

NO. 09-0085

IN THE SUPREME COURT OF TEXAS

DICK'S LAST RESORT OF THE WEST END, INC.,
DICK'S LAST RESORT OF DALLAS, INC., DICK'S LAST RESORT OF TEXAS,
INC., DICK'S LAST RESORT OF CHICAGO, INC., DICK'S HOLDING COMPANY,
INC, and STEVEN SCHIFF,

Petitioners,

v.

MARKET/ROSS, LTD. and WILLIAM H. NABORS,

Respondents.

RESPONSE TO PETITION FOR REVIEW

A. Erin Dwyer
State Bar No. 06302700
Dennis M. Lynch
State Bar No. 90001506

FIGARI & DAVENPORT, L.L.P.
3400 Bank of America Plaza
901 Main Street
Dallas, Texas 75202
(214) 939-2000
(214) 939-2090 (Facsimile)

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

DEFINITIONS AND ABBREVIATIONS v

ISSUES PRESENTED vi

STATEMENT OF FACTS..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT AND AUTHORITIES 3

A. Two of the Petitioners Assert No Grounds For Review 3

B. Petitioners Have Waived Any Error in the Trial Court’s Instruction 3

C. The Trial Court’s Veil-piercing Instructions Were Proper 5

D. Any Alleged Error In The Trial Court’s Instruction Was Harmless..... 9

E. The Contractual Disclaimer Does Not Defeat the Veil-Piercing
Theories As A Matter Of Law 10

 1. This Is Not A Tort Case 10

 2. Merger Clauses Do Not Ipso Facto Prevent Proof of Fraud..... 11

 3. The Verbal Representations Are Consistent With The Lease. 13

 4. Misrepresentations In The Lease And Post-Lease Fraud.. 14

 5. Non-Signatory Parties..... 14

CONCLUSION AND PRAYER FOR RELIEF 15

TABLE OF AUTHORITIES

CASES

<i>Barnes v. SWS Fin. Services, Inc.</i> , 97 S.W.3d 759 (Tex. App. – Dallas 2003, no pet.).....	4
<i>Burleson State Bank v. Plunkett</i> , 27 S.W.3d 605 (Tex. App.—Waco 2000, pet. denied).....	12
<i>Burton v. Bentley</i> , 153 S.W.3d 50 (Tex. 2004).....	4
<i>Castleberry v. Branscum</i> , 721 S.W.2d 270 (Tex. 1986).....	passim
<i>Country Village Homes, Inc. v. Patterson</i> , 236 S.W.3d 413 (Tex. App. — Houston [1 st Dist.] 2007, jdmt. vacated and reversed by agmt.....	7
<i>Dick’s Last Resort of the W. End, Inc. v. Market/Ross, Ltd.</i> , 273 S.W.3d 905 (Tex. App. – Dallas 2008, pet. filed)	passim
<i>First State Bank of Miami v. Fatheree</i> , 847 S.W.2d 391 (Tex. App.—Amarillo 1993, writ denied)	6
<i>Fletcher v. Edwards</i> , 26 S.W.3d 66 (Tex. App.—Waco 2000, pet. denied).....	12
<i>Ford Motor Co. v. Ledesna</i> , 242 S.W.3d 32 (Tex. 2007).....	5
<i>Forest Oil Corp. v. McAllen</i> , 268 S.W.3d 51 (Tex. 2008).....	11-13
<i>Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.</i> , 960 S.W.2d 41 (Tex. 1998).....	11
<i>Hyundai Motor Co. v. Rodriguez</i> , 995 S.W.2d 661 (Tex. 1999).....	8
<i>In re Dodgin</i> , 2006 WL 3069714 (Bankr. N.D. Tex. 2006).....	7
<i>Island Recreation Dev. Corp. v. Republic of Texas Sav. Ass’n.</i> , 710 S.W.2d 551 (Tex. 1986).....	9

