No. 10-20634

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WESTLAKE PETROCHEMICALS, L.L.C.,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED POLYCHEM, INC.,
and LYNNE VAN DER WALL,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR APPELLANTS-CROSS-APPELLEES UNITED POLYCHEM, INC. and LYNNE VAN DER WALL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants-Cross-Appellees United Polychem, Inc. and Lynne Van Der Wall respectfully request oral argument. This appeal involves a $30 million contract and a $6.3 million judgment. Given the magnitude of the judgment, the case is of the utmost importance to the parties, particularly Van Der Wall, who the district court found to be personally liable for the entire judgment based on its legal construction of a guaranty agreement he executed while Westlake and United Polychem were negotiating over credit terms intended to facilitate the transaction.

More importantly, conducting argument would meaningfully assist the Court in resolving the appeal. The commercial transaction underlying the case is not a routine one, and the district court presided over a trial lasting nearly two weeks. While the basic principles of contract law are familiar, their application to these facts is complex, and the Court would benefit from the opportunity to explore the issues involved and sharpen the points of disagreement with counsel for the parties.

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JURISDICTIONAL STATEMENT

Because United Polychem, Inc. ("UPC"), Lynne Van Der Wall and Westlake Petrochemicals L.L.C. are citizens of different states and the amount in controversy in this case exceeds $75,000, the district court had subject matter jurisdiction under 28 U.S.C. § 1332(a)(1). R 27-38. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is taken from the district court's amended final judgment, entered on November 18, 2010, disposing of the entire action and all claims and counterclaims. R.E. 6 (R. 5381-98). UPC's timely notice of appeal was filed on September 16, 2010. R.E. 2 (R. 1269-71). Lynne Van Der Wall's notice of appeal was filed on May 31, 2011, after the district court granted his motion for an extension of time to appeal under FED. R. APP. P. 4(a)(5)(A)(ii). R.E. 3-4.[1]

[1] Van Der Wall's notice of appeal and the trial court's order granting an extension are not included in the record on appeal prepared by the district court clerk. Trial exhibits and the transcripts of the testimony of two witnesses presented by deposition (Mark Selawski and Michael Greenberg) were also omitted. Following the instruction of this Court's clerk and pursuant to agreement with Westlake counsel, UPC's counsel submitted these items to this Court for supplemental inclusion in the appellate record under FED. R. APP. P. 10(e)(2)(A). Citations to "Selawski __" and "Greenberg __" are to the specified pages in the compilation of deposition transcript excerpts for these witnesses. Citations to "Pl Exh. __" and "Def. Exh. __" are to the specified trial exhibits.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a sales contract is void for lack of mutuality where the seller unilaterally reserves the right not to deliver by conditioning delivery on advance approval and continuous reassessment of the buyer's credit.

2. Whether Texas's general and UCC statutes of frauds preclude enforcement of an oral sales agreement where the seller's refusal to approve the buyer's credit – which relieves the seller of any obligation to perform – prevents the parties from having reached a final agreement before creation of e-mails supposedly confirming the contract.

3. Whether Texas's general and UCC statutes of frauds preclude enforcement of an oral sales agreement where a broker entered into the agreement on behalf of the buyer, but the seller failed to obtain a finding by the jury that the broker was authorized to contract on the buyer's behalf.

4. Whether a jury's finding that a contract was formed should stand in light of overwhelming evidence that no agreement existed unless and until the seller satisfied the condition precedent of extending credit to the buyer.

5. Whether TEX. BUS. & COM. CODE § 2.708(b), permitting recovery of profits the seller would have earned had the buyer performed, provides the correct measure of damages where the seller did not acquire the product to be delivered to the buyer but merely one of its components, which the seller also acquired for other purposes.

6. Whether an individual should be held personally liable for a breach of contract judgment against his company based on a guaranty he executed in a failed effort to obtain credit approval from the seller where the guaranty was offered and understood to secure $1 million in invoices, not a $6.3 million judgment years later, and where the owner cancelled the guaranty before any debt arose.

STATEMENT OF THE CASE

Westlake filed suit against UPC in Texas state court on November 10, 2008 alleging that UPC breached a contract to buy ethylene from Westlake. R. 33-38. The case was removed to the district court and tried to a jury, which found that UPC should pay Westlake $6.3 million in damages and $633,199.67 in attorneys' fees. R.E. 5 (R. 2968-93). Following post-trial motions, the district court entered an amended final judgment reflecting the jury's award and the district court's own decision that Van Der Wall is also liable as a matter of law for the award against UPC based on a guaranty agreement. R.E. 6 (R. 5381-98).

INTRODUCTION

A jury found UPC liable for $6.3 million in damages for breaching an oral agreement with Westlake. A broker arranged the supposed contract, by which UPC was to pay Westlake $32 million for 60 million pounds of ethylene delivered monthly in 2009. There is no dispute, however, that Westlake would not actually supply the ethylene unless and until it approved extending credit to UPC. Credit approval hinged on UPC providing what Westlake unilaterally deemed to be sufficient security against non-payment. The parties negotiated the unsettled issue of credit in the weeks after the broker brought them together and before the first delivery. But Westlake failed to approve two UPC applications for credit. Then, when the price of ethylene plummeted, Westlake suddenly reappeared, demanded UPC proceed with the transaction, and brought suit when UPC refused.

Reversal is required because there was no legally enforceable contract between the parties. By reserving the right to refuse to deliver ethylene unless it approved UPC's offered security, Westlake gave no consideration to UPC for its purchase. Westlake made sure it always retained the option not to perform, and even to approve UPC's security but reverse course and reject it later after reevaluating UPC's financial condition. Any contract between the parties lacked mutuality of obligation and is unenforceable.

The agreement found by the jury also flunks the statute of frauds. The writings offered to confirm the oral agreement – two e-mails sent by the broker – do not reflect a contract already in existence because the crucial matter of security was still unresolved. Indeed, both e-mails recognize this and explicitly mention the open and pending issue of credit. Westlake also failed to secure a finding from the jury that UPC authorized the broker who arranged the deal to enter into a binding contract for UPC despite the all-important and unsettled question of what credit Westlake would extend.

Finally, the district court held that UPC's owner Lynne Van Der Wall is liable for the full judgment against UPC based on a guaranty agreement he executed. Van Der Wall provided the guaranty, a Westlake form document, in a failed effort to persuade Westlake to extend credit to UPC, but Westlake never did. The guaranty was supposed to ensure payment of invoices up to $1 million, not satisfy a judgment for $6 million in damages years after the fact. Moreover, Van Der Wall cancelled the guaranty, as its plain terms allow, long before any obligation under the instrument came due. The district court erred in holding Van Der Wall liable under the guaranty.

A $6 million judgment for breach of a $30 million contract should rest on a far more solid foundation than exists here, to say nothing of holding an individual personally liable for it. This Court should reverse.

STATEMENT OF FACTS

I. UPC's Initial Contact with Westlake

UPC is a California company that deals in petrochemicals and plastics. R. 3172. In 2008, it sought to enter the market for ethylene, a gas used in making plastics. R. 3076, 3233-35. UPC intended to buy ethylene and then resell it. R. 3184.

Michael Greenberg, a trader, introduced Van Der Wall to an ethylene broker named Lawson Brice. R. 3189. Brice matches buyers who bid on ethylene with sellers offering it. R. 3513-15. Parties typically give Brice permission to anonymously bid and offer as to price, quantity, delivery date and location. R. 3515. After pairing sellers and buyers who agree on these terms, he "lifts the veil" and discloses their identities. *Id*.

On July 1, 2008, Brice and Van Der Wall discussed buying ethylene. R. 3189-90. Van Der Wall told Brice that any seller would have to approve UPC's credit "before the transaction could go forward." R. 3192. "There is no deal when we don't have credit approved," Van Der Wall explained, "because we cannot buy anything from you if we don't have credit approved." R. 3140; Selawski 9 ("the extension of credit is the basis for transactions").

Credit was particularly important because UPC was a new buyer of ethylene, which is traded in "a closed market and everybody knows each other and everything was either approved or not approved with each other, and yeah, you got a new player [UPC] involved." Greenberg 24. Brice understood that UPC "was not a usual party purchasing ethylene." R. 3541. Aside from credit, Van Der Wall expected that UPC would negotiate and then enter into a formal contract with the seller covering a variety of terms after Brice lifted the veil. R. 3192.

At the same time Brice was communicating with UPC, he was also dealing with Brian Chappelle, a Westlake trader looking to sell ethylene. On June 25, Chappelle and Brice were instant messaging about a possible buyer's finances and Chappelle stated: "just call it subject to credit approval (I think as always). That was a warren wilder stipulation." R.E. 7 (Pl. Exh. 214). Chappelle explained that the "warren wilder stipulation," referring to his supervisor at Westlake, meant "every deal had to be subject to credit approval." R. 3467. Brice rejoined, "as always, absolutely. It's that on all deals." R.E. 7 (Pl. Exh. 214).

On July 2, Van Der Wall gave Brice permission to bid for five million pounds of ethylene per month during 2009 at 54 cents per pound. R. 3520. Brice then matched UPC's bid with an offer from Westlake. Pl. Exh. 5.

