

# No. 08-0148

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*In the Texas Supreme Court*

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REGAL FINANCE COMPANY, LTD. AND  
REGAL FINANCE COMPANY II, LTD.,  
*Petitioners,*

v.

TEX STAR MOTORS, INC.,  
*Respondent.*

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Petition for Review from the Fourteenth Court of Appeals in Houston, Texas  
Trial Court Cause No. 2002-41615

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## **PETITIONER'S REPLY BRIEF ON THE MERITS**

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# TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
INDEX OF AUTHORITIES .....	iii
INTRODUCTION.....	1
I. The Court of Appeals Misapplied Section 9.627(b) of the UCC and Corrupted Texas Charge Law In the Process. ....	2
A. Tex Star Cannot Defend the Court of Appeals’ Opinion.....	2
1. The court of appeals badly misread the jury instruction.....	3
2. Tex Star’s effort to defend the court of appeals’ opinion confuses “definitions” with “instructions.”.....	5
3. The court of appeals’ opinion distorts the relationship between the <i>Brown</i> rule and the <i>Allen</i> rule of Texas jury charge practice.....	9
B. Under the General Rule, the Evidence of Commercial Reasonableness Is Sufficient.....	14
C. Even Under the Court of Appeals’ Mistaken Test for Dealer Practices, the Evidence of Commercial Reasonableness Is Legally Sufficient. ....	16
D. Tex Star Ignores the Request for a Remand In the Interests of Justice. ....	21
II. The Court of Appeals Awarded Money Contrary to the <i>Fortune</i> Rule. ....	22
A. The Funds In Question Are Covered by the Express Contracts.....	22
B. As a Matter of Law, the Agreement Modified the Written PSAs.....	23
C. Even if the Agreement Stands Alone, It Triggers the <i>Fortune</i> Rule. ....	25
CONCLUSION .....	25

CERTIFICATE OF SERVICE ..... 27

APPENDIX

Excerpts from Charge Conference ..... Tab I

## INDEX OF AUTHORITIES

CASES	PAGE(S)
<i>Acord v. General Motors Corp.</i> , 669 S.W.2d 111 (Tex. 1984) .....	7
<i>Allen v. American Nat'l Ins. Co.</i> , 380 S.W.2d 604 (Tex. 1964) .....	9
<i>American Garment Properties, Inc.</i> <i>v. CB Richard Ellis-El Paso</i> , 155 S.W.3d 431 (Tex. App.—El Paso 2004, no pet.) .....	25
<i>Bank One, Texas, N.A. v. Stewart</i> , 967 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) .....	15, 18
<i>Brown v. American Transfer &amp; Storage Co.</i> , 601 S.W.2d 931 (Tex. 1980) .....	9, 12
<i>Capulin v. Retailer's Credit Union</i> , 1999 WL 130136 (Tex. App.—Houston [14th Dist.] 1999, no pet.) .....	18
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005) .....	16
<i>Farley v. MM Cattle Co.</i> , 529 S.W.2d 751 (Tex. 1975) .....	16
<i>First Federal S &amp; L Ass'n v. Sharp</i> , 359 S.W.2d 902 (Tex. 1962) .....	8
<i>First Int'l Bank v. Roper Corp.</i> , 686 S.W.2d 602 (Tex. 1985) .....	7
<i>Ford Motor Co. v. Ledesma</i> , 242 S.W.3d 32 (Tex. 2007) .....	8, 21
<i>Greathouse v. McConnell</i> , 982 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) .....	19

<i>Gulf Coast Bank v. Emenhiser</i> , 562 S.W.2d 449 (Tex. 1978) .....	7
<i>Hammer v. Thompson</i> , 129 P.3d 609 (Kan. App. 2006).....	20
<i>Hathaway v. General Mills, Inc.</i> , 711 S.W.2d 227 (Tex. 1986) .....	24
<i>Havins v. First Nat’l Bank of Paducah</i> , 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ) .....	18, 19
<i>Houston Transit Co. v. Felder</i> , 208 S.W.2d 880 (Tex. 1948) .....	8
<i>ITT Commercial Fin. Corp. v. Riehn</i> , 796 S.W.2d 248 (Tex. App.—Dallas 1990, no writ) .....	17, 18
<i>Jackson v. U.S. Fidelity &amp; Guaranty Co.</i> , 689 S.W.2d 408 (Tex. 1985) .....	8
<i>K-Mart Corp. v. Honeycutt</i> , 24 S.W.3d 357 (Tex. 2000) .....	17
<i>Key Bank of Washington v. Hanson</i> , 2000 WL 526426 (Wash. App. 2000) .....	20
<i>Larson v. Cook Consultants, Inc.</i> , 690 S.W.2d 567 (Tex. 1985) .....	9
<i>Lemos v. Montez</i> , 680 S.W.2d 798 (Tex. 1984) .....	7
<i>Lone Star Steel Co. v. Scott</i> , 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied).....	25
<i>Louisiana-Pacific Corp. v. Knighten</i> , 976 S.W.2d 674 (Tex. 1998) .....	5
<i>McKelvy v. Barber</i> , 381 S.W.2d 59 (Tex. 1964) .....	2

<i>Osterberg v. Peca</i> , 12 S.W.3d 31 (Tex. 2000) .....	9
<i>Sage Street Assoc. v. Northdale Constr. Co.</i> , 863 S.W.2d 438 (Tex. 1993) .....	24
<i>Southwest Bank v. Information Support Concepts, Inc.</i> , 149 S.W.3d 104 (Tex. 2004) .....	21
<i>Spencer v. Eagle Star Ins. Co.</i> , 876 S.W.2d 154 (Tex. 1994) .....	9
<i>Sunjet, Inc. v. Ford Motor Credit Co.</i> , 703 S.W.2d 285 (Tex. App.—Dallas 1985, no writ) .....	17, 20
<i>Travelers Ins. Co. v. Brown</i> , 402 S.W.2d 500 (Tex. 1966) .....	8
<i>Wagner &amp; Brown, Ltd. v. Sheppard</i> , 42 TEX. SUP. CT. J. 130 (Nov. 21, 2008).....	21
<i>Wilson v. General Motors Acceptance Corp.</i> , 897 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1994, no writ) .....	10, 15, 18, 19
<i>Woods v. Crane Carrier Co.</i> , 693 S.W.2d 377 (Tex. 1985) .....	6

