

Defending the Debtor Client



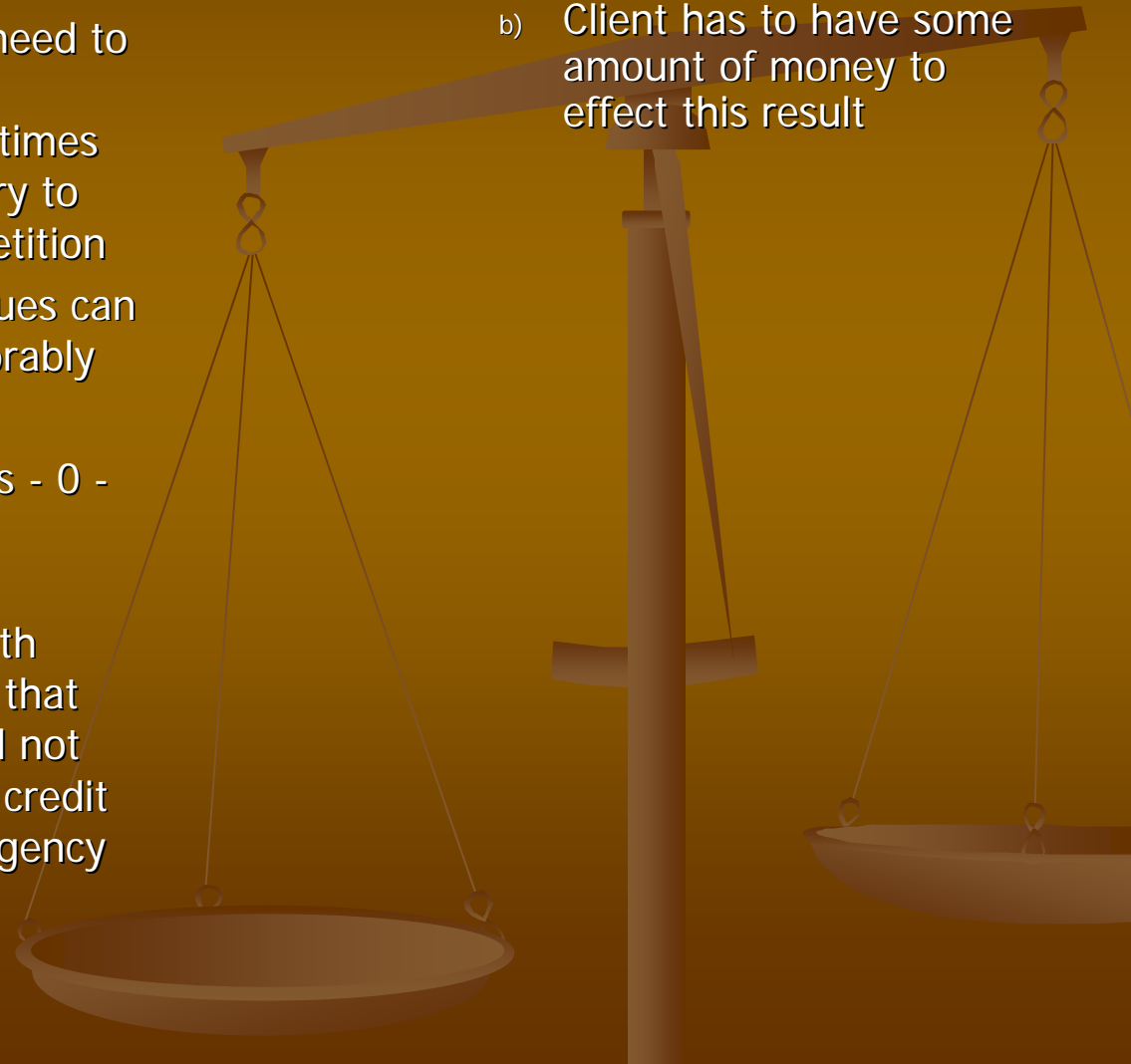
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- I. Identify the Plaintiff
 - A. Original Creditor
 - B. Debt Buyer "Bottom Feeder"
 - II. Find out Client's Goal(s)
 - A. Settlement
 - B. "Scorched-Earth" Approach

1. Settlement Advantages

- a) Quickest Resolution
- b) Defendant's attorney's fees are lowest
- c) Often times no need to file or answer discovery; sometimes even unnecessary to answer to the petition
- d) Credit report issues can be resolved favorably
 - Removed
 - Reported as - 0 - Balance
 - Defendant disputes with agreement that creditor will not respond to credit reporting agency

