

NO. 08-0390

In the Supreme Court of Texas

THE WOODLANDS OPERATING COMPANY, L.P.,

Cross-Petitioner

v.

**MBM FINANCIAL CORPORATION N/K/A
MBM FINANCIAL INTEREST, L.P.
AND MARIMON BUSINESS SYSTEMS, INC.**

Cross-Respondents

On Petition for Review from the Ninth Court of Appeals
09-07-00060-CV

**THE WOODLANDS OPERATING COMPANY, L.P.'S
RESPONSE BRIEF ON THE MERITS**

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COMPANY, L.P.**

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Petitioners

V.

THE WOODLANDS OPERATING COMPANY, L.P.

Respondent

**THE WOODLANDS OPERATING COMPANY, L.P.’S
RESPONSE BRIEF ON THE MERITS**

TO THE HONORABLE SUPREME COURT:

The Woodlands Operating Company, L.P. respectfully submits its Response Brief on the Merits to MBM Financial Corporation n/k/a MBM Financial Interest, L.P. and Marimon Business Systems, Inc.’s Brief on the Merits and requests that the Petition for Review be denied. Respondent, The Woodlands Operating Company, L.P., will be referred to as “TWOC” or “Respondent.” Petitioners, MBM Financial Corporation n/k/a MBM Financial Interest, L.P. and Marimon Business Systems, Inc. will be referred to collectively as “Petitioners” or individually as “MBM” or “Marimon,” respectively.

RESPONDENT'S STATEMENT OF THE CASE

TWOC includes this Statement of the Case because it is dissatisfied with that portion of the Brief on the Merits. *See* TEX. R. APP. P. 55.3(b).

- Nature of the case:* TWOC brought this action against MBM and Marimon for breach of contract, fraud, and declaratory judgment. TWOC sought a recovery of damages, declaratory relief and attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE Chapters 37 and 38, and as sanctions for MBM's conduct.
- MBM asserted a counter-claim for breach of contract seeking monetary damages in the amount of \$160,794.47 and also requested attorney's fees. The counter-claim was non-suited two months prior to trial. MBM continued to assert this same claim for damages as an offset.
- Trial Court:* 9th Judicial District Court of Montgomery County
Honorable Frederick E. Edwards, Jr.
Cause No. 05-02-01551
- Trial Court's Disposition:* The district court rendered judgment in favor of TWOC on its claims for breach of contract, fraud, and declaratory relief. The judgment awarded declaratory relief, nominal damages in the amount of \$1,000.00 and attorney's fees for trial and in the event of an appeal. MBM was denied the relief it sought with its claim for offset.
- Parties:* Plaintiff/Appellee/Respondent/Cross-Petitioner is The Woodlands Operating Company, L.P.
- Defendants/Appellants/Petitioners/Cross-Respondents are MBM Financial Corporation n/k/a MBM Financial Interests, L.P. and Marimon Business Systems, Inc.
- Court of Appeals:* Ninth Court of Appeals
McKeithen, C.J. (author), Gaultney, J., and Horton, J.
Cause No. 09-07-00060-CV
- Citation:* *MBM Financial Corporation v. The Woodlands Operating Company, L.P.*, 251 S.W.3d 174 (Tex. App.–Beaumont 2008, pet. filed)
- Court of Appeals' Disposition:* The court of appeals affirmed that portion of the

judgment that held that TWOC had suffered a wrong and was therefore entitled to an award of nominal damages. The court of appeals affirmed that portion of the judgment that held that whether TWOC had given timely notice of its intent not to renew the Agreements was appropriate for declaratory relief and allowed TWOC a recovery of its attorney's fees, but held other declarations to be somewhat duplicative of its claims for breach of contract and fraud. The court of appeals reversed and rendered that portion of the judgment that allowed TWOC a recovery of attorney's fees under its claim for fraud and breach of contract. Lastly, the court of appeals reversed and remanded for new trial the issue of the requirement for TWOC to segregate its attorney's fees in order to recover its attorney's fees by virtue of prevailing on its claim for declaratory judgment relief.

RESPONSE TO STATEMENT OF JURISDICTION

Petitioners fail to assert valid grounds for jurisdiction. This case does not require any interpretation by the Supreme Court regarding “borders between chapters 37 and 38 of the Texas Civil Practice and Remedies Code.” The court of appeals’ decision with regard to the merit of TWOC’s declaratory relief and attorney’s fees granted thereunder was appropriate and not in conflict with other intermediate courts of appeal. Likewise, the Supreme Court does not have jurisdiction because the court of appeal did not commit any errors related to the Petitioner’s appellate points. There is no need for clarification and jurisdiction should not be exercised in this instance.

RESPONSE TO ISSUES PRESENTED

Petitioners' "Issues Presented" misstates findings by the trial and appellate court. The stated issues are not properly before the Court. Therefore, Respondent is dissatisfied with the statement made in the Petitioners' Brief on the Merits and provides its response to the Petitioners' "Issues Presented." *See* TEX. R. APP. P. 55.3(c).

Response to Issue 1(a): Based upon the pleadings and evidence at trial, there is sufficient evidence TWOC was entitled to recover attorney's fees under the Declaratory Judgment Act.

Response to Issue 1(b): TWOC properly joined its declaratory judgment relief to its claims for breach of contract and fraud.

Response to Issue 1(c): TWOC need not meet the statutory requirements of chapter 38 in order to recover attorney's fees under the Declaratory Judgment Act.

Response to Issue 1(d): TWOC did not seek, nor did it recover, fees for a defense of a breach of contract claim. TWOC met its requirements under chapter 37 and separately met its requirements under chapter 38 so as to be entitled to attorney's fees under both chapters.

Response to Issue 2: Petitioners' Issue 2 is premature and not properly before the Court. Having determined that fees should have been segregated, it accordingly remanded that issue for a new trial.

Response to Issue 3: TWOC's recovery of "nominal" damages was valid and supported by legally and factually sufficient evidence.

RESPONDENT'S STATEMENT OF FACTS

TWOC includes this Statement of Facts because it is dissatisfied with that portion of the Petitioners' Brief on the Merits. *See* TEX. R. APP. P. 55.3(b). Among other reasons, the statement omits critical facts relied upon by TWOC in support of its right of recovery of attorney's fees for declaratory judgment and award of nominal damages under TWOC's claim for breach of contract. TWOC now provides its own Statement of Facts to state concisely the facts pertinent to the points presented. *See id.*

I. Background

The Lease and Maintenance Agreements. TWOC entered into twenty-two written agreements with MBM for the lease and maintenance of multiple copier machines.¹ RR vol. 4, ex. P-1. The Office Care Program agreements entered into with MBM provide for a term of forty-eight (48) months and an option at the end of the term. The option states:

15. YOUR OPTION AT END OF TERM. At the end of the initial term or any renewal term you may return the equipment to us or upgrade by notifying us at least ninety (90) days but no more than one hundred eighty (180) days of your intention. If you choose to return the equipment, you will deliver the equipment, at your cost, to a location designated by us. If you do not timely notify us of your intent, then this Rental Agreement shall automatically renew for successive 12 month terms on the same terms and conditions provided therein.

TWOC timely terminates the Agreements. On May 26, 2004 Penny Bradshaw, Manager of Office Administration for TWOC, requested the termination dates of the leases/maintenance agreements for the equipment at issue. RR vol. 4, ex. P-5. Ms. Bradshaw was required to request the termination dates because the agreements in her file did not include a termination date. RR vol. 2, p. 13. Crystal Wallace, Lease

¹ Only nineteen (19) of the Office Care Program Agreements were at issue in the underlying dispute. The "Owner" under these agreements is identified as MBM Financial Corporation and the "Customer" is The Woodlands Operating Company, L.P.

Administrator for MBM, provided the requested termination dates in a written email response dated June 18, 2004. RR vol. 4, ex. P-6 & 7. She arrived at the dates in the email communication by pulling the Office Care Program agreements maintained in the MBM lease files, reviewing the billing system and obtaining the approval of Anthony Marimon. RR vol. 2, pp. 37-38, 41-43, 45. She followed her normal procedure in arriving at the termination dates. RR vol. 2, pp. 44. In response, Ms Bradshaw forwarded a draft of the proposed termination to Nancy Young. The proposed termination notification included a spreadsheet which mirrored the dates of termination provided by Ms. Young. It also included the relevant portions of the Agreement regarding the timing of termination. RR vol. 2, p. 13, RR vol. 4, ex. P-8.