**STATUTES**

TEX. BUS. & COM. CODE § 9.610(a).....	11
TEX. BUS. & COM. CODE § 9-627(b)(3) .....	10, 12

**RULES**

TEX. R. CIV. P. 226a .....	5
TEX. R. CIV. P. 273-278.....	5
TEX. R. CIV. P. 278 .....	13
TEX. R. CIV. P. 279 .....	24

## OTHER AUTHORITIES

Imad Abyad, <i>Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence</i> , 83 VA. L. REV. 429 (1997) .....	20
68A AM. JUR. 2D—SECURED TRANSACTIONS § 596 (2006).....	18
ANDERSON ON THE UCC § 9-504 (2006) .....	18
Annotation, <i>What Is Commercially Reasonable Disposition of Collateral Required by UCC § 9-504(3)</i> , 7 A.L.R.4th 308 (1981) .....	20
COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1370-71 (1971) .....	3
Hodges & Guy, JURY CHARGE IN TEXAS CIVIL LITIGATION § 24 (2d ed. 1988).....	7
Rudyard Kipling, <i>If</i> (1910) .....	4
Roy W. McDonald, TEXAS CIVIL PRACTICE § 12.14.1 (1983 rev.) .....	5
15 TEXAS PRACTICE: TEXAS FORECLOSURE— LAW & PRACTICE §§ 3.50, 3.56 (2005) .....	18
WEBSTER'S REVISED UNABRIDGED DICTIONARY, <a href="http://dictionary.reference.com/browse/if">http://dictionary.reference.com/browse/if</a> (viewed February 14, 2009).....	3
4 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 34-11 (5th ed. 2006) .....	20, 21

## INTRODUCTION

This case presents a pair of simple and important questions concerning the UCC and Texas jury charge practice:

- Does a jury instruction using the term “if” mean “only if”?
- When a jury instruction closely tracks a statute, should the jury instruction be given the same meaning as the statute itself?

The court of appeals answered both questions incorrectly, and Tex Star’s brief does nothing to save the opinion. In fact, Tex Star’s brief confirms our central premises:

- Tex Star admits that UCC § 9-627(b)(3) creates a statutory safe harbor, making a sale commercially reasonable “if” certain conditions exist.
- Tex Star cannot deny that this jury charge tracked UCC § 9-627(b)(3).
- Tex Star cannot deny that the court of appeals came up with its holding that “if” means “only if,” contrary to UCC § 9-627(b)(3), *sua sponte*.

Tex Star is so ashamed of the court of appeals’ opinion that it devotes only 3 pages to defending the court of appeals’ analysis of the jury charge. *See* Tex Star Br. at 25-28. Tex Star attempts to bury that erroneous holding between an excessive factual discussion (xviii pages of opening material and 22 pages of facts) and numerous alternative grounds that were not reached below. None of that should obscure the court of appeals’ errors.

Failure to correct the court of appeals’ opinion would have serious consequences. Aside from the embarrassing fact of making Texas the only place on earth where “if” means “only if,” it would also render the Texas Uniform Commercial Code non-uniform, leaving Texas out of step with the rest of the nation in our application of UCC § 9-627. Indeed, the logic of the court of appeals’ opinion casts a cloud over the task of drafting a jury charge in *any* case with a statutory safe harbor.

Tex Star seems to believe that a statutory safe harbor is an exclusive “definition,” repeatedly suggesting that the charge gave a “definition” of commercial reasonableness. *See* Tex Star Br. at 2 (twice), 23-27 (six times). But this instruction was *not* a definition. The charge merely instructed the jury about one optional method—*i.e.*, a “safe harbor”—for proving the UCC concept of commercial reasonableness. It did so in terms that were legally correct, faithful to the rules of jury charge practice, and consistent with the UCC. If the court of appeals’ opinion is allowed to stand, jury charges drafted in accordance with statutory safe harbors will be given a different meaning than the statutes themselves. That would be absurd. The law should be the same at the courthouse as the statehouse.

This Court should (i) reverse the court of appeals’ ruling about the jury charge and Article 9 of the UCC; (ii) hold the evidence legally sufficient under the correct standard; (iii) reject Tex Star’s alternative theory that expert testimony is required under Article 9; and (iv) remand Tex Star’s other challenges on the Article 9 claim to the court of appeals. *See McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex. 1964). Finally, the Court should uphold the *Fortune* rule and reverse the judgment on the “money had and received” claim.

**I. The Court of Appeals Misapplied Section 9.627(b) of the UCC and Corrupted Texas Charge Law In the Process.**

**A. Tex Star Cannot Defend the Court of Appeals’ Opinion.**

Tex Star’s brief devotes less than 3 pages to the principal question presented, which challenges the court of appeals’ legal sufficiency ruling on Regal’s Article 9 claim. *See* Tex Star Br. at 25-28. In a curious turn, Tex Star’s merits brief even retreats *further* from defending the court of appeals’ opinion than its response to the petition for review. Because Tex Star cannot defend the opinion below, the petition should be granted.

**1. The court of appeals badly misread the jury instruction.**

First, as a matter of both grammar and logical theory, “if” does not mean “only if.” The court of appeals simply misread the instruction. Tex Star’s brief begs the question by assuming that the court of appeals correctly construed the word “if” to mean “only if,” but it does little to defend that assumption. The assumption is incorrect.

Regal’s Brief on the Merits pointed out that the plain and ordinary meaning of “if” does not connote the exclusive concept “only if,” as the court of appeals’ opinion holds. We cited leading authorities on logic. We cited the leading authority on legal writing. And we pointed out that the context of the jury instruction makes it plain that the word “if” did not mean “only if,” because that reading would nullify the preceding sentence. Regal Br. at 18. Tex Star does not refute these authorities and arguments, nor does it offer any dictionary definition to justify the assertion that “if” means “only if.” Indeed, there is no way to defend that conclusion; the definitive authority on the English language highlights the many and varied uses of the word “if,” but never equates “if” to “only if.” See COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1370-71 (1971).