Although Brice had matched the parties, they reserved the right to reject each other for any reason for a brief period after Brice lifted the veil, as is the practice in the industry. R. 5169. Westlake witnesses could not agree whether this customary option period lasted for a few minutes, one to two hours, a day, or five days. R. 3271, 3404, 3431, 5169.

Chappelle received an e-mail on July 2 dictated by Brice or a colleague stating: "Please find your attached confirmation (pending credit with UPC)." R.E. 8 (Def. Exh. 2); R. 3539-40. Brice explained that "pending credit with UPC" signified that "[a]ll deals are subject to credit. And in this case it was a reminder that we had expectations that there would be some credit to work out between the two parties." R. 3540. The "pending credit" notation was "very unusual for Lozier [Brice's firm] to write" on a confirmation to Westlake. R. 3348. Attached to the e-mail was a form "confirming the delivery date, the volume, the price, and our commission rate." R. 3537; R.E. 8 (Def. Exh. 2). The entry "Net 30" also appeared on the form, meaning that UPC's payment would be due every month 30 days after Westlake invoiced UPC for the ethylene. R. 3267, 3435.

Brice also e-mailed Van Der Wall on July 2, stating:

> As bilateral brokers, we typically send both the buyer and seller of each transaction a trade confirmation from our accounting system.
>
> We propose to delay this official paper work until we have finalized the credit details within Westlake and have all formalized the trading and storage rights within the Williams ethylene hub.
>
> In the meantime, please accept his e-mail as "pre-confirmation," detailing today's transaction.

R.E. 9 (Def. Exh. 7). The e-mail's subject line was: "Pre-confirmation on Cal 09 ethylene." *Id.* Brice called the e-mail a "pre-confirmation" because he did not know what commission to charge UPC. R. 3543. When Greenberg asked him later whether he ever sent a "formal confirmation" to either UPC or Westlake, he answered "no." R. 3586-87.

Before he connected the parties, Brice emphasized the credit issue to both sides:

> Q. Did you make it clear to everybody, Mr. Van Der Wall, Mr. Chappelle, look, guys, this is an unusual or different situation and y'all are going to have to work out credit, or words to that effect?
>
> A. I would agree with that.

R. 3567-68. "[O]nce you lift the veil," he testified, "it's subject to credit approval." R. 3562. "The buyer has the ability to reject due to credit. The seller has the ability to reject due to credit." R. 3560. Brice has worked on sales that collapsed because the parties were ultimately unable to agree on

credit terms, and he was asked to find new counterparties. R. 3564-65. Thus, Brice believed the Westlake-UPC sale would not fully close until the parties resolved the matter of credit. R. 3575. To Brice, therefore, the deal was "not complete." *Id*.

Westlake similarly treated its sales as contingent on the approval of a buyer's security, so it would be assured of payment. As Westlake's Peter Kaestner, the director of ethylene sales, testified, referring in part to Westlake's relationship with another company that had difficulty paying:

> Typically, you know, what I'm concerned about is the creditworthiness, you know, ability of somebody to pay before I give them the product… And I'm not going to give them, you know, a couple million dollars worth of product that, you know, I'm not making very much margin on it to begin with and under – you know, with the chance that I might not get paid for it.

R. 3305-06. Thus, Chappelle testified that Westlake treated every deal as subject to credit approval. R. 3467, 3471, 5057. Warren Wilder likewise told Paul Messina, Westlake's internal auditor, "all deals are subject to credit approval." R. 5062. Messina also agreed that Westlake's credit approval is "a precondition to approving a deal." R. 5063. Ron Cormier, Chappelle's predecessor as Westlake's ethylene trader, testified that Westlake's credit approval was "a contingency" to a finalized contract if the buyer was not paying up front. R. 4912.

II. UPC's Unsuccessful Efforts to Obtain Credit Approval from Westlake

UPC began the process of seeking Westlake's credit approval immediately after Brice lifted the veil. UPC's chief financial officer, Mark Selawski, e-mailed credit references and financial statements to Leticia Aleman, a Westlake credit analyst. Pl. Exh. 86, 89; Selawski 11; R. 3194-95. Chappelle determined that UPC needed a credit line of $3 million per month, given its anticipated monthly bill. R. 3434, 3481.

After reviewing UPC's information, Aleman concluded that the company's "financials did not support the credit limit that their company needed." R. 3615. Westlake therefore rejected "open credit" for UPC whereby it would simply deliver the ethylene and await payment. R. 3630-31. Instead, Westlake decided to require UPC to provide what it deemed to be adequate security in advance. *Id*.

To satisfy Westlake's demand for security, Selawski proposed that Van Der Wall execute a personal guaranty for $2 million, and that UPC provide a $1 million standby letter of credit. Def. Exh. 85, 92; R. 3616. Van Der Wall executed Westlake's form guaranty agreement, and Selawski e-mailed it to Aleman on July 23. R.E. 10 (Def. Exh. 94). In August, however, Westlake rejected UPC's proposal. R. 3635; Selawski 45-46.

On September 22, Selawski approached Aleman again:

> Back in early August you had communicated to me that Westlake was not interested in extending credit to United Polychem, Inc. with the personal guaranty of the owner of the company.
>
> I would like to propose that we would be willing to post a $2 million standby letter of credit, along with the personal guaranty for the establishment of a $3 million credit line…

R.E. 11 (Def. Exh. 97).

Aleman testified that she might have responded to this proposal by leaving a voicemail for Selawski on October 3, though Selawski testified he never received such a message. R. 3642-43; Selawski 24. If she did leave the message, she asked Selawski to tell her what bank would issue UPC's letter of credit so she could assess its reliability: "It's not dependable unless they tell you what bank it is." R. 3623; R. 3622-23, 3644. Aleman did not tell Selawski in her October 3 phone call or otherwise that Westlake had approved any UPC proposal for credit. *Id.* Nor did anyone else at Westlake approve extending credit to UPC. R. 3659-61, 3485-86. As Selawski put it, "with the passage of time, there was no response saying that we were approved for credit." Selawski 25; *see also id*. 42. UPC had worked on deals to resell the ethylene but it could not "pull the trigger" because "we did not have credit approved and we could not buy the ethylene." R. 3214.

Had Westlake actually approved UPC's credit in October or before, it would have revisited the issue in December anyway, since its approval

process requires review of the buyer's financial status shortly before delivery to make sure its condition has not deteriorated. R. 3618 (Aleman: "We would basically have to do all this [financial analysis] work again starting in December"). "Someone can be creditworthy this month, not creditworthy the next month," Joe Sevick, a Westlake official, testified; "once you are deemed to have this amount of credit, it can change." R. 5098-99, 3305-06 (Kaestner). As Sevick explained further: "In my industry, credit – the credit terms are fluid and… you basically determine the credit at time of delivery and that… can change based on a multiple of things." R. 5143-44. Revising credit terms in this way is at the seller's election. *Id*.

Westlake never considered itself bound to extend credit to UPC or approve its application for credit. R. 3467-68, 3351, 5130. Aleman testified: "Westlake always had the discretion to decline credit to United Polychem for any ethylene transaction." R. 3649. Sevick testified that the custom in the petrochemicals industry permits sellers like Westlake to "terminate the contract" with buyers like UPC if they disapprove their credit at any point. R. 5137-38. Nor would Westlake sell ethylene to UPC without having approved and received what it deemed to be sufficient security beforehand. R. 3468-69, 3353-54.

III. UPC's Rejection of the Deal and Westlake's After-the-Fact Credit Approval

By late October 2008, the price of ethylene had fallen dramatically. R. 3451. On October 30, Chappelle e-mailed Van Der Wall to let him know he was "getting things set up" in Westlake's system for the sale. R.E. 12 (Def. Exh. 98). Van Der Wall was surprised to receive the e-mail, the first Chappelle had ever sent him, and responded two hours later: "Bryan, We never closed the deal. We were not approved for credit." *Id*. Westlake understood that this was confirmation UPC was not "moving forward with [the] deal" to buy the ethylene. R.E. 13 (Def. Exh. 124). Nonetheless, Aleman called Selawski the next day to tell him Westlake now "would consider his proposal" from September 22. *Id*.

On November 4, Westlake informed UPC for the first time that it had approved UPC's September 22 offer of security. Selawski 30. Chappelle e-mailed Van Der Wall: "Westlake previously accepted and this e-mail will confirm that Westlake does accept UPC's September 22, 2008 offer to post a $2 million standby letter of credit, along with a personal guaranty for the establishment of a $3 million credit line." Def. Exh. 100. He also stated that the sale had "closed and performance is required." *Id*. Van Der Wall replied the same day, reiterating his message of October 30: "Per our conversation, we never confirmed or issued any confirmation or po

[purchase order] to you… There is and was no confirmation from Westlake until now and you had originally passed on the transaction that you now agree to." Def. Exh. 101. Despite Westlake's communications "purporting to approve United Polychem's credit" on November 4, Aleman fully understood that UPC had "already said that there wasn't a deal because of what had gone on with the credit." R. 3664.

Westlake's plan to supply ethylene to UPC consisted of buying ethylene from BASF as well as ethane – a component of ethylene – from another supplier. Westlake purchased the ethane on July 2, R. 3288-90, 5087, 5096, but not solely to sell ethylene to UPC; it also bought it to supply another Westlake entity, Westlake Polymers, as part of another transaction involving that company and more generally to permit Westlake Polymers to sell *polyethylene* to other buyers. R. 5100-01. Westlake did not buy ethylene from BASF, canceling the purchase when it became apparent the UPC deal had died. R. 5108, 5139.