There is no dispute that, on October 25, 2004, TWOC provided written notice of its intent not to renew in accordance with the requirements of the Office Care Program agreements. RR vol. 4, ex. P-9. However, it was only after TWOC initiated litigation and engaging in protracted and highly contentious discovery, that MBM finally acknowledged that on October 25, 2004 TWOC had in fact provided written notice of its intent not to renew the Office Care Program Agreements. (“Agreements.”) RR vol. 4, ex. P-9. This written notice was provided after the draft of the notice letter had been approved by Nancy Young, Sales Account Executive for MBM – the express account representative for the TWOC account. RR vol. 4, ex. P-8. After acknowledging the accuracy of the notice of termination, Petitioners began what would prove to be a calculated game of “bait and switch” to extort a twelve month renewal of the contracts and a claim for more than \$160,000.00 for equipment rental. RR vol. 2, p. 13, *cf.* RR vol. 4, ex. P-10. When finally presented for

deposition in the litigation,² Anthony Marimon confirmed that his employees acted appropriately in receiving and responding to the request for termination dates. RR vol. 2, pp. 50-57. He also testified that TWOC was reasonable in relying upon the information provided by his employees. RR vol. 2, pp. 50-57. TWOC's notice was 113 days before the lease termination date provided by MBM. RR vol. 2, p. 48.

Subsequent to providing notice of its intent not to renew under the Agreements, TWOC repeatedly sought instructions from MBM with respect to the return of the equipment. RR vol. 4, ex. P-11, 14-16; RR vol. 2, pp. 50-57. Once Petitioners engaged counsel, TWOC directed its requests for designation of a location and carrier for the return of the equipment to counsel for Petitioners. It appeared as if Mr. Marimon and his counsel were both unaware of the email communications between Penny Bradshaw and Nancy Young which led to the calculation of the termination dates. RR vol. 3, p. 6. However, even after counsel was made aware of the background information, Petitioners continued to express their intent not to comply with its obligations under the Agreements to designate a location and carrier for the return of the equipment. On February 14, 2005 counsel for Petitioners stated "MBM Financial will not accept The Woodlands Operating Company's effort to deliver the equipment as an attempt to terminate the lease. If payment is not made according to the terms of the Lease Agreement, action will be taken without further notice." RR vol. 4, ex. P-19 & 20. Petitioners' clear and unequivocal response to the proper request to return the leased equipment was to refuse to provide a location for its return and to state that the large, complex machines would not be accepted should delivery be attempted. RR vol. 4, ex. P-18. A second, later response was to counter with claims of its own for

² The oral deposition of Anthony Marimon was finally taken only after a Motion to Compel Deposition Testimony was heard by the trial court and Mr. Marimon was ordered to appear. Counsel for Petitioners chose the Wednesday before Thanksgiving to present his client for deposition. CR 562-564.

\$160,794.47. This claim was in the form of a First Amended Petition filed in Harris County by MBM against TWOC.³ The petition is supported by the sworn affidavit of Anthony Marimon and claims the above sum as liquidated damages based upon the automatic renewal of the subject contracts. RR vol. 4, ex. P-23.

Although multiple requests were made, Petitioners failed and refused to designate a location or carrier for the return of the equipment as required under the provisions of the Agreements.⁴ This refusal was a breach of the parties' agreement. The place of return and the means are express provisions of the Agreements and are highly material. The leased goods are subject to high risk of damage from excessive movement. Further, TWOC had no place to store the heavy, bulky leased goods in its place of business and was required to remove them to prevent disruption to its business operations. RR vol. 2, p. 5. In reliance on the information provided by Petitioners regarding the applicable termination dates, TWOC entered into agreements for other copiers with another supplier. The refusal to designate a means to have the copiers returned was a means to attempt to force new contracts with TWOC and to wrongfully be enriched through such deception. RR vol. 2, pp. 48-49.

MBM finally concedes and accepts the Return of the Leased Equipment. After filing its lawsuit for breach of contract and injunctive and declaratory relief, but prior to presenting TWOC's Application for Temporary Restraining Order, TWOC notified Petitioners' attorney of the filing of the lawsuit and of its intent to present an immediate TRO if the equipment was not accepted. RR vol. 3, p. 7. Karen West, Vice-President and General

³ MBM initiated litigation in Harris County for breach of contract although it was already on notice of the filing of the litigation in Montgomery County involving the same Agreements. RR vol. 3, pp. 22-26, RR vol. 4, ex. P-23.

⁴ MBM's attorney authored a letter to TWOC after five separate requests to please provide the carrier desired and place for return of the copiers. This letter of February 14, 2005 stated "**MBM Financial will not accept The Woodlands Operating Company's effort to deliver the equipment** as an attempt to terminate the lease". RR vol. 4, ex. P-18. When this was denied by Marimon in response to questions by the court, the court stated that "I thought your emails were fairly specific, which is basically, no, we're not going to tell you where to deliver them, we're not going to accept them." RR vol. 3, p. 37.

Counsel for TWOC, telephoned Petitioners' counsel from the courthouse steps. RR vol. 3, pp. 2, 7. It was only after this "courthouse call" that Petitioners through their counsel conceded and agreed to allow TWOC to proceed with the return of the equipment. RR vol. 3, p. 7. It was only because of the initiation of the litigation that TWOC was able to get Petitioners to accept the return of the equipment after months of refusing to designate a carrier and location for the return of the equipment. *Id.*; RR vol.4, ex. P-21.

TWOC first presented its claim to MBM on October 25, 2004 when TWOC gave notice of its intent not to renew the agreements and its intent to return the equipment. (RR vol. 4, ex. P-9; Exhibit C to TWOC's Original Petition; *see* RR vol. 2, p.47.) The notice is in the form of a letter from Randy Davis at TWOC to Nancy Young (now Zeitler) at MBM. RR vol. 4, ex. P-9. TWOC continued its efforts to contact MBM and seek performance. RR vol. 4, ex. P-11-12, 14-16 . The Agreements between the parties state, "If you choose to return the equipment, you will deliver the equipment, at your cost, to a location designated by us." RR vol. 4, ex. P-1. This is mandatory language, i.e., *you will deliver the equipment to a location designated by us*. TWOC chose to return the equipment and clearly notified MBM of this choice. The notice triggers MBM's obligation to designate a location. Although presented with the claim, it was not until February 17, 2005 – more than ninety (90) days later before MBM agreed to perform. RR vol. 4, ex. P-21. It is not disputed that MBM failed to designate a location as required by the agreements until much later than thirty days after the October 25, 2004 notice letter.⁵

⁵Petitioners concede a designation date of February 17, 2005, in their brief to this Court. That is more than 100 days after presentment. TWOC was represented by an attorney at least thirty days before the designation date. For example, its General Counsel became involved in mid-January. RR vol 3, p. 2.

The need for injunctive relief was eliminated and TWOC amended its petition to delete this claim for relief. CR 13-20. However, the need for a determination on TWOC's breach of contract action and request for declaratory relief continued.

TWOC's suit against Petitioners continues in order to address unresolved uncertainties. The risks and uncertainties faced by TWOC were far from over. TWOC sought and needed not only the return of the equipment but the withdrawal of the claim of renewal of the equipment leases and demand for liquidated damages of \$160,794.47. RR vol. 4, ex. P-23. While MBM accepted the return of the equipment on February 17, 2005, it did so without agreeing to "waive, release or resolve any claim or claims it may have under the Lease Agreement, including, but not limited to, claims for additional lease payments, damage to equipment, failure to return equipment, etc." RR vol. 7, ex D-25. MBM continued to urge its right to additional lease payments when it filed its First Amended Original Petition in Harris County on May 24, 2005 denying the timely termination of the Agreements and seeking substantial damages and attorney's fees. Anthony Marimon stated in his sworn affidavit submitted in support of the petition "After the respective contracts..were renewed, Defendant (The Woodlands Operating Company, L.P.) notified MBM Financial Corporation that it would no longer abide by the terms of the contract. Pursuant to the express language of the contract, the intent of the parties, and the agreement of the parties, damages are liquidated for each respective contract." RR vol. 4, ex. P-23. These claims were joined in the Montgomery county case following the denial of Petitioners' Motion to Transfer Venue. CR 62-63. Petitioners ultimately nonsuited their affirmative claims in April 2006, but continued to seek a recovery by way of offset up through the conclusion of the bench trial. CR 66-67 (April 19, 2006 Notice of Nonsuit); CR 181-185 (May 12, 2006 MBM Answer to

Third Amended Petition with claim of offset and attorney's fees); CR 186-190 (May 12, 2006 Marimon Answer to Third Amended petition with claim of offset and attorney's fees).

The Trial and entry of Judgment. The justiciable controversy continued as to whether TWOC gave timely notice to terminate under the Agreements or was subject to a twelve month renewal of the Agreements and liquidated damages as claimed by Petitioners. The case proceeded to trial on TWOC's claims of breach of contract, fraud and request for declaratory relief. CR 214-32. Counsel for Petitioners submitted its premature Motion for Entry of Judgment after Trial on July 28, 2006 and its Request for Findings of Fact and Conclusions of Law on August 2, 2006. CR 651-654; 667-677. Petitioners continued to seek judgment on their claim of offset and attorney's fees. In Defendants' Motion for Entry of Judgment After Trial, MBM stated "MBM Financial demonstrated its right to set-off and both Defendants demonstrated various defenses and their respective rights to recover legal fees." CR 651-654. Defendants' Request for Findings of Fact and Conclusions of Law sought a finding that "Defendants provided evidence that a fair, just and equitable attorneys fee in this case would be \$40,947.94, together with an award of \$65,000.00 in attorney's fees in the event of appeals to the Texas Supreme Court." CR 667-77 (Findings of Fact No. 16, CR 670). Defendants further requested a conclusion that "Defendant MBM Financial is entitled to an offset, but as pleaded by Defendant MBM Financial, the claim of offset is rendered moot by the Court's ruling on Plaintiff's causes of action." CR 667-77 (Conclusion of Law No. 9, CR 671). The court ruled in favor of TWOC on August 4, 2006. CR 678.