The word “if” is frequently used to introduce a supposition about the facts without endorsing them as true. *Id.*; see also WEBSTER’S REVISED UNABRIDGED DICTIONARY, <http://dictionary.reference.com/browse/if> (viewed February 14, 2009) (“in case that; granting, allowing, or supposing that; -- introducing a condition or supposition”). Here, that is precisely how the word was used. Because it would have been inappropriate for the trial court to comment on the evidence, it merely instructed the jury, in neutral terms, that Regal’s conduct was commercially reasonable “if” certain facts existed.

Tex Star tries to dismiss the ordinary meaning of the word “if” as unimportant: “These linguistic gyrations are unhelpful.” Tex Star Br. at 26. It offers just one citation (in a footnote) to justify the proposition that “if” means “only if.” *Id.* at 26 n.10. But the cited authority is a contract interpretation decision examining the difference between a “condition precedent” and a “covenant”; it is irrelevant to the question presented here. This Court construes jury instructions from the common-sense perspective of lay jurors, not the technical perspective of contract jurisprudence on “conditions” and “covenants.” From that common-sense perspective, any 9th grade English teacher instructing her students on the technical rules of grammar would know that “if” does not mean “only if.” And any 10th-grade geometry teacher teaching his students about the theory of proofs and deductive reasoning would know that equating “if” with “only if” is a logical fallacy. A few more examples should prove the point:

- An integer is an even number “if” it is divisible by 4. Does that mean an integer is even “only if” it is divisible by 4? Of course not – what about 2, or 6, or 10?
- A person is a citizen of the United States “if” he or she was born in this country. Does that mean a person is a citizen “only if” he or she was born on the mainland? Of course not – there are other ways to acquire U.S. citizenship, as John McCain (Panama Canal Zone) and Arnold Schwarzenegger (Austria) can attest.
- This Court has jurisdiction over an interlocutory appeal “if” there was a dissent. Does that mean jurisdiction exists “only if” there was a dissent? Of course not – the Court also has jurisdiction over conflicts.

An endless array of examples could be given, but they would belabor the obvious. Under Justice Edelman’s view of the word “if,” no boy could ever grow up to be a man. *See* Rudyard Kipling, *If* (1910). If anything deserves to be called a “linguistic gyration,” it is the opinion below. The judgment can be summarily reversed on this basis alone.

**2. Tex Star’s effort to defend the court of appeals’ opinion confuses “definitions” with “instructions.”**

In its effort to defend the court of appeals’ assumption that “if” means “only if,” Tex Star eschews grammar and logic in favor of a simplistic—and mistaken—construct: It repeatedly asserts that the trial court “defined” commercial reasonableness exclusively to mean reasonable commercial practices among dealers. *See, e.g.*, Tex Star Br. at 23 (“The jury was then instructed that a sale was defined as commercially reasonable if it conformed to reasonable practices among dealers in the type of property that was the subject of the sale.”). Indeed, in the sole passage of its brief in which Tex Star tries to defend the court of appeals’ opinion, it refers to the relevant jury instruction as a “definition” no less than 6 times. *Id.* at 23-27. By suggesting that the court “defined” commercial reasonableness in terms of the dealer standard, Tex Star hopes to establish that the instruction was exclusive, *i.e.*, a condition of proving commercial reasonableness. But that premise is wholly mistaken. The submission at issue was not a definition.

The charge rules refer to submission of “questions, definitions, and instructions.” TEX. R. CIV. P. 273-278. Definitions are submitted to provide a “proper legal definition” when a word “varies from the meaning commonly understood.” TEX. R. CIV. P. 226a (standard instructions to the jury). Instructions are submitted when the jury would benefit from guidance on the applicable legal rules in answering the questions submitted to it. *See Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998).<sup>1</sup>

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<sup>1</sup> For a discussion of the historical evolution of the rules, *see* Roy W. McDonald, TEXAS CIVIL PRACTICE § 12.14.1 (1983 rev.) (“An explanatory instruction, under the rule, may be a statement of a rule of law which the jury must understand in order intelligently to deal with the special issues submitted, but which formerly might have been condemned as a general charge. . . . A definition is an interpretation of a word or phrase used in the charge.”).

The submission at issue in this case was plainly an instruction, *not* a definition. Definitions ordinarily appear at the beginning of the charge, immediately after the standard instructions and before any of the questions. *See Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985). Instructions ordinarily appear in a particular question, to assist the jury in answering the question.

That is precisely how this charge was structured. The charge included a separate section titled “Definitions,” which defined numerous terms for the jury. *See* CR 2351 (defining “Regal I,” “Regal II,” “Tex Star,” “PSAs,” “Loans,” and the rules of agency). The definitions section did *not* include a definition of “Commercial Reasonableness.” *Id.* In the damages question, on the other hand, the jury was given a series of instructions about the legal rules of commercial reasonableness to assist it in determining damages:

- “In answering this question, consider only Loans relating to vehicles that Regal I and Regal II sold in good faith and in a commercially reasonable manner.”
- “Good faith means honesty in fact and the observance of reasonable commercial practices of fair dealing.”
- “Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable.”
- “A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.”
- “The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by Regal I and Regal II is not of itself sufficient to preclude Regal I and Regal II from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.”

CR 2358 [**Tab B**]. The court of appeals’ opinion picks out one of these five instructions and elevates it to the stature of an exclusive burden of proof. That is simply error.

Importantly, the trial court framed its dealer practice instruction in neutral terms because doing so was necessary to comply with other rules of Texas jury charge practice. The trial court could not directly instruct the jury about the legal effect of the safe harbor (*i.e.*, that conformity with dealer practices would establish commercial reasonableness as a matter of law, and that if the jury found such conformity it should find for Regal) because such a jury instruction—while legally correct—would have been objectionable. “It is not permissible for the trial court to marshal the facts or parties’ contentions in an instruction and then instruct the jury to find for one party if they believe certain facts to be true.” *Gulf Coast Bank v. Emehiser*, 562 S.W.2d 449, 453 (Tex. 1978). This Court repeatedly has admonished trial courts not to “tilt” or “nudge” the jury with instructions that emphasize certain facts or signal the effect of legal rules. *E.g.*, *First Int’l Bank v. Roper Corp.*, 686 S.W.2d 602, 605 (Tex. 1985); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984); *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984). Thus, the trial court fashioned its instruction on dealer practices in strictly neutral language, instructing the jury about the applicable legal rule without “tilting” or “nudging” the jury.

