CREDITORS' CAUSES OF ACTION: PLEADINGS AND PROOF

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State Bar of Texas
14TH ANNUAL
COLLECTIONS & CREDITORS' RIGHTS
May 5-6, 2016
Dallas

CHAPTER 1

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Mark P. Blenden received his Juris Doctor degree with honors from Washburn Law School of Topeka, Kansas. After serving four years in the United States Air Force - Judge Advocate General Corp, he joined Houston's Lapin, Totz and Mayer, becoming a partner and the senior litigator in the commercial collection section. In 1987 he founded the Blenden Law Firm, now the Blenden Roth Law Firm, in Dallas. The firm's practice is primarily commercial collections, commercial litigation and judgment enforcement.

Mr. Blenden is a frequent author and lecturer for seminars sponsored by the State Bar of Texas and University of Texas. Topics include service of process and default judgments, creditor's claims, trial techniques. He is a former chairman of the state bar's Advanced Creditor's Rights Course. Mr. Blenden was appointed by the Texas Supreme Court to the Task Force on Ancillary Proceedings. He also served on the Texas Supreme Court's Process Server Review Board. In 2012, he was appointed Chairman of the Board. In 2014, Mr. Blenden was appointed Commissioner, Judicial Branch Certification Commission. The Commission, established by the Texas Legislature, oversees certification and licensing of process servers, guardians, court reporters, and court interpreters.

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POP QUIZ

1) Defendant filed a verified denial of "the sworn account made the basis of plaintiff's petition pursuant to Rules 93(10) and 185." Is this answer sufficient?

2) If Plaintiff files an amended sworn account that is $10,000 less than the original account, must defendant file an amended sworn denial?

3) What is the single best discovery tool for expedited actions (less than $100,000 aggregate damages)?

Answers:

1) No, Defendant's verified denial must address the facts on which the defendant intends to rebut plaintiff's sworn account affidavit. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.–Dallas 2014, no pet.), discussed at page 9.

2) Yes. *See Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 356 (Tex. App.–Houston [14th Dist.] 2013, no pet.)(defendant filed a verified denial of the original account; creditor filed an amended account with new invoices and credits that reduced the balance by approximately $50,000; summary judgment for creditor affirmed because debtor failed to file a sworn denial of the amended account, which substantially differs from the original account), discussed at page 10.

3) In addition to disclosures under Rule 194.2, ". . . a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has . . . and may use to support its claims or defenses. . . ." R. 190.2(b)(6), discussed at page 1.

PART ONE: SWORN ACCOUNT

"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.

See generally Texas Collections Manual (Fourth Edition), § 14.1, Action on Sworn Account; *O'Connor's Texas Causes of Action (2016)*, Chapter 5-E, Suit on Sworn Account, pages 119-127.

Practice Tip: Even a sworn denial may be insufficient to deny a sworn account. Defendant's verified denial must address the facts on which the defendant intends to rebut the plaintiff's sworn account affidavit. In *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821 (Tex. App.–Dallas 2014, no pet.), discussed at page 9, a broad, generalized denial of the sworn account was held insufficient.

Practice Tip: If Plaintiff files an amended pleading with a substantially different sworn account, **Defendant must file a sworn denial the amended sworn account.** *See Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 356 (Tex. App.–Houston [14th Dist.] 2013, no pet.), discussed at page 10.

Practice Tip: A 190.2(b)(6) discovery request should be made on all expedited actions. "In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production." Rule 190.2(b)(6). The 190.2(b)(6) request should be specifically made in addition to the standard Requests For Disclosure under Rule 194.1. See also form discovery for expedited actions, Appendix B-1 through D, this paper.

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 creditor's preferred tool. A defendant who does not file a proper sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. *See* Rule 93(10); Rule 185; *Vance v. Holloway,* 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power & Equip. Co.* 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ); *Airborne Freight Corp. v. CRB Mktg, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978)(trial; sworn account constituted prima facie evidence of the debt, without the necessity of formally introducing the account into evidence); *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 "prima facie evidence" of the amount due, requiring no further proof of damages); *Cont'l Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184, 190 (Tex. App.–Dallas 2000, pet. denied)(motion for new trial; defendant's failure to file a written denial under oath precluded defendant from denying plaintiff's claims; in the face of the sworn account and deemed admissions, defendant failed to set up a meritorious defense (second *Craddock* element).

It is a rare creditor's case that should not be pleaded, at least alternatively, as a sworn account. Sworn accounts, however, 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. However, 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, no pet.)(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); *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); *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*).

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 also Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 429 (Tex. App.–Beaumont 1999, no pet.)(concludes that statutory change under CPRC 16.004(c) effectively eliminates the requirement that such accounts be restricted to those involving "items" or personal property); *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 distinguishes *Meaders* as an attorney's fee case).

O'Connor's Texas Causes of Action (2016) agrees that a sworn account may be based on services, Chapter 5-E, § 2.1. However, O'Connor's, like some appellate courts, ignores the 1984 "no particularization" amendment to Rule 185. See further discussion below, 1984 Amendment to Rule 185 Negating Specificity.

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 materials 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. *See 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); and *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:

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

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; debtor failed to file a verified denial);

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

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);

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);

c. Courts of Appeals Cases

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. See also the topics in b, *supra*, Texas Supreme Court Cases.

1. 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).

2. Electrical Utility Services

Naan Props., LLC v. Affordable Power, LP, No. 01-11-00027-CV (Tex. App.–Houston [1st Dist.] Jan. 12, 2012, no pet.)(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); *Andy's Sunmart # 352, Inc. v. Reliant Energy Retail Servs., L.L.C.*, No. 01-

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08-00890-CV (Tex. App.–Houston [1st Dist.] Nov. 5, 2009, no pet.)(2009 Tex. App. Lexis 8559)(mem. op.); *Rimco Enterprises, Inc. v. Texas Electric Service Co.*, 599 S.W.2d 362 (Tex. Civ. App.–Fort Worth 1980, no writ).

3. Freight Services

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

4. 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.)(same).

5. Mailing Services

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

6. 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.).

7. Medical Services

Solano v. Syndicated Office Sys., 225 S.W.3d 64 (Tex. App.–El Paso 2005, no pet.); *Andrews v. East Tex. Medical Center-Athens*, 885 S.W.2d 264 (Tex. App–Tyler 1994, no pet.).

8. 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).

9. Attorney's Fees

Becker-White v. Goodrum, 472 S.W.3d 337 (Tex. App.–Houston [14th Dist.] 2015, pet. denied)(bench trial judgment affirmed for plaintiff on proper sworn account); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.–Dallas 2014, no pet.); *Panditi v. Apostle*, 180 S.W.3d 924 (Tex. App.–Dallas 2006, no pet.); *Kahn v. Carlson*, No. 05-98-01415-CV (Tex. App.–Dallas, April 27, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2767); *Pantaze v. Welton*, No. 05-96-00509-CV (Tex. App.–Dallas, August 31, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 6564)(litigation expenses); *Wright v. Christian & Smith*, 950 S.W.2d 411(Tex. App.–Houston [1st Dist.] 1997, no pet.).

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10. 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).

11. Oil/Gas Lease Expenses

Southern Mgmt. Servs. v. SM Energy Co., 398 S.W.3d 350 (Tex. App.–Houston [14th Dist.] 2013, no pet.); *Vance v. Holloway*, 689 S.W.2d 403 (Tex. 1985).

12. 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).

13. 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); *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 Williams v. Unifund CCR Partners*, 264 S.W.3d 231 (Tex. App.–Houston [1st Dist.] 2008, no pet.)(Rule 185 is not available in a suit to recover credit card debt); *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.)(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. *See Jones v. Ben Maines Air Conditioning, Inc.*, 621 S.W.2d 437, 439 (Tex. Civ. App.–Texarkana 1981, no pet.); *Hassler v. Texas Gypsum Co.* 525 S.W.2d 53, 55 (Tex. Civ. App.–Dallas 1975 no writ); *Williamsburg Nursing Home v. Paramedics, Inc.*, 460 S.W.2d 168, 169 (Tex. Civ.

App.–Houston [1st Dist.] 1970, no writ).

4. 1984 Amendment to Rule 185 Negating Specificity

Rule 185 was amended, effective April 1, 1984, to include, "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." *See Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 355 (Tex. App.–Houston [14th Dist.] 2013, no pet.)(defendant did not except to lack of specificity; proper sworn account); *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. *See Mega Builders, Inc. v. Am. Door Prods., Inc.*, No. 01-12-00196-CV (Tex. App.–Houston [1st Dist.], Mar. 19, 2013, no pet.)(2013 Tex. App. Lexis 2831)(mem. op.)(not proper sworn account under Rule 185 because pleadings did not include a systematic or itemized record of the parties' transaction); *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 797 (Tex. App.–Dallas 2012, no pet.)(dicta, in a sworn account creditor would be required to show with reasonable certainty the name, date, and charge for each item), *citing 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"); *Chang Shun Chu v. Everbeauty, Inc.*, No. 05-10-01268-CV (Tex. App.–Dallas, Nov. 22, 2011, no pet.)(2011 Tex. App. Lexis 9325)(mem. op.)(sworn account must contain a systematic, itemized statement of the goods or services sold); *Pine Trail Shores Owners' Ass'n v. Aiken*, 160 S.W.3d 139 (Tex. App.–Tyler 2005, no pet.)(HOA's sworn account to collect unpaid assessments held not proper Rule 185 action because the petition did not include an explanation of how the assessments were calculated); *Andrews v. East Tex. Medical Center-Athens*, 885 S.W.2d 264, 266 (Tex. App. Tyler 1994)(sworn account must contain a systematic, itemized statement of the goods or services sold); *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).

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II. PLEADINGS

A. Petition

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. However, 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 in Rule 185 and the cases discussed in section I. 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 create issues. *See 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 plaintiff but a third party; reversed and rendered against creditor because of material variance between evidence and pleadings); *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). See the "Stranger to the Transaction" Defense, discussed below in Defenses, V., B. Attachments should accurately reflect the named parties and 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 . . . ." 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). "The difficulty lies in the fact that neither Rule 185 nor Rule 93(10) specify a particular form or mandate specific words to be used when a defendant files a sworn denial." *Andrews v. East Tex. Medical Center-Athens*, 885 S.W.2d 264, 267 (Tex. App.–Tyler 1994, no pet.).

a. Sworn General Denial Insufficient

"A sworn general denial does not constitute a denial of the account and is insufficient to remove the evidentiary presumption created by a properly worded and verified suit on an account." *Panditi v Apostle*, 180 S.W.3d 924, 927 (Tex. App.–Dallas 2006, no pet.). *See also Huddleston v. Case Power & Equip. Co.*, 748 S.W. 2d 102, 103 (Tex. App.–Dallas 1985, no writ).

b. Broad, Generalized Sworn Denial Insufficient (Caution)

"The purpose of a verified specific denial is to point out the manner in which the plaintiff's allegations within the petition are not true. Otherwise neither the court nor the opposing party is apprised of the fact issue that necessitates further litigation." *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 833 (Tex. App.–Dallas 2014, no pet.), *quoting Andrews v. East Tex. Medical Center-Athens*, 885 S.W.2d 264, 267 (Tex. App.–Tyler 1994, no writ). "The defendant's written denial must state more than a broad generalization that he "specifically denies" the sworn account allegations; instead, the verified affidavit must address the facts on which the defendant intends to rebut the plaintiff's affidavit." *Id., citing Andrews,* 885 S.W.2d at 268.

