NO. 01-06-00960-CV

In the First District Court of Appeals
Houston, Texas

CASE FUNDING NETWORK, L.P., 3K PARTNERSHIP, PROSPERITY SETTLEMENT FUNDING, INC., LAWSUIT FINANCIAL, LLC, FUTURE SETTLEMENT FUNDING OF SC, INC., ROBERT M. PRESS, RYAN BROOKS, JOSEPH DINARDO, JOSEPH GIURINTANO, NEW AMSTERDAM CAPITAL PARTNERS, INC., SUPPORT SERVICES, INC., ROBERT E. HILL, AND ANZAR SETTLEMENT FUNDING CORP.,

Appellants and Cross-Appellees,

v.

ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC., ANGLO-DUTCH (TENGE) LLC AND SCOTT VAN DYKE,

Appellees and Cross-Appellants.

ON APPEAL FROM THE 127TH DISTRICT COURT
HARRIS COUNTY, TEXAS

BRIEF OF APPELLEES

WINSTEAD PC

Craig T. Enoch
State Bar No. 00000026
Melissa A. Prentice
State Bar No. 24032969
401 Congress Ave., Suite 2100
Austin, Texas 78701
Telephone: (512) 370-2800
Facsimile: (512) 370-2850

NICKENS KEETON LAWLESS FARRELL & FLACK, LLP

Jacks C. Nickens
State Bar No. 15013800
Bradley W. Hoover
State Bar No. 09965700
Jessica L. Wilson
State Bar No. 24028230
600 Travis, Suite 7500
Houston, Texas 77002
Telephone: (713) 571-9191
Facsimile: (713) 571-9652

KEELING & DOWNES, P.C.

Byron C. Keeling
State Bar No. 11157980
600 Travis, Suite 6750
Houston, Texas 77002
Telephone: (832) 214-9900
Facsimile: (832) 214-9908

Attorneys for Appellees/Cross-Appellants Anglo-Dutch Petroleum International, Inc., Anglo-Dutch (Tenge) LLC and Scott Van Dyke

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REFERENCE CITATION GUIDE

The Parties

This Brief may refer to the following:

Defendants/Appellees/Cross-Appellants Anglo-Dutch Petroleum International, Inc., Anglo-Dutch (Tenge) LLC and Scott Van Dyke	collectively "Defendants"
Anglo-Dutch Petroleum International, Inc., and Anglo-Dutch (Tenge) LLC	collectively "Anglo-Dutch"
Plaintiffs/Appellants/Cross-Appellees Case Funding Network, L.P.; 3K Partnership; Prosperity Settlement Funding, Inc.; Lawsuit Financial, LLC; Future Settlement Funding of SC, Inc.; Robert M. Press; Ryan Brooks; Joseph DiNardo; Joseph Giurintano; New Amsterdam Capital Partners, Inc.; Support Services, Inc.; Robert E. Hill; and Anzar Settlement Funding Corp.	collectively "Plaintiffs" or "Appellants"
The Claims Investment Agreements between Plaintiffs and Anglo-Dutch	"the Agreements"

The Record on Appeal

This Brief will refer to the record as follows:

Brief of Appellants	"A'ant Br. at __"
Clerk's Record	"CR __"

NO. 01-06-00960-CV

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CASE FUNDING NETWORK, L.P., 3K PARTNERSHIP, PROSPERITY SETTLEMENT FUNDING, INC., LAWSUIT FINANCIAL, LLC, FUTURE SETTLEMENT FUNDING OF SC, INC., ROBERT M. PRESS, RYAN BROOKS, JOSEPH DINARDO, JOSEPH GIURINTANO, NEW AMSTERDAM CAPITAL PARTNERS, INC., SUPPORT SERVICES, INC., ROBERT E. HILL, AND ANZAR SETTLEMENT FUNDING CORP.,

Appellants and Cross-Appellees,

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ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC., ANGLO-DUTCH (TENGE) LLC AND SCOTT VAN DYKE,

Appellees and Cross-Appellants.

ON APPEAL FROM THE 127TH DISTRICT COURT
HARRIS COUNTY, TEXAS

BRIEF OF APPELLEES

TO THE HONORABLE COURT OF APPEALS:

Appellees Anglo-Dutch Petroleum International, Inc., Anglo-Dutch (Tenge) LLC and Scott Van Dyke (collectively "Defendants") respectfully file this Brief in support of their request that this Court affirm the trial court's summary judgment in favor of Defendants in Cause No. 2004-23845, *Case Funding Network, L.P. et al. v. Anglo-Dutch Petroleum Int'l, Inc. et al.*, in the 127th Judicial District Court of Harris County, Texas.

STATEMENT OF THE CASE

Nature of the Case: Plaintiffs sued Defendants to recover on a series of litigation funding agreements, entitled "Claims Investment Agreements," under which Plaintiffs provided funds to help finance a lawsuit that Anglo-Dutch was pursuing against Halliburton and other defendants. Defendants asserted several affirmative defenses to Plaintiffs' claims, including that Plaintiffs either released their claims under the contracts or entered into valid accords and satisfaction with Defendants. Copies of the releases and the accords and satisfaction are attached to this Brief as Exhibits A & B.

Trial Court: The Honorable Sharolyn Wood, 127th Judicial District Court of Harris County, Texas.

Trial Court's Disposition: On September 22, 2006, the trial court signed an order (the "Order") that, *inter alia*, (1) granted summary judgment for Plaintiffs on their claims for breach of the litigation funding agreements, *subject to* Defendants' affirmative defenses of accord and satisfaction and release, (2) granted summary judgment for Defendants on their affirmative defenses of accord and satisfaction and release, and (3) granted Defendants' "no evidence" summary judgment motions with respect to Plaintiffs' tort causes of action for breach of fiduciary duty, fraud (other than fraud in the inducement), conversion, and violation of Section 32.45 of the Texas Penal Code. (CR 5132-34). After the trial court severed all claims that it did not resolve by summary judgment, the Order of September 22, 2006, became final and appealable. (CR 5126). A copy of the Order is attached to this Brief as Exhibit C.

ISSUES PRESENTED

Pursuant to Rule 38.2(a) of the Texas Rules of Appellate Procedure, Defendants object to Plaintiffs' characterization of the issues presented in this appeal. Defendants identify the following issues in this appeal:

I. Accord and Satisfaction

1. Did the trial court correctly grant a traditional summary judgment against Plaintiffs on their contract claims based on the doctrine of accord and satisfaction where the parties had a legitimate dispute as to Defendants' liability on a liquidated claim?

2. Did the parties exchange valid consideration for an accord and satisfaction where Plaintiffs accepted and deposited settlement checks that allowed them to avoid any uncertainty over the enforceability of their litigation funding agreements with Anglo-Dutch?

3. Did the parties have a legitimate or bona fide dispute that they could properly resolve with an accord and satisfaction where the summary judgment evidence shows (a) that Defendants had a good faith legal basis for disputing the enforceability of the litigation funding agreements between Plaintiffs and Anglo-Dutch and (b) that Plaintiffs knew at the time that they accepted and deposited their settlement checks that Defendants disputed the enforceability of the litigation funding agreements?

4. Did Plaintiffs enter into a valid accord and satisfaction with Defendants when, after consulting with counsel, they accepted and deposited settlement checks which clearly and explicitly stated that Defendants tendered them "in full and final satisfaction of all amounts due" and that Plaintiffs, by endorsing the checks, were releasing Anglo-Dutch and Scott Van Dyke from "any and all claims related to the agreement?"

II. Release

1. Did the trial court correctly grant a traditional summary judgment against Plaintiffs Anzar, Press and Prosperity based on the doctrine of release where the evidence shows that Anzar, Press and Properity executed settlement and release agreements with Defendants?

2. Did the parties exchange valid consideration for the settlement and release agreements where the evidence shows that Anzar, Press and Prosperity secured an immediate cash benefit in exchange for relinquishing a potentially larger cash return that was subject to Anglo-Dutch's success in an appeal of its judgment against Halliburton?

III. Plaintiffs' Tort Claims

1. Did Plaintiffs fail to offer more than a scintilla of evidence to support their fraud claim where (a) Plaintiffs offered evidence to demonstrate only that Defendants made statements of opinion, and not representations of material fact, about the legal effect of the agreements between Plaintiffs and Anglo-Dutch, (b) Defendants made no false representations that the agreements were "legitimate investments" in light of this Court's opinion in *Haskell* that litigation funding agreements are in fact enforceable investments, and (c) Plaintiffs offered no evidence whatsoever that they reasonably relied on any representations that they received from Defendants?

2. Did Plaintiffs fail to offer more than a scintilla of evidence to support their conversion claim when Plaintiffs' evidence shows that the source of Plaintiffs' claim is not a specific chattel, but rather merely an indebtedness that Defendants may discharge by the payment of money generally?

3. Did Plaintiffs fail to offer more than a scintilla of evidence to support their breach of fiduciary duty claim where (a) Plaintiffs offered no legally probative evidence to establish that they ever shared any confidential fiduciary relationship with Defendants that existed prior to, and apart from, the litigation funding transactions that form the basis for this lawsuit and (b) Plaintiffs offered no legally probative evidence to show that they suffered any damages directly and independently resulting from any breach of fiduciary duty, as opposed to damages arising from a mere breach of contract?

4. Did Plaintiffs fail to offer more than a scintilla of evidence to support their claim under Section 32.45 of the Texas Penal Code where Plaintiffs offered no legally probative evidence to establish that they ever shared any confidential fiduciary relationship with Defendants that existed prior to, and apart from, the litigation funding transactions that form the basis for this lawsuit?

IV. Collateral Estoppel

1. Did the trial court properly exercise its discretion in declining to apply the doctrine of collateral estoppel to bar Defendants' accord and satisfaction and release defenses?

2. Did the trial court properly exercise its discretion in declining to apply the doctrine of collateral estoppel to excuse Plaintiffs from complying with their burden of offering more than a scintilla of evidence to support their tort claims in response to Defendants' "no evidence" motions for summary judgment?

V. Scott Van Dyke

1. Did the trial court properly grant summary judgment in Scott Van Dyke's favor on Plaintiffs' tort claims for the same reasons that it granted summary judgment in Anglo-Dutch's favor on Plaintiffs' tort claims?

STATEMENT OF FACTS

Defendants have described the background facts more fully in their Brief of Cross-Appellants. Briefly, the relevant facts are as follows:

A. The Halliburton Lawsuit

In May 2000, Anglo-Dutch filed a lawsuit against Halliburton Energy Services, Inc. ("Halliburton"), and other defendants seeking $600 million in damages. (CR 303). To remain in business while pursuing the lawsuit, Anglo-Dutch obtained a little over $2,400,000 in funds from several litigation financiers — including Plaintiffs, who furnished a total of $723,000 to Anglo-Dutch. (CR 304). Each of the financiers signed Claims Investment Agreements with Anglo-Dutch. (*Id.*). These Agreements provided that if Anglo-Dutch were to secure a "cash recovery" in the Halliburton lawsuit, Anglo-Dutch would pay its financiers a substantial "return" based on formulas in the Agreements. (*Id.*). With the passage of time, the formulas in these Agreements could have potentially enabled the financiers to claim *two to four times* the amounts that they originally furnished to Anglo-Dutch.