TWOC filed its Motion for Entry of Judgment and proposed Final Judgment on August 9, 2006. The Motion and proposed Judgment seek judgment on all of TWOC's claims. CR 679-680 (*See* Motion for Entry of Judgment, ¶A.2. – "Plaintiff sued Defendants for relief under the Declaratory Judgment Act, breach of contract, and fraud.") This is made

clear from the language in the Final Judgment which states “All matters in controversy, legal and factual, were submitted to the court for its determination. The court...announced its decision for Plaintiff.” CR 679-683. This was further clarified with the Findings of Fact and Conclusions of Law submitted by TWOC and entered by the court on September 11, 2006. The conclusions of law include, in part, findings which support Judgment on each of TWOC’s claims:

- TWOC brought this action for declaratory relief because of the insecurities and uncertainties it faced...
- MBM failed to comply with these Agreements...
- MBM’s failure to comply with the Agreements caused injury to TWOC.
- TWOC suffered actual damages in the form of nominal damages...
- MBM’s actions and concealments constitute fraud.

CR 703-13.

TWOC sought to modify the judgment, not because it “reversed course on its need for declaratory relief” but in order to make clear in the judgment the basis under which the court granted the specific relief previously requested. The declaratory relief requested by TWOC was implicitly addressed in the Final Judgment, but out of an abundance of caution, the Modified Final Judgment specifically delineated verbatim the relief previously requested in Plaintiff’s Fourth Amended Petition, tried to the court, and rendered in the ruling in favor of TWOC. CR 750-755; 756-758.

Defendants’ Motion for New Trial restated Petitioners’ continuing request for off-set and attorneys fees and confirmed that the case proceeded to trial and Judgment on all of TWOC’s claims. CR 714-719. Defendants’ Objections to and Request for Additional or Amended Findings and Conclusions and Second Request for Findings of Fact filed on September 21, 2006 sought “...Findings of Fact and Conclusions of Law on their separate and

individual claim of offset and attorneys fees.” CR 725-733. These arguments were repeated in Defendants’ Motion to Modify, Correct or Reform Modified Final Judgment. CR 774-780.

The claim by MBM of a twelve month renewal of the Agreements combined with a demand for in excess of \$160,000.00 in liquidated damages created a great deal of risk and uncertainties for TWOC. RR vol. 3, p. 8-9; CR 703-13. TWOC believed that it had complied with its contractual obligations in giving notice of its intent not to renew. Petitioners maintained that TWOC had not complied. This litigation proceeded in order to obtain a declaration by the court of the rights and obligations of the parties under the Agreements. TWOC sought a declaration as follows:

- (1) TWOC has complied with its contractual obligations to provide notice of its intent not to renew the Office Care Program agreements and Maintenance Agreement;
- (2) MBM improperly failed to timely designate a carrier and location for the return of the equipment;
- (3) MBM is estopped from or has waived any claim that TWOC failed to provide timely notice of its intent not to renew the Office Care Program agreements and Maintenance Agreement because TWOC justifiably relied upon the termination dates provided by MBM;
- (4) TWOC relied to its detriment on the termination dates provided by MBM in entering into an agreement with another supplier for replacement equipment; and
- (5) TWOC has suffered damage as a direct result of its detrimental reliance upon the termination dates provided by MBM.

CR 214-32.

This request for declaratory relief was not only necessary, but was the sole means to clarify the rights and obligations of the parties and to resolve the uncertainties thrust upon TWOC by Petitioners. This request for relief is separate and distinct from TWOC’s claims for breach of the Agreements which allowed for a recovery of damages and attorney’s fees.

II. Discovery and Trial

The Complete Story. The prosecution of the litigation was made needlessly expensive and cumbersome by the actions of Petitioners and their counsel.⁶ Petitioners' claim that there is a gross disparity between the results obtained and TWOC's award of attorney's fees makes this factual history particularly germane.⁷ (*See* Brief on the Merits of Petitioners, pp. 38-39.) What proved to be an arduous discovery process also led to the uncovering of the conduct on the part of Petitioners that supported the fraud cause of action added in TWOC's Fourth Amended Petition. *Id.* TWOC signed and returned the Agreements on or about December 29, 2000. At the time they were executed by TWOC the "Date of Commencement" and signature line for MBM was blank. RR vol. 4, ex. P-1; RR vol. 3, p. 3. The lease file presented by Anthony Marimon at a meeting prior to the initiation of the litigation contained the same unsigned Agreements without a date identified for the date of commencement. RR vol. 3, pp. 4, 9. However, when MBM filed suit against TWOC in Harris County, it attached as exhibits fully executed copies of the same Agreements which each now included not only a signature but also a date of commencement. RR vol. 3, p. 8; RR vol. 4, ex. P-23. In the prosecution of its case and the pursuit of facts, TWOC conducted discovery through oral depositions and written discovery requests. The following oral depositions were taken by plaintiff:

⁶ See the affidavits of Mr. Wetzel (CR 535-537) and Ms. Smith (CR 562-64) and trial exhibits 22 through 67 (RR vol. 4-5, ex. P-22-67) relating to depositions, cancellations, refusals to produce witnesses, refusal to produce documents, failures to admit matters in response to requests for admissions which were admitted in fact in deposition testimony by Petitioners' corporate representative, and other acts of obstruction of the litigation process. Further, see letters marked as Plaintiff's Exhibits 72, 78 and 80 (RR vol.5, ex. P-72, 78 & 80) attempting to narrow the case after Petitioners filed Notice of Nonsuit appearing to abrogate prior claims that the Notice of Nonrenewal by TWOC was not timely under the terms of the contract and withdrawing its claims for breach of contract damages it had maintained prior to suit and through the litigation. In response to TWOC's attempt to narrow the case after Petitioners' nonsuit of all claims, Petitioners proceed with serving amended pleadings which included new claims of offset, noticing multiple depositions and filing six lengthy and substantive motions to the court requiring substantial legal expense and costs. RR vol. 5, ex. P-71.

⁷ TWOC continues to maintain its position that this issue is premature and not properly before this court. (*See* ¶ IV, A, p. 39).

□	Anthony Marimon	November 23, 2005
□	Designated Corp. Rep. MBM Financial	November 23, 2005
□	Designated Corp. Rep. Marimon Business	November 23, 2005
□	Crystal Wallace	January 5, 2006
□	Nancy Young Zeitler	January 31, 2006

The depositions resulted in substantial admissions which support TWOC's causes of action – beginning with the deposition of Anthony Marimon.

Mr. Marimon conceded in deposition testimony and admitted in the trial court that Penny Bradshaw (TWOC) requested the termination dates of the lease/maintenance agreements for all the copiers that are the subject of the office care program agreements. RR vol. 3, pp. 50-57. Petitioners had previously denied this fact in response to Request for Admissions. RR vol. 5, ex. P-39 & 40.

After receiving these dates from Petitioners' authorized agents, TWOC gave timely notice of its express intent not to renew the Agreements. Although a fact earlier denied by Petitioners in response to Request for Admissions, *id.*, Mr. Marimon ultimately admitted to having been served with written notice on October 25, 2004 that TWOC did not elect to renew the Office Care Program agreements. RR vol. 3, pp. 50-57. Mr. Marimon admitted that he accepted the letter as notice regarding the intent not to renew. *Id.* The letter of October 25, 2004 falls within the 90 to 180 day window under the agreements. *Id.*

Anthony Marimon, refused to accept tender of the copiers and, in an attempt to extort new agreements, asserted that the leases terminated based upon nineteen (19) lease commencement dates of January 9, 2001. During trial, Anthony Marimon for the first time claimed that the commencement date of January 9 was a negotiated date between himself and Vicky Armstrong. On cross-examination, Mr. Marimon was impeached with his prior

deposition testimony where he testified that there was no discussion with the client regarding the commencement date, but that he had unilaterally selected the date. When challenged on the change in his sworn testimony Mr. Marimon testified “You know, I’ve had plenty of time since then to review this case and review my meetings through my head with Vicky, and I’m changing my testimony.” RR vol. 3, p. 38. In fact, Vicky Armstrong was deposed by Petitioners’ attorney, two weeks before trial, she was not asked as to any asserted agreement and testified to none. If such agreement existed that would certainly have been the emphasis of the discovery. It was not. Marimon provided no writing; no memorandum and no recordation of such asserted agreement as now relied upon when the house of cards began to fall under the light of judicial inquiry.