In so doing, the trial court faithfully followed the rules of Texas charge practice, instructing the jury about the applicable rules related to compliance with dealer practices (about which the jury had heard evidence) while remaining within the proper boundaries. *See* Hodges & Guy, *JURY CHARGE IN TEXAS CIVIL LITIGATION* § 24 (2d ed. 1988) (encouraging such a neutral approach). It would be perverse if the trial court’s effort to adhere to these rules were construed to transform a legally correct instruction about a statutory safe harbor into a definition fixing an exclusive burden of proof.

Tex Star, like the court of appeals, invokes a scarecrow by suggesting that failing to interpret “if” as “only if” would call into doubt several pattern definitions in the PJC. If anything, the possibility that multiple PJC submissions may suffer from the same flaw is a reason to grant review and study the question more closely—not to close one’s eyes. The PJC is not invariably correct, and this Court is willing to correct PJC submissions when necessary. *E.g.*, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 (Tex. 2007). But there is little reason to perceive any conflict. The PJC submissions set forth correct statements of common-law concepts that do not turn on the “if” vs. “only if” distinction, unlike the statutory safe harbor here. There is no reason to believe that giving this charge a common-sense and correct interpretation will require modification of PJC submissions that do not pose similar issues. “The court’s charge and the jury’s consideration of it must be appraised in the light of ordinary reason and everyday experience. Distinctions which are too fine are apt to lead to needless perplexities and purely legalistic results.” *Houston Transit Co. v. Felder*, 208 S.W.2d 880, 883 (Tex. 1948).

Regal does not believe there is any genuine uncertainty about this jury instruction, but importantly, “[i]f the jury finding is ambiguous or unclear, the courts must try to interpret the finding so as to uphold the judgment.” *First Federal S & L Ass’n v. Sharp*, 359 S.W.2d 902, 903 (Tex. 1962); *Jackson v. U.S. Fidelity & Guaranty Co.*, 689 S.W.2d 408, 412 (Tex. 1985) (same). As Chief Justice Calvert explained the bedrock principle, “the burden is on one appealing from an adverse judgment of a trial court to show that the judgment was erroneously rendered.” *Travelers Ins. Co. v. Brown*, 402 S.W.2d 500, 504 (Tex. 1966). The court of appeals’ opinion turns proper appellate review upside down.

**3. The court of appeals' opinion distorts the relationship between the *Brown* rule and the *Allen* rule of Texas jury charge practice.**

This case also poses a crucial question about the relationship between two rules of Texas charge practice. One rule concerns submission of statutory theories, and the other concerns sufficiency review. With increasing frequency, these two rules must interact. This case exposes the need for guidance about that interaction from this Court.

In statutory cases, this Court instructs lawyers and judges that the jury instructions “should be submitted in terms as close as possible to those actually used in the statute,” and “[t]he language of the statute may be altered somewhat to conform the issue to the evidence of the case.” *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); accord *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). Regal (and the trial court) relied on the *Brown* rule in submitting this jury charge.

The *Brown* rule must coexist with the rule that, when there is no charge objection, sufficiency issues are reviewed in light of the charge. *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 609 (Tex. 1964); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000); *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985). Tex Star's brief (like the court of appeals' opinion) relies on the *Allen* rule but fails to clash on the issue.

Regal does not quarrel with the *Allen* rule. On the contrary, Regal embraces it. The question is how the *Allen* rule operates when a jury charge closely tracks the statute, as it ought to, under the *Brown* rule. Here, the jury instructions were legally correct and they closely tracked the UCC, as the *Brown* rule required. In applying the *Allen* rule, they should be given the same meaning as the statute upon which they were based.

Tex Star does not deny that UCC § 9-627(b)(3) is a safe harbor, and its brief even admits unequivocally (for the first time) that Regal’s interpretation of Article 9 is correct. *See* Tex Star Br. at 32-33 (Tex Star now is not “arguing that [Regal] had to establish the safe harbor dealer standard to demonstrate commercial reasonableness under Article 9”). Likewise, Tex Star does not deny that a judicial decision interpreting UCC § 9-627(b)(3) as a requirement would be not only erroneous, but also unprecedented in the U.S. courts.<sup>2</sup> Yet that is *precisely* what the lower court held—first as a matter of statutory construction, and only later, once it had been exposed by the motion for rehearing and the amicus brief, as a retreat to the supposed language of the jury instruction under the *Allen* rule.

This case thus presents a dilemma that appears to be unprecedented in Texas law: A legally correct jury instruction, submitted pursuant to a statute under the *Brown* rule, has been given a different meaning than the statute upon which the instruction was based—ostensibly because that different interpretation is dictated by the *Allen* rule. We are not aware of any reported decision in which a Texas court has adopted such a curious rule. But if it is allowed to evade review, this bastardized version of the *Allen* rule will spread. In recent years, the Legislature has grown increasingly willing to legislate in areas that are frequent subjects of litigation. As a result, the *Brown* rule is increasingly important. The Court should not tolerate the notion that statutes may mean one thing when they are passed by the Legislature, but something different when they are applied in the courts.

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<sup>2</sup> Tex Star’s brief goes to great lengths to distinguish *Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1994, no writ), but its effort to do so misses the point. *See* Tex Star Br. at 32-34. We cited *Wilson* to illustrate that proof of compliance with the safe harbors set forth in UCC § 9-627 is not required, and that Texas appellate courts have found the resale of used cars to be commercially reasonable *as a matter of law* without demanding compliance with the safe harbor. Tex Star does not deny that point.