<i>John v. Marshall Health Services, Inc.</i> , 91 S.W.3d 446 (Tex. App.-Texarkana 2002, pet. denied)	12-13
<i>Lakeway Land Co. v. Kizer</i> , 796 S.W.2d 820 (Tex. App. – Austin 1990, writ denied)	4
<i>McCarthy v. Wami Venture, A.S.</i> , 251 S.W.3d 573 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).....	7
<i>McEwin v. Allstate Texas Lloyds</i> , 118 S.W.3d 811 (Tex. App.–Amarillo 2003, no pet.)	6
<i>Menetti v. Chavers</i> , 974 S.W.2d 168 (Tex. App.–San Antonio 1998, no writ)	7
<i>Pairett v. Gutierrez</i> , 969 S.W.2d 512 (Tex. App.—Austin 1998, pet. denied).....	12
<i>Priddy v. Rawson</i> , __ S.W.3d __, 2009 Tex. App. LEXIS 675 (Tex. App. – Houston [14 th Dist.], February 3, 2009, no pet. h).....	7
<i>Providence Health Center v. Dowell</i> , 262 S.W.3d 324 (Tex. 2008).....	9
<i>Prudential Insurance Co. of America v. Jefferson Associates, Ltd.</i> , 896 S.W.2d 156 (Tex. 1995).....	11
<i>Santana Natural Gas Corp. v. Hamon Operating Co.</i> , 954 S.W.2d 885 (Tex. App.–Austin 1997, pet. denied).....	6
<i>Schlumberger Tech. Corp. v. Swanson</i> , 959 S.W.2d 171 (Tex. 1997).....	2, 11-13
<i>Seaside Industries, Inc. v. Cooper</i> , 766 S.W.2d 566 (Tex. App.–Dallas 1989, no writ)	7
<i>Shupe v. Lingafelter</i> , 192 S.W.3d 577 (Tex. 2006).....	10
<i>Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.</i> , 237 S.W.3d 379 (Tex. App.–Houston [14 th Dist.] 2007, no pet.).....	7
<i>Spencer v. Eagle Star Ins. Co. of America</i> , 876 S.W.2d 154 (Tex. 1974).....	3
<i>Spring Window Fashions Div. v. Blind Maker, Inc.</i> , 184 S.W.3d 840 (Tex. App. – Austin 2006, pet. granted and remanded by agrmt)	11, 14

<i>SSP Partners v. Gladstone Investments Corp.</i> , 275 S.W.3d 444 (Tex. 2008).....	9
<i>Texas Workers' Comp. Ins. Fund v. Mandlebaur</i> , 34 S.W.3d 909 (Tex. 2000).....	8
<i>Transit Enterprises, Inc. v. Addicks Tire & Auto Supply, Inc.</i> , 725 S.W.2d 459 (Tex. App.—Houston [1st Dist.] 1987, no writ).....	14
<i>Wal-Mart Stores, Inc. v. Middleton</i> , 982 S.W. 2d 468 (Tex. App. – San Antonio 1998, pet. denied)	8
<i>Walker v. Anderson</i> , 232 S.W.3d 899 (Tex. App.—Dallas 2007, no writ).....	7
<i>Warehouse Assocs. Corporate Centre II v. Celotex Corp.</i> , 192 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)	12-13
<i>Woodlands Land Dev. Co. v. Jenkins</i> , 48 S.W.3d 415 (Tex. App.—Beaumont 2001, no pet.)	12-13
<i>Yamini v. Gentle</i> , 488 S.W.2d 839 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.)	6
<i>Zamarron v. Shinko Wire Co.</i> , 125 S.W.3d 132 (Tex. App. – Houston [1 st Dist.] 2003, pet. denied).....	4
STATUTES AND RULES	
Tex. Bus. Corp. Act. art. 2.21(A) (Vernon 2003).....	passim
Tex. Bus. Comm. Code § 24.005.....	6
Tex. Bus. & Comm. Code § 27.01.....	6
Tex. Govt. Code § 22.225(a)	1
Tex. R. Civ. P. 274.....	3
Tex. R. App. P. 53.2.....	1, 4

DEFINITIONS AND ABBREVIATIONS

“Market/Ross” refers to Respondent Market/Ross Ltd.

The “Lease” refers to the parties’ written Lease Agreement, as amended by the Fourth Amendment.

“Dick’s West End” refers to Petitioner Dick’s Last Resort of the West End, Inc.

“Dick’s Chicago” refers to Petitioner Dick’s Last Resort of Chicago, Inc.

“Schiff” refers to Petitioner Steven Schiff.

“Petitioners,” collectively, refers to Petitioners Dick’s West End, Dick’s Chicago, Schiff, and the other Dick’s Last Resort entities that were defendants in the trial court.

“Article 2.21(A)” refers to Tex. Bus. Corp. Act art. 2.21(A) (Vernon 2003), recodified at Tex. Bus. Org. Code §21.223 (Vernon Pamph. Supp. 2008).

The Petition for Review is cited as “Pet. at [page number].”

The Clerk’s Record is cited as “[volume number] CR [page number].”

The Reporter’s Record is cited as “[volume number] RR [page number].”