The evidence at trial revealed that a majority of the copiers had not yet even been delivered to TWOC by January 9, 2001. RR vol. 3, pp. 50-57. Marimon attempted to support this fiction by altering the nineteen (19) lease forms in his companies’ sole possession. It is clear from the testimony of multiple witnesses that there was no commencement date on any lease agreement at the time of its execution by TWOC, nor at the time that TWOC provided its notice, nor at the time Crystal Wallace examined the agreements as stored in the offices of MBM when TWOC made its inquiry regarding termination. The commencement dates were added and arguably false testimony given in an attempt to legitimize MBM’s claim of untimely notice. RR vol 2, pp. 27-28, 39-41, 45-46.⁸

⁸ The lease agreements signed by TWOC were admitted as Plaintiff’s Exhibit 1. RR vol. 4, ex. P-1. TWOC’s copies of the lease agreements contained no signature by Anthony Marimon nor was the lease commencement date filled in on any copier lease agreement. Marimon testified both at trial and in deposition that he signed these agreements on December 29, 2000 when they were returned to Marimon by his sales manager, Jim Bowie. RR vol. 2, pp. 50-57; vol. 3, pp. 34-39. The evidence suggests otherwise:

- A. Penny Bradshaw testified (RR vol. 2, pp. 9-23) that the lease agreements she obtained from MBM were not signed by Anthony Marimon and had no lease commencement date filled in. For this reason she had to call MBM to ask what termination date MBM believed was appropriate. She questioned the dates provided, but because the agreement was silent she accepted the dates provided for the purpose of giving timely notice.

Mr. Marimon, Nancy Young and Dee Muse (Office Manager and Billing Superintendent) testified that the general policy of MBM as it relates to a lease's commencement date is to record the date a copier is delivered by MBM to its customer and the date it is accepted as being complete and properly functioning. RR vol. 2, pp. 27-28. MBM Form 1945, offered as Plaintiff's Exhibit 82 (RR vol 6, ex. P-82), should reflect the date that the copiers were delivered to and accepted by TWOC's various offices, but very few are dated. Those that were dated included dates beginning on January 16, 2001 and continuing through February, 2001. None of the packing slips included with Plaintiff's Exhibit 82 include a date of acceptance of the equipment. No document was presented to the trial court that establishes any fact other than the delivery of the equipment. *Id.*

Using the MBM business procedure admitted by Anthony Marimon, and described in the testimony of Nancy Young and Dee Muse, the MBM computer system would book the

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- B. Nancy Young, TWOC's Sales Account Representative, testified (RR vol. 2, pp. 24-34) that she pulled the TWOC lease agreements more than three years after the leases had begun and examined the lease agreements. She testified that the leases in the companies files were not signed by Marimon and the lease commencement dates were blank.
 - C. Crystal Wallace testified (RR vol. 2, pp. 34-46) that the agreements were gathered when she was attempting to calculate the lease termination dates and that the leases in the companies files where not signed by Marimon and contained no lease commencement dates.
 - D. Karen West testified (RR vol. 3, pp. 2-16) that Anthony Marimon brought his lease file (referred to as a working file) to a meeting with TWOC regarding the notice not to renew. During this meeting Marimon asserted that the leases expired on January 9, 2005 pursuant to the express terms contained in the parties' written agreements. Ms. West asked to review and copy the lease agreements brought with Marimon. The leases tendered to TWOC in January 2005 were exactly as contained in TWOC's files. They were not signed by Marimon nor was a lease commencement date contained therein. Mr. Marimon refused to allow the leases to be copied and promised to return signed copies. This never occurred.
 - E. Dee Muse testified (RR vol. 3, pp. 22-34) that in January, 2005, presumably after the meeting with TWOC, she was asked to pull TWOC lease forms and to determine the lease termination dates contained therein. This request was by Anthony Marimon. She does not know why she was asked to do this. When she looked at the forms they contained both the dated signature of Anthony Marimon of December 29, 2000 and a lease commencement date of January 9, 2001. She swore she never looked at these forms before and had no role in determining lease commencement nor termination dates for TWOC's contracts.

first lease payment thirty days after recording each copier's delivery and acceptance. The lease commencement date could then be recorded and the lease termination date determined.

Crystal Wallace testified that it was the policy of MBM that fully executed copies of the lease agreements were not returned to the customers. RR vol. 2, pp. 40-41. Through this policy, customers were placed in a position of always having to ask for the end dates on the agreements. RR vol. 2, pp. 29-33, 45-46. By not having any means to know of a lease commencement date, timely notice of termination was made arbitrary and unilateral in its acceptance or rejection. MBM business practices on multiple copier accounts particularly profitable to Petitioners was to use the termination dates' ambiguity to attempt to coerce new contracts and new profits for Petitioners. RR vol. 2, p. 44.⁹

⁹ As elicited by the Court when Dee Muse took the stand:

Court: Let me see if I get this straight, according to your testimony, in this situation like The Woodlands Operating Company, the customer signs the lease agreement. It has a date on there. That date doesn't mean anything because you don't have the equipment. You don't know what the serial numbers are. You don't know when they're going to be delivered. You haven't set up a billing system until the equipment, you certainly can't start billing people for things they don't have."

Muse: "Right"

Court: "**Now the commencement date is pulled out of the air? Where did the January 9th, '05 come from? Where would it normally come from, the commencement date come from? What does it mean to you?**"

Muse: "**That commencement date doesn't mean anything to me**".

Court: "**. . . [T]he practical question is, when did the 48 months pass? When did we get the equipment? That is what we are talking about. So, the commencement date is meaningless. We don't even know where it came from. We don't know why it's January the 9th. Most of the equipment wasn't delivered until February, according to the signed receipts, correct?**"

Muse: "Yes."

Court: "**Well, you don't get back the agreement to the customer with a commencement date filled in as to each piece of equipment, when they got it and when the billing started, then this January 9th number is just fiction, because it doesn't apply in any of these cases. Does it?**"

Muse: "**I can't answer.**"

RR vol. 3, pp. 33-34. (emphasis added).

Anthony Marimon told his office that the only way TWOC could do it (return the copiers) was to pay a buyout of 12 months of service. This announcement was the final straw for Nancy Young who testified her jaw dropped on hearing this as did the sales manager, Jim Bowie. RR vol 2, pp. 29-33. The threatened buyout demand was subsequently followed with a demand that TWOC pay \$160,000. This demand was stated in affidavit form by Anthony Marimon and attached to MBM's First Amended Petition, swearing that the lease dates had been "agreed upon by TWOC in the lease agreements binding the parties." RR vol. 4, ex. P-23.

As evidenced by the preceding, the trial court's findings of fact tell a straightforward, compelling story of a business relationship thwarted by deception and misdeeds. CR 703-10. Those findings are supported by the pleadings and the evidence in the record.

This same evidence supported the conclusions of law that: (1) a justiciable controversy existed and TWOC was entitled to declaratory relief pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 37.001, *et seq.* from the uncertainties and insecurities which existed with respect to the rights, status, and other legal relations between TWOC and MBM under the Agreements; (2) valid and enforceable agreements existed between TWOC and MBM, MBM failed to comply with the Agreements, and caused a separate and distinct injury to TWOC for which it is entitled to a recovery of damages and attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 38.001, *et seq.*; and (3) Petitioners' actions and concealments as they relate to the alteration of the commencement date, failure to disclose its business practice of unilaterally selecting commencement dates for Agreements without discussion or negotiation and providing one date and not disclosing intent to insert a different date into the blank space of the Agreements constituted both a breach of contract and fraud. CR 710-13.

SUMMARY OF THE ARGUMENT

Declaratory relief was not only proper, but was essential even after the acceptance of the return of the equipment by Petitioners. Petitioners' Brief makes absolutely no mention of the continued demand for substantial sums of money by MBM. Demands which continued even after they made an appearance in the lawsuit, nonsuited claims for affirmative relief, and sought findings of fact and conclusions of law following the two day bench trial. Still unresolved and requiring declaratory relief from the court was the controversy surrounding the timeliness of the notice of termination. TWOC continued to maintain that the notice was timely under the Agreements. Petitioners claimed that it was not. The risks which remained for TWOC were great. TWOC certainly believed (and even hoped) that the relationship between the parties was terminated and over. However, Petitioners adamantly maintained otherwise. Petitioners continued to demand a twelve month automatic renewal of the Agreements and a right to liquidated damages and attorneys fees. TWOC was left with no choice but to "soldier on" and seek the relief afforded it under TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b).

The declaratory judgment action was not duplicative of any matter already pending before the court. Those issues in dispute under the claim for declaratory relief were separate and distinct from those issues which formed the basis of TWOC's claim for breach of contract and fraud. The trial court used its sound discretion to award the declaratory relief requested and which was necessary to completely define the rights and duties of the parties and to dispose of the entire controversy. The court further used its authority to grant TWOC a recovery of its costs and reasonable and necessary attorney's fees which were found to be equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.