In *Andrews*, the court found that a verified answer that the account "was not true in whole or in part,"without supporting facts, was insufficient to rebut the sworn account. In *Woodhaven Partners,* Defendants denied under oath that they "are indebted for the amount alleged in Plaintiff's Fourth Amended Petition pursuant to Rules 93(10) and 185 of the Texas Rules of Civil Procedure" and denied "the sworn account made the basis of Plaintiff's Fourth Amended Petition pursuant to Rules 93(10) and 185." The court found the answer "insufficient to rebut the evidentiary effect of [Plaintiff's] sworn account pleadings and put [Plaintiff] to its proof." *Woodhaven Partners, Ltd.*, 422 S.W.3d at 834 (intricate, multi-party case; 3,000-page clerk's record; plaintiff's summary judgment

affirmed in part and reversed in part). Read every sworn denial with *Woodhaven Parnters* in mind. It may be a powerful tool, to be often applied.

c. Verification

"There is no particular form of verification required, but a verification must be based on personal knowledge." *Cantu v. Holiday Inns*, 910 S.W.2d 113, 116 (Tex. App. Corpus Christi 1995), *citing Durrett v. Boger*, 234 S.W.2d 898, 900 (Tex. Civ. App.--Texarkana 1950, no writ). "A party's attorney may verify the pleading where he has knowledge of the facts, but does not have authority to verify based merely on his status as counsel." *Id. 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; defendant's attempted verification failed to assert personal knowledge of the facts alleged in the answer, *citing Cantu*). An unsworn declaration can apparently be used instead of a verification. See CPRC § 132.001, Unsworn Declaration, and *O'Connor's Texas Civil Forms (2015),* pages 14-15. A declaration that failed to declare "as true under penalty of perjury" was insufficient in *Bullock v. McLean*, No. 3-07-00204-CV (Tex. App.–Corpus Christi, Aug. 21, 2008, no pet.)(2008 Tex. App. Lexis 6383)(mem. op.)(no evidence summary judgment for defendant affirmed against plaintiff- inmate).

d. Verified Denial Solely in Summary Judgment Response Insufficient

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).

2. Amended Sworn Account Requires Additional Sworn Denial (Caution)

Defense counsel should review amended pleadings carefully. When an amended sworn account substantially differs from the original, the party resisting the account must file another sworn denial. *See Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 356 (Tex. App.–Houston [14th Dist.] 2013, no pet.)(defendant filed a verified denial of the original account; creditor filed an amended sworn account with new invoices and credits that reduced the balance by approximately $50,000; summary judgment for creditor affirmed because debtor failed to file a sworn denial of the amended account). Rule 92, general denial, is presumed to extend to all matters subsequently alleged, but does not apply to denials required to be denied under oath. *Southern Mgmt. Servs. v. SM Energy Co.*, 398 S.W.3d 350, 356 (Tex. App.–Houston [14th Dist.] 2013, no pet.). *But see Fontiberry v. Freeway Lumber Co.*, 453 S.W.2d 849, 852 (Tex. Civ. App.–Houston [1st Dist] 1970, no writ)(as amended sworn account was based on the same balance, debtor was entitled to have his original sworn denial considered as a response to the amended pleading; summary judgment for creditor reversed).

3. 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 His Indus. v. Keiger*, No. 04-12-00029-CV (Tex. App.–San Antonio, June 5, 2013, no pet.)(2013 Tex. App. Lexis 6832)(mem. op.)(limitations); *Schneider v. A-K Tex. Venture Capital, L.C.*, No. 14-00-00377-CV (Tex. App.–Houston [14th Dist.], April 12, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2439)(failure of consideration). The safest debtor practice is to file a verified denial and plead affirmative defenses, if the facts allow.

In order to defeat a summary judgment motion by raising an affirmative defense, the nonmovant must do more than just plead the affirmative defense. *Divin v. Tres Lagos Prop. Owners' Ass'n*, No. 06-13-00124-CV (Tex. App.–Texarkana, Aug. 7, 2014, pet. denied)(2014 Tex. App. Lexis 8587)(mem. op.)(insufficient evidence on limitations defense; summary judgment for plaintiff on sworn account affirmed). The nonmovant must offer evidence sufficient to raise a genuine issue of material fact on each element of his affirmative defense. *Id., citing Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)(statement that the contractual obligation was modified was a legal conclusion; affidavit should have gone further and specified factual matters such as the time, place, and exact nature of the alleged modification).

4. Waiver of Defective Pleadings

Rule 90 states that every defect, omission or fault in a pleading either of form or substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed shall be deemed to have been waived by the party seeking reversal on such account. *See Huddleston v. Western Nat'l Bank*, 577 S.W.2d 778, 781 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.)(failure to file written exceptions or to obtain ruling on oral objection to defective verification constituted waiver).

III. ELEMENTS

A. Proving Account After A Sworn Denial

After a proper sworn denial of the account, the burden is on plaintiff to prove the account, independent of Rule 185. "Upon filing of the denial the plaintiff's account stands as though it had not been verified; its character as prima facie evidence is destroyed, and the burden rests upon the plaintiff to prove his case as at common law." *Burtis v. Butler Bros.*, 243 S.W.2d 235, 236-237 (Tex. Civ. App.–Dallas, 1951, no writ). The elements of a sworn account are: (1) the sale and delivery of merchandise or performance of services; (2) that the amount of the account is "just," i.e., the prices charged are pursuant to an express agreement, or in the absence of an agreement, that the charges are usual, customary, or reasonable; and (3) that the outstanding amount remains unpaid. *Ellis v. Reliant Energy Retail Servs., L.L.C.*, 418 S.W.3d 235, 246 (Tex. App.–Houston [14th Dist.] 2013, no pet.), *citing PennWell Corp. v. Ken Assocs.*, 123 S.W.3d 756, 766 (Tex. App.–Houston [14th Dist.] 2003, pet. denied); *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App.--Beaumont

1999, no pet.); *Jones v. Ben Maines Air Conditioning, Inc.*, 621 S.W.2d 437, 439 (Tex. Civ. App–Texarkana 1981, no pet.).

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

The second element of a sworn account is an agreement as to price, or, in the absence of an agreement, that the prices charged were usual, customary, or reasonable. "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 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. 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; no proof that premiums charged were in accord with the express contracts of insurance). 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

The balance due is often proved through invoices, account statements, and other business records. Summary judgment motions and trial preparation should customarily include a business records affidavit. However, creditor's summary judgment proof may create fact issues. *See Four D Constr., Inc. v. Util. & Envtl. Servs.*, No. 05-12-000680CV (Tex. App.–Dallas, June 7, 2013, no pet.)(2013 Tex. App. Lexis 6995)(mem. op.)(three of the allegedly unpaid invoices attached to creditor's summary judgment affidavit showed a "PAID" stamp and a $0.00 balance, creating a fact issue as to the amount owed; summary judgment for creditor reversed). Review all attachments to pleadings carefully.

IV. PROOF

A. Business Records Affidavit

Creditor's cases are based on business records. As the business records predicate is onerous, why go to trial without a business records affidavit having been served pursuant to Tex. R. Evid. 902(10)(b)? Since an affidavit cannot be cross examined, it is a safer predicate than a witness. Under the old rule (suits filed before Sept. 1, 2014), the affidavit and records had to be filed with the court and served on all parties. Under the revised Rule 902(10), applicable to suits filed on or after September 1, 2014, the affidavit and records need only be served on each party to the case at least 14 days before trial. Service may be performed by any method permitted by Tex. R. Civ. P. 21a.

The business records 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 Kirkpatrick v. LVNV Funding, LLC*, No. 01-11-00382-CV (Tex. App.–Houston [1st Dist.] May 3, 2012, no pet.)(2012 Tex. App. Lexis 3489)(mem. op.)(third-party records admitted through business records affidavit); *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); *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). 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. Discovery With Petition

Standard discovery, including requests for admission, should generally be served with the citation. See forms, Appendix B-1 (Goods/ Services - Expedited Actions), Appendix B-2 (No Reference to Goods/ Services - Expedited Actions), and Appendix E. Debtor has 50 days after service to answer such discovery. See Rules 197.2(a) and Rule 198.2(a). Responses to discovery are generally more substantive if a statement of account or the invoices are attached to the petition.

Sworn Account

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, discussed in III. 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.

B. Stranger to the Transaction

"Rule 185 does not apply to nor cover transactions between third parties, or parties who are strangers to the transaction. Such accounts, though verified, are hearsay as to such parties, and in such case the stranger may controvert and disprove the account, although he does not file a written denial under oath." *Eng v. Wheeler*, 302 S.W.2d 263, 265-66 (Tex. Civ. App.–San Antonio 1957, writ dism'd w.o.j.). 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. "When the plaintiff's evidence fails to identify the defendant as the debtor on the account, 'the sworn account is not considered as prima facie proof of the debt.'" *Tandan v. Affordable Power, L.P.*, 377 S.W.3d 889, 895 (Tex. App.–Houston [14th Dist.] 2012, no pet.), *citing Sundance Oil Co. v. Aztec Pipe & Supply Co., Inc.*, 576 S.W.2d 780 (Tex. 1978)(statement attached to petition named defendant and another company, raising a fact question as to which company is indebted; sworn denial not required to controvert the account). *See also Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 654 (Tex. 2013)(when plaintiff's account indicates that defendant is a stranger to the account, no sworn denial is required); *Airborne Freight Corp. v. CRB Marketing, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978)(sworn account is not prima facie evidence of the debt as against a stranger to the transaction); *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); *Hassler v. Texas Gypsum Co.*, 525 S.W. 2d 53 (Tex. App.–Dallas 1975, no writ)(invoices named corporation, not individual defendant).

Sworn Account

To avoid the "Stranger to the Transaction" 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. The assumed name is established if a verified denial is not filed. *See* Rule 93(14); *Avenell v. Chrisman Properties, LLC*, No. 14-08-01180-CV (Tex. App.–Houston [14th Dist.] April 8, 2010, no pet.)(2010 Tex. App. Lexis 2499)(mem. op.)(defendant's failure to file a verified denial of an alleged assumed name waived the right to complain). Plaintiff should also consider suit against multiple defendants under a partnership theory, if the facts allow. *See* Rule 93(5), verified denial of partnership required. *See also* Rule 28, Suits in Assumed Name; parties may sue or be sued in assumed or common name.

Similarly, if creditor is Acme North Sand Co. and invoices attached to the petition state Acme Sand Co., plaintiff should generally confirm and plead that Plaintiff is "Acme North Sand Co., doing business as Acme Sand Co." A corporation, limited partnership, limited liability partnership, limited liability company, or foreign filing entity must file an assumed name certificate if the entity regularly conducts business or renders professional services in Texas under an assumed name. *See* Tex. Bus. & Com. Code § 71.101. The place of filing depends on whether the entity maintains a registered office in Texas. *See* Tex. Bus. & Com. Code § 71.103. An individual or entity that does not file a certificate as required may not maintain an action or proceeding in Texas arising out of a contract or act in which an assumed name was used until an original, new, or renewed certificate has been filed. *See* Tex. Bus. & Com. Code § 71.201.