In 2003, the jury in the Halliburton lawsuit returned a verdict awarding Anglo-Dutch $70.4 million in damages on its claims against Halliburton. (CR 304). The trial judge entered a judgment in Anglo-Dutch's favor. (*See, e.g.*, CR 2162).

B. Anglo-Dutch's Discussions With Plaintiffs

After receiving this judgment, Anglo-Dutch entered into settlement discussions with Halliburton. For a settlement to be possible, however, Anglo-Dutch needed its financiers to take less than the total amount of their "returns" under the Agreements. (CR 304). Thus, on

April 12, 2004, Anglo-Dutch's president, Scott Van Dyke, sent a letter to each of Anglo-Dutch's litigation financiers. (*See, e.g.,* CR 2162). The letter stated:

> In light of current Texas law, it is Anglo-Dutch's strong desire to settle the Lawsuit. . . . To achieve a resolution of the Lawsuit with Halliburton, Anglo-Dutch is respectfully requesting everyone who entered into a Claims Investment Agreement to accept a lower payment than what is set forth in their Claims Investment Agreement(s).

(*Id.*). Each of the letters attached a proposed settlement and release agreement ("settlement agreement") for the financiers to sign if they were willing to accept less than their total returns. (*Id.*).

Three of the plaintiffs in the present case (Anzar Settlement Funding Corp., Robert M. Press, and Prosperity Settlement Funding, Inc.) signed and returned the settlement agreement that Van Dyke attached to the April 2004 letter. (CR 305, 309-10, 313-14, 325-26; *see also* Exhibit A). The settlement agreement provided:

> To induce Anglo-Dutch to accept settlement terms substantially less than Anglo-Dutch had anticipated to receive and/or to help facilitate an early payment between Anglo-Dutch and the defendants in the [Halliburton Lawsuit] . . ., Investor agrees to accept a lower payment from Anglo-Dutch than what is provided for in the Investment Agreements. . . . All Investment Agreements . . . shall terminate, and, *by receiving such money, Investor releases Anglo-Dutch from any and all obligation with respect to the Investment Agreements.*

(*Id.*) (emphasis added). Anglo-Dutch paid the settlement amounts specified in the signed settlement agreements that it received from Anzar, Press and Prosperity. (CR 304).

Anglo-Dutch settled with Halliburton after receiving these signed settlement and release agreements, as well as assurances from other financiers that they would likewise accept lower payments. (*Id.*).

On April 23, 2004, Anglo-Dutch sent a letter to its remaining financiers enclosing checks for a reduced, *but still substantial*, payment on their Agreements. The letter stated:

> **By depositing the enclosed check, you hereby expressly release Anglo-Dutch from any and all present and future liability relative to the Agreement and the Lawsuit.**
>
> **By depositing the check, you hereby acknowledge that an "accord and satisfaction" and a "novation" have occurred.** Anglo-Dutch will be discharged of all liability under the Agreement (of whatever nature), and you may not interpret this fact in any contrary manner whatsoever. . . .
>
> **Tender of the enclosed check by Anglo-Dutch, and acceptance by you, constitute full satisfaction of any claim you may have under the Agreement or under Texas law.**

(CR 337, 360, 375, 380, 386, 392, 398, 404, 410) (emphasis in original). The front of each tendered check contained accord and satisfaction language. (*See* CR 416-53; *see also* Exhibit B). The back of each check contained additional accord and satisfaction language above the endorsement line:

> **PAYEE ACCEPTS AMOUNT TENDERED IN FULL SATISFACTION OF ALL AMOUNTS DUE AND CLAIMS ARISING UNDER THE AGREEMENT, AND AGREES THAT PAYMENT CONSTITUTES A NOVATION AND/OR WAS OBTAINED IN ACCORD AND SATISFACTION.**

(*Id.* (emphasis in original); *see also* Exhibits B & D). Each of the plaintiffs in the present case — other than Anzar, Press and Prosperity, which had executed settlement agreements — signed and deposited the settlement checks from Anglo-Dutch. (CR 306-07).

C. Procedural History

On May 7, 2004, Plaintiffs filed the present action against Anglo-Dutch and Van Dyke. (CR 2). Plaintiffs amended their pleadings several times, eventually alleging causes

of action against Defendants for breach of contract, fraud, conversion, breach of fiduciary duty, and violations of Section 32.45 of the Texas Penal Code. (CR 890). Both Plaintiffs and Defendants filed multiple motions for summary judgment. In particular, Defendants filed a traditional motion for summary judgment asserting that the defenses of release and accord and satisfaction barred Plaintiffs from recovering on any of their claims. (CR 293, 855, 1540). Defendants also filed "no evidence" motions asserting that Plaintiffs could not recover on their tort claims. (CR 915-98).

On September 22, 2006, the trial court signed an order ruling on the various summary judgment motions that the parties had respectively filed in the case. Among other things, the trial court concluded:

- "Plaintiffs' motions for summary judgment to recover on the contracts in question are granted, subject to Defendants' affirmative defense of (1) accord & satisfaction as to all Plaintiffs, and (2) release as to Plaintiffs Prosperity Settlement Funding ('Prosperity'), Robert Press ('Press') and Anzar Settlement Funding ('Anzar')."

- "Cross-points of Plaintiffs' and Defendants' motions for summary judgment concerning accord & satisfaction and release are granted as to Defendants and denied as to Plaintiffs with the Court's ruling that Defendants have established as a matter of law that in 2004 (1) there was an accord & satisfaction of the underlying debt between Plaintiffs and Defendants, and (2) the three Release Plaintiffs released Defendants by separate release agreements . . . ."

- "Defendants' no-evidence motions for summary judgment filed as to each Plaintiff are granted as to claims for breach of fiduciary duty, fraud (other than fraud in the inducement), conversion, and violation of Texas Penal Code Section 32.45 . . . ."

(CR 5132). Subsequently, the trial court severed all of the claims that it did not resolve in its Order — principally, claims alleging that Anglo-Dutch had fraudulently induced Anzar,

Press and Prosperity to sign their settlement agreements. (CR 5126). As a result, the trial court's Order became a final judgment. This appeal followed.

SUMMARY OF ARGUMENT

The trial court correctly granted Defendants' traditional motion for summary judgment against Plaintiffs' claims. The defense of release bars Plaintiffs Anzar, Press and Prosperity from pursuing their claims because they willingly signed settlement agreements stating that they released Defendants from any and all obligations relating to the Agreements. The defense of accord and satisfaction bars the remaining plaintiffs from pursuing claims against Defendants. With full knowledge that Defendants disputed the validity of the Agreements, these plaintiffs deposited settlement checks explicitly stating on their face that they were accords. Defendants had a legitimate basis for disputing the Agreements: at the time that Plaintiffs deposited the checks, this Court had not yet issued its opinion in *Haskell*, and no Texas court had addressed whether litigation funding agreements were enforceable.

The trial court also correctly granted Defendants' "no evidence" motions challenging Plaintiffs' tort claims. Plaintiffs failed to bring forth more than a scintilla of evidence to support each of the challenged elements of their claims:

- *Fraud.* Plaintiffs alleged that Defendants committed fraud by misrepresenting the Agreements to be investments while, at the same time, believing them to be loans. A misrepresentation about the legal effect of a document, however, is merely an expression of opinion and not an actionable representation of material fact. Moreover, this Court in *Haskell* specifically concluded that litigation funding agreements were investments and *not*

usurious loans; therefore, Defendants' representations to Plaintiffs were *true*, not false. In any event, Plaintiffs have offered no evidence to show that they reasonably relied on any alleged false representations that they received from Defendants.

- *Conversion*. Plaintiffs have offered no evidence to show that Defendants wrongfully exercised dominion or control over a specific item of personal property belonging to Plaintiffs. Their conversion claim improperly seeks to recover only a sum of money, not a specific item of personal property.

- *Breach of Fiduciary Duty*. Plaintiffs have offered no evidence to show that Defendants formed a fiduciary relationship with Plaintiffs, who in fact shared nothing more than an arm's-length business relationship with Defendants. Additionally, Plaintiffs have offered no evidence that they suffered any injury resulting directly from a breach of fiduciary duty: Plaintiffs' case against Defendants sounds only in contract, not in tort.

- *Section 32.45 of the Texas Penal Code*. Having offered no evidence that they shared a fiduciary relationship with Defendants, Plaintiffs also may not recover under Section 32.45.

The doctrine of collateral estoppel does not aid Plaintiffs in challenging the trial court's summary judgments in Defendants' favor. Plaintiffs have not shown, and cannot show, that Defendants fully and fairly litigated in any prior action the *identical issues* that Plaintiffs now ask this Court to resolve against Defendants on the basis of collateral estoppel. And even if Plaintiffs arguably could make such a showing, the non-mutual offensive use of collateral estoppel is inappropriate when, as here, it would be unfair to Defendants.

ARGUMENT

The standard for reviewing a summary judgment is de novo. *See Provident Life & Accident Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A traditional summary judgment is proper if the evidence shows that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). Thus, a trial court may grant summary judgment against a plaintiff who, as a matter of law, cannot establish one or more of the elements of its causes of action. *Id.* Likewise, a trial court may grant summary judgment when a defendant conclusively proves an affirmative defense to the plaintiff's claims. *See Johnson & Johnson Med. Cen. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996); *Randall's Food Mkts. v. Johnson*, 891 S.W.3d 640, 644 (Tex. 1995).

A "no evidence" summary judgment is proper when "there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). A plaintiff opposing a "no evidence" motion must identify more than a scintilla of evidence to support each of the challenged elements of its claims. The evidence will not rise to the level of a scintilla if either (a) it "is so weak as to do no more than create a mere surmise or suspicion of fact," *Sonnenberg v. Mike Smith Auto Plaza*, 8 S.W.3d 850, 852 (Tex. App.—Beaumont 2000, no pet.), or (b) the trial court "is barred by rules of law or of evidence" from giving any weight to it. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

The trial court here correctly granted Defendants' "no evidence" motions for summary judgment on Plaintiffs' tort claims and Defendants' traditional motion for summary judgment

with respect to their affirmative defenses of release and accord and satisfaction. This Court should affirm the trial court's Order granting Defendants' motions.

