No. 21-1234

In the Supreme Court of the United States

JOSE DOMINGUEZ,

Petitioner,

v.

AMERICAN EXPRESS NATIONAL BANK
(FORMERLY AMERICAN EXPRESS BANK, FSB),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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MARCH 4, 2022
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QUESTIONS PRESENTED

American Express solicits small businesses and issues "business cards" in order to avoid compliance with and evade consumer credit protection laws. The cards are issued by American Express based upon signed and approved applications, that are not kept, nor is a personal guaranty obtained from the applicant, but instead, relies on ambiguous boilerplate agreements in its attempt to hold the applicant liable for the debts of the business and avoid the requirements of the statute of frauds. Furthermore, American Express uses peremptory challenges in order to violate a defendant's constitutional rights.

The Questions Presented Are:

1. Did the trial court err in holding an owner of a corporation liable for the debts of the third person?

2. Did the trial court violate petitioner's constitutional rights by not allowing petitioner to raise a Batson challenge?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Jose Dominguez, is a natural person who acted as an agent on behalf of two businesses, a corporation and a limited liability company that were disclosed on the credit application for the businesses; American Express was aware of the separate legal persons and did not bring them into the lawsuit.

LIST OF PROCEEDINGS

Supreme Court of Texas

No. No. 20-0928

Jose Dominguez, *Appellant*, v. American Express Bank, FSB, *Appellee*

Order Denying Petition for Review: June 18, 2021

Motion for Rehearing Denied: October 8, 2021

Fourteenth Court of Appeals, Houston Texas

No. 14-17-0017-CV

Jose Dominguez, *Appellant*, v.
American Express Bank, FSB, *Appellee*

Final Opinion: May 29, 2020

434th Judicial District Court,
Fort Bend County, Texas

No. 12-DCV-202842

American Express, FSB, *Plaintiff*, v.
Jose Dominguez, *Defendant*

Final Judgment: February 2, 2017

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Dominguez requests that this court issue writ of certiorari and reverse and remand the decisions below.

OPINIONS BELOW

Jose Dominguez, *Appellant* v. American Express Bank, FSB, *Appellee*, No. 20-0928, Supreme Court of Texas. Order denying petition for Review. App.1a.

Jose Dominguez, *Appellant* v. American Express Bank, FSB, *Appellee*, No. 14-17-0017-CV, Fourteenth Court of Appeals, Houston Texas. Memorandum Opinion and Judgment issued May 29, 2020. App.12a.

American Express, FSB, *Plaintiff* v. Jose Dominguez, *Defendant*, No. 12-DCV-202842, 434th Judicial District Court, Fort Bend County, Texas. Judgment entered February 2, 2017. App.13a.

American Express, FSB, *Plaintiff* v. Jose Dominguez, *Defendant*, No. 12-DCV-202842, 434th Judicial District Court, Fort Bend County, Texas. Judgment signed on October 24, 2015. App.18a.. Motion for new trial granted November 16, 2015. App.16a.

JURISDICTION

Petitioner's Motion for Rehearing was denied by the Supreme Court of Texas on October 8, 2021 on case No. 20-0928, *Jose Dominguez v. American Express Bank, FSB*. Petitioner's application for extension of time within to file a petition for a writ of certiorari was granted on Application No. 21A301, extending the time to and including March 7, 2022. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1
Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Fin. Code § 301.002–Definitions

(2) "Credit card transaction" means a transaction for personal, family, or household use in which a credit card, plate, coupon book, or credit card cash advance check may be used or is used to debit an open-end account in connection with:

(A) a purchase or lease of goods or services; or

(B) a loan of money.

(9) "Lender credit card agreement":

(A) means an agreement between a creditor and an obligor that provides that:

(i) the obligor, by means of a credit card transaction for personal, family, or household use, may:

(a) obtain loans from the creditor directly or through other participating persons; and

(b) lease or purchase goods or services from more than one participating lessor or seller who honors the creditor's credit card;

(ii) the creditor or another person acting in cooperation with the creditor is to reimburse the participating persons, lessors, or sellers for the loans or the goods or services purchased or leased;

(C) does not include:

(i) an agreement, including an open-end account credit agreement, between a

seller and a buyer or between a lessor and a lessee; or

(ii) an agreement under which:

(a) the entire balance is due in full each month; and

(b) no interest is charged if the obligor pays the entire balance each month.

Tex. R. Civ. P. 31
Surety not to be sued alone

No surety shall be sued unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in cases otherwise provided for in the law and these rules.