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.

> 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 inadmissable. *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, no pet.)(2008 Tex. App. Lexis 880)(mem. op.)(guaranty); *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App.–Dallas 2004, no pet.)(real estate 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) *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); *Rea v. Sunbelt Savings, FSB, Dallas,* 822 S.W.2d 370, 372-373 (Tex. App.–Dallas 1991, no writ)(promissory note).

D. Limitations

The reader is referred to *O'Connor's CPRC Plus (2014-2015)* and other authorities as to this important defense. See pages 950-952 where sixteen debt collection limitations periods are summarized. Tex. Civ. Prac. & Rem. Code § 16.004(c) states: "A person must . . . bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, **the cause of action accrues on the day that the dealings in which the parties were interested together cease (emphasis added).**" In most account cases, the cause of action accrues when the dealings between the parties cease. *See His Indus. v. Keiger*, No. 04-12-00029-CV (Tex. App.–San Antonio, June 5, 2013, no pet.)(2013 Tex. App. Lexis 6832)(mem. op.)(summary judgment affirmed on limitations defense; four-year limitations applied to breach of contract/sworn account claim); *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App.–Beaumont 1999, no pet.)(applied four-year limitations; cause of action on open account accrued on the day of the last payment by debtor).

An acknowledgment may be used to defeat limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.065. There is no requirement that a debt subject to revival originate from a written promissory note; § 16.065 simply refers to a "claim." *In re Estate of Curtis*, 465 S.W.3d 357, 371 (Tex. App.—Texarkana 2015, pet. dism'd)(a debtor's handwritten letter acknowledging two spreadsheets showing amortization schedules revived two time-barred notes although the letter did not itself state the debt amounts). Whether a written instrument sufficiently acknowledges a barred debt is a question of law. *Bright & Co. v. Holbein*, 995 S.W.2d 742, 745 (Tex. App. -San Antonio 1999, pet. denied)(letter and fax from debtor's agent with production figures and "net due plaintiff" amount was sufficient acknowledgment of unpaid royalties and a new promise to pay), *citing MMP, Ltd. v. Jones*, 695 S.W.2d 208, 209 (Tex. App.--San Antonio 1985), *rev'd on other grounds*, 710 S.W.2d 59 (Tex. 1986). To take a debt otherwise barred out of the statute of limitations, the writing must acknowledge the justness of the debt and express a willingness to pay. *Id.*

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 Bruce A. Atkins, *Summary Judgments and Summary Dispositions*, this seminar; and *Summary Judgments in Texas: State and Federal Practice*, Hittner and Liberato, 46 Hous. L. Rev. 1379, Winter 2010. As to forms, *see Texas Collections Manual (Fourth Edition)*, Chapter 19, Pre-Trial Procedure, Forms 19-9 through 19-18, and *O'Connor's Texas Civil Forms (2015)*, Form 7C:1, Plaintiff's Motion For Summary Judgment.

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.W2d 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 including the following, or similar language:

> "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."

C. Obtaining Summary Judgment After Sworn Denial

Plaintiff may obtain summary judgment on a sworn account after a verified denial. "Despite a defendant's sworn denial, a plaintiff may properly obtain a summary judgment on its sworn account claim by filing "legal and competent summary judgment evidence establishing the validity of its claim as a matter of law." *Ellis v. Reliant Energy Retail Servs., L.L.C.*, 418 S.W.3d 235, 246 (Tex. App.–Houston [14th Dist.] 2013, no pet.), *citing PennWell Corp. v. Ken Assocs.*, 123 S.W.3d 756, 766 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). The elements of a sworn account are: (1) the sale and delivery of merchandise or performance of services; (2) that the amount of the account is "just," i.e., the prices charged are pursuant to an express agreement, or in the absence of an agreement, that the charges are usual, customary, or reasonable; and (3) that the outstanding amount remains unpaid. *Id.*

See also *Ramirez v. Coca-Cola Refreshments USA, Inc.*, No. 01-13-00278-CV (Tex. App.–Houston [1st Dist.], October 22, 2013, no pet.)(2013 Tex. App. Lexis 13110)(mem. op.)(summary judgment for creditor affirmed after sworn denial; signed invoices, and the affidavits authenticating and corroborating them, proved sale and delivery of goods, agreement as to price, and balance due); *United Business Machines v. Entertainment Marketing, Inc.*, 792 S.W.2d 262, 264 (Tex. App.–Houston [1st Dist.] 1990, no writ)(summary judgment proof consisted of a sworn summary of the account, signed invoices showing to whom the goods were sold, when, what was sold, the price therefor, terms of payment, and how the goods were to be delivered; affidavit proved the reasonableness of the prices charged, and that debtor agreed to pay).

D. 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. *See 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 failing to obtain a ruling).

E. 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). Affidavits sworn to on best knowledge and belief are insufficient. *Schultz v. Houston*, 551 S.W.2d 494, 496 (Tex. Civ. App. Houston [14th Dist.] 1977, no writ). 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 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."

" . . .[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). "A conclusory statement cannot support a judgment even when the opposing party fails to object to it at trial." *Jim Coleman Co. v. Rainer Randles Invs., LLC*, No. 01-13-00764-CV (Tex. App. - - Houston [1st Dist.], July 3, 2014, no pet.)(2014 Tex. App. Lexis 7235)(mem. op.)(judgment reversed and remanded because the testimony lacked specific liability facts and contained no evidence of causation), *citing City of San Antonio v Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). *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).

F. 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).

Sworn Account

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).

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.). *See generally O'Connor's Texas Causes of Action (2016)*, pages 126-127.

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 dism'd); *citing Glasco v. Frazer* 225 S.W.2d 633,635 (Tex. App.–Dallas 1949, writ dism'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, no pet.)(2010 Tex. App. Lexis 3477)(mem. op.); Tex. Civ. Prac. & Rem. Code § 38.001(8)(oral or written contract).

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, dishonored checks, credit card statements, and discovery responses.

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 or E-mail 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 August 10, 2016. We agree there are no offsets, credits or claims against the account or Creditor, Inc. The account balance is $34,212. Please promptly sign and return via fax to (214) 340-1111.

Very truly yours,

Creditor, Inc.

Agreed for Debtor, Inc.

By:_____
(Signature)

Its:_____
(Print name and title)

If a letter is ignored, try an e-mail to debtor requesting either a signed faxed response, or at least debtor's e-mail confirmation. An email admission can often be as effective as a letter, and may be more easily obtained.

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). *See H.G. Berning, Inc. v. Waggoner*, 247 S.W.2d 570, 571 (Tex. Civ. App.–Beaumont 1952, no writ)(debtor's letter admitting $252.77 did not constitute account stated when creditor contended over $700 was due; no agreement as to amount due).

B. Dishonored 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

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, no pet.)(account statements, along with checks and payment stubs, established account stated); *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 established implied agreement fixing the amount due and implied promise to pay); *Aymett v. Citibank South Dakota N.A.*, 397 S.W.3d 876 (Tex. App.–Dallas, Apr. 5, 2013, no pet.)(same); *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). *See also Walker v. Citibank, N.A.*, 458 S.W.3d 689 (Tex. App.–Eastland 2015, n.p.h.)(following precedent of Fort Worth Court of Appeals, finding that account stated is a proper cause of action for credit card collections suit), *distinguishing 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.)(account stated not established; suit to collect on ten different credit card accounts; custodian of records for the creditor testified that he "could not be sure that the statements were actually mailed or received").

Account Stated

Summary judgment affidavits must establish personal knowledge. *See Rodriguez v. Citibank, N.A.*, No. 04-12-00777-CV (Tex. App.–San Antonio, Aug. 30, 2013, no pet.)(2013 Tex. App. Lexis 11160)(mem. op.)(personal knowledge established when affiant stated he was Document Control Officer, his job duties, and that he had knowledge and access to debtor's account information and records).

D. Discovery Responses

In *Gonzales v. Main St. Acquisition Corp.*, No. 14-13-00546-CV (Tex. App–Houston [14th Dist.], July 1, 2014, no pet.)(2014 Tex. App. Lexis 7094)(mem. op.), Defendant's responses to requests for admissions established the following: (1) Defendant applied for the credit card; (2) At Defendant's request, the account was opened; (3) Defendant fully understood the risk and obligations associated with credit card accounts; (4) Defendant "made the purchases and took cash advances using the credit card made the basis of Plaintiff's Original Petition"; (5) Plaintiff is the present owner and holder of the subject account; (6) Since Defendant opened the account, Defendant has not notified Plaintiff of any dispute or error regarding any information contained in any monthly statement; (7) Prior to this lawsuit, Defendant never requested verification of the debt from Plaintiff or disputed the debt owing on the subject account; (8) Defendant requested and made written demand upon Defendant for payment of the subject account; and (9) Defendant failed to pay Plaintiff for the subject account. The admissions, along with credit card statements addressed to defendant, was sufficient proof of account stated.

V. DEFENSES

A. Attack Elements

If debtor persuades the fact finder that plaintiff has not met its burden of proof as to all elements, the claim fails. Often, the disputed issue 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. . . . 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.

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* 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.

Quantum Meruit

PART THREE: UNJUST ENRICHMENT CLAIMS

There is considerable confusion in Texas courts as to whether unjust enrichment is an independent cause of action or a theory of recovery. "The discomfort of Texas Courts with unjust enrichment in equity may be due to the fact that Texas merged its courts without gaining sufficient experience with a separate court in equity to appreciate the advantages of the law in equity and the safety net." George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Dessert Topping?* , 65 Baylor L. Rev. 153, 253-254 (2013)(opining that unjust enrichment, disgorgement, and other equitable remedies have proven more effective in resolving intellectual property claims than other remedies and are essential to the growth of the Texas economy).

"Most of the Texas courts of appeals and federal courts that have considered the question under Texas law have rejected the existence of an independent cause of action for unjust enrichment." David Dittfurth, *Restitution in Texas: Civil Liability for Unjust Enrichment*, 54 S. Tex. L. Rev. 225, 238 (2012). "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." *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.). *See also Davis v. OneWest Bank N.A.*, No. 02-14-00264-CV (Tex. App.–Fort Worth, Apr. 9, 2015, pet. denied)(2015 Tex. App. Lexis 3470)(mem. op.)(unjust enrichment not an independent cause of action), *citing Argyle Indep. Sch. Dist. v. Wolf*, 234 S.W.3d 229, 246 (Tex. App.–Fort Worth 2007, no pet.)

Unjust enrichment has been recognized as an independent cause of action. "We have recognized that, in some circumstances, a royalty owner has a cause of action against its lessee based on unjust enrichment, but only when the lessee profited at the royalty owner's expense." *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998). *See also Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 111 (Tex. App.–Houston [1st Dist.] 2013, no pet.)(unjust enrichment available to tenant against landlord; after tenant was evicted, landlord withheld gasoline tanks, walk-in cooler, and vapor recovery system purchased by tenant from landlord); *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 717 (Tex. App.–Dallas 2015, n.p.h.)(model's unjust enrichment claim against department store for using his image on underwear packaging without consent or payment was time-barred, as he filed suit over two years after his image was first displayed).

