

Creditor Causes of Action: Pleadings and Proof

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POP QUIZ

- 1) (TRUE or FALSE) Debtor's summary judgment response includes an affidavit affirming that all offsets and credits have not been allowed. The affidavit raises a fact issue.
- 2) Probably the most difficult defense to plead. Defendant must "file with his plea an account." What is the defense? _____
- 3) How can an affidavit "deem facts admitted"? _____
- 4) (TRUE or FALSE) A sworn account claim requires the sale and transfer of title to personal property.

Answers:

- 1) FALSE. Vague affidavit as to unspecified offsets is conclusory and insufficient. *See Life Ins. Co. of Virginia v. Gar-Dal, Inc.* 570 S.W.2d 378 (Tex. 1978), discussed at page 14.
- 2) Payment, Rule 95. See pages 11, 12.
- 3) Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services. If one serves the affidavit on the other parties, its contents are incontrovertible, unless a counter affidavit is served within 30 days of receiving the affidavit, and at least 14 days before trial. See pages 10 and 46.
- 4) Rule 185 does not require it, but case law is conflicting. See *Fallacies As To Scope of Rule 185 Sworn Account*, pages 2 -5.

PART ONE:

SWORN ACCOUNTS

“Counsel should be aware that there is considerable confusion as to the scope of the sworn account rule.” 1-11 Dorsaneo, Tex. Litigation Guide § 11.52.

I. RULE 185

A. Broad Rule

Rule 185, Suit On Account states:

When any action or defense is founded upon an open account or other claim for goods wares and merchandise, **including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties**, or is for personal service rendered, or labor done or labor or materials furnished, **on which a systematic record has been kept, and is supported by the affidavit of the party**, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, **the same shall be taken as prima facie evidence thereof**, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. **No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.** (emphasis added)

Note the breadth of the rule, as it includes a claim for a liquidated money demand founded on business dealings between the parties on which a systematic record has been kept. What debt is not within this expansive category?

B. Allows Judgment on the Pleadings

Sworn account is a creditor's preferred cause of action. The rule has numerous advantages. Absent a sworn denial, a proper sworn account is self proving and entitles creditor to judgment on the pleadings. See *Airborne Freight Corp. v. CRB Mktg. Inc.*, 566 S.W.2d 573, 574 (Tex. 1978)(trial); *Wilson v. Browning Arms Co.*, 501 S.W. 2d 705, 706 (Tex. Civ. App.–Houston [14th Dist.] 1973 writ ref'd.)(summary judgment); *O'Brian v. Cole*, 532 S.W.2d 151, 152 (Tex. Civ. App.–Dallas 1976, no writ)(default judgment; sworn account is liquidated claim requiring no further proof of damages). A defendant who does not file a sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. See Rule 93(10), and Rule 185; *Vance v. Holloway*, 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power*

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& Equip. Co. 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ).

It is a rare creditor's case that should not be pleaded, at least alternatively, as a sworn account. But sworn accounts are the subject of some questionable appellate decisions and fallacies.

C. Fallacies As to Scope and Required Specificity of Rule 185 Sworn Account

1. Fallacy One: That Sale of Personal Property is Required (Meaders v. Biskamp)

Numerous cases purport to require the sale of personal property to constitute a sworn account. These cases generally rely on cases in which the issue is whether the transaction is a sworn account within former Tex. Rev. Civ. Stat. Ann. art. 2226. Article 2226 was the predecessor to Tex. Civ. Prac. & Rem. Code Chapter 38 and allowed recovery of attorney fees for sworn accounts. But Article 2226 was deemed penal in nature and strictly construed. *See, e.g., Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958) (sworn account under Article 2226 requires sale and transfer of title to personal property; Article 2226 is penal in nature and strictly construed; contract to drill well not Article 2226 sworn account); *Van Zandt v. Ft. Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962) (citing *Meaders*, requires passage of title to personal property to be sworn account within Article 2226); *Langdeau v. Bouknight*, 344 S.W.2d 435, 441 (Tex. 1961) (citing *Meaders*, an Article 2226 sworn account does not include special contracts).

Unfortunately, some courts blindly follow these cases even when attorney fees are not the issue. *See Williams v. Unifund CCR Partners*, No. 01-06-00927-CV (Tex. App.–Houston [1st Dist.], February 7, 2008, no pet. (2008 Tex. App. Lexis 931) (credit card debt not basis of sworn account because no title to personal property transferred, citing *Meaders*); *Naan Props., LLC v. Affordable Power, LP*, No. 01-11-00027-CV (Tex. App.–Houston [1st Dist.] Jan. 12, 2012, n.p.h.) (2012 Tex. App. Lexis 271) (mem. op.) (early termination fee not proper sworn account claim); *Resurgence Fin. L.L.C. v. Lawrence*, No. 01-08-00341-CV (Tex. App.–Houston [1st Dist.], October 8, 2009, no pet.) (2009 Tex. App. Lexis 7927) (mem. op.) (credit card debt); *Tully v. Citibank, N.A.*, 173 S.W.3d 212, 216 (Tex. App.–Texarkana 2005, no pet.) (same); *Hou-Tex Printers v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.–Houston [14th Dist.] 1993) (promissory note is not basis of sworn account because there is no passage of title to personal property, citing *Meaders*); *Superior Derrick Servs. v. Anderson*, 831 S.W.2d 868, 873 (Tex. App.–Houston [14th Dist.] 1992, writ denied); *Young v. Am. Express Co.*, No. 06-01-00035-CV (Tex. App.–Texarkana, October 26, 2001, no pet.) (unpublished, 2001 Tex. App. Lexis 7217) (credit card account); *EMCC, Inc. v. Johnson*, No. 10-05-00287-CV (Tex. App.–Waco, October 25, 2006, no pet.) (2006 Tex. App. Lexis 9277) (mem. op.) (same).

The fallacy of requiring passage of title to personal property is noted by Justice Mirabel in an excellent concurring opinion in which she discusses a line of cases traced back to *Meaders*. Justice Mirabel notes the breadth of Rule 185, which includes cases in which title to property does not pass. *Schorer v. Box Service Co.*, 927 S.W.2d 132 (Tex. App.–Houston [1st Dist.] 1997, writ denied). *See Seisdata, Inc. v. Compagnie Generale de Geophysique*, 598 S.W.2d 690, 691 (Tex. Civ. App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.) (sworn account includes services; properly

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distinguishes *Meaders* as an attorney's fee case).

2. Sale of Personal Property is Not Required; Cases

a. Generally

The clear language of Rule 185 makes it applicable to "personal service rendered," "labor done," "labor or material furnished," and that sweeping category, "business dealings between the parties." Countless cases recognize that sale of personal property is not required for a Rule 185 sworn account. *Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(assumes without holding, that money owed as a result of fraud and deceit is sworn account; issue was sufficiency of sworn account affidavit); *Novosad v. Cunningham*, 38 S.W.3d 767 (Tex. App.—Houston [14th Dist.], 2001, no pet.)(accounting services); *Nat'l W. Life Ins. Co. v. Acreman*, 425 S.W.2d 815 (Tex. 1968)(labor and materials to build road); *Willie v. Donovan & Watkins, Inc.*, No.01-00-01039-CV (Tex. App.—Houston [1st Dist.], April 11, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 2655) (employment agency fees); *Boodhwani v. Bartosh*, No. 03-02-0432-CV(Tex. App.—Austin, March 6, 2003, no pet.)(unpublished, 2003 Tex. App. Lexis 1907)(dental services).

b. Texas Supreme Court Cases

The Texas Supreme Court ruled on the following sworn account claims without requiring passage of title to personal property:

Griswold v. Carlson, 249 S.W.2d 58 (Tex. 1952)(assumes without holding, that money owed as a result of fraud and deceit is sworn account; issue was sufficiency of sworn account affidavit);

Rizk v. Financial Guardian Ins. Agency, Inc., 584 S.W.2d 860 (Tex. 1979)(sworn account for insurance premiums; summary judgment for creditor reversed because defendant filed a verified denial);

Harmes v. Arklatex Corp., 615 S.W.2d 177 (Tex.1981)(debtor liable in suit on sworn account to recover costs in drilling oil well);

Vance v. Holloway, 689 S.W.2d 403 (Tex. 1985)(sworn account for expenses on oil lease; reversed court of appeals and affirmed trial court judgment for creditor, because debtor failed to file a verified denial);

Midland Western Bldg., L.L.C. v. First Serv. Air Conditioning Contrs., Inc., 300 S.W.3d 738, 739 (Tex. 2009)(sworn account for air conditioning services; reversed and remanded as to attorney's fees).

The following is a list of other sworn account cases, grouped by subject, without passage of title to personal property, though the scope of sworn account is not a specific issue in most of the cases.

c. Insurance Premiums

Bernsen v. Live Oaks Ins. Agency, Inc., 52 S.W.3d 306 (Tex. App.—Corpus Christi 2001, no pet.); *Smith v. Cigna Prop. & Cas.*, No. 06-97-00140-CV (Tex. App.—Texarkana, October 6, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 6199); *Webb v. Reynolds Transp.*, 949 S.W.2d 364 (Tex. App.—San Antonio 1997, no pet.)(experience-rated modification premiums).

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d. Electrical Utility Service

Andy's Sunmart # 352, Inc. v. Reliant Energy Retail Servs., L.L.C., No. 01-08-00890-CV (Tex. App.–Houston [1st Dist.] Nov. 5, 2009, no pet.)(2009 Tex. App. Lexis 8559)(mem. op.); *Naan Props., LLC v. Affordable Power, LP*, No. 01-11-00027-CV (Tex. App.–Houston [1st Dist.] Jan. 12, 2012, n.p.h.)(2012 Tex. App. Lexis 271)(mem. op.)(citing *Meaders*, requiring passage of title, then finds that sale of electrical services was proper sworn account claim; but early termination fee was not); *Rimco Enterprises, Inc. v. Texas Electric Service Co.*, 599 S.W.2d 362 (Tex. Civ. App.–Fort Worth 1980, no writ).

e. Freight Services

Airborne Freight Corp. v. CRB Mktg, Inc., 566 S.W.2d 573 (Tex. 1978)(apparently, freight services); *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App.–Dallas 2000, pet. denied)(ocean freight services).

f. Telephone Services

Mincron SBC Corp. v. Worldcom, Inc. 994 S.W.2d 785 (Tex. App.–Houston [1st Dist.], 1999, no pet.)(telephone service terms subject to tariff); *Kanuco Tech. Corp. v. Worldcom Network Servs.*, 979 S.W.2d 368 (Tex. App.–Houston [14th Dist.] 1998, no pet.)(telephone service charges subject to tariff).

g. Mailing Services

Innovative Mailing Solutions, Inc. v. Label Source, Inc., No. 2-09-129-CV (Tex. App.–Fort Worth, Feb. 4, 2010, n.p.h.)(2010 Tex. App. Lexis 834)(mem. op.).

h. Staffing Services

Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable Trust, 292 S.W.3d 750 (Tex. App.–Dallas 2009, no pet.).

i. Advertising

Beltline Antique Mall v. DFW Suburban Newspapers, Inc., No. 05-98-00977-CV (Tex.App–Dallas, August 31, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 5904)(newspaper advertising); *Heap v. Val-Pak*, No. 01-99-00255-CV (Tex. App.–Houston [1st Dist.], November 4, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8286)(mailed advertising); *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425 (Tex. App.–Beaumont 1999, no pet.)(radio advertising).

j. Attorney's Fees

Panditi v. Apostle, 180 S.W.3d 924 (Tex. App.–Dallas 2006, no pet.)(fees due attorney from client); *Pantaze v. Welton*, No. 05-96-00509-CV (Tex. App.–Dallas, August 31, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 6564)(litigation expenses due attorney from client); *Wimberly v. Fritz, Byrne & Head, L.L.P.*, No. 03-00-00500-CV (Tex. App.–Austin, July 26, 2001, pet. dism'd by agr.)(unpublished, 2001 Tex. App. Lexis 4993); *Kahn v. Carlson*, No. 05-98-01415-CV (Tex. App.–Dallas, April 27, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2767); *Wright*

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v. *Christian & Smith*, 950 S.W.2d 411 (Tex. App.–Houston [1st Dist.] 1997, no pet.).

k. Equipment Repairs

Smith v. CDI Rental Equip., Ltd., 310 S.W.3d 559 (Tex. App.–Tyler 2010, no pet.) (equipment repair charges; plaintiff's lack of standing was jurisdictional; reversed and rendered).

l. Personal Property Lease - - Conflicting Cases

The courts disagree as to whether personal property leases are sworn accounts, even though the broad language of Rule 185 appears to include such claims. *Baldwin v. Liberty Leasing Co.*, No. 05-99-00267-CV (Tex. App.–Dallas, June 20, 2000, pet. denied) (unpublished, 2000 Tex. App. Lexis 4097) (personal property lease is basis of sworn account). *But see AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV (Tex. App.–Houston [14th Dist.] April 3, 2008, no pet.) (2008 Tex. App. Lexis 2383) (mem. op.) (personal property lease is not basis for a suit on sworn account), *citing Schorer v. Box Service Co.*, 927 S.W.2d 132 (Tex. App.–Houston [1st Dist.] 1997, writ denied).

m. Credit Cards - - Conflicting Cases

The courts disagree as to whether credit cards are the proper subject of sworn account. If the account is based on a merchant-seller's credit card, rather than a bank's credit card, Rule 185 certainly appears to include such claims.

Financial Institution credit cards have been the subject of sworn account actions. *See Phillips v. Capital One Bank*, No. 01-96-01403-CV (Tex. App.–Houston [1st Dist.], August 27, 1998, no pet.) (unpublished, 1998 Tex. App. Lexis 5440) (suit on credit card contract is sworn account); *See also Citicorp Diners Club v. Hewitt*, No. 01-96-00706-CV (Tex. App.–Houston [1st Dist.], October 2, 1997, no pet.) (unpublished, 1997 Tex. App. Lexis 5219) (same); *but see Gellatly v. Unifund CCR Partners*, No. 01-07-00552-CV (Tex. App.–Houston [1st Dist.], July 3, 2008, no pet.) (2008 Tex. App. Lexis 5018) (mem. op.) (Rule 185 does not apply to a suit to recover credit card debt); *Resurgence Fin. L.L.C. v. Lawrence*, No. 01-08-00341-CV (Tex. App.–Houston [1st Dist.], October 8, 2009, no pet.) (2009 Tex. App. Lexis 7927) (mem. op.) (same); *Tully v. Citibank, N.A.*, 173 S.W.3d 212 (Tex. App.–Texarkana 2005, no pet.) (credit card debt not sworn account); *Cavazos v. Citibank*, No. 01-04-00422-CV (Tex. App.–Houston [1st Dist.] June 9, 2005, no pet.) (unpublished, 2005 Tex. App. Lexis 4484) (credit card account was not proper sworn account); *Young v. Am. Express Co.*, No. 06-01-00035-CV (Tex. App.–Texarkana, October 26, 2001, no pet.) (unpublished, 2001 Tex. App. Lexis 7217) (credit card debt involving advance of money by financial institution not sworn account); *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280 (Tex. App.–El Paso 1999, pet. denied) (same).

3. Fallacy Two: Sworn Account Requires Specific Account Description

It was once required that a sworn account show the nature of each item, the date, and charge. *Williamsburg Nursing Home v. Paramedics, Inc.*, 460 S.W.2d 168, 169 (Tex. Civ. App.–Houston [1st Dist.] 1970, no writ).; *Hassler v. Texas Gypsum Co.* 525 S.W.2d 53, 55 (Tex. Civ. App.–Dallas 1975 no writ).

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4. 1984 Amendment to Rule 185 Negating Specificity

Rule 185 was revised in 1984 to include, “No particularization or description of the nature of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.” *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ)(no particularization required); *Enernational Corp. v. Exploitation Eng’rs, Inc.* 705 S.W.2d 749, 750 (Tex. App.—Houston [1st dist.] 1986, writ ref’d n.r.e.)(discusses 1984 “no particularization” change to Rule 185); *Culp v. Hawkins*, 711 S.W.2d 726, 727 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.)(waiver of complaint as to sufficiency of sworn account affidavit by failing to specially except pursuant to Rules 185, 90); *Parra v. AT & T*, No. 05-97-01038-CV (Tex. App.—Dallas, November 2, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8177)(relying on *Culp*, court holds that debtor waived issue as to sufficiency of sworn account affidavit by failing to specially except, citing “no particularization” portion of Rule 185, Rule 90).