Utah Code § 25-5-4
Certain agreements void unless written and signed

(1)The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(b) every promise to answer for the debt, default, or miscarriage of another;

(f) every credit agreement.

STATEMENT OF THE CASE

American Express intended to bind Dominguez personally for his companies' charge card liability by suing him individually. American Express asserted breach-of-contract claims against him based on his alleged breach of two business agreements Dominguez allegedly entered into pertaining to business charge cards Dominguez applied for on behalf of a Texas Limited Liability Company and an out-of-jurisdiction Wyoming Corporation formed in 1999 (herein, the Third Person Corporations). During 2004, American Express sent the Third Person Corporations business charge card applications soliciting their use of a business card. Dominguez stated that he applied on behalf of the Third Person Corporations. When the Third Person Corporations failed to make a payment during 2012, on the combined balance on two statements, totaling $89,072.10, American Express sued Dominguez individually; American Express did not bring into the suit the Third Person Corporations. The case proceeded to a bench trial and the Honorable James H. Shoemake rendered judgment in favor of Dominguez, and signed the Final Judgment entered by Dominguez. App.18a. Dominguez had entered a Final Judgment since his second attorney of record had refused to enter the Final Judgment due to a $2,000 billing dispute; his attorney subsequently entered a second motion to withdraw; the record does not reflect that the court granted the motion before the hearing on the plaintiff's premature motion for a new trial. His attorney's first motion to withdraw had been in the middle of the bench trial, which Dominguez duly objected and the

court sustained. As it turns out, the Final Judgment that Dominguez entered contained a clerical error; the judge refused to correct the error and granted a new trial. App.16a. The case proceeded to a jury trial after a couple of more motions for summary judgment by the plaintiff had been denied. At the jury trial the jury found in favor of American Express on its breach-of-contract claim. The trial court rendered judgment on the jury verdict ordering that American Express recover $87,512.10, plus costs of court against Dominguez. App.13a. Dominguez had filed an affidavit that he was not personally liable for the debts of the Third Person Corporations and stated at the trial that he had applied on behalf of the Third Person Corporations in his capacity as an authorized officer. On December 18, 2018, prior to submitting the brief on the appeal, the court found Dominguez indigent and he proceeded pro se; American Express had already attempted to raid his bank accounts and had ruined his credit score by entering derogatory comments on his *consumer* credit report, resulting in Dominguez not being able to borrow money to obtain further legal representation.

REASONS FOR GRANTING THE PETITION

This case is about the high-handed, sloppy, deceitful, and fraudulent tactics American Express uses to attempt to hold consumers and business owners individually liable for the debts of another person and avoid federal consumer protection laws and deny citizens the equal protection laws afforded under the XIV Amendment of the Constitution. American Express issues business charge cards to small businesses with

a "business purpose" clause in order to bypass the consumer credit card protection laws; by specifying the "business purpose" American Express attempts to shield itself from being held accountable if they engage in prohibited activities, such as denial of credit based upon race or national origin. Usually, owners of small businesses are consumers that apply on behalf of their small business entity and are the same legal person, that is, the owner and the small business entity are one-and-the-same legal person. Consumers usually apply for a credit card for family or personal use, however, by specifying only the "business purpose" on the boilerplate agreement, American Express excludes the "family or personal" use purpose of the credit transaction, thus, American Express attempts to shield itself from the requirements of the Truth in Lending Act, and other federal provisions meant to protect consumers, when they solicit, approve, and issue "business charge cards."

There's a fine line between a consumer credit card and the business charge cards issued by American Express; that fine line is usually not understood by consumers, small businesses and the courts. American Express does its best to blur that line and it crosses it in order to not have to comply with consumer protection laws. Furthermore, American Express uses the same ambiguous application and ambiguous boilerplate agreements in its attempt to hold an owner of a small corporation individually liable for the debts of the separate legal persons by including ambiguous and undefined terms on the agreements. As this case falls within the purview of the statute of frauds (it exceeds the $50,000 threshold) and American Express did not obtain a personal guaranty indicating that Dominguez

agreed to be personally liable for the debts of the Third Person Corporations, American Express is not entitled to judgment, as a matter of law. American Express can't have it both ways.

