
11. For unimproved property, any seller approval rights, as warranted, over design of improvements to be constructed by buyer (especially where seller or its affiliates own adjoining property); and
12. Whether buyer will be entitled to recover as a result of a seller default buyer's 'pursuit costs,' including the amount of a customary 'cap' on such reimbursable costs.

C. Provide Basis for Reaching Definitive Agreements

A Letter of Intent can help the parties' attorneys move more efficiently to draft, negotiate, and finalize formal legally binding documentation. Sometimes a Letter of Intent will dictate the specific form of lease or purchase agreement to begin with; for example, contract forms are promulgated by the Texas Real Estate Commission, Texas Association of Realtors, and State Bar of Texas Real Estate Forms Committee. Some institutional parties dictate use of their own form, at least as a starting point. For most multi-tenant properties, the landlord's lease form will be used in almost every instance, except for certain major national tenants. A Letter of Intent can specifically provide who will prepare the first draft of the legal documentation and when it will be delivered.

D. Binding Agreements Contained in the Non-Binding Letter of Intent

Although the basic transaction terms contained in a Letter of Intent should <u>not</u> be legally binding, there are a number of agreements that may be appropriate in particular transactions to be legally binding upon the parties and may be contained in either the Letter of Intent or a separate agreement.

1. <u>Confidentiality</u>

A Letter of Intent will often provide that proprietary information provided in connection therewith is to be kept confidential.

2. "No Shop" (Exclusivity) Agreement

Whether as landlord or as seller, the owner will be pressed, while the Letter of Intent is in effect, to agree to not seek other tenants (and the tenant not to negotiate for other premises) or to not seek or entertain offers from other buyers, as applicable, for a stated period of time in order to allow an opportunity for the parties to negotiate and execute legally binding agreements.

3. Good Faith Obligation to Negotiate

The parties may also agree in a Letter of Intent that they will use "good faith," "best efforts," "all reasonable effort," or some other elevated standard of care in seeking to move from non-binding Letter of Intent to binding legal documentation. Without this contractual agreement, there is no obligation under Texas law to negotiate in good faith. *See Fed. Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706 (Tex. 1990); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *Syrian-Am. Oil Corp. v. SSPD Petroleum Dev., B.V.*, No. 01-10-00224-CV, 2011 WL 1328373, at *7 (Tex. App.—Houston [1st Dist.] Feb. 24, 2011, no pet.) (mem. op.); *Cluck v. Frost Nat'l. Bank of San Antonio*, 714 S.W.2d 408, 410 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Apparently, this is contrary to the law in other states.

4. Preparation and Circulation of Initial Definitive Agreement

A Letter of Intent will sometimes designate the party whose attorney will prepare and forward the initial draft of the legal documentation to evidence the transaction, the form of agreement to start with, and when and to whom the initial draft should be circulated.

5. Obtaining Contingent Approvals

Particularly for institutional parties, Letters of Intent must be subject to further internal approval (*e.g.*, board of directors, investment committee). Such a Letter of Intent may further provide that such party will promptly present the transaction for the approval of such board or committee and perhaps even that the signatories to the Letter of Intent will recommend approval of the transaction on the terms set forth in the Letter of Intent.

6. Agreement to Pay Brokerage Commission

A Letter of Intent could constitute the written agreement necessary under Texas law evidencing the agreement of a party to pay a brokerage commission to specified brokers. This is particularly relevant for properties that are not listed for sale or lease.

7. Venue

A designation of venue for disputes relating to a transaction contemplated in a Letter of Intent will be enforced, even if it is not listed as one of the binding provisions of a letter of intent that includes both binding and non-binding provisions. *Southridge Ethanol, Inc. v. S. Louisiana Ethanol L.L.C.*, No. 3:06-CV-2362-G, 2007 WL 2375758, at *1 (N.D. Tex. Aug. 16, 2007) (mem. op.).

E. Implied Obligation

Although the parties are not legally bound to the transaction pending satisfaction of stated conditions precedent, a Letter of Intent may nevertheless have the effect of binding the parties for some or all of the following reasons:

1. Psychological commitment of the parties to the transaction.
2. Moral/professional commitment.
3. Damage to future dealings with the specific parties to the transaction.
4. Damage to the "breaching" party's reputation in the commercial real estate community.

V. WHEN TO USE A LETTER OF INTENT?

Letters of Intent are appropriate for virtually every commercial real estate lease or sale transaction. Whether a Letter of Intent is actually used --- to one degree or another --- in any particular commercial real estate transaction may depend on one or more factors such as customary practice of one or both parties; timing and cost considerations; ascertaining how close to 'a deal' the parties have come following preliminary discussions; legal and business complexities of the contemplated transaction(s); and interpersonal dynamics.

The use of a Letter of Intent is often thought to be a relatively expeditious and low(er) cost way to determine if the parties to a contemplated transaction 'have a deal,' at least enough so that they can then decide to move on to the drafting and negotiation of definitive agreements. For the more routine leasing and sales transactions, this expectation is usually met. For the more complex transactions, this expectation is not always realized. On occasion, the parties find themselves spending unexpected time and resources trying to get to final on a Letter of Intent, leading them to conclude that there is enough agreement on material terms through the process of working on the Letter of Intent to put the Letter of Intent aside and proceed with trying, instead, to draft definitive agreements. And sometimes that works.

Another important consideration here, highlighted especially by the *Enterprise* case, is how long to remain subject to (to the extent either party is subject to an expressly non-binding Letter of Intent) a fully executed Letter of Intent as due diligence proceeds, deal circumstances change in material ways or material

expenditures are being made by one or both parties towards the contemplated endeavor. Any one or more of these factors and others may make it advisable for the parties to look again at the Letter of Intent to determine if any revisions, including those towards making any aspects of the deal binding (in a way they wouldn't have been but for the revision), should be made, if work on definitive agreements should be accelerated or even if termination of the Letter of Intent should be considered.

VI. HOW TO DRAFT WELL A LETTER OF INTENT?

A. Forms; Resources

Letters of Intent are often drafted in the format of a letter from the buyer/tenant's broker to the seller/landlord's broker with the majority of the text being a listing, often in numerical sequence with headings, of paragraphs discussing material business terms. A Letter of Intent may be a simple "term sheet," which is more of an outline signed or initialed by the parties. The form of a Letter of Intent is not critical so long as it is clear, concise, unambiguous and non-binding.

Illustrative forms of Letters of Intent are attached as appendices:

> Appendix A "Term Sheet" Style Office Lease Letter of Intent Form (Using State Bar Real Estate Forms Manual Format);
>
> Appendix B Letter Style Office Lease Letter of Intent Form;
>
> Appendix C "Term Sheet" Style Sales Letter of Intent Form (Using State Bar Real Estate Forms Manual Format).
>
> A Lease Letter of Intent Checklist is attached as Appendix D. A list of articles on Letters of Intent, many of which contain forms, is attached as Appendix E.

B. Drafting Tips

The following are practical issues and suggestions to consider for drafting well a Letter of Intent:

1. Title

The Letter of Intent should be titled "Non-Binding Letter of Intent" or "Letter of Intent." Avoid "Letter of Understanding" or "Letter of Agreement."

2. Non-Binding Character

Drafting of a Letter of Intent must reflect, as precisely as possible under the circumstances, the client's informed desire for it to be non-binding versus binding, if at all. You cannot too clearly nor too often make this critical distinction in a Letter of intent. But the parties to the Letter of Intent may well have different goals insofar as what binding provisions to include, if any. Even as there is usually agreement by both parties that cost allocations should be binding, a landlord/seller will be more interested that confidentiality provisions be included as binding; the tenant/buyer will be more interested that exclusivity and no further marketing provisions be included as binding.

A Letter of Intent should not rely upon language that the transaction is "subject to legal documentation" or otherwise indicate that a more formal document is anticipated as sufficient means to express its non-binding character. *See Foreca, S.A. v. GRD Dev. Co., Inc.*, 758 S.W.2d 744, 745 (Tex. 1988); *Enter. Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531, 537 (Tex. App.—Dallas 2017, pet. filed), *reh'g overruled* (Sept. 13, 2017); *Learners Online, Inc. v. Dallas Indep. School Dist.*, 333 S.W.3d 636, 642-43 (Tex. App.—Dallas 2009, no pet.); *Aegis Ins. Holding Co., L.P. v. Gaiser*, No. 04-05-00938-CV, 2007 WL 906328, at *10 (Tex. App.—San Antonio Mar. 28, 2007, pet. denied) (mem. op.). In *Foreca*, the Texas Supreme Court held that the statement "subject to legal documentation" in a Letter of Intent initialed by both the buyer and seller of certain equipment did not prevent the jury from determining that the Letter of Intent constituted an enforceable contract. *Foreca*, 758 S.W.2d at 745. Although the court indicated that the language was some evidence on the issue, it was "not conclusive on intent to contract." *Id.* at 746.

3. Conditions Precedent

As became very important in the *Enterprise* case, clearly set forth all conditions precedent to be satisfied before a transaction will become binding on the parties. The drafting, negotiating, and execution of contemplated definitive agreements is perhaps the most common such condition precedent. Approvals of the contemplated transactions by governing boards and/or investment committees are also frequently included.

4. Separation of Binding and Non-Binding Provisions

If any legally binding provisions are included within an otherwise non-binding Letter of Intent, they should be separated and located in a separate section, or otherwise carefully drafted so it is obvious they are independent, legally binding obligations. Courts look first to the language chosen by the parties to express their intention in determining whether a provision is legally binding.

5. Good Faith Negotiations

If the parties intend, provisions can be included to mandate that they will negotiate in good faith toward a legally binding contract. This provision should have a

stated term (perhaps 30 days). This provision is intended to keep the parties focused, but the decision in *John Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), may have eliminated any legal benefits by precluding damages for violation of good faith negotiation provisions. *John Wood*, 26 S.W.3d at 21.

6. "No Shop" (Exclusivity) Provisions

One or both parties may want an agreement that the other party will not seek other deals while the parties negotiate toward a binding contract. There should be a stated term, which should be the same stated term as the period outlined for the parties to negotiate in good faith (if applicable). Also, the property could be "removed" from the market or specific types of marketing prohibited.

7. Mechanics of Drafting Legal Documentation

A Letter of Intent can state:

a. Whose attorney will draft the legal documentation;
b. When the first draft will be complete;
c. To whom it will be circulated;
d. The form of contract (lease or purchase agreement);
e. The goal/deadline for completion of negotiations/signature to the binding legal documentation.

8. Distribution List/Cast of Characters

Accompanying the final Letter of Intent can be a listing of the individuals and firms related to the transaction. Relevant information includes company names, individual contacts and their capacity, mail and street addresses, general and direct phone numbers, and email addresses.

9. Signature

As nearly as possible, a complete and correct signature block should be included for the sender and the recipient of a Letter of Intent, and a representation by each as to the authority of the person signing on behalf of an entity party should be included. As mentioned earlier, it is not uncommon for a Letter of Intent to come to the attorney tasked with drafting or reviewing and revising definitive agreements not executed by both parties. Nevertheless, what is sent to the attorney as a 'final' (or nearly so) Letter of Intent will allow the attorney to better understand what 'the deal is.'

10. Attachments

Especially with Letters of Intent that are said to be 'final,' but not fully executed, referenced attachments are missing. Most often, referenced attachments are supposed to be legal descriptions, site plans, floor plans, etc. Particular care should be taken to identify early in the process the attachments that will be needed, secure them, and attach them to the Letter of Intent that is finalized (even if not fully executed).

VII. WHERE WILL A LETTER OF INTENT TAKE YOU?

A. The Well Drafted Letter of Intent

A well drafted Letter of Intent will help to move a transaction toward the consummation of a legally binding lease or purchase agreement in the following ways:

1. Establishing business terms.
2. Assisting attorneys in preparation of the definitive agreement.
3. Reducing misunderstandings and saving money if the deal hasn't really been struck.
4. Addressing issues of confidentiality, providing information, not shopping the property, and the like, through binding provisions in the otherwise non-binding Letter of Intent.
5. Clearly providing that the parties are not legally bound to the transaction until the definitive agreements are executed and/or that other conditions precedent (*e.g.*, board or committee approval) are satisfied.

B. The Poorly Drafted Letter of Intent

A poorly drafted Letter of Intent, particularly one with ambiguous terms or a lack of clear non-binding language, may well impede a transaction or cause the parties to waste time on a transaction that has no realistic chance of closing.