2. Disadvantages

- a) Conceding defeat without making Plaintiff prove anything
- b) Client has to have some amount of money to effect this result



III. If Settlement

- How much?
- Depends on client
- Worse shape he/she is in, lower the offer can be
- Get credit report (free www.annualcreditreport.com)
- If low income job, state that point
- If qualifies for legal aid STRESS THAT POINT
- Of course all Texas arguments
 1. No garnishment in Texas
 2. No foreclosure / homestead exemption, can't get blood from a rock

Very seldom settle for more than 50% of the principal amount of debt. [NO attorneys fees or interest]

IV. Scorched Earth Approach

A. Prepare Answer to Petition and Respond to Request for Admissions
Tex. R. Civ. P. 185 verified affidavit constitutes *prima facie* evidence that can be defeated only by filing a written denial under oath.

- Swear that all lawful offsets and credits have not been allowed.

- Cannot file "General Denial"

TRCP 93(10) TRCP 185

Cooper v. Scott Irrigation Construction, Inc., 838 S.W. 2d 743, 746
(Tex. App. - El Paso 1992, no writ)

Huddleston v. Case Power & Equipment Co., 748 S.W. 2d 102, 103-104
(Tex. App. - Dallas 1988, no writ)

- The filing of a proper verified denial by Defendant destroys evidentiary effect and forces Plaintiff to prove case at common law.

Nichols v. William A. Taylor, Inc., 662 S.W. 2d 396, 398 (Tex. App. - Corpus Christi 1983, no writ).

- Written denial under oath, must appear in Defendant's Answer, not in a response to Plaintiff's Motion for Summary Judgment.
 - Brightwell v. Barlow, Gardner, Tucker, & Garsek, 619 S.W. 2d. 249, 253 (Tex. Civ. App. – Fort Worth 1981, no writ)
 - Zemco, Inc. v. Navarro, 580 S.W. 2d 616, 620 (Tex. Civ. App. – Tyler 1979, writ dismiss'd)

- **Verified Denials**

- Defendant never had an open account with Plaintiff, a written or oral contract with Plaintiff for goods or services, or any business dealings with Plaintiff.
- Defendant denies that all conditions precedent were performed or have occurred (Plaintiff fails to attach an affidavit by the party with whom Defendant had dealings and/or failed to attach an affidavit from the original creditor, its agent or attorney). TRCP 185.
- Defendant denies Plaintiff has provided an affidavit based upon PERSONAL KNOWLEDGE. TRCP 185
- Plaintiff may not recover in the capacity in which is sued as it was not a party to the underlying contract.
- Plaintiff is not entitled to recover upon the theories of "quantum meruit," "money had and received," and "unjust enrichment" as it was not a party.
- Plaintiff cannot recover upon breach of contract as it is not in privity.

6. Look for affirmative defenses

- Statute of Limitations

Tex. Civ. Prac. & Rem. Code § 16.004(a)

"A person must bring suit on the following actions not later than 4 years after the day the cause of action accrues: (3) debt

- Tex. Civ. Prac. & Rem. Code § 16.004(c)

"The Cause of Action accrues on the day that the dealings in which the parties were interested together cease."

- When do the dealings cease?

- Charge Off
- Last payment date
- Date of default

V. Special Exceptions

A. Sworn Account

- Original Petition is not properly brought as a suit on a sworn account. *Tully v. Citibank*, 173 SW.3d 212 (Tex.App.–Texarkana 2005).
- A suit on a sworn account is permitted only if the claim is "founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished" Tex. R. Civ. P. 185.
- "A sworn account applies only to transactions between persons, in which there is a sale upon one side and a purchase upon the other, whereby title to personal property passes from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing--it does not mean transactions between parties resting upon special contract." *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App.- El Paso 1999, pet. denied).