I. QUANTUM MERUIT

See generally O'Connor's Texas Causes of Action (2016), Chapters 5-C, Quantum Meruit, pages 107-113.

A. Definition and Elements

Quantum meruit implies a contract in circumstances where the parties neglected to form one, but equity nonetheless requires payment for beneficial services rendered and knowingly accepted. *Houston Med. Testing Servs. v. Mintzer*, 417 S.W.3d 691 (Tex. App.–Houston [14th Dist.] 2013, no pet.), *citing In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005). 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:
>
> 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.

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, no pet.).

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 Preyear v. Kandasamy*, No. 01-11-01093-CV (Tex. App.–Houston [1st Dist.], Aug. 22, 2013, no pet.)(2013 Tex. App. Lexis 10586)(mem. op.)(personal payments and execution of personal guaranty to forestall a lawsuit against defendant-corporation satisfied first element of quantum meruit, valuable services or materials provided); *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). *See also Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)(judgment affirmed for Defendant-City; no evidence that subcontractor anticipated payment from the City); *Patel v. Patrick O'Connor & Assocs., LP*, No. 14-12-00809-CV (Tex. App.–Houston [14th Dist.], April 25, 2013, no pet.)(2013 Tex. App. Lexis 5122)(mem. op.)(summary judgment for creditor-company reversed; even though property owner paid reduced taxes, a third party was invoiced, and no proof that owner knew tax services were being performed); *Onwudiegwu v. Dominguez*, No. 14-14-00249-CV (Tex. App.–Houston [14th Dist.], July 16, 2015, n.p.h.)(2015 Tex. App. Lexis 7347)(mem. op.)(judgment reversed and rendered that construction worker take nothing from homeowner; no evidence of notice to homeowner that worker expected to be paid by her rather than by the general contractor).

Quantum Meruit

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 v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978), claimant provided remodeling services with an expectation of an option to purchase an apartment complex. These satisfied the "expectation of payment" element. *See also General Capital Group Beteligungsberatung GmbH v. AT&T*, 407 S.W.3d 507 (Tex. App.–Dallas 2013, pet. denied)(no expectation of payment on a contingent, success-fee basis where the required transaction never occurred).

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). If, however, evidence of a contract is introduced at trial and other evidence is admitted which disproves the validity of the contract, the plaintiff is not barred from recovery in quantum meruit, if he pleaded both theories. *Angroson, Inc. v. Independent Communications, Inc.*, 711 S.W.2d 268, 272 (Tex. App.–Dallas 1986, writ ref's n.r.e.). It is good creditor's practice to plead quantum meruit, alternatively, to sworn account or breach of contract. *See also Shamoun & Norman, LLP v. Hill*, No. 05-13-01634-CV (Tex. App.–Dallas, Jan. 26, 2016, n.p.h.)(2016 Tex. App. Lexis 744)(mem. op.)(though oral contingent fee agreement was void as a matter of law, law firm recovered $7.25 million on its quantum meruit claim for services to settle over 20 related lawsuits).

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). *But see Strickland Group, Inc. v. Pathfinder Exploration, LLC*, No. 02-12-00187-CV (Tex. App.–Fort Worth, Sept. 5, 2013, no pet.)(2013 Tex. App. Lexis

11438)(mem. op.)(court affirmed take nothing judgment against consultant on quantum meruit claim because evidence showed he did not expect compensation for partial performance).

3. Services and Materials Not Covered by Contract

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.*, 363 S.W.3d 623, 627 (Tex. App.–Houston [14th Dist.] 2011, no pet.) (charges for more expensive materials than were contracted, which were requested by defendant's project manager, recoverable under quantum meruit); *Four Points Bus., Inc. v. Rojas*, No. 01-12-00413-CV (Tex. App.–Houston [1st Dist.], Aug. 27, 2013, no pet.)(2013 Tex. App. Lexis 10834)(services and materials not covered by the express contract recoverable); *Bennett v. Spectrum Constr., Inc.*, No. 01-11-00566-CV (Tex. App.–Houston [1st Dist.] Nov. 21, 2012, no pet.)(2012 Tex. App. Lexis 9629)(mem. op.)(executor for electrician on service contract could recover under quantum meruit for the work performed).

4. 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, no pet.)(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.

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. *See also Clark v. Dillard's, Inc.*, 460 S.W.3d 714 (Tex. App.–Dallas 2015, n.p.h.)(applying two-year statute of limitations, court reversed and rendered that plaintiff take nothing on unjust enrichment claim). 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 (2014-2015)* and other authorities as to this important defense. See pages 950-952 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

See generally O'Connor's Texas Causes of Action (2016), Chapter 5-F, Money Had & Received, pages 128-131.

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. denied). *See also MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 813 (Tex. App.–Dallas 2012, no pet.)(money had and received is a category of general assumpsit); *Stewart Title Guar. Co. v. Mims*, 405 S.W.3d 319, 339 (Tex. App.–Dallas 2013, no pet.)(unjust enrichment and money had and received are examples of quasi-contract theories).

"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. "Simply put, a claim for money had and received is dependent upon a balancing of the equities in each unique case." *BV Energy Partners, LP v. Cheatham*, No. 05-14-00373-CV (Tex. App.–Dallas May 12, 2015, n.p.h.)(2015 Tex. App. Lexis 4804)(mem. op.). *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).

Money Had and Received

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).

C. No Recovery When Express Contract Controls

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, no pet.)(2010 Tex. App. Lexis 9806)(mem. op.), *citing Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000).

D. 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 valid 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).

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 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 is valid money had and received claim. *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex.1978).

8) **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, no pet.).

9) **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).

10) **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, no pet.)(2011 Tex. App. Lexis 1589)(mem. op.)(same).

11) **Overpayment of Expenses to Homebuilder:** *See Cavendish v. Atashi Town Homes*, LLC, No. 06-14-00023-CV (Tex. App.–Texarkana, Dec. 16, 2014, no pet.)(2014 Tex. App. Lexis 13381)(mem. op.).

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 Legal Fees Paid from Trust Account:** 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).

14) **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).

15) **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.).

16) **Not against a Bank on a Chargeback:** No money had and received claim against bank, which had the statutory right to a chargeback for a dishonored item. *Am. Dream Team, Inc. v. Citizens State Bank*, No. 12-14-00117-CV, (Tex. App.–Tyler, Dec. 30, 2015, pet. filed)(2015 Tex. App. Lexis 13074)(mem. op.), *citing* Tex. Bus. & Com. Code Ann. § 4.214.

17) **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.).

18) **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).

19) **Not Against Seller on Overpayment to a Commercial Factor:** Evidence that defendant-seller did not receive, hold, or benefit from overpayment to its commercial factor set up meritorious defense to money had and received claim; court reversed default judgment and remanded for further proceedings. *L'Arte De La Mode, Inc. v. Neiman Marcus Group*, No. 05-11-01440-CV (Tex. App.–Dallas, January 23, 2013, no pet.)(2013 Tex. App. Lexis 598)(mem. op.).

20) **Not on a Voidable Instrument:** A party cannot sue for money had and received on a voidable instrument. *See Country Cupboard, Inc. v. Texstar Corp.*, 570 S.W.2d 70 (Tex. Civ. App.–Dallas 1978, writ ref'd n.r.e.)(money paid pursuant to a release agreement, allegedly executed under duress, could not be recovered as a money had and received claim; a voidable instrument has legal effect until judicially set aside). *See* Section C, above, no recovery under Money Had and Received when contract controls.

E. 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.

F. Limitations

A two-year statute of limitations generally applies to money had and received claims. *See City of Beaumont v. Moore*, 146 Tex. 46, 52 (Tex. 1947); *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)(1)(three-year limitations applies to an action for conversion of an instrument, an action for money had and received, or like action based on conversion).

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). *But see Dorsett v. Hispanic Hous. & Educ. Corp.*, 389 S.W.3d 609 (Tex. App.–Houston [14th Dist.] 2012, no pet.)(court noted different essential elements for a promissory note claim than for other types of contracts). 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).

E. Negotiability

A negotiable instrument is a written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise to pay or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer." *Aguero v. Ramirez*, 70 S.W.3d 372, 373 (Tex. App.–Corpus Christi 2002, pet. denied), *citing* Tex. Bus. & Com. Code § 3.104, Negotiable Instrument. The negotiability of an instrument is a question of law. *Ward v. Stanford*, 443 S.W.3d 334, 343 (Tex. App.–Dallas 2014, pet. filed), *citing FFP Mktg. Co. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 408-09 (Tex. App.—Fort Worth 2005, no pet.). A note is non-negotiable if another instrument must be examined to determine

the rights and obligations under the note. *Id.*, *citing* Tex. Bus. & Com. Code Ann. § 3.106(a), Unconditional Promise or Order. If, by some clause or stipulation in the body of the instrument, those elements which impart to it negotiability are limited and qualified, the negotiable character of the paper, as an ordinary promissory note, is destroyed. *Martin v. Shumatte & Matthews*, 62 Tex. 188, 189 (Tex. 1884).

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.). In a suit between the original parties to the promissory note, the elements of a note claim are the same whether the instrument sued upon is negotiable. *Ropa Exploration Corp. v. Barash Energy*, No. 02-11-00258-CV (Tex. App.–Fort Worth, June 13, 2013, pet. denied)(2013 Tex. App. Lexis 7290)(mem. op.), *citing Diversified Fin. Sys., Inc.*, 99 S.W.3d at 357.

III. PLEADINGS

A. Petition

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

Promissory Note

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 also 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); *Shin-Con Dev. Corp. v. I.P. Invs., Ltd.*, 270 S.W.3d 759, 768 (Tex. App.–Dallas 2008, pet. denied)(mere assertion that "Plaintiffs have not satisfied a condition precedent" was insufficient denial of presentment, a condition precedent to Plaintiff's breach of contract claim); *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 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); *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211 (Tex. App.–Dallas 2015, n.p.h.)(in the absence of a verified denial, copy of a promissory note was received as fully proved).

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. *See O'Connor's Texas Rules - Civil Trials 2016*, page 263. However, denial of some conditions precedent could be within Rule 93's verified denial requirement. For example, denial that notice and proof of loss or claim for damage was not given, must be verified per Rule 93(12).

IV. EVIDENTIARY ISSUES

Practice Tip: Don't be overconfident that "this is just a promissory note case." *See Res-Tx Blvd., L.L.C. v. Blvd. Builders/Citta Townhomes, LP*, No. 05-12-01450-CV (Tex. App.–Dallas, April 15, 2014, no pet.)(2014 Tex. App. Lexis 4132)(mem. op.)(evidence did not establish a "certain balance" due and owing on assigned notes; take-nothing judgment for defendant affirmed; statement that "each borrower . . . acknowledges and agrees that . . . the parties *believe* the outstanding principal balance. . . is *approximately* $5.5 million" (emphasis added) did not establish specific amount due and owing).

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. *TrueStar Petroleum Corp. v. Eagle Oil & Gas Co.*, 323 S.W.3d 316, 319 (Tex. App.–Dallas 2010, no pet.); *Scott v. Commercial Servs. of Perry, Inc.*, 121 S.W.3d 26, 29 (Tex. App.– Tyler 2003, pet denied); *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 522 (Tex. App.–Dallas 1994, no writ); *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App–Houston [14th Dist] 1994, no writ).