ISSUES PRESENTED

1. Have two of the Petitioners – Dick’s West End and Dick’s Chicago – presented any issues for review?
2. Did Petitioners fail to preserve their claimed error with respect to the trial court’s jury instruction?
3. Did the trial court correctly instruct the jury as to Market/Ross’s veil-piercing theories by following the pattern jury charge approach – *i.e.*, using the wording of Article 2.21(A) and defining actual fraud as “conduct involving either dishonesty of purpose or intent to deceive” – or is actual fraud for purposes of veil-piercing limited only to instances of common law misrepresentation?
4. Was Petitioners’ claimed error with respect to the trial court’s jury instruction harmless?
5. Does the contractual disclaimer bar veil-piercing liability as a matter of law?

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF FACTS

Petitioners fail to affirm that the Court of Appeals correctly stated the nature of the case, except in any particulars pointed out, as required by Tex. R. App. P. 53.2(g). Instead, Petitioners submit an argumentative and fanciful version of the facts that is at odds with the evidence, the jury's findings, and the judgment of the Court of Appeals.

A judgment of the Court of Appeals is conclusive on the facts in all civil cases. Tex. Govt. Code § 22.225(a). Petitioners' attempt to recast the facts should therefore be ignored. Respondents believe that the nature of the case and factual background set forth in the opinion of the Court of Appeals is sufficient for a determination of the Petition. Additional relevant facts will be referenced in the Argument section where applicable.

SUMMARY OF ARGUMENT

The Petition should be denied. Conflict jurisdiction does not exist because the decision of the Court of Appeals is consistent with prior decisions of this Court and the other Courts of Appeal. Petitioners also do not present issues important to the jurisprudence of this State, but instead argue that the Court of Appeals erred in applying settled law to the particular facts in this case. On the merits, Petitioners have failed to demonstrate any error made by the Court of Appeals, much less one that was properly preserved in either of the courts below.

The evidence demonstrates a classic veil-piercing scenario, in which Petitioners engaged in a subterfuge to avoid existing lease obligations of a solvent restaurant operation by naming a sham affiliate, Dick's West End, as a replacement tenant in order

to perpetrate a fraud on Market/Ross. Given the expansive nature of Petitioners' fraudulent conduct, the trial court broadly defined "actual fraud" and correctly overruled Petitioners' objection that "actual fraud" under Article 2.21(A) should be limited to common law misrepresentation. The trial court's veil-piercing instructions precisely tracked the governing statute, and used language from the Texas Pattern Jury Charge that was consistent with this Court's decision in *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986). Other courts of appeals have approved the exact same instruction, and no Texas court has ever held that instruction to be erroneous.

But even if the instruction had been improper, Petitioners failed to object to it on the basis they now urge. They also waived their complaint when they assigned error in the Court of Appeals only as to two of Market/Ross's veil-piercing theories. In any event, given that much of the evidence of fraud was undisputed, Petitioners cannot demonstrate that the alleged error probably caused the rendition of an improper judgment or prevented Petitioners from properly presenting their case on appeal.

The contractual disclaimer in the Lease does not bar any of the veil-piercing theories because (1) this is a breach of contract case, not a tort case, (2) the disclaimer here falls outside the *Schlumberger* exception, (3) the representations at issue did not vary or contradict the written agreement, (4) the disclaimer does not apply to fraudulent misrepresentations or false promises contained in the Lease itself or post-closing misrepresentations, concealments, and fraudulent transfers, and (5) the complaining Petitioners were not even parties to the Lease and, therefore, cannot rely on the disclaimer.

ARGUMENT AND AUTHORITIES

A. Two of the Petitioners Assert No Grounds For Review

Two of the Petitioners, Dick's West End and Dick's Chicago, were held liable for breach of contract. The judgment amounts awarded against those Petitioners do not depend in any way on the veil-piercing findings, which are the sole object of the Petition.¹ Because Dick's West End and Dick's Chicago have presented no issues for review, their Petition should be denied.

B. Petitioners Have Waived Any Error in the Trial Court's Instruction

Petitioners now admit that "actual fraud" under Article 2.21(A) could be fraud by misrepresentation, concealment, or omission. Petition at 7, 8. Although this delineation of fraud is still too narrow, it entails a far broader definition than Petitioners were willing to accept in the trial court. At the charge conference, Petitioners objected to the trial court's instruction for not defining "actual fraud" as common law misrepresentation of existing fact. 9 RR 19-21. If granted, this objection would have foreclosed scrutiny of Petitioners' numerous other acts of fraud, including the fraudulent omissions and concealments that Petitioners now concede were appropriate for jury consideration.