B. Breach of Contract

- Original Petition is not properly brought as a suit for breach of contract. A breach of contract action requires that there be privity of contract between the parties. *Boy Scouts of America v. Responsive Terminal Systems, Inc.* 790 S.W.2d 738 (Tex.App.-Dallas, writ granted, opinion substituted on other grounds); That is, privity must exist between the party damaged and the party sought to be held liable therefore. *Cannon v. ICO Tubular Servs.*, 905 S.W.2d 380 (Tex.App.-Houston [1st Dist.] 1995).

c. Quantum Meruit

- Original Petition is not properly brought as a suit for quantum meruit. An action for quantum meruit requires that Plaintiff establish that
 1. valuable services and/or materials were furnished;
 2. to the party sought to be charged;
 3. which were accepted by the party sought to be charged; and
 4. under such circumstances as reasonably notified the recipient that the Plaintiff, in performing, expected to be paid by the recipient. *Heldenfels Bros. Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992).
- Neither Plaintiff nor anyone else provided Defendant with services or materials.
- Defendant disputes the notion that Plaintiff reasonably expected to be paid for anything since it purchased from its "predecessor" what it perceived to be a "bad debt." (Usually for a price between fifty basis points and seven cents on the dollar)

D. Money Had and Received

- Original Petition is not properly brought as a suit on “money had and received.” An action for “money had and received” will lie where:
 1. a person has obtained money from another by fraud, duress, or undue advantage;
 2. a person has paid money in consideration of an act to be done by another and the act is not performed, whether the Defendant is unwilling or unable to perform;
 3. the action is to recover money received on consideration that has failed in whole or in part; or
 4. there is a surplus arising on the sale of the security for a debt. *Leier v. Purnell*, No. 3–04-039-CV (Tex.App.– Fort Worth 2004, pet. denied)(unreported decision); 64 Tex. Jr. 3d *Restitution and Constructive Trusts*, Section 6.
- Plaintiff has not, nor could it, plead facts which would support a finding that Defendant obtained money from another or that she engaged in conduct amounting to fraud, duress, or undue influence.

E. Unjust Enrichment

- Original Petition is not properly brought as an action for “unjust enrichment.” A party may recover under the “unjust enrichment” doctrine when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. *Heldenfels Brothers, Inc. V. City of Corpus Christi*, 832 SW.2d 39, 41 (Tex. 1992).
- See also, *Medford v. Medford*, 68 S.W.3d 242, 248 (Tex.App.-Fort Worth 2002, no pet.).

V. Plaintiffs Requests for Admissions

1. Defendant applied for the credit card as referenced in Plaintiffs Original Petition.

■ **RESPONSE: Admit**

2. Based upon Defendant's request, the account made a basis for Plaintiff s Original Petition was opened.

■ **RESPONSE: Admit**

3. Defendant understood from the time the account made a basis of Plaintiffs Original Petition was opened that use of the credit card results in a loan being made to Defendant for the amount charged or cash advanced requested.

■ **RESPONSE: Admit**

4. Defendant understood from the time the account made a basis of Plaintiffs Original Petition was opened that Defendant is required and obligated to repay all charges or cash advances incurred on the account.

■ **RESPONSE: Defendant denies this request inasmuch as it implies Defendant would be responsible to pay charges not authorized, or made by her.**

5. Defendant fully understood the risk and obligations associated with credit card accounts.

■ **RESPONSE:** Deny

6. Defendant made the purchases and took cash advances using the credit card made a basis of Plaintiffs Original Petition.

■ **RESPONSE:** Deny

7. Plaintiff is the present owner and holder of said account.

■ **RESPONSE:** Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.