VIII. ILLUSTRATIVE CASES

A. *Enterprise* Case – Express (Unsatisfied/Unwaived) Conditions Precedent for Letter of Intent to be Binding versus the *De Facto* Partnership Doctrine

Brief Summary:

The case of *Enterprise Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet filed), *reh'g overruled* (Sept. 13, 2017), arose from a dispute over whether the parties had formed a joint venture or a *de facto* partnership under Texas law. *See id.*; *see also* Annual Survey Working Group of the M&A Jurisprudence Subcommittee, Mergers & Acquisitions Committee, ABA Business Law Section, *Annual Survey of*

Judicial Developments Pertaining to Mergers and Acquisitions, 73 Bus. Law. 379, 398-403 (2018) [hereinafter ABA M&A Annual Survey]. The controversy that became the subject of this case arose despite the existence of three preliminary agreements between the parties—including, a letter agreement and an attached term sheet (together, the "***Letter of Intent***")[3]. *Id*. The Letter of Intent expressly provided that the parties were not bound to pursue any transaction, nor form any joint venture or partnership until definitive agreements had been reached, memorialized, and executed. *Enterprise*, 529 S.W.3d at 534-35, 537; *see also* ABA M&A Annual Survey, at 398-400. Moreover, the Letter of Intent stated that any potential definitive agreements reached by the parties first required the approval and consent of each of the parties' respective board of directors. *See Enterprise*, 529 S.W.3d at 537. The following excerpt from the Letter of Intent is illustrative to one of the central issues in the *Enterprise* case (as well as to the types of issues that can arise in the use of letters of intent in general):

> . . . no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties. *Id.*

Facts and Procedural Posture:

In 2011, Enterprise Product Partners, L.P. ("***Enterprise***") and Energy Transfer Partners, L.P. ("***ETP***") entered into the three non-binding, preliminary agreements to enter negotiations to form a joint venture to jointly build and operate an oil pipeline from Cushing, Oklahoma, to the Texas Gulf Coast, which they both referred to—privately and publicly—as the "Double E Pipeline." *Id*. at 533-34. Despite the non-binding language present in the Letter of Intent, publicly, the parties proceeded as if they already had formed a joint venture, publicly communicating the existence of the joint venture and the pending construction of the pipeline to potential clients and in press conferences. ABA M&A Annual Survey at 398; *see Enterprise*, 529 S.W.3d at 534-35. And, not unlike *Texaco v. Pennzoil*, 729 S.W.2d 768, both parties spent significant time, money, and effort in furtherance the agreement envisioned by the non-binding preliminary agreements. *See* ABA M&A Annual Survey at 398; *cf. Texaco*, 729 S.W.2d 768.

After some time, Enterprise terminated its participation in the project after it determined that the parties' joint marketing efforts had been insufficient to produce enough shipping commitments to sustain the economic feasibility of the "Double E Pipeline." *Enterprise*, 529 S.W.3d at 534-35. Enterprise then entered into an agreement with another pipeline company, Enbridge Inc., to build and operate a pipeline along the same Cushing-Texas Gulf Coast route as the Enterprise-ETP project. *Id*. at 535; *see also* ABA M&A Annual Survey at 398-99.

ETP sued Enterprise in state court in Dallas, Texas, for breach of joint enterprise and breach of fiduciary duty. *Enterprise*, 529 S.W.3d at 535–36. ETP alleged that Enterprise's conduct constituted a breach of Enterprise's fiduciary[4] duties to ETP based on the preliminary agreements and the parties' ensuing conduct with regard to the "Double E Pipeline" project. *Enterprise*, 529 S.W.3d at 535–36. In spite of the express provisions regarding the non-binding nature of the preliminary agreements, the jury found in favor of ETP (the plaintiff). *See id*. at 536. The jury concluded that the parties' conduct in jointly marketing and pursuing the "Double-E Pipeline" project created a *de facto* partnership under Texas law, and accordingly, Enterprise had breached its fiduciary duty of loyalty to ETP. *Id*. Based on the jury's findings, the trial court awarded ETP a judgment totaling: $535,794,777.40. *Id.* at 532. Enterprise appealed the trial court's judgment to the Texas Court of Appeals in Dallas, which subsequently reversed the trial court's judgment. *Id*. at 545; *see also* ABA M&A Annual Survey at 398-400.

Case Analysis (*Enterprise* Court's Ruling)

In reversing the trial court's ruling, the *Enterprise* court primarily based its decision upon the failure of two conditions precedent that the Letter of Intent required to be satisfied prior to the parties' formation of a partnership: (1) approvals from each of the parties' respective Board of Directors, and (2) execution and

[3] Even as all three preliminary agreements contained provisions purporting to limit the parties' obligations to one another, the *Enterprise* Court of Appeals primarily considered the Letter of Intent in its analysis because it found the Letter of Intent to contain the clearest language.

[4] As implied by Texas law under the "Five-Factor Test." *See* TEX. BUS. ORG. CODE § 152.052(a); *Ingram v. Deere*, 288 S.W.3d 886, 895-96 (Tex. 2009).

delivery of definitive agreements for the 'Transaction.' *Enterprise*, 529 S.W.3d at 544-45. Additionally, the *Enterprise* court cited ETP's failure to request (and to obtain) a jury finding at the trial court level that the parties had waived the conditions precedent contained in the preliminary agreements as one of the primary bases for its decision. *Id.*

In its opinion, the *Enterprise* court noted that it was unpersuaded by ETP's primary contention that the formation of a common law *de facto* partnership existed between ETP and Enterprise, and that the existence of such a partnership was controlled solely by the five-factor test in Section 152.052 of the TBOC. *Enterprise*, 529 S.W.3d at 537-39; *see also* ABA M&A Annual Survey at 401-02. Rather, the *Enterprise* court opined that the five factors set forth in Section 152.052 of the TBOC are non-exclusive, and accordingly, the conditions set forth in the parties' Letter of Intent constituted conditions precedent, the satisfaction (or waiver) of which were necessary to the formation of any partnership between the parties. *Enterprise*, 529 S.W.3d at 537-39; *see* ABA M&A Annual Survey at 401-03.

Case Analysis (Key Arguments in the Parties' Filings with the Supreme Court of Texas):

In its Petition for Review filed with the Supreme Court, ETP primarily relies on its contention that the *Enterprise* court deviated from Section 152.052(a) of the TBOC's five-factor test, which identifies factors indicative of the formation of a partnership under Texas law. *See* Petitioners' Petition for Review at 10-11, *Energy Transfer Partners, L.P. v. Enterprise Prods. Partners, L.P.*, No. 17-0862 (Tex. Dec. 27, 2017), Tex-21482761, 2017 WL 6814900, at *10-11. In support of this argument, ETP contends that the *Enterprise* court's assertion that the five-factor test is non-exclusive "directly conflicts" with the Texas Supreme Court's ruling in *Ingram v. Deere*. Petitioners' Petition for Review at 10-11, *Energy Transfer Partners, L.P. v. Enterprise Prods. Partners, L.P.*, No. 17-0862 (Tex. Dec. 27, 2017), Tex-21482761; *cf. Ingram*, 288 S.W.3d at 895-904. In *Ingram*, the Court stated that:

> Whether a partnership exists must be determined by an examination of the totality of the circumstances. Evidence of none of the factors under the Texas Revised Partnership Act will preclude the recognition of a partnership, and even conclusive evidence of only one factor will also normally be insufficient to establish a partnership under [the] TRPA. However, *conclusive evidence of all five factors establishes a partnership as a matter of law*. *Ingram*, 288 S.W.3d at 903-04 (emphasis added).

In its Response to EPT's Petition for Review, Enterprise primarily relied upon: (1) the *Enterprise* court's ruling, and (2) its discussion of the failure of the parties to satisfy (or waive) the conditions precedent contained in the Letter of Intent. *See* Respondents' Response to Petition to Review at 9-14, *Energy Transfer Partners, L.P. v. Enterprise Prods. Partners, L.P.*, No. 17-0862 (Tex. Feb. 26, 2018), tex-22770246, 2017 WL 6814900, at *9-14. In addition, Enterprise incorporated a number of 'business consideration' arguments in support of its position that the Texas Supreme Court should deny ETP's Petition for Review. Respondents' Response to Petition to Review at 15, *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, No. 17-0862 (Tex. Feb. 26, 2018), tex-22770246. For example, in its Response to ETP's Petition for Review, Enterprise stated that if the Court were to grant review it "would continue to sow doubt in the Texas business community about how to keep businesses out of unwanted partnerships. Until this case ends, a fog of uncertainty will linger over Texas businesses and their transactional lawyers." *Id*.

B. Other Course of Dealings Issues

There may be other instances where the existence of the Letter of Intent, together with a significant course of dealing between the parties with specific verbal representations and a significant change in position by one party in reliance upon those representations, could result in a non-contract cause of action by one party asserting that the other party is bound to the essential terms of the transaction outlined in the Letter of Intent.

1. Partial Performance

A party may argue that each party to the transaction should be bound to an otherwise unenforceable Letter of Intent through their partial performance. Where there is partial performance, courts will apply a five-factor test to determine whether the parties intended to be bound by a preliminary agreement.

The five factors are as follows:

(1) the language of the agreement;
(2) the context of the negotiations;
(3) the existence of open terms;
(4) nature of the partial performance; and
(5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions.

COC Services, 150 S.W.3d at 668; *John Wood*, 26 S.W.3d at 18 (citing *Arcadian Phosphates, Inc. v. Arcadian Corp.* 884 F.2d 69, 70 (2d Cir. 1989) (applying New York law)).

In *COC Services*, the parties attached a detailed legal agreement form as an exhibit to a Letter of Intent that contained non-binding language. 150 S.W.3d at

668. After the proposed transaction failed to materialize, COC Services argued that through partial performance of the exhibit, the parties expressed their intent to be bound to it. The partial performance element may not be supported by actions consistent with the Letter of Intent (which is non-binding), but must relate to the alleged contract (*i.e.*, the exhibit, which in this case was a Master Franchise Agreement). Due diligence efforts relating to the underlying business transaction was held to be related to the Letter of Intent, not the Master Franchise Agreement. Further, inconsistent positions taken by CompUSA in some documentation was not sufficient to outweigh the preponderance of the evidence to the contrary. The court held that there was not partial performance of the primary obligation under the Master Franchise Agreement (e.g., no payment of fees or opening of stores). *Id.* at 669. Without performance of critical components of the alleged legally binding agreement, the partial performance claim fails.

2. Promissory Estoppel

The legal concept of "promissory estoppel" can be invoked to preclude a party from relying upon the non-binding character of what is otherwise a legally unenforceable writing.

The elements for promissory estoppel are as follows:

(1) A promise;
(2) The foreseeability of the promisee's reliance;
(3) Actual, reasonable substantial reliance by the promisee on the promise; and
(4) Damages.

F.D.I.C. v. Perry Bros., Inc., 854 F. Supp. 1248, 1267 (E.D. Tex. 1994), *aff'd in part, vacated in part sub nom. Nationsbank v. Perry Bros., Inc.*, 68 F.3d 466 (5th Cir. 1995) (citing *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983)); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n. 25 (Tex. 2002); *Collins v. Walker*, 341 S.W.3d 570, 573-74 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Henderson v. Texas Commerce Bank-Midland, N.A.*, 837 S.W.2d 778, 782 (Tex. App.—El Paso 1992, writ denied).

Promissory estoppel may be asserted when one party makes a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee that does induce such action or forbearance and when an injustice can be avoided only by the enforcement of the promise. *Id.*

Although normally a defensive theory, promissory estoppel has increasingly been pled as an affirmative cause of action. *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 672 (Tex. App.—Houston [1st Dist.] 1996, no writ). The Texas Supreme Court stated that promissory estoppel is defensive in nature in that it does not create a contract where none existed before, but only prevents a party from insisting upon strict legal rights when to do so would be unjust. *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965). In *Wheeler*, the Texas Supreme Court applied promissory estoppel to allow enforcement of an oral agreement to lend money, which the Court of Appeals found unenforceable due to vagueness. *Id.*

> The function of waiver or estoppel is to preserve rights, not to create independent causes of action. . .. Waiver and estoppel are defensive in nature and operate to prevent the loss of existing rights. They do not operate to create liability where it does not otherwise exist.

Hruska v. First State Bank of Deanville, 747 S.W.2d 783, 785 (Tex. 1988).