I. The Trial Court Correctly Granted a Traditional Summary Judgment Against Plaintiffs' Claims Based on the Doctrine of Accord and Satisfaction

Defendants filed a traditional motion for summary judgment against "*all claims* asserted by all Plaintiffs in this case." (CR 293) (emphasis added). With respect to those plaintiffs who had deposited settlement checks (*i.e.*, all plaintiffs other than Anzar, Press and Prosperity), Defendants asked the trial court to grant summary judgment on the basis of the doctrine of accord and satisfaction. (*Id.*).[1] The trial court granted Defendants' motion. (CR 5132). On appeal, Plaintiffs suggest that the trial court only granted Defendants' motion as to Plaintiffs' contract claims.[2] The trial court's order, however, contains no such limitation. (*Id.*). Because Defendants directed their traditional motion against *all* of Plaintiffs' claims, this Court need not even reach Defendants' "no evidence" motions if it affirms the trial court's Order granting Defendants' traditional motion for summary judgment.

Plaintiffs hinge their argument in response to Defendants' accord and satisfaction defense on the representation that "Texas law has long held that a contract creditor's receipt and cashing of a check in an amount less than the amount due the creditor does not bar the creditor's subsequent lawsuit seeking to recover the balance owed." A'ant Br. at 31. If not

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[1]Plaintiffs acknowledge that an accord and satisfaction is a *contract* that discharges an existing obligation. *See* A'ant Br. at 32. Thus, in a case where Plaintiffs have criticized Defendants for challenging the validity of the Claims Investment Agreements, Plaintiffs ironically find themselves in the position of challenging the validity of other contracts that they entered into with Defendants — the settlement checks.

[2]For this reason, Plaintiffs do not argue that the defense is inapplicable to tort claims. In fact, "[c]laims arising out of the commission of a tort are particularly applicable subjects for accord and satisfaction." *Marsalis v. Garre*, 391 S.W.2d 522, 525 (Tex. App.—Amarillo 1965, writ ref'd n.r.e.).

an outright misstatement of the law, this representation is at best only partially true. *See Southwestern Bell Media, Inc. v. Boozer & Coleman, Inc.*, No. 05-91-00627-CV, 1992 WL 141152, *3 (Tex. App.—Dallas June 22, 1992, no writ) (not designated for publication). Under Texas law, a creditor's acceptance of a check in an amount less than the amount due on a debt *will bar* a subsequent action *if* the parties had a legitimate dispute and *if* the check states clearly that it constitutes an accord and satisfaction.

It is certainly true that a debtor may not send a partial payment on a debt and then, after the fact and with no legitimate dispute to settle, claim that the payment discharged its debt to its creditor. ***That, however, is not the case here.***

A. Contrary to Plaintiffs' Suggestion, the Doctrine of Accord and Satisfaction Does Not Require an Unliquidated Claim

Plaintiffs suggest that the doctrine of accord and satisfaction requires an unliquidated claim. *See, e.g.,* A'ant Br. at 38 ("The amounts due Appellants under their Agreements are liquidated because they can be calculated precisely using the formulae set forth therein ...."). Not true. A valid accord and satisfaction may arise "when the claim is unliquidated *or* when there is a dispute between the parties *as to the liability on a liquidated claim*." *Hixson v. Cox*, 633 S.W.2d 330, 331 (Tex. App.—Dallas 1982, no writ) (emphasis added); *see also American Gen. Life Ins. Co. v. Copley*, 428 S.W.2d 862, 865 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) ("[S]ufficient consideration may inhere in or arise out of a good faith dispute as to liability even if the amount claimed is liquidated.").

The result is no different under Section 3.311 of the Texas Business & Commerce Code. *See AXA S.A. v. Union Pac. R.R. Co.*, 269 F. Supp. 2d 863, 866 (S.D. Tex. 2003)

(noting that Section 3.311 codifies the common law and contains "essentially the same" rules as under the common law).[3] Section 3.311 provides that a valid accord and satisfaction may arise where either "the amount of the claim was unliquidated ***or*** subject to a bona fide dispute." TEX. BUS. & COM. CODE ANN. § 3.311 (Vernon Supp. 2006) (emphasis added). The disjunctive term "or" is significant. *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 30 (Tex. 1978). Under the plain meaning of Section 3.311, an accord and satisfaction does not require an unliquidated claim: as under the common law, it may also arise — as here — where the parties have a legitimate dispute over a liquidated claim.

B. Plaintiffs Are Incorrect in Arguing that the Settlement Checks Are Unenforceable for Lack of Consideration

Plaintiffs argue that the settlement checks are not valid accords because they are "not supported by consideration." A'ant Br. at 42. In support of their argument, Plaintiffs protest that they received no additional compensation for accepting the reduced amount reflected in the settlement checks. *Id.* The consideration necessary to support an accord and satisfaction, however, need not be in the form of additional money or compensation. The mere existence of a legitimate dispute on a liquidated or unliquidated claim itself "furnishes sufficient consideration for an accord and satisfaction." *Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 110 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also Indiana*

[3]As Plaintiffs acknowledge, Anglo-Dutch tendered its settlement checks to Plaintiffs "pursuant to Texas law *including but not limited to* U.C.C. § 3.311." (CR 306) (emphasis added). Section 3.311 does not bar Defendants from asserting an accord and satisfaction defense under the common law — and vice versa. *See Petty v. Citibank (S.D.) N.A.*, No. 11-05-00337-CV, 2007 WL 512065, *3 (Tex. App.—Eastland Feb. 15, 2007, no pet. h.). Indeed, the comments to Section 3.311 recognize that "Section 3.311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged." TEX. BUS. & COM. CODE § 3.311 cmt. 3 (Vernon Supp. 2006).

Lumbermen's Mut. Ins. Co. v. State, 1 S.W.3d 264, 266 (Tex. App.—Fort Worth 1999, pet. denied).

This result makes intuitive sense. A settlement agreement is a form of accord and satisfaction; yet, a party to litigation may properly agree to accept a settlement payment less than the full amount of an otherwise liquidated claim. The consideration in such a situation "is found in the resolution of the uncertainty which exists as to the validity or the amount of a claim." *Hycarbex, Inc.*, 927 S.W.2d at 110; *see also AXA, Inc.*, 269 F. Supp. 2d at 867. Plaintiffs accepted settlement checks from Defendants precisely for the purpose of avoiding the uncertainty which Plaintiffs, from their involvement in the litigation financing industry, knew to exist as to the validity of litigation funding agreements. Thus, the checks that Plaintiffs accepted from Defendants were not unenforceable for lack of consideration.

C. The Parties Had a Legitimate and Bona Fide Dispute About Whether the Claims Investment Agreements Were Enforceable

No matter how Plaintiffs phrase their argument on appeal, the real issue is whether the parties had a legitimate or bona fide dispute. Plaintiffs deny that the parties ever had a legitimate dispute, citing twenty bullet-points of "evidence." *See* A'ant Br. at 35-39.[4] This "evidence" falls into four categories:

1. *Evidence purporting to show that Defendants acted in bad faith in their performance of the Claims Investment Agreements. Id.* at 35-38 (Bullet-points 1-3, 10-13). The legitimacy of a dispute does not depend on a party's motives or conduct in performing the original contract. Courts interpreting versions of Section 3.311 of the UCC have uniformly recognized that "[t]he focus of the good faith inquiry is on the offer of the accord, and not on the actions of the parties in performing the underlying contract."

[4]Although Plaintiffs did not number these bullet-points in their brief, Defendants will refer to them, in the order in which Plaintiffs raised them in their brief, as Bullet-points 1 to 20.

Webb Bus. Promotions, Inc. v. American Elec. & Entertainment Corp., 617 N.W.2d 67, 73 (Minn. 2000); *see Ross Bros. Constr. Co. v. Markwest Hydrocarbon, Inc.*, 196 Fed. Appx. 412, 414 (6th Cir. 2006); *Ex Parte Meztista*, 845 So. 2d 795, 799-800 (Ala. 2001); *cf. Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 482 (Tex. App.—Corpus Christi 1989, writ denied) (same rule under Section 1.203). "Bad faith is not necessarily established by a failure to disclose facts about the underlying dispute. . . ." *Webb Bus. Promotions*, 617 N.W.2d at 74.

2. *Evidence purporting to show that Defendants were wrong in arguing that the Agreements were unenforceable. See* A'ant Br. at 37-38 (Bullet-points 11 & 12). The legitimacy of a dispute does not depend on the accuracy of a party's understanding of his legal rights.[5] "[I]t is not necessary to resolve the parties' underlying dispute to determine whether the accord and satisfaction is supported by consideration." *Hycarbex, Inc.*, 927 S.W.2d at 110. *See General Am. Life Ins. Co. v. Valley Feed Mills*, 458 S.W.2d 860, 862 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.) ("The validity of the accord and satisfaction is not affected by the fact that the party who claimed that nothing is due . . . is subsequently shown to have been in error."); *Firestone Tire & Rubber Co. v. White*, 274 S.W.2d 452, 455 (Tex. Civ. App.—Dallas 1954, no writ); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 74 cmt. b (1981) (noting that even when the invalidity of an asserted contractual claim or defense "later becomes clear," the legitimacy of a dispute leading to an accord "is to be judged as it appeared to the parties at the time").

3. *Evidence purporting to show that Defendants fraudulently induced Anzar, Press and Prosperity to sign settlement agreements. See* A'ant Br. at 36-37 (Bullet-points 4, 6-9). Each of the plaintiffs other than Anzar, Press and Prosperity, however, did *not* sign the settlement agreements that Anglo-Dutch sent to its financiers and therefore were not "fraudulently induced" to sign any settlement agreements. And in any event, Plaintiffs do not explain how evidence relating to the settlement agreements in any way affects the legitimacy of the legal issues that Van Dyke raised in his letter accompanying the settlement checks. Tellingly, while Plaintiffs filed affidavits in which Anzar, Press and Prosperity self-servingly identified "false" statements on which they allegedly relied in signing the release agreements, Plaintiffs have identified no such similarly "false" statements in the letter that Van Dyke sent to the remaining plaintiffs with the settlement checks.

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[5]Remarkably, Plaintiffs assert that the summary judgment in *Haskell* "casts doubt upon Appellees' claims of 'good faith' and the existence of 'legitimate' and 'bona fide' disputes regarding the enforceability of the Agreements." A'ant Br. at 39. By this logic, the fact that Plaintiffs themselves could not cite any evidence or case law to avoid the trial court's summary judgment must cast doubt upon Plaintiffs' own good faith in attacking settlement checks that they deposited into their bank accounts with the representation and endorsement that they understood the checks to be an accord and satisfaction.