Although an objection is sufficient to preserve error in a defective jury instruction, Rule 274 requires the objecting party to point out distinctly the grounds of the objection, and any defect or omission in the definition or instruction is waived unless specifically included in the objection. Tex. R. Civ. P. 274; *Spencer v. Eagle Star Ins. Co. of America*,

¹ Petitioners' Issue No. 1 asserts error in the trial court's veil-piercing instructions; Issue No. 2 argues that a contractual disclaimer bars the veil-piercing theories; and Issue No. 3 concerns the trial court's refusal to submit

876 S.W.2d 154, 157 (Tex. 1974). A party is also confined to the objection it made in the trial court; any variant complaint on appeal is waived. *Lakeway Land Co. v. Kizer*, 796 S.W.2d 820, 825 (Tex. App. – Austin 1990, writ denied). Petitioners implicitly concede that their objection below was improper, inasmuch as they now argue that “actual fraud” includes other species of fraud beyond common law misrepresentation of existing fact. Because their objection at trial does not align with the argument they now make on appeal, Petitioners have not preserved the issue for review.

Preserving a complaint in the trial court is only half the story. An appellant must also assign the matter as error in the court of appeals or else the complaint is waived. *Burton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) (per curium); Tex. R. App. P. 53.2(f). The jury found four separate bases for piercing the corporate veil of Dick’s West End. 5 CR 1261-65. On appeal to the court of appeals, however, Petitioners singled out only two of these – alter ego and single business enterprise -- in their complaint about the court’s charge. *Dick’s Last Resort of the W. End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 909 (Tex. App. – Dallas 2008, pet. filed) (appellants’ fourth issue limited to alter ego and single business enterprise claims).² The jury’s alternate veil-piercing findings –

issues asking whether Market/Ross had waived, or was estopped to assert, its veil-piercing theories. Indeed, the Petition itself acknowledges that “it is the alter-ego claims that are at issue, not the contract claim itself.” Pet. at 14.

² Petitioners similarly limited their fifth issue in the court of appeals, which attacked the legal and factual sufficiency of the evidence to support the alter ego and single business enterprise findings. Once again, no mention was made of the jury’s other two veil-piercing findings. In that instance, the Court of Appeals observed that “[i]n their reply brief, however, appellants argue their complaint applies to these latter theories as well.” 273 S.W.3d at 911 n.3. Even if the same could have been said about Petitioners’ fourth issue in the Court of Appeals, which attacked the actual fraud definition, the law is well-established that an appellant may not include in a reply brief an issue that was not raised in the appellant’s original brief. *Zamarron v. Shinko Wire Co.*, 125 S.W.3d 132, 139 (Tex. App. – Houston [1st Dist.] 2003, pet. denied); *Barnes v. SWS Fin. Services, Inc.*, 97 S.W.3d 759, 761 n. 3 (Tex. App. – Dallas 2003, no pet.)

sham to perpetrate a fraud and evasion of existing liability – were not attacked in the court of appeals, and each is alone sufficient to support the judgment.

C. The Trial Court’s Veil-piercing Instructions Were Proper

The trial court submitted all four veil-piercing theories to the jury based on the accepted definitions and instructions contained in the Texas Pattern Jury Charges. 5 CR 1261-65; *see* State Bar of Texas, Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment PJC 108.1 - .4, Cmt. (2006). These instructions precisely track Article 2.21(A) and adopt the definition of “actual fraud” used by this Court in *Castleberry*. *Id.*, citing Tex. Bus. Corp. Act. Article 2.21(A) (2) and *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986) (actual fraud involves dishonesty of purpose or intention to deceive). “[O]ur trial courts routinely rely on the Pattern Jury Charges in submitting cases to juries, and we rarely disapprove of these charges.” *Ford Motor Co. v. Ledesna*, 242 S.W.3d 32, 45 (Tex. 2007).

Article 2.21(A) does not define “actual fraud.” But there is nothing in the statute that indicates the Legislature intended the term to be applied narrowly, or limited to instances of fraud by misrepresentation, as Petitioners argued in the trial court. Instead, the statute permits the corporate veil to be pierced if the corporate form is used to perpetrate any “actual fraud.” Tex. Bus. Corp. Act. Art. 2.21(A)(2). As this Court observed in *Castleberry*, the variety of corporate shams to perpetrate such frauds “is infinite.” 721 S.W.2d at 275. As a result, no Texas court has ever held that “actual fraud” for veil-piercing purposes can be defined only in terms of fraud by misrepresentation.

Indeed, the generally accepted rule in Texas is that “there can be no all-embracing definition of fraud.” *First State Bank of Miami v. Fatheree*, 847 S.W.2d 391, 395 (Tex. App.—Amarillo 1993, writ denied).³ Fraud is multiform, admitting of no single definition, and not all fraud is comprehended within the elements of the traditional test. *McEwin v. Allstate Texas Lloyds*, 118 S.W.3d 811, 816 (Tex. App.—Amarillo 2003, no pet.); see also *Yamini v. Gentle*, 488 S.W.2d 839, 843 (Tex. Civ. App.—Dallas 1972, writ ref’d n.r.e.) (fraud is an elusive term that is not exactly definable). Some courts, therefore, have defined fraud simply as “any cunning or artifice used to cheat or deceive another.” E.g., *McEwin*, 118 S.W.3d at 816; *Santana Natural Gas Corp. v. Hamon Operating Co.*, 954 S.W.2d 885, 890 (Tex. App.—Austin 1997, pet. denied); *Fatheree*, 847 S.W.2d at 395.