I. STANDARD OF REVIEW

The standard of review when the appellant challenges the legal sufficiency of the evidence supporting an adverse finding on which he did not have the burden of proof at trial, he must demonstrate that there is no evidence to support the adverse finding. *City of Keller v. Wislon*, 168 S.W.3d 802, 807-08 (Tex. 2005). Without any evidence the only simple-minded question put to the jury was:

> "Did American Express Bank, F.S.B., and Jose Dominguez enter into two agreements . . . ?" 4RR17.

The question itself does not address the actual parties that entered into the contract, the businesses. Nor does it address in what capacity Dominguez entered into the contracts. It does not mention that Dominguez entered into the contract *on behalf of* the businesses, a corporation and a Texas LLC.

A. Elements of a Breach of Contract Claim

The essential elements of a breach of contract claim: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; (4) damages sustained as a result of the breach. *Prime Products, Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.-Houston [1st Dist].

Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *See id.* To be enforceable, a contract must be sufficiently certain to enable a court to determine the rights and responsibilities of the parties. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) 2002, pet. denied).

B. No Signed Application Agreements

Dominguez alleged that he signed the application agreements on behalf of the Third Person Corporations as an authorized officer of the Third Person Corporations that applied for the business credit cards.

American Express did not produce the original signed application agreement using the excuse that the only keep them for 24 months.

> DOMINGUEZ: Is there an original signed credit card application?
>
> THE WITNESS: There might be.
>
> DOMINGUEZ: Thank you. But American Express has not produced it, correct?
>
> THE WITNESS: American Express has not produced it because we only maintain it for two years.

This excuse is indistinguishable from the excuse given in elementary school that "my dog ate my homework." Although the witness for American Express did not specify the regulation relied upon for keeping the

business credit card application for only two years, Code of Federal Regulation 12 C.F.R § 1002.12, Record Retention, specifies the retention period of 25 months for consumer credit applications in which there was an adverse action, defined "as a refusal to grant credit."

It is also important to note that by not keeping the signed applications, American Express also has an excuse for not proving that it complies with 15 U.S. Code § 1642-Issuance of credit cards, passed in 1970:

> "No credit card shall be issued except in response to a request or application therefore."

The signed application agreement is an integral part of the agreement, as stated by the witness for American Express:

> Q. (BY MR. DOMINGUEZ) Do you agree that these statements are for two-two companies, two business companies?
>
> A. (BY THE WITNESS) Now, I-I'll clarify again. I agree that these are for a business company. The agreements American Express produced are for small business. These-That's what these are.
>
> (RR Volume 3, page 17)
>
> Q. How–how do you know these are small businesses?
>
> A. Because I maintain these type of agreements. That's how I know.
>
> Q. Well, how do you define a small corporation?
>
> A. As I explained earlier, American Express has two types of companies. You can call your company whatever you want to call it, but

American Express only issues small-small business accounts and a large business account. That's what they issue. That's all they issue. They don't issue corporate cards for small business. That's all I'm trying to explain to you.

(RR Volume 3, page 18)

Q. (BY MR. DOMINGUEZ) Are you aware that the original credit card application is an agreement? It's also an agreement?

A. Restate you question again, please.

Q. The original application for credit is an agreement?

A. Not–

Q. Do you agree?

A. It's not an agreement until we accept it. We accept your application, and then we send you the card. And you—At the time when you use the card, then it becomes an agreement. When you use the card, it becomes an agreement.

(RR Volume 3, page 19)

The pre-printed boilerplate agreement provided that Utah law would govern all questions about legality, enforceability and interpretation. However, Utah law was not plead or proven, and the trial court did not take notice of Utah law. Nevertheless, if we consider Utah law, whether a contract has been formed is ultimately a conclusion of law. *Terry v. Retirement Bd.*, 157 P.3d 362, 364 (Utah App. 2007). Whether an ambiguity exists in a contract is a question of law. *The*

Cantamar, L.L.C. v. Champagne, 142 P.3d 140. 151 (Utah App. 2006). The Utah Statute of Frauds also states "for purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application." Utah Code Sec. 25-5-4(2)(b)(ii)

The witness for American Express stated that American Express issued a credit card to the Third Person Corporations:

> THE WITNESS: "Well, we issued it to his business. It's a small business but not a corporation." RR 0224 85

Obviously, the witness for American Express thinks that a small business can't be a corporation or a limited liability company. However, subsequently he admitted that the company name on one of the business cards was SVIDEOCOM, Inc. The name on the other card, as evidenced by the cards submitted and accepted as evidence, was SVIDEO COM LLC.