5. Troublesome Cases Ignoring “No Particularization” Amendment

Some courts ignore the “no particularization” language of the 1984 revision to Rule 185 and mistakenly continue to require an itemized statement of the account. Homeowner’s association’s sworn account action to collect unpaid assessments held not proper Rule 185 action because the petition did not include an explanation of how the assessments were calculated. *Pine Trail Shores Owners’ Ass’n v. Aiken*, 160 S.W.3d 139 (Tex. App.—Tyler 2005, no pet.). The court reasoned that the action was not a claim for a liquidated amount and was therefore not suit on sworn account as a matter of law. The court ignores the “no particularization” language of Rule 185, citing a case that pre-dates the 1984 rule change.

Other cases ignoring the “no particularization” language of Rule 185 include: *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.—Dallas 2006, no pet.)(“account must show with reasonable certainty the name, date, and charge for each item, and provide specifics or details as to how the figures were arrived”); *Cespedes v. Am. Express-CA*, No. 13-05-385-CV (Tex. App.—Corpus Christi, May 10, 2007, no pet.)(2007 Tex. App. Lexis 3555)(mem. op.)(“account must contain systematic, itemized statement of goods or services sold”); *Wimberly v. Fritz, Byrne & Head, L.L.P.*, No. 03-00-00500-CV (Tex. App.—Austin, July 26, 2001, pet. dismissed by agr.)(unpublished, 2001 Tex. App. Lexis 4993)(same); *Foley v. Sears Roebuck & Co.*, No. 14-92-00932-CV (Tex. App.—Houston [14th Dist.] 1993, no writ)(unpublished, 1993 Tex. App. Lexis 1885) (account must identify nature of items, date of sale, and related charges); *Dibco Underground, Inc. v. JCF Bridge & Concrete, Inc.*, No. 03-09-00255-CV (Tex. App.—Austin, April 8, 2010, no pet.)(2010 Tex. App. Lexis 2531)(mem. op.)(“general statements contained in an affidavit without description of specific items are insufficient to comply with Rule 185”), citing *Powers v. Adams*, 2 S.W.3d 496, 499 (Tex. App.—Houston [14th Dist.] 1999, no pet.)(itemized monthly statements of services rendered listing offsets, payments, and credits sufficient).

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II. PLEADINGS

A. Petition

1. Form of Pleading

The following form was used in *Continental Carbon v Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App.–Dallas 2000, pet. denied)(default judgment was affirmed, with no attack on the petition):

Business Dealings Account: Plaintiff sues on an account founded on business dealings between the parties and for which a systematic record has been kept. Defendant failed to pay as promised, to plaintiff's damage in the principal amount stated herein. All conditions precedent to plaintiff's recovery have occurred. The account is verified in the attached affidavit and itemized in Exhibit A. Alternatively, defendant is liable based on other grounds, for example, breach of contract and quantum meruit.

B. The Affidavit

Rule 185 requires language that “such claim is within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed.” Our form affidavit is attached as appendix A. The Rule 185 language should be used verbatim.

If the affidavit does not contain the required language, there is no sworn account. *Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(sworn account affidavit signed by creditor's attorney fatally defective because it failed to state “within the knowledge of affiant the cause of action is just and true. . .”). The opposite result was reached in *Parra v. AT & T*, No. 05-97-01038-CV (Tex. App.–Dallas, November 2, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8177). The court reasoned that the 1984 amendment to Rule 185 made the affidavit's knowledge requirement a waivable defect of form.

C. Attachments to Petition (Caution)

Normally, the sworn account suit affidavit, Appendix A, and the statement or invoices are attached to the petition. But review them from a defense perspective. Do they raise issues as to whether debtor is the proper party? Do they raise usury issues? Are the documents accurate and consistent with the petition? We occasionally sue without attaching invoices or a statement. This appears authorized under the “no-particularization” language discussed in the preceding section. Alternatively, creditor or its counsel can prepare and attach a summary of invoices, as long as they are not wrongfully alleged to be records made in the ordinary course of business.

Records attached to the petition may themselves create issues. *See Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780 (Tex. 1978)(summary judgment reversed because invoice contained name of debtor and a third party creating a fact issue as to responsible party); *Smith v. CDI Rental Equip., Ltd.*, 310 S.W.3d 559 (Tex. App.–Tyler 2010, n.p.h.)(variance between name of plaintiff and name of creditor; held, plaintiff's lack of standing is jurisdictional, reversed and rendered); *Lakhani v. Switzer Petroleum Prods.*, No. 05-97-01621-CV (Tex. App.–Dallas, July 26, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 5019)(evidence at trial established seller was not

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plaintiff but a third party; reversed and rendered against creditor because of material variance between evidence and pleadings); *Kiva, Inc. v. Cent. Tex. Barricades*, No. 03-07-000684-CV (Tex. App.–Austin, Jan. 8, 2010, n.p.h.)(2010 Tex. App. Lexis 89)(mem. op.)(invoices, statements, and reports attached to creditor’s affidavit and petition did not establish a liquidated claim; held, not a sworn account, reversed and rendered against creditor). Attachments should clearly and accurately reflect the amount claimed on creditor’s affidavit.

D. The Answer

1. Requirements of Sworn Denial

Rule 185 states that creditor’s sworn account claim, “. . . shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be”

Early cases required debtor to precisely plead, “each and every item is not just or true or that some specified item is not just and true.” *See Red Top Products, Inc. v. T & R Chemicals, Inc.*, 619 S.W.2d 562, 563 (Tex. Civ. App. - - San Antonio, 1981, no writ). However, Rule 185 was amended in 1984 to allow pleading as required in any other suit. Butterworth, Texas Rules of Civil Procedure 70 (1984). Nearly any sworn denial is now sufficient. However, a sworn general denial is insufficient to satisfy the requirements of Rule 185 or 93(10); *Huddleston v. Case Power & Equip. Co.*, 748 S.W. 2d 102, 103 (Tex. App.–Dallas 1985, no writ). A sworn response to a creditor’s summary judgment motion is insufficient. A sworn answer is required. *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.–Houston [14th Dist.] 1988, writ denied). *See also Sundance Res., Inc. v. Dialog Wireline Servs., L.L.C.*, No. 06-08-00137-CV (Tex. App.–Texarkana, April 8, 2009, no pet.)(2009 Tex. App. Lexis 2345)(mem. op.)(summary judgment on sworn account affirmed because defendant’s affiant did not aver personal knowledge of facts stated in defendant’s answer).

If plaintiff filed a proper sworn account, defendant must file a sworn denial satisfying Rules 93(10) and 185, or defendant may not dispute the receipt of the items or services, correctness of charges or ownership of account. Rules 93(10), 185; *Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985). But plaintiff’s failure to object to defendant’s defective verification constituted trial by consent in *Rasa Floors, L.P. v. Spring Vill. Partners, Ltd.*, No. 01-08-00918-CV (Tex. App.–Houston [1st Dist.] Nov. 18, 2010, no pet.)(2010 Tex. App. Lexis 9253)(mem. op.).

2. Affirmative Defenses - - Allowed Without Sworn Denial

Without a Rule 185 sworn denial of account, debtor may present defenses not inconsistent with accuracy of the account. These defenses are often referred to as affirmative defenses and most are referenced in Rule 93, Verified Pleas; Rule 94, Affirmative Defenses; and Rule 95, Payment. In *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 863 (Tex. 1979), the court noted that defenses of failure of consideration and statute of limitations could be raised in the absence of a verified denial. *See also Schneider v. A-K Tex. Venture Capital, L.C.*, No. 14-00-00377-CV (Tex.

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App.–Houston [14th Dist.], April 12, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2439) (defenses of confession and avoidance available, in absence of proper denial of sworn account). The safest debtor practice is to file a verified denial and to plead affirmative defenses, if the facts allow.

III. ELEMENTS

A. Generally

If a defendant files a verified denial, plaintiff must present evidence proving: 1) sale and delivery of merchandise or performance of services; 2) that the amount of the account is just, agreed, or in the absence of agreement, that charges are usual, customary or reasonable, and 3) the amount remains unpaid. *Burch v. Hancock*, 56 S.W.3d 257, 264 (Tex. App.–Tyler 2001, no pet.); *Superior Derrick Servs., Inc. v. Anderson*, 831 S.W.2d 868, 872 (Tex. App.–Houston [14th dist.] 1992, writ denied).

B. Order as Additional Element

The court apparently adds an element in *Wright v. Christian & Smith*, 950 S.W.2d 411, 413 (Tex. App.–Houston [1st Dist.]1997, no writ). In this attorney fee case, the court recognizes the three familiar elements, above, citing *Thorp v. Adair & Meyers*, 809 S.W.2d 306, 307 (Tex. App.–Houston [14th Dist.] 1991, no writ). But the court adds an element, “. . . we conclude that proof of an agreement to pay for services rendered is implicit in the requirement that [creditor] prove their performance of services.” Proof of debtor’s order has also been required by other cases.

Essential elements of proof of a claim on a sworn account are, generally, the [1] order for merchandise and [2] its delivery, [3] the justness of the account, that is, that the prices charged were agreed upon by the parties, or, in absence of an agreement, the prices were usual, customary or reasonable, and [4] the amount that is due and unpaid on the account. *Arndt v. National Supply Company, Et Al*, 633 S.W.2d 919, 922 (Tex. Civ. App.–Houston [14th Dist.] 1982 writ ref’d n.r.e.), citing *Brooks v. Eaton Yale and Towne, Inc.*, 474 S.W.2d 321, 323 (Tex. Civ. App.–Waco 1971, no writ).

C. Price

Proof of a suit on a sworn account does not require an express agreement; in the absence of an agreement, the plaintiff can meet the second requirement by showing that the charges were usual, customary, or reasonable. *Lopez v. M. G. Bldg. Materials, Ltd.*, No. 04-08-00550-CV (Tex. App.–San Antonio, June 3, 2009, no pet.)(2009 Tex. App. Lexis 3815)(mem. op.); *Arrellano v. J&K Garment Restoration Co.* (Tex. App.–Houston [14th Dist.] December 28, 2006, no pet.)(2006 Tex. App. Lexis 11072)(mem. op.)(no evidence that prices charged were usual, customary, and reasonable; judgment reversed and rendered that creditor take nothing on its suit on account).

Evidence as to usual, customary or reasonable prices is not relevant when there is a contract and the contract price should be proven. If the account is for insurance premiums, the policies should be admitted in evidence. *Bluebonnet Express, Inc. v. Employers Ins. Of Wausau*, 651 S.W.2d 345, 354 (Tex. App.–Houston [14th Dist.] 1983, writ ref’d n.r.e.)(reversed and rendered against creditor;

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no proof that premiums charged were in accord with the express contracts of insurance)(disapproved on other grounds *Horrocks v. Texas Dept. of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). Likewise, if a tariff is relevant to the transaction, prove the tariff, as it generally supercedes prior contractual arrangements under the “filed rate doctrine.” See, e.g., *Kanuco Tech. Corp. v. Worldcom Network Servs.* 979 S.W.2d 368 (Tex. App.–Houston [14th Dist.] 1998, no pet.)(telephone service; charges subject to tariff); *Mincron SBC Corp. v. Worldcom Inc.*, 994 S.W.2d 785 (Tex. App.–Houston [1st Dist.] 1999, no pet.)(telephone service).

D. Amount Due

See *Prompt Profl Real Estate, Inc. v. RSC Equip. Rental, Inc.*, No. 05-08-00398-CV (Tex. App.–Dallas May 5, 2009, no pet.)(2009 Tex. App. Lexis 3099)(mem. op.)(the fact that creditor made a pre-suit demand for less than amount sued did not create a genuine issue of material fact precluding summary judgment on uncontroverted summary-judgment evidence establishing the amount due).

IV. PROOF

A. Business Records Affidavit

Creditor’s cases are based on business records. Summary judgment motions and trial preparation should customarily include a business records affidavit. See Texas Rules of Evidence 902(10). The affidavit allows the nearly automatic admission of documents, which usually includes the statement of account and invoices. Such records may satisfy creditor’s burden of proof. See *Morgan v. O’Beirne*, 429 S.W.2d 569, 572 (Tex. Civ. App.–Dallas 1968, no writ)(audit billing, invoices, ledger sheets, and policy admitted as business records, though third party-auditor did not testify); *Voss v. Southwestern Bell Tel. Co.* 610 S.W.2d 537 (Tex. Civ. App.–Houston [1st Dist.] 1980 writ ref’d n.r.e.)(computer print-outs admitted as business records); *Kirkpatrick v. LVNV Funding, LLC*, No. 01-11-00382-CV (Tex. App.–Houston [1st Dist.] May 3, 2012, n.p.h.)(2012 Tex. App. Lexis 3489)(mem. op.)(third-party records admitted through business records affidavit). Failure to use a business records affidavit may be fatal. See *Siegler v. Williams*, 658 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1983, no writ)(plaintiff failed to prove invoices through business records affidavit; no exception to the hearsay rule; judgment for creditor reversed).

B. Services Affidavit

Civil Practice & Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Though routinely used by personal injury attorneys, it is rarely employed by commercial litigators. If one serves the affidavit on the other parties at least 30 days before trial, its contents are incontrovertible, unless a counter-affidavit is served at least 14 days before trial. It presumably could be used to prove a debt based on services rendered; or attorney’s fees in virtually any case except a sworn account action. However, one could amend, abandon the sworn account action, and proceed to trial on breach of contract, common law account, quantum meruit and other claims, employing this device. The statute, amended in 2007 to delete filing requirement, arguably still requires filing of controverting affidavit. See 18.001(b).

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C. Discovery With Petition

Standard discovery, including requests for admission, should generally be served with the citation, see form, appendix B. Debtor has 50 days after service to answer such discovery. *See* Rules 197.2(a); Rule 198.2(a). Responses to discovery are generally more substantiative if a statement of account or the invoices are attached to the petition.

A default judgment may be bolstered by a motion for default judgment, with an attached affidavit establishing service and lack of response to attached admissions. Without such a motion, the deemed admissions are not part of the court file or subsequent record. Deemed admissions provide alternate proof of the claim, in the event the judgment is attacked. *See Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184, 190 (Tex. App.–Dallas 2000, pet. denied)(default judgment attack; deemed admissions established debt).

The attached form discovery also aids creditor in proving its case through summary judgment or trial. The debtor sometimes ignores the discovery resulting in deemed admissions. Many of the attached admissions were discussed and enforced as deemed admissions in *Continental Carbon*. The discovery, when answered, generally results in admission of some of creditor's elements.

V. DEFENSES

A. Negating Elements

A debtor's first defense is to negate one of the sworn account elements (see "Elements"). Assuming a proper verified answer is filed, debtor prevails if creditor fails to prove a required element. Debtor's counsel should carefully review the petition. Is the sworn account affidavit proper? Is the account consistent with the petition? Is the seller on the attached invoice or statement the same as the plaintiff? Is the debtor's name identical on the invoices, statement, and petition? Any variance could open the account to attack under the stranger to the transaction defense, next section.

B. Stranger to the Transaction

If debtor is not named on the invoice or statement as he is named in the petition, the suit may be subject to the stranger to the transaction defense. *Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780 (Tex. 1978); *Hassler v. Texas Gypsum Co.*, 525 S.W. 2d 53 (Tex. App.–Dallas 1975, no writ)(invoices named corporation, not individual defendant); *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 914 (Tex. App.–Dallas 2008, no pet.)(invoices named general contractor, not the defendant homeowner). To avoid this defense, plaintiff should plead that John Doe does business as Doe Co. if the invoices bill Doe Co., and it is John Doe's proprietorship. Plaintiff should also consider suit against multiple defendants under a partnership theory, if the facts allow.

C. Payment

Payment: If the account was paid, or credits are due, debtor should plead payment pursuant to Rule 95. Surprisingly, payment is one of the most difficult matters to plead.

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When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; **failing to do so, he shall not be allowed to prove the same**, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof (emphasis added). Rule 95.