Many of the very facts which Petitioners choose to omit as irrelevant to the Court's disposition of the legal and statutory claims of Petitioners, are the critical facts that support TWOC's right to declaratory relief. In addition, Petitioners' complaint regarding the appellate court's failure to assess reasonable fees is premature and is not properly before this Court. Given the appellate court's ruling that TWOC should have segregated its attorney's fees, it accordingly remanded the issue of the amount of fee award to the trial court. TWOC maintains that each of its causes of action allowed for an award of attorney's fees even with a finding of nominal damages only therefore no remand is required. TWOC prevailed before the trial court and obtained a judgment for (1) declaratory relief; (2) breach of contract; and (3) fraud. Chapters 37 and 38 of the Texas Civil Practice and Remedies Code both authorize an award of attorney's fees in this case. The fraud finding also supports an award of attorney's fees because the fraud arose from a breach of contract and there was a showing of bad faith. TWOC was not required to segregate its attorney's fees among its various claims because each claim is one for which attorney's fees are recoverable. (*See* Brief of Cross-Petitioner The Woodlands Operating Company, L.P.)

The appellate court holdings challenged by Petitioners were correctly decided and consistent with applicable case law. The petition for review should be denied.

ARGUMENT

Contrary to the argument of Petitioners – TWOC prevailed on its suit for breach of contract and fraud. Its suit has not “failed both fronts.” The trial court found a breach by MBM and that Petitioners had engaged in conduct that constituted fraud. CR 703-13. Petitioners did not challenge on appeal the trial court's finding of breach or fraud, only that these findings did not allow for a recovery of attorney's fees. While the court of appeals

denied TWOC a recovery of its attorney's fees under these claims,¹⁰ the court of appeals did affirm the merit of these claims and the award of monetary damages in the form of nominal damages. *MBM Financial Corporation v. The Woodlands Operating Company, L.P.*, 251 S.W.3d 174 (Tex. App.–Beaumont 2008, pet. filed). Likewise, Petitioners did not challenge on appeal the trial court's finding of declaratory relief, only that it was duplicative of TWOC's claim for breach of contract and therefore did not allow for a recovery of attorney's fees. The court of appeal disagreed with Petitioners, found declaratory relief to be appropriate, and that TWOC was entitled to recover attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. §37.004(a), 37.009. *Id.* at 182-83.

Chapters 37 and 38 are separate routes with each, independent of the other, allowing for a recovery of attorney's fees. These two chapters of the Texas Civil Practice and Remedies Code have separate requirements which must be met in order to prevail on a claim for attorney's fees. TWOC met the requirements of both these chapters and was therefore entitled to the separate relief afforded under each. This Court has clearly defined the boundaries between these two chapters and the trial court and court of appeals both followed these boundaries in finding in favor of TWOC.

I. The judgment in favor of TWOC, as affirmed by the court of appeals, is consistent with the intent and purpose behind Chapters 37 and 38 of the Civil Practices and Remedies Code. (in response to Petitioners' points I.A-C and II.A-B)

Congress, like Texas, has enacted numerous statutes which allow for the recovery of attorney's fees by the prevailing party. Prevailing party is a legal term which is defined in

¹⁰ TWOC maintains that the court of appeals erred in not allowing it a recovery of its attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, when TWOC was the prevailing party on its claim for breach of contract. *Hauglam v. Durst*, 769 S.W.2d 646, 651 (Tex. App. – Corpus Christi 1989, no writ). TWOC further maintains that the court of appeals erred in not allowing it a recovery of its attorney's fees under its fraud claim when the fraud arose from a breach of contract and involved conduct that constituted bad faith. *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (See Brief of Cross-Petitioner The Woodlands Operating Company, L.P.)

Black's Law Dictionary as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the courts will award attorney's fees to the prevailing party>." *Buckhannon Board and Care Home, Inc. v. West Va. Dept. Of Health and Human Res.*, 532 U.S. 598, 603 (2001). "Determination of the prevailing party focus should be based on the success on the merits, i.e., the party who is vindicated by the trial court's judgment." *Flagship Hotel Ltd. v. City of Galveston*, 117 S.W.3d 552, 565 (Tex. App.–Texarkana 2003, pet. denied)(quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999).

Included among the Texas statutes which allow a prevailing party a recovery of its attorney's fees is TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (authorizing recovery of attorney's fees for a claim on a contract) and TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (for a claim for declaratory judgment action). These statutes are to be construed liberally in order to promote their underlying purposes. *Medical City Dallas Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 59 (Tex. 2008). This is not a case of "loser pays," but rather "prevailing party" recovers.

As detailed below, TWOC's claims for breach of contract, fraud and for declaratory relief were each independent and viable causes of action. Each which by virtue of statute or holdings of this court provide for a recovery of attorney's fees for the prevailing party. TWOC succeeded on the merits on each of the claims pled and was vindicated by the trial court's judgment. This should be the focus. TWOC was clearly the prevailing party and was awarded damages and attorney's fees.

II. TWOC was properly awarded its reasonable and necessary attorney's fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

Petitioners improperly characterize TWOC's claim for declaratory relief as redundant, premised on a terminated relationship, and defensive in nature. The fallacy of these points is apparent from the factual history surrounding the relationship of the parties and the

procedural history of the litigation. (*See* Respondent’s Statement of Facts above.) TWOC brought the request for relief under CPRC chapter 37 seeking a declaration of its rights and status in connection with its business relationship and agreements with MBM. TWOC had need for declaratory relief. The relief was necessary and proper. MBM was continuing to maintain the position that the agreements between it and TWOC had not yet terminated. It was making claim to a substantial amount of monies as payment for its unilateral renewal of the agreements. TWOC had timely terminated the agreements based upon the information provided by authorized representatives for MBM. TWOC was faced with serious uncertainties due to the conflicting positions on the termination of the agreements.

A. TWOC’s claim for declaratory relief served the intended purpose of addressing ongoing risks and uncertainties and disposing of the entire controversy among the parties and therefore allowed for a recovery of attorney’s fees by TWOC.

The court of appeals acknowledged, in part, the distinction between TWOC’s request for declaratory relief and the request for relief under its claims for breach of contract and fraud.¹¹ TWOC’s compelling need for declaratory relief was demonstrated by the fact that TWOC brought its request for declaratory relief from the beginning in its Original Petition (CR 4-12) and continued to seek the relief through Judgment (CR 756-758). The declarations added in the Modified Judgment are not evidence of “procedural shenanigans” or at the heart of some sinister intent, as characterized by Petitioners, but rather a means to make clear the relief granted in the Final Judgment. But for the Modified Final Judgment Petitioners would stand before this court and claim that no declaratory relief had been

¹¹ The court of appeals’ finding that certain elements contained in the declarations TWOC sought (which pertain to breach of contract, intentional misrepresentations by MBM, reliance on MBM’s misrepresentations, and damages) are somewhat duplicative of its fraud and breach of contract claims forms in part the basis of TWOC’s Petition for Review. *See* The Woodlands Operating Company, L.P.’s Brief on the Merits at pp. 31-35.

granted even though the pleadings, evidence and findings of fact and conclusions of law all indicate to the contrary. CR 214-32; 679-683; 703-13; 750-52; 756-58.

The purpose of the Uniform Declaratory Judgments Act is to settle and afford relief from uncertainty and insecurity about rights, status, and other legal relations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (Vernon 1997); *Bexar Metropolitan Water Dist. v. City of Bulverde*, 156 S.W.3d 79 (Tex. App.–Austin 2004, pet. denied)(declaratory judgment actions determine the rights of parties when a controversy has arisen, can be brought before any wrong has actually been committed, and can be utilized in a preventative manner). A trial court may construe a contract in a declaratory judgment suit either before or after a breach occurs. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1997); *see also Hasty Inc. v. Inwood Buckhorn*, 908 S.W.2d 494, 499 (Tex. App.–Dallas 1995, writ denied).

The declaratory judgment action here cannot be held to improperly duplicate TWOC's breach of contract action. Validity of the underlying agreements, status of the business relationship, and construction of provisions relating to the parties' respective obligations are all declaratory judgment claims that raise new issues not raised in TWOC's breach of contract claims. Declaration 2 is the only requested relief that arguably duplicates TWOC's breach of contract claims. Declarations 1, 3, 4, and 5, do not duplicate relief sought through TWOC's breach of contract claims. Unlike the *Leventhal* case cited by Petitioners, declarations 1, 3, 4, and 5 are *not* the same relief TWOC sought under its breach of contract claims. *See Leventhal v. Reeves*, 978 S.W.2d 253 (Tex. App.–Houston [14th Dist.] 1998, no pet.). Appellants reliance on the *Mustang* case does not change this conclusion. That case addresses a claim for breach of contract, but does not include a claim for declaratory relief for comparison. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004). Here, declarations 3, 4, and 5 expressly focus on the termination dates provided by

MBM, while the breach of contract claims make no mention of termination dates. In fact, one of the breach of contract claims expressly focuses on alteration of the commencement dates. This involved a totally separate and distinct act and actor, from MBM's providing of the termination dates. Again, TWOC had a need for declaratory relief. Such was not the case for the plaintiff in *Leventhal*. Under the circumstances here, declaratory relief was proper.

