

Creditors' Causes of Action

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INTRODUCTION

This article presents a practitioner's view of popular creditors' causes of action in Texas. Rule 185, Texas Rules of Civil Procedure, Suit On Account, is examined, with an emphasis on the broad scope of the Rule. Two popular fallacies are considered. Other causes of action included are: account stated, quantum meruit, money had and received, promissory notes, and guaranty.

Appendices include A) sworn account suit affidavit; B) form discovery, sworn account claim; C) form discovery, guaranty claim. The form discovery includes: interrogatories, requests for admission, requests for production, and requests for disclosure. Serving standard discovery with all collection lawsuits is efficient and often effective. Our returns of citation specifically state that defendant was served by the process server with discovery, as well as the citation and petition. This practice is recommended to overcome the "I didn't get the request for admissions" plea. For the same reason, a notice that requests for admission are also being served, appears at the end of our petitions.

This article is based on a review of Texas case law and is intended as a departure point - - not a destination. The reader is urged to read the original sources of authority. Neither this article, nor the attached forms, constitute legal advice; the reader should verify all statements with original sources. Verify accuracy and applicability of forms. No representations or warranties are given as to forms, except that they are generally used in the authors' practice.

"Rule" refers to Texas Rules of Civil Procedure. Litigants are sometimes referred to as creditor (plaintiff) and debtor (defendant). Other excellent sources include:

- Texas Collections Manual, State Bar of Texas
- Dorsaneo, Texas Litigation Guide
- Dorsaneo and Soules' Texas Codes and Rules
- O'Connor's Texas Rules * Civil Trials
- O'Connor's Annotated CPRC Plus
- O'Connor's Texas Causes of Action
- O'Connor's Texas Civil Forms
- Texas Pretrial Practice

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POP QUIZ

- 1) Probably the most difficult defense to plead. Defendant must “file with his plea an account.” What is the defense? _____
- 2) Plaintiff serves affidavit as to the amount and necessity of attorney services, and attaches detailed invoices. What must Defendant do to contest fees? _____
- 3) Creditor sues Debtor and Guarantor on sworn account and guaranty. Debtor defaults. At trial against Guarantor, what must Creditor prove? _____
- 4) What creditors’ cause of action may require no evidence at trial? _____

Answers:

- 1) Payment, Rule 95. See this article, page 10.
- 2) Promptly file and serve counter-affidavit. Otherwise, plaintiff’s affidavit is incontrovertible. Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services; See page 9.
- 3) The Guaranty, Guarantor’s signature, and the underlying account (order, delivery, reasonable/ agreed price, and balance due). See *Daredia v. Nat’l Distributions*, No. 05-04-00307-CV (Tex. App.–Dallas, April 28, 2005, pet. denied)(2005 Tex. App. Lexis 3168)(mem. op.). Reversed and rendered. See page 36.
- 4) Sworn account, Rule 185. Unless debtor files a sworn answer, a proper sworn account is self-proving and entitles creditor to judgment on the pleadings. *Airborne Freight Corp. v. CRB Mktg, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978). See page 1.

PART ONE:

SWORN ACCOUNTS

I. RULE 185

A. Broad Rule

Rule 185, Suit On Account states:

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

(emphasis added)

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

B. Allows Judgment on the Pleadings

Sworn account is a creditor's preferred cause of action. The rule has numerous advantages. Absent a sworn denial, a proper sworn account is self proving and entitles creditor to judgment on the pleadings: *Airborne Freight Corp. v. CRB Mktg, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978)(trial); *Wilson v. Browning Arms Co.*, 501 S.W. 2d 705, 706 (Tex. Civ. App.–Houston [14th Dist.] 1973 writ ref'd.) (summary judgment); *O'Brian v. Cole*, 532 S.W.2d 151, 152 (Tex. Civ. App.–Dallas 1976, no writ) (default judgment; sworn account is liquidated claim requiring no further proof of damages). A defendant who does not file a sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. See Rule 93(10), and Rule 185; *Vance v. Holloway*, 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power & Equip. Co.* 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ). It is a rare creditor's case that should not be pleaded, at least alternatively, as a sworn account. But sworn accounts are the subject of some questionable appellate decisions and fallacies.

Sworn Account

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

1. Fallacy One: That Sale of Personal Property is Required.

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 Ann. Chapter 38 and allowed recovery of attorney fees for sworn accounts. But Article 2226 was deemed penal in nature and strictly construed. *See, e.g., Meaders v. Biskamp*, 316 S.W.2d 75,78 (Tex.1958) (sworn account under Article 2226 requires sale and transfer of title to personal property; Article 2226 is penal in nature and strictly construed; contract to drill well not Article 2226 sworn account); *Van Zandt v. Ft. Worth Press*, 359 S.W.2d 893, 895 (Tex.1962)(citing *Meaders*, requires passage of title to personal property to be sworn account within Article 2226); *Langdeau v. Bouknight*, 344 S.W.2d 435, 441 (Tex. 1961) (citing *Meaders*, an Article 2226 sworn account does not include special contracts).

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

The fallacy of requiring passage of title to personal property is noted by Justice Mirabel in an excellent dissent 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).