4. *Evidence purporting to show that Anglo-Dutch refused to pay the amounts that it owed under the Claims Investment Agreements because it desired to net more money out of the Halliburton settlement. See, e.g.,* A'ant Br. at 36-38 (Bullet-points 5 & 15). The mere fact that Anglo-Dutch desired to net more money under the Agreements, however, does not establish bad faith if Anglo-Dutch otherwise had a legitimate basis for challenging the Agreements. *See Fetter v. Wells Fargo Bank Tex., N.A.*, 110 S.W.3d 683, 691 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (noting that a party does not act in bad faith by exercising its legitimate rights under the law); *see also Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 435 (Tex. 2004) (noting that a party's subjective motives do not negate good faith if the party's actions are otherwise commercially reasonable). Plaintiffs do not dispute the evidence showing that Anglo-Dutch needed its financiers to accept reduced payments for it to settle the Halliburton lawsuit and to stay in business as an oil company. *See, e.g.*, CR 304; *cf. Boozer & Coleman, Inc.*, 1992 WL 141152, at *4 (recognizing that the insolvency of a debtor excuses the requirement of a legitimate or bona fide dispute).

None of these categories of "evidence" is relevant in determining whether the parties had a legitimate dispute.[6] A proper inquiry into the legitimacy of a dispute instead asks two questions: (a) Did the contract debtor have a good faith basis in law or fact for disputing the creditor's claim?, and (b) Did the creditor know or have reason to know that the debtor disputed the creditor's claim? The answer to both questions here is "Yes."

1. *Defendants Had a Good Faith Basis for Disputing the Enforceability of the Claims Investment Agreements*

A legitimate dispute arises for purposes of the doctrine of accord and satisfaction where the contract debtor has a good faith basis in law or fact for challenging the creditor's claim. *See Simms Oil Co. v. American Refining Co.*, 288 S.W. 163, 164 (Tex. Comm'n App. 1926, judgm't adopted) (noting that a "real basis for the denial is not essential," but only that

[6]Plaintiffs complain that the "only summary judgment 'evidence'" Defendants offered in support of their motion for summary judgment was the affidavit of Scott Van Dyke. A'ant Br. at 41. Van Dyke's affidavit is not the only summary judgment evidence that supports the trial court's summary judgment in favor of Defendants. (*See, e.g.*, CR 308-468, 1540-2622). Indeed, this Court need not even consider Van Dyke's affidavit to uphold the trial court's summary judgment. *See infra* at 13-19.

the denial of liability "is not merely factitious or mala fides"); RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981) (noting that an accord and satisfaction has valid consideration when the debtor challenges a claim "because of uncertainty as to the facts or the law"); *cf. Copley*, 428 S.W.2d at 865 (noting that an accord and satisfaction lacks valid consideration when "a reasonable person, acting in good faith, would have concluded that there was *no substantial basis* for denying liability") (emphasis added).[7]

Here, Scott Van Dyke testified that he consulted a lawyer, Sanford Dow, in April 2004 to discuss the Claims Investment Agreements. (CR 4964).[8] Dow drafted the letter that Van Dyke sent to Plaintiffs with the settlement checks. (*Id.*). Each letter stated that Anglo-Dutch believed the Agreements to be "contrary to Texas public policy and . . . unenforceable under Texas law." (*E.g.*, CR 343). The letter was based on recent case law. Before Van Dyke sent the letter, the Ohio Supreme Court had ruled that litigation funding agreements were contrary to Ohio public policy and unenforceable under Ohio law. *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121, 789 N.E.2d 217, 221 (2003). A Michigan court had similarly ruled that litigation funding agreements could be usurious loans. *Lawsuit Financial, L.L.C. v. Curry*, 261 Mich. App. 579, 683 N.W.2d 233, 239 (2004).

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[7]The comments to Section 3.311 offer two examples of disputes that are not bona fide: (1) where an insurer, from a position of superior bargaining power, takes unfair advantage of an insured; and (2) where a business debtor prints full satisfaction language on all of its checks as a matter of routine practice without regards to the merits. TEX. BUS. & COM. CODE ANN. § 3.311 cmt. 4 (Vernon Supp. 2006). Each of these examples illustrates a situation where the contract debtor lacks a good faith basis in law or fact for denying the claim.

[8]Plaintiffs suggest that this Court should infer a sinister motive from the timing of Van Dyke's consultation with Dow. Van Dyke, however, is not a lawyer and had no reason to be aware of the case law in other states invalidating litigation funding agreements — unlike Plaintiffs, who for the most part are major players in the litigation financing industry. (CR 4964).

Significantly, Plaintiffs have never argued that Defendants' affirmative defenses in the present case violate Rule 13 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 13 (stating that pleadings must not be groundless and noting that "[c]ourts shall presume that pleadings, motions, and other papers are filed in good faith"); *see also* CR 4962 n.1. Nor did this Court rule in *Haskell* that Anglo-Dutch's defenses lacked a good faith basis in law or fact. On the contrary, this Court observed that *Haskell* case was a case "of first impression in Texas." *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 100 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In concluding that the litigation funding agreements in *Haskell* were enforceable, this Court acknowledged that courts in other states had reached different results. *Id.* at 100-01.

At the time that Plaintiffs deposited the settlement checks from Anglo-Dutch, this Court had not yet issued its decision in *Haskell*. As participants in the litigation funding industry, Plaintiffs knew or had reason to know of the decisions in *Rancman* and *Curry*; and therefore, they had reason to anticipate the risk that Texas, which had no case law on point prior to *Haskell*, might adopt the reasoning in *Rancman* or *Curry*. As Joe DiNardo testified:

> Q: We've talked about, you know, the possibilities at least in certain states in certain circumstances these contracts would be considered usury and therefore violate usury law, right?
> A: Yes.
> Q: And you've agreed that that's at least a risk?
> . . .
> A: Yes.
> . . .
> Q: And again, you know that there's a risk out there and that some state or some judge could hold these contracts invalid or unenforceable due to public policy?
> A: On a state-by-state basis, that's correct.

(CR 1645-47; *see* CR 1582-83, 1607-08, 1620, 2188; *see also* Brief of Cross-Appellants at 9-36 (discussing the reasons that the Claims Investment Agreements are unenforceable)).

Defendants had a good faith basis for disputing the enforceability of the Agreements based on the uncertainty of the law in Texas — and, in particular, whether Texas would follow *Rancman* and *Curry*. Accordingly, the trial court correctly recognized that the parties had a legitimate dispute.

2. *Plaintiffs Knew that Defendants Disputed the Enforceability of the Claims Investment Agreements*

A legitimate dispute arises for purposes of accord and satisfaction where the creditor knows or has reason to know that the debtor disputes the creditor's claim. *See Hycarbex, Inc.*, 927 S.W.2d at 110 (upholding a directed verdict in favor of defendant because, while the plaintiff was "stunned" by the defendant's interpretation of the contract, the plaintiff signed the alleged accord with full knowledge of the defendant's interpretation); *Vann v. Western Data Centers, Inc.*, 532 S.W.2d 419, 421 (Tex. Civ. App.—Amarillo 1976, no writ) (noting that because plaintiffs recognized that "there was a dispute," the issue of a good faith dispute was "no longer open to question"). If the creditor has knowledge of the dispute, then it cannot reasonably contend that its assent to an accord was involuntary or accidental. *See Flowers v. Diamond Shamrock Corp.*, 693 F.2d 1146, 1152 (5th Cir. 1982).

The cases that Plaintiffs cite in their brief illustrate this principle. The defendant in *Flowers*, for example, sent the plaintiffs a check stating in small print that it was "issued in full settlement of the account," but otherwise giving the plaintiffs no reason to suspect that the defendants had a problem with their accounts. The Fifth Circuit commented:

> The requirement of a bona fide dispute presupposes both parties' knowledge that there exists a particular issue as to a greater liability that is settled by the accord. . . . Mutual assent of the parties to settlement of a dispute is a requirement for an accord and satisfaction, and the creditor must fully understand that the amount tendered is conditioned as full disposition of the underlying obligation.

Id. Because the plaintiffs had no knowledge of any dispute, the Fifth Circuit concluded that the plaintiffs did not create an accord and satisfaction by depositing the check. *Id. See Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 863 (Tex. 2000) (finding no evidence of any preexisting dispute by either party and noting that "there must be a dispute and an unmistakable communication to the creditor that tender of the reduced sum is upon the condition that acceptance will satisfy the underlying obligation."); *see also* TEX. BUS. & COM. CODE ANN. § 3.311(d) (Vernon Supp. 2006).

By contrast, Plaintiffs here were well aware that Defendants disputed the validity of the Agreements. (*See, e.g*, CR 1564-66, 2022, 2087, 2187-88, 2336-37). The letters that Van Dyke sent to each of the plaintiffs specifically informed them that Anglo-Dutch disputed the validity of the Agreements. (*E.g.*, CR 380-81). Along with each letter, Defendants tendered settlement checks "in an effort to compromise" the dispute. (*E.g.*, CR 380-84). There was nothing involuntary or accidental in Plaintiffs' decision to deposit the checks.[9] Plaintiffs understood and willingly agreed that, by accepting the checks, they were releasing Anglo-Dutch from its obligations under the Agreements. (*E.g.*, CR 381). Accordingly, the trial court correctly recognized that the parties had a legitimate dispute.

[9]Indeed, several of the plaintiffs consulted with their current counsel — the Hagans, Bobb & Burdine law firm — before accepting the settlement checks. (CR 1738-39; 2027).

D. Plaintiffs Entered Into a Valid Accord and Satisfaction By Depositing the Settlement Checks, Which Explicitly Stated that They Fully Satisfied All Amounts Due

A debtor may seek to discharge a disputed claim by tendering to the creditor a check for an amount less than the full value of the claim with the condition that "acceptance will constitute satisfaction of the underlying obligation." *Indiana Lumbermen's Mut. Ins. Co.*, 1 S.W.3d at 266. The check will create an accord and satisfaction if it is "so clear, full, and explicit that it is not susceptible to any other interpretation." *Metromarketing Servs., Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 197 (Tex. App.—Houston [14th Dist.] 2000, no pet.). On receiving such a check, the creditor has the choice either (1) to accept the check as complete satisfaction of its claim against the debtor or (2) to return the check and sue the debtor for the full amount of its claim. *Hixson v. Cox*, 633 S.W.2d 330, 331-32 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

Here, the settlement checks expressly stated that Defendants were tendering them to Plaintiffs "in full and final satisfaction of all amounts due." (*E.g.*, CR 416). They further stated that Plaintiffs, by depositing the checks, were releasing "any and all claims" that they might have against Defendants. (*E.g.*, CR 416-17; *see also* Exhibit D (identifying the accord and satisfaction language in the letters and checks)). Such language clearly and explicitly created an accord and satisfaction. *See Hill v. Bartlette*, 181 S.W.3d 541, 549 (Tex. App.—Texarkana 2005, no pet.); *see also General Am. Life Ins. Co. v. Valley Feed Mills, Inc.*, 458 S.W.2d 860, 862 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.) ("No one of ordinary intelligence could fail to understand that if the release was executed and the check cashed, it would necessarily be in full settlement and satisfaction of the claim.").