Absence of a proper plea renders payment evidence inadmissible. *Garner v. Fidelity Bank, N.A.*, 244 S.W.3d 855, 861 (Tex. App.—Dallas 2008, no pet.)(creditor’s objections to debtor’s unpleaded evidence of payment properly sustained; summary judgment on note affirmed); *De La Calzada v. Am. First Nat’l Bank*, No. 14-07-00022-CV (Tex. App.—Houston [14th Dist.], February 7, 2008, n.p.h)(2008 Tex. App. Lexis 880)(mem. op.)(guaranty); *Rea v. Sunbelt Savings, FSB, Dallas*, 822 S.W.2d 370, 372-373 (Tex. App.—Dallas 1991, no writ)(promissory note); *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App.—Dallas 2004, no pet.)(real estate note); *Obasi v. Univ. of Okla. Health Sci. Ctr.*, No. 04-04-00016-CV (Tex. App.—San Antonio, October 27, 2004, pet. denied)(mem. op.)(2004 Tex. App. Lexis 9435)(student loan-promissory note); *Capers v. Citibank (South Dakota)*, N.A., No. 05-05-01230-CV (Tex. App.—Dallas, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9175)(mem. op.)(credit card contract).

VI. MOTIONS FOR SUMMARY JUDGMENT

A. Generally

Many sworn account claims are resolved through a motion for summary judgment (“Motion”). The reader is referred to other articles on the subject, including Summary Judgments in Collection Cases, *Collecting Debts & Judgments*, University of Houston Law Foundation; and *Summary Judgments in Texas*, Hittner and Liberato, 54 Baylor L. Rev. 1, Winter 2002.

B. Specificity of Motion

“The motion for summary judgment shall state the specific grounds therefor.” Rule 166a(c). A motion based on debtor’s insufficient answer must be specific. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993). The *McConnell* court specifically disapproved of an earlier case which allowed a vague allegation as to the insufficiency of debtor’s answer, *Bado Equip. Co. v. Ryder Truck Lines, Inc.*, 612 S.W.2d 81-82 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.). *Bado* held that a motion stating that “defendant’s answer is insufficient in law to constitute a defense,” was sufficient. See also *Robinson v. Texas Timberjack, Inc.*, 175 S.W.3d 528 (Tex. App.—Texarkana 2005, no pet.)(plaintiff’s motion failed to mention defendant’s insufficient answer to sworn account; plaintiff could not rely on insufficient answer to support summary judgment). Creditor’s Motion should include:

“This is a suit on a sworn account. Plaintiff’s affidavit attached to the petition establishes the account balance and is prima facie evidence of Plaintiff’s claim. Defendant’s insufficient answer renders Defendant unable to deny the claim, and Plaintiff is entitled to judgment as a matter of law.”

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C. Obtain Ruling on Objections

Objections to summary judgment evidence should be ruled upon prior to consideration of the motion, or they are waived. Consider requesting a record, but at least obtain entry of an order, which states the court's ruling on each objection. *Grant-Brooks v. Transamerica Bank, N.A.*, No. 05-02-00754-CV (Tex. App.—Dallas, January 31, 2003, no pet.)(unpublished, 2003 Tex. App. Lexis 990)(debtor waived objections by obtaining no ruling).

D. Affidavits As Summary Judgment Evidence

1. Personal Knowledge Requirement

Rule 166a(f) states: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient. *Humphreys v. Caldwell*, 888 S.W. 2d 469, 470 (Tex. 1994).

In *Robinson v. Texas Timberjack, Inc.*, 175 S.W.3d 528 (Tex. App.—Texarkana 2005, no pet.), the court held that plaintiff's affidavit was insufficient because it failed to show how the agent acquired personal knowledge of the facts. To be sufficient, the affidavit must affirmatively show how the affiant became personally familiar with the facts. *Id.* at 531, citing *Fair Woman, Inc. v. Transland Mgmt. Corp.*, 766 S.W.2d 323 (Tex. App.—Dallas 1989, no writ). But see *Requipco, Inc. v. Am-Tex Tank & Equip.*, 738 S.W.2d 299, 301 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(affidavit of plaintiff's president stating, "I have personal knowledge of all facts," held sufficient).

2. Readily Controverted Requirement

Summary judgment affidavits in creditor's cases invariably involve affidavits of creditor and debtor, which are affidavits of interested witnesses. As such, they may be subject to objection. Rule 166a(c) states:

A summary judgment may be based on uncontroverted testimonial evidence of an interested witness. . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

In *Thomas N. Heap, D.D.S., Inc. v. Val-Pak*, No. 01-00-00756-CV, (Tex. App.—Houston [1st Dist.] June 21, 2001, pet. denied)(unpublished, 2001 Tex. App. Lexis 4147), the court applied Rule 166a(c) to respondent's summary judgment evidence. Respondent - debtor's affidavit was an affidavit of an interested witness and described an agreement between himself personally and himself as president of his corporation. The court held that the affidavit was not capable of being readily

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controverted and was not competent summary judgment evidence.

3. Avoid Conclusory Statements

In *Life Ins. Co. of Virginia v. Gar-Dal, Inc.* 570 S.W.2d 378 (Tex. 1978) the court considered a vague affidavit of respondent - debtor, asserting unspecified offsets and payments. The court held such was insufficient to raise a fact issue. The court quoted with approval from *Smith v. Crockett Production Credit Assoc.*, 372 S.W.2d 956 (Tex. Civ. App.—Houston 1963, writ ref'd n. r. e.). In rejecting a vague debtor's affidavit the Houston court stated:

“However, we are of the view that the plea in appellant Smiths' affidavit, there being nothing more, stating that all offsets and credits have not been allowed, is but a conclusion. It should have gone further and specified what such credits and offsets were. If this had been a trial on the merits and the only thing stated by appellant was that all offsets and payments had not been credited, the court would have been required to instruct a verdict against appellant. His testimony in such a trial, that all payments and offsets had not been allowed, without more, would be a pure conclusion. See *Franklin Life Ins. Co. v. Rogers*, 316 S.W.2d 116 (CCA), ref., n.r.e.”

“ . . . [I]t is axiomatic that legal conclusions are insufficient to raise issues of fact . . . ” *CGM Valve & Gauge Co., Inc. v. Energy Valve, Inc.* 698 S.W.2d 253, 254 (Tex. App.—Houston [14th Dist.] 1985, no writ). See also *Schultz v. General Motors Acceptance Corp.*, 704 S.W.2d 797, 798 (Tex. App.—Dallas 1985, no writ)(conclusory statement regarding disposition of collateral was insufficient to support summary judgment).

E. Other Summary Judgment Cases

Liberty Mut. Ins. Co. v. Garrison Contrs. 966 S.W.2d 482 (Tex. 1998)(debtor raised fact issue through affidavits asserting that creditor's agreement misrepresented amount of retrospective premiums); *Boodhwani v. Bartosh*, No. 03-02-0432-CV (Tex. App.—Austin, March 6, 2003, no pet.)(2003 Tex. App. Lexis 1907)(mem. op.)(debtor filed no sworn answer; sworn response to creditor's motion for summary judgment therefore ineffectual); *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523, (Tex. App.—Houston [14th Dist.] 1988 writ denied (same)); *Grant-Brooks v. Transamerica Bank, N.A.*, No. 05-02-00754-CV (Tex. App.—Dallas, January 31, 2003, no pet.)(2003 Tex. App. Lexis 990)(mem. op.)(summary judgment affidavit from creditor's legal account specialist was sufficient though sale was apparently by a third party; debtor waived objections by failing to obtain ruling).

A summary judgment motion based on sworn account should include an alternate request for judgment based on breach of contract. If the court rejects the sworn account, creditor may yet prevail. See *Cavazos v. Citibank*, No. 01-04-00422-CV (Tex. App.—Houston [1st Dist.] June 9, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 4484)(court rendered judgment on contract claim after rejecting sworn account).

Account Stated

PART TWO:

ACCOUNT STATED

I. DEFINITION OF ACCOUNT STATED

An account stated is an agreement between the parties who have had previous transactions of a monetary character that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance. *Griffith v. Geffen & Jacobsen, P.C.* 693 S.W.2d 724, 726 (Tex. App.–Dallas 1985, no writ), *citing Eastern Dev. & Inv. Corp. v. City of San Antonio*, 557 S.W.2d 823, 824-25 (Tex. Civ. App.–San Antonio 1977, writ ref'd n.r.e.).

II. ELEMENTS

The elements of an account stated are:

[1]. . . transactions between the parties which give rise to an indebtedness of one to the other; [2] an agreement, express or implied, between the parties fixing the amount due; and [3] a promise, express or implied, by the one to be charged, to pay such indebtedness. *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.–Dallas 2008, no pet.); *Arnold D. Kamen & Co. v. Young*, 466 S.W.2d 381, 388 (Tex. Civ. App.–Dallas 1971, writ ref'd n.r.e.); *Central Nat. Bank of San Angelo v. Cox* 96 S.W.2d 746 (Tex. Civ. App.–Austin 1936 writ dismiss'd); *citing Glasco v. Frazer* 225 S.W.2d 633, 635 (Tex. App.–Dallas 1949, writ dismiss'd).

III. PLEADING

Pleading account stated should include an allegation of each element. “To bring an action on an account stated it would be incumbent on plaintiff to allege in his petition that the defendant admitted the correctness of the account and that he expressly or impliedly assented to it.” *Unit Inc. v. 10 Eych-Shaw, Inc.*, 524 S.W.2d 330, 334 (Tex. App.–Dallas 1975, writ ref'd n.r.e.), *citing Reed v. Harris* 37 Tex. 167, 169 (Tex. 1872).

A creditor can recover attorney's fees under Chapter 38 based upon an account stated claim. *See Busch v. Hudson & Keyse, LLC*, No. 14-09-00009-CV (Tex. App.–Houston [14th Dist.], May 11, 2010, n.p.h.)(2010 Tex. App. Lexis 3477)(mem. op.); Tex. Civ. Prac. & Rem. Code § 38.001(8)(oral or written contract).

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IV. PROOF

Because the agreement on which an account stated claim is based can be express or implied, creditor need not produce a written contract, as long as it produces other evidence of the agreement between the parties. *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 894 (Tex. App.–Dallas 2008, no pet.). “Based on the series of transactions reflected on the account statements, it is reasonable to infer that [debtor] agreed to the full amount shown on the statements and impliedly promised to pay the indebtedness.” *Id.* Other evidence of account stated may include letters and e-mails, stopped payment checks, and credit card statements.

A. Confirming Letters

A letter from debtor to creditor stated, “In answer to your letter of February 17 regarding our balance as of beginning of 1950, our books show a balance of \$12,532.83, which agrees with your books.” This constituted undisputed evidence establishing account stated, *Dozier v. Jarman* 254 S.W.2d 569, 570 (Tex. Civ. App.–Amarillo 1952 no writ).

1. Sample Letter Confirming Balance

Re: Debtor, Inc., debt to Creditor, Inc. \$34,212

Mr. Jones,

Confirming our telephone conversation, you indicated that Debtor, Inc. needs to collect receivables from its customers and expects to fully pay the account by December 1, 2012. We agree there are no offsets, credits or claims against the account, and the account balance is \$34,212. Please promptly sign and return via fax to (214) 340-1111.

Very truly yours,

Agreed for Debtor, Inc.

Creditor, Inc.

By: _____
(Signature)

Its: _____
(Print name and title)

If the foregoing letter is ignored, try an e-mail to debtor requesting either a signed faxed response, or at least debtor’s e-mail confirmation, confirming the balance due. An email admission can often be as effective as a letter.

Account Stated

2. Specificity Required

An account stated requires an absolute acknowledgment or admission of a sum certain by the debtor to the creditor. *Paine v. Moore*, 464 S.W.2d 477, 480 (Tex. Civ. App.—Tyler 1971), citing *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920). Debtor's letter admitting debt of \$252.77 did not constitute account stated, when creditor contended over \$700 was due; there was no agreement as to amount due. *H.G. Berning, Inc. v. Waggoner*, 247 S.W.2d 570, 571 (Tex. Civ. App.—Beaumont 1952, no writ).

B. Stopped Payment/ NSF Checks

In *Magic Carpet Co. v. Pharr*, 508 S.W.2d 696 (Tex. App.—Dallas 1974, no writ), introduction of receipt, together with “payment stopped” check, was sufficient as acknowledgment of the amount due considering decision holding that an implied acknowledgment of the amount due is sufficient, citing *Graham v. San Antonio Machine & Supply Corp.*, 418 S.W.2d, 303,312 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

C. Credit Card Statements - Conflicting Cases

1. Statements As Account Stated

Credit card statements may be used as evidence to establish account stated. See *Compton v. Citibank (S.D.), N.A.*, 364 S.W.3d 415, 418 (Tex. App.—Dallas 2012)(court expressly disapproved of *Morrison*, next paragraph); *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2008, no pet.)(summary judgment affirmed against debtor on account stated - monthly credit card statements reflecting charges and payments over a seven-year period established implied agreement fixing the amount due and implied promise to pay); *Singh v. Citibank (South Dakota), N.A.*, No. 03-10-00408-CV (Tex. App.—Austin Mar. 24, 2011, no pet.)(2011 Tex. App. Lexis 2161)(mem. op.)(same); *McFarland v. Citibank, N.A.*, 293 S.W.3d 759, 764 (Tex. App.—Waco 2009, no pet.)(same); *Eaves v. Unifund CCR Partners*, 301 S.W.3d 402, 408 (Tex. App.—El Paso 2009, no pet.)(same); *Jamarillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV (Tex. App.—Houston [14th Dist.], March 30, 2010, no pet.)(2010 Tex. App. Lexis 2219)(mem. op.)(same).

2. Statements Not Account Stated (Minority View)

See *Morrison v. Citibank (S.D.) N.A.*, No. 2-07-130-CV (Tex. App.—Fort Worth, February 28, 2008, no pet.)(2008 Tex. App. Lexis 1692)(mem. op.)(monthly credit card statements, coupled with debtor's payment history involving a pattern of minimum monthly payments, held factually insufficient to support the second element of account stated, an agreement, express or implied, fixing an amount due).

Account Stated

V. DEFENSES

A. Attack Elements

If debtor persuades the fact finder that plaintiff has not met his burden of proof as to all elements, such is an effective defense. Often, the “weak link” in an account stated claim is the agreed amount due. See *Neil v. Agris*, 693 S.W.2d 604, 605 (Tex. Civ. App.–Houston [14th Dist.] 1985 no writ)(proof that creditor mailed debtor a bill that was never paid, without more, was insufficient to establish account stated); *Montoya v. Bluebonnet Fin. Assets*, No. 02-09-00301-CV (Tex. App.–Fort Worth, October 28, 2010, no pet.)(2010 Tex. App. Lexis 8691)(mem. op.)(summary judgment for assignee of a credit card account reversed because of balance variance between the final credit card statement and the bill of sale to assignee).

B. The “Forgotten Offset”

After an account stated is established, may debtor allege an offset omitted by mistake, a forgotten offset? Such seems to negate the concept of account stated. Recent cases provide no authority for such attacks. However, a forgotten offset was allowed with troublesome language in *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920). Debtor, at trial, sought to prove credits against an account stated. The issue was whether debtor had to prove mutual mistake in order to obtain the credits. Mutual mistake was not required and the supreme court stated that an account stated simply establishes a prima facie case, shifting the burden to the debtor to disprove its correctness. The court stated:

Mere presumptive evidence cannot create an estoppel. A stated account does not, therefore, amount to an estoppel. It is open to impeachment, just as other presumptions are subject to be overcome by competent proof. It does not of itself amount to an obligatory agreement - - a contract upon a new consideration, having all the sanctity of a written agreement. Its purpose is but to reach an agreed balance between the parties whereby the particular items may be eliminated. When that is done, its office is performed and the character of prima facie correctness in the balance is attained.

The case may be brought within the principles of an estoppel, or of an obligatory agreement between the parties, as when upon a settlement mutual compromises are made; but the mere stating of an account in its very nature and purpose precludes giving to the account when stated the character of a binding written contract. In the ordinary affairs of men it is not intended to have that character. In modern business transactions, such, for instance, as between banks and their customers, it would be perilous to state accounts if the statement of the balance is to be held in all cases as creating a contract binding upon both parties and subject to no correction for errors unless they be due to the fault of both. 220 S.W. at 775.