2. Sale of Personal Property is Not Required; Cases a. Generally

The clear language of Rule 185 makes it applicable to “personal service rendered”, “labor done”, “labor or material furnished,” and that sweeping category, “business dealings between the parties.” Countless cases recognize that sale of personal property is not required for a Rule 185 sworn account. *Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(assumes without holding, that money owed as a result of fraud and deceit is sworn account; issue was sufficiency of sworn account affidavit); *Novosad v. Cunningham*, 38 S.W.3d 767 (Tex. App.–Houston [14th Dist.],

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2001, no pet.)(accounting services); *Nat'l W. Life Ins. Co. v. Acreman*, 425 S.W.2d 815 (Tex. 1968)(labor and materials to build road). *Willie v. Donovan & Watkins, Inc.*, No.01-00-01039-CV (Tex. App.–Houston [1st Dist.], April 11, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 2655) (employment agency fees); *Boodhwani v. Bartosh*, No. 03-02-0432-CV(Tex. App.–Austin, March 6, 2003, no pet.) (unpublished, 2003 Tex. App. Lexis 1907)(dental services).

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

b. Oil and Gas

Vance v. Holloway, 689 S.W.2d 403 (Tex. 1985)(sworn account suit to recover expenses on oil lease); *Harmes v. Arklatex Corp.*, 615 S.W.2d 177 (Tex.1981)(debtor liable in suit on sworn account to recover for goods and services in drilling gas well);

c. Insurance Premiums

Liberty Mut. Ins. Co. v. Garrison Contrs. 966 S.W.2d 482 (Tex.1998); *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860 (Tex. 1979); *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).

d. Freight Services

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

e. Telephone Services

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

f. Pharmaceuticals

Powells v. Nova Factor, Inc., No. 14-05-00912-CV (Tex. App.–Houston [14th Dist.], March 27, 2007, n.p.h.)(2007 Tex. App. Lexis 2331)(mem. op.)(pharmaceuticals sold to physician).

g. 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).

h. Attorney's Fees

Panditi v. Apostle, 180 S.W.3d 924 (Tex. App.–Dallas 2006, no pet.)(fees due attorney from client); *Pantaze v. Welton*, No. 05-96-00509-CV (Tex. App.–Dallas, August 31, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 6564)(litigation expenses due attorney from client);

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Wimberly v. Fritz, Byrne & Head, L.L.P., No. 03-00-00500-CV (Tex. App.–Austin, July 26, 2001, pet. dismissed by agr.)(unpublished, 2001 Tex. App. Lexis 4993); *Kahn v. Carlson*, No. 05-98-01415-CV (Tex. App.–Dallas, April 27, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2767); *Wright v. Christian & Smith*, 950 S.W.2d 411(Tex. App.–Houston [1st Dist.] 1997, no pet.).

i. 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, n.p.h.)(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).

j. Credit Cards - - Conflicting Cases

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

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

3. Fallacy Two: Sworn Account Requires Specific Account Description

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

4. 1984 Amendment to Rule 185 Negating Specificity

Rule 185 was revised in 1984 to include, "No particularization or description of the nature of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings."

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

5. Troublesome Cases Ignoring “No Particularization” Amendment

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

Other cases ignoring the “no particularization” language of Rule 185 include: *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.–Dallas 2006, no pet.)(“account must show with reasonable certainty the name, date, and charge for each item, and provide specifics or details as to how the figures were arrived at.”); *Cespedes v. Am. Express-CA*, No. 13-05-385-CV (Tex. App.–Corpus Christi, May 10, 2007, n.p.h.)(2007 Tex. App. Lexis 3555)(mem. op.)(“account must contain systematic, itemized statement of goods or services sold”); *Wimberly v. Fritz, Byrne & Head, L.L.P.*, No. 03-00-00500-CV (Tex. App.–Austin, July 26, 2001, pet. dismissed by agr.)(unpublished, 2001 Tex. App. Lexis 4993)(same); *Foley v. Sears Roebuck & Co.*, No. 14-92-00932-CV(Tex. App.–Houston [14th Dist.] 1993, no writ)(unpublished, 1993 Tex. App. Lexis 1885) (account must identify nature of items, date of sale, and related charges); *Powers v. Adams*, 2 S.W.3d 496, 499 (Tex. App.–Houston [14th Dist.] 1999, no pet.)(creditor’s petition “complied with the requirements of the rule [185],” as it included itemized monthly statements of legal services rendered).

II. PLEADINGS

A. Petition

Form of Pleading

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

Business Dealings Account: Plaintiff sues on an account founded on business dealings between the parties and for which a systematic record has been kept.

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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

Records attached to the petition may themselves create issues. See *Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780 (Tex. 1978)(summary judgment reversed because invoice contained name of debtor and a third party creating a fact issue as to responsible party); *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).

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

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 . . ."

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Early cases required debtor to precisely plead, “each and every item is not just or true or that some specified item is not just and true.” See *Red Top Products, Inc. v. T & R Chemicals, Inc.*, 619 S.W.2d 562, 563 (Tex. Civ. App. - - San Antonio, 1981, no writ). However, Rule 185 was amended in 1984 to allow pleading as required in any other suit. Butterworth, Texas Rules of Civil Procedure 70 (1984). Nearly any sworn denial is now sufficient. However, a sworn general denial is insufficient to satisfy the requirements of Rule 185 or 93(10); *Huddleston v. Case Power & Equip. Co.*, 748 S.W. 2d 102, 103 (Tex. App.–Dallas 1985, no writ). A sworn response to a creditor’s summary judgment motion is insufficient. A sworn answer is required. *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.–Houston [14th Dist.] 1988, writ denied).