In *State Nat'l. Bank v. Academia, Inc.*, 802 S.W.2d 282 (Tex. App.—Corpus Christi 1990, writ denied) [hereinafter *Academia*], the court held that a contract otherwise unenforceable due to the parol evidence rule could not be enforced under a promissory estoppel cause of action. *Academia* supports a defense that no justifiable reliance is possible on a contract otherwise unenforceable under Section 26.01 of the Texas Business and Commerce Code (Texas Statute of Frauds). *See also Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 835 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Farah*, 927 S.W.2d at 672. Further, the affirmative defense of limitations applies to promissory estoppel. *Id.*

Promissory estoppel requires extraordinary circumstances such as those outlined in the *Texaco v. Pennzoil*. *Texaco v. Pennzoil*, 729 S.W.2d at 768. In *Texaco v. Pennzoil*, Pennzoil reached an agreement in principal to acquire Getty Oil but no formal documentation was executed. Texaco stepped in and negotiated a binding agreement to acquire Getty Oil, thereby cutting off Pennzoil. Pennzoil and Getty previously signed a Letter of Intent, produced a press release that they had reached a "deal," and then took other actions consistent with a completed agreement. Under the complex circumstances involved, which related to a corporate acquisition under New York law, the court held that the parties intended that the Letter of Intent be binding based on a review of the following factors:

- Whether a party expressly reserved the right to be bound only when a written agreement was signed;

- Whether there was partial performance by one of the parties that the party disclaiming the contract accepted;
- Whether all essential terms of the alleged contract were agreed upon; and
- Whether the complexity or magnitude of the transaction was such that a formal executed writing would normally be expected.

As a result of the holding that the Getty/Pennzoil Letter of Intent was drafted to be binding, the court held that Texaco had tortiously interfered with Pennzoil's rights, thus resulting in a significant verdict.

The parties to a transaction should be careful that their actions are consistent with the non-binding character of the Letter of Intent. If one party can assert that the course of conduct of the other party led to a substantial change in position by a party acting in reasonable reliance on those actions, then the normally non-binding Letter of Intent may be held to become binding based upon the equitable legal principle of estoppel.

3. Fraudulent/Negligent Misrepresentation

Another cause of concern regarding Letters of Intent is fraudulent/negligent misrepresentation. The elements are as follows:

- A business relationship;
- Representation made by one party intended to be relied upon by the other party;
- Reasonable reliance;
- Representation either falsely made (and the party making the representation knew it) [fraudulent misrepresentation] or recklessly made (with the party failing to check out its validity) [negligent misrepresentation]; and
- Damage to the party.

See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999) (discussing negligent misrepresentation); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992) (discussing fraudulent misrepresentation); *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439 (Tex. 1991).

Plaintiffs asserting fraudulent/negligent misrepresentation have three major proof obstacles:

- *Reasonable* reliance,
- Misrepresentation of an *existing fact*, and
- *Intent* [for fraudulent misrepresentation].

Proving reasonable reliance in the context of a well-drafted Letter of Intent, particularly if the defendant has been careful in documenting its course of dealings with the plaintiff, is difficult.

In a commercial real estate setting, this cause of action could arise when a landlord signs a Letter of Intent, makes verbal representations to the potential tenant that the transaction will be consummated, and the tenant then materially changes its position by terminating its current lease, or, perhaps, by taking possession of the leased premises. If the landlord then tries to change the deal, based on the non-binding nature of the Letter of Intent, the doctrine of fraudulent/negligent misrepresentation will operate to bind the landlord to the transaction.

For discussion of fraudulent misrepresentation in the context of a real estate Letter of Intent, *see HK Partners, Inc. v. Power Computing Corp.*, No. 03-98-00124-CV, 1999 WL 332573, at *1 (Tex. App.—Austin May 27, 1999) (mem. op., not designated for publication), where the court held not only that fraudulent misrepresentation was not a proper claim, but even if it was, there was a lack of evidence to overturn a motion for summary judgment denying the fraudulent misrepresentation of claim in the context of a pre-development agreement with contingent language.

4. Deceptive Trade Practices Act

A consumer may maintain an action under the Texas Deceptive Trade Practices-Consumer Protection Act for a commercial real estate transaction of $500,000 or less. TEX. BUS. & COM. CODE § 17.41 et. seq. (West 2015). A cause of action can be based on an otherwise non-binding Letter of Intent. *See Sec. Bank v. Dalton*, 803 S.W.2d 443, 452 (Tex. App.—Fort Worth 1991, writ denied); *Investors, Inc. v. Hadley*, 738 S.W.2d 737 (Tex. App.—Austin 1987, writ denied). The lower proof requirements and statutory penalties of the DTPA can be problematic if an otherwise non-binding Letter of Intent is coupled with a course of dealing indicating a binding agreement.

5. Real Estate Fraud Act

Section 27.01 of the Texas Business and Commerce Code, provides an express statutory action for fraud in the context of real estate transactions, which might be alleged to apply to a Letter of Intent. The act requires an allegation that misrepresentations were made to induce a party to enter a "contract." Where a Letter of Intent has binding provisions, it clearly is a contract within contemplation of the act, but where it is clearly stated to be non-binding, an argument can be made that it is not a contract. In most instances where negligent/fraudulent misrepresentation is alleged, this act can also be alleged.

C. Defenses to Purported Binding Letter of Intent

1. Clear Non-Binding Language

Many clients are unsure if a statement that a Letter of Intent is non-binding is, itself, binding. The issue addressed by such a statement is the requirement that there be intent to enter into a contract. This intent requirement is eliminated by a clear statement that the Letter of Intent is non-binding. *See Scott v. Ingle Bros.*, 489 S.W.2d 554 (Tex. 1972); *Enterprise*, 529 S.W.3d at 537; *WTG Gas Processing, L.P. v. ConocoPhillips Co.*, 309 S.W.3d 635, 647 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *John Wood*, 26 S.W.3d at 16; *Wiley v. Bertelsen*, 770 S.W.2d 878 (Tex. App.—Texarkana 1989, no writ). However, merely referencing a more definitive agreement to be executed later is not sufficient for an otherwise complete Letter of Intent to be considered a binding contract. *Garner v. Boyd*, 330 F. Supp. 22 (N.D. Tex. 1970) (mem. op.), *aff'd*, 447 F.2d 1373 (5th Cir. 1971); *Foreca*, 758 S.W.2d 744. Performance of the transaction referenced in the Letter of Intent without a formal contract indicates intent for it to be a binding contract. *Houston Chronicle Pub. Co. v. McNair Trucklease, Inc.*, 519 S.W.2d 924 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) [hereinafter *Houston Chronicle*].

2. Lack of Description

A real estate contract requires a legally sufficient description, which may not rely on extrinsic evidence except to reasonably identify the property based on information contained in the contract. *See Morrow v. Shotwell*, 477 S.W.2d 538 (Tex. 1972); *Wilson v. Fisher*, 188 S.W.2d 150 (Tex. 1945); *Reiland v. Patrick Thomas Properties, Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Eberling's Estate v. Fair*, 546 S.W.2d 329 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). Many Letters of Intent fail to include legally sufficient legal descriptions.

3. Lack of Consideration

There must be the exchange of something of value ("consideration") for agreements to be binding. Where a Letter of Intent contains a reference to a feasibility review period, with a clearly stated right for the buyer to terminate during that review period without forfeiting any earnest money, even if the Letter of Intent (or portions thereof) is intended to be binding, it is not likely to be enforced due to the lack of consideration for the agreement. A contract that lacks consideration lacks mutuality of obligation and is therefore unenforceable. *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997), *superseded by statute on other grounds*; *Elliott v. S&S Emergency Training Sols., Inc.*, No. 05-16-01373-CV, 2017 WL 2118787, at *4 (Tex. App.—Dallas May 16, 2017, pet. filed), *reh'g denied* (June 26, 2017); *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 224 (Tex. App.—Fort Worth 2009, pet. denied), *cert. denied*, 559 U.S. 1036 (2010).

However, even without monetary payment, a court may find consideration for an enforceable contract. *Copeland v. Alsobrook*, 3 S.W.3d 598 (Tex. App.—San Antonio 1999, pet. denied). In *Copeland*, the Court held:

> "Consideration is a present exchange bargained for in return for a promise…It can be either a benefit to the promisor or a detriment to the promise…A promise for a promise is sufficient consideration."

Id. at 606 (citing *Crest Constr., Inc. v. Murray*, 888 S.W.2d 931 (Tex. App.—Beaumont 1994), *rev'd on other grounds*, 900 S.W.2d 342 (Tex. 1995)).

4. Unsigned Letter of Intent

Sometimes the parties may have exchanged drafts of a Letter of Intent but never signed them. This lack of signature can be asserted as reflecting the lack of intent that is critical to the making of an enforceable contract. Further, where there has simply been an exchange of Letters of Intent, but no single Letter of Intent has been signed by both parties, the same argument can be made. In *RHS Interests, Inc. v. 2727 Kirby Ltd.*, 994 S.W.2d 895 (Tex. App.—Houston [1st Dist.] 1999, no pet.) [hereinafter *RHS Interests*], the court held that a unilateral Letter of Intent sent after a telephone call between the buyer and seller's broker was not sufficient to establish a binding contract where the language in the Letter of Intent clearly reflected that there were further negotiations contemplated. However, in *Hardin Const. Group, Inc. v. Strictly Painting, Inc.*, 945 S.W.2d 308, 313 (Tex. App.—San Antonio 1997, no writ), the court held that an unsigned contract (in this case a construction contract) together with indications that the parties had agreed to all but one provision (which the court held was not an "essential term" of the contract), and substantial performance by one party, constituted an enforceable contract.

5. Lack of Essential Terms

To be an enforceable contract, a court must be able to find that the document is sufficiently definitive to set forth the essential terms such that it can be inferred that the parties meant to be bound. *Fiduciary Fin. Servs. of Sw., Inc. v. Corilant Fin., L.P.*, 376 S.W.3d 253 (Tex. App.—Dallas 2012, pet. denied); *Geophysical Micro Computer Applications (Int'l) Ltd. v. Paradigm Geophysical Ltd.*, No. 05-98-02016-CV, 2001 WL 1270795, at *1 (Tex. App.—Dallas Oct. 24, 2001, pet. denied) (not designated for publication). The court in *Texas Oil Co. v. Tenneco Inc.*, 917 S.W.2d 826, 830-31 (Tex. App.—Houston [14th Dist.] 1994), *rev'd in part sub nom., Morgan Stanley & Co. v. Texas Oil Co.*, 958

S.W.2d 178 (Tex. 1997), set forth a helpful list of issues in determining whether a Letter of Intent for sale of a company was sufficiently definitive to be enforceable. Those guidelines are as follows:

- The rules regarding indefiniteness of material terms of a contract are based on the concept that a party cannot accept an offer so as to form a contract unless the terms of that contract are reasonably certain. (Citing Restatement [Second] of Contracts §33(1) (1991)).
- The actions of the parties may conclusively establish their intent to enter a binding agreement, even if some terms are left for a future agreement.
- Texas courts prefer to validate transactions rather than void them.
- A court may not create a contract where none exists and generally may not interpolate or eliminate material terms, however, parties may agree on some terms sufficiently to create a contract, leaving other terms for later negotiation. Further, a court may uphold an agreement by supplying missing terms, such as implying a reasonable price.
- Contract terms are reasonably certain "if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." This is in line with the policy that parties, and not the courts, should make contracts.
- Where the parties intended to make an agreement and there is a certain basis for granting a remedy, courts should find the contract terms definitive enough to provide a remedy. Uncertainty of terms, however, can preclude one remedy without affecting others. For example, less certainty is necessary in a suit for damages than one for specific performance.
- Where the parties are agreeing to make a future contract and the agreement leaves material terms to be agreed upon later, that agreement is not definitive and specific as to material and central terms and, is therefore, unenforceable.

6. Disguised Contract Claims

Courts are increasingly realizing that many allegedly tort causes of action are simply repackaged contract claims. If the basis for the alleged tortious action is the breach of an alleged agreement between the parties, the claim sounds only in contract, not in tort. *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 177–78 (5th Cir. 2016); *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991).

A. Real Estate Case Law

1. *RHS Interest, Inc. v. 2727 Kirby, Ltd.*, 994 S.W.2d 895 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

In *RHS Interest*, a buyer submitted two successive Letters of Intent to the owner of an office building. The listing broker responded after receiving the second Letter of intent and gave verbal approval to the deal, with certain modifications. The broker followed up with a written letter confirming the terms of the transaction. The buyer's Letter of Intent form contained the following provisions:

> "This offer is a summary of a transaction to be more fully described in an earnest money contract, the specifics of which will be negotiated in good faith. This letter serves only as an offer . . . and is not binding as an agreement unless and until a fully executed earnest money contract is signed."

The listing broker's letter repeatedly mentioned "a binding purchase and sale agreement" and a "formal purchase and sale agreement". A number of terms in the second of the buyer's Letter of Intent, such as time periods, earnest money and commissions were changed. Additionally, the broker's letter agreed to cease marketing efforts to allow the buyer to begin inspections. Buyer commenced inspections, but never signed a contract nor deposited any earnest money. Subsequently, the seller discontinued negotiations toward a contract.

Buyer sued for specific performance of the Letter of Intent as a binding contract. Seller asserted the following defenses:

(1) no binding contract;
(2) statute of frauds;
(3) insufficient legal description;
(4) lack of material terms; and
(5) lack of consideration.