Texas Finance Code § 301.002(9)(A)(i), defines a "lender credit card agreement" as an agreement between a creditor and obligor, by which the obligor, by means of a credit card transaction obtains loans for personal, family, or household use. In addition, Texas Finance Code § 301.002(9)(C)(ii)(a) states that a "lender credit card agreement" does not include an agreement under which the entire balance is due in full each month, such as the business charge cards issued by American Express. This distinction is important to notice, since the business charge cards that American Express issues are not "lender credit cards" issued to consumers, but are business charge cards issued to

businesses. The business charge card model of American Express is based on issuing business charge cards to effectively evade the consumer credit card laws. They take it a step further, however, when they rely on court cases related to consumer credit cards, not just to confuse everyone, but to evade the statute of fraud requirements that a person is not liable for the debts of a third person without a signed, written agreement or personal guaranty.

Aside from their "dog ate their homework" excuse, the other reason that American Express does not produce the signed application agreement is because it also contains ambiguous terms and does not bind the applicant personally. *See In re Gonzalez* No. 4:07-bk-02459-JMM United States Bankruptcy Court, D. Arizona. In *Gonzalez* the signed application agreement did not bind Mr. Gonzalez personally to his corporation's debts; it contained no legally binding agreement as to Mr. Gonzalez, such as "I personally guaranty these debts," or "I agree to pay the debts of the corporation if it fails to do so." American Express had the burden to produce the original, or copy, of the signed application agreement. American Express did not do so, as such, Dominguez is not liable for the debts of the third persons, as a matter of law.

C. Ambiguous Terms on Boilerplate Agreements

The pre-printed boilerplate business credit card agreements introduced as evidence also do not bind Dominguez to the Third Person Corporations' debts. Neither he nor the corporations ever signed such pre-printed forms. However, the corporations' acceptance and use of the credit card would bind the corporations

to honor their promises to repay such debts. Ambiguous and inconspicuous terms are everywhere on the agreement. For instance, the witness for American Express was asked by their own attorney to explain "Basic Cardmember":

> Q. Would you read the part about "Basic Cardmember"?
>
> A. Okay. It says: "We, us, and our mean the issuer shown on Page 1 of Part 1. Except as provided below, Basic Cardmember means the person who applied for the account or to whom we address billing statement."
>
> Q. Okay. I'm going to stop you there and ask you if you will *flip back* to Page 1. Who would be the basic Cardmember on this agreement?
>
> A. The basic Cardmember in this case is Mr. Jose Dominguez.
>
> Q. Thank you. Now, I want you to pick back up in that same place where it says "Company."
>
> A. Okay. "Basic Cardmember" means the person who applied for the account or to whom we address the billing address. "Company" means the basic [sic] for which the account is established. "You" and "your" mean the basic Cardmember and the Company. You agree jointly and severally to be bound by the terms of this agreement.

Even the attorney for American Express relies on back-flipping circus act tricks in order to attempt to bind Dominguez to the boilerplate agreement, or did you miss the wedding? The boilerplate agreement does not even list the parties! Are Dominguez and the

Company the same person? No, of course not, Dominguez is a natural person and the companies, in this case, are legal persons that require a natural person to act on their behalf. Dominguez testified that he applied on their behalf and would never have signed the application agreement agreeing to be personally responsible for the debts of the corporation. He never intended to be bound by the terms of the boilerplate agreement. The word "you" on the boilerplate agreement is clearly ambiguous. At the bench trial the judge stated:

> "Well, you've shown me Page 1 of 10, where it says, You promise to pay all charges. Okay? It just doesn't define you. Tell me where it defines you as this man." RR (01 of 03), Page 16

The witness for American Express simply fails to understand, or does not want to admit, that the persons who entered into the credit card agreement were the corporation and the limited liability company. American Express simply uses an agreement that encompasses all types of small businesses, such as sole-proprietors doing business under their own name, sole-proprietors and partnerships doing business under a fictitious name, and small business corporations and limited liability companies. As clearly stated by Judge Shoemake at the bench trial:

> "I haven't seen anything here that tells me who it was issued to. I see the reference to the word you. And because corporations are people, in law, I don't know if that means this man back here or that means a corporation, I don't know that." RR (01 of 03) FLD 091318, Page 18

In addition, during the bench trial the judge stated:

> THE COURT: " . . . Mr. Mendez gave all the testimony he could give with the records he had. He had nothing in my mind that tied Mr. Dominguez individually to liability on this card. I assume that was on the original application. I assume it was something that I just haven't seen yet. The pronoun you can be applied to a corporation; to an individual, you know, that's–it's just sloppy." RR (01 of 03) FLD 091318, Page 26

It is clear that the person who applied for the accounts were the Third Person Corporations; Dominguez applied on behalf of the legal persons that require a natural person to act on their behalf.