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).

2. Affirmative Defenses - - Allowed Without Sworn Denial

Without a Rule 185 sworn denial of account, debtor may present defenses not inconsistent with accuracy of the account. These defenses are often referred to as affirmative defenses and most are referenced in Rule 93, Verified Pleas; Rule 94, Affirmative Defenses; and Rule 95, Payment. In *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 863 (Tex. 1979), the court noted that defenses of failure of consideration and statute of limitations could be raised in the absence of a verified denial. See also *Schneider v. A-K Tex. Venture Capital, L.C.*, No. 14-00-00377-CV (Tex. App.–Houston [14th Dist.], April 12, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2439)(defenses of confession and avoidance available, in absence of proper denial of sworn account). The safest debtor practice is to file a verified denial and to plead affirmative defenses, if the facts allow.

III. ELEMENTS

A. Generally

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

B. Order as Additional Element

The court apparently adds an element in *Wright v. Christian & Smith*, 950 S.W.2d 411, 413 (Tex. App.–Houston [1st Dist.]1997, no writ). In this attorney fee case, the court recognizes the three familiar elements, above, citing *Thorp v. Adair & Meyers*, 809 S.W.2d 306, 307 (Tex.

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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

See *Arrellano v. J&K Garment Restoration Co.*, No. 14-05-00818-CV (Tex. App.–Houston [14th Dist.] December 28, 2006, no pet.)(2006 Tex. App. Lexis 11072)(mem. op.)(no evidence that prices charged were usual, customary, and reasonable; judgment reversed and rendered that creditor take nothing on its suit on account).

Evidence as to usual, customary or reasonable prices is not relevant when there is a contract and the contract price should be proven. If the account is for insurance premiums, the policies should be admitted in evidence. *Bluebonnet Express, Inc. v. Employers Ins. Of Wausau*, 651 S.W.2d 345, 354 (Tex. App.–Houston [14th Dist.] 1983, writ ref’d n.r.e.)(reversed and rendered against creditor; no proof that premiums charged were in accord with the express contracts of insurance)(disapproved on other grounds *Horrocks v. Texas Dept. of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). Likewise, if a tariff is relevant to the transaction, prove the tariff, as it generally supercedes prior contractual arrangements under the “filed rate doctrine.” See, e.g., *Kanuco Tech. Corp. v. Worldcom Network Servs.* 979 S.W.2d 368 (Tex. App.–Houston [14th Dist.] 1998, no pet.)(telephone service; charges subject to tariff); *Mincron SBC Corp. v. Worldcom Inc.*, 994 S.W.2d 785 (Tex. App.–Houston [1st Dist.] 1999, no pet.)(telephone service).

IV. PROOF

A. Business Records Affidavit

Creditor’s cases are based on business records. Summary judgment motions and trial preparation should customarily include a business records affidavit, Texas Rules of Evidence 902(10). The affidavit allows the nearly automatic admission of documents, which usually includes the statement of account (account summary), and invoices. Such records may satisfy creditor’s burden of proof, *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 prove the invoices are business records may be fatal to a sworn account claim. *Siegler v. Williams*, 658 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1983,

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no writ). Computer print-outs may be admitted as business records. *Voss v. Southwestern Bell Tel. Co.*, 610 S.W.2d 537 (Tex. Civ. App.–Houston [1st Dist.] 1980 writ ref'd n.r.e.). A 1975 statement of account for insurance premiums, prepared at credit manager's request, which accrued in 1972 and 1973 was not an admissible business record. *Carr Well Service, Inc. v. Liberty Mut. Ins. Co.*, 587 S.W.2d 62 (Tex. Civ. App.–El Paso, 1979, no writ)

B. Services Affidavit

Civil Practice and Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Routinely used by personal injury attorneys, it is rarely employed by commercial litigators. For causes of action commenced before September 1, 2007, if one files and serves the affidavit on the other parties at least 30 days before trial, its contents are incontrovertible, unless a counter-affidavit is timely filed and served. For causes of action commenced on or after September 1, 2007, the filing requirement is omitted. *See* Act of June 15, 2007, 80th Leg., R.S., Ch. 978, CPRC 18.001, and O'CONNOR'S CPRC Plus (2007-2008), pages 99-100. The services affidavit 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 services affidavit cannot be used in sworn account actions.** However, after a verified answer to a sworn account, one could amend, abandon the sworn account action, and proceed to trial on alternate claims.

C. Discovery With Petition

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

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

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

V. DEFENSES

A. Negating Elements

A debtor's first defense is to negate one of the sworn account elements (see "Elements").

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

B. Stranger to the Transaction

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

C. Payment

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

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).

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

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VI. MOTIONS FOR SUMMARY JUDGMENT

A. Generally

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

B. Specificity of Motion

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

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

C. Obtain Ruling on Objections

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

D. Summary Judgment Evidence

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.

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

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ref'd n.r.e.)(affidavit of plaintiff's president stating, "I have personal knowledge of all facts," held sufficient).

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.