Any of the myriad species of actual fraud will satisfy the fraud requirement of Article 2.21(A), which may explain why so many courts have adopted the broad formulation articulated in *Castleberry*. Since *Castleberry* was decided, not a single court has criticized the use of this broad definition in the veil-piercing context, or reversed a trial court that instructed the jury in accordance with the Texas Pattern Jury Charge. To the contrary, numerous courts of appeals have specifically referenced *Castleberry*’s

³ The *Fatheree* court listed a dozen different definitions of fraud that it identified in the authorities, and observed that cases defining fraud using the traditional elements of common law misrepresentation “were not attempting to make a limited (*i.e.*, straight-jacket) definition of fraud for use in all fraud situations,” but instead were dealing with only one form of fraud. 847 S.W.2d at 395. Various Texas statutes also contain additional, and different, definitions of fraud that are likewise appropriate to the circumstances. See Tex. Bus. & Comm. Code §§ 24.005 (transfers made to hinder, delay or defraud), 27.01 (fraud in real estate and stock transactions).

definition of actual fraud with approval in the veil-piercing context.⁴

Admittedly, some veil-piercing cases have employed a more limited definition of actual fraud depending on the circumstances involved. These cases do not cast any doubt on those in which a broader definition of “actual fraud” was used, however, and certainly none of them hold that actual fraud in the veil-piercing context is limited to fraud by misrepresentation, as Petitioners contended below. For example, the court in *Walker v. Anderson*, 232 S.W.3d 899, 917 (Tex. App.–Dallas 2007, no writ), held that factual findings of “badges of fraud” in connection with a fraudulent transfer were sufficient to support a piercing of the corporate veil because they established actual intent to defraud. In *McCarthy v. Wami Venture, A.S.*, 251 S.W.3d 573, 584-85 (Tex. App.–Houston [1st Dist.] 2007, pet. denied), on the other hand, actual fraud was defined only in terms of fraudulent concealment.⁵

Besides, no acceptable, alternative definition is available that fits the statute and fully captures the numerous and variegated forms of actual fraud. The trial court could have submitted pages of instructions covering every type of fraud presented by the

⁴ See, e.g., *Priddy v. Rawson*, __ S.W.3d __ 2009 Tex. App. LEXIS 675 at * 29 (Tex. App. – Houston [14th Dist.], February 3, 2009, no pet. h); *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 387 (Tex. App.–Houston [14th Dist.] 2007, no pet.) (noting that instruction tracked “actual fraud” language from article 2.21(A) (2) and holding “actual fraud involves dishonesty of purpose or intent to deceive”); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 433 n.13, 435 (Tex. App.– Houston [1st Dist.] 2007, jdmt. vacated and remanded by agreement) (noting that charge’s definition of actual fraud tracked the Pattern Jury Charge, and that the Texas Supreme Court does not require in corporate-veil context a finding on the elements of common law misrepresentation); *In re Dodgin*, 2006 WL 3069714 at *8 (Bankr. N.D. Tex. 2006) (under Texas law, “actual fraud in the corporate-veil context involves ‘dishonesty of purpose or intent to deceive’”); *Menetti v. Chavers*, 974 S.W.2d 168, 174 (Tex. App.–San Antonio 1998, no writ) (definition of “actual fraud” as material misrepresentation is “narrow,” because “actual fraud in the corporate-veil context involves dishonesty of purpose or intent to deceive”); *Seaside Industries, Inc. v. Cooper*, 766 S.W.2d 566, 568 (Tex. App.–Dallas 1989, no writ).

⁵ In approving this definition of “actual fraud,” the *Wami* court of appeals expressly rejected the same argument Petitioners made below that “actual fraud” requires a finding of material misrepresentation. 251 S.W.3d at 585.

evidence, but that approach would have overwhelmed the jury and undermined the goal of submitting the issues “logically, simply, clearly, fairly, correctly, and completely.” *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999). Even then, the jury would most likely have been confused, not only by the sheer number of instructions regarding fraud, but by its repeated definition as a verb when the accompanying statutory instruction uses it as a noun.⁶ Perhaps even more confusing would have been the damage element of the instructions. The classic definition of common law misrepresentation, along with the definitions of many other types of fraud, include an element of damages caused by the fraud. In the veil-piercing context, however, the damages arise from the underlying breach of contract.