This case is further distinguishable from the *Leventhal* case, as the plaintiff there "presented no evidence of damages in connection with his breach of contract claim" and attempted to "use declaratory relief . . . simply to pave the way to recover attorney's fees not otherwise available." *Id.* at 259. Here, TWOC presented some evidence of damages in connection with its breach of contract claim, making the recovery of attorney's fees otherwise available. The relief sought by the declaratory judgment action is not identical to the relief sought in TWOC's breach of contract action.

TWOC does not dispute the long standing rule that an action for declaratory judgment will not lie if there is another action or proceeding pending between the same parties in which the same issues may be adjudicated. *Texas Liquor Control Board v. Canyon Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970). However, that general principal simply does not apply to the facts of this case. In *Texas Liquor Control Board*, this court found that the trial court should have declined to exercise jurisdiction of the claim for declaratory relief when two administrative proceedings had been instituted prior to the filing of the suit for declaratory relief. The court held that the construction of the same penal statute was at stake in the first filed administrative proceedings as in the subsequently suit in which the party was seeking declaratory relief. *Id.* at 895. There was no pending action or proceeding with

TWOC filed its Original Petition and sought for the first time the declaratory relief ultimately awarded by the trial court.

Petitioners' reliance on *Hartford Cas. Ins. Co. v. Budget Rent-a-Car Sys., Inc.*, 796 S.W.2d 763 (Tex. App. – Dallas 1990, writ denied) is also misplaced. The plaintiff in *Hartford* filed an “amended pleading” including “a declaratory relief claim” when it “had no need for declaratory relief what[so]ever.” *Id.* Here, TWOC’s original petition included its declaratory relief claim because it had need for declaratory relief from the beginning. The *Hartford* case “involved issues of automobile liability coverage and the duty to defend.” *Id.* at 764. Application of that case should, therefore, be limited to cases involving liability coverage and the duty to defend. TWOC’s request for declaratory relief was a part of its original pleading and did not present issues of liability coverage or a duty to defend. The issues present in *Hartford* are not present here.

The *Silver Lion* case cited by Petitioners is also distinguishable. *Silver Lion, Inc. v. Martinez*, No. 14-05-00746-CV, 2007 WL 665253 (Tex. App.–Houston [14th Dist.] Mar. 6, 2007, pet. denied). It is an action for conversion. A claim for which attorney’s fees are not recoverable. In *Silver Lion*, the Houston Court of Appeals decided that the determination of whether the items of collateral were fixtures “added nothing” to the plaintiff’s claim of conversion. *Id.* at *4. *See also Hageman/Fritz, Byrne, Head & Harrison v. Luth*, 150 S.W.3d 617, 627 (Tex. App. – Austin 2003, pet denied) (action for conversion improperly joined with a claim for declaratory judgment does not allow for a recovery of attorney’s fees where not otherwise authorized by statute.) This is not an action for conversion. It is a claim for breach of contract and fraud. TWOC’s claims included a separate and independent means by which it could seek a recovery of attorney’s fees. TWOC had no need to join its

claims with a claim for declaratory relief in order to create a means of recovering attorney's fees.

TWOC's claims likewise do not involve a claim for tax relief as in *Strayhorn v. Raytheon E-Systems, Inc.*, 101 S.W.3d 558 (Tex. App. – Austin 2003, pet. denied) (request for declaratory judgment was a suit for refund which was specifically provided for under the tax code.) In this case, the trial court, using its discretion, decided TWOC's declaratory judgment action since it had additional ramifications not addressed by other claims. TEX. CIV. PRAC. & REM. CODE ANN. § 37.011. In other words, the declaration served to completely define the rights and duties of the parties and assisted in disposing of the entire controversy among the parties.

Hageman/Fritz and *Strayhorn* can be relied upon for the proposition that whether to award attorney's fees in a declaratory judgment action lies within the sound discretion of the trial court and will not be reversed on appeal absent a clear showing that the trial court abused its discretion. *Hageman/Fritz*, 150 S.W.3d at 627; *Strayhorn*, 101 S.W.3d at 572. A grant or denial of attorney's fees in a declaratory judgment action lies within the sound discretion of the trial court. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). The trial court's discretion has been construed broadly. *Id.*; *Fuqua v. Fuqua*, 750 S.W.2d 238, 246 (Tex. App.–Dallas 1988, writ denied). TWOC's request for declaratory relief was neither redundant nor a veiled attempt to bolster its claim for attorney's fees, but rather the only means available to resolve the serious uncertainties it was facing due to Petitioners' conflicting positions on the termination of the Agreements.

This court need not look to “[c]ourts around the country” to conclude that an action for declaratory judgment was proper and appropriate in the case at bar. A review of the record before this court shows that a valid claim for declaratory relief existed and there was

no abuse of discretion in the awarding of attorney's fees which would warrant the grant of review.

B. TWOC's request for declaratory judgment was necessary and proper given the ongoing relationship and controversy between the parties.

Petitioners incorrectly character the relationship between it and TWOC as a "terminated relationship." The relationship between TWOC and MBM did not end on February 17, 2005. TWOC and MBM had an ongoing disputed contractual relationship for the trial court to interpret. The relationship between the parties was still uncertain on February 17, 2005. TWOC had a need for declaratory relief. For example, delivery was still uncertain as MBM had been refusing to designate a carrier and location for the return of the equipment until TWOC filed its Original Petition for Declaratory Judgment and Damages and Application for Temporary Restraining Order and for Temporary and Permanent Injunction. Even after MBM accepted the return of the equipment, there remained a disputed contractual relationship for the trial court to interpret. The trial court was still required to determine whether the contractual relationship continued with MBM's renewal of the agreements or had been terminated with the notice which TWOC argued was timely. MBM alleged in its breach of contract claim (only after TWOC had filed its action) and through its claim of offset that agreements had been renewed and TWOC was liable for payments. Clearly, MBM's own claims were not predicated upon a terminated relationship.

TWOC's request for declaratory relief pertained to this uncertainty that remained with respect to the renewal/termination of the parties' Agreements. *See Universal Printing Co., Inc. v. Premier Victorian Homes, Inc.*, 73 S.W.3d 283, 297 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)(holding declaratory judgment proper since controversy present "[f]rom the inception of the dispute until very shortly before trial). Therefore, TWOC and MBM had an ongoing disputed contractual relationship for the trial court to interpret. The trial court

was still required to determine whether the contractual relationship continued with MBM's renewal of the Agreements or had been terminated with the notice which TWOC argued was timely. In addition, the trial court was faced with assessing – outside the four corners of the Agreements – MBM's process of dating contracts and determining termination dates. TWOC's claim for declaratory relief regarding the termination of the Agreements presented a justiciable controversy and was not moot. Declaratory relief was necessary and proper to determine the rights and status of TWOC's and MBM's business relationship and Agreements.

In an attempt to blur the line between TWOC's breach of contract claim and its request for declaratory relief, Petitioners' briefing has consistently omitted reference to a significant component of the controversy among the parties. More specifically, Petitioners ignore the fact that MBM took the position that the Agreements had automatically renewed and, to that end, demanded \$160,000 from TWOC. MBM made these demands in letters, in the lawsuit initially filed in Harris County, and in its counterclaim, later renamed as an offset, in the case at bar. RR vol. 2, pp. 29-33; RR vol. 4, ex. P-21 & 23. At the same time, it was TWOC's position that it had timely terminated the agreements based upon the information provided by authorized representatives for MBM. A claim being disputed by MBM. Even more importantly, there were additional Office Care agreements between the parties which would require a similar notice of termination or suffer the consequences of automatic renewal. RR vol. 4, ex. P-7 & 8. The proper means of terminating these future agreement remained at issue.

Petitioners argue otherwise and allege there was no uncertainty, i.e., the claims and causes of action had fully matured by February 18, 2005 (when TWOC filed and served their first amended petition). They are incorrect. The cases cited on this point are inapposite. For

example, the *Tucker* case is distinguishable. *See Tucker v. Graham*, 878 S.W.2d 681 (Tex. App.—Eastland 1994, no writ). In that case, the plaintiffs sought two declarations. First, they “sought a declaration that [defendant] created a nuisance.” *Id.* at 682. The appellate court held that this was “not a proper request for declaratory relief because it did not involve . . . construction or validity.” *Id.* Second, the plaintiffs “sought a declaration that [defendant’s] actions were in violation of . . . the Water Code.” *Id.* The plaintiffs’ first amended petition also “alleged a cause of action for the violation of . . . the Water Code based on the nuisance created by [defendant].” *Id.* The appellate court in *Tucker* held that “[p]laintiffs’ declaratory judgment action involved the same parties and same issues as in the statutory cause of action and was not appropriate.” *Id.* at 683. TWOC’s declaratory judgment action, however, did not involve all of the same issues as in the breach of contract action.