The trial court granted the seller's motion for summary judgment and the buyer appealed. On appeal, the court upheld the summary judgment on the basis of a lack of consideration. However, the court also held that there was no binding contract due to the language quoted above in the buyer's Letter of Intent and the seller's agent's acceptance letter. The court held there were clearly significant negotiations ahead and the parties did not contemplate to be bound by the exchange of Letters of Intent. In addressing the lack of consideration point, the court followed *Antwine v. Reed*, 199 S.W.2d 482 (Tex. 1947), where the Texas Supreme Court refused specific performance under a fully executed real estate contract since the buyer never tendered any earnest

money. The court also noted that any money spent on inspections by the buyer was not substantial performance or other material action that would substitute for cash consideration because of the "preliminary" context of the exchanged Letters of Intent. The court did acknowledge that under different circumstances, where there had been substantial performance or other material action in reliance upon the transaction, that such actions would be a consideration substitute, citing *Scott*, 489 S.W.2d 554.

This case demonstrates a significant hurdle for a party seeking to enforce a Letter of Intent as a binding contract, even if clear non-binding language is not included.

2. *HK Partners, Inc. v. Power Computing Corp.*, No. 03-98-00124-CV, 1999 WL 332573, at *1 (Tex. App.—Austin May 27, 1999) (mem. op., not designated for publication).

In the *HK Partners* case, HK Partners formed a development team to respond to a request for proposal from Power Computing for construction of a manufacturing facility in Georgetown, Texas. HK Partners' submission was accepted, but no formal contract was signed. Several drafts of a proposed pre-development agreement were exchanged over a three-week period, but none were signed. Power Computing then changed its entire approach to the project, instructed HK Partners to discontinue its work, submit an invoice for work completed to date, and submit a new proposal conforming to Power Computing's new approach (wherein HK Partners would have a more limited role). HK Partners declined to submit a new proposal and submitted an invoice for $250,000.00, which Power Computing refused to pay, claiming it was excessive.

HK Partners asserted that the pre-development agreement memorialized a "broader agreement" between the parties that HK Partners had been selected as the owner/developer/landlord of the entire project. Power Computing asserted that its sole purpose was to confirm that HK Partners was to proceed immediately with pre-development work and that Power Computing would compensate HK Partners on a "pay-as-you-go" basis. Power Computing filed a declaratory judgment action seeking to confirm that there was no contract for development of the entire project and that it was obligated only to pay the fair value of the pre-development work actually performed. HK Partners counterclaimed for breach of contract, fraud and negligent misrepresentation.

The appellate court upheld summary judgment granted in favor of Power Computing on the contract and fraud claims. Power Computing's promises to sign a pre-development agreement were insufficient to create a binding contract. Further, the pre-development agreement itself was too indefinite to be enforced as a "broader agreement" relating to the entire project because it did not specify any of the material terms inherent in contracts to develop commercial real estate. Power Computing's only promise was to sign a pre-development agreement either (i) affirmatively stating HK Partners would be the owner/developer/landlord or (ii) referencing a "continuing relationship" between the parties on the project. That promise did not provide the terms necessary to create a contract for the development of an entire manufacturing plant, since it failed to address issues such as scope of the project, budget, design, duration or lease terms.

The court also considered HK Partners' allegation of an "implied-in-fact" contract based on the course of dealings between the parties. An implied-in-fact contract requires a meeting of the minds of the parties as evidenced by their course of dealings. *See Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972). The conduct must evidence an objective assent to the terms of an agreement. The parties' conduct and course of dealings were insufficient to evidence the "broader agreement" for a binding contract to develop the entire project. The court also dispensed with the argument that the doctrine of promissory estoppel precluded Power Computing from denying an agreement existed, holding that promissory estoppel does not create a contract where none existed under contract law principles.

On the issue of fraud, the Court held that HK Partners alleged fraud and breach of contract based on essentially the same facts; that being Power Computing's failure to allow HK Partners to be the owner/developer/landlord of the project. Therefore, although HK Partners couched a cause of action as common law fraud, it is really seeking to recover the benefit of the alleged contract. Since the real objective is to enforce the contract, it cannot use a fraud allegation to circumvent the unenforceability of the contract. In the related issue of fraudulent misrepresentation, HK Partners asserts that Power Computing fraudulently agreed to sign the pre-development agreement and later refused to do so. The court held that a promise of future performance constitutes actionable fraud only if the promise was made with no intention of performing it at the time it was made. Power Computing never denied that it promised to sign a pre-development agreement, only that it changed its mind regarding the direction of the project (presumably with a legitimate basis). Although the court indicated that failure to perform as promised is one factor that may be considered to establish deceitful intent of a party at the time the promise was made, standing alone, failure to perform is not evidence of fraud. Since that was the sole evidence produced by HK Partners, the fraudulent misrepresentation failed.

3. *Cleveland Regional Med. Center v. Celtic Properties, L.C.*, 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied).

Celtic Properties ("Celtic") leased medical office space to the tenant, Cleveland Regional Medical Center ("CRMC"). CRMC then subleased the property back to Celtic. The parties subsequently signed a "Letter of Agreement" providing that upon a certain sublessee vacating the property, the master lease would terminate, CRMC would then enter into a new master lease for seven years, and that CRMC would pay Celtic an escalated rental rate. The letter incorporated the prior master lease, supplied the address of the leased premises, the signatures of both parties, square footage of the property, the lease term, and rental rate.

However, after the sublessee vacated the property, CRMC refused to pay the escalated rental price. Celtic then filed suit against CRMC for breach of lease terms set forth in the letter. CRMC defended by calling the letter a letter of intent. Celtic submitted evidence of extensive negotiations between the parties and that the parties changed the title of the document from "Letter of Intent" to "Letter of Agreement" in order to make a valid and binding contract.

The letter was held sufficient to support to be binding with all material terms for a binding lease. The letter did not leave essential terms open for future negotiation. An agreement may be binding even though it refers to the drafting of a future, more formal agreement.

Don't rely on the requirement for a more definitive agreement to make a "letter of intent" non-binding. If you don't want to be bound, don't use "Letter of Agreement!"

4. *Martinez v. Vann*, No. 11-06-00186-CV, 2008 WL 2133085, at *1 (Tex. App.—Eastland May 22, 2008, no pet.) (mem. op.).

Martinez sent a letter of intent (full text included in the opinion) to Vann outlining terms of a proposed sale of condominium units, including a $22,000 sale price and terms of the seller financing. The letter also stated, "Upon acceptance of this offer, a fully executed contract will be signed by all parties." Vann wrote on the letter "I agree with your proposal[.] Go ahead & start it. Open an escrow," and faxed it back to Martinez.

Following that exchange, Martinez incurred expenses making repairs to the property, but the parties never closed on the transaction, and several other provisions from Martinez's letter were not fulfilled. Not binding contract was formed because the document stated that it was merely a "letter of intent," and that an enforceable contract would be executed at a future date, thus, there was no intent of the parties to be bound at that time. Additionally, the letter did not contain a sufficient legal description.

APPENDIX A
"TERM SHEET" STYLE OFFICE LEASE LETTER OF INTENT FORM
(Using State Bar Format)

Letter of Intent (Office Lease)

This Letter of Intent (Office Lease) is between Landlord and Tenant as identified below and is effective on the date of the last of the signatures by Landlord and Tenant.

Non-Binding Terms of Proposed Transaction

Date:

Landlord:
Landlord's Address:

Tenant:
Tenant's Address:

Premises
Approximate Square Feet:_____net rentable, _____ usable (___% add on factor)
Name of Building:
Street Address/Suite:
City, State, Zip:

Base Rent (monthly): $
Adjustments to Base Rent:
Term (months):
Commencement Date:
Termination Date:
Renewals:
Expansions:
Right of First Refusal:
Security Deposit: $
Holdover Rent: % of Base Rent
Permitted Use:
Signage:
Liability Insurance: Death/Bodily Injury: $_____ Property: $_____
Guarantors:
Tenant's Pro Rata Share: %
Parking: _____reserved at $___monthly, _____unreserved at $___monthly
Essential Services-heating, ventilating, air conditioning, water, and utility connections reasonably necessary for occupancy of the premises for the permitted use in building standard levels and quantities.
Operating Expenses- Includes_____
Excludes_____
Building Operating Hours:_____
Common Areas:_____
Tenant Allowance: $
Floor plan of Premise: Exhibit A
Approved Tenant Space Plan: Exhibit B
Work letter: Exhibit C
[INSERT OTHER APPLICABLE PROVISIONS]

Tenant Obligations:

1. Lease the premises from the commencement date to the termination date.
2. Accept the premises in their present condition **"as is,"** the premises being currently suitable for Tenant's intended use, except of alterations made pursuant to the Work letter.
3. Obey all laws, ordinances, orders, and rules and regulations applicable to the use, condition, and occupancy of the premises, including the rules and regulations of the building adopted by Landlord.
4. Pay monthly, in advance, on the first day of the month, the base rent to Landlord at Landlord's address.
5. Pay, as additional rent, _____.
6. Pay a late charge of ___% of any rent not received by Landlord by the _____day of the month in which the rent is due.
7. Pay for all utility services used by Tenant and not provided by Landlord and Tenant's pro rata share of any utility services provided by Landlord.
8. Pay monthly Tenant's pro rata share of estimated monthly operating expenses, and annually, the actual operating expenses, within ___days of notice of the amount due.
9. Allow Landlord to enter the premises to perform Landlord's obligations, inspect the premises, and show the premises to prospective purchasers or tenants.
10. Repair, replace, and maintain any part of the premises that Landlord is not obligated to repair, replace, or maintain, normal wear excepted.
11. Repair any damage to the premises caused by Tenant.
12. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are the obligations of Landlord.
13. Maintain public liability insurance for the premises and the conduct of Tenant's business, naming Landlord as an additional insured, in the amounts stated in the basic lease terms and definitions.
14. Maintain insurance on Tenant's personal property.
15. Deliver certificates of insurance to Landlord before the commencement date and thereafter when requested.
16. Indemnify, defend, and hold Landlord harmless from any loss, attorney's fees, expenses, or claims arising out of use of the premises.
17. Deliver to Landlord a financing statement perfecting the security interest.
18. Vacate the premises on termination of this lease.

Tenant Limitations:

1. Use the premises for other than the permitted purpose.
2. (a) Create a nuisance, (b) interfere with any other tenant's normal business operations or Landlord's management of the building, (c) permit any waste, or (d) use the premises in any way that is extra hazardous, would increase insurance premiums, or would void insurance on the building.
3. Change locks or alter the premises, except as provided in the Work letter or_____.
4. Assign this lease or sublease any portion of the premises without Landlord's written consent, except_____.

Landlord Obligations:

1. Lease to Tenant the premises from the commencement date to the termination date.
2. Obey all laws, ordinances, orders, and rules and regulations applicable to the use, condition, and occupancy of the building.
3. Provide normal utility service connections to the building.
4. Repair, replace, and maintain the (a) roof, (b) foundation, (c) parking and common areas, (d) structural soundness of the exterior walls, doors, corridors, windows, and (e) other structures or equipment serving the premises.
5. Insure the building against all risks of direct physical loss in an amount equal to at least 90 percent of the full replacement cost of the building as of the date of the loss and liability; Tenant will have no claim to any proceeds of Landlord's insurance policy.
6. Return the security deposit to Tenant, less itemized deductions, if any, within thirty days after the termination of the lease.
7. Advance the Tenant Allowance per the Work letter.
8. Provide the essential services.
9. Provide an annual accounting of operating expenses passed through to Tenant.

Landlord Limitations:

1. Interfere with Tenant's possession of the premises as long as Tenant is not in default.
2. Unreasonably withhold consent to a proposed assignment or sublease.

Specific Matters:

1. **Alterations-** _____.
2. **Rent Abatement-**_____.
3. **Landlord's Lien-**_____.
4. **Alternative Dispute Resolution-** Landlord and Tenant shall submit in good faith to mediation before filing a suit for damages.
5. **Limitation of Warranties.** There are no implied warranties of merchantability, of fitness for a particular purpose, or of any other kind.

Representations and Warranties of the Parties

[INSERT RELEVANT REPRESENTATIONS AND WARRANTIES]

Disclosures

[INSERT RELEVANT DISCLOSURES]

Contingencies

[INSERT RELEVANT CONTINGENCIES]
Each party agrees to exercise good faith efforts to satisfy any contingency within its reasonable control.