8. Plaintiff is the party entitled to sue on said account.

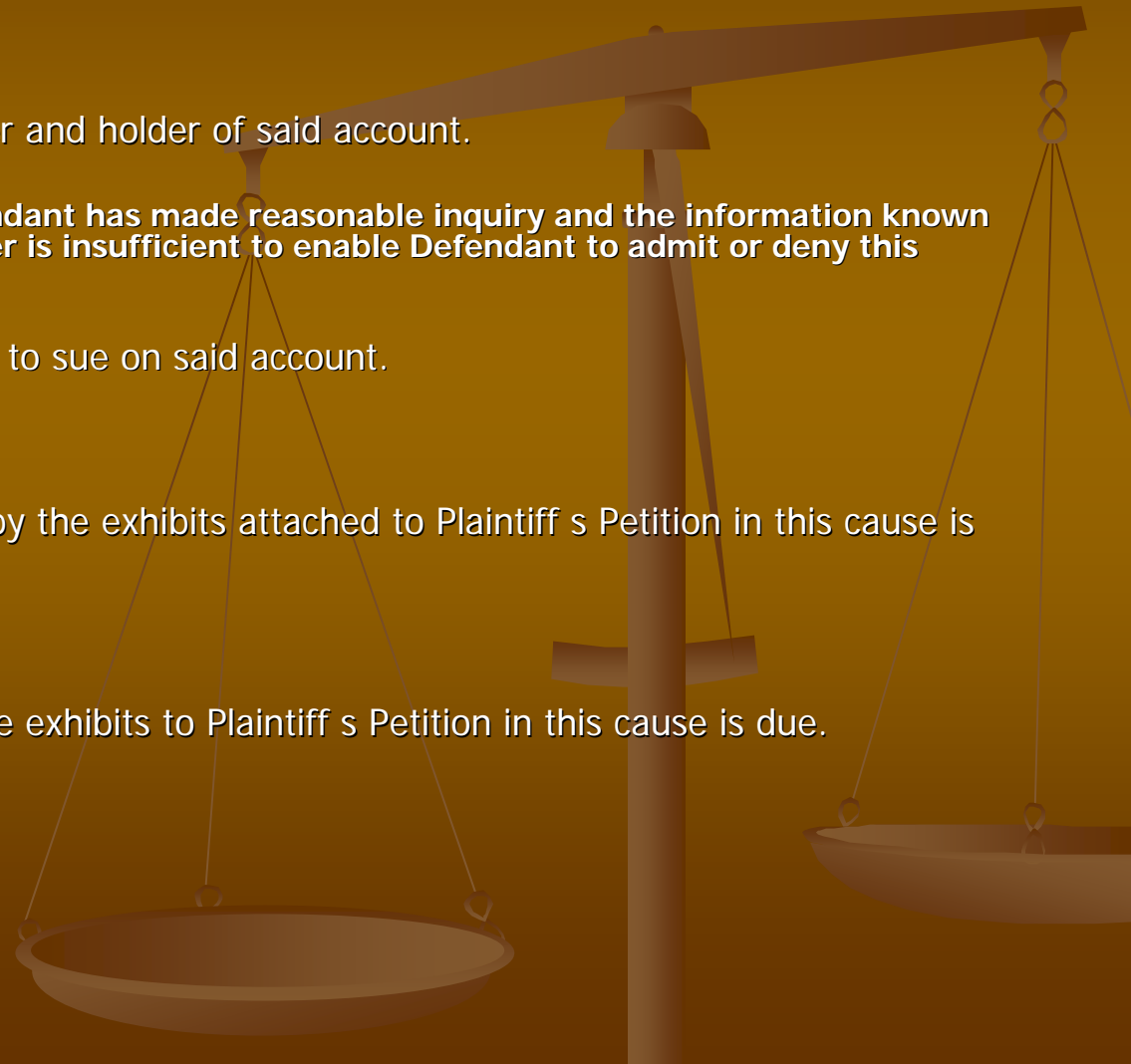
■ **RESPONSE:** Deny

9. That the account reflected by the exhibits attached to Plaintiff s Petition in this cause is just and true.

■ **RESPONSE:** Deny

10. The account reflected by the exhibits to Plaintiff s Petition in this cause is due.

■ **RESPONSE:** Deny



11. The account reflected by the exhibits attached to Plaintiff s Petition in this cause is the balance due Plaintiff after all just and lawful offsets, payments and credits have been allowed.

■ **RESPONSE: Deny**

12. Defendant received monthly statements showing the amount of charges or cash advances incurred for that monthly period, along with any payments or credits to the account, and specifying the monthly installment being due and owing.

■ **RESPONSE: Deny**

13. The monthly statement received by Defendant specifically advised of Defendant's right to dispute any error contained in the monthly statement.

■ **RESPONSE: Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.**

14. Since the account was opened, Defendant has not notified Plaintiff of any dispute or error regarding any information contained in any monthly statement.

■ **RESPONSE: Admit**

15. Defendant did promise to pay Plaintiff for said account.

■ **RESPONSE: Deny**



16. Plaintiff has requested Defendant to pay Plaintiff for said account.

- **RESPONSE:** Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.

17. Defendant has failed to pay Plaintiff for said account.

- **RESPONSE:** Objection. This request is premature because the party will not know the answer until discovery is completed.