Plaintiffs were sophisticated entities and individuals. They knew exactly what they were doing in depositing the checks that they received from Defendants. Indeed, many of them participated in a conference call with their Texas counsel — the Hagans, Bobb & Burdine law firm — *before* deciding to deposit the checks. (CR 1567-69, 1738-39, 2027). By depositing the checks, Plaintiffs created an accord and satisfaction. Accordingly, the trial court correctly granted summary judgment in favor of Defendants.

III. The Trial Court Correctly Granted a Traditional Summary Judgment Against Plaintiffs Anzar, Press and Prosperity Based on the Doctrine of Release

A release that is valid on its face is a complete bar to any later action. *McMahan v. Greenwood*, 108 S.W.3d 467, 478 (Tex. App.—Houston [14th Dist.] 2003, no pet.). After a party has moved for summary judgment on the basis of a release that is valid on its face, the burden shifts to the opposing party to offer evidence showing that the release should be set aside. *Id.* Here, Plaintiffs Anzar, Press and Prosperity entered into written settlement agreements with Defendants. (CR 309-36). In their traditional motion for summary judgment, Defendants asked the trial court to enter summary judgment against Anzar, Press and Prosperity on the basis of these settlement agreements. (CR 293-302). The trial court granted Defendants' motion. (CR 5132-34).[10]

Plaintiffs argue that the settlement and release agreements are unenforceable for lack of consideration. *See* A'ant Br. at 43. However, where a release recites that the parties

[10]As they do with Defendants' accord and satisfaction defense, Plaintiffs suggest that Defendants' release defense applies only to Plaintiffs' contract claims. *See* A'ant Br. at 43. Defendants, however, did not limit their traditional motion for summary judgment to Plaintiffs' contract claims. (CR 293). Nor did the trial court so limit its order granting Defendants' motion. (CR 5132). If Plaintiffs contend that the settlement agreements do not apply to Plaintiffs' tort claims, then they have waived any such argument by failing to brief it either in the trial court or in this Court.

received good and valuable consideration, this Court may presume that valid consideration supports the release in the absence of any evidence proving a lack of consideration. *See Lemaire v. Davis*, 79 S.W.3d 592, 597 (Tex. App.—Amarillo 2002, pet. denied); *Buddy "L," Inc. v. General Trailer Co.*, 672 S.W.2d 541, 547 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The settlement agreements between Defendants and Plaintiffs Anzar, Press and Prosperity are valid on their face, expressly reciting that the parties exchanged "good and valuable consideration, the sufficiency of which is hereby acknowledged." (*E.g.*, CR 309).

The only "evidence" that Plaintiffs cite to support their argument that the settlement agreements lack consideration is a finding of fact from a *different* case — *Forest Hunter Smith v. Anglo-Dutch Petroleum Int'l, Inc.* Specifically, Plaintiffs emphasize that the trial judge in *Smith* found that "there was no consideration for any proposed settlement agreement between Smith and Anglo-Dutch." A'ant Br. at 43 (citing CR 2782). Plaintiffs neglect to mention that the trial judge in *Smith* also found (a) that Smith never signed a settlement agreement with Anglo-Dutch and (b) that "Anglo-Dutch withdrew all settlement offers that it had ever made to Smith." (CR 2782; *see also* CR 5014-30, 5033-34). The fact that Smith received no consideration for an aborted, and unsuccessful, settlement agreement does not create a genuine issue of fact as to whether Plaintiffs received consideration for their written and signed settlement agreements with Defendants. *See infra* at 35-39 (explaining that the findings of fact in *Smith* have no collateral estoppel effect in the present case).

Nor is it true as a matter of law that Plaintiffs received insufficient consideration for the settlement agreements. Consideration may be either a benefit to the promisor or a loss

or detriment to the promisee. *Northern Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998). At the time of the settlement agreements, Anglo-Dutch had not yet received any "cash recovery" that would have triggered its obligation to pay Plaintiffs their Investor's Total Return. (CR 304). By signing the settlement agreements, Anzar, Press and Prosperity gave up their right to request the full amount of their cash "return" following an appeal of Anglo-Dutch's judgment against Halliburton (which, as this Court observed in *Haskell*, may or may not have been successful). In exchange, they received the benefit of a prompt and certain — but nonetheless lower — amount that would enable Anglo-Dutch to avoid an appeal and settle with Halliburton. (*E.g.*, CR 309).

Plaintiffs Anzar, Press and Prosperity secured an immediate benefit in exchange for relinquishing a potentially larger return subject to Anglo-Dutch's success on appeal against Halliburton. *See Hycarbex, Inc.*, 927 S.W.2d at 110 (noting that consideration may lie in the resolution of uncertainty as to the validity or amount of a claim). Because Anzar, Press and Prosperity received valid consideration for their settlement agreements, this Court should affirm the trial court's summary judgment in Defendants' favor.

III. The Trial Court Correctly Granted a "No Evidence" Summary Judgment in Favor of Defendants on Plaintiffs' Tort Claims

Not only did Defendants file a traditional motion for summary judgment, but they also filed a "no evidence" motion for summary judgment against each of the thirteen plaintiffs challenging their tort claims. (CR 915-98). Plaintiffs filed a single "combined" response to Defendants' motions. (CR 2747-74). The affidavits that Plaintiffs submitted with their response were virtually identical, differing only as to the amount that the Plaintiffs

respectively furnished to Anglo-Dutch. (CR 2776-3260). The trial court correctly ruled that Plaintiffs failed to bring forth more than a scintilla of evidence to support one or more of the challenged elements of each of their tort causes of action.

A. Plaintiffs Failed to Offer Evidence to Support Each of the Elements of Their Fraud Claim Against Defendants

As the basis for their fraud claim, Plaintiffs alleged that Van Dyke misrepresented the Agreements to be investments when, in fact, he believed them to be unenforceable loans. (CR 892-93). To recover for fraud, a plaintiff must prove (1) that the defendants made a material representation of fact, (2) that the representation was false, (3) that the defendants knew that the representation was false or made it recklessly, (4) that the defendants intended the plaintiff to act upon the representation, (5) that the plaintiff reasonably and justifiably relied upon the representation, and (6) that the plaintiff suffered injury as a result of the fraud. *Eagle Prop., Ltd. v. Scharbauer,* 807 S.W.2d 714, 723 (Tex. 1990). Plaintiffs have offered no evidence to support the first, second and fifth elements of their fraud claim.

1. *The Summary Judgment Record Contains No Evidence that Defendants Made Any Material Representation of Fact*

A party cannot be liable for fraud unless it has made a false representation of fact, as opposed to a statement of opinion. *Stephanz v. Laird,* 846 S.W.2d 895, 902-03 (Tex. App.—Houston [1st Dist.] 1993, writ denied). A representation as to the legal effect of a document, even if inaccurate, is a statement of opinion and will not ordinarily support a cause of action for fraud. *See Fina Supply, Inc. v. Abilene Nat'l Bank,* 726 S.W.2d 537, 540 (Tex. 1987); *Gold Kist, Inc. v. Carr,* 886 S.W.2d 425, 430 (Tex. App.—Eastland 1994, writ denied). This

rule is consistent with Texas law recognizing that a contracting party may not normally rely on representations about the interpretation of a written contract and instead must "protect its own interests." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).

Plaintiffs argue that Van Dyke made material representations *of fact* because the issue whether a transaction is an investment or loan is a *question of fact. See* A'ant Br. at 15-16. This confuses two distinct concepts. Whether an issue is a question of fact has no effect on whether a representation is a statement of opinion. For example, the interpretation of an ambiguous contract is a question of fact, not a question of law. The fact that a contract is ambiguous, however, does not mean that a representation about the interpretation of the contract is any less a statement of opinion. *See West Anderson Plaza v. Feyznia*, 876 S.W.2d 528, 533-34 (Tex. App.—Austin 1994, no writ) (holding that a representation about the interpretation of a letter was not actionable even though the letter was ambiguous).

An exception to the general rule may arise where the defendant intended the plaintiff to understand a representation about the legal effect of a document to be a statement of fact. *Fina Supply*, 726 S.W.2d at 540.[11] This exception, however, is narrow and does not apply "where the parties are in an equal bargaining position with equal access to legal advice." *Id.* "This is so because in such a situation the parties enjoy the opportunity of making their own investigation and determination of the legal effect of their actions." *Id. See Motorola, Inc. v. Chapman*, 761 F. Supp. 458, 463 (S.D. Tex. 1991) (declining to hold that the defendant

[11] Another exception may arise where the parties share a fiduciary relationship. *Fina Supply, Inc.*, 726 S.W.2d at 240. Plaintiffs, however, offered no evidence to show that they shared a fiduciary relationship with Defendants. *See infra* at 30-32.

intended a false representation of the legal effect of a document to be a statement of fact where the parties were sophisticated and "dealing at arm's length").

The only representations that Plaintiffs cite in support of their fraud claim are alleged representations about the "substance" of the Agreements — specifically, that the Agreements were "legitimate investments" and not loans. A'ant Br. at 14-15. The parties occupied an equal bargaining position with equal access to legal advice: most, if not all, of the plaintiffs are actively involved in the business of financing litigation, and several of the plaintiffs are either themselves attorneys or have retained attorneys to research the validity of litigation funding agreements. (*See, e.g.,* CR 1353, 1472, 1478, 1567, 1629, 2080-83, 2275-87, 2307). Thus, any representations that Van Dyke may have made to Plaintiffs about the legal effect of the Agreements were statements of opinion, not actionable representations of fact.

2. *The Summary Judgment Record Contains No Evidence that Defendants Made a False Representation*

To be actionable, a representation must be false. *Sonterra Capital Partners, Ltd. v. Sonterra Prop. Owners Ass'n, Inc.,* No. 04-06-00358-CV, 2006 WL 2683342, *4 (Tex. App.—San Antonio Sept. 20, 2006, no pet. h.). Plaintiffs' fraud claim rests on the theory that Defendants "apparently considered the transactions underlying the contracts to be loans but represented to Plaintiffs at all times material that they were investments." (CR 892). This Court in *Haskell*, however, ruled that litigation funding agreements of the type at issue in the present case are enforceable investments, not usurious loans. *Haskell*, 193 S.W.3d at 96-97. If Scott Van Dyke represented the transactions to be investments, and they were indeed enforceable investments, then Defendants made no *false* representation to Plaintiffs.

Plaintiffs argue that Defendants should have disclosed that Van Dyke believed the transactions to be loans. *See* A'ant Br. at 16-18. This argument does not salvage Plaintiffs' fraud claim:

- First, assuming that this Court in *Haskell* was correct that litigation funding agreements are enforceable investments,[12] then the fact that Van Dyke may have believed them to be loans is of no harm to Plaintiffs: the transactions were exactly as Van Dyke represented them to be.

- Second, Defendants owed no general duty of disclosure to Plaintiffs in a commercial arm's length transaction, particularly given that Plaintiffs had an equal opportunity to conduct their own due diligence. *See Via Net*, 211 S.W.3d at 314; *Bradford v. Vento*, 48 S.W.3d 749, 755-56 (Tex. 2001).