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.).

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). *See also Goad v. Hancock Bank*, No. 14-13-00861-CV (Tex. App.–Houston [14th Dist.], Apr. 9, 2015, pet. denied)(2015 Tex. App. Lexis 3517)(mem. op.)(bank manager's affidavit that the bank changed its name was not conclusory; absent controverting evidence, there was no sale, assignment, or transfer resulting in the bank's acquisition of the note and thus no "chain of title" to prove).

1. Blank Indorsement

If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a blank indorsement. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed. Tex. Bus. & Com. Code § 3.205(b). *See Wilner v. Deutsche Bank Nat'l Trust Co.*, No. 02-11-00287-CV (Tex. App.–Fort Worth, Dec. 21, 2012, no pet.)(2012 Tex. App. Lexis 10595)(mem. op.)(summary judgment granted for bank because bank had physical possession of the "original, wet ink note, indorsed in blank."); *Henning v. OneWest Bank FSB*, 405 S.W.3d 950, 958 (Tex. App.–Dallas 2013, no pet.)(summary judgment affirmed for bank, which proved it was owner and holder of note after blank indorsement).

2. No Indorsement

Under common-law principles of assignment, a party who fails to qualify as a "holder" for lack of an indorsement may still prove that it owns the note. *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App.–Houston [1st Dist.] 2012, no pet.), *citing Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.). A non-holder seeking to enforce a note must prove the transfer by which he acquired the note. *Id. See also Gharbi v. Hemmasi*, No. 03-07-00036-CV (Tex. App.–Austin, Aug. 6, 2015, n.p.h.)(2015 Tex. App. Lexis 8209)(mem. op.)(transferee of a promissory note had standing to bring suit against the borrower, a buyer of condominium units, even though he was not a holder).

3. 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). *See also Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 152 (Tex. App.–Houston [14th Dist.] 2014, no pet.)(summary judgment reversed because bank failed to establish that it was the owner and holder of the note and guarantee).

4. Corporate Merger

Ownership of a note may be obtained through corporate merger. *See 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. 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); *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).

E. Proof of the Balance Due

1. Detailed Calculations Generally Not Required

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). *See also Van Adrichem v. AgStar Fin. Servs., FLCA*, No. 07-13-00432-CV (Tex. App.–Amarillo, Nov. 13, 2015, n.p.h.)(2015 Tex. App. Lexis 11734)(mem. op.)(affiant's statement, in chart format, of the unpaid principal, accrued interest, late charges, costs, and per diem interest, was not impermissibly conclusory).

2. Records and Other Proof

Payment-history records may be used to prove the balance due. 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 and other discovery devices.

3. Beware of Vagueness and Inconsistences

Though detailed calculations are generally not required, beware of vagueness and inconsistences in proof of the balance due. *See Res-Tx Blvd., L.L.C. v. Blvd. Builders/Citta Townhomes, LP*, No. 05-12-01450-CV (Tex. App.–Dallas, April 15, 2014, no pet.)(2014 Tex.

App. Lexis 4132)(mem. op.)(take-nothing judgment for defendant affirmed; no specific proof of the balance due on multiple notes). *Guerra v. M.H. Equities, LTD.*, No. 02-11-00261-CV (Tex. App.–Fort Worth, June 14, 2012, no pet.)(2012 Tex. App. Lexis 4735)(mem. op.)(summary judgment evidence raised fact issue as to balance due; reversed and remanded in part); *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 and remanded); *Carter v. Perry*, No. 02-14-00185-CV (Tex. App.–Fort Worth July 9, 2015, n.p.h.)(2015 Tex. App. Lexis 7133)(mem. op.)(deemed admissions proved certain facts, others proved the opposite, creating a fact issue; summary judgment reversed).

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), *citing* Tex. Bus. & Com. Code § 3.112(b).

G. Discharge of Note By Intentional Voluntary Act

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). *But 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); *Chance v. Citimortgage, Inc.*, No. 05-12-00306-CV (Tex. App.–Dallas, February 6, 2013)(2013 Tex. App. Lexis 1082)("VOID" stamp over a blank endorsement block, without more, was insufficient to show an intent to discharge, cancel, or neutralize debtor's obligations under the note, *citing* Texas Bus. & Com. Code § 3.604(b)).

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).

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. Gilbraltar 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. Gilbraltar Sav. Ass'n.*, 640 S.W.2d 232, 233 (Tex. 1982).

B. Acceleration Not Favored

Acceleration is not favored in the law. "Acceleration is a harsh remedy with draconian consequences for the debtor, and Texas courts look with disfavor upon the exercise of this power because great inequity may result." *Mastin v. Mastin*, 70 S.W.3d 148, 154 (Tex. App.–San Antonio 2001, no pet.). "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, 466 (Tex. 1973), *citing City Nat. Bank v. Pope*, (Tex. Civ. App. 1924, no writ).

C. Waiver

1. Generally

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.

2. Multiple Instrument Issues

"Every instrument executed in conjunction with a promissory note need not contain the necessary language in order to effectively waive the right to notice; such a requirement is unnecessarily duplicative." *Parker v. Frost Nat'l Bank*, 852 S.W.2d 741, 744 (Tex. App.–Austin 1993, writ dism'd). *But see Mathis v. DCR Mortg. III Sub I, L.L.C.*, 389 S.W.3d 494 (Tex. App.–El Paso 2012, no pet.)(waiver language in the note was clear and unequivocal; however, deed of trust created reasonable doubt as to the intent of parties; as there was no notice of intent to accelerate, acceleration was void). "If any reasonable doubt exists as to the parties intent, we resolve such doubt against acceleration." *Id. See also Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mt. Ranch, Inc.*, No. 04-13-00529-CV (Tex. App.–San Antonio, Dec. 17, 2014, pet. denied)(2014 Tex. App. Lexis 13417)(note and deed of trust construed together; note contained waiver, deed did not; held, waiver ineffective, *citing Mathis*).

Promissory Note

3. Conditions Precedent (Rule 54)

Presentment, Notice of Intent to Accelerate, and Notice of Acceleration may be waived under Rule 54. *See 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 that all conditions precedent have been performed or have occurred).

VI. DEFENSES

A. Limitations

Caution, avoid limitations issues. Sue and serve defendants promptly. Though limitations may be longer, practice as though limitations is four years. *See Bank of Am., N.A. v. Alta Logistics, Inc.*, No. 05-13-01633-CV (Tex. App.–Dallas Feb. 6, 2015, n.p.h.)(2015 Tex. App. Lexis 1218)(four-year limitations on a non-negotiable note); *Guniganti v. Kalvakuntla*, 346 S.W.3d 242 (Tex. App.–Houston [14th Dist.] 2011, no pet.)(creditor argued six-year limitations; court held promissory note was not negotiable, and that a four-year bar applied); *Educap, Inc. v. Sanchez*, No. 01-12-01033-CV (Tex. App.–Houston [1st Dist.] June 25, 2013, pet. denied)(2013 Tex. App. Lexis 7709)(mem. op.)(summary judgment for debtor affirmed on four-year limitations defense).

The reader is referred to *O'Connor's CPRC Plus (2014-2015)* and other authorities as to this important defense. See pages 950-952 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 also 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, no pet.)(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 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. Tolling Agreements

"As a defense to a civil action, the statute of limitations is a personal privilege and may be waived by agreement either before or after expiration of the prescribed time limit. However, any agreement made before the statutory bar has fallen must be specific and for a reasonable time. A general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy." *Am. Alloy Steel v. Armco*, 777 S.W.2d 173, 177 (Tex. App.–Houston [14th Dist.] 1989, no writ), *citing* 50 TEX.JUR.3d Limitation of Actions § 6 (1986). *See also Lucio v. City State Bank of Palacios*, Nos. 13-12-00383-CV, 13-12-00384-CV (Tex. App.–Corpus Christi, Mar. 21, 2013, no pet.)(2013 Tex. App. Lexis 3124)(mem. op.)(summary judgment for creditor affirmed; upheld agreement to toll limitations).

3. 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). When a debt is memorialized by a note and a lien, the note and the lien constitute two separate bundles of rights and obligations. *Farkas v. Aurora Loan Servs., LLC*, No. 11-12-00024-CV (Tex. App.–Dallas, Nov. 26, 2013, pet. denied)(2013 Tex. App. Lexis 14547)(mem. op.). A non-judicial foreclosure enforces the deed of trust, not the underlying promissory note. *Id.*

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 also Roth v. JPMorgan Chase Bank, N.A.*, 439 S.W.3d 508, 513 (Tex. App.–El Paso 2014, no pet.)(defendant waived payment and offset defenses by failing to plead the same); *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); *De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.–Houston [14th Dist.], February 7, 2008, no pet.)(2008 Tex. App. Lexis 880)(mem. op.)(improperly pleaded payment defense to a creditor's summary judgment motion).

If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates. Tex. Bus. & Com. Code §3.603(b). Tender of payment within 30 days of presentment may preclude recovery of attorney's fees. *See* Tex. Civ. Prac. & Rem. Code § 38.002(3).

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. . . . " 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.

"When an agent seeks to avoid personal liability on a contract he signs, it is his duty to disclose that he is acting in a representative capacity and the identity of his principal." *Ferrant v. Graham Assocs.*, No. 02-12-00190-CV (Tex. App.–Fort Worth, May 8, 2014, no pet.)(2014 Tex. App. Lexis 4984)(mem. op.), *citing Southwestern Bell Media v. Trepper*, 784 S.W.2d 68, 71-72 (Tex. App.–Dallas 1989, no writ).

1. Representative Capacity

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.

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."

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 her signature was made on behalf of TS-Clare. *Id.* at 612. *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)(maker personally liable on a promissory note for his failure to disclose his representative capacity to holder).

2. Identity of the Principal

There is no requirement that the principal be identified in the body of the note. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 612 (Tex. App.–Houston [1st Dist.] 2004, no pet.). 3.402(b)(1) merely requires that the principal be identified "in the instrument." *Id. See also Williams v. Bell,* 402 S.W.3d 28 (Tex. App.–Houston [14th Dist.] 2013, pet. denied)(pastor not personally liable for note when he signed below the legal name of the church and listed his title as pastor); *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).

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. Broaddus*, 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, 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. denied)(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).

F. Alteration

"Alteration" means: (1) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party; or (2) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party. Tex. Bus. & Com. Code § 3.407(a). An alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. See Tex. Bus. & Com. Code § 3.407(b). Whether an alteration was material is a question of law. *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 588 (Tex. App. –Houston [14th Dist.] 2000, no pet.). *See Cunningham v. Anglin*, No. 05-13-01166-CV (Tex. App.–Dallas, Jan. 30, 2015, n.p.h.)(2015 Tex. App. Lexis 939)(change to a notation on the memo line of a check to show the actual application of a rent payment was not a fraudulent material alteration); *First State Bank v. Keilman*, 851 S.W.2d 914, 920 (Tex. App.—Austin 1993, writ denied)(bank altered a note to make the arithmetic number, 12.5%, consistent with the written words, "prime plus two percent"; held, not a material alteration as it did not alter the legal effect of the note).