Binding Agreements Relating to Proposed Transaction

[1. The Lease shall be prepared on the [ALTERNATIVES-most current form of lease promulgated by the State Bar of Texas in its Real Estate Forms Manual/ Texas Association of Realtors Commercial lease form/ Landlord's standard lease form]. The Lease shall be prepared by Landlord's Attorney within ___ days of the effective date of this letter and distributed contemporaneously to all parties by [messenger/fax/over night delivery/email].
2. If the Lease is not finally negotiated, signed and tendered to Landlord with the security deposit and first month's rent within ___ days of the effective date of this letter, this letter shall terminate.
3. Landlord agrees to abate all marketing efforts for the Premise during the term hereof. Any existing signs may remain. Any ordered advertising shall be canceled, if cancelable without penalty, otherwise ordered advertising many proceeds, but no additional advertising may occur. Brokers and prospective buyers will not be shown the Premises and may be given only currently available printed information about the Premises prepared by Landlord's Broker.

INSERT OTHER APPLICABLE ITEMS]

Binding/Non-Binding Nature

LANDLORD IS NOT LEGALLY BOUND TO ENTER INTO THE TRANSACTION DESCRIBED HEREIN UNLESS AND UNTIL A COMPLETE LEASE IS EXECUTED BY LANDLORD AND TENANT AND TENDERED TO LANDLORD TOGETHER WITH THE SECURITY DEPOSIT AND THE FIRST MONTH'S RENT. LANDLORD IS BOUND TO COMPLY WITH THE PROVISIONS SPECIFICALLY LISTED AS BINDING AGREEMENTS. [LANDLORD ACKNOWLEDGES RECEIPT OF $10.00 AND OTHER VALUABLE CONSIDERATION, WHICH LANDLORD ACCEPTS AS LEGALLY SUFFICIENT TO BIND LANDLORD TO PERFORM THE BINDING AGREEMENTS].

THIS LETTER OF INTENT SUPERSEDES ALL PRIOR RELATED DISCUSSIONS AND AGREEMENTS BETWEEN THE PARTIES REGARDING THE PREMISES.

Exhibits:

"A"- Floor plan of Premises [Not Attached]
"B"- Tenant Site Plan [Not Attached]
"C"- Work letter [Not Attached]

_____
[Name and title of landlord]
Date signed:

_____
[Name and title of tenant]
Date signed:

APPENDIX B
LETTER STYLE OFFICE LEASE LETTER OF INTENT FORM

[Letterhead of Broker]

Address of Prospective Tenant or their Broker

RE: Letter of Intent to Lease [Description of leased premises] ("Premises")

Dear Sir:

On behalf of Landlord, I am authorized to offer to lease the Premises to Tenant on the following terms.

This letter of intent contains both non-binding provisions relating to the real estate transaction itself, and binding provisions relating to the actions of the parties with respect to certain procedures relating to inspection of the Premises and the process toward negotiation and documentation of a legally binding agreement.

This letter of intent supersedes all prior related discussions and agreements between the parties regarding the Premises.

Non-Binding Understandings Regarding the Real Estate Transaction:

1. Premises. The Premises shall consist of approximately _____ rentable square feet (_____ usable square feet) on the _____ floor, Suite _____ . The common area factor for the Premises is _____ .

2. Building. The Premises is located in _____.

3. Use. The Premises shall be used for general office purposes.

4. Commencement Date. Approximately _____ .

5. Term. _____ Years.

6. Base Rent. Years Rental Rate Per Rentable Sq. Ft.

7. Operating Expenses. Tenant will be responsible for its pro rata share of operating expenses and real estate taxes in excess of [ALTERNATIVES- actual <insert base year. amounts/$____ per sq. ft] ("Expense Stop") grossed up to _____% occupancy.

   Increases in controllable operating expenses will be capped at ____% on a cumulative and compounding basis. Controllable operating expenses will be defined as those expenses within the reasonable control of Landlord, thus, excluding taxes, insurance, utilities, etc.

   The net Base Rent (Base Rent less the Expense Stop) will be adjusted annually [ALTERNATIVES-in accordance with the Consumer Price Index <DEFINE WHICH CPI>/___%]

8. Electricity. Tenant shall pay a pro rata share of the Building's electric utility expenses incurred in the operation of the Building (estimated to be $_____ per rentable sq. ft. in _____). Above-standard electrical usage is metered and billed to tenants on an "as used" basis.

9. Security Deposit. A Security Deposit equal to one (1) month of Base Rent is required to be submitted when the Lease is signed.

10. Parking. _____

11. Lease Assumption. Landlord will reimburse Tenant for its current lease rent obligation for a period of up to ____ months in an amount not to exceed $_____ per month. Any proceeds from subleasing Tenant's existing office shall be distributed to Landlord.

12. Space Planning. Landlord's architect will provide initial space planning and interior design services at no charge to Tenant. Landlord will provide an allowance for space planning, construction drawings and mechanical, electrical and plumbing documentation equal to the lesser of $_____ per rentable square foot or the actual cost of drawings.

13. Base Building Conditions. Landlord will provide the Premises in its current shell condition with: (I) ceiling grid installed, (ii) HVAC distribution equipment installed, (iii) fire sprinklers in place, (iv) ceiling tiles and lights stacked on floor, (v) building standard window covering installed, (vi) building columns drywalled taped and bedded, (vii) surfaces beneath or above exterior windows furred, drywalled, taped and bedded and (viii) finished concrete floors.

14. Tenant Improvements. The space will be provided in its "as-is" condition. In addition, Landlord will provide an allowance of $_____ per net rentable square foot for the design and construction of standard and above-standard improvements. All improvements to the Premises will be paid for with this allowance including any required demolition and finished ceiling (and above ceiling) improvements.

    Landlord will contract with the construction contractor, manage the construction, act as liaison between Tenant, the contractor and the designer and coordinate the relationship between the construction, the building and the building's systems. In consideration for its construction supervision services, Landlord will earn a construction management fee equal to _____percent (__%) of the total construction costs.

    [ALTERNATIVES- The tenant improvements will be competitively bid to at least _____ (__) general contractors that have been approved by Landlord and Tenant. All construction information will be made available to Tenant. Landlord does not require the use of any specific contractors or subcontractors.]

15. Funding of Additional Improvements. Should the cost of construction for Tenant's offices exceed the Tenant Allowance, Landlord agrees to amortize the additional build-out costs up to an amount equal to $_____ per rentable square foot over the term of the lease at the annual interest rate of _____% compounded and payable monthly.

16. Moving Allowance. Landlord will reimburse Tenant for actual third party costs directly associated with (I) relocating Tenant's furniture, fixtures and equipment, (ii) telephone installation and (iii) stationery replacement in an amount equal to the lesser of $____ per rentable square foot or the actual costs incurred.

17. Refurbishment. At the end of the ____ year of the Lease, Landlord will provide a refurbishment allowance of $____ per rentable square foot for space initially occupied. The refurbishment allowance must be utilized to remodel or improve Tenant's Premises within ____ (__) months of its availability.

18. Cancellation Option. Tenant will be provided with a Cancellation Option at the end of the ___ year of the Lease subject to the following provisions:

    1) Tenant shall repay the unamortized portion of all costs (at an interest rate of ___% per year) incurred by Landlord in connection with the Lease.

    2) Tenant will pay a cancellation fee equal to _____ months rent.

    3) Tenant will provide Landlord with ____ months prior written notice of its intention to cancel.

    4) Tenant shall not cancel for the purpose of moving to another office building within _____ counties.

19. Renewal Option. Tenant shall have _____ option(s) to renew this lease for a period of _____ years at the then prevailing market rate. If Tenant elects to exercise its option to renew, it must do so in writing _____ (____) months prior to Lease expiration. Market rate shall be determined as follows: _____

20. Right of First Refusal. Tenant shall have the Right of First Refusal to lease _____ rentable square feet of space located _____.

21. Expansion Option. Upon the ____ anniversary date of the Lease, Landlord will grant Tenant the right to expand into _____ rentable square feet. In order to exercise this expansion option, Tenant must provide Landlord with at least _____ (__) months prior written notice. The expansion space will be offered at the then prevailing market rate for the Building. All other terms and conditions of the Lease shall remain the same.

22. Hours of Operation. The Building hours of operation are 7:00 AM to 6:00 PM Monday through Friday and 9:00 AM to 1:00 PM Saturdays, except holidays. After hours HVAC may be obtained with 24 hour notice at a charge of $_____ per hour.

23. Assignment and Subletting. Tenant will have the right to assign the lease or sublease all or a portion of the Premises with Landlord's consent which shall not be unreasonably withheld or delayed (subject to certain restrictions).

24. Hazardous Material. To Landlord's knowledge, the Building does not contain asbestos or other hazardous materials.

25. Americans with Disabilities Act. Landlord has a plan to bring the Building's common areas into compliance with the Americans With Disabilities Act of 1990 (the "ADA"). A copy of this plan is available for Tenant's review in the Building's management office. From and after the Commencement Date, Landlord will be responsible for the ADA in the Building's common areas and Tenant will be responsible for the ADA in the Premises.

26. Subordination, Non-disturbance. Landlord will exercise good faith efforts to obtain a Subordination, Non-disturbance and Attornment agreement from Landlord's lender (on its standard form) with the goal of such discussions being to deliver it with the Lease, or if not then available, prior to the Commencement Date.

27. Amenities. _____

28. Signage. _____

29. Communications Antenna. Tenant will have the right to install a satellite dish or other communications equipment on a balcony of the Building provided the installation thereof is harmonious with the appearance of the Building and does not interfere with other tenants or then existing equipment. The cost of installation, maintenance and insurance for such equipment will be borne by Tenant and Landlord will have the right to approve all aspects of this equipment installation and operation.

30. Review. This proposal is subject to (i) a financial review of Tenant by the Landlord and (ii) review and approval by Landlord's lender.

EXCEPT AS PROVIDED BELOW, THIS IS A NON-BINDING LETTER OF INTENT SUBMITTED TO OUTLINE THE MATERIAL BUSINESS TERMS FOR PROPOSED LEASE BY TENANT. NEITHER PARTY SHALL BE BOUND TO THE TRANSACTION UNTIL A FINAL LEASE, ACCEPTABLE TO ALL PARTIES HAS BEEN EXECUTED TOGETHER WITH THE SECURITY DEPOSIT AND FIRST MONTH'S RENT. SUBJECT TO THE BINDING AGREEMENTS BELOW, EITHER PARTY MAY TERMINATE NEGOTIATIONS AT ANY TIME.

Binding Agreements of the Parties:

The following agreements of Landlord and Tenant are legally binding with regard to the specified matters:

1. Exclusive Dealings. During the _____ day period following the execution of this Letter of Intent, Landlord will not enter into any negotiations with other parties regarding the lease of the Premises.
2. Good Faith Negotiations. The parties agree to exercise good faith in negotiating toward a legally binding Lease. The parties agree that the Lease shall contain the material provisions set forth in this Letter of Intent. If despite good faith negotiations, the parties have not executed a legally binding Lease within _____ days following the execution of this Letter of Intent, either party may terminate negotiations.
3. Confidentiality. The parties shall keep this Letter of Intent, their negotiations and any information regarding the Premises confidential, except as necessary to comply with applicable laws and regulations and for consultation with professionals retained by the parties relating to the real estate transaction. In the event a legally binding Lease is not executed, Tenant agrees to return all copies of information regarding the Premises to Landlord together with copies of all third party reports obtained by Tenant. Tenant agrees that any third party reports obtained by Tenant shall be addressed to both Tenant and Landlord.
4. Inspection of Premises. Landlord grants to Tenant the right to conduct inspections of the Premises including structural and environmental studies. Tenant shall not unreasonably interfere with the operations of the Premises and shall obtain advance approval from Landlord to any inspections, which approval shall not unreasonably withheld or delayed. Tenant indemnifies and holds Landlord harmless from all liability relating to Tenant's inspections and studies.
5. Preparation of Documentation. Landlord agrees to cause its legal counsel to prepare a draft Lease for delivery to Tenant and its legal counsel within _____ days from the date this Letter of Intent is executed. The form of Lease shall be [ALTERNATIVES: the most current form promulgated by the Texas Association of Realtors for Commercial Property/ State Bar of Texas form/ Landlord's standard form/ revised for this transaction].

BY YOUR SIGNATURE, YOU REPRESENT THAT YOU ARE AUTHORIZED TO SIGN ON BEHALF OF LANDLORD. LANDLORD ACKNOWLEDGES TENANT IS RELYING UPON THE ENFORCEABILITY OF THE FOREGOING AGREEMENTS IN PROCEEDING WITH THIS TRANSACTION. LANDLORD ACKNOWLEDGES RECEIPT OF $10.00 AND OTHER VALUABLE CONSIDERATION FROM TENANT.

If the foregoing terms are acceptable to you, please so indicate by your signature below and the return of the executed Letter of Intent to my attention.
Very truly yours,
[Landlord's Representative]

AGREED THIS _____ DAY OF _____, 20___.