As simply stated by the Arizona court:

> "If American Express intended to bind Mr. Gonzalez personally, by the use of the simple word "you" under his signature, that effort was deceptive and failed such purpose." *See In re Gonzalez* 410 B.R. 868 (Bankr. D. Ariz. 2009)

"[T]he language of an ambiguous instrument should be construed most strictly against the party who drafted the instrument." *Matter of Orris' Estate*, 622 P.2d 337, 339 (Utah 1980). The language does not clearly make Dominguez personally liable for payment of charges because the terms "jointly and individually liable" conflict with the language of the application, which is devoid of any legally binding agreement as to Dominguez, such as "I personally guaranty this debt," or "I agree to pay the debts of the

corporation if it fails to do so." As the "Basic Cardmember" who authorized the card on behalf of the corporation, Dominguez is the business contact and in that sense is the "responsible" party but that does not make him liable for the debts of the Third Persons. Neither is there evidence in the language of the boilerplate agreement that a Basic Cardmember can also be an Additional Cardmember. In fact, the boilerplate agreement states, that the cards of Additional Cardmembers are authorized by, and may be canceled by, the Basic Cardmember, which language implies that the Basic and Additional Cardmembers are different persons.

The arguments by American Express can be can be summarized by the following Socratic syllogism:

> Persons enter into Credit Card Agreements.
> Dominguez is a person.
> Therefore, Dominguez is liable.

D. False Statements by American Express

Dominguez entered an affidavit that the claim against him is not true and that proof of claim against him had not been given; that is, he was not responsible for the debt of the Third Person Corporations. *See* Affidavit at App.24a.

Dominguez testified under oath that he had submitted the affidavit and he would never have agreed to be personally liable for the debts of the Third Person Corporations. Although Dominguez entered the affidavit, as required by Tex. R. Civ. Pro. 93(2), and American Express knew about the affidavit, American Express *falsely* claimed the following on the their brief, dated

December 27, 2018, to the 14th Court of Appeals (14th COA):

> "However, the Appellant never plead that he is not personally liable. Under the Texas Rules of Civil Procedure, certain pleas are required to be stated and verified by affidavit, one of which is an allegation that the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is being sued. Tex. R. Civ. Pro. 93(2). Appellant never filed a verified Answer claiming that he is not liable in his individual capacity. The Supreme Court of Texas has also held that a Defendant could be held liable in his individual capacity (along with the Defendant's corporation), if there is evidence to support such a judgment. *W.O.S. Const. Co., Inc. v. Hanyard*, 684 S.W.2d 675, 676 (Tex. 1985)."

It is important to note the reference to *Hanyard* is not on point; in that case, Hanyard was held liable because he executed the contract before his corporation was formed, as stated on the case:

> "Hanyard did not file a verified denial, contending that he was not liable in the capacity in which he was sued. Therefore, Hanyard could properly be held liable in either his individual or corporate capacity. There is evidence to support a judgment against Hanyard individually because he executed the contract in question before Bernard Hanyard Enterprises, Inc. was formed. *Bibbee v. Root Glass Co.*, 128 Tex. 220, 96 S.W.2d 975 (1936); *Weatherford,*

> *M.W. N.W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S.W. 795 (1894). We hold that the court of appeals erred in holding that Hanyard was not individually liable."

In this case, Dominguez did file a verified denial contending that he was not liable in the capacity in which he was sued; Dominguez cannot be held liable under his individual capacity.

E. No Personal Guaranty

American Express did not introduce or require a personal guaranty contract in which Dominguez agreed to be personally liable for the debts of the Third Persons.

American Express apparently knew at one time that in order to hold an owner of a corporation personally liable for the debts of the corporation *on a credit card account*, it knows to obtain a personal guaranty. *See American Express Co. v. Koerner,* 452 U.S. 233, 237, 101 S.Ct. 2281, 2284, 68 L.Ed.2d 803 (1981), John E. Koerner & Co., Inc. (the corporation) applied for a business credit card to be used by officer Louis Koerner. Mr. Koerner was required to sign a "company account" form by which he agreed to be jointly and severally liable with the corporation for all charges incurred through the use of the company card issued to him. *Id.*, 452 U.S. at 237, 101 S.Ct. at 2284.