Tex Star hopes to sidestep this problem by arguing that the jury instruction at issue “deviated from the statutory language in a significant way,” Tex Star Br. at 24, and thus was not a faithful application of Article 9 under the *Brown* rule. But that claim is a bluff. Tex Star cites only one alleged deviation: use of the term “sale” rather than “disposition.” *Id.* at 24, 26-27. And the UCC makes explicit that a “sale” is one form of “disposition.” TEX. BUS. & COM. CODE § 9.610(a) (“After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral . . .”). It is uncontroverted that Regal disposed of the collateral in only one way—by reselling the used cars. Thus, use of the term “sale” was correct and it did not deviate from the UCC in a material way. Tex Star’s “simple logical syllogism” defies the accepted meaning of the UCC.

Tellingly, aside from its misguided effort to distinguish “disposition” from “sale,” Tex Star does not suggest any other reason to believe the jury instruction was incorrect. In its Summary of Argument, Tex Star takes issue with “Petitioners’ argument that the jury instruction was legally correct and that no one has suggested otherwise,” claiming it “is simply contrary to the law and the record. Tex Star objected to the submission of the jury question and instruction and raised the issue on appeal.” Tex Star Br. at 24 (citing 10 RR 34-35, 40-41). But in its Argument, Tex Star does not try to defend that assertion. And with good reason, because those record citations reveal that Tex Star did *not* object on the ground that the jury instruction materially varied from the language of the statute. Tex Star objected only because the trial court refused non-statutory surplus instructions (and for other unrelated reasons). 10 RR 34-37, 40-41; CR 2340-43 [Tab I]. In short, nobody can argue the jury instruction was legally incorrect on its own terms.

To be sure, the jury instruction was not submitted in the precise terms of the UCC, but as we have explained, it was necessary to simplify the statutory language in order to eliminate safe harbors that were not raised by the evidence and to avoid violating the rule against marshalling facts and tilting the jury. That approach was necessary and proper. *See Brown*, 601 S.W.2d at 937 (“The language of the statute may be altered somewhat to conform the issue to the evidence of the case.”). The differences were immaterial:

UCC § 9-627(b)(3)	Jury Instruction
A disposition of collateral is made in a commercially reasonable manner <i>if</i> the disposition is made . . . otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.	A sale is commercially reasonable <i>if</i> it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.

The Court should take note that the UCC itself uses the term “if,” not “only if.” As we have explained, that language is uniformly understood to establish a safe harbor, not an exclusive burden of proof. The jury instruction also faithfully used the term “if.” The trial judge and all the litigants in the trial court understood exactly what it meant. But the court of appeals construed “if” to mean “only if,” turning it upside down.

This comparison frames the question: May a legally correct jury instruction on a statutory theory be given a different meaning than the statute upon which it was based? We think the answer is self-evident: Statutes must mean the same thing in the courthouse and the statehouse, so legally correct jury instructions must be given the same meaning.

Relying on its mistaken premise that the jury instruction deviated from the statute, Tex Star woodenly assumes this case is controlled by the *Allen* rule and simply ignores any tension with the *Brown* rule. Because the instruction was legally correct, however, that tension is inescapable. It is not acceptable to ignore this important issue.

The Court may wish to resolve this tension by clarifying that the *Allen* rule applies only when a jury instruction is legally incorrect, but a litigant fails to object to the error. (That is certainly how it always has been applied.) That approach would harmonize the *Allen* rule with the rule that litigants are not entitled to particular language in the charge. *See* TEX. R. CIV. P. 278 (litigants may not demand “various phases or different shades of the same question”). If a litigant cannot object to the use of particular language because the instruction is legally correct—which was the case here—it cannot fairly be said that the litigant has agreed to accept a different evidentiary burden than the controlling law. A decision that the *Allen* rule applies only if the jury charge is first held to be erroneous would harmonize the two rules, avoiding any conflict with the *Brown* rule.

Alternatively, the Court may wish to clarify that the *Allen* rule applies to all cases in which there is no charge objection, but is to be applied in harmony with the *Brown* rule because a legally correct jury instruction has the same meaning as the statute upon which it was based. That approach would also harmonize the two rules, avoiding any conflict.

Either way, the court of appeals’ stubborn refusal to interpret this jury instruction consistently with the UCC provision upon which it was based, despite the fact that the instruction was legally correct and the meaning of the underlying statute is not in doubt, was nothing less than defiance of the rule of law. It should be reversed.

**B. Under the General Rule, the Evidence of Commercial Reasonableness Is Sufficient.**

Once the court of appeals' erroneous interpretation of the jury charge is set aside, there should be no question that the evidence is legally sufficient to sustain the verdict. The court of appeals recognized that Regal offered evidence to satisfy the general rule, Op. at 751-52, and Regal recounted much of that evidence in the Brief on the Merits.

Tex Star denies that premise, seeking comfort from the court of appeals' statement (in a footnote) that "there was no evidence of commercial reasonableness of any kind in this case." Tex Star Br. at 28. Tex Star has taken that statement badly out of context. The court of appeals did not hold there was no evidence of commercial reasonableness under the general rule; it was simply explaining that—under its reading of the charge—there was no need to reach Tex Star's contention that expert testimony is a requirement. Op. at 752 n.9. Indeed, if the court of appeals had believed there was no evidence under the general rule, there would have been no need to hold that the jury instruction required Regal to satisfy the safe harbor for dealer practices. But if there is any question about the sufficiency of the evidence under the general rule, that fact-bound issue can be remanded to the court of appeals for decision under the correct legal standard.

Beyond its misreading of the court of appeals' opinion, Tex Star's argument about the sufficiency of the evidence under the general rule of commercial reasonableness simply rehashes the evidence and faults Regal for failing to offer evidence about each car with magic words blessing each of the 906 separate sales as "commercially reasonable." The law does not require magic words, however, so the evidence is legally sufficient.

Regal offered evidence about “the method, manner, time, place and other terms” of its sales of repossessed cars, thereby satisfying the general rule. CR 2358 [Tab B]. That evidence was discussed in detail in the Brief on the Merits, so we will not repeat it. *See* Regal Br. at 23-29. Tex Star argues that Regal was required to offer detailed proof with respect to each separate car, *e.g.*, Tex Star Br. at 28, 35, but that is plainly incorrect. Regal offered evidence about its business procedures (*i.e.*, its “method” and “manner”), and it introduced the loan files for each vehicle (*i.e.*, the “time, place, and other terms”). *See* PX 76B. From this evidence, the jury had a sufficient basis to decide whether Regal had proved commercial reasonableness, for each vehicle, under the general rule.