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

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

“ . . . [I]t is axiomatic that legal conclusions are insufficient to raise issues of fact . . .” *CGM Valve & Gauge Co., Inc. v. Energy Valve, Inc.* 698 S.W.2d 253, 254 (Tex. App.–Houston [14th Dist.] 1985, no writ).

E. Other Summary Judgment Cases

Liberty Mut. Ins. Co. v. Garrison Contrs. 966 S.W.2d 482 (Tex.1998)(debtor raised fact issue through affidavits asserting that creditor's agreement misrepresented amount of retrospective premiums); *Boodhwani v. Bartosh*, No. 03-02-0432-CV(Tex. App.–Austin, March 6, 2003, no pet.)(2003 Tex. App. Lexis 1907)(mem. op.)(debtor filed no sworn answer; sworn response to creditor's motion for summary judgment therefore ineffectual); *Rush v. Montgomery Ward*, 757

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S.W.2d 521, 523, (Tex. App.–Houston [14th Dist.] 1988 writ denied (same); *Grant-Brooks v. Transamerica Bank, N.A.*, No. 05-02-00754-CV (Tex. App.–Dallas, January 31, 2003, no pet.)(2003 Tex. App. Lexis 990)(mem. op.)(summary judgment affidavit from creditor’s legal account specialist was sufficient though sale was apparently by a third party; debtor waived objections by failing to obtain ruling).

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

Account Stated

PART TWO:

ACCOUNT STATED

I. DEFINITION OF ACCOUNT STATED

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

II. ELEMENTS

The elements of an account stated are:

[1]. . . transactions between the parties which give rise to an indebtedness of one to the other; [2] an agreement, express or implied, between the parties fixing the amount due; and [3] a promise, express or implied, by the one to be charged, to pay such indebtedness. *Arnold D. Kamen & Co. v. Young*, 466 S.W.2d 381, 388 (Tex. Civ. App.–Dallas 1971, writ ref'd n.r.e.); *Central Nat. Bank of San Angelo v. Cox* 96 S.W.2d 746 (Tex. Civ. App.–Austin 1936 writ dismiss'd); citing *Glasco v. Frazer* 225 S.W.2d 633,635 (Tex. App.–Dallas 1949, writ dismiss'd).

III. PLEADING

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

IV. PROOF

Creditor must prove the elements of account stated. 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).

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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, were 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.).

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

A letter which did not contain a specific amount of the debt was insufficient as account stated in *Paine v. Moore*, 464 S.W.2d 477, 480 (Tex. Civ. App.–Tyler 1971). An account stated requires an absolute acknowledgment or admission of a sum certain by the debtor to the creditor, *Id.*, citing *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920).

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

V. DEFENSES

A. Attack Elements

Of course, if debtor persuades the fact finder that plaintiff has not met his burden of proof as to all elements, such is an effective defense. As indicated in the preceding section, often the “weak link” is the element of 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 which was never paid, without more, was insufficient to establish account stated).

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

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presumptions are subject to be overcome by competent proof. It does not of itself amount to an obligatory agreement - - a contract upon a new consideration, having all the sanctity of a written agreement. Its purpose is but to reach an agreed balance between the parties whereby the particular items may be eliminated. When that is done, its office is performed and the character of prima facie correctness in the balance is attained.

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

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

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.), citing *Oxford Fin. Co., Inc. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.–Austin 1991, writ denied).

I. QUANTUM MERUIT

A. Definition and Elements

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

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

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

See also *Speck v. First Evangelical Lutheran Church of Houston*, No. 01-06-00638-CV (Tex. App.–Houston [1st Dist.] May 31, 2007, n.p.h.)(2007 Tex. App. Lexis 4308)(same). 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).

Quantum Meruit

B. Expectation of Payment or Deal As Element

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

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, n.p.h.). Compare *Sanders* with *Copps v. Gardern Appraisal Group, Inc.*, No. 04-07-00070-CV (Tex. App.–San Antonio, October 31, 2007, n.p.h.)(2007 Tex. App. Lexis 8636)(mem. op.)(judgment on quantum meruit affirmed where appraiser, after being contacted by a third party, sought payment directly from the homeowner).

D. Other Restrictions

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). The rationale is that parties should be bound by their express agreements. *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*, No. 14-03-00538-CV (Tex. App.–Houston [14th Dist.], April 27, 2006, pet. filed)(2006 Tex. App. Lexis 3668)(mem. op.), citing *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000).

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. The only Texas cases that have permitted a *breaching* plaintiff to recover in quantum meruit have involved building or construction contracts. *Id.* “Recovery in quantum meruit is based on equity. It is well-settled that a party seeking an equitable remedy must do equity and come to court with clean hands (citations omitted).” *Id.* at 938.

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).

Quantum Meruit

As to partial performance by attorney, *see 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); *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006)(intricate discussion of unconscionable termination provision in fee agreement).

A party may plead alternatively for relief under both contract and quasi-contract theories. But such pleading does not defeat the effect of an arbitration clause that broadly covers all disputes that arise out of the underlying agreement. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005).

E. Recent Cases

1) Attorney-plaintiff waived quantum meruit claim against client, because the claim was neither submitted to the jury, nor conclusively established. Reversed and rendered as to quantum meruit recovery, affirmed as to attorney's debt claim, reversed and remanded as to client's DTPA counterclaim. *Wohlfahrt v. Holloway*, 172 S.W.3d 630 (Tex. App.–Houston[14th Dist.] 2005, pet. denied)(unpublished, 2005 Tex. App. Lexis 4215).