- Third, any private belief that Van Dyke may have held that the transactions were loans could not have created any duty of disclosure: if the transactions were indeed investments, than any such private belief would neither have created a false impression nor made any prior representations to Plaintiffs untrue. *See Bradford*, 48 S.W.3d at 756; *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, no writ).

- Fourth, the fact that Van Dyke may have believed the transactions to be loans is not inconsistent with any representation that the transactions were investments. A

[12]Defendants do not concede that the Agreements are enforceable contracts. However, if this Court continues to follow *Haskell*, then Van Dyke made no *false* representation to Plaintiffs — and Plaintiffs may recover at best only for breach of contract, not fraud. Even if this Court were to rule that the Agreements are unenforceable, Plaintiffs still could not recover for fraud. A plaintiff may not use a fraud claim to recover the benefit of an unenforceable bargain. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

transaction may be *both* a loan *and* an investment. *See Grotjohn Precise Connexiones Int'l, S.A. v. JEM Fin., Inc.*, 12 S.W.3d 859, 869 (Tex. App.—Texarkana 2000, no pet.).

Absent any evidence of a false representation, the trial court correctly concluded that Plaintiffs had no fraud claim against Defendants.

3. *The Summary Judgment Record Contains No Evidence that Plaintiffs Relied on Any Representation that the Transactions Were Investments*

A plaintiff in a fraud action must show that it reasonably or justifiably relied on a false representation. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997). Here, Plaintiffs asserted that the summary judgment evidence "easily raises a fact issue" on reliance, but they cited no evidence to the trial court supporting their assertion. (CR 2766). They now cite the record at CR 3240-41 and CR 3324-3761 to support the element of reliance. *See* A'ant Br. at 20. CR 3240-41 contains part of Scott Van Dyke's affidavit, which says nothing about whether Plaintiffs relied on any representations from Van Dyke. (CR 3240-41). CR 3324-3761 contains each of Plaintiffs' affidavits — *none* of which states or suggests that Plaintiffs relied on any representations from Defendants as an inducement to enter into the Agreements. (CR 3324-3761).

To the contrary, Plaintiffs did ***not*** rely on anything Defendants may have said about the substance or legal effect of the Agreements.[13] Joe DiNardo, a lawyer, drafted the form of the Agreements that Anglo-Dutch entered into with each of the plaintiffs: DiNardo, not

[13]Some of Plaintiffs' affidavits state that Plaintiffs relied on Scott Van Dyke's representations to accept the settlement agreements, but none states that they relied on any representations when entering into the Claims Investment Agreements. (*See, e.g.*, CR 3053-54). The trial court has severed Plaintiffs' claims against Defendants for fraudulently inducing the settlement agreements, and those fraudulent inducement claims are not at issue in this appeal. (CR 5132-34; *see* A'ant Br. at 12 n.7).

Van Dyke, crafted the term "investment" to describe the Agreements. (CR 304). The majority of the plaintiffs are professional lawsuit financiers, who advertise specifically for the purpose of soliciting litigation funding transactions. (*See, e.g.*, CR 1370, 1478, 1656-57, 2323). These financiers do not need Van Dyke or anyone else to represent to them that litigation funding agreements are "investments." They have hired their own legal counsel to research the validity of litigation funding agreements and to advise them on ways to argue that the agreements are enforceable investments. (*See, e.g.*, CR 1472, 2296-98, 2307).

Plaintiffs entered into the Agreements not because Defendants represented them to be "investments," but rather because they either were themselves in the business of financing lawsuits or independently believed that they could enforce them as investments. Because Plaintiffs have offered no evidence that they relied on any representations from Defendants, the trial court correctly ruled that Plaintiffs cannot recover on their fraud claim.

B. Plaintiffs Failed to Offer Evidence to Support Each of the Elements of Their Conversion Claim Against Defendants

Plaintiffs alleged in their pleadings that Defendants committed conversion by failing to pay Plaintiffs their "proportionate share of any cash recovery" under the Agreements. (CR 894). To recover for conversion, a plaintiff must prove (1) that he owned or had the legal right to immediate possession of a specific item of personal property, (2) that the defendants wrongfully exercised dominion and control over the item of property, (3) that the plaintiff demanded the return of the property, and (4) that the defendants refused to return the property. *Ojeda v. Wal-Mart Stores, Inc.*, 956 S.W.2d 704, 707 (Tex. App.—San Antonio 1997, pet. denied). Plaintiffs have offered no evidence to support the first and second of

these elements: their conversion claim against Defendants improperly seeks to recover only a sum of money, not a specific item of personal property.

Money is subject to conversion only when it qualifies as a specific chattel and not when the defendant may discharge an indebtedness simply by the payment of a sum of money generally. *Paschal v. Great Western Drilling, Ltd.*, No. 11-05-00101-CV, 2006 WL 2975312, *14 (Tex. App.—Eastland Oct. 19, 2006, no pet. h.). Typically, a claim for conversion of money exists "only when there is an obligation resting on the defendant not to convert to his own use specific coin or notes." *Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 774 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). Otherwise, a claim for the payment of money is one for ordinary debt — for which no conversion claim will lie. *Id. See Rente Co. v. Truckers Exp., Inc.*, 116 S.W.3d 326, 332 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Plaintiffs cite a series of opinions purportedly to suggest that they may assert a cause of action for "conversion of money." A'ant Br. at 23 & n.9. Each of these cases, however, involved the exercise of dominion or control over a specific item of personal property, not the failure to pay a sum of money to satisfy an ordinary debt. *See Santanna Natural Gas Corp. v. Hamon Operating Co.*, 954 S.W.2d 885, 892 (Tex. App.—Austin 1997, pet. denied) (conversion of natural gas liquids); *Intermarkets U.S.A., Inc. v. C-E Natco*, 749 S.W.2d 603, 604 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (conversion of a letter of credit); *Diaz v. Cantu*, 586 S.W.2d 576, 580 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (conversion of an insurance benefits check).

Not surprisingly, Plaintiffs confuse (a) the conversion of money due on a simple debt with (b) the conversion of proceeds from the sale of a specific item of converted property. *See* A'ant Br. at 23 n.9. The former is not a valid cause of action; the latter is. As the court explained in *Santanna Natural Gas*, a defendant remains liable for conversion even after selling property that it converted from the plaintiff. A plaintiff who seeks to recover the proceeds from such a sale is not pursuing an improper cause of action for conversion of money, but is instead properly pursuing a cause of action for damages resulting from the conversion of a specific item of property. *See Santanna Natural Gas Corp.*, 954 S.W.2d at 892 ("The evidence presented to this court indicates that Hamon received proceeds from the sale of extracted liquids from gas it did not rightfully own.").[14]

Here, Plaintiffs do not seek to recover the proceeds from any alleged sale of converted property. They seek to recover a "proportionate share" of Anglo-Dutch's "cash recovery" from its settlement with Halliburton. (CR 894). In other words, Plaintiffs have asserted a conversion cause of action to compel Anglo-Dutch to pay the amount of money that it allegedly owes to Plaintiffs under the terms of the Agreements. Thus, Plaintiffs' conversion claim is simply one to satisfy an ordinary debt — an improper cause of action for the

[14]Plaintiffs also suggest that Defendants converted a "security interest" that Plaintiffs allegedly owned in their proportionate share of the cash recovery from the Halliburton lawsuit. A'ant Br. at 23 (citing *Crutcher v. Continental Nat'l Bank*, 884 S.W.2d 884, 888 (Tex. App.—El Paso 1994, writ denied); *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658, 662 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ)). The cases that Plaintiffs cite for this argument note that a security interest can be a form of "ownership" that enables a party to have standing to sue for conversion. However, those same cases go on to point out that the mere taking of a security interest is not itself sufficient for a conversion claim: the defendant must also have exercised dominion or control over an underlying item of collateral property that is subject to conversion. *See Crutcher*, 884 S.W.2d at 888-89. Here, the underlying "collateral" was a sum of money, not a specific item of personal property that is subject to conversion.

conversion of money. Because Plaintiffs offered no evidence to show that Defendants exercised dominion and control over *a specific item of personal property*, the trial court correctly granted summary judgment in favor of Defendants and ruled that Plaintiffs cannot recover on their conversion claim.

C. Plaintiffs Failed to Offer Evidence to Support Each of the Elements of Their Breach of Fiduciary Duty Claim Against Defendants

Plaintiffs alleged that Defendants breached a "fiduciary duty to Plaintiffs to safeguard the monies owed to Plaintiffs under the Claims Investment Agreements." (CR 893). To recover on a cause of action for breach of fiduciary duty, a plaintiff must prove (1) that the defendants owed a fiduciary duty to the plaintiff, (2) that the defendants breached their fiduciary duty, and (3) that the plaintiff suffered injuries as a result of the breach. *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 792 (Tex. App.—Dallas 2002, pet. denied). Plaintiffs have offered no evidence to support the first and third elements of their cause of action for breach of fiduciary duty: Defendants owed no fiduciary duty to Plaintiffs, and Plaintiffs suffered no damages resulting from any breach of fiduciary duty.

1. *The Summary Judgment Record Contains No Evidence that Defendants Owed a Fiduciary Duty to Plaintiffs*

Plaintiffs argue that the existence of a fiduciary relationship is normally a question of fact, citing *Four Brothers Boat Works, Inc. v. Tesoro Petroleum Cos.*, No. 14-05-00498-CV, 2006 WL 3589480 (Tex. App.—Houston [14th Dist.] Dec. 12, 2006, no pet. h.). Defendants agree that *Four Brothers* is instructive. But notably, Plaintiffs neglect to mention the dispositive language in *Four Brothers*:

> Although the existence of a confidential relationship can be a question of fact, ***where there is no evidence to establish the relationship, it is a question of law***. . . . Appellants have not shown any relationship with Tesoro prior to entering their respective subleases, which are the subject matter of this litigation, *i.e.*, that the parties have worked together in the joint acquisition and development of property before entering the agreement sought to be enforced. Nor have appellants shown that this is anything but an arms-length transaction.

Id. at *12 (emphasis added). The same reasoning applies equally to Plaintiffs' breach of fiduciary duty claim against Defendants.

The only "evidence" that Plaintiffs have cited in support of the existence of a fiduciary relationship is the fact that they signed confidentiality agreements with Anglo-Dutch. *See* A'ant Br. at 26; *see also* CR 2760. According to Plaintiffs, these confidentiality agreements created an informal confidential relationship between Plaintiffs and Defendants. *See* A'ant Br. at 26.[15] To support a breach of fiduciary duty claim, however, a confidential relationship requires more than merely that the parties signed a confidentiality agreement. *See Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 896 (Tex. App.—San Antonio 2002, no pet.). Otherwise, a confidentiality agreement could impose a "fiduciary duty" between parties who would have no reason to expect such a duty — *e.g.*, opposing lawyers in litigation involving sensitive documents. Such is not the law.