Van Der Wall terminated the guaranty agreement he executed on July 23 on December 10, 2008. R. 3223. Under the agreement, the termination became effective 30 days later, on January 9, 2009. R.E. 10 (Def. Exh. 94).

IV. Procedural History

Westlake filed suit against UPC and Van Der Wall in Texas state court on November 10, 2008. R 33-38. Westlake claimed UPC committed breach of contract by refusing to proceed with the ethylene sale and that Van Der Wall is jointly and severally liable based on the guaranty. R. 36, 1036-37. UPC and Van Der Wall removed, answered, and asserted a counterclaim alleging breach by Westlake. R. 27, 1055.

The case was tried to a jury from April 12-22, 2010. The jury found that Westlake and UPC intended to bind themselves to an agreement to sell and buy five million pounds of ethylene per month during 2009 at $.54/lb, that UPC failed to comply with the agreement, that Westlake is owed $6,300,000 in damages, that Westlake also failed to comply with the agreement, but that UPC excused Westlake's breach through waiver. R.E. 5 (R. 2977-93). After the verdict, Westlake moved for judgment against Van Der Wall since the parties agreed at trial that his liability on the guaranty was a matter of law to be decided by the district court. R. 3024-33. On November 18, 2010, the court entered an Amended Final Judgment against Westlake in accord with the verdict and against Van Der Wall for the full amount of the award. R.E. 6 (R. 5381-98).

SUMMARY OF THE ARGUMENT

Any agreement between UPC and Westlake cannot be enforced as a contract because it lacks consideration from Westlake. Westlake supposedly committed to sell the ethylene to UPC, but in reality it left itself the option not to perform because it made any sale subject to its approval of UPC's credit and refused to deliver if it rejected UPC's offered security. Westlake could even approve credit and reverse itself later upon reevaluating UPC's financial status, in which case it would not deliver. Because Westlake unilaterally dictated that its performance was ultimately entirely within its discretion, its promise was illusory and the contract lacks the mutuality of obligation necessary for enforcement. *See* Point I, *infra*.

Any contract is also unenforceable under two applicable Texas statues of frauds. *See* TEX. BUS. & COM. CODE §§ 2.201, § 26.01. Under both statutes, a writing must confirm a contract already in existence, and the e-mails offered by Westlake to satisfy the statutes of frauds fail this test because the parties had not yet agreed on the essential term of credit when they were sent. Moreover, the writings cannot satisfy the statutes of frauds because Westlake did not obtain a jury finding that UPC authorized Brice to bind it to a final contract with Westlake despite the open issue of credit.

UPC requested a specific jury interrogatory on authorization, but the district court erroneously refused. *See* Point II, *infra.*

Westlake's approval of UPC's credit also constituted a condition precedent to formation of the contract. Although the jury found that the parties intended to be bound despite UPC's contention that credit approval was a condition precedent, this finding is without support in the record. *See* Point III, *infra.*

In addition, the district court erred in holding held that Westlake could recover the difference between the average market price of ethylene in 2009 and the unpaid contract price under TEX. BUS. & COM. CODE § 2.708(a), rather than the profits it would have earned had UPC performed, under § 2.708(b). Under this Court's precedent, § 2.708(b) provides the correct measure of damages because Westlake did not buy ethylene for resale after UPC made clear it would not perform. Westlake's damages should therefore be limited to $2 million. *See* Point IV, *infra*.

Finally, the district court erred in holding that Van Der Wall is liable for the full $6.3 million award based on the guaranty agreement he executed while unsuccessfully attempting to persuade Westlake to extend credit to UPC. Guaranties are strictly construed, and the one at issue was never intended to cover a $6.3 million judgment. It was only intended to secure

unpaid invoices up to $1 million as part of the credit line UPC hoped to receive but never did. Additionally, Van Der Wall terminated the guaranty before any obligation arose under its terms. *See* Point V, *infra*.

ARGUMENT

I. UPC and Westlake Did Not Form a Contract as a Matter of Law Because Westlake Did Not Provide Legally Cognizable Consideration

A. This Court Reviews the Legal Adequacy of Consideration *De Novo*

Although the jury found that the parties intended to bind themselves to an agreement, whether that agreement amounts to an enforceable contract is a question of law reviewed *de novo*. *See Martin v. Martin,* 326 S.W.3d 741, 747 (Tex. App. – Texarkana 2010, rev. denied). Whether a contract has adequate consideration is a question of enforceability, *see Fed. Sign v. Tex. So. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997), and thus a question of law for the court. *See, e.g., Quanta Serv. Inc. v. Am. Admin. Grp. Inc*., 2008 WL 5068804 at * 4 (5th Cir. 2008); *Sudan v. Sudan*, 145 S.W.3d 280, 285 (Tex. App. – Houston [14th Dist.] 2004) rev'd on other grounds 199 S.W.3d 291 (Tex. 2006).

B. Any Agreement Reached Between UPC and Westlake Lacked Consideration Flowing From Westlake

Westlake purportedly agreed to sell ethylene to UPC, but in reality it reserved for itself the discretion not to deliver if it unilaterally decided it did not like UPC's offered security. Because this arrangement did not truly bind Westlake to perform, it is not enforceable as a contract under Texas law.

"A contract that lacks consideration, lacks mutuality of obligation and is unenforceable." *Fed. Sign*, 951 S.W.2d at 409. "A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance. When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract." *In re 24R, Inc*., 324 S.W.3d 564, 567 (Tex. 2010) (citations omitted). A contract conditioning performance on "something that is exclusively within the control of the promisor" is void. *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 477 (5th Cir. 2003) (quoting *Light v. Centel Cellular Co. of Tex*., 883 S.W.2d 642, 645 n. 4 (Tex. 1994)).

At the heart of the Westlake-UPC deal is a textbook example of an illusory promise. Westlake witnesses uniformly testified that, after agreeing to sell to UPC on July 2, the company still had to approve UPC's credit. Chappelle stated that "every deal had to be subject to credit approval." R. 3467. Wilder told Messina that "all deals are subject to credit approval,"

and Messina agreed that such approval is "a precondition to approving a deal." R. 5062-63. Westlake would not simply plan on delivering millions in ethylene and then wait to see if its customer could pay. R. 3305-06.

Crucially, however, Westlake did not consider itself required to extend credit to UPC, or to approve its application for credit. R. 3467-68, 3351, 5130. As Aleman testified, "Westlake always had the discretion to decline credit to United Polychem for any ethylene transaction." R. 3649. And Westlake would not complete the sale or deliver ethylene to UPC without approving UPC's credit beforehand. R. 3468-69, 3353-54. In fact, Sevick testified that any seller in the petrochemicals industry could simply "terminate the contract" if it disapproved the buyer's credit. R. 5137-38. It could also approve UPC's credit but unilaterally reverse the decision shortly before shipment or during the yearlong term of the contract based on its ongoing assessment of UPC's financial health. R. 5098-99, 5143-44, 3305-06.

Several Texas decisions confirm that unilaterally preserving the option of non-performance in this way effectively nullifies a contract that might otherwise bind the parties. In one case, the court reversed judgment for a homeowners' association that claimed it could change the schedule of payments to a club adjacent to the subdivision. *See Hackbury Creek*

Country Club, Inc. v. Hackberry Creek Home Owners Ass'n, 205 S.W.3d 46 (Tex. App. – Dallas 2006, rev. denied). "[T]he Association's construction," the court held, "would allow it, acting unilaterally, to reduce or even eliminate its payments to the Club. Thus, it would render the Association's promise to pay illusory, and destroy the mutuality of the parties' obligations under the Membership Agreement." *Id.* at 57-58.

In *Maharashi School of Vedic Science v. Olympus Real Estate Corp*., a school entered into a sales agreement to sell property, but the agreement gave the buyer discretion not to "proceed to closing." 2002 WL 1263894 at * 2 (Tex. App. – Dallas 2002, rev. denied). This rendered the buyer's promise illusory:

> The contract initially appears to require Maharishi to sell and Olympus to purchase the hotel. However, on a closer inspection of the contract… Olympus has not promised to purchase the property. Olympus could close the sale or not close for any reason or no reason at all… Simply put, Maharishi never contractually bound Olympus to purchase the property. Therefore, the contract lacks mutuality of obligation and is unenforceable against Olympus.

Id.

Kunz v. Machine Repair & Maintenance, Inc., where a buyer signed a contract to buy a business, is similar authority. *See* 2001 WL 1288995 at * 2 (Tex. App. – Houston [14th Dist.] 2001). The seller promised to sell all of the business's assets in one clause, while another provision gave the seller

leeway to refuse to move ahead with the transaction, in which case the contract would terminate. *See id*. "Such an agreement is illusory, as performance is dependent upon something exclusively within the control of one of the promisors." *Id*.; *see also Rogers v. Alexander*, 244 S.W.3d 370 (Tex. App. – Dallas 2007, rev. denied) (agreement that gave investor control over whether to fund business void because investor "retained the option of discontinuing his performance under the investment agreement"); *Alpha Partners, Ltd. v. Safeway Ins. Co*., 2002 WL 14297 at * 2 (Tex. App. – Dallas 2002, rev. denied) (agreement illusory and unenforceable where sale of business was conditioned on buyer's filing form with state because buyer therefore had option to forgo performance by not filing form).