_____
[Tenant's Representative]
cc: [Tenant]
[Landlord]

APPENDIX C
"TERM SHEET" STYLE SALES LETTER OF INTENT FORM (USING STATE BAR FORMAT)

[**Date**]

[**Name and address of seller**]

Re: Letter of Intent [**describe transaction**]
[**describe property by address or lot and block number, city, county, state**]

[**Salutation**]

The attached exhibits and this letter of intent (collectively, this "Letter") outline the business points under which [**name of buyer**] ("Buyer") will consider acquiring the property described above (the "Property") from [**name of seller**] ("Seller"). Buyer is interested in purchasing the Property on the general terms referenced in this Letter.

1. *Contract*. No right or obligation of either party, except those specifically set forth in the binding agreements relating to the proposed transaction listed in the attached Exhibit A, will arise until the execution of a real estate sales contract (the "Contract") incorporating the essential terms of this Letter and other terms and conditions satisfactory to both parties. Except as otherwise agreed by the parties, the Contract will be prepared on the most current form of real estate sales contract published by the State Bar of Texas in its *Texas Real Estate Forms Manual*. The initial draft of the Contract will be prepared by Seller's attorney within [**number**] days after the effective date of this Letter and distributed contemporaneously to all parties by [**describe method of delivery**].

2. *Payment of the Purchase Price*. The purchase price will be paid by wire transfer of immediately available funds to the escrow agent at closing.

3. *Title*. Title will be conveyed free and clear of all defects, liens, encumbrances, and easements, except as approved by Buyer during the title review period specified in the Contract.

4. *Effect*. Each party agrees that this Letter is intended only to set forth the discussions of the parties and will not constitute a complete statement of the agreement or be a legally binding or enforceable agreement or commitment on the part of either party with respect to the matters described herein (except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, which will be fully enforceable and will survive the termination of this Letter, the termination of the Contract, and the closing of any transaction). This Letter is not intended to impose on either party an enforceable duty or obligation to negotiate toward or conclude any such agreement or commitment. Each party acknowledges that, except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, in no event will any discussions, negotiations, or other communications between the parties regarding this Letter or the terms contained herein rise to the level of an oral or written agreement. The parties have no obligation of good faith and fair dealing. The parties' respective legal obligations will otherwise arise, if at all, solely from a fully executed Contract.

5. *Counterparts*. If this Letter is executed in multiple counterparts, all counterparts taken together will constitute this Letter.

6. *Exclusive Negotiations*. Until 5:00 P.M. on [**date**], Seller will negotiate only with Buyer for the sale of the Property.

Binding/Nonbinding Nature

SELLER AND BUYER ARE NOT LEGALLY BOUND TO ENTER INTO THE TRANSACTION DESCRIBED HEREIN

UNLESS AND UNTIL THE CONTRACT IS EXECUTED BY BUYER. SELLER AND BUYER ARE BOUND TO COMPLY WITH THE PROVISIONS SPECIFICALLY LISTED AS BINDING AGREEMENTS. SELLER AND BUYER EACH ACKNOWLEDGE RECEIPT OF $10.00 AND OTHER VALUABLE CONSIDERATION, WHICH EACH SUCH PARTY ACCEPTS AS LEGALLY SUFFICIENT TO BIND SUCH PARTY TO PERFORM THE BINDING AGREEMENTS.

If the foregoing meets with your approval, please sign and return the enclosed duplicate copy of this Letter on or before 5:00 P.M. central [standard/daylight saving] time on [**date**]. An electronic copy of this Letter executed by you will be considered an original. This Letter is effective on the date of the last of the signatures by Seller and Buyer. We look forward to receiving your prompt response.

Sincerely,

_____

[**Name of buyer**]
[a/an] [individual/partnership/limited partnership/corporation]

By:

_____

[**Name of representative**]
[**Title**]

Agreed to and accepted on [**date**].

_____

[**Name of seller**],
[a/an] [individual/partnership/limited partnership/corporation]

By:

_____

Name of representative

_____

Title

EXHIBIT A
Nonbinding Terms of Proposed Transaction

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller's Attorney:

Law firm:

Address:

Phone:

E-mail:

Seller's Sales Agent:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer's Sales Agent:

Brokerage firm:

Address:

Phone:

E-mail:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit B ("Land") [**include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary:** , together with improvements to the Land ("Improvements"), the leases associated with the Land and Improvements ("Leases"), and the personal property described in Exhibit B ("Personal Property")].

Underwriter:

Escrow Agent:

Address:

Phone:

E-mail:

[**Include if applicable:** Estimated] Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Third-party-financed portion:

Total purchase price:

Earnest Money

[Initial] Earnest Money:

[Additional Earnest Money:]

Deadlines and Closing Date:

1. [Initial] Earnest Money deadline: [**date**]

2. Delivery of Title Commitment: [[**date**]/[**number**] days after the Contract effective date]

3. Delivery of Survey: [[**date**]/[**number**] days after the Contract effective date]

4. Delivery of UCC Search: [[**date**]/[**number**] days after the Contract effective date]

5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: [[**date**]/[**number**] days after the Contract effective date]

6. Delivery of Title Objections: [[**date**]/[**number**] days after delivery of items 1.–5.]

7. Delivery of Seller's records as specified in the Contract: [[**date**]/[**number**] days after the Contract effective date]

8. End of Inspection Period: [[**date**]/[**number**] days after the Contract effective date]

9. Additional Earnest Money Deadline: [[**date**]/[**number**] days after the end of the Inspection Period]

[9./10.] Closing Date: [[**date**]/[**number**] days after the end of the Inspection Period]

[10./11.] Closing Time: [**time**]

Binding Agreements Relating to Proposed Transaction

1. If the Contract is not finally negotiated, signed by all parties, and tendered to Escrow Agent with the earnest money within [**number**] days of the effective date of this Letter, this Letter will terminate.

2. Seller agrees to abate all marketing efforts for the Property during the term of this Letter. Any existing signs may remain. Any ordered advertising will be canceled, if cancelable without penalty; otherwise ordered advertising may proceed, but no additional advertising may occur. Brokers and prospective buyers will not be shown the Property and may be given only currently available printed information about the Property prepared by Seller's Sales Agent.

3. Except as may be required by law or to its own attorney, advisors, and existing or prospective lenders or investors, no party to this Letter nor any affiliate will disclose the existence of this Letter, names of the parties, or the transaction contemplated herein; or issue any press release or make any other disclosure to a nonaffiliated third person concerning the existence of this Letter or the matters contained herein without the written consent of each party.

4. Each party will pay its own expenses related to this Letter and the Contract.

5. Unless Seller agrees otherwise, Buyer is not permitted to enter into the Property for the purpose of inspecting it before the execution of the Contract. If Buyer is permitted by Seller to enter the Property for the purpose of inspecting it before the execution of the Contract, Buyer will indemnify, defend, and hold Seller harmless from and against any losses, damages, costs, expenses, or claims arising in connection with or out of such entry and inspection by Buyer.

EXHIBIT B
Description of the Land [and Personal Property]

That certain tract of land more particularly described as [**property**].

All personal property associated with the Land and Improvements, except the following: [**list exceptions**].

The following described personal property: [**describe property**].

APPENDIX D
LEASE LETTER OF INTENT CHECKLIST

I. THE PARTIES

1. Tenant's information
   a. Name
   b. Address
   c. Type of entity and place of formation
   d. Tax identification number
   f. Contact person
2. Owner's Information
   a. Name
   b. Address
   c. Building/Center ownership information
   d. Contact person
   e. Building management information (e.g., name, address)
   f. Lease form to be used (e.g., owner's/tenant's standard form)

II. THE SPACE

1. Description of space (e.g., location, size, suite #, floor)
2. Space planning information (e.g., floor loads, floor duct locations)
3. Base building plans
4. Owner's construction obligations for space/common area
5. Tenant improvements
   a. Owner's/Tenant's obligation
   b. Tenant improvement allowance (e.g., amount, when paid, conditions for payment [e.g., no default, assignment])
6. Electricity requirements (e.g., wattage per square foot)
7. Casualty damages: owner/tenant rights and responsibilities regarding partial/total destruction of space
8. Condemnation
9. Restoration of space at lease end (e.g., removal of alterations)

III. LEASE TERM

1. Term of lease (number of years)
2. Lease commencement
   a. Date
   b. Conditions to commencement (e.g., co-tenancy, owner's buildout, tenant's buildout)
   c. Ramifications of delay (e.g., penalties, termination, self-help)
3. Early occupancy
4. Delayed possession

IV. RENT & EXPENSES

1. Rent commencement
2. Date
3. Conditions triggering commencement (e.g., delivery of space, co-tenancy)
4. Base rent and escalation method (e.g., CPI or rent bumps)
5. Percentage rent
6. Definition of gross sales/receipts (inclusions/exclusions)
7. Breakpoint (natural or artificial)
8. Operating expenses/CAM costs
9. Inclusions/Exclusions

10. Base year
11. Pro rata share
12. Cap
13. Gross up
14. Adjustments
15. Merchants association/promotional fund (e.g., contribution amount, withdrawal right)
16. Electricity charge
17. Real estate tax
18. Base year or base amount
19. Pro rata share
20. Right to contest
21. Security deposit (e.g., amount, treatment of interest, application form [such as letter of credit], reductions)
22. Rent abatement (e.g., conditions, duration, amount)
23. Rent acceleration right
24. Rent concessions
25. Guaranty (e.g., limits, "good guy")

V. USE & OPERATION

1. Tenant's use of space
2. Operating restrictions/requirements
3. Duration/Hours of operation
4. Continuous operations
5. Trade name requirements
6. Radius restriction
7. Restrictions on owner
8. Exclusive
9. Cotenancy
10. Covenant to open
11. Conduct of business
12. Tenant's right to finance equipment/improvements

VI. BUILDING & SERVICES

1. Parking (e.g., assigned spaces, charge, restrictions on owner, parking ratio)
2. Building amenities (e.g., garage, cafeteria, newsstand, day care, high-tech communications capabilities)
3. Signage (e.g., location, restrictions)
4. Building directory
5. Roof antenna rights (and riser availability)
6. Building access (e.g., 24 hrs, 7 days)
7. Size, design, and layout of building/center (e.g., plot plan, floor plan, gross leasable area, signage and location)
8. Building services furnished by owner (e.g., HVAC, plumbing, electricity, passenger elevators, freight elevators)
9. Business hours of building/center
10. Hours of basic service (e.g., HVAC, elevator)
11. After-hours service costs
12. Supplemental A/C and other services (e.g., availability, cost)
13. Temperature range for HVAC
14. Quality of building/center and services (e.g., 1st class)
15. Interruption of services (who bears responsibility)
16. Legal documentation needed regarding leasing or ownership of property (e.g., ground lease, REA)

VII. ASSIGNMENT & SUBLETTING

1. Consent conditions
2. Exceptions
3. Stock transfer or similar transfer
4. Recapture rights
5. Profit sharing

6. Change of use restrictions
7. Assignee's/Subtenant's loss of rent concessions

VIII. OPTIONS & RIGHTS

1. Expansion
2. Renewal/Extension
3. Purchase
4. Termination (owner and/or tenant)
5. Conditions (e.g., gross sales, co-tenancy)
6. Right of first refusal/offer)
7. Right to go dark (e.g., owner's recapture right)
8. Relocation right
9. Self-help right (tenant and/or owner)

IX. REPRESENTATIONS/OBLIGATIONS

1. Compliance with law
2. Latent defects
3. ADA compliance
4. Certificate of occupancy (temporary and permanent)
5. Subordination, nondisturbance, and attornment agreement (SNDA) from lender, ground lessor, and/or owner (for subtenant)
6. Insurance (owner and tenant obligations)
7. Asbestos/Toxic materials representation (e.g., it is/isn't present, owner will/will not remove it)
8. Hazardous materials
9. General liability obligations for owner/tenant (e.g., for space, common area)
10. Constructive eviction (conditions for)
11. Zoning restrictions

X. MISCELLANEOUS

1. Arbitration or other alternative dispute resolution
2. Verification of square footage
3. Brokers (e.g., identity, who pays)
4. Audit rights
5. Tenant's right to audit CAM/operating expenses
6. Owner's right to audit gross sales
7. Binding/Nonbinding
8. Binding provisions in an otherwise nonbinding letter of intent

This checklist is based on a checklist in the September 1999 edition of the Commercial Lease Law Insider.

APPENDIX E
BIBLIOGRAPHY OF SELECTED RESEARCH MATERIAL

1. Becker, Douglas, "We Don't Have a Binding Agreement, Just a Letter of Intent." *Mortgage Lending Institute*, 1996, *available at* www.texasbarcle.com.

2. Hollyfield, John. "Letters of Intent." *State Bar of Texas Advanced Real Estate Drafting Course*, 1997, *available at* www.texasbarcle.com.