2) Jury questions:

“Where equitable relief, such as quantum meruit, is claimed, a trial court must first determine whether any contested fact issues exist that are not established as a matter of law and must therefore be decided by a jury (if requested)...Once any such necessary factual disputes have been resolved, the weighing of all equitable considerations (such as whether the defendant has been unjustly enriched, the plaintiff would be unjustly penalized if the defendant retained the benefits of partial performance without paying for them, and the plaintiff had “unclean hands”) and the ultimate decision of how much, if any, equitable relief should be awarded, must be determined by the trial court. . . .” *Hudson v. Cooper*, 162 S.W.3d 685, 688 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

3) Limitations:

Unjust enrichment claims are governed by the two-year statute of limitations in CPRC § 16.003. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007). “The most logical reading of sections 16.003 and 16.004 is to treat “debt” actions under section 16.004 as breach-of-contract actions that fall under the four-year statute of limitations for such claims, . . . while construing the two-year statute’s reference to actions for ‘taking or detaining the personal property of another’ as applicable to extra-contractual actions for unjust enrichment.” *Id.* at 870. *Of questionable authority, see Quigley v. Bennett*, 256 S.W.3d 356 (Tex. App.–San Antonio 2008, n.p.h.)(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 (2007-2008) and other authorities as to this important defense. See pages 82-84 where sixteen debt collection limitations periods are summarized.

Money Had and Received

II. MONEY HAD AND RECEIVED

A. Definition and Elements

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

“All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him.” *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951). The court explains:

A cause of action for money had and received is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry whether the defendant holds money which belongs to the plaintiff, citing *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859, 54 Sup. Ct. 443; *Staats*, 243 S.W.2d at 687-688.

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

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

B. Pleading

An allegation that debtor received money belonging to creditor which should be returned is an allegation of money had and received. *Zwank v. Kemper*, No. 07-01-0400-CV (Tex. App.–Amarillo, August 29, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 6508). Alleging facts of the transaction sufficiently informed debtor that he was alleged to hold money belonging to creditor. *Staats* 243 S.W.2d 686, 688. In defending against such a claim, a defendant may present any facts and raise any defenses that would deny the claimant's right or show that the claimant should not recover. *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162 (Tex. 2007)(per curiam), citing *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007)(per curiam).

Money Had and Received

C. Cases

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

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

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

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

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

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

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

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

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

9) **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).

11) **Misapplication of Mortgage Payment:** Lender's misapplication of a payment

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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).

12) **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).

13) **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.).

14) **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.).

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

D. Attorney's Fees

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

Promissory Note

PART FOUR: PROMISSORY NOTE

I. DEFINITIONS AND TERMS

A. Promissory Note

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

B. Negotiability

A negotiable instrument means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain: (A) an undertaking or power to give, maintain, or protect collateral to secure payment; (B) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or (C) a waiver of the benefit of any law intended for the advantage or protection of an obligor. Tex. Bus. & Com. Code § 3.104. *See In re GE Capital Corp.*, 203 S.W.3d 314 (Tex. 2006)(per curiam)(mandamus relief granted to enforce conspicuous jury waiver provision in note).

More simply put, “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 Ann. § 3.104 (Vernon 1994 & Supp. 2002).

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). *See, e.g., NAB Asset Venture III, L.P. v. John O’Brien & Assoc.*, No. 05-96-01453-CV (Tex. App.–Dallas February 23, 1999, pet. denied)(unpublished, 1999 Tex. App. Lexis 1302)(holding that line-of-credit notes, which did not contain an order or promise to pay a sum certain, were not negotiable instruments).

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C. Negotiation

Negotiation means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder. Tex. Bus. & Com. Code § 3.201(a). Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. Tex. Bus. & Com. Code § 3.201(b).

D. 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).

E. 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).

F. Bearer

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

II. ELEMENTS OF SUIT ON NOTE

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

III. PLEADINGS

A. Petition

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

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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.

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.

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." 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); *Miller v. University Sav. Assoc.*, 858 S.W.2d 33, 35 (Tex. App.-Houston [14th Dist.] 1993, writ denied)(proof of notice of intent to accelerate a note was waived by guarantor's failure to specifically deny creditor's Rule 54 pleading: "all conditions precedent have been performed or have occurred."); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.-Eastland 2006, no pet.) (creditor pleaded 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). If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity. Tex. Bus. & Com. Code §3.308.

3. Payment

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

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plainly and particularly described in the plea as to give the plaintiff full notice.

4. Conditions Precedent

If plaintiff pleads that all conditions precedent have been performed or have occurred, defendant should itemize and specifically deny all contested conditions. *See Hill v. Thompson & Knight*, 756 S.W.2d 824, 826 (Tex. App.–Dallas 1998, no writ)(defendant's denial of "all conditions precedent" insufficient). One commentator suggests that a Rule 54 denial be verified, though Rule 54 does not expressly require verification. Michol O'Connor & Byron P. Davis, *O'Connor's Texas Rules - Civil Trials 2007* § 6.1, at 192 (2007). However, denial of some conditions precedent could be within Rule 93's verified denial requirement. For example, denial that notice and proof of loss was given or denial that claim for damage was given, must be verified per Rule 93(12).