18. Plaintiff made written demand upon Defendant for payment of said account.

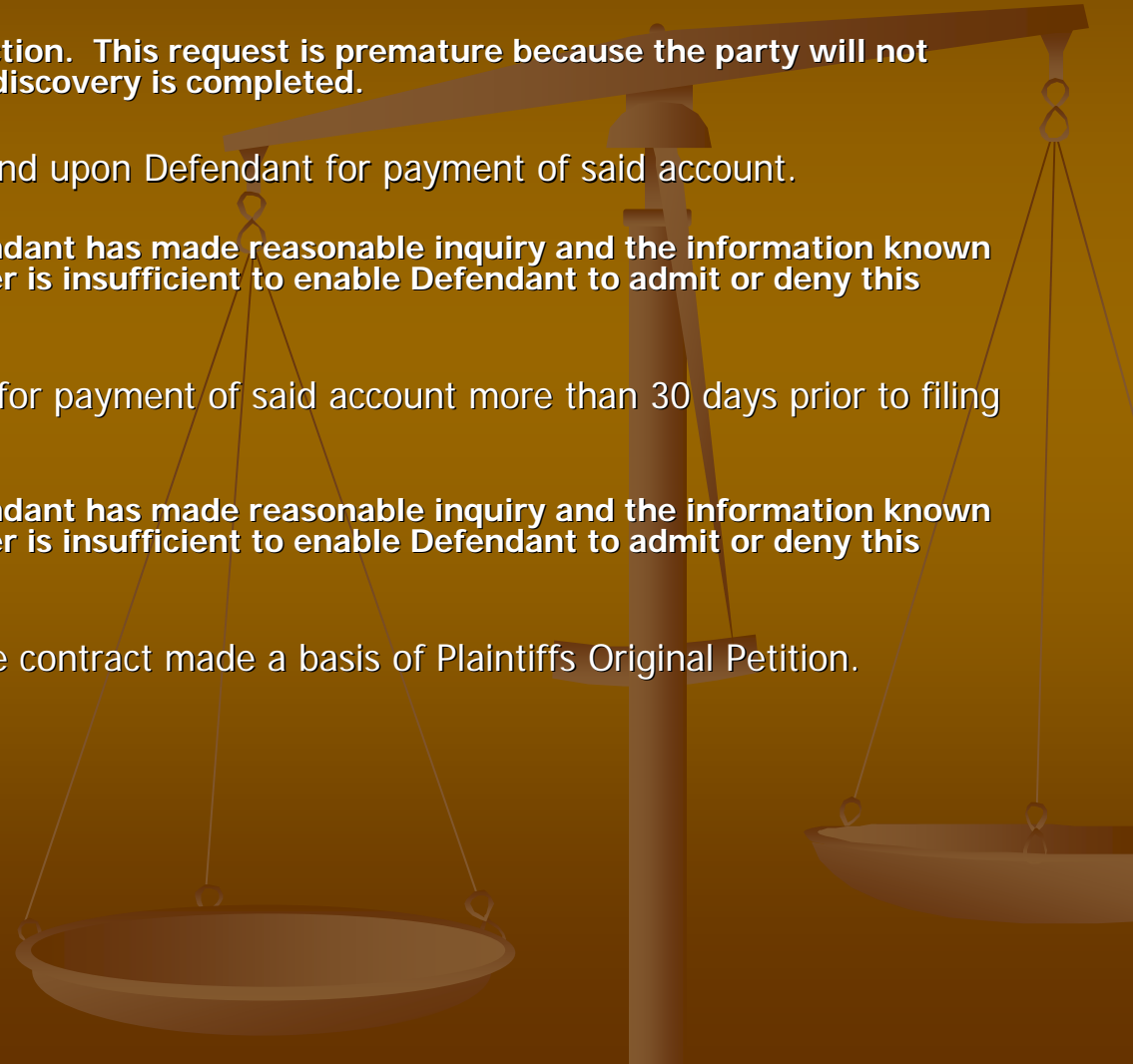
- **RESPONSE:** Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.

19. Written demand was made for payment of said account more than 30 days prior to filing this lawsuit.

- **RESPONSE:** Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.

20. Defendant has breached the contract made a basis of Plaintiffs Original Petition.

- **RESPONSE:** Deny



21. Defendant presently owes Plaintiff the amount of \$4,919.46 on said account.

■ **RESPONSE: Deny**

22. At no time prior to the filing of this lawsuit did Defendant or Defendant's representative requested verification of the debt from Plaintiff or its agents.

■ **RESPONSE: Admit**

23. At no time prior to the filing of this lawsuit did Defendant or Defendant's representative dispute the debt owing on the account made a basis of Plaintiff s Original Petition.