In *Koerner,* American Express billed the Koerner Company for all charges arising from the use of the cards issued for the company account, as in this case, where American Express also billed the owner's two companies and the companies paid the charges, over $2.5 million over an eight year period.

However, in this case American Express did not produce a personal guaranty because in their multi-universe fantasy land:

> THE WITNESS: "There's no such thing as a personal guarantee with American Express." RR (03 of 24) FLD 040218 Feb 1 2017 Page 26)
>
> THE COURT: Hold on just a second. Both of you stop. Personal guaranty. "Is there–Is there a personal guaranty? Do you know what a personal guaranty is?" That's what the question is.
>
> THE WITNESS: Yes, I do, your Honor. I know what a personal guaranty is, and there is no such thing as a personal guaranty in this particular issue.
>
> RR (03 of 24) FLD 040218 Feb 1 2017 Page 27)

F. Bait-and-Switch

Although the boilerplate agreement is clearly ambiguous, the 14th Court of Appeals (14th COA) confoundedly sides with American Express on their opinion and discredits the argument that American Express effectively attempted to hold Dominguez liable as surety:

> "Under the unambiguous language of each of the Cardmember Agreements admitted into evidence at trial, "You" is defined to mean both Dominguez and his respective company, and in each agreement Dominguez and the company "agree[d], jointly and severally, to be bound by the terms of this Agreement." In

> this context, presuming, without deciding, that Dominguez served as a surety for each company under the contract, Dominguez bore the burden of pleading his rights as a surety under Rule 31 and of bringing the companies into this case as parties. *See Reed v. Buck*, 370 S.W.2d 867, 872 (Tex. 1963); *Smith v. West Texas Hosp., Inc.*, 487 S.W.2d 143, 145 (Tex. Civ. App.–Amarillo 1972, no writ). Dominguez did not do so."

Aside from the circus act and wedding they would have had to sit through to arrive at this presumption, the fine justices of the 14th COA were clearly biased: they basically argued for American Express by bringing up cases not even mentioned in the plaintiff's brief, but even worse, the cases are hardly on point and illustrate a fundamental misunderstanding of agency law and misapplication of their own Texas Rules.

In *Reed v. Buck* the court describes the essence of Rule 31:

> "From a procedural standpoint, the rule is highly practical which permits a note creditor to sue a debtor in the contractual capacity which the debtor assumed at the time the obligation was made."

In *Reed v. Buck*, Glen Shine and T. W. Buck (both debtors) executed a promissory note in the capacity of co-makers to the payee, J.H. (Dude) Stelfox, (a note-creditor) who subsequently assigned the note to H. M. Reed. The trial court ruled in favor of Buck and the Supreme Court of Texas reversed. Buck's liability arose from the fact he was a co-maker on the note, as distinguished from an endorser or one signing in some

other capacity, such as in this case, where Dominguez signed as an agent on behalf of the Third Person Corporations. Buck's argument that he was surety for Shine failed, not because he was a surety, which he was not, but because he was a principal co-maker on the note and, Reed, the assigned payee and plaintiff, need not need to bring in Shine, the other defendant and co-maker, into the suit. *See* the reference to *Ritter v. Hamilton*, (1894) 4 Tex. 325 in *Reed v. Buck*.

In this case, Dominguez was not a principal but an agent of the corporations (debtors) that were disclosed and known to American Express from the very beginning. Had Dominguez acted as an agent of a principal-debtor that was *undisclosed* to the plaintiff, then Dominguez could have been held liable for the debts of the undisclosed principal-debtor by that fact alone, and had he plead as surety he would have also failed, regardless if he had brought in the actual principal to the case or not. The 14th COA simply misapplies Rule 31 rear-backwards in order to keep Dominguez on the hook.

Now lets examine the other off-mark case referenced by the 14th COA, *Smith v. West Texas Hosp., Inc.*, Smith *signed* a contract that had the terms "I, WE, EITHER of us promise to pay" and the patient, Arroyo, did not sign the contract. The hospital treated Arroyo and sued Smith individually. Smith, the defendant, also tried to argue that he was being held as surety, though he was, in fact, a principal maker (and thus debtor) on the contract. In *Smith*, the court references older, established cases that had never been overruled:

> In *Head v. Cleburne Building and Loan Ass'n.*, Tex. Civ. App. (1893) 25 S.W. 810, no wr. hist.,

the Court said:

> 'The obligation being joint and several, it is well settled that defendants cannot plead that they are sureties, for the purpose of avoiding suit without their co-obligor Pearson being joined. To the plaintiff, they are all principals. *Ritter v. Hamilton*, [1849] 4 Tex. 325; *Lewis v. Riggs*, 9 Tex. (164) 165; *McDonald v. Holt*, 1 White W. Civ. Cas. Ct. App. 1014; *Ennis v. Crump*, 6 Tex. 85.'