3. Jolley, Rhonda G. and Thompson, Chris. "What Do You Really Mean? Drafting Letters of Intent." *State Bar of Texas Advanced Real Estate Drafting Course*, 2008 (Forms attached), *available at* www.reptl.org.

4. Annual Survey Working Group of the M&A Jurisprudence Subcommittee, Mergers and & Acquisitions Committee, ABA Business Law Section, *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, 73 Bus. Law. 379, 397–403 (2018).

5. J. Andrew Holten, *Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance*, 162 U. Pa. L. Rev. 1237 (2014).

APPENDIX F
HOW TO ENROLL IN TEXAS SUPREME COURT EMAIL NOTIFICATIONS FOR *ENTERPRISE* CASE ACTIVITY

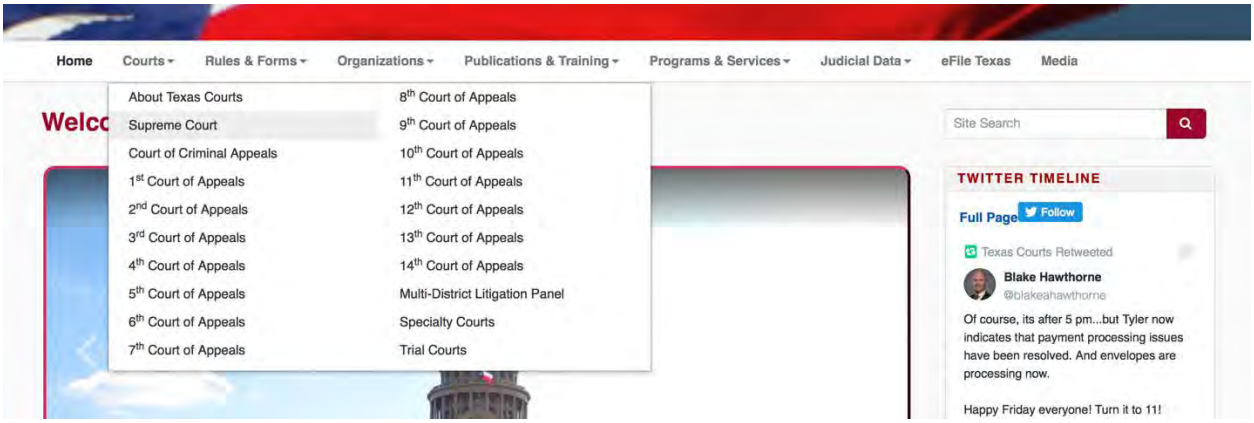
Note: Screenshots for each instruction below, if applicable, are located directly under the corresponding numbered instruction.

1. Open your web browser and enter the following URL address: http://www.txcourts.gov

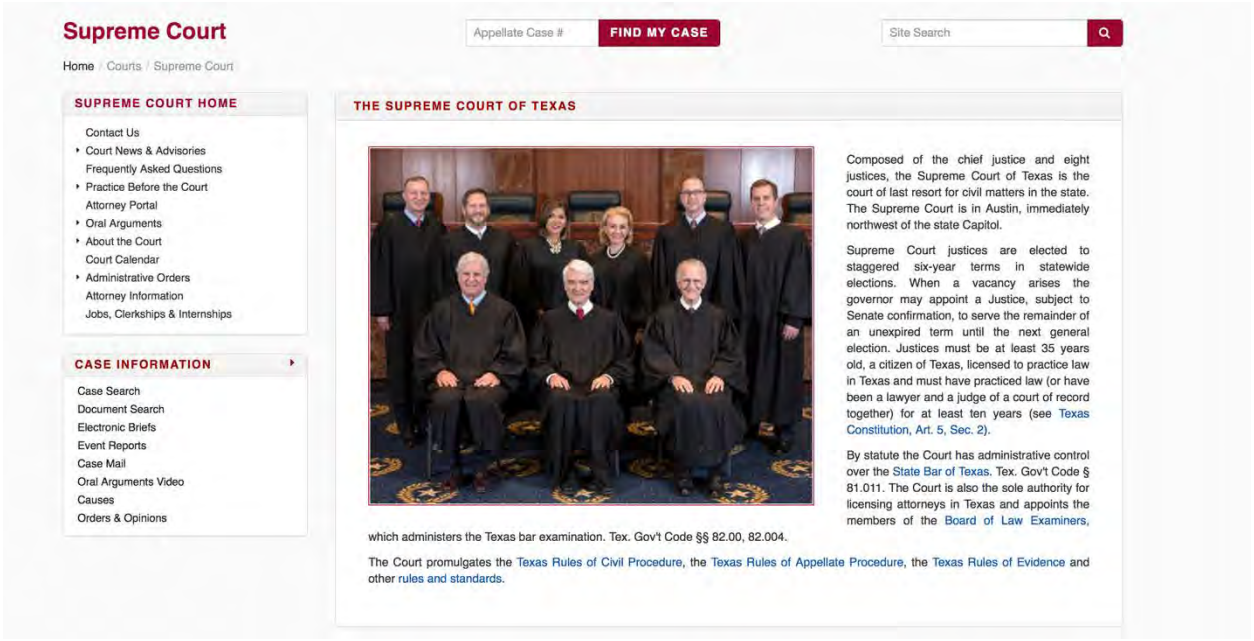


2. Press "Enter" to go to the URL.

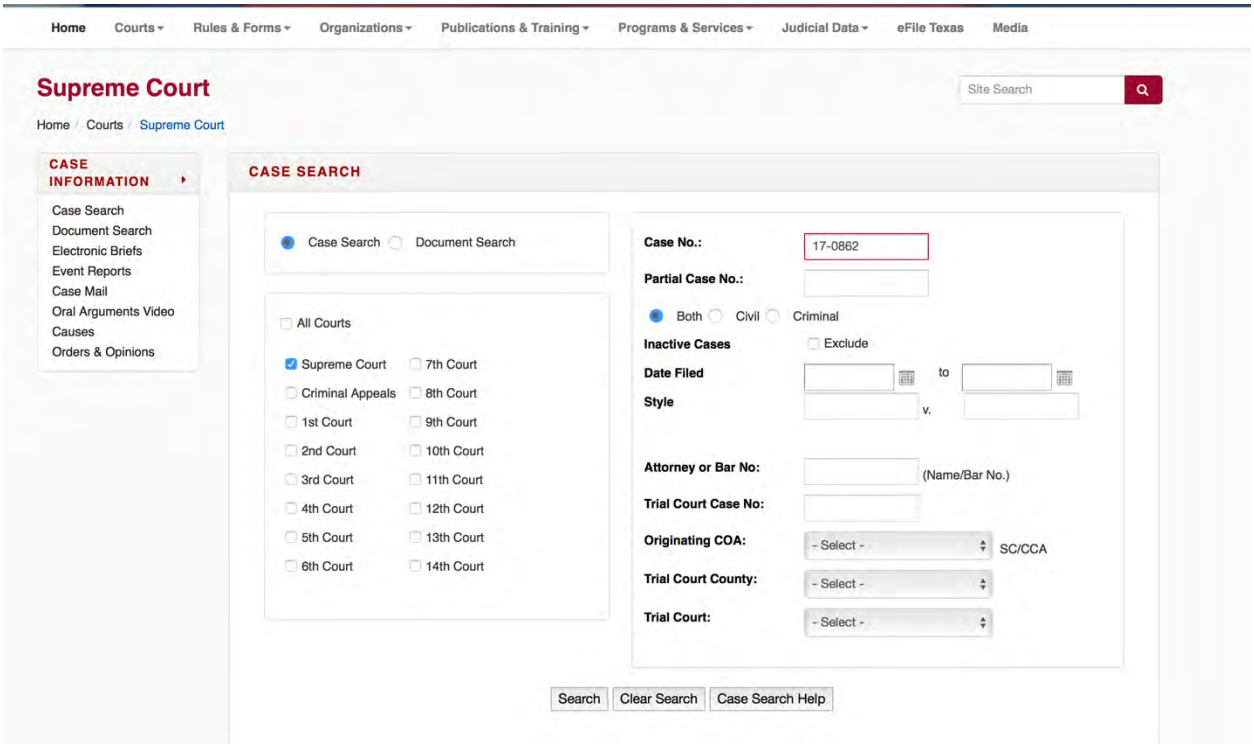
3. Click the "Courts" menu and select "Supreme Court" from the drop-down list.



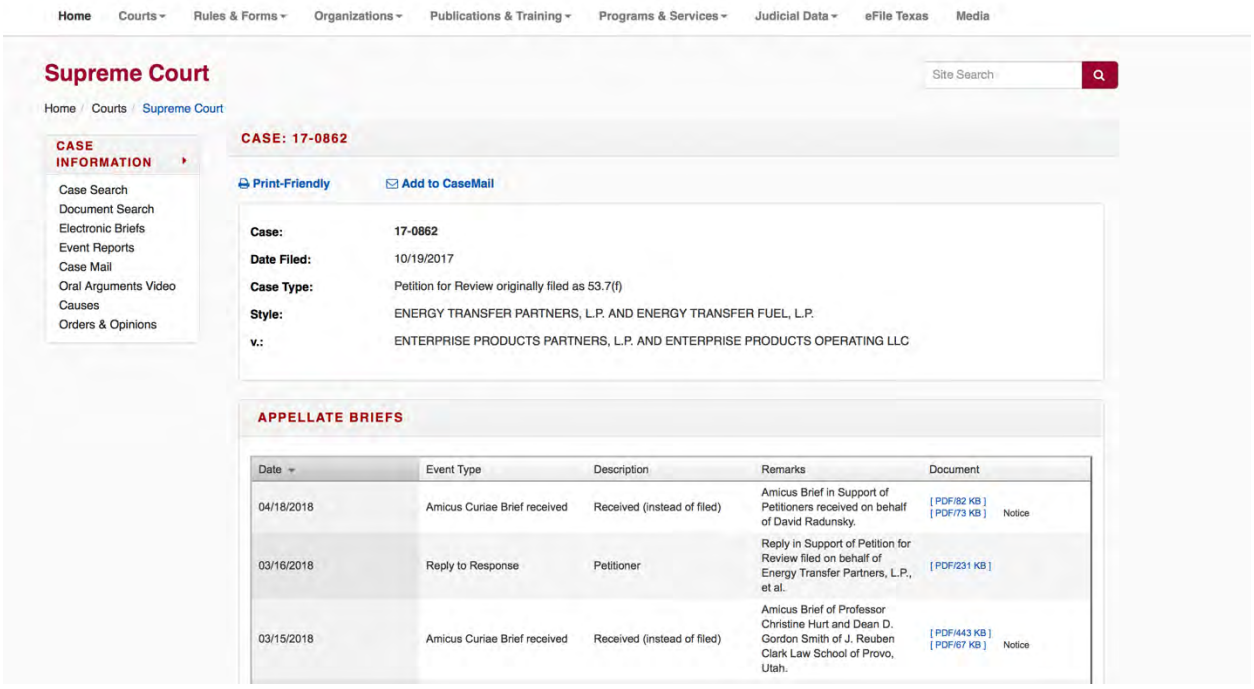
4. Under the "Case Information" Section, click the "Case Search" link.



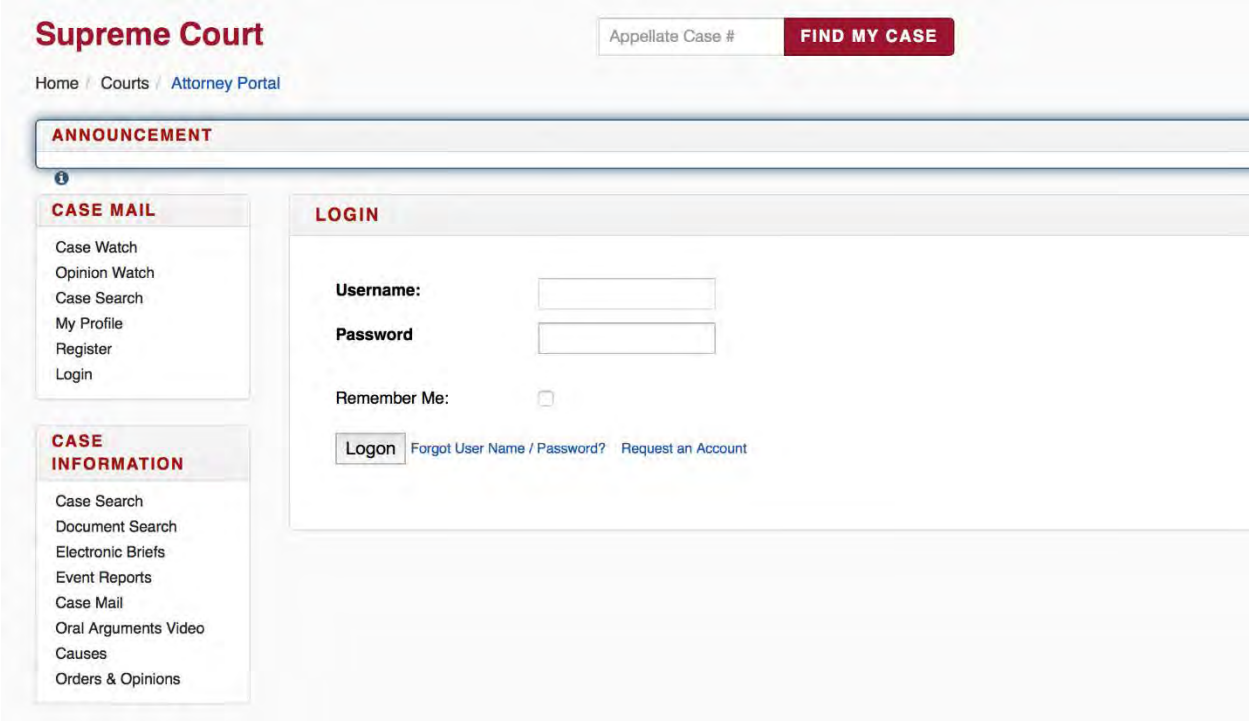
5. Once on the "Case Search" screen, click on the "Case No." box and enter "17-0862" (*Note:* this is the Case No. assigned to the *Enterprise* Case), and then click the "Search" button located near the bottom of the page (center left).