G. Usury

A detailed discussion of usury is beyond the scope of this article. The reader is referred to *O'Connor's Texas Causes of Action (2016)*, Chapter 31, and other authorities. See pages 1039 - 1041 where maximum interest rates are listed for fourteen transactions. A verified pleading is required to plead usury as a defense. Rule 93(11).

Usury may be cured. *See* Tex. Fin. Code § 305.006 (Limitation on Filing Suit) and § 305.103 (Correction of Violation). *See also Lagow v. Harmon*, 384 S.W.3d 411 (Tex. App.–Dallas 2012, no pet.)(following a usury counterclaim, plaintiff filed a plea in abatement and usury cure letter pursuant to Texas Finance Code § 305.006; summary judgment affirmed for plaintiff; defendant's usury-attorney fees were offset against plaintiff's recovery on the notes). In affirming the offset of defendant's attorney's fees in the judgment, the court stated: "There is nothing in the plain language of section 305.006(d) of the Texas Finance Code that directs how payment of attorney's fees should be made. . . . Instead, that section directs only that the creditor 'offer to pay the obligor's attorney's fees.'" *Id.* at 421.

Practice Tip: If usury or excess interest is mentioned by debtor in any way, immediately review usury law, including usury cure provisions. For example, Tex. Fin. Code § 305.103 provides only 60 days for creditor to cure, after the violation is discovered.

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 guarantied. *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252, 261 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). "A guarantor's liability on a debt is measured by the principal's liability unless a more extensive or a more limited liability is expressly set forth in the guaranty agreement." *Houston Furniture Distributors, Inc. v. Bank of Woodlake, N. A.*, 562 S.W.2d 880, 884 (Tex. Civ. App.–Houston [1st Dist.] 1978, no writ), *citing Gubitosi v. Buddy Schoellkopf Products, Inc.*, 545 S.W.2d 528, 534 (Tex. Civ. App. Tyler 1976, no writ).

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.

"If uncertainty exists as to the meaning of the guaranty contract, and if two reasonable interpretations may be made, we apply the construction most favorable to the guarantor. *Silvestri v. Int'l Bank of Commerce*, No. 01-11-00921-CV (Tex. App.–Houston [1st Dist.] Feb. 7, 2013, pet. denied)(2013 Tex. App. Lexis 1151)(mem. op.), *citing Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983).

As to strict construction, *see also 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, no pet.)(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); *Abel v. Alexander Oil Co.*, No. 14-13-00105-CV (Tex. App.–Houston [14th Dist.], Dec. 4, 2014, no pet.)(2014 Tex. App. Lexis 12978)(mem. op.)(creditor precluded from recovery against a guarantor where the guaranty was limited to debts of the sole proprietorship).

The rule of strictissmi juris only applies when ordinary rules of contract construction render the parties' obligations uncertain or ambiguous. *TWI XVIII, Inc. v. Christopher S. Carroll No. 1, Ltd.*, No. 02-12-00065-CV (Tex. App.–Fort Worth, April 11, 2013, pet. denied)(2013 Tex. App. Lexis 4646)(mem. op.)(corporate guarantor was mistakenly named as the obligor on the guaranty agreement; lease correctly identified obligor and guarantor; construing lease and guaranty together, only one reasonable interpretation). *See also 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).

Practice Tip: When drafting a guaranty agreement, define Creditor, Obligor, and Guarantor carefully. Advise creditor-clients to review guaranty agreements annually to verify continued accuracy of corporate names. Precisely what creditor's extension of credit is guaranteed, and precisely what debtor's obligations are guaranteed? Who is the precise guarantor? Because of mergers, acquisitions, name changes, affiliate changes, and pro-guarantor law, be cautious. *See 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 the successor entity); *McLane Foodservice, Inc. v. Table Rock Restaurants*, 736 F.3d 375 (5th Cir. 2013)(guaranty was limited to credit extended by the original creditor and its affiliates; because plaintiff-successor was not an affiliate of the original creditor, guaranty did not apply to goods sold by plaintiff). Consider broad language when

defining parties. For example, "Creditor" includes Creditor, Inc., and its affiliates, successors, transferees, and assigns. Define Obligor and Guarantor broadly as well.

II. GUARANTY OF PAYMENT VERSUS COLLECTION

Texas law recognizes a distinction between a "guaranty of collection (or conditional guaranty)" and a "guaranty of payment (or unconditional guaranty)." *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 879-880 (Tex. App.–El Paso 2014, no pet.)(guaranty of payment; creditor not required to take action against obligor), *citing Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex. App.–Houston [14th Dist.] 1997, no pet.). 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).

The terms of a guaranty agreement determine whether the lender is required to collect from the borrower or on the collateral before looking to the guarantor to satisfy the debt. *Berry v. Encore Bank*, No. 01-14-00246-CV (Tex. App.–Houston [1st Dist.], June 2, 2015, pet. denied)(2015 Tex. App. Lexis 5551)(mem. op.)(guaranty of a $6 million loan to refurbish a yacht; bank not obligated to look to the collateral before asserting claim against guarantors).

III. CONTINUING VERSUS SPECIFIC GUARANTY

> "Texas case law recognizes that a guaranty may be continuing or specific. A 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. If the signed guaranty is illegible, plaintiff should consider attaching an affidavit proving up a good copy of the guaranty form. *See Bank of America, N.A. v. Lilly*, No. 07-11-00154-CV (Tex. App.–Amarillo, August 27, 2012, no pet.)(2012 Tex. App. Lexis 7216)(mem. op.)(court affirmed judgment for guarantor because the guaranty text was illegible; bank attempted to correct by attaching an affidavit and legible guaranty form to its appellate brief; affidavit could not be considered on appeal).

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. *See Wright v. Gateway Tire of Tex., Inc.*, No. 05-13-01409-CV (Tex. App.–Dallas, Nov. 20, 2014, no pet.)(2014 Tex. App. Lexis 12640)(mem. op.)(because defendant failed to file a verified denial that he executed the guaranty, the judge properly treated the guaranty as "fully proved" under Rule 93(7) and properly disregarded defendant's summary-judgment affidavit claiming forgery).

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 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 dism'd) (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 ref'd 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 74, 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

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. The statute of frauds is an affirmative defense to the enforcement of a contract which must be pleaded or it is waived. *Cannon v. MBCI*, No. 14-11-00895-CV (Tex. App.–Houston [14th Dist.], April 30, 2013, pet. denied)(2013 Tex. App. Lexis 5285)(mem. op.)(citing Rule 94).

C. Name Changes

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*, 376 S.W.3d 202 (Tex. App.–Houston [14th Dist.] 2012, no pet.)(guarantor liable even though name changes by creditor and obligor), *citing* Tex. Bus. Org. Code § 10.103 (Plan of Conversion); Tex. Bus. Org. 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. 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.

E. Limitations

The reader is referred to *O'Connor's CPRC Plus (2014-2015)* and other authorities as to this important defense. See pages 950-952 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). *But see Sowell v. Int'l Interests, LP*, 416 S.W.3d 593, 599 (Tex. App.–Houston [14th Dist.] 2013, pet. denied)(Tex. Prop. Code § 51.003 extended the limitations period to sue on guaranty to two years after the date of the nonjudicial foreclosure sale, which was more than four years after the guaranty claim accrued).

F. 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, no pet.)(2008 Tex. App. Lexis 880)(mem. op.)(guarantor's failure to file an accounting, or otherwise plainly and particularly describe the payment, failed to raise a fact issue on payment defense).

G. 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.

H. Promissory Estoppel

The elements of promissory estoppel are: (1) a promise; (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promise to his detriment. *See Stuart v. Summers Group, Inc.*, No. 05-12-00489-CV (Tex. App.–Dallas, Jan. 15, 2014, no pet.)(2014 Tex. App. Lexis 493)(mem. op.)(summary judgment for creditor reversed; guarantors raised fact issue on each element of promissory estoppel: (1) oral promise by creditor's employees to remove guarantors from the account after the sale of the business; (2) foreseeable reliance by creditor; and (3) substantial reliance by guarantors to their detriment). However, guaranty agreements often contain merger, integration, and other clauses that preclude reliance on oral statements. A party to a transaction may contractually agree to

waive reliance on another party's oral statements. *See Berry v. Encore Bank*, No. 01-14-00246-CV (Tex. App.–Houston [1st Dist.], June 2, 2015, pet. denied)(2015 Tex. App. Lexis 5551)(mem. op.), *citing Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011).

I. Agency

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 84 Lumber Company, L.P. v. Powers*, 393 S.W.3d 299 (Tex. App.–Houston [1st Dist.] 2012, pet. denied)(guaranty clause in capital letters just above the signature line on credit application was enforceable against individual, who signed as president); *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 488 (Tex. App.–San Antonio 2000, pet. denied)(by agreeing to "personally ... pay" obligor's delinquent account, vice-president made herself personally liable for the corporation's debt); *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). 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). The words "personally guaranty," when used in combination and in reference to outstanding debt, are not susceptible of any other meaning. *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252, 264 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). See also VII, C, Imbedded Guaranty, discussed at page 57.

J. Imbedded Guaranty

An officer or credit manager signing a "Credit Application" can be trapped by an imbedded guaranty sentence, promising to "personally guarantee the debts of the obligor." See the cases discussed in the preceding section, Agency. The document is generally titled "Credit Application" but may include only a single sentence imposing personal liability. Absent in these cases, however, is an allegation by the corporate officer that creditor deceived or defrauded, by assuring that a credit application would be forwarded, with no mention of a personal guaranty. See the dissenting opinion by Justice Lopez in *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 488 (Tex. App.–San Antonio 2000, pet. denied)(discussing strict

construction in favor of guarantors and noting that the document is missing clear indicators such as "guarantee" and a signature line for the surety to sign in her individual capacity). "The majority's opinion puts at risk the personal estates of corporate officers and employees . . . who are routinely authorized to sign credit applications in the course of business on behalf of the company, can now easily be lured into personally guaranteeing the debts of their employer no matter how weakly-worded and despite the fact that they are signing the document solely in their official capacity." *Id.* at 495.

K. Revocation

A guarantor may revoke his guaranty at any time unless that right is precluded by the language of the guaranty contract. *See First Bank of Houston v. Bradley*, 702 S.W.2d 683, 685-86 (Tex. App.–Houston [14th Dist.] 1985, no pet.), *citing Straus-Frank Co. v. Hughes*, 138 Tex. 50, 156 S.W.2d 519, 520 (1942). "Following such a revocation, the guarantor is liable only for extensions of credit before the revocation and any renewals or extensions of the indebtedness he initially guaranteed." *Id., citing Holland v. First National Bank in Dallas*, 597 S.W.2d 406, 408 (Tex. App.–Dallas 1980, writ dism'd w.o.j.). "In order to revoke a guaranty, where revocation can be made, the language employed for that purpose should be clear and explicit, and whether there has been a revocation depends on the facts of the particular case." *Whatley v. Crown Sash & Door, Inc.*, 514 S.W.2d 467, 468 (Tex. Civ. App.–Eastland 1974, writ ref'd n.r.e.)(letter from guarantor requesting future orders by signed purchase order was ineffective as a revocation of guaranty; letter did not mention the guaranty agreement).