Petitioners rely upon the unpublished opinion in *Monterey Networks, Inc. v. Alcatel USA, Inc.*, No. 05-01-00071-CV, 2002 WL 461550 (Tex. App. – Dallas March 27, 2002, no pet.) (not designated for publication) in support of their claim that an ongoing and continuing relationship must be present in a claim for declaratory relief. (*See* Brief on the Merits of Petitioners, p. 24.) However, *Monterey* involved a counterclaim for declaratory relief. The counterclaim did “nothing more than respond to [Appellee’s] allegations in the petition and request for injunction.” *Id.* at *2. The court declined to find that the declaratory judgment counterclaim affected an ongoing relationship and therefore qualified as an affirmative claim for relief. *Id.* at *3, *distinguishing BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990). Also easily distinguished is the holding in *Mustang Security and Investigations, Inc. v. Alpha & Omega Services, Inc.*, 2007 WL 4099413 (Tex. App. – Houston [1st Dist.] Nov. 15, 2007, no pet. h.) (mem. op.). *Mustang Security* also involves a counterclaim for declaratory relief. *Id.* at *3. The court denied declaratory relief because

(1) there was no contract between the parties; and (2) there was no evidence of a continuing relationship. *Id.* at *4. Neither of which are true in the case at bar. It is undisputed that the existence of a contract and its status is at the very heart of the dispute. MBM's claim that the contractual relationship continued serves as the basis for the existence of an ongoing relationship. Petitioners concede that an action for declaratory judgment has long been a vehicle by which parties to a contractual dispute may resolve questions of construction or validity of a contract. *See* Brief on the Merits of Petitioner at p. 28, *citing Bollner v. Plastics Solutions of Texas, Inc.*, No. 08-06-00152-CV, 2008 WL 2554385, *9 (Tex. App. – El Paso June 27, 2008, no pet. h.) However, Petitioners incorrectly conclude that the contractual relationship had ended by again ignoring its continuing demand for performance under the Agreements. TWOC's request for declaratory relief did not seek a vindication of past acts, but rather a resolution of the uncertainties which remained with respect to its future conduct because it was faced with a substantial demand for \$160,000 from MBM.

“[T]he Declaratory Judgment Act provides for use of the Act to determine the construction of a written instrument.” *Contact Products, Inc. v. Dixico, Inc.*, 672 S.W.2d 607, 610 (Tex. App.–Dallas 1984, no writ). Further, “A trial court may construe a contract either before or after a breach occurs.” *Hasty Inc. v. Inwood Buckhorn*, 908 S.W.2d 494, 499 (Tex. App.–Dallas 1995, writ denied). A party is entitled “to request a determination of questions of construction or validity arising under the instrument and to obtain a declaration of rights, status, or other legal relations thereunder.” *Stark v. Benckenstein*, 156 S.W.3d 112, 117 (Tex. App. – Beaumont 2004, pet denied). Therefore, considering the facts in the record and the trial court's authority to determine the construction of the contract before or after breach occurs, TWOC and MBM had an ongoing disputed contractual relationship regarding the

termination of that contractual relationship for the trial court to interpret after February 17, 2005.

In addition, when a party brings a claim under the Declaratory Judgment Act seeking determination of disputed issues and the claim is not brought solely to recover attorney fees, the declaratory judgment will be recognized and attorney fees are permissible. *See Falls County v. Perkins*, 798 S.W.2d 868, 871-72 (Tex. App. – Fort Worth 1990, no writ). This rule applies even when the opponent is granted nonsuit. *See id.* (“We do not agree” that “the legislature meant for section 37.009 to read as authorizing attorney’s fees only in cases tried (not dismissed) “[W]e hold that recovery of attorney’s fees is permissible although a nonsuit is granted.”). In the present case, the request for declaratory judgment was logical and clearly authorized in light of the contractual claims by both sides. TWOC’s declaratory judgment presented new issues. TWOC did not bring the declaratory action solely to recover attorney fees. TWOC brought the declaratory action because of the uncertainties and insecurities it faced with respect to the rights, status and legal relationship of the parties under the agreements and the need for the court to interpret these agreements as they related to their termination. MBM’s nonsuit did nothing to diminish the necessity or reasonableness of the declaratory relief requested by TWOC or the resulting attorney fees.

Petitioners rely heavily on the *Leventhal* case in arguing against TWOC’s declaratory relief, but that case is distinguishable and does not apply. The holding there was not even based on the rule advanced by Petitioners. *See Leventhal*, 978 S.W.2d at 257-60. Here, TWOC still had a need for declaratory relief. In the *Leventhal* case, the appellate court held that plaintiff’s “claim for declaratory relief did not present a justiciable controversy and was moot” and, thus, “he was not entitled to recover attorney’s fees.” *Id.* at 259. Here, there can be no dispute that TWOC’s claim for declaratory relief presented a justiciable controversy.

C. TWOC’s declaratory judgment claim was not brought to seek a declaration of non-liability or as a mechanism to defend against MBM’s claim for breach of contract.

Petitioners next struggle in making the allegation that TWOC’s declaratory relief was improperly brought as a defense to MBM’s breach of contract counterclaim. In support, Petitioners cite cases that have no application here. Two of Petitioners’ cases, *G.R.A.V.I.T.Y. Enters., Inc. v. Reece Supply Co.*, 177 S.W.3d 537 (Tex. App.–Dallas 2005, no pet.) and *Energen Res. MAQ v. Dalbosco*, 23 S.W.2d 551 (Tex. App.–Houston [1st Dist.] 2000, pet. denied), are simply breach of contract cases without any comparison to declaratory judgment actions. In *G.R.A.V.I.T.Y.*, the defendant counterclaimed for breach of contract, requesting the fees and costs it incurred in defending against the plaintiff’s breach of contract suit. *Id.* at 542. Because “the sole basis for its claim for attorney’s fees *under section 38.001* was for successfully defending against [plaintiff’s] breach of contract claim,” the appellate court did not allow defendant to recover attorney’s fees as damages. *Id.* at 546-47 (emphasis added). The *Energen* case stands for the accepted principle that Chapter 38 does not allow one who defends successfully against a contract claim to recover attorney’s fees. *Energen*, 23 S.W.2d at 558. A defense to a breach of contract claim is not at issue here. The third case relied upon by Petitioners is equally inapplicable to the issues in dispute here. *Abor* is a medical malpractice action where defendants brought an action seeking declaration of nonliability in a personal injury suit. *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985).

Acknowledging this logical deficit, Petitioners also allege that TWOC’s declaratory judgment claim was an “attempted end run around” Chapter 38 restrictions. *See* Brief on the Merits of Petitioner, at p. 33. In other words, Petitioners allege that TWOC simply recast its defense to breach of contract as a declaratory judgment action. Petitioners cite to *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479 (Tex. App.–Houston [1st Dist. 2006, pet. filed)

where a declaratory judgment claimant was refused its attorney's fees. *Id.* There, the plaintiff brought only a declaratory action asking the court to declare certain licensing agreements unenforceable. The defendant counterclaimed for declaratory relief and breach of contract. The jury found that it was the plaintiff who had breached and, thus, refused to award fees. On appeal, the plaintiff still did not recover any fees since the court did not reach the determination of whether the agreements were enforceable. *Id.* at 487. In dicta, the court described plaintiff's declaratory claim as "nothing more than a suit in avoidance of a contract." *Id.* at 491.

The present case is unlike the *Cytogenix* case in that the declaratory relief here sought more than to avoid a contract. In fact, there was no contract claim to defend against. Petitioner's reliance on the Fifth Circuit case of *Mission Insurance Company v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983) is particularly misplaced. First, the *Mission* case is a federal court case interpreting the federal Declaratory Judgment Act at 28 U.S.C. § 2201, not the Texas Declaratory Judgment Act. Moreover, in that case, the court upheld the dismissal of a case filed in Texas by a party who had intentionally caused the other side to delay filing suit. The court was persuaded that the party's filing amounted to "forum-shopping" in order to avoid California laws on burden of proof. *Id.* at 602.

Such was not the case here. TWOC's declaratory judgment claim was not brought in defense of MBM's breach of contract claim. It was filed necessarily first since a genuine, justiciable controversy existed. The request for declaratory relief was made both *before* MBM counterclaimed with a breach action, and was maintained and tried *after* MBM non-suited its counterclaim. Moreover, the trial court granted TWOC's declaratory relief in the absence of any breach of contract claim by MBM. There is no evidence here, as there was

in *Mission*, that TWOC employed any type of gamesmanship. Instead, TWOC had a legitimate need for declaratory relief and the trial court used its discretion in granting it.

III. The Court of Appeals properly awarded TWOC nominal damages under its claim for breach of contract because it had suffered a wrong for which the precise amount of its loss was not capable of calculation.