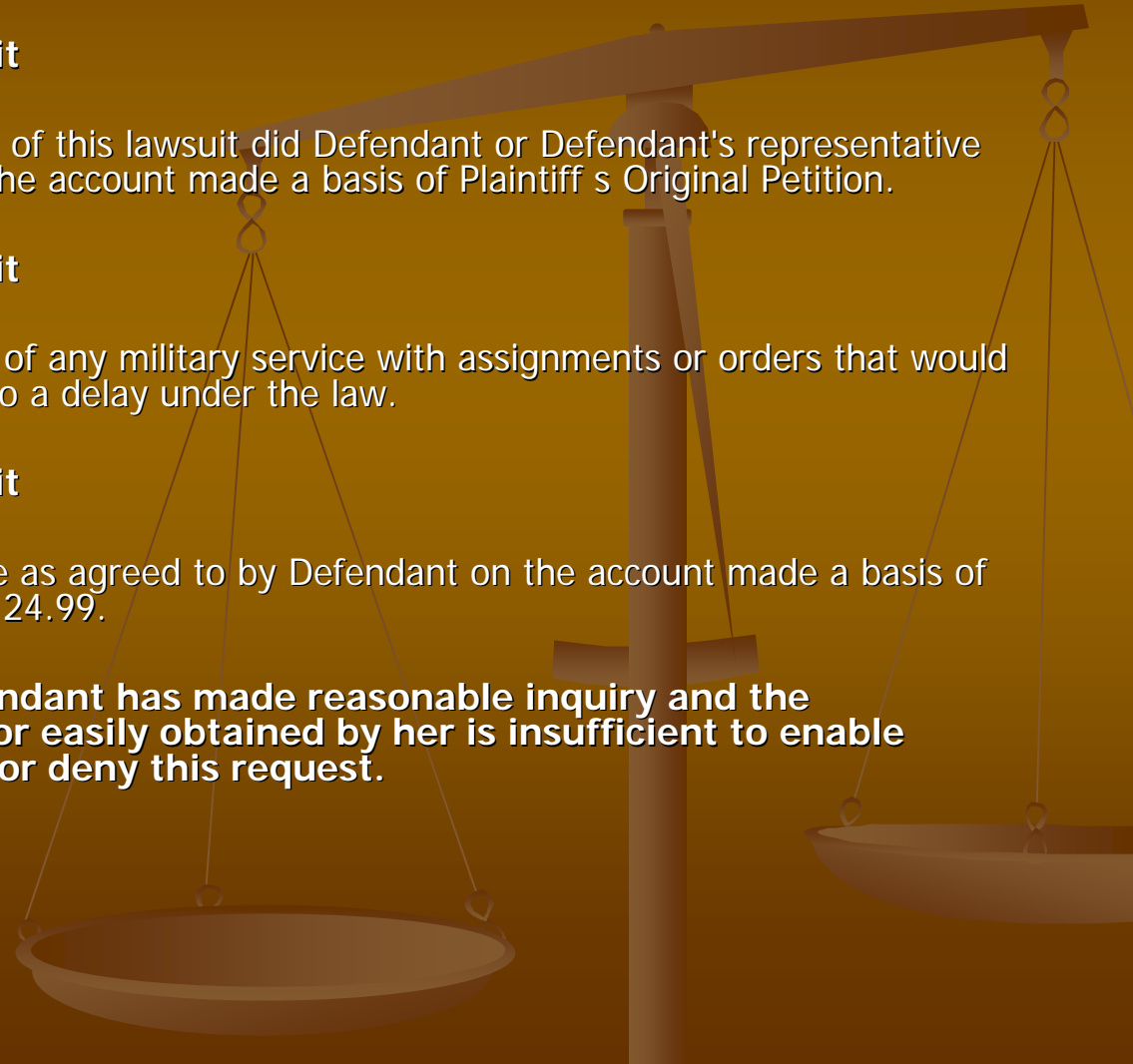
■ **RESPONSE: Admit**

24. Defendant is not a member of any military service with assignments or orders that would give the Defendant a right to a delay under the law.

■ **RESPONSE: Admit**

25. The contractual interest rate as agreed to by Defendant on the account made a basis of Plaintiffs Original Petition is 24.99.