VII. OTHER GUARANTY MATTERS

A. Waiver of Defenses

Guarantor defenses may be waived in the agreement. *See Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1 (Tex. 2014)(waiver of "any defense other than the full payment of the indebtedness" waived guarantor's right to fair market value determination after foreclosure sale, Tex. Prop. Code §51.003); *Holmes v. Graham Mortg. Corp.*, 449 S.W.3d 257, 265 (Tex. App.–Dallas 2014, pet. denied)(same).

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. Important Rule Changes

Several important rule changes, applicable to suits filed after March 1, 2013, include:

1. **Rule 47, Claims For Relief** - requires a party to plead into or out of expedited-action procedure. A party that fails to comply with this rule may not conduct discovery until the party's pleading is amended to comply.

2. **Rule 169, Expedited Actions** - requires limited discovery, prompt trial settings, and time limits for trial; applies to a suit that requests only monetary relief totaling $100,000 or less.

3. **Rule 190.2(b), Discovery Control Plan, Expedited Actions** - limits interrogatories, requests for production, and requests for admission to 15 per party, 190.2(b)(3-5); **party may request disclosure of all documents, electronic information, and tangible items, which may be used by the disclosing party to support its claims or defenses, 190.2(b)(6).** See form discovery for expedited actions: Appendix B, Sworn Account; Appendix C, Guaranty; and Appendix D, Long-Arm Jurisdiction.

4. **Rule 190.2(b)(1), Abbreviated Discovery Period** - discovery period begins when suit is filed and ends 180 days after the first discovery of any kind is served on a party.

5. **Rule 91a, Dismissal of Baseless Causes of Action** - provides method for a party to move to dismiss a cause of action that has no basis in law or fact, 91a.1; award of costs and attorney's fees to prevailing party are mandatory, 91a.7; but court may not rule on motion if respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion, at least 3 days before the hearing, 91a.5(a); if respondent amends the challenged cause at least 3 days before the hearing, the movant may, before the hearing, file a withdrawal or amended motion, 91a.5(b); an amended motion restarts the rule's time periods, 91a.5(d).

Other Matters

B. Justice Court Rule Changes

Rules of Civil Procedure 500-510 govern cases filed in Justice Court on or after August 31, 2013. Texas Supreme Court, Misc. Docket No. 13-9049. An action taken before August 31, 2013, in a case pending on August 31, 2013, that was done pursuant to any previously applicable procedure must be treated as valid. *Id. See also* Katherine Chancia and Honorable David M. Patronella, *Justice Court Practice,* this seminar, and the attached Summary Table of Contents, Justice Court Rules, Appendix G.

C. 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).

D. 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).

E. Signing of Pleadings - 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, email address, and, if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number. Rule 57.

F. Treble Damages To Sales Representatives For Unpaid Commission

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

Other Matters

G. Business Records Affidavit

See the recent changes to Tex. R. Evid. 902(10), applicable to suits filed on or after September 1, 2014, including changes to the affidavit form. Serve the affidavit and records on all parties at least 14 days before trial.

The form medical expenses affidavit was removed from Rule 902(10); it can now be found in CPRC 18.002(b-1). The affidavit is subject to a different form and procedure. The affidavit may become incontrovertible if a counter-affidavit is not filed. See next section.

H. Services Affidavit (CPRC §§ 18.001; 18.002)

Practice Tip: It can be as lethal as deemed admissions.

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.

Other Matters

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.

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). *½ Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378 (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).

C. E-mail Ineffective as Rule 11 Agreement (Caution)

Be cautious with e-mails. In *Cunningham v. Zurick Am. Ins. Co.*, 352 S.W.3d 519 (Tex. App.–Fort Worth 2011, pet. denied), an attorney e-mail did not satisfy Rule 11 requirements as there was no graphical representation of a signature (e.g. an "s/" followed by a typed name), or any other symbol or mark to denote an electronic signature. There was no evidence that the signature block was intended as a signature, noting that most email programs "allow a signature block . . . to be built into every message sent." Request that all agreements be signed by hand.

APPENDICES

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 _____, 2016.

_____
NOTARY PUBLIC

Appendix A

May 1, 2016

TO: DOE CONSTRUCTION CORPORATION, Defendant

ALL AMERICAN COMPANY vs. DOE CONSTRUCTION CORPORATION
Dallas County Court at Law #5
Our File: 17542

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

Plaintiff serves the attached discovery on Defendant.

DEFINITIONS: For clarity, "Plaintiff" means ALL AMERICAN COMPANY and "Defendant" means DOE CONSTRUCTION CORPORATION 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 $15,000 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, employer, and position. "Identify" as to a document, email, or other electronic communication means to describe the document or email, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed 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. Plaintiff will pay reasonable copying/printing costs up to $100.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's Attorney

BY: _____
MARK P. BLENDEN, Bar No. 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, Bar No. 24039148
david@blendenlawfirm.com

Appendix B-1: Form Discovery, Traditional Sworn Account for Goods and Services (Expedited Actions)

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/printing costs, to $100. 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. Documents include electronic and magnetic information and communication. Production of electronic and magnetic data, including emails, are requested in printed form. Production shall be at The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because Plaintiff will accept copies and agrees to pay reasonable copying costs, Plaintiff objects to the tender of Documents at an alternate location. Unless otherwise specified, the requested Documents are for the preceding five years.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant.

Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Please respond and produce documents to The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021. **There are no attachments pertaining to these Requests for Disclosure**.

PLAINTIFF'S INTERROGATORIES

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 factual basis for all asserted defenses.

7. State the amount and specific facts for every alleged credit, offset or claim against Plaintiff.

8. Identify all emails and electronic communication that relate to the business transactions between the parties.

9. 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.

10. Identify all documents that support Defendant's contention that the debt is not owed.

11. Describe the business transactions between Plaintiff and Defendant, including: dates, dollar amount, and general description.

12. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S REQUESTS FOR ADMISSION

Answer:

_____ 1. The account is just and true.

_____ 2. The account states the balance due Plaintiff by Defendant, after all offsets, payments, claims and credits have been allowed.

_____ 3. The facts stated in the petition are accurate, and Plaintiff is entitled to the requested relief.

_____ 4. On the dates shown in the account, Defendant purchased and received goods or services.

_____ 5. Defendant promised to pay Plaintiff for the account.

_____ 6. All prices charged by Plaintiff were agreed to by Defendant.

_____ 7. Plaintiff has fully performed, to Defendant's satisfaction, in all transactions between Plaintiff and Defendant.

_____ 8. Plaintiff made written demand upon Defendant for payment of the account more than 30 days prior to filing suit.

_____ 9. Defendant did not reply to written demands for payment of the account.

_____10. Defendant made no objection or complaint after receiving monthly account invoices.

_____11. Venue is proper in this court.

_____12. Defendant consents to this court's jurisdiction.

PLAINTIFF'S 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. All calculations relating to the balance due Plaintiff.
4. All communication to or from Defendant, including emails, relating to the Account.
5. All written or electronic communication between Defendant and any other party to this suit.
6. All emails between Plaintiff and Defendant.
7. All documents relating to every offset, credit, or claim against Plaintiff.
8. All reports of experts which may be called to testify in this cause.
9. All computations, charts, and visual aids relating to the transactions between the parties.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

May 1, 2016

TO: DOE CONSTRUCTION CORPORATION, defendant

ALL AMERICAN COMPANY vs. DOE CONSTRUCTION CORPORATION
Dallas County Court at Law #5
Our File: 17542

RE: PLAINTIFF'S 1) INTERROGATORIES; 2) REQUESTS FOR ADMISSION; 3) DOCUMENT REQUESTS; and 4) REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on defendant.

DEFINITIONS: For clarity, "plaintiff" means ALL AMERICAN COMPANY and "defendant" means DOE CONSTRUCTION CORPORATION and includes all of defendant's agents and employees. "Debt," "invoices," and "account" refer to the transactions, account, and resulting debt in the amount of $15,000.00 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, 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, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed 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. Plaintiff will pay reasonable copying/printing costs up to $100.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's Attorney

BY: _____
MARK P. BLENDEN, 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, 24039148
david@blendenlawfirm.com

Appendix B-2: Form Discovery, Debt/ Sworn Account; No reference to Goods and Services (Expedited Actions)

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/printing costs, to $100. 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. Documents include electronic and magnetic information and communication. Production of electronic and magnetic data, including emails, are requested in printed form. Production shall be at The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because Plaintiff will accept copies and agrees to pay reasonable copying costs, Plaintiff objects to the tender of Documents at an alternate location. Unless otherwise specified, the requested Documents are for the preceding five years.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant.

Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Please respond and produce documents to The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021. **There are no attachments pertaining to these Requests for Disclosure.**

PLAINTIFF'S INTERROGATORIES

1. State the amount, if any, which defendant owes plaintiff and the calculation used to determine the amount.

2. State the amount and specific facts for every alleged credit, offset or claim against plaintiff.

3. State the date and amount of every payment made by defendant to plaintiff.

4. 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.

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. State all facts that support each affirmative defense asserted by defendant.

8. Identify all documents that support defendant's contention that the debt is not owed.

9. 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.

10. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S REQUESTS FOR ADMISSION

Answer:

_____ 1. The account is just and true.

_____ 2. The account states the balance due Plaintiff by Defendant, after all offsets, payments, claims and credits have been allowed.

_____ 3. The facts stated in the petition are accurate, and Plaintiff is entitled to the requested relief.

_____ 4. Defendant is indebted to Plaintiff in at least the principal amount sued upon.

_____ 5. Defendant promised to pay Plaintiff for the account.

_____ 6. All prices charged by Plaintiff were agreed to by Defendant.

_____ 7. Plaintiff has fully performed, to Defendant's satisfaction, in all transactions between Plaintiff and Defendant.

_____ 8. Plaintiff made written demand upon Defendant for payment of the account more than 30 days prior to filing suit.

_____ 9. Defendant did not reply to written demands for payment of the account.

_____10. Defendant made no objection or complaint after receiving monthly account invoices.

_____11. Venue is proper in this court.

_____12. Defendant consents to this court's jurisdiction.

PLAINTIFF'S 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. All calculations relating to the balance due Plaintiff.
4. All communication to or from Defendant, including emails, relating to the Account.
5. All written or electronic communication between Defendant and any other party to this suit.
6. All emails between Plaintiff and Defendant.
7. All documents relating to every offset, credit, or claim against Plaintiff.
8. All reports of experts which may be called to testify in this cause.
9. All computations, charts, and visual aids relating to the transactions between the parties.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

May 1, 2016

TO: JOHN DOE, Defendant

ALL AMERICAN COMPANY
vs. DOE CONSTRUCTION CORPORATION and JOHN DOE
Dallas County Court at Law #5
Our File: 17542

RE: PLAINTIFF'S GUARANTY INTERROGATORIES; REQUESTS FOR ADMISSION; DOCUMENT REQUESTS; REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on Defendant.