To begin with, Smith was found liable, not because he did not meet or had any "burden" to bring in Arroyo, the co-obligor, into the suit in order for him to plead his "rights as surety," but, because he was a principal-debtor maker on the contract. The 14th COA simply confused the argument by Dominguez that American Express was trying to effectively hold him liable as surety; Dominguez was never a surety; nor plead as such. He certainly was not an agent of an undisclosed principal–the principal corporations were known to American Express from the very beginning: from the initial signed application agreement, that they approved based on the credit reports of the companies, through the jury trial. American Express' attempt to effectively hold the agent liable as surety for the debts of the known principals is as if American Express "did not know" about the principals, who are separate legal persons. As stated above, American Express knew about the corporations from the start, from their initial mailing, review, and approval of the applications through the issuance of the cards embossed with the corporations' names.

If American Express wanted to recover from the principal corporations, *they* needed to have brought in

the principals, as required by Rule 31; American Express did not do so. The presumptuous argument by the 14th COA that Dominguez bore the burden to bring in the principals into the lawsuit stinks as much as a red herring presented to the Foxhounds to throw off their scent before the chase.

G. A Corporation is a Separate Legal Person

American Express would like to have every person who applies for a business charge card to be "jointly and severally liable" because they include these terms on their boilerplate agreement, which are so ambiguous they require you to sit through a circus act and a wedding to try to make some sense.

American Express also uses the inconspicuous term "business purpose" in the boilerplate agreements in order to avoid and evade consumer protection laws. The majority of small businesses in this country are persons who are doing business under their own name, or under a fictitious name, commonly referred to as a DBA, for the term "doing business as." The application agreement, as stated by the witness for American Express includes various boxes that an applicant needs to check off to identify the type of business:

Q. (BY MR. DOMINGUEZ) Mr. Carey, you testified that we have a corporation, one for like a little bit over $5,000? Or an agreement, whatever.

A. Correct.

Q. And the other one for like $82,000?

A. Correct. And I said, "Business."

Q. That's the American Express definition, again, of how you define a corporation. Mr. Carey, when somebody applies for a business credit card, are you aware that there's like four, five different boxes that are checked off?

A. Sure.

Q. One box is called D/B/A, Doing Business As; and you can put your name there. I'm doing business as, as an example, Jose Dominguez Gardening Service, okay. There's another box that's checked off that says "Partner." Are you a partner, and then you–and then you write down which partnership you are. And then there's another box called Corporation; and within that Corporation, there's a whole bunch of boxes: Profit, Nonprofit, Large, Small."

Are you aware of the–Are you familiar with the credit card application?

A. I am.

Q. Okay, And those credit card applications have different types of boxes that you can check to determine the type of corporation or the type of credit card.

(RR Volume 3 2-1-17 Afternoon, page 33)

American Express knew from the beginning that it was a corporation and a limited liability company that applied for the business cards. However, in their fantasy land, they do not distinguish between a small business doing business as a DBA and a small corporation.

H. No Meeting of the Minds

The evidence presented established that Mr. Dominguez signed the business credit card application on behalf of the corporation, that he did not intend to bind himself personally, and that his use of the card was entirely for corporation purchases, although he did admit to occasional use of the card for personal purposes, which were authorized by, and paid for, by the corporation. The Agreement also states that it is for a "business" credit card. Mr. Dominguez' testimony and the evidence therefore established that, while there was a meeting of the minds as to the liability of the corporation, there was no meeting of the minds concerning his personal liability for the charges on the business cards. *Crismon v. Western Co. of North America*, 742 P.2d 1219,1221-22 (Utah App.1987); *Oberhansly v. Earle*, 572 P.2d 1384, 1386 (Utah 1977) (meeting of minds required).