As in these decisions, any agreement between UPC and Westlake reached on July 2 fails as a matter of law for lack of mutuality because Westlake retained the discretion not to deliver if it chose to reject UPC's credit. And as it happened, Westlake never did agree to any live proposal for credit approval from UPC. First, Westlake reviewed UPC's financial statements, found them wanting, and rejected open credit. R. 3630-31. Then it rejected UPC's first proposal for security – a $1 million letter of credit and $2 million covered by Van Der Wall's guaranty – in August 2008. R. 3635; Selawski 45-46. When UPC made a second proposal on September

22 – a $2 million letter of credit and $1 million covered by the guaranty, Def. Exh. 97 – Westlake did not approve it before UPC withdrew it on October 30 by indicating it was not proceeding. R.E. 12 (Def. Exh. 98). The Westlake-UPC deal was void for lack of consideration at the outset and then died on October 30, before Westlake's sudden, belated move on November 4 to accept UPC's proposal of September 22.

Moreover, Westlake was going to reevaluate the entire matter in December anyway, since that was closer to Westlake's first delivery in January. R. 3618. Westlake regarded credit as fluid rather than fixed and settled, and always reserved the right to change any security terms granted to UPC based on its ongoing analysis of UPC's financial status. R. 5098-99, 5143-44, 3305-07. If it decided after delivering ethylene for six months that UPC was no longer an acceptable risk, it could change the credit terms and refuse to deliver entirely or "terminate the contract." R. 5137-38; *see also* R. 5098-99, 5143-44, 3305-07.

In sum, Westlake "retain[ed] the option to discontinue performance" by sitting in ongoing judgment of UPC's credit, *24R*, 324 S.W.3d at 567. It thereby made its delivery of ethylene "something that is exclusively within the control of the promisor." *Hadnot*, 344 F.3d at 477. Because such an

agreement does not constitute and enforceable contract, the judgment must be reversed.

II. Any Agreement Between UPC and Westlake Fails to Satisfy Two Statutes of Frauds and is Therefore Unenforceable

A. Applicable Statutes of Frauds and Standard of Review

Westlake was required to satisfy two statutes of frauds under Texas law. Texas's UCC statute of frauds governed the Westlake-UPC sale because the price exceeded $500. TEX. BUS. & COM. CODE § 2.201(a); *see* Addendum. Texas's general statute of frauds also governed because the claimed agreement required performance through 2009, more than a year after the parties allegedly formed it in July 2008. *See* TEX. BUS. & COM. CODE § 26.01(b)(6); Addendum. Texas courts apply both statutes when their terms apply to particular transactions. *See Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp*., 994 S.W.2d 830 (Tex. App. – Houston [1st Dist.] 1999) ("It is uncontested that the alleged agreement in this case is for the sale of goods for a price of more than $500 and is not to be performed within one year. Therefore, both the UCC and general statute of frauds apply"); *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc*., 55 F.3d 181, 184-87 (5th Cir. 1995) (analyzing agreement under §§ 26.01 and 2.201).

"Under Texas law, whether a contract falls within the statute of frauds is a question of law." *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 432 (5th Cir. 2001). It is therefore subject to *de novo* review.

B. Brice's E-Mails Do Not Confirm a Fully Formed Contract and So Do Not Satisfy the Statutes of Frauds

Under both statutes of frauds, Westlake was obligated to establish that the parties had reached a completed agreement before the writing proffered to satisfy the statutes came into existence, and which the writing then confirmed.[2] Brice's e-mails flunk this basic test.

1. The July 2 E-Mails Do Not Confirm Existing Contracts Because Westlake and UPC Had Not Yet Agreed on the Essential Subject of Credit

The writings Westlake relies on to meet the statutes of frauds consist of Brice's July 2 e-mails to Chappelle and Van Der Wall. R. 2324, 4298; R.E. 8 (Def. Exh. 2), R.E. 9 (Def. Exh. 7). Both include the same terms on price, quantity, delivery schedule and location, but neither mentions credit or

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[2] Under the UCC statute of frauds, the writing must "indicate that a contract *has been made* between the parties." TEX. BUS. & COM. CODE § 2.201(a) (emphasis added); *see* Addendum. The contract must therefore precede the writing to satisfy the statute. *See Southmark Corp. v. Life Inv.*, 851 F.2d 763, 766-67 (5th Cir. 1988). Under the UCC statute of fraud's "merchant's exception" set forth in TEX. BUS. & COM. CODE § 2.201(b), the writing must be "in confirmation of the contract" and therefore must also post-date contract formation. *See* Addendum; *see also Baker Hughes, Inc. v. Schwartz*, 833 S.W.2d 292, 296 (Tex. App. – Houston [14th Dist.] 1992, rev. denied). The same requirement underlies the general statute of frauds. *See Hartford Fire Ins. Co. v. C Spring 300, Ltd.*, 287 S.W.3d 771, 778 (Tex. App. – Houston [1st Dist.] 2009, rev. denied).

security other than to note that the deal was pending credit approval, and there is no dispute the parties had no agreement on that subject on July 2. *See id.* Even if they had, Westlake regarded it as subject to change shortly before shipment and during the contract term anyway. R. 5098-99, 5143-44, 3305-06.

Yet agreement on credit was an essential component of any contract between UPC and Westlake. "Where an essential term is open for future negotiation, there is no binding contract." *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (citations omitted); *accord Conner*, 267 F.3d at 434. "The parties can leave some of the contract's terms open for future negotiation. Nonetheless, those terms left open cannot be essential or material elements of the contract because leaving such terms open renders the contract unenforceable under the statute of frauds." *Conner*, 267 F.3d at 433. Whether particular terms are essential is a question of law reviewed *de novo*. *See Liberto v. D.F. Stauffer Biscuit Co., Inc*., 441 F.3d 318, 323 (5th Cir. 2006). "Each contract should be considered separately to determine its material terms." *T.O. Stanley Boot*, 847 S.W.2d at 221.

"[A]n 'essential' promise denotes one that the parties reasonably regarded, at the time of contracting, as a vitally important ingredient in their

bargain. Failure to fulfill such a promise, in other words, would seriously frustrate the expectations of one or more of the parties as to what would constitute sufficient performance of the contract as a whole." *Neely v. Bankers Trust Co. of Tex.*, 757 F.2d 621, 628 (5th Cir. 1985). "In determining whether a term is an essential element of a contract, we look at whether a party's rejection of the term could have affected the negotiation of the other terms." *Conner*, 267 F.3d at 433 (quotation omitted).

There can be little doubt that credit was essential to the Westlake-UPC sale. UPC could not buy from Westlake without credit. R. 3140. Credit was especially crucial in this case because UPC was a new entrant in the relatively small and closed ethylene market. Greenberg 24; R. 3567-68. Hence Brice made it clear to both sides: "look, guys, this is an unusual or different situation and y'all are going to have to work out credit." R. 3567-68. Brice knew the parties could reject each other "due to credit," and that the sale was therefore "not complete." R. 3560, 3577.

Just as UPC could not buy without credit, Westlake would not sell without acceptable security. As discussed above, it rejected open credit, reserved the right to disapprove UPC's credit and reverse any approval given earlier, and would not ship absent previously blessed security. It could terminate if it disapproved UPC's credit. R. 5137-38. Thus, Westlake's

agreement on and approval of credit was tantamount to agreement to enter into the transaction at all; if it later decided at any point to reject UPC's credit or offered security, it would not perform. Westlake even viewed the security offered by Van Der Wall's guaranty as consideration for the sale supposedly completed on July 2. R.E. 10 (Def. Exh. 94) (guaranty "in consideration of" sale). Obviously, consideration is an essential term of any sales contract. *See John Wood Grp. USA, Inc. v. ICO, Inc*., 26 S.W.3d 12, 20 (Tex. App. – Houston [1st Dist.] 2000, rev. denied). How could the July 2 e-mails reflect a contract already in existence when Westlake was still soliciting and obtaining consideration for the sale on July 23?

Credit, then, was not merely "a vitally important ingredient in the[] bargain" between UPC and Westlake – it was the component without which the deal could not and would not happen. *Neely*, 757 F.2d at 628. If the parties proved unable to reach agreement on credit, the failure would do more than "seriously frustrate the expectations of one or more of the parties as to what would constitute sufficient performance of the contract as a whole," *id*. – it would deprive the agreement of consideration flowing from Westlake, preclude performance altogether, and completely destroy the parties' expectations. Nor is there any doubt Westlake's rejection of UPC's credit would "have affected the negotiation of the other terms." *Conner*, 267

F3d at 433. Since rejection precluded Westlake's performance, there would have been little point in discussing other terms at all.