DEFINITIONS: For clarity, "Plaintiff" means ALL AMERICAN COMPANY and "Defendant" means JOHN DOE and includes Defendant's agents and employees. "Obligor" refers to DOE CONSTRUCTION CORPORATION . "Goods", "Goods or Services", "Debt", "Invoices", and "Account" refer to goods or services and the resulting debt in the amount of $15,000.00 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Guaranty" means the personal guaranty agreement attached to the Petition. "Identify" as to a person means to state the person's name, address, telephone number, employer, and position. "Identify" as to a document, email, or other electronic communication means to describe the document or email, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed 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. Plaintiff will pay reasonable copying/printing costs up to $100.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's Attorney

BY: _____
MARK P. BLENDEN, Bar No. 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, Bar No. 24039148
david@blendenlawfirm.com

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/printing costs, to $100. 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. Documents include electronic and magnetic information and communication. Production of electronic and magnetic data, including emails, are requested in printed form. Production shall be at The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because Plaintiff will accept copies and agrees to pay reasonable copying costs, Plaintiff objects to the tender of Documents at an alternate location. Unless otherwise specified, the requested Documents are for the preceding five years.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant.

Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Please respond and produce documents to The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021. **There are no attachments pertaining to these Requests for Disclosure.**

PLAINTIFF'S GUARANTY INTERROGATORIES

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 specifically every reason the Defendant does not owe the debt.

4. State specifically every reason Obligor does not owe the debt.

5. If another is liable on this account, state the correct name and address of the individual or entity, and all facts supporting their liability.

6. State all facts which support your claim that Defendant is not indebted to Plaintiff as stated in the petition.

7. State all reasons why Defendant signed the Guaranty.

8. Describe all communication between Obligor and Guarantor relating to: the Guaranty; the Plaintiff; this litigation.

9. Attach or fully describe all documents that support Defendant's contention that Defendant is not indebted to Plaintiff as alleged in the petition.

10. Neither Defendant, nor Obligor has a claim, offset or credit against Plaintiff.

11. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S GUARANTY REQUESTS FOR ADMISSION

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

_____ 8. All signatures on attachments to the petition are genuine.

_____ 9. Matters stated in the documents attached to the petition are accurate.

_____ 10. Plaintiff should recover judgment as requested in its petition filed herein.

_____ 11. Neither Defendant, nor Obligor has a claim, offset or credit against Plaintiff.

_____ 12. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____ 13. Venue is proper in this court.

_____ 14. 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. All calculations relating to the balance due Plaintiff.

3. All communication to or from Defendant, including emails, relating to Guaranty or the Account.

4. All written or electronic communication between Defendant and any other party to this suit.

5. All emails between Plaintiff and Defendant.

6. All documents relating to every offset, credit, or claim against Plaintiff.

7. All reports of experts which may be called to testify in this cause.

8. All computations, charts, and visual aids relating to the transactions between the parties.

9. All Documents relating to the Guaranty and Account.

10. Obligor's books and records as they relate to Plaintiff.

11. Defendant's accounts payable records relating to Defendant's account with Plaintiff.

12. Obligor's accounts payable records relating to Defendant's account with Plaintiff.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

May 1, 2016

TO: DOE CONSTRUCTION CORPORATION, defendant

ALL AMERICAN COMPANY vs. DOE CONSTRUCTION CORPORATION
Dallas County Court at Law #5
Our File: 17542

RE: PLAINTIFF'S 1) INTERROGATORIES; 2) REQUESTS FOR ADMISSION; 3) DOCUMENT REQUESTS; and 4) REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on Defendant.

DEFINITIONS: For clarity, "Plaintiff" means ALL AMERICAN COMPANY. "You," and "Defendant" mean DOE CONSTRUCTION CORPORATION and includes all of Defendant's agents and employees. "Debt," "invoices," and "account" refer to the transactions, account, and resulting debt in the amount of $15,000.00 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to "people," person," and "persons" means to state the person's name, address, telephone number, 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, emails, electronic communication, electronic and magnetic data, and data compilation in any form. Electronic and magnetic data, including emails, are requested in printed 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. Plaintiff will pay reasonable copying/printing costs up to $100.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's Attorney

_____

MARK P. BLENDEN, Bar No. 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, Bar No. 24039148
david@blendenlawfirm.com

Appendix D - Form Discovery, Long-Arm Jurisdiction (Expedited Actions)

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/printing costs, to $100. 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. Documents include electronic and magnetic information and communication. Production of electronic and magnetic data, including emails, are requested in printed form. Production shall be at Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because Plaintiff will accept copies and agrees to pay reasonable copying costs, Plaintiff objects to the tender of Documents at an alternate location. Unless otherwise specified, the requested Documents are for the preceding five years.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant.

Pursuant to Rule 190.2(b)(6), you are requested to disclose all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. Please respond and produce documents to The Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021. **There are no attachments pertaining to these Requests for Disclosure.**

PLAINTIFF'S INTERROGATORIES

1. Identify all people with Texas addresses, with which Defendant regularly corresponds.

2. State all addresses in Texas, to which Defendant has either shipped goods, or performed services.

3. State all addresses in Texas at which Defendant has done business.

4. Describe all business transactions to which Defendant was a party, which required some action within Texas.

5. State all addresses, for the preceding 10 years, at which Defendant has received mail.

6. State the amount, if any, which Defendant owes Plaintiff and the calculation used to determine the amount.

7. State the amount and specific facts for every alleged credit, offset or claim against Plaintiff.

8. State the date and amount of every payment made by Defendant to Plaintiff.

9. Describe the business transactions between Plaintiff and Defendant, including the total dollar amount of the transactions, and general explanation of the transactions.

10. State specifically every reason why the Defendant does not owe the debt.

11. State all facts that support each affirmative defense asserted by Defendant.

12. Describe or attach to your answers all documents and electronic information that relate to each defense asserted by Defendant.

13. Identify all documents that support Defendant's contention that the debt is not owed.

14. 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.

15. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S REQUESTS FOR ADMISSION

Answer:

_____ 1. The account states the balance due Plaintiff by Defendant, after all offsets, payments, claims and credits have been allowed.

_____ 2. The facts stated in the petition are accurate, and Plaintiff is entitled to the requested relief.

_____ 3. Defendant promised to pay Plaintiff for the account.

_____ 4. All prices charged by Plaintiff were agreed to by Defendant.

_____ 5. Plaintiff has fully performed, to Defendant's satisfaction, in all transactions between Plaintiff and Defendant.

_____ 6. Venue is proper in this court.

_____ 7. Defendant consents to this court's jurisdiction.

_____ 8. Defendant contracted with a Texas resident as to a contract which was entirely or partially to be performed in Texas.

_____ 9. The contract which is the basis of the suit was performed entirely or partially in Texas.

_____ 10. Plaintiff's claims against Defendant are based on Defendant's intentional actions in Texas.

_____ 11. Plaintiff's causes of action arise out of Defendant's actions in Texas.

_____ 12. Defendant's actions establish a substantial connection between Defendant and Texas.

_____ 13. Defendant sells goods and services to Texas residents.

_____ 14. Defendant regularly accepts payments from Texas residents.

_____ 15. Defendant has agents in Texas which transact business for Defendant.

PLAINTIFF'S DOCUMENT REQUEST

1. Statements for all Texas financial accounts.
2. Tax statements for all Texas real and personal property.
3. Communication with all of Defendant's agents based in Texas.
4. All Defendant's contracts which will be performed entirely or partially in Texas.
5. All invoices and statements of account received by Defendant from Plaintiff.
6. Defendant's accounts payable records relating to Defendant's account with Plaintiff.
7. All calculations relating to the balance due Plaintiff.
8. All communication to or from Defendant, including emails, relating to the Account.
9. All written or electronic communication between Defendant and any other party to this suit.
10. All emails between Plaintiff and Defendant.
11. All documents relating to every offset, credit, or claim against Plaintiff.
12. All reports of experts which may be called to testify in this cause.
13. All computations, charts, and visual aids relating to the transactions between the parties.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

May 1, 2016

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 $101,000 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, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's attorney

BY: _____

MARK P. BLENDEN, Bar No. 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, Bar No. 24039148
david@blendenlawfirm.com

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 $100. 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 Blenden Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to $100, 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 or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant. **There are no attachments pertaining to these Requests for Disclosure**.

PLAINTIFF'S ACCOUNT INTERROGATORIES

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. Defendant owes Plaintiff the principal amount stated in the petition.

_____ 2. The account is just and true.

_____ 3. Payment of the debt is due from defendant to plaintiff.

_____ 4. The account states the principal balance due plaintiff after all offsets, payments, claims and credits have been allowed.

_____ 5. On the dates shown in the account, defendant purchased the items or services.

_____ 6. On or about the dates shown on the account, defendant received the items billed.

_____ 7. All prices charged by plaintiff were agreed to by defendant.

_____ 8. All prices charged defendant are reasonable.

_____ 9. Defendant promised to pay plaintiff for the account.

_____10. Defendant failed to pay the account.

_____11. Plaintiff made written demand upon defendant for payment of the account more than 30 days prior to filing suit.

_____12. Defendant timely received monthly account invoices.

_____13. Defendant received accurate account invoices which total the principal amount sued for.

_____14. Defendant made no objection or complaint after receiving the account invoices.

_____15. Defendant did not reply to written demands for payment of the account.

_____16. Defendant never rejected or made complaint regarding the goods or services.

_____17. Plaintiff has fully performed, to defendant's satisfaction, in all transactions between plaintiff and defendant.

_____18. The petition is entirely accurate and plaintiff is entitled to the requested relief.

_____19. Plaintiff should recover judgment as requested in the petition.

_____20. There are no documents which support any defense in this cause.

_____21. All documents attached to the petition are true copies of the original.

_____22. All signatures on attachments to the petition are genuine.

_____23. Matters stated in the documents attached to the petition are accurate.

_____24. Defendant has no offset, credit or claim against plaintiff.

_____25. The court should render judgment against defendant for the relief requested in plaintiff's most recently filed petition.

_____26. Venue is proper in this court.

_____27. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____28. Defendant consents to this court's jurisdiction.

_____29. 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.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

May 1, 2016

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 $101,000 sued upon herein. Unless otherwise noted "petition" refers to Plaintiff's Original Petition filed in this cause. "Guaranty" means the personal guaranty agreement attached to the Petition. "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, Document Requests, and Requests for Disclosure are served on Defendant. All discovery accompanied the citation and petition at the time of service upon Defendant. Note that Requests for Disclosures appear only at page 2; there is no applicable attachment.

BLENDEN ROTH LAW FIRM
Plaintiff's Attorney

BY: _____

MARK P. BLENDEN, Bar No. 02486300
mark@blendenlawfirm.com
DAVID W. ROTH, Bar No. 24039148
david@blendenlawfirm.com

Appendix F - Form Discovery, Guaranty (Not for Expedited Actions)

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 $100. 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 Roth Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to $100, 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 or material described in Rule 194.2. If this request accompanies citation, a Defendant need not respond until 50 days after service of the request upon the Defendant. **There are no attachments pertaining to these Requests for Disclosure**.

PLAINTIFF'S GUARANTY INTERROGATORIES

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

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

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

20. 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

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

_____ 15. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____ 16. Venue is proper in this court.

_____ 17. 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.

NOTE: Please respond to all Requests for Disclosure which are stated at page 2.

[Consolidated for publication]

TEXAS RULES OF CIVIL PROCEDURE
PART V. RULES OF PRACTICE IN JUSTICE COURTS (Rules 500-510)
(Misc. Docket No. 13-9049, Effective August 31, 2013)
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