IV. EVIDENTIARY ISSUES

A. Summary Judgment

To prevail on a motion for summary judgment, a plaintiff seeking to enforce payment under the note must establish: (1) the instrument in question; (2) that the party sued on the instrument signed the instrument; (3) that the plaintiff is the owner and holder of the note; and (4) that a certain balance is due and owing. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio April 20, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 2964); *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 522 (Tex. App.–Dallas 1994, no writ); *Scott v. Commercial Servs. of Perry, Inc.*, 121 S.W.3d 26, 29 (Tex. App.–Tyler 2003, pet denied); *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.–Houston [14th Dist] 1994, no writ). But, an affidavit stating that the, "principal balance [on a \$400,000 note], plus accrued interest and charges through March 31, 2004, . . . [is] . . . \$ 215,741.82," was conclusory; respondent's objection should have been sustained; summary judgment reversed. *Fairbank v. First Am. Bank*, No. 05-06-00005-CV (Tex. App.–Dallas, August 7, 2007, n.p.h.)(2007 Tex. App. Lexis 6228)(mem. op.).

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 dismissed w.o.j.)(summary judgment for holder affirmed where a photocopy of a note, attached to an affidavit, in which the affiant swore that the photocopy was a true and correct copy of the original, that the affiant was the holder of the note, and that a balance was due in the amount stated).

C. Proof of Ownership

Regarding the issue of ownership, testimony in an affidavit that a particular person or entity owns the note is generally sufficient, even in the absence of supporting documentation, if there is no controverting summary judgment evidence. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio April 20, 2005, no pet.)(unpublished, 2005 Tex.

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App. Lexis 2964), citing *Zaergas v. Bevan*, 652 S.W.2d 368, 369, 26 Tex. Sup. Ct. J. 455 (Tex. 1983) In *Docken*, 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).

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

D. Lost Note

A person who is not in possession of an instrument is entitled to enforce the instrument if: (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. Tex. Bus. & Com. Code § 3.309(a). A person seeking enforcement of an instrument under Subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. Tex. Bus. & Com. Code § 3.309(b). *See generally* *Briscoe v. Goodmark Corp.*, 130 S.W.3d 160 (Tex. App.–El Paso 2003, no pet.)(holding that the notes could be enforced without the originals, because the creditors established that they were the owners, that the original notes were lost, the reason for their inability to produce them, and copies of the notes were admitted into evidence).

E. Proof of the Balance Due

To collect on a promissory note, the plaintiff must prove that a balance is due and owing. *See* *Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 678 (Tex. App.–Austin 2000, pet. denied)(in addition to establishing that the principal on the notes remained unpaid, creditor must establish a certain balance was owing on the notes); *Bailey, Vaught, Robertson & Co. v. Remington Invs.*, 888 S.W.2d 860, 864 (Tex. App.–Dallas 1994, no writ (to recover on the note, creditor had to establish a sum certain due on the note). Courts do not usually require the movant to file detailed proof reflecting calculations of the balance due on a note in order to support a motion for summary judgment. *Obasi v. Univ. of Okla. Health Sci. Ctr.*, No. 04-04-00016-CV (Tex. App.– San Antonio, October 27, 2004, pet. denied)(2004 Tex. App. Lexis 9435)(mem. op.), *citing* Timothy Patton, *Summary Judgments in Texas*, § 9.06(2)(e) (3rd ed. 2002). Generally, an affidavit, based on personal knowledge, which identifies an attached copy of the actual note as being true and correct, the amount of the principal and interest owing on the date of default, and the interest rate accruing from the date of default is considered sufficient proof of the amount owing on a note. *Id.* *But see*, *Fairbank v. First Am. Bank*, No. 05-06-00005-CV (Tex. App.–Dallas, August 7, 2007, n.p.h.)(2007 Tex. App. Lexis 6228)(mem. op.)(summary judgment affidavit that did not

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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, was not competent summary judgment evidence).

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

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); *Pinkston v. Diversified Fin. Sys., L.P.*, NO. 07-99-0489-CV (Tex. App.–Amarillo 2000, pet. denied)(2000 Tex. App. LEXIS 6962). See also *Bailey, Vaught, Robertson & Co. v. Remington Invs*, 888 S.W.2d 860, 866 (Tex. App.–Dallas 1994, no writ)("reasonable" rate of interest applied to a note when interest is based on the no-longer-published prime rate of a defunct financial institution).

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

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V. ACCELERATION & NOTICE

A. Generally

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). "The note holder must also notify the maker of his intent to accelerate and of the acceleration, absent contractual waiver of those duties of notice." *Price v. Bustamante*, NO. 01-98-00881-CV (Tex. App.-Houston [1st Dist.] 2001, pet. denied)(unpublished, 2001 Tex. App. LEXIS 5251); *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892 (Tex. 1991)

B. 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).

C. Notice of Intent to Accelerate

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

D. Notice of Acceleration

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

E. Waiver

Presentment and notice of dishonor can be waived, see Tex. Bus. & Com. Code § 3.504. Obtaining effective waiver of 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), holding "that a 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

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words, is effective to waive presentment and notice of acceleration. *Id.* See, e.g., *Real Estate Exchange, Inc. v. Bacci*, 676 S.W.2d 440, 441 (Tex. App.–Houston [1st Dist.] 1984, no writ)(holder "shall have the option without demand or notice to the maker . . . to declare this note immediately due") (citation omitted) "Likewise, a waiver of 'notice of intent to accelerate' is effective to waive that right" (citations omitted) *Id.* at 894. "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. We disapprove cases that have reached contrary results" (citation omitted) *Shumway v. Horizon Credit Corp.*, 801 S.W.2d at 894.