Moreover, to support a breach of fiduciary duty claim, a confidential relationship must exist prior to, ***and apart from***, the transactions that form the basis for the lawsuit. *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). The confidentiality agreements that Plaintiffs

[15]Plaintiffs have neither alleged nor offered any evidence to prove the type of *formal* relationship that normally gives rise to a fiduciary relationship, such as the relationship between attorneys and clients. *See Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *see also* Justice Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 846 (Oct. 2006).

entered into with Anglo-Dutch were ***not*** apart from — but, indeed, were an inextricable part of — the transactions that form the basis for this lawsuit. (*See, e.g.*, CR 1936). The very purpose of the confidentiality agreements was to ensure that Plaintiffs had access to sensitive information about the Halliburton lawsuit so that they could determine whether they wished "to provide financing to Anglo-Dutch" — in other words, so that they could determine whether to enter into the Claims Investment Agreements. (*Id.*). As Plaintiffs acknowledge, the confidentiality agreements were incorporated into the Agreements. (*See, e.g.*, CR 2797).

Plaintiffs have offered no evidence to show that their relationship with Anglo-Dutch involved anything other than arm's-length dealings. The type of confidential relationship that may impose a fiduciary duty is not a brief and cordial business relationship, but rather a relationship of trust and confidence that develops "over a long period of time." *Four Bros. Boat Works, Inc.*, 2006 WL 3589480, at *8. *See Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied). Plaintiffs had no such long-standing relationship of trust and confidence with Anglo-Dutch. Indeed, Plaintiffs had no prior dealings with Anglo-Dutch before they began communicating with Van Dyke about financing the Halliburton litigation. (*See, e.g.*, CR 304, 1789, 2098-99, 2326).

Absent any evidence that Defendants owed a fiduciary duty to Plaintiffs, the trial court correctly granted summary judgment on Plaintiffs' breach of fiduciary duty claim.

2. *The Summary Judgment Record Contains No Evidence that Plaintiffs Suffered Any Damages Resulting from Any Breach of Fiduciary Duty*

To recover for a breach of fiduciary duty, a plaintiff must show that it suffered an injury *resulting from* the breach of fiduciary duty, as opposed to an injury resulting from a

breach of contract. *See Villanueva v. Gonzalez*, 123 S.W.3d 461, 467 (Tex. App.—San Antonio 2003, no pet.). This is the independent injury rule. A plaintiff may not recover in tort for losses that arise purely from the subject matter of a contract; to recover in tort, the plaintiff must prove that it suffered an injury independent of its damages for a mere breach of contract. *D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998). *See Villanueva*, 123 S.W.3d at 467 (applying the rule to bar a breach of fiduciary duty claim "because the duties allegedly breached . . . were created by the unenforceable contract" and the plaintiff's damages "stemmed from the unenforceable contract").

Plaintiffs suggest that the independent injury rule cannot support the trial court's "no evidence" summary judgment because Defendants did not specifically mention the rule as a ground for summary judgment. *See* A'ant Br. at 21 n.8. However, a "no evidence" motion need only "state the elements as to which [the movant contends] there is no evidence." TEX. R. CIV. P. 166a(i). In compliance with Rule 166a(i), Defendants stated in their "no evidence" motions that Plaintiffs had not produced any evidence that "Defendants' breach resulted in injury to Plaintiff[s]." (*E.g.*, CR 933). Because Defendants specified an element for which there was no evidence, Plaintiffs assumed the burden to bring forth more than a scintilla of *legally probative* evidence to raise a genuine issue of material fact. *See Ianni v. Loram Maintenance of Way, Inc.*, 16 S.W.3d 508, 512 (Tex. App.—El Paso 2000, pet. denied).[16]

[16]Plaintiffs imply that the independent injury rule is an affirmative defense for which a "no evidence" motion is inappropriate. The independent injury rule is *not* an affirmative defense. *Tarrant County Hosp. Dist. v. GE Automation Servs., Inc.*, 156 S.W.3d 885, 895 (Tex. App.—Fort Worth 2005, no pet.).

Plaintiffs failed to carry their burden. In response to Defendants' motions, Plaintiffs offered the following "evidence" to establish their damages:

> Mr. Van Dyke has admitted that Defendants have not paid Plaintiffs all monies *due and owing them under their Claims Investment Agreements*. . . . This summary judgment evidence conclusively establishes and easily raises a fact issue with respect to the damages element of each Plaintiffs' breach of fiduciary duty claims.

(CR 2763) (emphasis added). Plaintiffs identified this same "evidence" in their brief to this Court. *See* A'ant Br. at 21 ("Appellees failed to pay Appellants all amounts owed them under their Agreements."). This "evidence" is not legally probative evidence of damages on a breach of fiduciary duty claim. The amounts that Defendants allegedly owed Plaintiffs under the Agreements are losses that arise solely from the subject matter of the Agreements.

Plaintiffs offered no evidence to show that they suffered any tort damages independent from the damages that they seek to recover on their breach of contract claims. Thus, the trial court correctly granted a "no evidence" summary judgment in favor of Defendants.

D. Plaintiffs Failed to Offer Evidence to Support Each of the Elements of Their Section 32.45 Claim Against Defendants

In the same section of their pleadings that alleged their breach of fiduciary duty claim, Plaintiffs further alleged that Defendants "misapplied property belonging to Plaintiffs and, thereby, violated Section 32.45 of the Texas Penal Code." (CR 894). Plaintiffs did not specify whether they cited Section 32.45 as the basis for a separate cause of action or as the basis for recovering exemplary damages in excess of the statutory cap. To the extent that Plaintiffs cited Section 32.45 as the basis for a separate cause of action, their cause of action under Section 32.45 has no foundation in law: the Texas Penal Code does not create private

causes of action. *See Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.); *A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 379 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Regardless, Section 32.45 states that the misapplication of *fiduciary property* is a criminal offense. TEX. PENAL CODE ANN. § 32.45 (Vernon Supp. 2006). To commit an offense under Section 32.45, the offender must occupy a *fiduciary relationship* with the victim. *Id.* Plaintiffs have offered no evidence to show that Defendants occupied a fiduciary relationship with Plaintiffs. Just as the confidentiality agreements between Plaintiffs and Anglo-Dutch are insufficient to create a fiduciary relationship for purposes of Plaintiffs' breach of fiduciary duty claim, they are equally insufficient to create a fiduciary relationship for purposes of Plaintiffs' purported Section 32.45 claim. *See supra* at 30-32; *see also Richter*, 90 S.W.3d at 896. Absent any evidence of a fiduciary relationship, Plaintiffs may not recover on any cause of action that they may have asserted under Section 32.45.

IV. The Trial Court Correctly Concluded that the Doctrine of Collateral Estoppel Does Not Spare Plaintiffs of Their Summary Judgment Burden of Proof

Plaintiffs argue that the trial judge's findings of fact in *Smith* should have collaterally estopped Defendants from litigating similar issues in the present case.[17] Yet, while Plaintiffs only cite case law involving the traditional application of the doctrine of collateral estoppel, Plaintiffs in fact ask this Court, as they asked the trial court, to invoke the doctrine of *non-*

[17] Anglo-Dutch appealed the *Smith* case to the Fourteenth District Court of Appeals (Cause No. 14-06-00580-CV, *Anglo-Dutch Petroleum Int'l, Inc. et al. v. Smith*), and it is scheduled for oral argument on March 27, 2007. If the court of appeals were to reverse the judgment in *Smith*, then the judgment would no longer be a final judgment on which Plaintiffs here could rely for purposes of collateral estoppel. *See J.J. Gregory Gourmet Servs., Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 34 (Tex. App.—Houston [1st Dist.] 1995, no writ).

mutual offensive collateral estoppel. Even when a case would otherwise satisfy the elements of collateral estoppel, a court should not invoke the doctrine of offensive collateral estoppel if its application would be unfair or inequitable. *Phillips v. Allums*, 882 S.W.2d 71, 75 (Tex. App.—Houston [14th Dist.] 1994, writ denied). A trial court has broad discretion in deciding the fairness of imposing the doctrine of offensive collateral estoppel. *Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210, 216 (Tex. App.—Beaumont 2001, no pet.).

Here, the trial court denied Plaintiffs' motion for summary judgment on Defendants' accord and satisfaction and release defenses, implicitly ruling that the findings of fact in *Smith* did not excuse Plaintiffs from their obligation to raise a genuine issue of material fact in response to Defendants' traditional and "no evidence" motions for summary judgment. The trial court's ruling was an appropriate exercise of its discretion. Plaintiffs cannot satisfy the elements for invoking collateral estoppel; and even if they could, the application of the doctrine of offensive collateral estoppel is neither fair nor equitable.

A. Collateral Estoppel Does Not Preclude the Trial Court's Summary Judgment in Defendants' Favor on their Accord and Satisfaction and Release Defenses

To invoke the doctrine of collateral estoppel, a party must establish three elements: (a) the facts sought to be litigated in the second lawsuit were fully and fairly litigated in the first lawsuit; (b) those facts were essential to the judgment in the first lawsuit; and (c) the parties were cast as adversaries in the first lawsuit. *See Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 795, 801 (Tex. 1994); *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347, 350 (Tex. App.—Houston [14th Dist.] 1998, no pet.). As a function of the element requiring that the facts be "fully and fairly litigated" in the first lawsuit, "[t]he issue decided

in the first lawsuit *must be identical* to the issue sought to be precluded in the second." *Centre Equities, Inc. v. Tingley,* 106 S.W.3d 143, 152 (Tex. App.—Austin 2003, no pet.) (emphasis added).

Plaintiffs complain that Defendants may not rely on their accord and satisfaction defense because the trial judge in *Smith* found that "[a]t the time Anglo-Dutch requested Smith and other investors to take less than was set forth in the contract, there was no bona fide dispute between Anglo-Dutch and the investors, including Smith." A'ant Br. at 45 (citing CR 2782). However, to prove collateral estoppel, Plaintiffs had to offer "so much of" the record from *Smith* "as will establish that the issue sought to be precluded is identical to that in the first suit and that it was fully and fairly litigated at that time." *Centre Equities, Inc.*, 106 S.W.3d at 153. The record that Plaintiffs offered from *Smith* shows nothing of the kind. Anglo-Dutch did not plead the defense of accord and satisfaction in *Smith*. (CR 5000-02). Nor did Anglo-Dutch try the issue by consent. (CR 4140).

To have preclusive collateral estoppel effect, the findings in a previous case must be "essential to the prior judgment." *State & County Mut. Fire Ins. Co. v. Miller,* 52 S.W.3d 693, 697 (Tex. 2001). At best, the record from *Smith* shows only that Anglo-Dutch litigated the issue of whether it entered into a valid oral release agreement with Forest Hunter Smith, not that it litigated — or even needed to litigate — whether it entered into an enforceable accord and satisfaction with other "investors." (CR 4986-5012). The only reason that the trial judge made a finding with respect to other "investors" in *Smith* is that Smith's counsel inserted such a finding in its proposed findings of fact — presumably because Smith's

counsel desired to use the unnecessary finding for collateral estoppel purposes, not because Smith needed such a finding to resolve any disputed issue in his case. (*Compare* CR 4849-50 (Smith's proposed findings) *with* CR 2781-82) (trial judge's findings)).