A trial court has considerable discretion to determine necessary and proper jury instructions. *Texas Workers' Comp. Ins. Fund v. Mandlebaur*, 34 S.W.3d 909, 911 (Tex. 2000) (per curiam). It has even greater discretion in submitting instructions and definitions than it does in submitting questions. *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W. 2d 468, 470 (Tex. App. – San Antonio 1998, pet. denied). By requiring the jury to find that the fraud was perpetrated on Market/Ross by conduct involving dishonesty of purpose or intention to deceive, the trial court's instruction fulfilled the Legislature's objective in requiring actual fraud, rather than constructive fraud, in order to pierce the corporate veil.⁷

⁶ Tex. B. Corp. Act. Art 2.21(A)(2) (“caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee”).

⁷ As the Court of Appeals also correctly observed, the instruction does not permit veil-piercing in cases of “everyday business negotiations” or harmless “puffing,” as Petitioners contend, because the other requirements for

D. Any Alleged Error In The Trial Court's Instruction Was Harmless

Even assuming for argument's sake that the trial court erred by failing to submit a separate definition for every type of fraud raised by evidence— as opposed to the broader and all encompassing definition endorsed by the Supreme Court and the Texas Pattern Jury Charge – that error is reversible only if it “was reasonably calculated and probably did cause the rendition of an improper judgment.” *Island Recreation Dev. Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W.2d 551, 555 (Tex. 1986). To make this determination, the reviewing court should consider the pleadings, the evidence presented at trial, and the charge in its entirety. *Providence Health Center v. Dowell*, 262 S.W.3d 324, 331 (Tex. 2008).

The Petition fails to demonstrate how the trial court's instruction led to the rendition of an improper judgment, especially since much of the evidence regarding fraud was undisputed. Schiff admitted, for example, that he unilaterally altered the sublease between Dick's Texas and Dick's West End, without consideration, once he realized he had made a mistake that would allow Market/Ross to recover its Lease damages after the Lease was breached. *Dick's Last Resort*, 273 S.W.3d at 912. It was likewise undisputed that Schiff avoided the one percent (1%) provision by failing to disclose the sublease, and he obtained a release of the landlord's lien by making misrepresentations about a purported loan to Dick's West End. *Id.* Indeed, the only real point of contention at trial was whether Schiff honestly disclosed his intentions and plan, as he claimed, or whether

veil-piercing were set forth in the instruction. *Dick's Last Resort*, 273 S.W.3d at 910. Each of these instructions required an abuse of the corporate structure of the type described by this Court in *SSP Partners v. Gladstone Investments Corp.*, 275 S.W.3d 444, 454-455 (Tex. 2008).

he misrepresented and concealed them, as Market/Ross claimed. The instruction given by the trial court supplied more than adequate guidance for the jury's determination of this fact in light of the evidence.⁸

E. The Contractual Disclaimer Does Not Defeat the Veil-Piercing Theories As A Matter Of Law

Petitioners argue that Market/Ross cannot satisfy the "actual fraud" requirement of Article 2.21(A) because the merger clause contained in paragraph 13 of the Lease absolves them from any misrepresentations they made regarding Dick's West End. For at least five reasons, this argument misses the mark.

1. This Is Not A Tort Case. Petitioners' argument evinces a fundamental misunderstanding of veil-piercing doctrine. The gravamen of the veil-piercing claims is not the tort of fraud by inducement, in which a complainant seeks to avoid a contract, but instead is an attempt to enforce the contract terms against persons who have fraudulently used the corporate fiction as a means of escaping their obligations. Article 2.21's requirement of "actual fraud" simply requires that a party demonstrate actual deception on the part of the defendant, rather than a constructive fraud, before the veil will be pierced. By equating the "actual fraud" requirement to fraudulent inducement, Petitioners construct a strawman that they proceed to "knock down" by citing cases in which merger clauses were used to defeat tort causes of action. But Market/Ross *did not* sue anyone for fraud, fraudulent inducement, or any other tort. Nor did it seek to avoid

⁸ Any alleged error in the trial court's alter ego instruction was also harmless because, as pointed out previously, Petitioners failed to attack two of the veil-piercing findings on appeal, and each is alone sufficient to support the judgment. *See Shupe v. Lingafelter*, 192 S.W.3d 577, 579-80 (Tex. 2006) (error in omission of an issue is harmless when jury's answers to other issues are sufficient to support judgment).

the Lease. Instead, it sought to enforce the Lease and guaranty against Dick's West End and Dick's Chicago, and hold the remaining Petitioners liable for the contract debt under its veil-piercing theories of liability. This fact alone distinguishes all of the cases cited by Petitioners involving merger clauses and fraudulent inducement claims.