Practice Tip: Argue that agreement as to the balance due disposes of all issues to that date; that debtor should be able to assert only post-agreement offsets and credits. But beware of *Dodson*

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when offsets or credits are asserted, as it could negate an account stated. Debtor should plead offsets and credits as affirmative defenses under Rule 94. Payment must be specially pleaded per Rule 95.

PART THREE: UNJUST ENRICHMENT CLAIMS

Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay. *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.–Waco 2008, pet. filed); *Walker v. Cotter Props.*, 181 S.W.3d 895, 900 (Tex. App.–Dallas 2006, no pet.); *Oxford Fin. Co., Inc. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.–Austin 1991, writ denied). The unjust enrichment doctrine applies principles of restitution to disputes where there is no actual contract and is based on the equitable principle that one who receives benefits which would be unjust for him to retain ought to make restitution. *In re Guardianship of Fortenberry*, 261 S.W.3d 904, 915 (Tex. App.–Dallas 2008, no pet.). However, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment. *Southwestern Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 469 (Tex. 1998), citing *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951). See also *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)(A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage).

I. QUANTUM MERUIT

A. Definition and Elements

The Texas Supreme Court explains quantum meruit and its elements in *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990):

Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it. *Colbert v. Dallas Joint Stock Land Bank*, 129 Tex. 235, 102 S.W.2d 1031, 1034 (1937). Generally, a party may recover under quantum meruit only when there is no express contract covering the services or materials furnished. *Truly v. Austin*, 744 S.W. 2d 934, 936 (Tex. 1988). This remedy “is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.” *Id.* See *Campbell v. Northwestern Nat’l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978). Recovery in quantum meruit will be had when non-payment for the services rendered could “result in an unjust enrichment to the party benefitted by the work.” *City of Ingleside v. Stewart*, 554 S.W.2d 939, 943 (Tex. Civ. App.–Corpus Christi 1977, writ ref’d n.r.e.) Recognizing that quantum meruit is founded on unjust enrichment, this court set out the elements of a quantum meruit claim in *Bashara v. Baptist Memorial Hospital System*, 685 S.W.2d 307, 310 (Tex. 1985). To recover under quantum meruit a claimant must plead and prove that:

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- 1) valuable services were rendered or materials furnished;
- 2) for the person sought to be charged;
- 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him;
- 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt* 787 S.W.2d at 944.

1. Damages

The proper measure of damages for a claim in quantum meruit is the reasonable value of work performed and the materials furnished. *M.J. Sheridan & Son Co. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 625 (Tex. App.–Houston [1st Dist.] 1987, no writ). What constitutes a reasonable compensation for benefits furnished does not depend on any single factor, but takes into account all the evidence and circumstances. *Walker & Assocs. Surveying v. Roberts*, 306 S.W.3d 839, 859 (Tex. App.–Texarkana 2010, n.p.h.).

B. Services Rendered and Accepted

To prevail on a quantum meruit claim, the plaintiff must establish that the services were valuable from the perspective of the defendant. *Carr v. Austin Forty*, 744 S.W.2d 267, 273 (Tex. App.–Austin 1987, writ denied). *See also Rickett v. Lesikar*, No. 02-10-00026-CV (Tex. App.–Fort Worth, October 14, 2010, no pet.)(2010 Tex. App. Lexis 8307)(mem. op.)(no quantum meruit recovery for plaintiff, who provided contour maps and seismic lines, with no explanatory report to defendant, a non-expert).

C. Reasonable Notification To The Person Sought To Be Charged

Quantum meruit requires reasonable notification to the person sought to be charged. In a suit by a subcontractor against a homeowner, even though the homeowner was present at meetings to review additional work, because subcontractor invoiced the general contractor and because the homeowner informed the subcontractor that it should expect payment only from the general contractor, the court concluded that there was no evidence to establish that subcontractor reasonably notified the homeowners that it expected payment directly from them. *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907 (Tex. App.–Dallas 2008, no pet.). *Compare Sanders with Copps v. Gardern Appraisal Group, Inc.*, No. 04-07-00070-CV (Tex. App.–San Antonio, October 31, 2007, no pet.)(2007 Tex. App. Lexis 8636)(mem. op.)(judgment on quantum meruit affirmed where appraiser, after being contacted by a third party, sought payment directly from the homeowner).

D. Expectation of Payment or Deal As Element

Expectation of payment of money is not required; expectation of a deal may suffice. In *Vortt*, *supra*, claimant provided seismic information with an expectation of concluding an agreement for production of a well. In *Campbell*, *supra*, claimant provided remodeling services with an expectation of an option to purchase an apartment complex. These satisfied the “expectation of payment” element.

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E. Other Restrictions

1. Absence of Express Contract

Generally, quantum meruit recovery is allowed only in the absence of express contract. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198 (Tex. App.–Dallas 2005, no pet.); *Truly v. Austin et. al.*, 744 S.W.2d 934, 936 (Tex. 1988). An express contract between the parties precludes a plaintiff from recovering for services rendered in quantum meruit if the contract covers those services or materials and if no exception to the general rule applies. *Christus Health v. Quality Infusion Care, Inc.*, 359 S.W.3d 719, 723 (Tex. App.–Houston [1st Dist.] 2011, no pet.), citing *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683-84 (Tex. 2000).

2. Partial Performance on Contract

Recovery in quantum meruit is sometimes permitted when a plaintiff partially performs an express contract that is unilateral in nature. *Truly v. Austin et. al.*, 744 S.W.2d 934, 937 (Tex. 1988). Examples include partial performance by broker to sell real estate and partial performance by an attorney. As to partial performance by attorney, see *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006)(intricate discussion of unconscionable termination provision in fee agreement); *Hudson v. Cooper*, 162 S.W.3d 685 (Tex. App.–Houston [14th Dist.] 2005, no pet.)(partial performance by attorney allows quantum meruit claim, even though a contingent fee contract existed); *French v. Law Offices of Windle Turley, P.C.*, No. 2-08-273-CV (Tex. App.–Fort Worth, Mar. 4, 2010, no pet.)(2010 Tex. App. Lexis 1586)(mem. op.)(same).

A contractor may recover the reasonable value of the services rendered and accepted or the materials supplied under the theory of quantum meruit if: (1) the services rendered and accepted are not covered by the contract; (2) the contractor partially performed under the terms of an express contract, but was prohibited from completing the contract because of the owner's breach; or (3) the contractor breached but the owner accepted and retained the benefits of the contractor's partial performance. *Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 403 (Tex. App.–Dallas 2006, no pet.)(reversed on other grounds)(labor and material costs awarded to plaintiff-contractor because defendants accepted and retained the benefits of partial performance). See also *Bluelinx Corp. v. Tex. Constr. Sys.*, No. 14-09-00237-CV (Tex. App.–Houston [14th Dist.] Jan. 27, 2011, n.p.h.)(2011 Tex. App. Lexis 605)(mem. op.)(change to more expensive materials recoverable but time and expense obtaining permit not compensable as permit was within the scope of contract).

3. Clean Hands Required

A party seeking an equitable remedy, such as quantum meruit, must come to court with "clean hands." *Jones v. Whatley*, No. 13-09-00355-CV (Tex. App.–Corpus Christi, June 9, 2011, n.p.h.)(2011 Tex. App. Lexis 4380)(mem. op.)(attorney falsely testified to a contingent fee contract), citing *In re Gamble*, 71 S.W.3d 313, 325 (Tex. 2002). The complaining party must show that he has been injured by such conduct. *Id.*, citing *Afri-Carib Enters., Inc. v. Mabon Ltd.*, 287 S.W.3d 217, 222 (Tex. App.–Houston [14th Dist.] 2009, no pet.). In *Jones*, the court did not apply the clean hands doctrine because the jury awarded less attorney's fees than the attorney would have recovered using an hourly rate calculation.

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F. Limitations

Unjust enrichment claims are governed by the two-year statute of limitations in CPRC § 16.003. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007). “The most logical reading of sections 16.003 and 16.004 is to treat “debt” actions under section 16.004 as breach-of-contract actions that fall under the four-year statute of limitations for such claims, . . . while construing the two-year statute’s reference to actions for ‘taking or detaining the personal property of another’ as applicable to extra-contractual actions for unjust enrichment.” *Id.* at 870. Of questionable authority, *see Quigley v. Bennett*, 256 S.W.3d 356 (Tex. App.–San Antonio 2008, no pet.)(court applied four-year statute of limitations to quantum meruit claim).

Avoid limitations issues. Sue and serve defendants promptly. The reader is referred to O’CONNOR’S CPRC Plus (2012-2013) and other authorities as to this important defense. See pages 898-900 where sixteen debt collection limitations periods are summarized.

G. Attorney’s Fees

A party may recover attorney’s fees for claims arising out of quantum meruit. *Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 366 (Tex. App.–Dallas 1993, writ denied), *citing* Tex. Civ. Prac. & Rem. Code §38.001.

II. MONEY HAD AND RECEIVED

A. Definition and Elements

Money had and received is an equitable action that may be maintained to prevent unjust enrichment when one person obtains money, which in equity and good conscience belongs to another. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.–Fort Worth 2005, no pet.); *Finish Line Pshp. v. Kasmir & Drage, L.L.P.*, No. 05-97-01931-CV (Tex. App.–Dallas November 15, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 7744), *citing Miller-Rogaska, Inc. v. Bank One, N.A.*, 931 S.W.2d 655, 662 (Tex. App.–Dallas 1996, no writ). Many courts use the term “money had and received” interchangeably with other terms, such as restitution, unjust enrichment, and assumpsit. *Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 837 (Tex. App.–Dallas 2008, pet. filed).

“All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him.” *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951). The court explains: A cause of action for money had and received is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry whether the defendant holds money which belongs to the plaintiff, *citing United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859, 54 Sup. Ct. 443; *Staats*, 243 S.W.2d at 687-688.

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See also *Leier v. Purnell*, No. 2-04-039-CV (Tex. App.–Fort Worth, December 9, 2004, pet. denied) (unpublished, 2004 Tex. App. Lexis 11127), citing 64 Tex. Jur. 3d, Restitution and Constructive Trusts, §6:

An action for money had and received will lie where (1) a person has obtained money from another by fraud, duress or undue advantage; (2) a person has paid money in consideration of an act to be done by another, and the act is not performed, whether the defendant is unwilling or unable to perform; (3) the action is to recover money received on consideration that has failed in whole or in part; or (4) there is a surplus arising on the sale of the security for a debt.

B. Pleading

An allegation that debtor received money belonging to creditor which should be returned is an allegation of money had and received. *Zwank v. Kemper*, No. 07-01-0400-CV (Tex. App.–Amarillo, August 29, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 6508). Alleging facts of the transaction sufficiently informed debtor that he was alleged to hold money belonging to creditor. *Staats* 243 S.W.2d 686, 688.

In defending against such a claim, a defendant may present any facts and raise any defenses that would deny the claimant's right or show that the claimant should not recover. *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162 (Tex. 2007)(per curiam), citing *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007)(per curiam). When a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory, such as money had and received. *UL, Inc. v. Pruneda*, No. 01-09-00169-CV (Tex. App.–Houston [1st Dist.], Dec. 9, 2010, n.p.h.)(2010 Tex. App. Lexis 9806)(mem. op.), citing *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000).

C. Cases

Money had and received is a broad and flexible cause of action. A money had and received claim reaches property purchased with the money. *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189 (Tex. App.–Amarillo 2002, pet. denied). A variety of claims are asserted as money had and received:

1) **Improper Fees:** Claim of illegal student fees paid under implied duress was proper money had and received claim. *Dallas v. Bolton*, 89 S.W.3d 707 (Tex. App.–Dallas 2002, pet. granted).

2) **Transferred Assets:** After transfer of assets by debtor to third party, creditor properly asserted money had and received against third party; third party's summary judgment reversed and remanded. Money had and received claim reached money and property held by third party. Debtor improperly converted consigned goods to cash, then purchased and sold goods to third party. *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189 (Tex. App.–Amarillo 2002, pet. denied).

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3) **Retained Money, Realty:** Creditor paid \$40,000 based on oral agreement to convey land; debtor's failure to convey resulted in a proper money had and received claim, summary judgment affirmed. *Quintanilla v. Almaguer*, No. 13-96-455-CV (Tex. App.—Corpus Christi, May 21, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 3095).

4) **Retained Money, Goods:** Money had and received is a viable cause of action in dispute between buyer and seller of horse, when horse died prior to delivery and seller kept purchase price. *Leier v. Purnell*, No. 2-04-039-CV (Tex. App.—Fort Worth, December 9, 2004, pet. denied)(unpublished, 2004 Tex. App. Lexis 11127).

5) **Escrowed Funds:** Funds escrowed with city for specified improvements, which were never made, was proper money had and received claim. *Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313 (Tex. App.—Austin 1992, no writ).

6) **Expert's Services:** Seismic information provided with expectation of agreement for production of well is proper money had and received claim. *Vortt Exploration Co., Inc. v. Chevron U.S.A. Inc.*, 787 S.W.2d 942, 944 (Tex.1990).

7) **Remodeling Services:** Remodeling services made with expectation of an option to purchase apartment complex proper money had and received claim. *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex.1978).

8) **Legal Services:** Law firm properly paid itself for services from trust account; such did not constitute money had and received claim because there was no unjust enrichment to law firm. *Finish Line P'shp. v. Kasmir & Krage*, No. 05-97-01931-CV (Tex. App.—Dallas November 15, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 7744).

9) **Unearned Retainer:** Plaintiff-inmate's claim that attorney refused to return unearned retainer was sufficient money had and received claim. *Burnett v. Sharp*, 328 S.W.3d 594 (Tex. App.—Houston [14th Dist.] 2010, n.p.h.).

10) **Wrongful Credit Card Charges:** Class action litigation based on wrongful credit card premium charges by department store and insurers was apparently viable money had and received claim; reversed and remanded as to class certification. *J.C.Penney Co. v. Pitts*, 139 S.W.3d 455 (Tex. App.—Corpus Christi 2004, pet. denied).

11) **Child Support Overpayment:** Overpayment of child support is sufficient to assert a claim for money had and received. *London v. London*, 192 S.W.3d 6, 11-12 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *In the Interest of L.R.S.*, No. 02-09-00244-CV, (Tex. App.—Fort Worth, March 3, 2011, n.p.h.)(2011 Tex. App. Lexis 1589)(mem. op.)(same).

12) **Misapplication of Mortgage Payment:** Lender's misapplication of a payment was a proper money had and received claim. *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706 (Tex. App.—Corpus Christi 2006, pet. denied).

13) **Not Bank Account; Failure to Prove Control:** Court properly entered judgment notwithstanding verdict for debtor because there was no evidence debtor received money in question. Money was deposited into bank account during sale of business, but third party controlled account. *Akturk v. Leech*, No. 05-98-02095-CV, (Tex. App.—Dallas, June 7, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 3803).

14) **Not Improper Payment of Check:** Money had and received claim against bank, based on improper payment of check, failed as there was no evidence bank held funds in question. *Miller- Rogaska, Inc. v. Bank One, N.A.*, 931 S.W.2d 655 (Tex. App.—Dallas 1996, no pet.).

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15) **Not Defective Product Claim:** Money had and received claim properly dismissed for lack of standing when based on prospective damages in class action. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.–Fort Worth 2005, no pet.).

16) **Not Freight Overcharges Where Contract Controlled:** Claim of freight overcharges was not money had and received or unjust enrichment as contractual provisions controlled. *Southwestern Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467 (Tex. 1998).

D. Attorney's Fees

Attorney's fees are not recoverable under CPRC 38.001 for a money had and received claim. *See Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 713-14 (Tex. App.–Corpus Christi 2006, pet. denied)(summary judgment based solely on money had and received). Often, money had and received should be plead alternatively as a sworn account, account stated, or breach of contract claim, which allow fee recovery under CPRC 38.001, et. seq.

E. Limitations

A two-year statute of limitations generally applies to money had and received claims. *See Merry Homes, Inc. v. Luc Dao*, 359 S.W.3d 881 (Tex. App.–Houston [14th Dist.] 2012, no pet.); *Pollard v. Hanschen*, No. 05-09-00704-CV (Tex. App.–Dallas, June 8, 2010, no pet.)(2010 Tex. App. Lexis 4281)(mem. op.), *both citing Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007)(unjust enrichment claims are governed by two-year limitations period).