■ **RESPONSE: Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.**



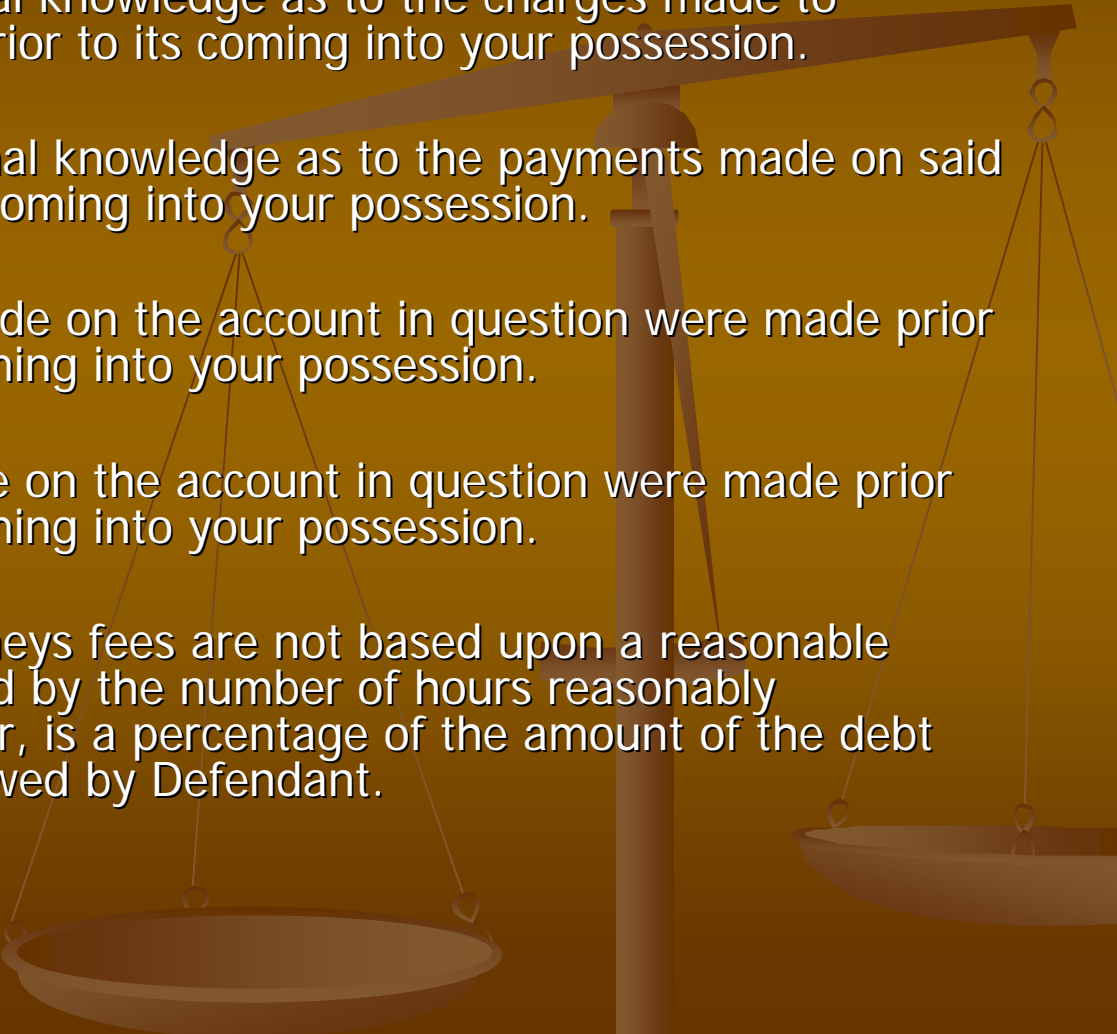
26. The terms of the agreement made a basis of Plaintiff's Original Petition allowed Defendant to be charged late fees if Defendant's monthly payments were late and over credit limit fees if Defendant exceeded the credit limit.

- **RESPONSE:** Defendant has made reasonable inquiry and the information known or easily obtained by her is insufficient to enable Defendant to admit or deny this request.