None of the cases cited in the Petition involve the effect of a merger clause on veil-piercing theories of liability. Indeed, if Petitioners' argument were correct, veil-piercing could no longer occur in any contract case. The merger doctrine is simply an adjunct of the parol evidence rule, which applies to all contracts. *Spring Window Fashions Div. v. Blind Maker, Inc.*, 184 S.W.3d 840, 869 (Tex. App. – Austin 2006, pet. granted and remanded by agrmt). If that rule automatically negates the actual fraud requirement, then there can never be veil-piercing in cases involving written contracts. That result would be incompatible with Article 2.21(A), since the Legislature clearly did not intend to eliminate corporate veil-piercing altogether in breach of contract cases.

2. **Merger Clauses Do Not *Ipso Facto* Prevent Proof of Fraud.** Just ten years ago, this Court acknowledged the long-standing rule in Texas that a party may not procure a contract by fraud. *See Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 46-47 (Tex. 1998); *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995) (contract avoidable if induced by fraudulent representation or concealment). The Court has also recently reiterated that a contractual disclaimer does not automatically bar a claim of fraudulent inducement. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008); *see Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179-81 (Tex. 1997).

Although Petitioners advert to *Schlumberger* and *Forest Oil*, they never acknowledge the limits on those holdings. *Schlumberger* dealt with a merger clause contained in a release. The Court enforced this merger clause because, among other things, (1) the release at issue clearly expressed the parties' intent to waive fraudulent inducement claims, (2) the merger clause contained in the release expressly disclaimed reliance on representations about the specific subject matter in dispute, and (3) the disclaimer was specifically negotiated, and not mere boilerplate. *See Schlumberger*, 959 S.W.2d at 180-81. In so holding, the Court emphasized that a merger clause "will not always bar a fraudulent inducement claim," and a disclaimer may lack "the requisite clear and unequivocal expression of intent necessary to disclaim reliance" on the specific representations at issue. *Id.* at 181. Numerous cases decided after *Schlumberger*, therefore, have concluded that under appropriate circumstances, even claims of fraudulent inducement may survive the presence of a merger clause.⁹ These courts and others have recognized that *Schlumberger* carved out an exception to the general rule, and that the exception applies only in limited circumstances, unlike those existing in this case. Here, for example, the merger clause was not specifically negotiated; the parties were not ending their relationship; and Market/Ross, at least, did not contemplate that the disclaimer would permit use of the tenant as a sham to perpetrate a fraud, or otherwise

⁹ *See, e.g., John v. Marshall Health Services, Inc.*, 91 S.W.3d 446, 449-50 (Tex. App.-Texarkana 2002, pet. denied); *Woodlands Land Dev. Co. v. Jenkins*, 48 S.W.3d 415, 420-22 (Tex. App.—Beaumont 2001, no pet.); *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 615-16 (Tex. App.—Waco 2000, pet. denied); *Fletcher v. Edwards*, 26 S.W.3d 66, 75-76 (Tex. App.—Waco 2000, pet. denied); *Pairett v. Gutierrez*, 969 S.W.2d 512, 516-17 (Tex. App.—Austin 1998, pet. denied); *see also Warehouse Assocs. Corporate Centre II v. Celotex Corp.*, 192 S.W.3d 225, 230-34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

preclude veil-piercing theories of liability.

Forest Oil reiterated that a mere disclaimer standing alone will not “forgive intentional lies regardless of context,” 268 S.W.3d at 61, and the Court again emphasized that two of the key factors are whether the merger clause was specifically negotiated, rather than boilerplate, and whether the parties specifically discussed the precise subject matter involved in the dispute during their negotiations, *id.* at 60.¹⁰ The Texarkana and Beaumont Courts of Appeals have likewise noted the importance of the “boilerplate” factor in considering whether a fraudulent inducement claim would survive the presence of a merger clause. *See John*, 91 S.W.3d at 450 (“The disclaimer is more like ‘boilerplate’ contract language rather than something negotiated by the parties”); *Woodlands Land Dev. Co.*, 48 S.W.3d at 422. Unlike *Forest Oil* and *Schlumberger*, the disclaimer here was admittedly boilerplate and not the subject of any negotiation.¹¹ Since the merger clause in the Lease was not a bargained-for provision disclaiming reliance about the specific matters later in dispute, the *Schlumberger* exception would not apply even if Market/Ross had been suing for fraudulent inducement.