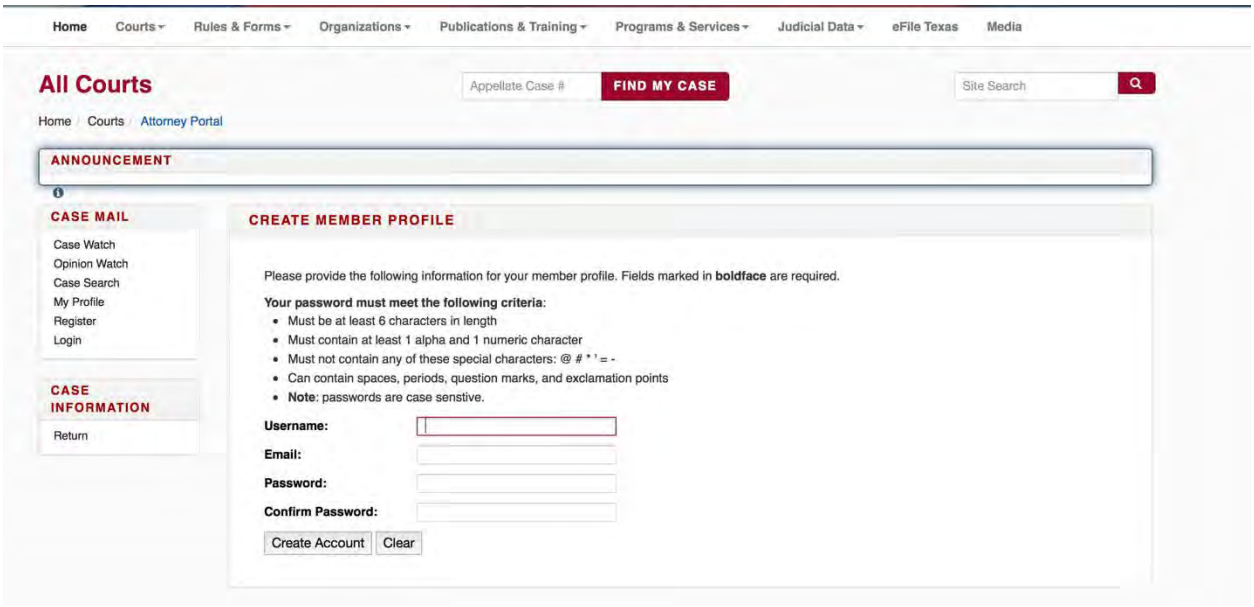
6. Click the "Add to CaseMail" button.



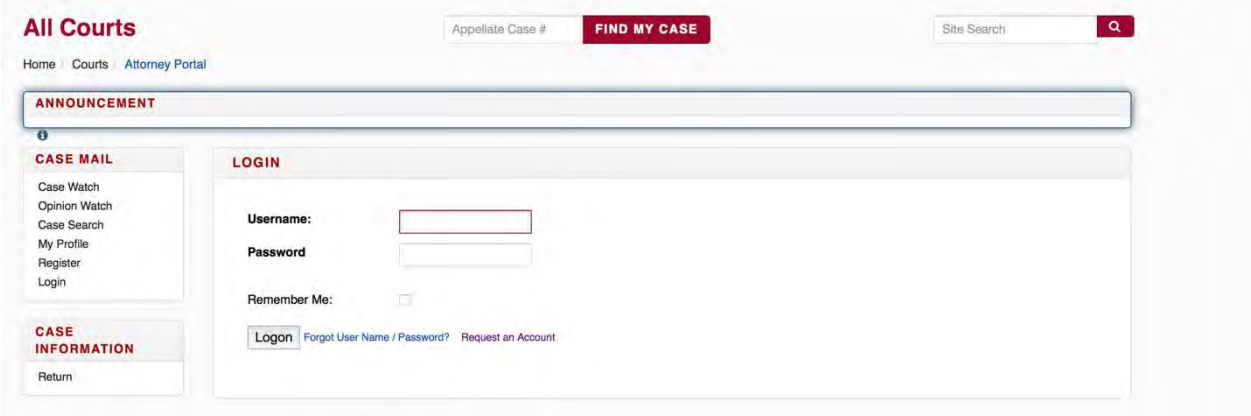
7. This will take you to a "Login" Screen, (if you do not have a free account, click the link that says "Request an Account" to the right of the "Logon" button).



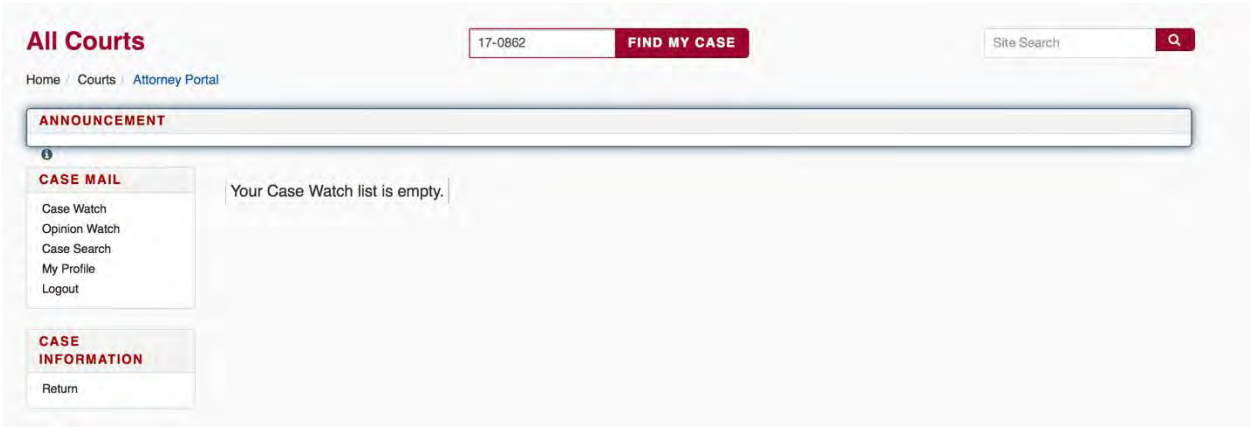
8. Enter your: "Username", Email, and Password in the respective boxes. Then, click the "Create Account" button (this will take you back to the "Login" screen).



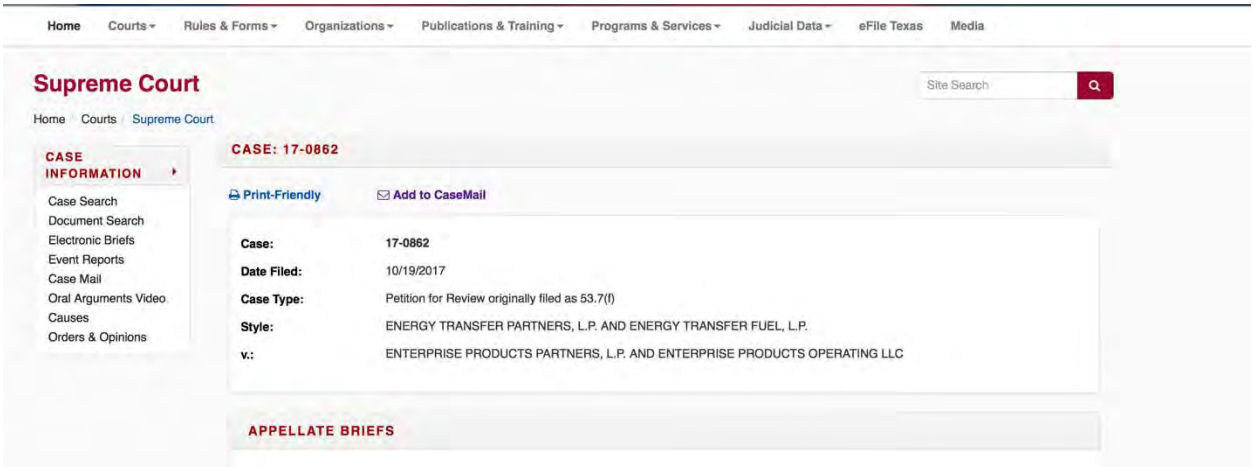
9. Enter the Username and Password that you just chose and then click the "Logon" button.



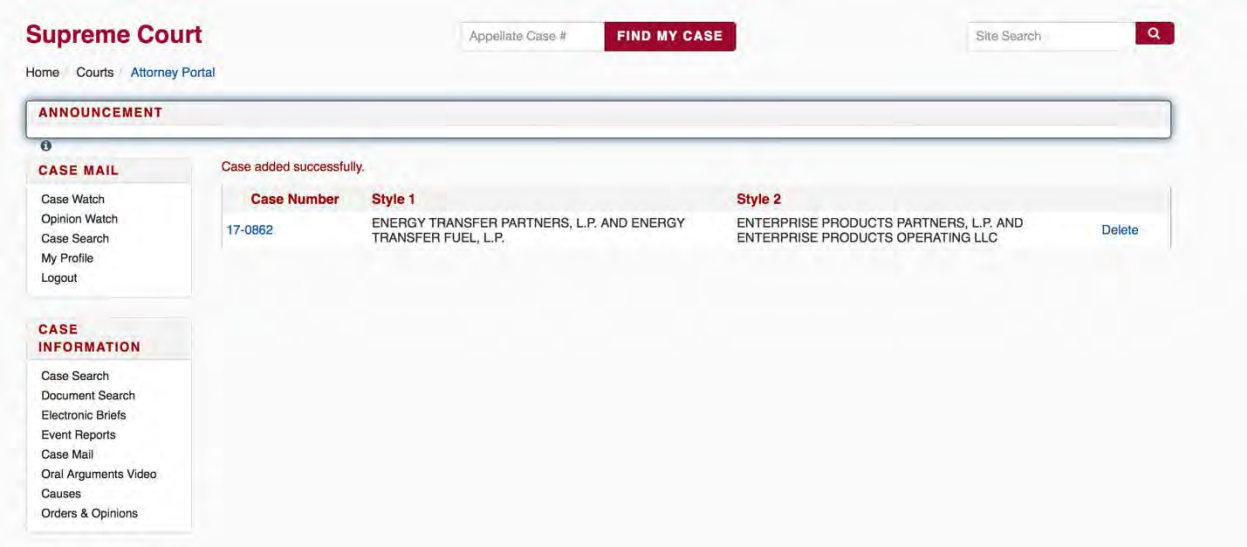
10. On the following screen, enter "17-0862" in the "Find My Case" box and click the "Find My Case" button.



11. Now that you are back on the *Enterprise* Case status screen, click the "Add to CaseMail" button.



12. This will add the case to your "CaseMail" and you will now receive email updates of case activity at the email address that you specified when you created your free account. Your screen should look like the screenshot below.


Supreme Court
Appellate Case #
FIND MY CASE
Site Search
Home / Courts / Attorney Portal
ANNOUNCEMENT
CASE MAIL
Case Watch
Opinion Watch
Case Search
My Profile
Logout
CASE INFORMATION
Case Search
Document Search
Electronic Briefs
Event Reports
Case Mail
Oral Arguments Video
Causes
Orders & Opinions
Case added successfully.
Case Number
Style 1
Style 2
17-0862
ENERGY TRANSFER PARTNERS, L.P. AND ENERGY TRANSFER FUEL, L.P.
ENTERPRISE PRODUCTS PARTNERS, L.P. AND ENTERPRISE PRODUCTS OPERATING LLC
Delete