But see Tex. Bus. & Com. Code § 3.118(g), (three-year limitations applies to money had and received claim based on conversion of an instrument).

Promissory Note

PART FOUR: PROMISSORY NOTE

I. DEFINITIONS AND TERMS

A. Promissory Note

A promissory note is a contract between the maker and the payee. *Strickland v. Coleman*, 824 S.W.2d 188, 191 (Tex. App.–Houston [1st Dist.] 1991, no writ), citing *Mauricio v. Mendez*, 723 S.W.2d 296, 298 (Tex. App.–San Antonio 1987, no writ). Courts employ the same rules for interpreting a note that they use to interpret a contract. *EMC Mortg. Corp. v. Davis*, 167 S.W.3d 406 (Tex. App.–Austin, 2005, pet. denied), citing *Affiliated Capital Corp. v. Commercial Fed. Bank*, 834 S.W.2d 521, 526 (Tex. App.–Austin 1992, no writ). Note: This broad topic, promissory note, merits additional research; this is intended as a starting point only.

B. Maker

A maker means a person who signs or is identified in a note as a person undertaking to pay. Tex. Bus. & Com. Code §3.103(a)(5).

C. Holder

A holder means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. Tex. Bus. & Com. Code §1.201(b)(21).

D. Bearer

Bearer means a person in possession of a negotiable instrument that is payable to bearer or indorsed in blank. Tex. Bus. & Com. Code §1.201(b)(5).

II. ELEMENTS OF SUIT ON NOTE

To collect on a promissory note, the holder or payee must establish: (1) there is a note; (2) it is the legal owner and holder of the note; (3) the defendant is the maker of the note; and (4) a certain balance is due and owing on the note. *Levitin v. Michael Group, L.L.C.*, 277 S.W.3d 121, 123 (Tex. App.–Dallas 2009, no pet.); *UMLIC VP LLC v. T&M Sales & Envtl. Sys.*, 176 S.W.3d 595, 611 (Tex. App.–Corpus Christi 2005, pet. denied); *Diversified Fin. Sys. v. Hill, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 354 (Tex. App.–Fort Worth 2003, no pet.); *Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 674 (Tex. App.–Austin 2000, pet. denied); *Clark v. Dedina*, 658 S.W.2d 293, 295 (Tex. App.–Houston [1st Dist.] 1983, writ dism'd w.o.j.).

III. PLEADINGS

A. Petition

A sworn copy of the promissory note, upon which the lawsuit is founded, should be

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attached to plaintiff's original petition. The petition should state that the defendant signed the note. "When a claim is founded on the execution of a written instrument, and the defendant does not deny under oath the execution of the instrument, the instrument shall be received in evidence as fully proved." *Boyd v. Diversified Fin. Sys.*, 1 S.W.3d 888, 891 (Tex. App.–Dallas 1999, no pet.), *citing* Rule 93(7). The petition should also state that the plaintiff is the holder of the note and state the balance due on the note.

1. Promissory Note As A Sworn Account Claim

Hou-Tex Printers v. Marbach, 862 S.W.2d 188, 190 (Tex. App.–Houston [14th Dist.] 1993) held that a note is not included within the definition of a sworn account. However, it is arguable that a note is within Rule 185 as a liquidated claim based on written contract between the parties upon which a systematic record has been kept. The court reasons that passage of title to personal property is required for a sworn account. This is not the case. See prior discussion, Part I, Sworn Accounts.

2. Conditions Precedent (Rule 54)

Rule 54 states:

In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). Plaintiff should assert that all conditions precedent have been performed or have occurred. Plaintiff is then required to prove "only such of them as are specifically denied." See *Greathouse v. Charter Nat'l Bank-Southwest*, 851 S.W.2d 173 (Tex. 1992)(creditor in deficiency action plead all conditions precedent have been performed or have occurred; debtor did not deny that disposition of collateral was commercially reasonable; creditor not required to prove reasonableness at trial); *Miller v. University Sav. Assoc.*, 858 S.W.2d 33, 35 (Tex. App.–Houston [14th Dist.] 1993, writ denied)(proof of notice of intent to accelerate a note was waived by guarantor's failure to specifically deny creditor's Rule 54 pleading: "all conditions precedent have been performed or have occurred."); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.–Eastland 2006, no pet.) (creditor plead conditions precedent as to attorney's fees; debtor waived presentment of claim under CPRC 38.002(2) by failing to affirmatively deny the same).

B. Answer

1. General Denial

"A general denial puts in issue allegations that the plaintiff is the owner or holder of the note, that the same is due, and the amount due and owing thereon." *Derbigny v. Bank One*, 809 S.W.2d 292, 294 (Tex. App.–Houston [14th Dist.] 1991, no writ). Of course, if the court were to treat the note, or a preceding debt, as a sworn account, defendant must file a verified

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answer pursuant to Rule 185.

2. Denial of Signature

If the defendant denies signing the note, he should file a verified denial of execution pursuant to Rule 93(7). *See Wheeler v. Sec. State Bank, N.A.*, 159 S.W.3d 754 (Tex. App.–Texarkana 2005, no pet.)(as defendant neglected to file a verified denial of signature on a promissory note, the notes were received into evidence as fully proved). If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity. Tex. Bus. & Com. Code §3.308.

3. Payment

Payment is an affirmative defense and must be pleaded by the defendant pursuant to Rule 95. Defendant must file with his plea an account stating distinctly the nature of such payment; failing to do so, he shall not be allowed to prove the same, unless payment is plainly and particularly described in the plea as to give the plaintiff full notice.

4. Conditions Precedent

If plaintiff pleads that all conditions precedent have been performed or have occurred, defendant should itemize and specifically deny all contested conditions. *See Hill v. Thompson & Knight*, 756 S.W.2d 824, 826 (Tex. App.–Dallas 1998, no writ)(defendant's denial of "all conditions precedent" insufficient). One commentator suggests that a Rule 54 denial be verified, though Rule 54 does not expressly require verification. Michol O'Connor & Byron P. Davis, *O'Connor's Texas Rules - Civil Trials 2011*, at 213 (2011). However, denial of some conditions precedent could be within Rule 93's verified denial requirement. For example, denial that notice and proof of loss was given or denial that claim for damage was given, must be verified per Rule 93(12).

IV. EVIDENTIARY ISSUES

A. Summary Judgment

To prevail on a motion for summary judgment, a plaintiff seeking to enforce payment under the note must establish: (1) the instrument in question; (2) that the party sued on the instrument signed the instrument; (3) that the plaintiff is the owner and holder of the note; and (4) that a certain balance is due and owing. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio April 20, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 2964); *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 522 (Tex. App.–Dallas 1994, no writ); *Scott v. Commercial Servs. of Perry, Inc.*, 121 S.W.3d 26, 29 (Tex. App.–Tyler 2003, pet denied); *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.–Houston [14th Dist] 1994, no writ); *TrueStar Petroleum Corp. v. Eagle Oil & Gas Co.*, 323 S.W.3d 316, 319 (Tex. App.–Dallas 2010, n.p.h.). But, an affidavit stating that the, "principal balance [on a \$400,000 note], plus accrued interest and charges through March 31, 2004, . . . [is] . . . \$215,741.82," was conclusory; respondent's objection should have been sustained; summary judgment reversed. *Fairbank v. First Am. Bank*, No. 05-06-00005-CV (Tex. App.–Dallas, August 7,

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2007, no pet.)(2007 Tex. App. Lexis 6228)(mem. op.). See also Proof of Balance Due, at page 30.

B. Proof of the Note

“In an action by the holder of a note against the maker, the introduction of the note in evidence makes a prima facie case for the holder, where the execution of the note has not been denied under oath.” *Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.–Houston [1st Dist.] 1983, writ dism’d w.o.j.)(summary judgment for holder affirmed where a photocopy of a note, attached to an affidavit, in which the affiant swore that the photocopy was a true and correct copy of the original, that the affiant was the holder of the note, and that a balance was due in the amount stated).

C. Proof of Ownership

Regarding the issue of ownership, testimony in an affidavit that a particular person or entity owns the note is generally sufficient, even in the absence of supporting documentation, if there is no controverting summary judgment evidence. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio, April 20, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 2964), citing *Zaergas v. Bevan*, 652 S.W.2d 368, 369, 26 Tex. Sup. Ct. J. 455 (Tex. 1983); *Calbert v. Assocs. Asset Mgmt., LLC*, No. 01-09-01062-CV (Tex. App.–Houston [1st Dist.], June 10, 2010, n.p.h.)(2010 Tex. App. Lexis 4383)(mem. op.).

1. Gap in Chain of Title

In *Docken, supra*, summary judgment for the bank was reversed because there was no evidence to explain how title to the note passed from a third party automotive dealer to the bank. When there is an unexplained gap in the chain of title, there is an issue of material fact regarding the ownership of the note, and the owner is required to prove the transfer by which it acquired the note. *Jernigan v. Bank One, Tex., N.A.*, 803 S.W.2d 774, 776-77 (Tex. App.–Houston [14th Dist.] 1991, no writ).

2. Corporate Merger

Ownership of a note may be obtained through corporate merger. *Couturier v. Tex. State Bank*, No. 13-03-00013-CV (Tex. App.–Corpus Christi, August 18, 2005, no pet.)(2005 Tex. App. Lexis 6630)(mem. op.).

D. Lost Note

A person who is not in possession of an instrument is entitled to enforce the instrument if: (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. Tex. Bus. & Com. Code § 3.309(a). A person seeking enforcement of an instrument under Subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. Tex. Bus. & Com. Code § 3.309(b). See generally *Briscoe v.*

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Goodmark Corp., 130 S.W.3d 160 (Tex. App.–El Paso 2003, no pet.)(holding that the notes could be enforced without the originals, because the creditors established that they were the owners, that the original notes were lost, the reason for their inability to produce them, and copies of the notes were admitted into evidence).

E. Proof of the Balance Due

To collect on a promissory note, the plaintiff must prove that a balance is due and owing. *See Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 678 (Tex. App.–Austin 2000, pet. denied)(in addition to establishing that the principal on the notes remained unpaid, creditor must establish a certain balance was owing on the notes); *Bailey, Vaught, Robertson & Co. v. Remington Invs.*, 888 S.W.2d 860, 864 (Tex. App.–Dallas 1994, no writ (to recover on the note, creditor had to establish a sum certain due on the note). Courts do not usually require the movant to file detailed proof reflecting calculations of the balance due on a note in order to support a motion for summary judgment. *Obasi v. Univ. of Okla. Health Sci. Ctr.*, No. 04-04-00016-CV (Tex. App.– San Antonio, October 27, 2004, pet. denied)(2004 Tex. App. Lexis 9435)(mem. op.), *citing* Timothy Patton, Summary Judgments in Texas, § 9.06(2)(e) (3rd ed. 2002). Generally, an affidavit, based on personal knowledge, which identifies an attached copy of the actual note as being true and correct, the amount of the principal and interest owing on the date of default, and the interest rate accruing from the date of default is considered sufficient proof of the amount owing on a note. *Id.*; *Sandhu v. Pinglia Invs. of Tex., L.L.C.*, No. 14-08-00184-CV (Tex. App.–Houston [14th Dist.], June 25, 2009, pet. denied)(2009 Tex. App. Lexis 4781)(mem. op.)(same). *But see Fairbank v. First Am. Bank*, No. 05-06-00005-CV (Tex. App.–Dallas, August 7, 2007, no pet.)(2007 Tex. App. Lexis 6228)(mem. op.)(summary judgment affidavit that did not offer facts explaining the difference between the face amount of the note and the principal balance alleged, nor contain a ledger sheet with credits or offsets, held conclusory; judgment reversed); *Guerra v. M.H. Equities, LTD.*, No. 02-11-00261-CV (Tex. App.–Fort Worth, June 14, 2012, n.p.h.)(2012 Tex. App. Lexis 4735)(mem. op.)(summary judgment evidence raised fact issue as to balance due; reversed and remanded in part).

Payment-history records may be used to prove the balance due at trial. Spreadsheets and data compilations may be admitted into evidence through a business record affidavit. *See* Tex. R. Evid. 902(10); *East Plano Retail Joint Venture v. Amwest Sav. Ass'n*, No. 05-93-01573-CV (Tex. App.–Dallas, August 18, 1994, no writ)(unpublished, 1994 Tex. App. Lexis 3985)(based upon the affidavit of the bank's vice-president that he monitored the status of promissory notes and collected the amounts, was the custodian of records, was familiar with the bank's procedures for keeping payment records, that he prepared the payment-history records, that records were made at or near the time in which the payment was received, and that records were true and correct copies, the bank's payment history spreadsheets qualified for the business-records exception, and the court properly considered them). The balance due may also be proved through requests for admissions or other discovery devices.

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F. Variable Interest Rates

The Texas Supreme Court addressed the use of variable interest rate notes in *Amberboy v. Societe de Banque Privee*. The court held that a variable rate note which contains a provision for interest to be paid at a variable rate that is readily ascertainable by reference to a bank's published prime rate is compatible with the Uniform Commercial Code's objective of commercial certainty and is negotiable. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 796 (Tex. 1992)(commercial certainty is satisfied when the information is readily available to the public, regardless of the means utilized to make that information available). See also *Bailey, Vaught, Robertson & Co. v. Remington Invs*, 888 S.W.2d 860, 866 (Tex. App.–Dallas 1994, no writ)("reasonable" rate of interest applied to a note when interest is based on the no-longer-published prime rate of a defunct financial institution).

"After *Amberboy* was decided, the legislature codified its rationale by adopting the following Code section addressing the calculation of interest: Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. . . ." *Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 679 (Tex. App.–Austin 2000, pet. denied). See Tex. Bus. & Com. Code § 3.112(b).

G. Mistaken Surrender of Note

A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument: (1) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge. Texas Bus. & Com. Code § 3.604(a). See *Manley v. Wachovia Small Bus. Capital*, 349 S.W.3d 233, 238 (Tex. App.–Dallas 2011, no pet.)(note surrendered and marked "paid" due to clerical error does not provide the requisite intent to effectively discharge the debt when evidence proved that amounts remained due on the note).

V. NOTICE AND ACCELERATION

A. Distinct Concepts

Presentment, notice of intent to accelerate, and the notice of acceleration are distinct concepts. "Presentment to the maker of a note is required before the note holder can exercise an optional right to accelerate the time for any payment due on the note." *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892 (Tex. 1991); *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982).

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1. Presentment

Presentment means a demand made by or on behalf of a person entitled to enforce an instrument to the party obligated to pay the instrument. Tex. Bus. & Com. Code §3.501(a)(1).

2. Notice of Intent to Accelerate

"Notice of intent to accelerate is necessary in order to provide the debtor an opportunity to cure his default prior to harsh consequences of acceleration and foreclosure." *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). The notice of intent to accelerate must be unequivocal. *See Ogden*, 640 S.W.2d at 233 (holding that the statement: "Your failure to cure such breach may result in acceleration. . ." was insufficient notice of an intent to accelerate; judgment granted in favor of debtor against the savings association for wrongful foreclosure).

3. Notice of Acceleration

Notice of acceleration cuts off the debtor's right to cure his default and gives notice that the entire debt is due and payable. *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982).

B. Waiver

Presentment and notice of dishonor can be waived. *See* Tex. Bus. & Com. Code § 3.504. Obtaining effective waiver of presentment, notice of intent to accelerate, and notice of acceleration must be done carefully. *See Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991), which states:

"Waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective if and only if it is clear and unequivocal. To meet this standard, a waiver provision must state specifically and separately the rights surrendered. Waiver of "demand" or "presentment", and of "notice" or "notice of acceleration", in just so many words, is effective to waive presentment and notice of acceleration. . . . Likewise, a waiver of 'notice of intent to accelerate' is effective to waive that right. . . . Waiver of "notice" or even "all notice" or "any notice whatsoever", without more specificity, does not unequivocally convey that the borrower intended to waive both notice of acceleration and notice of intent to accelerate, two separate rights."