Several Texas decisions involve contracts voided for lack of essential terms. In *Kottke v. Scott*, a contract for sale of property was found to lack the essential term of financing. *See* 2011 WL 1467194 at * 5 (Tex. App. – Austin 2011). The buyers determined that a bank would not extend financing and that they therefore needed the sellers to do so, but as the terms of such financing were unresolved, the court held that no agreement existed. *See id*. The court reached the same result in *Pine v. Gibraltar Sav. Ass'n*, commenting: "Essential elements of a commitment to provide interim or permanent financing were to be negotiated at a later date or were subject to alteration at a later date. There was no enforceable agreement and therefore no breach of any agreement." 519 S.W.2d 238, 244 (Tex. Civ. App. – Houston [1st Dist.] 1974, writ ref'd n.r.e.); *accord T.O. Stanley Boot*, 847 S.W.2d at 221-22 (contract to loan money failed for lack of agreement on rate of interest or other repayment terms); *Terrell v. Nelson Puett Mortg. Co*., 511 S.W.2d 366, 369 (Tex. Civ. App. – Austin 1974, writ ref'd n.r.e.) (contract by mortgage service to underwrite loans from bank to third party

failed for lack of term indicating total sum to be underwritten). Many other kinds of terms have also been found essential.[3]

Finally, § 2.204 of the UCC does not compel a different result as to the UCC statute of frauds. That section provides: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." TEX. BUS. & COM. CODE § 2.204(c). Section 2.204 exists to permit the court to uphold an agreement where individual missing terms can be filled in from other sources. *See, e.g., Dura-Wood Treating Co. v. Century Forest Indus*., 675 F.2d 745, 750-53 (5th Cir.), *cert. denied*, 459 U.S. 865 (1982). [4]

In this case, the term left open is nothing less than Westlake's effective assent to the contract. Westlake's reservation of the unilateral right to reject UPC's credit and not deliver means that the parties' agreement on

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[3] *See, e.g*., *Floating Bulk Terminal, LLC v. Coal Logistics Corp*., 2002 WL 1733670 at * 6 (Tex. App. – Houston [14th Dist.] 2002, rev. denied) (division of purchase price, profits and costs); *Conner*, 267 F.3d at 434 (classification of doctors' charges for tax purposes and work schedule); *Campbell v. NW Nat. Life Ins. Co*., 565 S.W.2d 248, 250 (Tex. Civ. App. – Eastland) (how buyer would pay "cash cost" of apartments) rev'd on other grounds 573 S.W.2d 496 (Tex. 1978).

[4] Section 2.204 has no application to writings offered to satisfy § 26.01's general statute of frauds because writings must "contain all of the essential elements of the agreement" to meet the general statute of frauds. *Conner*, 267 F.3d at 432. By contrast, the UCC statute of frauds tracks § 2.204 and does not require the offered writing to "contain all the material terms of the contract." TEX. BUS. & COM. CODE § 2.201, cmt 1.

credit was a necessary precondition to mutuality of obligation and Westlake's willingness to perform. In these circumstances, where the absent term effectively determines one party's participation in the transaction, it cannot be ignored or supplied by the court. *See, e.g., Parker Drilling Co. v. Romfor Supply Co*., 316 S.W.3d 68, 74-77 (Tex, App. – Houston [14th Dist.] 2010, rev. denied) (reversing jury verdict finding existence of sales contract because parties did not reach mutual assent on identical material terms); *Allamon Tool Co., Inc. v. Derryberry*, 2007 WL 3306671 at ** 2-3 and n. 2 (Tex. App. – Beaumont 2007) (contract for sale of dirt lacking various essential terms that "would have to be negotiated in the future" would fail under § 2.204); *Spinal Concepts, Inc. v. Curasan, AG*, 2006 WL 2577820 at * 4 (N.D. Tex. 2006) (reversing arbitral award for seller and holding sales contract failed for lack of essential term, despite § 2.204: "While there is no doubt the Parties intended to form a contract, the Parties left open to negotiation and determination an essential quantity term, without which the Parties could not perform the contract").

As the court observed in *John Wood Grp*., "this is not simply a case of missing terms; this case involves the more essential question of whether there was mutual consent to exchange the item to be sold for the agreed upon price." 26 S.W.3d at 20 (emphasis removed). That is true here too –

given Westlake's one-sided approach to credit and withholding of consideration – and it rules out the existence of a legally binding contract subject to confirmation by Brice's July 2 e-mails. *See* Thomas M. Quinn, 1 Quinn's Uniform Commercial Code Commentary and Law Digest § 2-204 at 579 (rev. 2d ed. 2009) ("The Code is clear when the charge is 'indefiniteness.' The essential element is that the buyer and seller must intend to close a deal"). At most, what Westlake and UPC formed on July 2 was an agreement to agree in the future by coming to terms on security and credit sometime later, which is legally insufficient. R. 3273 ("once we commit, we find a way to work it out"); R. 5178 (parties obliged "to negotiate and reach a reasonable conclusion"); *Martin*, 326 S.W.3d at 749 (agreements to agree void); *Ft. Worth Indep. School Dist. v. City of Ft. Worth*, 22 S.W.3d 831, 846 (Tex. 2000) (same).

In light of the unsettled status of credit on July 2, Brice's e-mails do not satisfy the statutes of frauds.

2. The E-Mails' Prospective Language Also Confirms That No Final Agreement Existed on July 2

"[I]t is common sense that 'futuristic' language in a writing is not confirmatory of a contract already in existence." *Southmark*, 851 F.2d at 767 (quotation omitted). If the parties are required to do more or take

further steps to perfect their assent after the supposedly confirmatory writing, it is insufficient evidence of a presently existing agreement. *See, e.g., Int'l Meat Traders, Inc. v. H&M Food Sys*., 70 F.3d 836, 839-40 (5th Cir. 1995). "A true confirmation requires no response." *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 706 (Tex. App. – Houston [1st Dist.] 1988, writ denied) (quotation omitted).

Both of Brice's e-mails contain "futuristic" language clearly signaling that they were not intended to confirm a completed contract. His e-mail to Westlake stated: "Please find your attached confirmation (pending credit with UPC)." R.E. 8 (Def. Exh. 2). "Pending" means, *e.g.*, "until the completion of." *Carey v. Saffold*, 536 U.S. 214, 219 (2002) (quoting Webster's Third New Int'l Dictionary 1669 (1993)). Thus, the natural interpretation of Brice's e-mail is that the form he was transmitting should not be considered a confirmation until the parties resolved the issue of credit. Indeed, when asked why he sends confirmations at all, Brice testified that he does so "to confirm the price, the volume, the delivery location, and the date of delivery," R. 3519 – not to more generally confirm legally binding contracts or address other essential terms.

The language in Brice's e-mail to Van Der Wall is even more prospective. He proposed delaying the "official paper work until we have

finalized the credit details within Westlake" and wrote: "In the meantime, please accept this e-mail as a 'pre-confirmation' detailing today's transaction." R.E. 9 (Def. Exh. 7). There is no way to read "pre-confirmation" as "confirmation" without giving near-Orwellian offense to plain English. *See In re Green Tree Serv., LLC*, 275 S.W.3d 592, 598 (Tex. App. – Texarkana 2008) (court should adopt "plain, ordinary and generally accepted meaning" of words in agreements). Brice testified that the e-mail to Van Der Wall was intended to confirm the agreement on the four terms reached on July 2 and that he used the word "pre-confirmation" because he did not yet know what to bill UPC. R. 3543-44. But he explained that he well knew the overall deal was "pending credit" and therefore "not complete." R. 3575. When Greenberg asked Brice on November 4 whether he had sent the parties a "formal confirmation," he answered "no." Def. Exh. 23; R. 3586-87. As for his supposedly confirmatory July 2 e-mail to UPC, it would have been hard for Brice to use more future-oriented terminology than "until we have finalized" and "pre-confirmation."

Because of their overtly prospective language, the July 2 e-mails cannot bear the weight of confirming a completed sale and thereby satisfying the statutes of frauds.

C. Westlake Failed to Satisfy the Statutes of Frauds By Obtaining a Jury Finding on Brice's Authorization to Bind UPC to a Final Contract

The statutes of frauds also require reversal because Westlake failed to obtain a finding that Van Der Wall authorized Brice to enter into and confirm a binding sales contract.

Westlake bore the burden of establishing that its proffered writings met the statute of frauds. *See Hugh Symons Group, plc v. Motorola*, Inc., 292 F.3d 466, 469 (5th Cir.), *cert. denied*, 537 U.S. 950 (2002). While determining whether a writing passes muster is a question of law for the court, factual questions relevant to the issue must be decided by the jury. *See, e.g., Dobson v. Masonite Corp*., 359 F.2d 921 (5th Cir. 1966); *accord Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987) (statute of frauds a legal question "[w]hen the material facts are not in dispute"). Similarly, "[w]hether the circumstances of a particular case fall within an exception to the statute of frauds is generally a question of fact." *Adams*, 754 S.W.2d at 705. Thus, "[i]f a party claims that an exception to the statute of frauds exists, he must secure a finding to that effect." *Barbouti IBI Indus., Inc. v. Munden*, 866 S.W.2d 288, 295 (Tex. App. – Houston [14th Dist.] 1993, writ denied).

In this case, the factual issue at the core of the statute of frauds issue is whether Van Der Wall gave Brice authority to irrevocably bind UPC to a completed contract with Westlake in light of the necessary and unfinished negotiations to come over credit. This factual question is pivotal both to whether Brice's e-mails can satisfy the statutes of frauds and whether the merchant's exception applies. *See, e.g.*, *Welch v. Coca-Cola Enter., Inc*., 36 S.W.3d 532, 540 (Tex. App. – Tyler 2000) ("If, in fact, Williams was authorized by the school district to enter into a contract with Welch, the written contract satisfies the statute of frauds").[5] Westlake argued below that the necessary finding can be implied from the jury's answer to Question 1. R. 4299-4300. Since the jury found UPC intended to bind itself to buy the ethylene, and Brice offered the bid for UPC, Westlake claims the jury must have decided Brice was UPC's agent authorized to enter into the contract for UPC. *See id.* The jury also received an instruction on agency. R. 2978.