The burden of proving commercial reasonableness is not a “magic words” test. Regal was not required to ask a witness to recite a ritual incantation over each loan file, blessing it as “commercially reasonable.” Indeed, Texas courts have rejected that view. *See Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818, 823 (Tex. App.—Houston [1st Dist.] 1994, no writ) (en banc) (“Not only is such a statement not required, it would have been improper.”). The jury was entitled to weigh the conflicting evidence, draw reasonable inferences, and decide whether the ultimate fact had been established. *See, e.g., Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 450 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (commercial reasonableness “is inherently a factual issue, whose resolution depends upon the totality of the circumstances particular to each case”). Accordingly, Regal’s evidence concerning its general procedures and the loan files for each separate vehicle provided a legally sufficient foundation for the jury’s verdict under the general rule. Any other specific complaints can be addressed on remand.

**C. Even Under the Court of Appeals’ Mistaken Test for Dealer Practices, the Evidence of Commercial Reasonableness Is Legally Sufficient.**

Even if the court of appeals’ misreading of the jury instruction were not reversed, Regal’s Brief on the Merits demonstrates that there was legally sufficient evidence to support the verdict under the safe harbor for dealer practices. Thus, the court of appeals was incorrect in rendering judgment even under its own mistaken standard.

Tex Star offers two basic answers (aside from simply rearguing the evidence). First, Tex Star insists that there was no evidence of dealer practices because there was no “frame of reference” for the jury to evaluate which practices are reasonable in this field. Second, Tex Star suggests that expert testimony was required. *See* Tex Star Br. at 38-45.

First, the court of appeals’ demand for a “frame of reference” on the issue of dealer practices is simply another demand for magic words, sidestepping the evidence. This jury heard detailed testimony about the practices of dealers in the used car industry. *See* Regal Br. at 23-29. Tex Star wants to relitigate the facts and tell its side of the story, but its fact-bound arguments do not render the evidence legally insufficient. There was conflicting evidence about dealer practices, and “[i]t is the province of the jury to resolve conflicts in the evidence.” *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005). Juries are permitted to base findings about ultimate issues on reasonable inferences from circumstantial evidence. *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975). Because the Court “must assume jurors made all inferences in favor of their verdict if reasonable minds could,” *Keller*, 168 S.W.3d at 821, this jury was free to draw inferences on the ultimate issue of reasonable dealer practices. Magic words were unnecessary.

Second, Tex Star suggests that it is impossible to provide a “frame of reference,” and thus impossible to establish commercial reasonableness, without expert testimony. *See* Tex Star Br. at 31. But there is no general requirement of expert testimony to prove commercial reasonableness, and Tex Star’s attempt to impose such a requirement would take Texas law well beyond the mainstream of UCC jurisprudence.

Contrary to the assertion in Tex Star’s brief, there is no “widely accepted concept” requiring expert testimony to prove commercial reasonableness. Tex Star cites only one no-writ case for its “widely accepted concept.” *See ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 251 (Tex. App.—Dallas 1990, no writ) (“In general, expert testimony is required to establish the commercial reasonableness of a sale.”). But the statement in *ITT* was dictum—because the parties in that case offered expert testimony, that court was not called to decide whether expert testimony was required. *ITT* has never been followed by any other Texas court for the proposition that, “in general,” expert testimony is required.

In addition, the dictum in *ITT* was derived from a single case concerning airplanes. *See Sunjet, Inc. v. Ford Motor Credit Co.*, 703 S.W.2d 285, 289 (Tex. App.—Dallas 1985, no writ). *Sunjet* did *not* hold that expert testimony is always required by the UCC; its holding was limited to the facts of that case, based on the common-sense proposition that “[t]he normal procedures used in jet aircraft sales are not within the knowledge of the average person.” *Id.* Obviously, there are good reasons to require expert testimony about commercial reasonableness in a case involving the secondary market for used airplanes, but we are talking about used cars here—not airplanes. Expert testimony is unnecessary. *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000).

In fact, careful study of Texas law refutes Tex Star’s demand for expert testimony. The lone opinion citing *ITT*’s statement about experts *refused* to require expert testimony. In *Havins v. First Nat’l Bank of Paducah*, 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ), the court surveyed the Texas decisions regarding commercial reasonableness and correctly observed that “since the question is inherently one of fact . . . much depends upon the totality of the circumstances particular to each case.” *Id.* After surveying the evidence of commercial reasonableness—which did not include any expert testimony—the *Havins* court found it legally sufficient (albeit factually insufficient). *Id.* at 181-82. *Havins* observed in passing that “[o]ne court has even suggested that expert testimony may be needed depending upon the means of disposition and the nature of the collateral,” *id.* at 182 n.7 (citing *ITT*), but it did not adopt that rule. Instead, even in the absence of expert testimony, the *Havins* court found the evidence legally sufficient. *Id.* Therefore, *Havins* forecloses any suggestion that Texas law *requires* expert testimony.<sup>3</sup>

*Havins* is significant because it explodes the myth of a “widely accepted concept.” But even more important is *Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1994, no writ), which was discussed at length in Regal’s Brief on the Merits. In that case, the First Court of Appeals held that GMAC proved the commercial reasonableness of a used car sale *conclusively*—without expert testimony. Tex Star’s proposed requirement of expert testimony cannot coexist with *Wilson*.

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<sup>3</sup> *Havins* has been favorably cited in several Texas cases and secondary authorities as a leading authority on the test for commercial reasonableness. See *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419, 450 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Capulin v. Retailer’s Credit Union*, 1999 WL 130136, \*2 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (not designated for publication); see also ANDERSON ON THE UCC § 9-504:145, 156, 204 (2006); 15 TEXAS PRACTICE: TEXAS FORECLOSURE—LAW & PRACTICE §§ 3.50, 3.56 (2005); 68A AM. JUR. 2D—SECURED TRANSACTIONS § 596 (2006).