C. Harsh Remedy

Acceleration of a debt is a harsh remedy. "Provision therefor, in order to be effective, should be clear and unequivocal; and if there is a reasonable doubt as to the meaning of the terms employed, preference should be given to that construction which will avoid the forfeiture and prevent acceleration of the maturity of the debt." *Ramo, Inc. v. English*, 500 S.W.2d 461,

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466 (Tex. 1973), citing *City Nat. Bank v. Pope*, (Tex. Civ. App. 1924, no writ).

VI. DEFENSES

A. Limitations

Caution, avoid limitations issues. Sue and serve defendants promptly. Though limitations may be longer, practice generally as though limitations is four years. See *Guniganti v. Kalvakuntla*, 346 S.W.3d 242 (Tex. App.–Houston [14th Dist.] 2011, n.p.h.)(creditor argued six-year limitations, but court held promissory note was not negotiable, and that a four-year bar applied).

The reader is referred to O'CONNOR'S CPRC Plus (2012-2013) and other authorities as to this important defense. See pages 898-900 where sixteen debt collection limitations periods are summarized. A suit to enforce a note payable at a definite time must be brought within six years after the due date, or, if a due date is accelerated, within six years after the accelerated due date. Tex. Bus. & Com. Code § 3.118(a). See *Gorzell v. Tillman*, No. 11-09-00110-CV (Tex. App.–Eastland, September 9, 2010, no pet.)(2010 Tex. App. Lexis 7455)(mem. op.)(installment notes are notes payable at a definite time; six-year statute applies). If demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. Tex. Bus. & Com. Code § 3.118(b). But see *Guniganti v. Kalvakuntla*, 346 S.W.3d 242 (Tex. App.–Houston [14th Dist.] 2011, n.p.h.)(six-year limitations did not apply because note's reference to a separate loan agreement rendered it non-negotiable, citing Tex. Bus. & Com. Code § 3.106).

A four-year limitations period may apply to notes secured by a real property lien. See Tex. Civ. Prac. & Rem. Code § 16.035; *Shankles v. Shankles*, 195 S.W.3d 884, 885 (Tex. App.–Dallas 2006, no pet.)(four-year limitations applied to note and deed of trust); *Alsheikh v. Arabian Nat'l Shipping Corp.*, No. 14-05-00787-CV (Tex. App.–Houston [14th Dist.], June 20, 2006, no pet.)(2006 Tex. App. Lexis 5229). If a note payable in installments is secured by a lien on real property, limitations does not begin to run until the maturity date of the last installment. *CA Partners v. Spears*, 274 S.W.3d 51, 65 (Tex. App.–Houston [14th Dist.] 2008, no pet.), citing Tex. Civ. Prac. & Rem. Code § 16.035(e). If a note contains an optional acceleration clause, default does not ipso facto start limitations running on the note. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Rather, the action accrues only when the holder actually exercises its option to accelerate. *Id.*

1. Acknowledgment Exception

An acknowledgment of the justness of a claim that appears to be barred by

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limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged. Tex. Civ. Prac. & Rem. Code § 16.065.

"Texas courts have consistently interpreted this statute to require that an agreement: 1) be in writing and signed by the party to be charged; 2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and 3) refer to the obligation and express a willingness to honor that obligation." *Stines v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002)(per curiam). See also *David v. David*, No. 01-09-00787-CV (Tex. App.–Houston [1st Dist.], April 7, 2011, no pet.)(2011 Tex. App. Lexis 2563)(suit on 1991 note not barred because maker acknowledged the debt with a signed writing in 2006, satisfying 16.065; suit filed in 2007).

2. Time-Barred Note; Creditor in Possession of Collateral

Where one holds collateral to guarantee a debt, the holder should be able to keep the collateral, or, if the terms of the agreement so provide, sell the collateral and satisfy the debt. *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree Nat'l Bank*, 894 S.W.2d 828, 830 (Tex. App.–Dallas 1995, no writ)(court upheld creditor's foreclosure on the collateral after the statute of limitations had run on the underlying note).

B. Payment

When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; **failing to do so, he shall not be allowed to prove the same**, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof (emphasis added). Rule 95.

Under Rules 94 and 95, payment is an affirmative defense on which the defendant has the burden of proof, which must be specially pleaded, and may not be shown under a general denial. *Southwestern Fire & Casualty Co. v. Larue*, 367 S.W.2d 162, 163 (Tex. 1963)(holding that since the execution of the note and its endorsement were not in issue, and since the burden was upon maker to establish payments on the note, the trial court did not err in overruling maker's special exception which would have required the payee to show what payments had been made and when). Rule 95 also bars payment evidence. See *De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.–Houston [14th Dist.], February 7, 2008, n.p.h.)(2008 Tex. App. Lexis 880)(mem. op.)(improperly pleaded payment defense to a creditor's summary judgment motion); *Rockwall Commons Assocs. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 506 (Tex. App.–El Paso 2010, no pet.)(construction note marked "paid in full" inadmissible because defendants failed to properly plead payment).

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C. Agency

A person is not liable on an instrument unless the person: (1) signed the instrument; or (2) is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under Section 3.402. Tex. Bus. & Com. Code § 3.401(a). A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing. Tex. Bus. & Com. Code § 3.401(b). Tex. Bus. & Com. Code § 3.402 (b) states, “If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply: (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument. . . . ”

A person who signs a promissory note is presumed to be liable in an individual capacity, unless he interposes a defense. *Caraway v. Land Design Studio*, 47 S.W.3d 696, 700 (Tex. App.– Austin 2001, no pet.). In *Caraway*, the parties executed the note, which stated the following: “In consideration of design services rendered, I (We) Hugh Carraway [sic], Internacional Realty, Inc. (hereinafter “Debtor”) do hereby promise to pay Land Design Studio (hereinafter “Creditor”), the amount of \$ 42,639.82” The note was signed “Hugh L. Caroway (signature), Debtor”. Payee brought suit against both the individual and the corporation on the promissory note. Summary judgment was affirmed against both over the maker’s agency defense. As the court pointed out, the language of the instrument reflects that payment was promised from more than one source, and maker’s signature bears no indication of his representative capacity. *Caraway*, 47 S.W.3d at 700. *See also A. Duda & Sons, Inc. v. Madera*, 687 S.W.2d 83 (Tex. App.– Houston [1st Dist.] 1985, no writ)(agent was personally liable on the note because he signed below the typewritten name and address of the company, but did not indicate that he was signing the note in a representative capacity); *Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974)(holding maker personally liable on a promissory note for his failure to disclose his representative capacity to holder).

Former section 3.403 directed courts to look to the instrument to determine representative capacity. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 612-13. (Tex. App.–Houston [1st Dist.] 2004, no pet.), *citing* Acts of September 1, 1967, 60th Leg, R.S. ch. 785, 1967 Tex. Gen. Laws 2343, 2323 (amended 1995). Under § 3.402(b)(1), which is more limited than former § 3.403, courts should look only to the “form of the signature” to insure that the signature, itself, unambiguously shows representative capacity. *Id.* at 613. In *Suttles*, the signature line stated:

“Gessner Partners, Ltd.
TS Clare, Inc., General Partner
Tracy Suttles, President
/s/ Tracy Suttles;
Borrower.”

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The court reversed summary judgment against Tracy Suttles, individually, concluding that TS-Clare, Inc. was identified in the instrument and that the form of the signature showed unambiguously that Suttles's signature was made on behalf of TS-Clare. *Id.* at 612. There is no requirement that the principal be identified in the body of the note. *Id.* 3.402(b)(1) merely requires that the principal be identified "in the instrument." *Id.*, citing Tex. Bus. & Com. Code Ann. § 3.402(b)(1).

In *Savitch v. Southwestern Bell Yellow Pages, Inc.*, No. 2-04-257-CV (Tex. App.—Fort Worth, August 4, 2005, no pet.)(2005 Tex. App. Lexis 6215), the court reversed judgment against the treasurer individually because the original parties did not intend for her to be personally liable, evidenced by the fact that the treasurer refused to sign the first draft of the note, which named her as maker. *See also Packard Transp. v. Dunkerly*, No. 14-09-00652-CV (Tex. App. Houston [14th Dist.], July 1, 2010, no pet.)(2010 Tex. App. Lexis 4984)(mem. op.)(proper agency signature did not personally bind vice-president). If an issue as to agency signature arises, review Tex. Bus. & Com. Code § 3.402 and comments carefully, as the statute resolves many agency signature issues.

D. Fraud in the Inducement

1. Generally

"A negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon." *Town North Nat'l Bank v. Broadus*, 569 S.W.2d 489, 491 (Tex. 1978). An exception to the parol-evidence rule exists that permits extrinsic evidence to show fraud in the inducement of a contract. *Suttles v. Kastleman*, No. 03-01-00719-CV (Tex. App.—Austin, July 26, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 5405)(holding no fraud in the inducement where the maker was induced to sign the note by the payee's representations that the maker would not incur liability on the note).

2. Cases Holding No Fraud in the Inducement

"A party to a written agreement is charged as a matter of law with knowledge of its provisions and as a matter of law cannot claim fraud unless he can demonstrate that he was tricked into its execution." *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 139 (Tex. App.—Dallas 1974, no writ). "To prove fraud in the inducement sufficiently to allow any exception to the parol evidence rule to come into play, there must be (1) a showing of some type of trickery, artifice, or device employed by the payee in addition to (2) the showing that the payee represented to the maker that he would not be liable." *Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983). *See generally Suttles v. Kastleman*, No. 03-01-00719-CV (Tex. App.—Austin, July 26, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 5405)(holding no fraud in the inducement where the maker was induced to sign the note by the payee's representations that the maker would not incur liability on the note); *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 139 (Tex. App.—Dallas 1974)(holding that a representation on the part of a payee of a note that he would not look to the maker for payment,

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but to profits of a venture, does not constitute fraud); *Athey v. Mortg. Elec. Registration Sys.*, No. 11-09-00224-CV (Tex. App.–Eastland, April 22, 2010, pet. filed)(2010 Tex. App. Lexis 2980)(no fraud when alleged oral representation of fixed interest rate was clearly contradicted by the note's language as to variable interest rate).

3. Cases Holding Fraud in the Inducement

Fraud in the inducement is rarely upheld as a defense to a promissory note. *See, however, Berry v. Abilene Savings Assoc.* 513 S.W.2d 872 (Tex. App.–Eastland 1974, no writ)(fraud in the inducement upheld when a college student was told by his employer that the employer was not able to sign the note on his own behalf and, while under duress from his employer, student was repeatedly told that he would not be personally liable for the note); *Helmcamp v. Interfirst Bank Wichita Falls, N.A.*, 685 S.W.2d 794 (Tex. App.–Fort Worth 1985, writ ref'd, n.r.e.)(summary judgment reversed on a fact issue as to fraud in the inducement where a long-time customer of a bank, claiming duress, was told by a bank officer, also a long-time friend, that he needed to immediately co-sign a note, that the third party had adequate funds to pay it off as evidenced by a financial statement provided by the bank officer, and that he "would not lose a penny").

E. Release

In order to effectively release a claim in Texas, the releasing instrument must mention the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991). *But see Am. Bank of Commerce v. Davis*, No. 03-07-00264-CV (Tex. App.–Austin, Dec. 31, 2008, pet. denied)(2008 Tex. App. Lexis 9704)(mem. op.)(affirmed verdict holding that broad mutual release included a note that was not specifically identified in the release).

PART FIVE:

GUARANTY

A guaranty agreement is a contract in which one party agrees to be responsible for the performance of another party even if he does not have direct control. *Gooch v. American Sling Co.*, 902 S.W.2d 181, 185 (Tex. App.--Fort Worth 1995, no writ). The essential terms of a guaranty agreement are (1) the parties involved, (2) a manifestation of intent to guaranty the obligation, and (3) a description of the obligation being guaranteed. *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252, 261 (Tex. App.--Houston [14th Dist.] 2003, pet. denied).

I. STRICT CONSTRUCTION

The Texas Supreme Court discussed strict construction of guaranties in *McKnight v. Virginia Mirror Co., Inc.*, 463 S.W.2d 428, 430 (Tex. 1971):

It is well settled in Texas that a guarantor may rely and insist upon the terms and conditions of his guarantyship being strictly followed, and if the creditor and principal debtor vary in any material degree the terms of their contract, then a new contract has been formed, upon which the guarantor is not obligated or bound. *Jarecki Mfg. Co. v. Hinds*, 295 S.W. 274 (Tex. Civ. App.--Eastland 1927, writ dism'd.); Tex.Com.App., 6 S.W. 2d 343; *Ryan v. Morton*, 65 Tex. 258. In *Jarecki*, supra, the late Chief Justice Hickman, while a member of the Eastland Court of Civil Appeals, stated the rule as follows:

When one person assumes to answer for the debt, default, or miscarriage of another, whether such assumption constitutes him a surety or a guarantor within the technical meaning of the two terms, his liability upon such undertaking can be fixed and preserved only by a strict compliance with the terms of the guaranty. It has been often said that he is a favorite of the law. His obligation does not extend one jot or tittle beyond what is 'nominated in the bond', citing *Smith v. Montgomery*, 3 Tex. 199 (Tex. 1848).

After the terms of a guaranty agreement have been ascertained, the rule of strictissimi juris applies, meaning that the guarantor is entitled to have his agreement strictly construed and that it may not be extended by construction or implication beyond the precise terms of his contract.

Guaranty

See, e.g., Marshall v. Ford Motor Co., 878 S.W.2d 629, 632 (Tex. App.–Dallas 1994, no writ)(guaranty to pay for goods sold by Ford Marketing Corporation did not extend to goods sold by Ford Motor Company as the guaranty did not state that it would continue for the benefit of successors); *Bank of America, N.A. v. Lilly*, No. 07-11-00154-CV (Tex. App.–Amarillo, July 31, 2012, n.p.h.)(2012 Tex. App. Lexis 6306)(mem. op.)(no evidence motion for summary judgment affirmed for purported guarantor because guaranty text mostly illegible; no evidence as to conditions what would give rise to liability under guaranty).

A. Contra to Strict Construction

See Hasty v. Keller HCP Parnters, L.P., 260 S.W.3d 666 (Tex. App.–Dallas 2008, no pet.) (summary judgment against guarantor affirmed though creditor's name not identical on lease and personal guaranty); *James Clark, Inc. v. Vitro Am., Inc.*, 269 S.W.3d 681 (Tex. App.–Beaumont 2008, no pet.)(judgment affirmed against guarantor though obligor misnamed on guaranty form, holding only reasonable interpretation is that guarantor agreed to pay obligor's debt).

II. GUARANTY OF PAYMENT VERSUS COLLECTION

Creditors prefer a guaranty of payment because it provides primary liability against the guarantor.

“Under a guaranty of collection, the guarantor agrees to pay if the debt cannot be collected from the maker by the use of reasonable diligence. *Ford v. Darwin*, 767 S.W.2d 851, 854 (Tex. App.–Dallas 1989, writ denied). In contrast, under a guaranty of payment, guarantor is primarily liable and waives any requirement that the holder of the note take action against the maker as a condition precedent to the guarantor's liability. *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343,345 (Tex. 1977)(per curiam).”

Dirt Arresters, Inc. v. H.C. Rental Properties, Inc., No. 05-98-00030-CV (Tex. App.–Dallas 2000, no writ)(unpublished, 2000 Tex. App. Lexis 968)(judgment against guarantor reversed and rendered; guaranty of collection with no proof of action against obligor). *See also* Tex. Bus. & Com. Code § 3.419(d)(required actions by creditor prior to pursuing a guarantor of collection); *Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.–Texarkana 2007, no pet.)(under guaranty of payment, holder properly sued guarantors without joining maker of note).

III. CONTINUING VERSUS SPECIFIC GUARANTY

"Texas case law recognizes that a guaranty may be continuing or specific. A

Guaranty

continuing guaranty contemplates a future course of dealing between the lender and debtor, and the guaranty applies to other liabilities as they accrue. A specific guaranty applies only to the liability specified in the guaranty contract. A guarantor may require that the terms of his guaranty be followed strictly, and the guaranty agreement may not be extended beyond its precise terms by construction or implication."

Beal Bank, SSB v. Biggers, No. 01-05-00789-CV (Tex. App.–Houston [1st Dist.] February 15, 2007, no pet.)(2007 Tex. App. Lexis 1151)(modification of a note did not increase the amount owed by guarantors on a specific guaranty)(citations omitted).