[5] The UCC statute requires any legally sufficient writing to be signed "by the party against whom enforcement is sought or by his authorized agent or broker," while the merchant's exception requires writings to be "in confirmation of the contract and sufficient against the sender." TEX. BUS. & COM. CODE §§ 2.201(a) – (b); *see* Addendum. Any writing sufficient to meet the general statute of frauds must also be "signed by the person to be charged… or by someone lawfully authorized to sign for him." *Id.*, § 26.01(a)(2); *see* Addendum.

Under Texas law, however, agency should not be simply be implied on the basis of a more general finding. "Agency is never to be presumed; it must be shown affirmatively. The party who asserts the existence of an agency relationship has the burden of proving it." *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994); *see also Buchoz v. Klein*, 184 S.W.2d 271 (Tex. 1944) ("The law does not presume agency"). Here, there was evidence Van Der Wall authorized Brice to agree to terms on price, quantity, delivery date and location, but there is no evidence Van Der Wall gave Brice permission to enter into an irrevocably binding contract with Westlake despite the lack of agreement on credit.

Van Der Wall testified that he talked to Brice on the phone before Brice matched Westlake's offer with UPC's bid and stressed that any seller would have to approve UPC's credit "before the transaction could go forward," since UPC could not buy otherwise. R. 3192. Greenberg has the same recollection. Greenberg 39. Van Der Wall also expected that the parties would exchange formal written contracts covering a myriad of terms after Brice brought them together, as was UPC's standard practice. R. 3192.

Brice, on the other hand, was not asked and did not testify that Van Der Wall authorized him to bind UPC even though credit and other terms were unresolved. He testified generically about how he operates, R. 3513-

15, but gave no account at all about any actual, specific instructions from or conversations with Van Der Wall prior to matching the parties on July 2, other than Van Der Wall's telling him UPC wanted to bid on the ethylene. R. 3533-34 ("I'm a firm bid, 54 cents"). Brice also explained that, when a buyer gives him a bid, the buyer is authorizing agreement as to four particular terms only:

> Q. And what's the significance of the communication when you tell them, both parties, you're done?
>
> A. The parties agree to buy and the parties agree to sell.
>
> Q. You've matched an offer – all of the terms of an offer with all the terms of a bid?
>
> A. Not necessarily.
>
> Q. What do you mean by that?
>
> A. The terms that we, as the broker, typically are responsible for are price, quantity, delivery location… and delivery date.

R. 3517-18; *see also* R. 3558 (Q: "you match buyer and seller on price, volume, term, and you lift the veil and you get out of the way? A: That's a fair assessment, yes sir"); R. 3559 (Brice brokered a deal *"[t]o the extent that we, as bilateral brokers, are concerned, yes*. Then it's up to the two parties to speak afterwards regarding credit" (emphasis added)).

Thus, at most, Brice testified that Van Der Wall gave him authority to "buy" – which to him means reach agreement solely on price, quantity, delivery date and location. And Brice acknowledged that any sale was pending credit and therefore incomplete. R. 3575. He did not testify that he actually told Van Der Wall he would be entering a legally binding contract on UPC's behalf regardless of later developments between the parties, such as negotiations on credit and other terms. Nor did he testify that Van Der Wall understood or authorized such a move. The scope of Brice's agency was a discrete factual question that should have been resolved by the jury and is neither encompassed in the jury's finding nor addressed in the evidence, except by the contrary testimony of Van Der Wall. *See, e.g*, *Lucadou v. Time Ins. Co*., 758 S.W.2d 886, 889 (Tex. App. – Houston [14th Dist.] 1988) (when "parties dispute the scope of the agent's apparent authority, that question requires resolution of issues of fact").

In addition, Brice testified that he was simply a "neutral intermediary" who was not "working for" UPC or Westlake. It is unclear how, as a matter of law, a finding could be implied that Brice functioned as UPC's agent given his admission that he was a neutral not working for the company. *See, e.g*., *Johnson v. Brewer & Pritchard, P.C*., 73 S.W.3d 193, 200 (Tex. 2002)

("an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency" (quotation omitted)).

Presuming a finding of agency is all the more questionable because UPC requested a special interrogatory to the jury on the issue of Brice's authorization, which Westlake successfully opposed. R. 3756-3759, 2815, 2960. This Court reviews jury interrogatories for abuse of discretion and asks whether: "a) when read as a whole and in conjunction with the general charge, the interrogatories adequately presented the contested issues to the jury; b) the submission of the issues to the jury was fair; and c) the ultimate questions of fact were clearly submitted to the jury." *Broadcast Satellite Int'l, Inc. v. Nat.'l Digital Television Ctr., Inc*., 323 F.3d 339, 342, 348 (5th Cir. 2003). Failure to submit a material issue to the jury will be cause for reversal. *See Chemetron Corp. v. Bus. Funds, Inc*., 682 F.2d 1149, 1173 (5th Cir. 1982); *accord Tex-Goober Co. v. L.A. Nut House, Inc*., 803 F.2d 1358, 1362 (5th Cir. 1986).

The district court abused its discretion by denying UPC's request for a question on Van Der Wall's authorization of Brice. There could be no underlying contract and no writing satisfying the statute of frauds without such approval, and the evidence adduced at trial strongly supported such a question given the absence of specific testimony from Brice about his

instructions from Van Der Wall, and Van Der Wall's uncontradicted testimony denying Brice's authority to enter into a binding contract on behalf of UPC. Subsuming the issue within a question on overall contract formation and relying on a generic agency instruction did not adequately present the issue to the jury given its centrality to the case. *See, e.g., Najarro v. First Fed. Savings and Loan Ass'n of Nacogdoches, Tex.*, 918 F.2d 513, 515 (5th Cir. 1990) (describing special interrogatories relating to agent's authority).

III. Westlake's Failure to Fulfill the Condition Precedent of Credit Approval Prevented the Formation of an Enforceable Contract

A. Standard of Review

Whether parties intend there to be a condition precedent to contract formation is a question of fact. *See Crest Ridge Constr. Grp. Inc. v. Newcourt Inc.*, 78 F.3d 146, 151 (5th Cir. 1995). Given the jury's finding that the parties intended to form a binding agreement, reversal is required if reasonable jurors could not have determined that the parties formed an agreement in light of the failure to satisfy the condition precedent. *See Wackman v. Rubsamen*, 602 F.3d 391, 399 (5th Cir. 2010).

B. Insufficient Evidence Supports the Jury's Finding That the Parties Formed An Agreement Despite the Open Issue of Credit Approval

The only reasonable conclusion to be drawn from the evidence at trial is that the parties' agreement on and Westlake's approval of UPC's credit functioned as a condition precedent to the formation of any final contract.

While no specific language is necessary to create a condition, *see Criswell v. European Crossroads Shopping Ctr.*, 792 S.W.2d 945, 948 (Tex. 1990), the phrase "subject to" connotes its existence. *Cedyco Corp. v. Petroquest Energy, LLC*, 497 F.3d 485, 489 (5th Cir. 2007). Westlake witnesses repeatedly agreed that the sale was "subject to" Westlake's approval of credit. R. 3467, 5062-63. Messina actually called credit approval "*a precondition* to approving a deal." R. 5063 (emphasis added). Cormier agreed that it is "a contingency." R. 4912. The word "pending" – used by Brice in his July 2 e-mail to Chappelle when describing the sale as "pending credit" – is also conditional in this context. *See Carey*, 536 U.S. at 219 ("pending" means "until the completion of"); *Kosberg v. Brown*, 601 S.W.2d 414, 416 (Tex. Civ. App. – Houston [14th Dist.] 1980) ("upon the happening of" signifies condition precedent).

More important than the particular words employed is the nature of the agreement. Because Westlake rejected delivery on open credit and

would not actually sell unless and until UPC provided what Westlake unilaterally decided was adequate security, final credit approval was the trigger for the existence of a binding commitment on Westlake's part. True, Westlake witnesses testified that they thought the sale was complete and binding after Brice instant messaged "done" on July 2, indicating that the parties had come together on price, quantity, delivery schedule and location. R. 3261-62, 3274, 3430. But this testimony does not preclude the finding of a condition precedent as a matter of law. The two uncontested facts – a binding agreement on some terms and a corresponding agreement that the transaction will not occur unless and until credit approval – are not inconsistent, and the former in no way vitiates the legal significance of the latter. UPC does not dispute that the parties agreed to be bound regarding several key terms on July 2, but the question is what effect their simultaneous understanding that the sale would not actually happen without Westlake's approval of security had on the deal. *See Malatt v. C&R Refrigeration*, 179 S.W.3d 152, 159 (Tex. App. – Tyler 2005) (court "must consider the entire agreement" when deciding if condition is present).