VI. DEFENSES

A. Limitations

Avoid limitations issues. Sue and serve defendants promptly. It is perhaps best to practice as though limitations is four years, though it is generally longer.

The reader is referred to O'CONNOR'S CPRC Plus (2007-2008) and other authorities as to this important defense. See pages 82-84 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). A suit to enforce a demand note must generally be made within six years after demand. If no demand for payment is made, an action to enforce the demand note is generally barred if neither principal or interest on the note has been paid for a continuous period of 10 years. Tex. Bus. & Com. Code § 3.118(b).

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 1986 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).

B. Payment

When a defendant shall desire to prove payment, he shall file with his plea an accounting 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. 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

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since the execution of the note and its endorsement were not in issue, and since the burden was upon maker to establish payments on the note, the trial court did not err in overruling maker's special exception which would have required the payee to show what payments had been made and when). Rule 95 also bars payment evidence. *See De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.–Houston [14th Dist.], February 7, 2008, n.p.h)(2008 Tex. App. Lexis 880)(mem. op.)(improperly pleaded payment defense to a creditor's summary judgment motion).

C. Agency

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

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

Former section 3.403 directed courts to look to the instrument to determine representative capacity. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 612-13. (Tex. App.–Houston [1st Dist.] 2004, no pet.), citing Acts of September 1, 1967, 60th Leg, R.S. ch. 785, 1967

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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 Suttles’s signature was made on behalf of TS-Clare. *Id.* at 612. There is no requirement that the principal be identified in the body of the note. *Id.* 3.402(b)(1) merely requires that the principal be identified “in the instrument.” *Id.*, citing Tex. Bus. & Com. Code Ann. § 3.402(b)(1).

In *Savitch v. Southwestern Bell Yellow Pages, Inc.*, No. 2-04-257-CV (Tex. App.–Fort Worth, August 4, 2005, no pet.)(2005 Tex. App. Lexis 6215), the court reversed judgment against the treasurer individually because the original parties did not intend for her to be personally liable (citing Tex. Bus. & Com. Code Ann. § 3.402(b)(2)), evidenced by the fact that the treasurer refused to sign the first draft of the note, which named her as maker. If an issue as to agency signature arises, review Tex. Bus. & Com. Code § 3.402 and comments carefully, as the statute resolves many agency signature issues.

D. Fraud in the Inducement

1. Generally

“A negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon.” *Town North Nat’l Bank v. 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 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

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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 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 and is not a defense to a note).

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").

PART FIVE:

GUARANTY

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 dismissed.); 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.

II. GUARANTY OF PAYMENT VERSUS COLLECTION

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

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

Dirt Arresters, Inc. v. H.C. Rental Properties, Inc., No. 05-98-00030-CV (Tex. App.–Dallas 2000, no writ) (unpublished, 2000 Tex. App. Lexis 968)(judgment against guarantor reversed and rendered; guaranty of collection with no proof of action against

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obligor). See *Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.–Texarkana 2007, n.p.h.)(under guaranty of payment, holder properly sued guarantors without joining maker of note). See also Tex. Bus. & Com. Code § 3.419 as to guaranty of collection versus guaranty of payment.

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, n.p.h.)(2007 Tex. App. Lexis 1151)(modification of a note did not increase the amount owed by guarantors on a specific guaranty)(citations omitted).

IV. PLEADING

A. Petition

A petition seeking recovery based on a guaranty must allege: 1) the existence and ownership of the guaranty, 2) performance of the underlying contract by the holder, 3) the occurrence of the conditions upon which liability is based, and 4) the failure or refusal to perform the promise by the guarantor. *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421, 424 (Tex. App.–Dallas 2004, no writ) citing *Wiman v. Tomaszewicz*, 877 S.W.2d 1,8 (Tex. App.–Dallas 1994, no writ).

Plaintiff should plead that defendant signed the guaranty and attach it to the petition. The guaranty is fully proven if a verified denial of signature is not filed pursuant to Rule 93(7). Plaintiff should also plead that all conditions precedent have occurred pursuant to Rule 54.

B. Answer

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

Guaranty

V. ELEMENTS

A. Generally

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 based on failure to prove 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*, 50 Tex. Sup. J. 830 (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.*

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 874, 877-78 (Tex. 1976)(guarantor who agreed to be primarily, jointly, severally and unconditionally liable under absolute guaranty, held liable though maker’s signature forged on note).

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B. Statute of Frauds

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

C. Change of Obligor

If the obligor changes its name, it is creditor's burden to prove that fact. A guaranty of the debt of Shanbrooke does not guaranty the debt of SEI, unless creditor proves that they are the same entity. *SEI Business Systems Inc. et al v. Bank One Texas*, 803 S.W.2d 838, 841 (Tex. App.–Dallas 1991, no writ).