IV. PLEADING

A. Petition

A petition seeking recovery based on a guaranty must allege: 1) the existence and ownership of the guaranty, 2) performance of the underlying contract by the holder, 3) the occurrence of the conditions upon which liability is based, and 4) the failure or refusal to perform the promise by the guarantor. *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421, 424 (Tex. App.–Dallas 2004, no writ) *citing Wiman v. Tomaszewicz*, 877 S.W.2d 1,8 (Tex. App.–Dallas 1994, no writ). Plaintiff should plead that defendant signed the guaranty and attach it to the petition. The guaranty is fully proven if a verified denial of signature is not filed pursuant to Rule 93(7). Plaintiff should also plead that all conditions precedent have occurred pursuant to Rule 54.

B. Answer

Defendant must plead affirmative and verified defenses pursuant to Rules 93, 94, 95. Common defenses include verified denial of signature, Rule 93(7); statute of frauds, Tex. Bus. & Com. Code §26.01; and payment, Rule 95. If it is contended that the guaranty is ambiguous, ambiguity should be pleaded. Defendant should specially deny conditions precedent which have not occurred pursuant to Rule 54.

V. ELEMENTS

A. Generally

A guaranty agreement is a person's promise to perform the same act that another person is contractually bound to perform. *Dong Jae Shin v. Sharif*, No. 2-08-347-CV (Tex. App.–Fort Worth, June 4, 2009, no pet.)(2009 Tex. App. Lexis 3950)(mem. op.). Elements of a guaranty claim include: 1) the existence and ownership of the guaranty, 2) performance of the underlying contract by the holder, 3) the occurrence of the conditions upon which liability is

Guaranty

based, and 4) the failure or refusal to perform the promise by the guarantor. See *Corona v. Pilgrim's Pride Corp.*, 245 S.W.3d 75, 80 (Tex. App.–Texarkana 2008, pet. denied); *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421, 424 (Tex. App.–Dallas 2004, no pet.), citing *Wiman v. Tomaszewicz*, 877 S.W.2d 1, 8 (Tex. App.–Dallas 1994, no writ); *Barclay v. Waxahachie Bank and Trust Co.*, 568 S.W.2d 721, 723 (Tex. Civ. App.–Waco 1978, no writ).

B. Prove Underlying Debt; Performance by Holder

Practice Tip: Even if the obligor defaults or does not actively defend, remember to prove the underlying debt when proceeding against guarantor. See element “2”, above. Creditor must prove not only the guaranty, but also the underlying debt. See *Daredia v. Nat'l Distribs.*, No. 05-04-00307-CV (Tex. App.–Dallas April 28, 2005, pet. denied)(2005 Tex. App. Lexis 3168)(mem. op.)(reversed and rendered for guarantor based on no evidence of delivery, an element of the underlying sworn account).

C. Consideration

If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, the consideration for the debt likewise supports the guaranty. *First Commerce Bank v. Palmer*, 226 S.W.3d 396 (Tex. 2007), citing *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874, 878 (Tex. 1976). And even when the guaranty is signed after the principal obligation, “the guaranty promise is founded upon a consideration if the promise was given as the result of previous arrangement, the principal obligation having been induced by or created on faith of the guaranty.” *Id.*, citing 38 Am. Jur. 2d Guaranty, § 43 at 905 (1999). Guaranty agreements that post-date the underlying obligation have thus often been enforced in Texas without the requirement of additional consideration to the guarantor. *Id.*, citing *Windham v. Cal-Tim, Ltd.*, 47 S.W.3d 846, 849-50 (Tex. App.–Beaumont 2001, pet. denied) (guaranty signed two months after lease); *Holland v. First Nat'l Bank*, 597 S.W.2d 406, 410 (Tex. Civ. App.–Dallas 1980, writ dismissed) (guaranty signed after note).

VI. DEFENSES

A. Guarantor's Assertion of Obligor's Defenses

Generally, a guarantor may assert defenses that the principal obligor might have asserted. *Mayfield v. Hicks*, 575 S.W.2d 571, 574 (Tex. Civ. App.–Dallas 1978, writ refused n.r.e.) Assertion of principal obligor's defenses is an equitable right, which may be circumscribed by the guaranty. See *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874, 877-78 (Tex. 1976)(guarantor who agreed to be primarily, jointly, severally and unconditionally liable under absolute guaranty, held liable though maker's signature forged on

Guaranty

note). *But see Bair Chase Prop. Co., LLC v. S&K Dev. Co.*, 260 S.W.3d 133, 146 (Tex. App.—Austin 2008, pet. denied)(usury defense is personal to the debtor and may not be asserted by a guarantor unless the guaranty agreement also contains the usurious provision).

B. Statute of Frauds

A promise to pay the debt of another is unenforceable unless it is in writing and signed by the person to be charged or someone lawfully authorized to sign for him. Tex. Bus. & Com. Code § 26.01.

C. Change of Obligor

If the obligor changes its name, it is creditor's burden to prove that fact. *See SEI Business Systems Inc. et al v. Bank One Texas*, 803 S.W.2d 838, 841 (Tex. App.—Dallas 1991, no writ)(summary judgment against guarantor reversed because creditor failed to prove obligor's name change). *See also Wasserberg v. Flooring Servs. of Tex., LLC*, No. 14-11-00736-CV (Tex. App.—Houston [14th Dist.] July 24, 2012, n.p.h.)(2012 Tex. App. Lexis 5927)(mem. op.)(guarantor liable even though name changes by creditor and obligor), *citing* Tex. Bus. Ord. Code § 10.103 (Plan of Conversion); Tex. Bus. Ord. Code § 10.106 (General Effect on Conversion); and *Lee v. Martin Marietta Materials Southwest, Ltd.*, 141 S.W.3d 719, 721 (Tex. App.—San Antonio 2004, no pet.)(multiple name changes by creditor; judgment affirmed against guarantor because creditor proved that it was the same company named on the guaranty agreement).

D. Agency Signature

The fact that a person is under an agency relation to another which is disclosed does not prevent him from becoming personally liable where the terms of the contract clearly establish the personal obligation. *American Petrofina Co. v. Bryan*, 519 S.W.2d 484 (Tex. Civ. App.—El Paso 1975, no writ). An important guaranty case with a creditor's result is *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The letter guaranty stated "I personally, guaranty all outstandings [sic] and liabilities of [obligor]...as well as future shipments". Guarantor signed the guaranty over the designation "Jorge Lopez Ventura, General Manager." Guarantor claimed the signature block made the document ambiguous. The court reversed and rendered judgment against the guarantor, finding the guaranty unambiguous and enforceable. *See also Smith v. Patrick W. Y. Tam Trust*, 235 S.W.3d 819, 823-824 (Tex. App.—Dallas 2007, pet. granted)(guarantor individually liable though she placed her corporate title after her signature; guaranty named her as guarantor); *Austin Hardwoods v. Vanden Berghe*, 917 S.W.2d 320 (Tex. App.—El Paso 1995, writ denied) (individual liable, though guaranty signed as vice-president); *84 Lumber Company, L.P. v. Powers*, No. 01-09-00986-CV (Tex. App.—Houston [1st Dist.], January 26, 2012, n.p.h.)(2012 Tex. App. Lexis 590)(mem. op.)(guaranty clause in capital letters just above the signature line

Guaranty

on credit application was enforceable against individual, who signed as president). Corporate designations appearing after signatures on personal guarantees are considered to be only *descriptio personae*, use of a word or phrase to identify the person intended and not as proof that a person is acting in any particular capacity. *IMC, Inc. v. Gambulos*, No. 05-07-00470-CV (Tex. App.--Dallas August 28, 2008, no pet.)(2008 Tex. App. Lexis 6331)(mem. op.), citing *Dann v. Team Bank*, 788 S.W.2d 182, 183 (Tex. App.--Dallas 1990, no writ).

E. Enhancement of Risk (Material Alteration)

A guaranty is strictly construed. *McKnight v. Virginia Mirror Co.*, 463 S.W.2d 428, 430 (Tex. 1971). If guarantor's risk is increased, by a change of the agreement between creditor and obligor, guarantor's performance may be excused. In *FDIC v. Attayi*, 745 S.W.2d 939, 944 (Tex. App.--Houston [1st Dist.] 1988, no writ), the court explained:

A "material alteration" of a contract between a creditor and principal debtor is one that either injures or enhances the risk of injury to the guarantor. *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 365 (Tex.1968). Material alteration is an affirmative defense (citations omitted). The elements of the defense are threefold; the party asserting the defense must show: 1) a material alteration of the underlying contract; 2) made without his consent; 3) which is to his detriment (i.e. is prejudicial to his interest). See *Old Colony Ins. Co. v. City of Quitman*, 352 S.W.2d 452, 456 (Tex. 1961); *Straus-Frank Co. v. Hughes*, 156 S.W.2d 519, 521 (Tex. Comm'n App. 1941, opinion adopted).

Regarding the second of the above stated elements, consent may be found in the guaranty's language limiting the guarantor's rights and this language will be enforced (citations omitted). In short, if the guarantor consented in the guaranty to creditor's actions in extending credit without acquiring more collateral, then he cannot satisfy the second element of his defense.

F. Limitations

The reader is referred to O'CONNOR'S CPRC Plus (2012-2013) and other authorities as to this important defense. See pages 898-900 where sixteen debt collection limitations periods are summarized. See also *Mid-South Telcoms. Co. v. Best*, 184 S.W.3d 386 (Tex. App.--Austin 2006, no pet.)(guarantors effectively raised four-year statute of limitations; absolute guaranty of payment accrued on date obligor defaulted on note).

G. Payment

The onerous pleading requirement for payment, Rule 95, applies to guarantors and sureties as well as obligors. See *De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.--Houston [14th Dist.], February 7, 2008, n.p.h)(2008 Tex. App. Lexis 880)(mem. op.)(guarantor's failure to file an accounting, or otherwise plainly and particularly describe the

Guaranty

payment, failed to raise a fact issue on payment defense).

H. Release

In order to effectively release a claim, the releasing instrument must mention the claim to be released. *Biggs v. ABCO Props.*, No. 13-03-00398-CV (Tex. App.–Corpus Christi, pet. denied)(2006 Tex. App. Lexis 1494), citing *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991). In *Biggs*, a general release did not discharge the guarantors because the guaranties were not mentioned.

VII. OTHER GUARANTY MATTERS

A. Waiver

Jury waiver in commercial lease was binding on guarantors, even though guaranty did not contain jury waiver clause. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004). See also *Tran v. Compass Bank*, No. 02-11-00189-CV (Tex. App.–Fort Worth, Jan. 12, 2012, n.p.h.)(2012 Tex. App. Lexis 323)(mem. op.)(guarantor's waiver of "any rights or defenses based, in whole or in part, upon an offset" precluded determination of fair market value determination under Tex. Prop. Code § 51.003(c)); *King v. Park Cities Bank*, No. 05-1100593-CV (Tex. App.–Dallas, August 3, 2012, n.p.h.)(2012 Tex. App. Lexis 6429)(waiver of any offset defense).

B. Contribution

A guarantor who pays more than his share of the underlying debt, can recover a proportionate share from other guarantors. A guarantor can purchase the underlying debt, but does not thereby increase the recovery against co-guarantors. *Byrd v. Estate of Nelms*, 154 S.W.3d 149, 164 (Tex. App.–Waco 2004, pet. denied); *Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.–Texarkana 2007, no pet.)(same).

PART SIX:

OTHER MATTERS

I. STATUTES AND RULES

A. Justice Court/ Small Claims Court Consolidation

House Bill 79 consolidates justice courts and small claims courts, effective May 1, 2013. See § 5.06. The bill requires the Texas Supreme Court to promulgate new rules for justice courts no later than May 1, 2013. Prior to the effective date, justice court judges are required to transfer their smalls claims cases to justice court, and by majority vote, adopt local rules of administration. The complete bill is available at www.capitol.state.tx.us.

Justice court jurisdiction is \$10,000, exclusive of interest. Tex. Gov. Code § 27.031.

B. Pleadings Must Contain Partial Identification Information

In a civil action filed in a district court, county court, or statutory county court, each party or the party's attorney shall include in its initial pleading: (1) the last three numbers of the party's driver's license number, if the party has been issued a driver's license; and (2) the last three numbers of the party's social security number, if the party has been issued a social security number. CPRC § 30.014(a).

C. Provision of Current Address of Party in Civil Action

In a civil action filed in a district court, county court, statutory county court, or statutory probate court each party or the party's attorney must provide the clerk of the court with written notice of the party's name and current residence or business address. CPRC § 30.015(a). If the party's address changes during the course of a civil action, the party or the party's attorney must provide the clerk of the court with written notice of the party's new address. CPRC § 30.015(d).

D. Signing of Pleadings - Further Address Requirement

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, and, if available, telecopier number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available, telecopier number. Rule 57.

E. Treble Damages To Sales Representatives For Unpaid Commission

A principal who fails to comply with Tex. Bus. & Com. Code § 54.002 and

Other Matters

§ 54.003 relating to payment of commission is liable for (1) three times the unpaid commission due the sales representative; and (2) reasonable attorney's fees and costs. Tex. Bus. & Com. Code § 54.004.

F. Business Records Affidavit

The business records predicate is onerous. Why go to trial without a business records affidavit having been filed and served, pursuant to T.R.E. 902(10)? Since an affidavit cannot be cross examined, it is a safer predicate than a witness. File and serve the affidavit on counsel 14 days prior to trial. Either forward a copy of the records to counsel or make them available pursuant to the rule. T.R.E. 902(10) includes a proposed affidavit form.

G. Services Affidavit (CPRC § 18.001)

Civil Practice & Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Though routinely used by personal injury attorneys, it is rarely employed by commercial litigators. If one serves the affidavit on the other parties, its contents are incontrovertible, unless a counter-affidavit is served within 30 days after receiving the affidavit, and at least 14 days before trial. It presumably could be used to prove a debt based on services rendered; or attorney's fees in virtually any case except a sworn account action. The affidavit cannot be used in sworn account actions. However, one could amend, abandon the sworn account action, and proceed to trial on breach of contract, common law account, quantum meruit and other claims. The statute, amended in 2007 to delete filing requirement, arguably still requires filing of controverting affidavit.

II. CASES

A. Attorney's Fees; Texas Civil Practice & Remedies Code, Chapter 38

1. Breach of Warranty

Because CPRC § 38.001(8) permits attorney's fees for a suit based on a written or oral contract, and because breach of express warranty is such a claim, attorney's fees may be recovered on a breach of express warranty claim. *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2007). The case also traces the history of Article 2226, now CPRC § 38.001.

Other Matters

2. Dishonored Check

A check, as a negotiable instrument, is a contract. Therefore, the holder is entitled to recover attorney's fees against the drawer of a dishonored check under Tex. Civ. Prac. & Rem. Code § 38.001(8). *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 2011 Tex. Lexis 455, 54 Tex. Sup. J. 1264 (Tex. 2011).

B. Discovery Responses in Defendant's Answer

In *Landaverde v. Centurion Capital Corp.*, No. 14-06-00712-CV (Tex. App.–Houston [14th Dist.], June 28, 2007, no pet.)(2007 Tex. App. Lexis 4992)(mem. op.), deemed admissions were prevented by denials in Defendant's Answer. Defendant's pro se answer denied an extension of credit by plaintiff or plaintiff's assignor. Defendant apparently served no responses to the requests for admission. The court apparently treats Defendant's Answer as a discovery response and holds that certain critical requests are thereby denied. Applying the court's logic, if a defendant files a five-page original answer, plaintiff's counsel and the court must review it for undesignated discovery responses. But see Rule 193.1 (responding party's response must be preceded by the discovery request) and Rule 198.2(b) (the responding party must specifically admit or deny the request for admission or explain in detail the reasons that the responding party cannot admit or deny the request).