The Texas Supreme Court's decision in *Sun Exploration and Prod. Co. v. Benton* is instructive here. *See* 728 S.W.2d 35 (Tex. 1987). In that case, the trial court found as a matter of fact that "Benton and Sun

Exploration entered into a contract in which Sun Exploration 'agreed to purchase'" a lease on property from Benton. *Id.* at 36. Because Sun Exploration was unsure Benton had clear title, however, it wrote "15 days after sight and upon approval of title" on the draft it gave in payment, and later dishonored the draft. *See id.* Despite the trial court's factual finding that the parties agreed to the sale, the Texas Supreme Court reversed judgment for Benton and held that the language "15 days after sight and upon approval of title" "made Sun's approval of title a condition precedent to formation of the contract." *Id*. at 37. Here too, the parties' binding agreement on some sales terms does not nullify the concurrent agreement that the parties were not truly bound to sell and buy unless and until Westlake fulfilled the condition precedent of approving UPC's credit.

Finally, it is crucial to ask whether Westlake would be insisting that the parties bound themselves to the sale on July 2 if UPC had never applied for credit at all. Westlake explicitly rejected open credit. Its officials testified that it would not have delivered ethylene to UPC if UPC did not provide acceptable security. Had January 2009 come and gone without delivery and UPC then sought enforcement of the July 2 agreement despite never having offered security, would Westlake take the position that the July 2 agreement bound it to perform anyway, and admit to breach? *See*

Kosberg, 601 S.W.2d at 415 (considering "unlikelihood" there is no condition given nature of transaction and parties' expectations).

"[P]arties may structure their negotiations so that they preliminarily agree on certain terms, yet protect themselves from being prematurely bound in the event they disagree on other terms." *WTG Gas Processing, LP v. ConocoPhillips Co.*, 309 S.W.3d 635, 649 (Tex. App. – Houston [14th Dist.] 2010, rev. denied). That is what the parties did here, using the device of condition precedent. The jury's finding of an agreement should therefore be reversed.

IV. The District Court Applied the Incorrect Measure of Damages

The jury awarded Westlake $6.3 million under TEX. BUS. & COM. CODE § 2.708(a). R. 2981; *see* Addendum. The district court agreed with Westlake that § 2.708(a), permitting recovery of the difference between the market price at tender and the unpaid contract price, was the proper measure of damages instead of § 2.708(b), which permits recovery of profits the seller would have earned had the buyer performed. R. 5558; *see* Addendum. Westlake's damages expert testified that the average price for ethylene in 2009 was 26.81 cents per pound, and that Westlake should therefore be awarded $16.3 million in damages as the difference between the contract and market prices. R. 5192. This Court conducts *de novo* review of the

district court's decision on the applicable measure of damages. *See Lubke v. City of Arlington*, 455 F.3d 489, 498 (5th Cir. 2006).

Damages in this case are governed by this Court's decision in *Nobs Chemical, USA, Inc. v. Koppers Co., Inc*., 616 F.2d 212 (5th Cir. 1980). In *Nobs Chemical*, the plaintiffs contracted to sell cumene to the defendant for $540,000. *See id.* at 214. The plaintiffs, in turn, planned to acquire the cumene from their supplier for $445,000 but cancelled the purchase when the buyer breached. *See id.* This Court held that § 2.708(b) represented the proper measure of damages, reasoning that compensating the plaintiffs for the diminished resale value of the cumene made little sense because they never acquired the product to resell. *See id*. at 215. The Court invoked the UCC's "basic philosophy… which provides 'that the aggrieved party may be put in as good a position as if the other party had fully performed' but not in a better posture." *Id*. (*quoting* TEX. BUS. & COM. CODE § 1.106(a) [now § 1.305(a)]). As the Court concluded:

> No one insists, and we do not think they could, that the difference between the fallen market price and the contract price is necessary to compensate the plaintiffs for the breach. Had the transaction been completed, their "benefit of the bargain" would not have been affected by the fall in market price, and they would not have experienced the windfall they otherwise would receive if the market price-contract price rule contained in § 2.708(a) is followed.

Id. at 215-216; *see also Diversified Energy, Inc. v. T.V.A*, 339 F.3d 437, 446-47 (6th Cir. 2003); *Blair Intern., Ltd. v. LaBarge, Inc*., 675 F.2d 954 (8th Cir. 1982) (subsection (b) governs compensation of resellers who reasonably choose not to acquire goods for resale following buyer's breach).

Westlake is akin to the plaintiff in *Nobs Chemical*. It planned to buy ethylene from BASF as part of the transaction to supply UPC, but it did not proceed with the acquisition after UPC made it clear it would not buy from Westlake. R. 5108, 5139. Westlake did buy ethane on July 2, but that purchase was not solely to sell ethylene to UPC. R. 5100 (Q: "It's true also, though, that you didn't just buy ethane for a three-way deal involving United Polychem on July 2nd, right? A: Yes, that's true"). It also intended to supply Westlake Polymers with ethylene and more generally to permit that entity to sell *polyethylene* to other buyers. R. 5100-01 ("I bought enough ethane to enable them to go out and sell the polyethylene to their customers"). Moreover, Westlake's damages expert based his calculations on the market price of ethylene, not the market price of the commodity Westlake actually bought: ethane. R. 5188-5192. This is not a case of Westlake being stuck with ethylene and therefore facing a drop in prices, such that it makes sense to apply subsection (a).

Westlake's lost profits from UPC's rejection of the ethylene sale were $2 million. R. 3490-91. Awarding Westlake more than that represents an enormous windfall. "The purpose of damages, including the remedies provided under the Texas Business and Commerce Code, is to place the injured party in as good a position as it would enjoy if the other party had fully performed under the contract." *Lakewood Pipe of Houston, Inc. v. Conveying Techniques, Inc*., 814 S.W.2d 553, 555 (Tex. App. – Houston [1st Dist.] 1991); *see also* TEX. BUS. & COM. CODE § 1.305(a); Addendum. Because Westlake would have received $2 million if UPC had performed, § 2.708(b) provides the correct measure of damages in this case. If the Court otherwise upholds the judgment, it should reverse the damages award and remand for entry of judgment in Westlake's favor for $2 million.

V. This Court Should Reverse the District Court's Decision Entering Judgment Against Van Der Wall Based on the Guaranty

The district court determined as a matter of law that the guaranty executed by Van Der Wall on July 23, 2008 compels his joint and several liability for the judgment against UPC. R. 5381-98. Because this decision was based on the court's legal construction of the guaranty, it is reviewed *de novo*. *See Admiral Ins. Co. v. Ford*, 607 F.3d 420, 422 (5th Cir. 2010).

"Traditionally, a guarantor is a favorite of the law and creditors' claims against them are strictly construed." *Joseph Thomas, Inc. v. Graham*, 842 S.W.2d 343, 346 (Tex. App. – Tyler 1992). "His obligation does not extend one jot or tittle beyond" the instrument's terms. *McKnight v. Virginia Mirror Co*., 463 S.W.2d 428, 431 (Tex. 1971) (quotations omitted). "Where uncertainty exists as to the meaning of a contract of guaranty, and where two *reasonable* constructions may be made, the reviewing court will apply the construction more favorable to the guarantor. The rule of *strictissimi juris* is applied to refrain from extending the guarantor's obligation by implication beyond the written terms of the agreement." *Clark v. Walter-Kurth Lumber Co*., 689 S.W.2d 275, 278 (Tex. App. – Houston [1st Dist] 1985, writ ref'd n.r.e.) (emphasis in original). Moreover, the guaranty should be construed "so as to attain the objects for which the instrument is designed and the purposes to which it is applied." *EAC Credit Corp. v. E.L. King*, 507 F.2d 1232, 1237 (5th Cir. 1975).

Using the guaranty as an indemnity to satisfy a judgment for UPC's breach of contract distorts it beyond recognition in several ways. First, the guaranty should not be given life beyond UPC's failed attempt to obtain credit. UPC proposed that the guaranty serve as $2 million in security in July, but that offer was rejected in August. R. 3635; Selawski 45-46. Thus,

the guaranty effectively died with Westlake's rejection. UPC did make a new offer that a personal guaranty from Van Der Wall secure $1 million in September, but that would presumably have entailed the execution of a new instrument, since Westlake rejected the original one. Even if the document Van Der Wall executed in July was to serve as the guaranty to be used by Westlake after September 22, that proposal was not accepted by Westlake until after UPC effectively withdrew it by indicating on October 30 that the deal was dead. R.E. 12 (Def. Exh. 98). Westlake should not be permitted to twice resurrect offered consideration for a moribund deal and then use it to satisfy a judgment entered years later. While the guaranty states that it is effective upon execution and that Westlake need not notify UPC of its acceptance, R.E. 10 (Def. Exh. 94), Westlake cannot do away with the basic requirement that it actually accept the guaranty while it remained a live offer. *See, e.g. Harris v. Mickel*, 15 F.3d 428, 431 (5th Cir. 1994) ("under Texas law, once an offer is rejected, the general rule is that the offer is thereby terminated, and consequently it cannot be accepted").