D. Agency Signature

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 outstanding[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. "The fact that parties provide conflicting interpretations does not create an ambiguity...For an ambiguity to exist, both interpretations must be reasonable." *Id.* at 258. The court found that the guaranty clearly bound guarantor personally. *See also Smith v. Patrick W.Y. Tam Trust*, 235 S.W.3d 819, 823-824 (Tex. App.–Dallas 2007, pet. granted)(guarantor individually liable though she placed her corporate title after her signature; guaranty named her as guarantor); *Austin Hardwoods v. Vanden Berghe*, 917 S.W.2d 320 (Tex. App.–El Paso 1995, writ denied) (individual guarantor liable, though guaranty signed as vice-president).

E. Enhancement of Risk (Material Alteration)

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

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

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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. *Attayi*, 745 S.W.2d at 944.

F. Limitations

The reader is referred to O'CONNOR'S CPRC Plus (2007-2008) and other authorities as to this important defense. See pages 82-84 where sixteen debt collection limitations periods are summarized. See *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 on a debt as an affirmative defense; as the guarantors "unconditionally and irrevocably" guaranteed "the prompt and complete payment" of the debt, the claim against the guarantors accrued on the date that the obligor defaulted on the note).

G. Payment

The pleading requirement for payment [Rule 95] applies equally to direct payors and to guarantors and sureties of underlying debts. See *De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.–Houston [14th Dist.], February 7, 2008, n.p.h)(2008 Tex. App. Lexis 880)(mem. op.)(guarantor's failure to file an accounting, or otherwise plainly and particularly describe the payment, failed to raise a fact issue on payment defense sufficient to defeat summary judgment).

H. Other Guaranty Matters

- 1) Jury waiver in commercial lease was binding on guarantors, even though guaranty did not contain jury waiver clause. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004).
- 2) 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); *Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.–Texarkana 2007, n.p.h.)(same).
- 3) 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. filed)(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.

PART SIX:

OTHER MATTERS

I. CASES

A. Attorney's Fees

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.

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, n.p.h.)(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).

II. STATUTES

A. Justice Court Jurisdiction

The justice court has original jurisdiction of civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than \$10,000, exclusive of interest. Tex. Gov. Code § 27.031.

B. Pleading Requirements

In a civil action filed in district court or 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. *See* Act of April 27, 2007, Tex. S.B. 699, 80th Leg. (2007) and CPRC § 30.014. Additionally, 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.

Appendices

- A) Sworn Account Suit Affidavit
- B) Sworn Account Discovery
- C) Guaranty Discovery

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 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 \$5,000.00
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 _____, 2008.

NOTARY PUBLIC

12345
A624

July 20, 2008

TO: ABC, Inc., defendant

All American Company vs. ABC, Inc.
Dallas County Court at Law Number 1
Cause Number: CC-09-00000-A
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 \$5000 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, and employer and position. "Identify" as to a document means to describe the document, and identify its author, recipient, and custodian.

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

SERVICE CERTIFICATE AND SIGNATURE

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

THE BLENDE LAW FIRM

BY: 

MARK P. BLENDE
Bar No. 02486300
ATTORNEY FOR PLAINTIFF

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

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

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

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

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

PLAINTIFF'S ACCOUNT INTERROGATORIES

NOTE: Please read cover letter before proceeding.

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

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

PLAINTIFF'S ACCOUNT REQUESTS FOR ADMISSION

Answer:

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

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

DOCUMENT REQUEST

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

11. All assumed name certificates filed by defendant during the preceding ten years.
12. All documents requesting or constituting a name change of the defendant or any other defendant in this action.
13. All balance sheets and income statements submitted to any creditor or prospective creditor within one year of commencement of this account.
14. All credit applications submitted to any creditor or prospective creditor within one year of commencement of this account.
15. All applications for any license, permit, or certificate together with all licenses, permits or certificates held, or owned by defendant, or any agent thereof.

[Consolidated for publication]

July 20, 2008

TO: Gary Guarantor

All American Company vs. ABC, Inc. and Gary Guarantor
Dallas County Court at Law #1
Our File: 12345

RE: PLAINTIFF'S ACCOUNT 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 \$5000 sued upon herein. Unless otherwise noted "petition" refers to Plaintiff's Original Petition filed in this cause. "Attach" requests the attachment to your answers, of described documents.

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

SERVICE CERTIFICATE AND SIGNATURE

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

THE BLENDEN LAW FIRM
Plaintiff's Attorney

BY: 
MARK P. BLENDEN
Bar No. 02486300

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PLAINTIFF'S GUARANTY INTERROGATORIES

NOTE: Please read cover letter before proceeding.

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

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

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

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

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

PLAINTIFF'S GUARANTY REQUESTS FOR ADMISSION

NOTE: Please read cover letter before answering these requests.

_____ 1. Defendant signed the guaranty.

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

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

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

_____ 5. Defendant failed to pay plaintiff as promised.

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

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

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

_____ 9. The statements in the petition are true.

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

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

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

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

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

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

_____ 16. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.

_____ 17. Venue is proper in this court.

_____ 18. The court has jurisdiction over defendant and the subject matter of this suit.

DOCUMENT REQUEST

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