Similarly, Plaintiffs contend that Defendants may not rely on their release defense because the trial judge in *Smith* found that "there was no consideration for any proposed settlement agreement between Smith and Anglo-Dutch." A'ant Br. at 45 (citing CR 2782). However, the issue whether there was consideration for a proposed settlement between Smith and Anglo-Dutch is not *identical to* the issue whether there was consideration for the signed settlement agreements between Anglo-Dutch and Plaintiffs Anzar, Press and Prosperity. The facts in *Smith* are entirely different from those here:

- Anglo-Dutch and Smith exchanged several drafts of proposed settlement agreements, each of which contained different terms from the settlement agreements that Anzar, Press and Prosperity entered into with Anglo-Dutch. (*Compare* CR 5037-5125 *with* CR 309-36).

- Smith ultimately refused to sign any form of written settlement agreement with Anglo-Dutch, and he rejected any payment or settlement checks from Anglo-Dutch on the Claims Investment Agreements. (CR 2782, 4262-63).

- The trial judge in *Smith* concluded that Anglo-Dutch never had an enforceable settlement agreement with Smith. (CR 2782).[18]

In light of these factual differences, the issue whether Anzar, Press and Prosperity received consideration for their settlement agreements was not, and could not have been, fully and

[18]Because the trial judge found that Anglo-Dutch never had an enforceable settlement agreement with Smith, the judge's further finding that the parties exchanged no consideration for the proposed agreement was either effectively dicta or an alternative holding — neither of which supports the application of collateral estoppel. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmts. h & i (1982); *see also Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1423 (5th Cir. 1995).

fairly litigated in *Smith*. *See Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1423 (5th Cir. 1995); *Quicksilver Res., Inc. v. CMS Mktg. Serv. & Trading Co.*, No. 02-03-251-CV, 2005 WL 182951, *4 (Tex. App.—Fort Worth Jan. 27, 2005, pet. denied) (not designated for publication).

Even if Plaintiffs could otherwise satisfy the elements of collateral estoppel, the application of offensive collateral estoppel is not fair to Defendants. The same attorneys represent both Smith and Plaintiffs. (CR 4138). They could have chosen to bring a single joint action against Defendants, but they instead elected to pursue separate actions. Thus, the doctrine of collateral estoppel will not serve its goal of promoting judicial economy; if anything, it has spawned additional litigation. *See John G. & Marie Stella Kennedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 288-89 (Tex. 2002).[19] Given the factual differences between *Smith* and the present case, Defendants had no reason to — or incentive to — prove in *Smith* the same consideration and bona fide dispute issues for which Plaintiffs now seek to invoke the doctrine of collateral estoppel. *See Neely v. Commission for Lawyer Discipline*, 976 S.W.2d 824, 829 (Tex. App.—Houston [1st Dist.] 1998, no writ).

The trial court acted well within its discretion in declining to hold that the findings of fact in *Smith* have any collateral estoppel effect on Defendants' affirmative defenses.

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[19]The doctrine of non-mutual offensive collateral estoppel "discourages a plaintiff from joining with other plaintiffs in the first case against a defendant. If a potential claimant waits for another plaintiff to sue, he can 'wait and see' the result. He then can claim the result if he likes it, by invoking nonmutual collateral estoppel, or ignore it if he does not, by standing on his right to a day in court on the issue." Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 76 (1988). This description of offensive collateral estoppel accurately describes Plaintiffs' apparent strategy in declining to join Smith's action against Defendants.

B. Collateral Estoppel Does Not Preclude the Trial Court's Summary Judgment in Defendants' Favor on Plaintiffs' Tort Claims

Plaintiffs further argue that the doctrine of offensive collateral estoppel excused them from having to offer any evidence in response to the "no evidence" motions challenging their tort claims. They rest their argument on the representation that the agreements at issue in *Smith* "are effectively identical" to the Claims Investment Agreements between Plaintiffs and Defendants. A'ant Br. at 47. That, however, was not their own attorney's position at trial in *Smith*. Smith's attorney, who also represents Plaintiffs, objected to Anglo-Dutch's efforts to offer evidence relating to agreements other than those at issue in *Smith*:

> [W]e're talking about someone else in a ***different claims agreement, different amounts, different times, different circumstances***; simply not part of this case. In fact, it is part of a separate case. It's not relevant to any issue in this case.

(CR 4869 (emphasis added); *see also* CR 4870-95). Plaintiffs cannot validly contend that Anglo-Dutch fully and fairly litigated Plaintiffs' tort claims in *Smith* when Plaintiffs' counsel sought to exclude evidence relating to other litigation financiers on the basis that it involved different agreements, different amounts, different times and different circumstances.

But in any event, Defendants did *not* fully and fairly litigate Plaintiffs' tort claims in *Smith*. The trial judge in *Smith* made findings only with respect to Smith's tort claims — *e.g.,* that Anglo-Dutch made material representations *to Smith*, that *Smith* relied on Anglo-Dutch's representations, and that Anglo-Dutch owed a fiduciary duty *to Smith*. (CR 2780-85). The findings as to the elements of Smith's tort claims are personal to Smith and, as a matter of law, cannot serve to prove the same elements as to Plaintiffs. For example:

- *Materiality*. Evidence showing that a representation is material to one plaintiff does not usually answer whether it is material to another plaintiff. *See Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 623 (Tex. App.—Tyler 2000, pet. denied).

- *Reliance.* Evidence showing that one plaintiff reasonably relied on a false representation is not usually relevant to establish that another plaintiff relied on the representation. *See Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 810 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693-94 (Tex. 2002).

- *Fiduciary Duty*. Evidence showing that a defendant formed an informal confidential relationship with one plaintiff does not usually establish that the defendant formed such a relationship with another plaintiff. *See Meyer*, 167 S.W.3d at 631 (noting that a fiduciary relationship must exist prior to, and apart from, the agreement that forms the basis for the action); *see also Spera*, 4 S.W.3d at 810 (noting that a distinctly individual issue is "what duty or duties were variously owed to whom").

Consequently, the tort issues in *Smith* are not identical to the tort issues here. *See Holloway v. Atlantic Richfield Co.*, 970 S.W.2d 641, 645 (Tex. App.—Tyler 1998, no writ) (holding that a finding of sham to perpetrate a fraud as to one plaintiff did not have collateral estoppel effect against another plaintiff in a different case); *see also Bearden Investigative Agency v. Melvin*, No. 02-02-078-CV, 2003 WL 194729, *3 (Tex. App.—Fort Worth Jan. 30, 2003, no pet.) (not designated for publication) ("Because the agreed final judgment [in the first lawsuit] only concerned Catherine, the facts sought to be litigated in Bearden's action against the Melvins were not fairly and fully litigated in the action against Catherine.").

The trial court acted well within its discretion in declining to hold that the findings of fact in *Smith* have any collateral estoppel effect on Plaintiffs' tort claims.

V. The Trial Court Correctly Granted Summary Judgment in Favor of Scott Van Dyke for the Same Reasons it Granted Summary Judgment for Anglo-Dutch on Plaintiffs' Fraud and Tort Claims

Plaintiffs argue that this Court should reverse the trial court's summary judgment in favor of Scott Van Dyke because "[c]orporate agents are personally liable for fraudulent or tortious acts committed while in the service of their corporation." A'ant Br. at 48. Whether or not Van Dyke is personally liable for acts he performed for Anglo-Dutch, Defendants' traditional and "no evidence" motions specifically identified Van Dyke as a summary judgment movant. (*E.g.*, CR 293, 915-98). Thus, for the same reasons that the trial court correctly granted the motions with respect to Plaintiffs' tort claims against Anglo-Dutch, the trial court also correctly granted the motions with respect to Plaintiffs' tort claims against Van Dyke. *See supra* at 8-35. The doctrine of accord and satisfaction bars Plaintiffs' tort claims against Van Dyke, who was released equally along with Anglo-Dutch under the express terms of the settlement checks. *See* Exhibits B & D. Moreover, Plaintiffs failed to failed to bring forth more than a scintilla of evidence to support the challenged elements of each of their tort causes of action against Van Dyke. *See supra* at 21-35.

CONCLUSION

Appellants Anglo-Dutch Petroleum International, Inc., Anglo-Dutch (Tenge) LLC, and Scott Van Dyke respectfully request that this Court affirm the trial court's order granting their traditional and "no evidence" motions for summary judgment. Appellants further request all other relief to which they may show themselves to be justly entitled.

Respectfully submitted,

By:_____

Byron C. Keeling
State Bar No. 11157980
KEELING & DOWNES, P.C.
JP Morgan Chase Tower
600 Travis, Suite 6750
Houston, Texas 77002
Telephone: (832) 214-9900
Facsimile: (832) 214-9908

Craig T. Enoch
State Bar No. 00000026
Melissa A. Prentice
State Bar No. 24032969
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
Telephone: (512) 370-2800
Facsimile: (512) 370-2850

Jacks C. Nickens
State Bar No. 15013800
Bradley W. Hoover
State Bar No. 09965700
Jessica L. Wilson
State Bar No. 24028230
NICKENS, KEETON, LAWLESS,
FARRELL & FLACK LLP
JP Morgan Chase Tower
600 Travis, Suite 7500
Houston, Texas 77002
Telephone: (713) 571-9191
Facsimile: (713) 571-9652

ATTORNEYS FOR APPELLANTS ANGLO-ANGLO-DUTCH PETROLEUM INTERNATIONAL, INC., ANGLO-DUTCH (TENGE) LLC and SCOTT VAN DYKE

CERTIFICATE OF SERVICE

I certify that on the 23rd day of March, 2007, this document was served on the following counsel of record in accordance with the Texas Rules of Civil Procedure, via facsimile:

Mr. William Fred Hagans
Mr. Carl D. Kulhanek, Jr.
Hagans Burdine Montgomery Rustay & Winchester, P.C.
3200 Travis Street, Fourth Floor
Houston, Texas 77006
Telephone: (713) 222-2700
Facsimile: (713) 547-4950

Attorneys for Appellants
Appellants Case Funding Network, L.P.;
3K Partnership; Prosperity Settlement
Funding, Inc.; Lawsuit Financial, LLC;
Future Settlement Funding of SC, Inc.,
Robert M. Press, Ryan Brooks; Joseph Dinardo;
Joseph Giurintano; New Amsterdam Capital
Partners, Inc., Support Services, Inc., Robert E.
Hill, and Anzar Settlement Funding Corp.

_____
Byron C. Keeling