3. The Verbal Representations Are Consistent With The Lease. Even if the *Schlumberger* exception otherwise applied, it still would not preclude a finding of

¹⁰ It remains unclear whether the fact of settlement is itself an important factor in the equation. Both *Schlumberger* and *Forest Oil* involved settlement agreements, and one of the specific factors enumerated as relevant in *Forest Oil* was that “(5) the *release* language was clear.” 268 S.W.3d at 60 (emphasis added). Numerous courts of appeals have also focused on this aspect of *Schlumberger*. *See, e.g., Warehouse Assocs. Corporate Ctr. II, Inc. v. Celotex Corp.* 192 S.W.3d 225, 230-34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *John v. Marshall Health Servs., Inc.*, 91 S.W. 3d 446, 450 (Tex. App. – Texarkana 2002, pet. denied).

¹¹ Indeed, everyone involved in the negotiations, including those on Petitioners’ side, acknowledged that the contractual disclaimer was mere “boilerplate” carried forward from prior forms used over the years. 4 RR 98 99; 8 RR 61 62; 8 RR 85.

actual fraud with respect to the misrepresentations made in this case. Neither the parol evidence rule nor a merger clause precludes enforcement of prior or contemporaneous promises or agreements which are collateral to, are not inconsistent with, and do not vary or contradict the express or implied terms or obligations of the written agreement. *Spring Window*, 184 S.W.2d at 870; *see also Transit Enterprises, Inc. v. Addicks Tire & Auto Supply, Inc.*, 725 S.W.2d 459, 461 (Tex. App.–Houston [1st Dist.] 1987, no writ). The verbal misrepresentations made by Petitioners are not in any way inconsistent with the Lease, which likewise contemplated that Dick’s West End would occupy the space, operate the restaurant, and own the furniture, fixtures and equipment as to which the Lease granted a landlord’s lien. 4 RR 100-03; 5 RR 99-100; 14 RR Exs. 7, 20.

4. **Misrepresentations In The Lease And Post-Lease Fraud.** Obviously, a contractual disclaimer could not bar fraud arising from (a) written misrepresentations contained in the Lease itself; (b) a false promise of performance in the Lease, made with the present intention not to perform; or (c) misrepresentations, concealments, and fraudulent transfers made by Petitioners after the Lease was signed. All of these bases of “actual fraud” were pled by Market/Ross and, as detailed by the Court of Appeals, proved with substantial evidence. Petitioners’ second issue simply ignores all of these facts, as it is confined to the verbal representations that preceded the Lease.

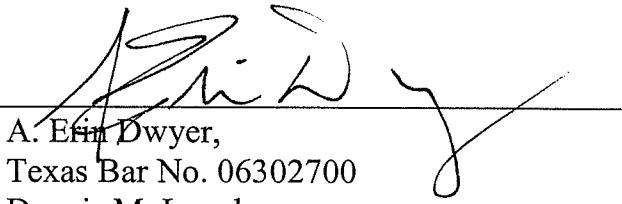
5. **Non-Signatory Parties.** Finally, Petitioners also just presume that they can all rely on a disclaimer in a written contract to which they were not parties. Dick’s West End is the only judgment-Defendant that was a party to the Lease and entitled to rely on the disclaimer. But its liability does not depend on any finding of fraud because it is

directly liable to Market/Ross for breach of lease. Conversely, the remaining Petitioners, who actually caused Dick's West End to be used to perpetrate an actual fraud on Market/Ross and thus cannot hide behind the corporate veil, were not parties to the contract containing the disclaimer on which Petitioners' argument is predicated.

CONCLUSION AND PRAYER FOR RELIEF

For all of the foregoing reasons, the Court should deny the Petition for Review.

Respectfully submitted,

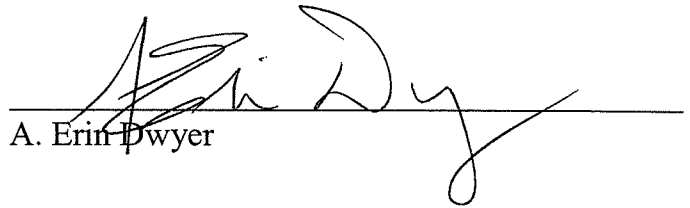
By: 
A. Erin Dwyer,
Texas Bar No. 06302700
Dennis M. Lynch,
Texas Bar No. 90001506

FIGARI & DAVENPORT, L.L.P.
901 Main Street
Suite 3400
Dallas, TX 75202-3796
(214) 939-2000
Facsimile: (214) 939-2090

ATTORNEYS FOR RESPONENTS
MARKET/ROSS LTD. and WILLIAM H.
NABORS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to Petition for Review has been forwarded by certified mail, return receipt requested, to counsel for Petitioners, Mr. Tom Thomas, Thomas & Blackwood, L.L.P., 5910 N. Central Expressway, Suite 275, Dallas, TX 75206, on this 8th day of April 2009.


A. Erin Dwyer