TWOC's recovery of "nominal" damages was valid and supported by evidence that TWOC suffered a wrong and was therefore entitled to an award of nominal damages. As the court of appeals noted, Petitioners do not challenge whether the amount of \$1,000.00 could be an appropriate measure of damages, but instead rely upon this court's opinion in *Gulf States Utilities* to support their claim that nominal damages are barred in this instance. *MBM*, 251 S.W.3d at 180. As pointed out below, the *Gulf States* case is distinguishable and cannot support overturning the award of attorney fees nor does the court of appeals award of nominal damages warrant reaffirmation of *Gulf States* by this court.

TWOC pled actual damages (e.g., the cost of employees' time and employee and general contractor expenses) and offered testimony that these actual damages were difficult to prove. RR vol. 2, p. 47; RR vol. 3, p. 9; CR 535-37, 562-64. TWOC also pled and proved nominal damages. "Nominal damages are those damages recoverable where a legal right is to be vindicated against an invasion that produced no actual loss, or where, from the very nature of the case, some injury has been done, the amount of which the proof fails to show." *Trevino v. S.W. Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ). The "mere proof of the making and breach of a contract fully prove a plaintiff's cause of action for which he is entitled to recover at least nominal damages, regardless of whether actual damages are proved." *Hauglam v. Durst*, 769 S.W.2d 646, 651 (Tex. App.—Corpus Christi 1989, no writ) (holding that the evidence sufficiently established the making and breach of an agreement and that plaintiff was entitled to \$3,000 as nominal

damages). A pleading of actual damages supports an award of nominal damages. *Press v. Davis*, 118 S.W.2d 982 (Tex. Civ. App. – Fort Worth 1938), *judgment modified*, 140 S.W.2d 438 (Tex. 1940).

The relevant issue in the *Gulf States* case, however, was whether nominal damages can be recovered in a DTPA case. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002). Application of the *Gulf States* case, therefore, is limited to DTPA cases. *See id.* For example, the opinion provides, “nominal damages are not available under the DTPA.” *Id.* In this case, however, there are actions in which nominal damages are available. There are no DTPA claims here. This is a case where TWOC can, and ultimately did, recover nominal damages for which it pled because this case is a situation where there was an invasion that produced no actual loss or where some injury was done but the amount of which the proof failed to show due to the very nature of the case. *See Trevino*, 582 S.W.2d at 584. Further distinguishing the *Gulf States* case is the fact that the plaintiff there did not contend he could not prove actual damages. *See id.* (“Low does not contend that he could not prove the food’s value.”). Again, TWOC: pled actual damages; offered testimony that these actual damages were difficult to prove; pled nominal damages; and proved nominal damages. There was certainly an invasion here that produced no actual loss *or* at least some injury was done but the proof failed to show the amount due to the nature of the case. This is demonstrated by the trial court’s judgment, findings, and conclusions. The record makes this clear as well. Thus, nominal damages are available and properly awarded to TWOC. The court of appeals holding should be affirmed.

IV. TWOC proved its attorney’s fees to be reasonable and necessary. The trial court found the attorney’s fees to be equitable and just.

In rendering judgment for TWOC, including an award of attorney’s fees, the trial court had before it lengthy affidavits from counsel for TWOC which outlined in detail the

time and work spent on the entire case, both on TWOC's claims and in defense of MBM's claims and counterclaims. *See First Wichita Nat'l Bank v. Wood*, 632 S.W.2d 210, 215 (Tex. App.—Fort Worth 1982, no writ). All of this evidence came in without objection, either as to alleged lack of compliance with Chapter 38, reasonableness, whether attorney fees are recoverable for the claims alleged, or that the attorneys' work on TWOC's claims and in defense of MBM's claims and counterclaims had not been separated. TWOC's affidavits were uncontroverted. CR 535-37, 562-64. "Uncontroverted testimony by an interested witness concerning attorney's fees may establish a fact as a matter of law." *See Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 566 (Tex. App. — Texarkana 2003, pet denied) (citing *Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.—Houston [14th Dist.] 2002, no pet.)). The uncontroverted affidavit testimony (CR 535-37, 562-64) establishes the reasonable and necessary attorney fees for TWOC's claims as \$145,091.59. *See id.*

A. The question of the reasonableness of TWOC's attorney's fees is premature and not properly before this court.

Based upon the holding of *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006), the court of appeals remanded for new trial TWOC's award of attorney's fees. The court of appeals correctly remanded without comment the determination of the proper allocation of fees. Until decided on remand, this issue is not ripe for consideration by this court.

B. The fees were not excessive under the circumstances of the case.

A careful review of the tortured procedural history of this case reveals that driving the fees was not TWOC's desire to spend in excess of \$145,000.00, but rather the abusive conduct of Petitioners and/or their counsel which needlessly increased the costs of the litigation. CR 535-537; CR 562-564; RR vol. 6, ex. P-83. TWOC would have been happy to have this dispute put to rest with the return of the equipment. Petitioners would not have

it. Instead, MBM continued to maintain a claim and right to a recovery of more than \$160,000.00. RR vol. 4, ex. P-21. A claim perpetrated by the very acts of fraud uncovered in the course of the litigation. RR vol. 2, pp. 9-23, 24-46; RR vol. 3, pp. 2-16.

“The determination of the amount to be awarded as a reasonable attorney’s fee is a question for the trier of fact.” *Pegasus Energy Group, Inc. v. Cheyenne Petro. Co.*, 3 S.W.3d 112, 132 (Tex. App.–Corpus Christi 199, pet denied). “The determination of what is reasonable cannot be made by application of some mechanical formula.” *Flint & Assocs. v. Inter’l Pipe & Steel, Inc.*, 739 S.W.2d 622, 626 (Tex. App. – Dallas 1987, writ denied). “Rather, the court must take into consideration the entire nature of the case.” *Id.* “The trial court’s award of attorney’s fees will not be disturbed absent an abuse of discretion.” *Pegasus*, 3 S.W.3d at 132. “A trial court may be reversed for abusing its discretion only when the court of appeals finds the court acted in an unreasonable, arbitrary manner, or acted without reference to any guiding rules and principles.” *Id.*

“Factors to be considered in determining the reasonableness of attorney’s fees include the time and labor involved, the extent of the responsibilities assumed by the attorney, and the benefits resulting to the client from the attorney’s services.” *Id.* Other “[f]actors to be considered in reviewing the reasonableness of attorney’s fees include: the difficulties and complexities in the nature of the case; the amount of money involved; . . . and his experience and skill in presenting the case.” *Stuckey v. White*, 647 S.W.2d 35, 38 (Tex. App.–Houston [1st Dist.] 1982, no writ).

The attorney’s fees awarded in this case, although large, are not unreasonable or excessive. *See Pegasus*, 3 S.W.3d at 132. This proved to be a very complicated case. *See id.* An overall review of the record reveals a controversy that was both factually and legally complex. *See Stuckey*, 647 S.W.2d at 38. The original petition was filed on February 16,

2005 (CR 4-12) and the modified final judgment was not signed until October 27, 2006 (CR 756-58). *See Pegasus*, 3 S.W.3d at 132. There was extensive briefing to the trial court. There were voluminous records, agreements, and exhibits involved. Four witnesses testified during the course of the trial. Deposition excerpts of four other witnesses were read into the record during the course of trial. A total of 117 exhibits were offered into evidence. There was testimony that the hours expended by appellee's counsel and the hourly fee were reasonable. CR 535-37, 562-64. *See Stuckey*, 647 S.W.2d at 39. Considering all of this, there is no excessiveness in the attorney's fees as determined by the trial court. *See id.*

The attorney's fees awarded were not unreasonable or excessive. *See Pegasus*, 3 S.W.3d at 133. The attorney's fees awarded for preparation and trial – \$145,091.59 – were reasonably proportional to the total amount involved in the case: (1) \$160,000+ (TWOC's damages and MBM's claim for offset, previously presented as its counterclaim for breach of contract) or (2) \$360,000+ (total attorney fees for both sides, in addition to TWOC's damages and MBM's claim for offset). Petitioners, not TWOC, transformed this case from a simple suit to a full blown trial. *See Flint*, 739 S.W.2d at 626. "Having picked the game and set the stakes," Petitioners "cannot now complain of the size of the pot." *See id.* It would seem that Petitioners have fallen in line with the age old philosophy that "[l]itigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party..." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). The factors to be considered in determining reasonable attorney fees weigh in favor of TWOC. The trial court followed the law and did not act unreasonably, arbitrarily, or without reference to rules and principles. After a careful review of the record, this court of appeals declined to comment on the reasonableness of the fees, but remanded for segregation under *Tony Gullo Motors*.

PRAYER

The court of appeals' holdings placed at issue by Petitioners are consistent with case law. Petitioners have not demonstrated that the court of appeals committed any errors of law with regard to the relevant holdings; accordingly, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Appellate Procedure to the following counsel on **December 16, 2008:**

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