Second, the obvious purpose of the guaranty was to commit Van Der Wall to pay for ethylene if UPC failed to pay 30 days after delivery, that is, to serve as security so UPC would perform. Specifically, Van Der Wall agreed to pay "any and all liabilities or obligations of Buyer, whether from

invoices, promissory notes, drafts, checks, and all other charges." R.E. 10 (Def. Exh. 94). But no unpaid invoices, deficient promissory notes, ineffective drafts, bounced checks or other unsatisfied charges came into existence because Westlake never delivered ethylene to UPC. The guaranty must be strictly construed – not just because it is a guaranty but also because Westlake drafted it. *See Thompson v. Preston State Bank*, 575 S.W.2d 312, 315 (Tex. Civ. App. – Dallas 1978, writ ref'd n.r.e.). If Westlake intended the guaranty to satisfy later breach of contract judgments and not simply unpaid bills 30 days after it invoiced UPC, it could surely have provided for that eventuality in the instrument. The guaranty should not be extended to cover such contingencies by implication. *See Clark*, 689 S.W.2d at 278.

Case law makes clear that Van Der Wall's guaranty should not be stretched beyond what the parties had in mind when they executed it – payment of specific unpaid invoices and similarly listed charges. In *Pham v. Mongiello*, the court reversed judgment on a guaranty securing a residential lease. *See* 58 S.W.3d 284, 286-87 (Tex. App. – Austin 2001, rev. denied). Although the guaranty had language broadly obligating the guarantor to cover any sort of payment owed by the tenant, the court more narrowly construed it to effectuate the parties' actual intentions:

> The guaranty states Pham would be liable for "any payment" and for Leffingwell's "performance of obligations" under the

> lease. However, the guaranty then immediately references rent and late fees, with only a blanket, cursory reference to other possible charges – "(rent, late fees, charges, attorney fees, *or others*)." (Emphasis added.) This language indicates the guaranty was intended to ensure rent payments and late fees tied to rent. It does not indicate that Pham guaranteed unlisted charges such as repairs or unauthorized pet charges.

Id. at 288. Liabilities must be expressly stated rather than camouflaged through "novel ways of writing provisions which fail to expressly state the true intent of those provisions." *Id.* at 288 (quotations omitted). Here too, Van Der Wall's liability must be limited to the expressly denominated types of charges – invoices, promissory notes, drafts, checks and the like – not every sort of other imaginable debt. *See, e.g.*, *Thompson*, 575 S.W.2d at 315 (requirement that guarantor pay for "all purchases made on the account" of credit card did not include finance charges because term "finance charges" did not appear in guaranty); *EAC Credit,* 507 F.2d at 1241 (guaranty securing "any and all indebtedness" inapplicable because parties did not intend guaranty to cover debt in question).

Third, there is no dispute that the guarantee was only offered to cover $1 million in liability. After Westlake rejected UPC's July credit proposal, Selawski proposed a $2 million letter of credit on September 22, thus diminishing the security intended to be covered by the guaranty to $1 million. R.E. 11 (Def. Exh. 97). On October 3, Aleman drafted an e-mail to

her supervisor making clear she fully understood this: "Owner/Pres Lynne Van Der Wall is offering a $2 mil. letter of credit and provides a personal guaranty *to secure $1 mm of the $3 mm requested*." R.E. 14 (Pl. Exh. 608) (emphasis added). Even when it belatedly purported to approve UPC's credit on November 4, Westlake stated it was accepting UPC's "offer to post a $2 million standby letter of credit, along with a personal guaranty for the establishment of a $3 million credit line." Def. Exh. 100. And in practice, Van Der Wall's liability on the guaranty could never have exceeded $1 million because, if UPC proved unable or unwilling to pay for one month's delivery, Westlake would not deliver the following month. Contorting the guaranty to cover $5.3 million more than the parties indisputably intended, when the guaranty itself is a boilerplate form silent on the subject, makes a mockery of the rule requiring guaranties to be interpreted "so as to attain the objects for which the instrument is designed and the purposes to which it is applied." *EAC Credit*, 507 F.2d at 1237. The district court's conclusion that no evidence in the record supports limiting the guaranty to $1 million ignores voluminous and conclusive proof on the subject. R. 5396.

Finally, the guaranty does not cover liabilities incurred 30 days after Van Der Wall terminated it. R.E. 10 (Def. Exh. 94). Because Van Der Wall cancelled the guaranty on December 10, 2008, it does not cover debts

incurred after January 9, 2009. R. 3223. There is no question UPC's first payment to Westlake would not have been due until well after January 9. R. 3268 (first Westlake invoice would be sent in February). Van Der Wall contends that his cancellation therefore became effective before any "debt [was] incurred" under the guaranty, R.E. 10 (Def. Exh. 94), whereas the district court held that the debt arose when the contract came into existence on or just after July 2, though Van Der Wall did not provide the guaranty until July 23. R. 5389-90.

Van Der Wall executed a *continuing* guaranty:

> A continuing guaranty is one which is not limited to a single transaction, but which contemplates a future course of dealing, covering a series of transactions, generally for an indefinite time or until revoked. It is prospective in its operation and is generally intended to provide security with respect to future transactions, within certain limits, and contemplates a succession of liabilities, for which, as they accrue, the guarantor becomes liable.

Reece v. First State Bank of Denton, 555 S.W.2d 929, 931 (Tex. Civ. App. – Ft. Worth 1977) (quoting 38 C.J.S. *Guaranty* § 7 at 1142) aff'd 566 S.W.2d 296 (Tex. 1978); *see also Vaughn v. DAP Fin. Serv., Inc.,* 982 S.W.2d 1, 4-5 (Tex. App. – Houston [1st Dist.] 1997) (same). The guaranty at issue "contemplated a future course of dealing" between Westlake and UPC: monthly deliveries of ethylene for which payment would be due 30 days afterward. *Id*. It was "intended to provide security with respect to future

transactions": UPC's payment for the monthly ethylene deliveries. *Id*. Therefore, Van Der Wall's liability did not arise all at once and up front, when UPC and Westlake entered into the contract. Rather, he and Westlake "contemplated a succession of liabilities for which, *as they accrue[d]*" Van Der Wall would serially become obligated. *Id.* (emphasis added).

The Texas Court of Appeals' decision in *Casey v. Gibson Prod., Co*. bears out Van Der Wall's view of the guaranty. *See* 216 S.W.2d 266 (Tex. Civ. App. – Dallas 1948, writ dismissed). The defendants in *Casey*, who guaranteed a traveling salesman's payment for drugs advanced by a wholesaler, obtained reversal of a judgment for the full value of unpaid products because they cancelled the guaranty months before the unpaid advancements: "Where the guaranty is for advances to be made from time to time to the principal obligor, it is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guaranty only when the advance is made." *Id*. at 268 (quotation and emphasis omitted); *see also*; *Hargis v. Radio Corp. of Am, Elec. Components*, 539 S.W.2d 230, 232 (Tex. Civ. App. – Austin 1976) ("each delivery of merchandise after the guaranty agreement was an extension of new credit"). There must be a balance on the underlying contract or a debt "due and owing" before recovery can be had on a continuing guaranty. *Vaughn,* 982 S.W.2d at 4-5. Van Der Wall's

guaranty was similarly divisible and would have ripened upon each delivery of ethylene in 2009. It did not suddenly spring to life to cover $32 million in debt on July 2.

Indeed, if Van Der Wall's obligation arose when UPC first contracted with Westlake on or near July 2, as the district court held, there would be no way for him to cancel the guaranty despite its express termination provision. Since he executed it after the debt arose, he would perpetually be on the hook for UPC's payments despite having availed himself of the termination clause. This interpretation not only nullifies a provision of the agreement, it disregards the essential nature of the guaranty as continuing. Van Der Wall's view of when obligations are "incurred" represents the more reasonable construction of the guaranty, but even if both sides' constructions are reasonable, this Court must enforce Van Der Wall's under the rules favoring guarantors. *See Clark*, 689 S.W.2d at 278.

The district court's reading of the guaranty ignores its purpose, history, context and status as continuing and should not be adopted by this Court. The judgment against Van Der Wall should therefore be reversed.

CONCLUSION

This Court should reverse the judgment and remand with instructions that judgment be entered for UPC and Van Der Wall. If this Court otherwise decides to affirm, it should remand with instructions that judgment be entered against UPC and Van Der Wall for $2 million only.

August 3, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2011, seven copies of the foregoing Appellants-Cross-Appellees' Brief were sent via third-party commercial carrier, overnight service, to the Clerk of the Court, and two copies were sent via First Class U.S. mail to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because this brief contains 13,289 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is printed in a proportionally spaced typeface using the Microsoft Word 2004 for Mac, Version 11.5.6, program in 14 point, Times New Roman font in body text and 12 point, Times New Roman font in footnote text.

Martin J. Siegel /s/
Martin J. Siegel

Dated: August 3, 2011

ADDENDUM SETTING FORTH RELEVANT PORTIONS OF APPLICABLE STATUTES

TEX. BUS. & COM. CODE § 1.305. Remedies to Be Liberally Administered:

(a) The remedies provided by this title must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in this title or by other rule of law.

TEX. BUS. & COM. CODE § 2.201. Formal Requirements; Statute of Frauds:

(a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(b) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.

TEX. BUS. & COM. CODE § 2.708. Seller's Damages for Non-Acceptance or Repudiation:

(a) Subject to Subsection (b) and to the provisions of this chapter with respect to proof of market price (Section 2.723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 2.710), but less expenses saved in consequence of the buyer's breach.

(b) If the measure of damages provided in Subsection (a) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (section 2.710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

TEX. BUS. & COM. CODE § 26.01. Promise or Agreement Must Be in Writing:

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

* * * *

(6) an agreement which is not to be performed within one year from the date of making the agreement.