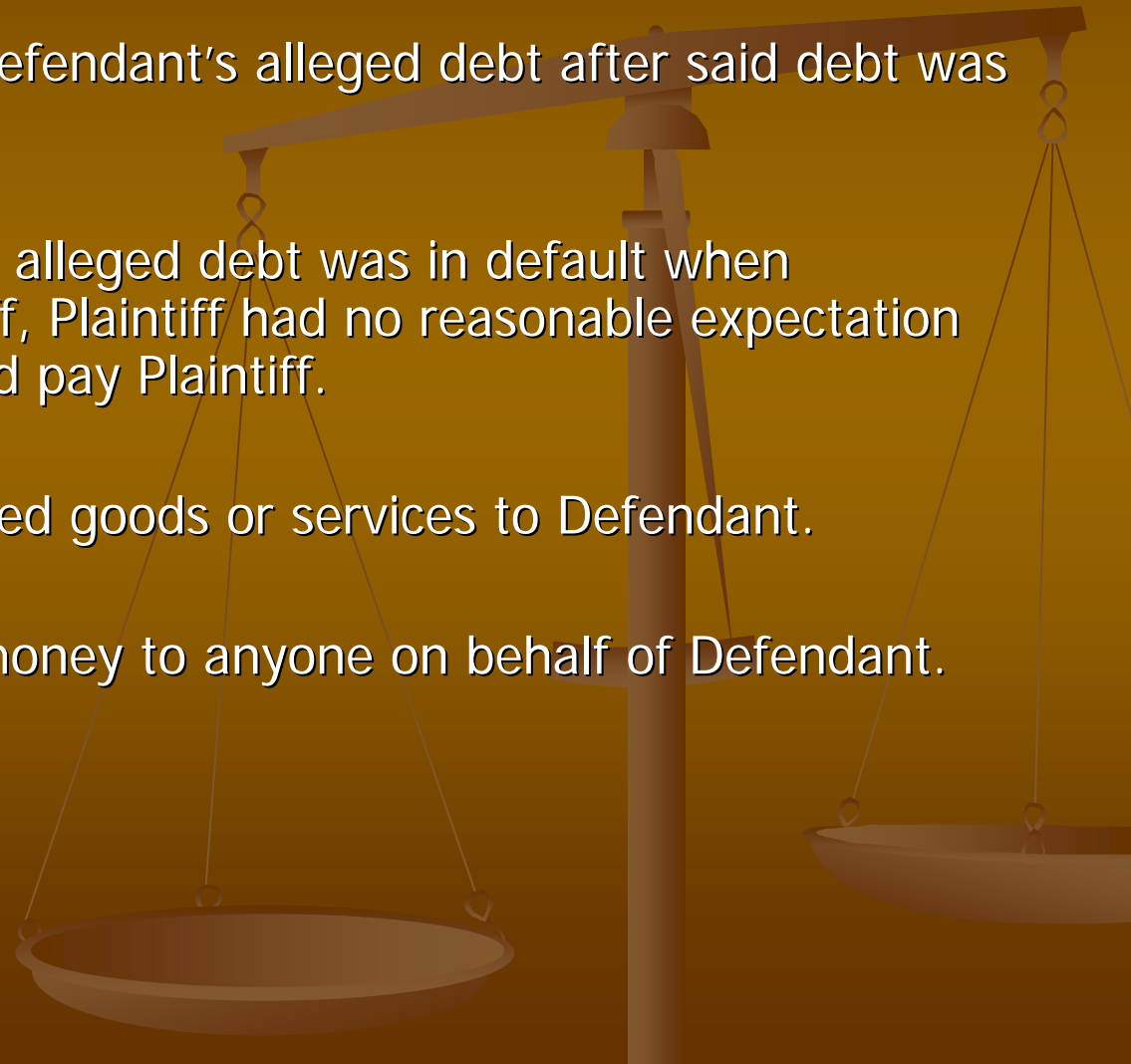
27. A reasonable attorney fee for Plaintiff's attorney for the prosecution of this lawsuit would be at least the amount of \$1,639.82.

- **RESPONSE:** Objection. This request is premature because the party will not know the answer until discovery is completed.

VI. Defendants Requests for Admissions

1. You do not possess the original documents which you claim obligates Defendant.
 2. You have no personal knowledge as to the charges made to Plaintiff's account, prior to its coming into your possession.
 3. You have no personal knowledge as to the payments made on said account prior to its coming into your possession.
 4. All the payments made on the account in question were made prior to the obligation coming into your possession.
 5. All the charges made on the account in question were made prior to the obligation coming into your possession.
 6. Your claim for attorneys fees are not based upon a reasonable hourly rate multiplied by the number of hours reasonably expended; but rather, is a percentage of the amount of the debt you claimed to be owed by Defendant.
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7. This suit is filed outside the applicable statute of limitations.
8. Defendant never entered into a contract with Plaintiff.
9. Plaintiff purchased Defendant's alleged debt after said debt was in default.
10. Because Defendant's alleged debt was in default when purchased by Plaintiff, Plaintiff had no reasonable expectation that Defendant would pay Plaintiff.
11. Plaintiff never provided goods or services to Defendant.
12. Plaintiff never paid money to anyone on behalf of Defendant.



VII. Other Strategies

1. Set hearings
2. Depose affiant
3. File MSJ