In *Wilson*, GMAC did not tender expert testimony on commercial reasonableness; it offered “the affidavit of Carlene Shannon, the special collections manager for GMAC,” who “testified that she was the custodian of records for GMAC, and authenticated three exhibits as business records.” *Id.* at 821. The First Court held that “the affidavit contains sufficient information to establish *as a matter of law* that the sale was conducted in a commercially reasonable manner.” *Id.* at 823 (emphasis added); *see also Greathouse v. McConnell*, 982 S.W.2d 165, 173 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (following *Wilson*).

Justice Hedges’ opinion in *Wilson*—the closest reported decision in Texas that is factually comparable to the present case on the question of commercial reasonableness—makes it plain that expert opinions are not required to prove commercial reasonableness in cases involving repossessed vehicles. Justice Hedges specifically rejected the need for opinion testimony, holding that the facts alone established commercial reasonableness. Justice O’Connor dissented on the basis that “Ms. Shannon’s affidavit contains the only sworn facts regarding the sale. Nowhere in the affidavit does she state that the sale was conducted in a commercially reasonable manner.” *Id.* at 825 (O’Connor, J., dissenting). But the en banc First Court rejected the need for an opinion using such magic words: “Not only is such a statement not required, it would have been improper.” *Id.* at 823.<sup>4</sup> Unless *Wilson* is to be overruled, it is impossible to hold that expert testimony is required to establish commercial reasonableness in a case involving repossessed vehicles.

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<sup>4</sup> For this reason, the *Havins* court was mistaken in alluding to the Shannon affidavit as expert testimony. *Havins*, 919 S.W.2d at 182. As the en banc opinion makes plain, the affidavit simply summarized the facts related to disposition of the collateral. *See Wilson*, 897 S.W.2d at 821-23.

Tex Star’s boast about some “widely accepted concept” requiring expert testimony is further exposed when decisions from other states are considered. National authorities reject Tex Star’s theory that expert testimony is a requirement: “[T]here is no authority requiring expert testimony to establish reasonable commercial standards have been met.” *Hammer v. Thompson*, 129 P.3d 609, 623 (Kan. App. 2006).<sup>5</sup>

In fact, other state courts have confronted the very argument urged by Tex Star—that expert testimony is “required” on the basis of *Sunjet*—and they have repudiated it. The Washington Court of Appeals held that *Sunjet* “does not stand for the proposition that expert testimony is required in all cases where the equipment sold is specialized.” *Key Bank of Washington v. Hanson*, 2000 WL 526426, at \*4 (Wash. App. 2000) (n.d.p.). *Key Bank* correctly recognized that the *Sunjet* court “was of the opinion that the procedures used in jet aircraft sales are not within the knowledge of the average person. The court’s statements cannot be read as requiring expert testimony in all sales of collateral that is ‘specialized.’” *Id.* *Key Bank* correctly summarizes the law on this issue: “Finally, no case could be found in which the court announced a rule that expert testimony is always required to show the commercial reasonableness of a sale of a particular type of equipment. Rather, the commercial reasonableness of a sale must be determined on a case-by-case basis.” *Id.* That synthesis is consistent with Texas law.

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<sup>5</sup> Tex Star cites a student law review note, but that note does not document a “widely accepted concept” requiring expert testimony; on the contrary, it decries the fact that courts do *not* require expert testimony to prove commercial reasonableness on a consistent basis. See Imad Abyad, *Commercial Reasonableness in Karl Llewellyn’s Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429 (1997). In fact, secondary authorities surveying UCC decisions confirm that courts determine commercial reasonableness on a case-by-case basis, without a general requirement of expert testimony. See 4 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 34-11 (5th ed. 2006); Annotation, *What Is Commercially Reasonable Disposition of Collateral Required by UCC § 9-504(3)*, 7 A.L.R.4th 308 (1981).

Finally, the leading UCC treatise counsels against reliance on expert testimony: “Courts should have skepticism about hired experts’ testimony concerning the value of the collateral, about facile assertions concerning the ease of its resale and the large price that the collateral ‘could’ bring.” 4 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 34-11(e) (5th ed. 2006). This Court should heed the leading authority on the UCC.

Expert testimony is required on issues that exceed the competence of lay jurors, such as the standard of care owed by professionals or sophisticated scientific questions. Used car cases do not need an expert. To our knowledge, there is no reported decision—anywhere in America—requiring an “expert” to attest to the commercial reasonableness of used car sales. Tex Star’s suggestion would thus impose “a unique liability scheme, overriding the UCC’s express purpose of furthering uniformity among the states.” *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 110 (Tex. 2004). The Court should decline Tex Star’s invitation to create such a novel scheme.

**D. Tex Star Ignores the Request for a Remand In the Interests of Justice.**

Interestingly, Tex Star totally ignores Regal’s alternative request for a remand in the interests of justice, which is a revealing signal. As our Brief on the Merits explained, everyone understood during the trial what this jury instruction meant. There is no debate about the proper interpretation of the statute in question, and there has never been any guidance in Texas law on the proper submission of a jury instruction under that statute. If the court of appeals’ unprecedented reading of the jury instruction is allowed to stand, this case should be remanded in the interests of justice. *See Ledesma*, 242 S.W.3d at 45; *cf. Wagner & Brown, Ltd. v. Sheppard*, 52 TEX. SUP. CT. J. 130, 137 (Nov. 21, 2008).

## **II. The Court of Appeals Awarded Money Contrary to the *Fortune* Rule.**

Tex Star fights the *Fortune* rule with a flurry of factual contentions, which are based principally on the idea that the “reserve” fund referenced in the written PSAs was somehow distinct from the “reserve” fund referenced in the Bank One loan agreement. *See* Tex Star Br. at 7-8, 38-45. Based on that premise, Tex Star insists that the \$975,000 awarded by the court of appeals on a “money had and received” theory is not covered by any express contract (and is thus exempt from the *Fortune* rule). Tex Star is wrong.

### **A. The Funds In Question Are Covered by the Express Contracts.**

There are two key provisions in the contractual documents that conclusively defeat Tex Star’s effort to exempt the Bank One dealer reserve funds from the express contracts. First, the terms of the written PSAs do not distinguish among types of reserve funds in permitting Regal to hold the funds until expiration of the PSAs; by their express terms, they allow Regal to “hold the amount of *all* reserve accounts.” TX 8 at ¶ 8; TX 28 at ¶ 8 (emphasis added). Thus, the plain language of the PSAs covers these reserve funds.