SWORN ACCOUNT SUIT AFFIDAVIT

STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who swore on oath that the following facts are true:

1. My name is: William P. Smith
2. My position is: President
3. "Creditor" refers to: All American Company
4. "Debtor" refers to: ABC, Inc.
5. Debtor is indebted to Creditor in the principal amount of \$15,000.00
6. I am over the age of eighteen years, of sound mind, have never been convicted of a crime, competent to testify and have personal knowledge of the facts stated herein. I am employed by and authorized to make this affidavit for Creditor, have personal knowledge of this account and the matters stated herein are true.
7. This claim is, within my personal knowledge just and true. The claim is due Creditor by Debtor, and all just and lawful offsets, payments, and credits have been allowed.

AFFIANT

SIGNED AND SWORN TO before me on _____, 2012.

NOTARY PUBLIC

Appendix A

July 15, 2012

TO: ABC, Inc., defendant

All American Company vs. ABC, Inc.
Dallas County Court at Law Number 5
Cause Number: CC-12-00011-E
Our File: 12345

RE: PLAINTIFF'S ACCOUNT INTERROGATORIES; REQUESTS FOR ADMISSION;
REQUESTS FOR PRODUCTION; and REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on defendant.


DEFINITIONS: For clarity, "plaintiff" means ALL AMERICAN COMPANY and "defendant" means ABC, Inc. and includes all of defendant's agents and employees. "Goods", "goods or services", "debt", "invoices", and "account" refer to goods or services and the resulting debt in the amount of \$10,000 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, and employer and position. "Identify" as to a document means to describe the document, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings and data compilation in any form. Where defendant possesses more than one copy of an item, production of all copies are requested unless all copies are, in all respects, identical.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Requests For Production, and Requests for Disclosure are served on defendant. All discovery accompanied the citation and petition at the time of service upon defendant.

THE BLENDEN ROTH LAW FIRM

BY: 
MARK P. BLENDEN
Bar No. 02486300
ATTORNEY FOR PLAINTIFF

References to rules are to the Texas Rules of Civil Procedure. Responses must be supplemented pursuant to Rule 193.5.

INTERROGATORIES: Pursuant to Rule 197, plaintiff requests answers to the attached interrogatories. The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.

REQUESTS FOR ADMISSION: Pursuant to Rule 198, plaintiff requests that you make the following admissions for the purpose of this action only. The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

REQUEST FOR PRODUCTION: Pursuant to Rule 196, plaintiff requests that the defendant produce the requested documents; or copies pursuant to Rule 196.3(b). Plaintiff agrees to pay reasonable copying costs, to \$50. The requested documents, or true copies thereof, should be provided to the undersigned by 2:00 p.m. on the next weekday following the expiration of 31 days after service of the request, except that if the request accompanies citation a defendant need not respond until 50 days after service of the request upon the defendant. Production shall be at The Blenden Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to \$50, plaintiff objects to the tender of documents at an alternate location. Unless otherwise specified the requested documents are for the period January 1, 2006 to the present date.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information and material described in Rule 194.2: **a)** the correct names of the parties to the lawsuit; **b)** the name, address, and telephone number of any potential parties; **c)** the legal theories and, in general, the factual bases of the responding party's claims or defenses; **d)** the amount and any method of calculating economic damages; **e)** the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case; **f)** all expert information described in Rule 194.2(f) including but not limited to 1) the expert's name, address, and telephone number; 2) the subject matter on which the expert will testify; 3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them; ("g" and "h" intentionally omitted) **i)** any witness statements described in Rule 192.3(h)("j" and "k" intentionally omitted); **l)** the name, address, and telephone number of any person who may be designated as a responsible third party. Please respond and produce documents to the Blenden Law Firm 2217 Harwood Road, Bedford, Texas 76021 within 30 days of service of this request. A defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. There are no attachments pertaining to these Requests for Disclosure.

PLAINTIFF'S ACCOUNT INTERROGATORIES

NOTE: Please read cover letter before proceeding.

1. State the amount, if any, which defendant owes plaintiff and the calculation used to determine the amount.
2. State specifically all goods and services which defendant ordered from plaintiff.
3. Did defendant receive the goods or services? If your answer is other than an unqualified "yes", state what was received, and specifically how the goods or services received differed from those ordered.
4. Did defendant agree to the prices charged; were these prices reasonable?
5. State specifically every reason why the defendant does not owe the debt.
6. State the legal theories and describe in general the factual basis for all asserted defenses.
7. Identify all documents that support defendant's contention that the debt is not owed.
8. Identify all business records which relate to plaintiff, including defendant's accounts payable records. Include the balance due plaintiff as indicated by your accounts payable records.
9. Explain fully defendant's knowledge of the goods or services and the account.
10. Describe the business transactions between plaintiff and defendant, including date of first and last transaction; total dollar amount of the transactions, and general explanation of the transactions.
11. State the approximate date of every demand for payment from plaintiff or plaintiff's representatives. (Including invoices, statements, letters.)
12. Did defendant notify plaintiff of any reason why defendant should not pay the debt? If so, fully describe all such communication, including the date, place, content and parties thereto.
13. If another is or may be liable on this account, identify the individual or entity, and state all facts supporting their liability.
14. Does defendant still have the goods? If not, explain all transfers or sales of the goods by defendant, including approximate date, names, and addresses of recipients, and consideration received.
15. If defendant claims the goods or services were defective, fully describe all facts supporting said contention, and the specific items suffering from said defect.
16. State the amount and specific facts for every alleged credit, offset or claim against plaintiff.

17. State defendant's full name, together with all variations, assumed names, and trade names.
18. State defendant's driver's license number and state of issuance; social security number and defendant's name as it appears on each. If defendant is a corporation, instead state date and state of incorporation, and charter number.
19. Identify all persons who either answered or provided information used in responding to these interrogatories.
20. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S ACCOUNT REQUESTS FOR ADMISSION

Answer:

- _____ 1. The account is just and true.
- _____ 2. Payment of the debt is due from defendant to plaintiff.
- _____ 3. The account states the balance due plaintiff after all offsets, payments, claims and credits have been allowed.
- _____ 4. On the dates shown in the account, defendant purchased the items or services.
- _____ 5. On or about the dates shown on the account, defendant received the items billed.
- _____ 6. All prices charged by plaintiff were agreed to by defendant.
- _____ 7. All prices charged defendant are reasonable.
- _____ 8. Defendant promised to pay plaintiff for the account.
- _____ 9. Defendant failed to pay the account.
- _____ 10. Plaintiff made written demand upon defendant for payment of the account more than 30 days prior to filing suit.
- _____ 11. Defendant timely received monthly account invoices.
- _____ 12. Defendant received accurate account invoices which total the principal amount sued for.
- _____ 13. Defendant made no objection or complaint after receiving the account invoices.
- _____ 14. Defendant did not reply to written demands for payment of the account.
- _____ 15. Defendant never rejected or made complaint regarding the goods or services.
- _____ 16. Plaintiff has fully performed, to defendant's satisfaction, in all transactions between

plaintiff and defendant.

- _____ 17. The petition is entirely accurate and plaintiff is entitled to the requested relief.
- _____ 18. Plaintiff should recover judgment as requested in the petition.
- _____ 19. There are no documents which support any defense in this cause.
- _____ 20. All documents attached to the petition are true copies of the original.
- _____ 21. All signatures on attachments to the petition are genuine.
- _____ 22. Matters stated in the documents attached to the petition are accurate.
- _____ 23. Defendant has no offset, credit or claim against plaintiff.
- _____ 24. The court should render judgment against defendant for the relief requested in plaintiff's most recently filed petition.
- _____ 25. Venue is proper in this court.
- _____ 26. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.
- _____ 27. Defendant consents to this court's jurisdiction.
- _____ 28. The court has jurisdiction over defendant and the subject matter of this suit.

DOCUMENT REQUEST

- 1. All invoices and statements of account received by defendant from plaintiff.
- 2. Defendant's accounts payable records relating to defendant's account with plaintiff.
- 3. Defendant's books and records as they relate to plaintiff.
- 4. Letters and faxes received by defendant, requesting payment of the debt.
- 5. Defendant's letters and faxes responding to requests for payment.
- 6. All correspondence relating to the transaction referenced in plaintiff's petition.
- 7. All communication between defendant and any other party to this suit.
- 8. All memoranda of any telephone conversation relating directly or indirectly to the matters alleged in plaintiff's petition or any defense thereto.

9. All documents upon which defendant relies in denying any matters alleged in plaintiff's petition.
10. All reports of experts which may be called to testify in this cause.
11. All assumed name certificates filed by defendant during the preceding ten years.
12. All documents requesting or constituting a name change of the defendant or any other defendant in this action.
13. All balance sheets and income statements submitted to any creditor or prospective creditor within one year of commencement of this account.
14. All credit applications submitted to any creditor or prospective creditor within one year of commencement of this account.
15. All applications for any license, permit, or certificate together with all licenses, permits or certificates held, or owned by defendant, or any agent thereof.

July 15, 2012

TO: Gary Guarantor

All American Company vs. ABC, Inc. and Gary Guarantor
Dallas County Court at Law #5
Our File: 12345

RE: PLAINTIFF'S INTERROGATORIES; REQUESTS FOR ADMISSION
REQUESTS FOR PRODUCTION; REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on defendant.

DEFINITIONS: For clarity, "plaintiff" means ALL AMERICAN COMPANY and "defendant" means Gary Guarantor and includes all of defendant's agents and employees. "Obligor" refers to ABC, Inc.. "Goods", "goods or services", "debt", "invoices", and "account" refer to goods or services and the resulting debt in the amount of \$15,000 sued upon herein. Unless otherwise noted "petition" refers to Plaintiff's Original Petition filed in this cause. "Attach" requests the attachment to your answers, of described documents.

"Documents" include records, correspondence, memoranda, photographs, film, recordings and data compilation in any form. Where defendant possesses more than one copy of an item, production of all copies are requested unless all copies are, in all respects, identical.

SERVICE CERTIFICATE AND SIGNATURE

The attached interrogatories, requests for admission, requests for production, and requests for disclosure is served on defendant. I certify that all discovery accompanied the citation and petition at the time of service upon defendant.

THE BLENDE ROTH LAW FIRM
Attorney For Plaintiff

BY: 

MARK P. BLENDE N
Bar No. 02486300

References to rules are to the Texas Rules of Civil Procedure. Responses must be supplemented pursuant to Rule 193.5.

INTERROGATORIES: Pursuant to Rule 197, plaintiff requests answers to the attached interrogatories. The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.

REQUESTS FOR ADMISSION: Pursuant to Rule 198, plaintiff requests that you make the following admissions for the purpose of this action only. The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

REQUEST FOR PRODUCTION: Pursuant to Rule 196, plaintiff requests that the defendant produce the requested documents; or copies pursuant to Rule 196.3(b). Plaintiff agrees to pay reasonable copying costs, to \$50. The requested documents, or true copies thereof, should be provided to the undersigned by 2:00 p.m. on the next weekday following the expiration of 31 days after service of the request, except that if the request accompanies citation a defendant need not respond until 50 days after service of the request upon the defendant. Production shall be at The Blenden Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to \$50, plaintiff objects to the tender of documents at an alternate location. Unless otherwise specified the requested documents are for the period January 1, 2006 to the present date.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information and material described in Rule 194.2: **a)** the correct names of the parties to the lawsuit; **b)** the name, address, and telephone number of any potential parties; **c)** the legal theories and, in general, the factual bases of the responding party's claims or defenses; **d)** the amount and any method of calculating economic damages; **e)** the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case; **f)** **all** expert information described in Rule 194.2(f) including but not limited to 1) the expert's name, address, and telephone number; 2) the subject matter on which the expert will testify; 3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them; ("g" and "h" intentionally omitted) **i)** any witness statements described in Rule 192.3(h) ("j" and "k" intentionally omitted); **l)** the name, address, and telephone number of any person who may be designated as a responsible third party. Please respond and produce documents to the Blenden Law Firm 2217 Harwood Road, Bedford, Texas 76021 within 30 days of service of this request. A defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. There are no attachments pertaining to these Requests for Disclosure.

PLAINTIFF'S GUARANTY INTERROGATORIES

NOTE: Please read cover letter before proceeding.

1. State the amount, if any, which defendant owes plaintiff and the calculation used to derive the amount.
2. State the amount, if any, which obligor owes plaintiff and the calculation used to derive the amount.
3. State the approximate date of every demand for payment from plaintiff or plaintiff's representatives (including statements, letters and oral requests).
4. Describe all information defendant had as to the obligor's indebtedness and the approximate date defendant received the information.
5. State specifically every reason why the defendant does not owe the debt.
6. State specifically every reason why obligor does not owe the debt.
7. If another is liable on this account, state the correct name and address of the individual or entity, and all facts supporting their liability.
8. State all facts which support your claim that defendant is not indebted to plaintiff as stated in the petition.
9. Does obligor still have the goods? If not, fully explain all transfers or sales of any portion of the goods by defendant, including approximate date, names and addresses of recipients, and consideration paid.
10. State all information and facts as to whether the obligor is indebted to plaintiff as stated in plaintiff's petition.
11. Explain fully the relationship between defendant and obligor.
12. State all consideration paid or promised by obligor to induce defendant to guarantee the debt.
13. State all reasons why defendant signed the guaranty.
14. Fully describe all guaranties which defendant has signed for obligor.
15. Describe all communication between obligor and guarantor relating to guaranty, or the plaintiff, or this litigation.
16. Attach or fully describe all documents that support defendant's contention that defendant is not indebted to plaintiff as alleged in the petition.
17. (Answer only if obligor is a corporation) As to all agents, officers or board members of obligor who are or have ever been associated with defendant, please state the name, address and telephone number of each, as well as a brief summary of the individual's relationship to obligor and guarantor.

18. State the name and address of all individuals who have knowledge of this transaction, and the extent of their knowledge.

19. Did defendant advise plaintiff orally, or in writing, of any reason why defendant should not pay the debt? If so, fully describe all communication.

20. State the amount and specific grounds for every claim, credit or offset which defendant or obligor may have against plaintiff.

21. State the name and address of all experts who may testify in this matter for defendant or obligor. Briefly state the experts' credentials, conclusions and expected testimony.

PLAINTIFF'S GUARANTY REQUESTS FOR ADMISSION

NOTE: Please read cover letter before answering these requests.

_____ 1. Defendant signed the guaranty.

_____ 2. The copy of the guaranty attached to plaintiff's petition is a true copy of the original document.

_____ 3. The petition accurately describes the indebtedness of the obligor whose debt defendant guaranteed.

_____ 4. That, by reason of the guaranty, defendant is indebted to plaintiff as stated in plaintiff's petition.

_____ 5. Defendant failed to pay plaintiff as promised.

_____ 6. Plaintiff made written demand upon defendant for payment of the account more than 30 days prior to filing this lawsuit.

_____ 7. Defendant made no objection or complaint after receiving demand for payment.

_____ 8. Defendant is indebted to plaintiff as stated in the petition.

_____ 9. The statements in the petition are true.

_____ 10. There are no documents which support any defense in this cause.

_____ 11. All documents attached to the petition are true copies of the original documents.

_____ 12. All signatures on attachments to the petition are genuine.

_____ 13. Matters stated in the documents attached to the petition are accurate.

_____ 14. Plaintiff should recover judgment as requested in its petition filed herein.

_____ 15. Neither defendant, nor obligor has a claim, offset or credit against plaintiff.

- _____ 16. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.
- _____ 17. Venue is proper in this court.
- _____ 18. The court has jurisdiction over defendant and the subject matter of this suit.

DOCUMENT REQUEST

1. All assumed name certificates filed by defendant during the preceding ten years.
2. All balance sheets and income statements submitted to any creditor or prospective creditor within one year of commencement of this account.
3. All credit applications submitted to any creditor or prospective creditor within one year of commencement of this account.
4. All applications for any license, permit, or certificate together with all licenses, permits or certificates held, or owned by defendant, or any agent thereof.
5. All documents and correspondence relating to the transaction referenced in plaintiff's petition.
6. All communication between plaintiff and defendant or defendant and any other party to this suit.
7. All memoranda of any telephone conversation relating directly or indirectly to the matters alleged in plaintiff's petition or any defense thereto.
8. All documents upon which defendant relies in denying any matters alleged in plaintiff's petition.
9. Defendant's books and records as they relate to plaintiff.
10. Defendant's accounts payable records relating to defendant's account with plaintiff.
11. All documents requesting or constituting a name change of the defendant or any other defendant in this action.
12. All reports of experts which may be called to testify in this cause.