Second, the Bank One agreement explicitly defines the “Dealer Reserve Account” contemplated by that agreement as “funds reserved by a Borrower [*i.e.*, Regal] from the purchase price to be paid to a Dealer [*i.e.*, Tex Star] for a Contract for use by Borrower for satisfaction of such Dealer’s recourse obligations to the Borrower.” PX 22 at ¶ 1.23. That is precisely the function of the “holdback reserve” referenced in the written PSAs (as Tex Star’s own description of that reserve explains). *See* TX 8 at ¶ 8; TX 28 at ¶ 8. Thus the Bank One loan agreement conclusively establishes that the \$975,000 in question constitutes the very reserve funds covered by the written PSAs, as a matter of law.

Regal’s Brief on the Merits quoted these sections of the Bank One loan agreement. *See* Regal Br. at 34. To emphasize this point, Regal even underlined its significance: “Crucially, the Bank One loan agreement leaves no doubt that the dealer reserve account it contemplates is precisely the same dealer reserve fund established by the PSAs.” *Id.* (emphasis in original). And we attached the key provisions to our Brief on the Merits.

Yet inconceivably, Tex Star seems to have missed the point. It offers no answer. Tex Star’s brief does not deal with ¶ 1.23 of the loan agreement (defining reserve funds) or ¶ 5.2 (requiring that the reserves be increased to 5% of the aggregate loan balance). Those sections preclude any factual dispute about the \$975,000 referenced in Question 8, which referred to “the dealer reserve obligation of Regal I and Regal II to Bank One.” CR 2361 [Tab B]. As a matter of law, and without need for any further legal analysis, those funds were the very “holdback reserves” governed by the written PSAs.

**B. As a Matter of Law, the Agreement Modified the Written PSAs.**

If it is necessary to reach the issue, the parties’ agreement that Tex Star would maintain the dealer reserve fund at the level required by Bank One modified the PSAs—increasing the size of that fund but leaving the other terms of the PSAs in place.

Tex Star contends there is no jury finding on the ultimate issue of an amendment, but no additional finding was needed. In Question 1, the jury found that Tex Star agreed to maintain the dealer reserve fund at the level required by Bank One, CR 2352 [Tab B], and as we have explained, ¶ 1.23 of the loan agreement defined that dealer reserve fund to include the “holdback reserve” under the PSAs. Thus, there was no other fact to find. The parties’ agreement modified the PSAs, as a matter of law. *See* Regal Br. at 36-37.

Tex Star relies on *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986) for the proposition that modification is a question of fact, but *Hathaway* proves our point. The jury question in such a case is not the ultimate legal determination of “modification,” but whether the parties knew of and accepted the changed terms. *Id.* As we have noted, that is precisely what Regal proved, and the jury found, in Question 1.

Further, if any other finding was necessary, Regal is entitled to a deemed finding. *See* TEX. R. CIV. P. 279. Such a finding is subsumed in the first material breach finding, CR 2356 [**Tab B**], which allowed the jury to consider the agreement found in Question 1 in deciding the first breach of the PSAs. *See Sage Street Assoc. v. Northdale Constr. Co.*, 863 S.W.2d 438, 444 (Tex. 1993) (finding on one element “subsumed within the jury’s answer to the damages question”). Although Regal pointed out Rule 279 and the effect of the first material breach finding in its Brief on the Merits, Tex Star offers no answer.

Tex Star asserts a variety of factual arguments in an effort to deny this conclusion, *see* Tex Star Br. at 39-42, but those factual assertions are immaterial to the legal question. For example, Mr. McMillan’s testimony about how the reserve funds were administered, and whether a formal document titled an “amendment” was executed, has no materiality to the legal effect of the agreement. Fact witnesses are not asked for legal conclusions, and there is ample proof of the agreement found in Question 1. *See* Regal Br. at 33-35. Indeed, contrary to Tex Star’s claim that the parties’ dealings prove there were two funds, the evidence at trial established that the parties used the procedures set forth in the PSAs *and in addition* Tex Star deposited additional funds in the reserve when necessary. *Id.* Thus, Tex Star’s effort to relitigate the factual dispute resolved in Question 1 is hopeless.

Finally, Tex Star suggests that any modification of the PSAs was barred by clauses in those contracts prohibiting oral amendments. Tex Star Br. at 44-45. Under Texas law, however, such contracts may be modified by an oral agreement if they are not subject to the Statute of Frauds. *American Garment Properties, Inc. v. CB Richard Ellis-El Paso*, 155 S.W.3d 431, 435 (Tex. App.—El Paso 2004, no pet.) (citing cases); *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 153 (Tex. App.—Texarkana 1988, writ denied) (same). And in this case, Regal secured jury findings on three exceptions to the Statute of Frauds: (i) main purpose; (ii) partial performance; and (iii) promissory estoppel. CR 2353-55. The court of appeals did not disturb those findings, and Tex Star does not assail them. Accordingly, the oral agreement found in Question 1 effectively modified the PSAs.

**C. Even if the Agreement Stands Alone, It Triggers the *Fortune* Rule.**

Finally, even if the agreement found in Question 1 was a stand-alone oral contract, it still triggers the *Fortune* rule. On that point, Regal cited *Lone Star Steel* and *Freeman* (which this Court cited in *Fortune*). Tex Star ignores both cases—and this entire theory.

Elsewhere, Tex Star suggests that Regal needed to secure additional findings about terms governing “return of the money.” Tex Star Br. at 39, 42. But that is incorrect. Under *Fortune* and *Freeman*, Regal only had a burden to plead and prove the “existence” of a contract that covers the “subject matter,” and Regal did so. See Regal Br. at 39-40. This theory provides an adequate and independent ground to reverse the court of appeals’ erroneous judgment and reinstate the JNOV on the “money had and received” claim.

**CONCLUSION**

Regal respectfully renews its prayer for relief in Petitioner’s Brief on the Merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that on February 18, 2008, a true and correct copy of this brief was served on opposing counsel by hand delivery, addressed as follows:

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