American Express argued that Utah law applied in this case. Utah contract law strictly requires evidence of intent, such as a signed personal guaranty, in order to be bound to another's debt. *See Cessna Finance Corp. v. Meyer*, 575 P.2d 1048, 1050-51 (Utah 1978); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 7 (1996) ("The requisites of contract formation apply generally to formation of a contract creating a secondary obligation."). This requirement is all the more salient considering that officers generally are not held personally liable for a corporation's debts. *Reedeker v. Salisbury*, 952 P.2d 577, 581-82 (Utah App.1998). In particular, Utah's Revised Limited Liability Company Act generally provides that no member of an LLC is personally liable for a debt, obligation or liability of

the company. Utah Code § 48-2c-601. An officer's personal liability can be based on known waiver or a written guaranty of the corporate debt, which does not exist on this case.

I. Factually Distinguishable Cases

The cases cited by American Express in their brief are factually distinguishable because they do not involve a corporate credit card or signed application, so there was no issue over who the liable party was. For example, in *Jones v. Citibank, (S.D.) N.A.,* 235 S.W.3d 333, 338 (Tex. App. 2007), no pet. and *Winchek v American Ex. Travel Related*, 232 S.W.3d 197 (Tex. App., 2007) both Jones and Winchek were appellant-debtors that opened a "personal account," that is, consumer credit card. In *Winchek*, the court held that the debtor's conduct in using the card and making payments on the account manifested her intent that the contract become effective in the breach-of-contract action. *Winchek* is distinguishable from this case in that Winchek was for a consumer "personal account" credit card and Winchek, the debtor, made payments on the account.

Under federal law, the term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. *See* 15 U.S.C. Section 1602(e). The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes. *See* 15 U.S.C. Section 1602(i) and Section 103(h) of the Truth in Lending

Act. Regarding the credit card provisions of the Truth in Lending Act, the Supreme court stated in *American Express v. Koerner*:

> "We hold that for a credit card issuer to hold an individual jointly and severally liable with his employer, the issuer must comply with the requirements of § 1666. We base our holding primarily on a principle almost as old as flour: You cannot have your cake and eat it too."

American Express's entire case is based upon holding a natural person-the agent/owner of the separate legal businesses–liable as if this case was a typical consumer credit card case and not a business card of a corporation or Texas LLC.

J. Beam Me Up Scotty, No Fraud Here

The ninth issue brought up by Dominguez on his brief, that there is no evidence of personal liability, is grouped by the 14th COA along with issues ten through twenty-seven and dismissed because "we cannot conclude that Dominguez adequately briefed the ninth through twenty-seven issues."

Dominguez begs to differ regarding the ninth issue and would like the court to consider the fact that Dominguez did bring up the case, referenced applicable Texas Rules of Civil Procedure 185, and succinctly summarized the issues of the case for which the appellee on that case lost and that the appellee did not plead alter-ego, fraud or piercing the corporate veil. *See Daniels v. Lavery*, No. 05-06-00216-CV, Court of Appeals of Texas, Fifth District, Dallas (2007). In *Daniels,* the court concluded that the evidence in the

record is legally insufficient to support the trial court's judgment that Daniels is personally liable on the sworn account debt alleged by Lavery. Lavery testified that Daniels was representing a third person and was not directing the transaction "personally." This case is similar in that Dominguez was representing the Third Person Corporations who made purchases with their credit card and title passed to the third persons. American Express knew from the beginning that Dominguez was acting in the capacity of an agent, though during the trial they attempted to evade this fact with their statement that "the small business was not a corporation." American Express should know better and trying to act otherwise can only be considered deceitful.

K. Violation of Constitutional Rights

It must be noted that on this case there was no Batson challenge that was allowed to be timely made; the trial court simply did not let the parties see the peremptory charges and rushed to empanel the petit jury after the peremptory strikes were submitted to the clerk. Dominguez complained in his brief to the 14th COA that trail court did not allow him to preserve error regarding the peremptory challenges, in which American Express's use of its peremptory challenges during jury selection violated Dominguez's constitutional rights. The 14th COA simply overruled his complaint with the statement " . . . but the record does not support this proposition." However, the 14th COA makes this statement in a conclusory manner and makes no reference to the record. In fact, the reporter's record does not have any time stamps for which the 14th COA could have reached this conclusion in support of this statement on their opinion.

However, the record does show that Dominguez objected to the three challenges for cause, one of them being upon a Hispanic venire member, and the court overruled American Express's three challenges for cause. Then, immediately, the judge told the attorney for American Express, "[y]ou have your peremptories,"– effectively giving him a wink that he can try again later. The judge then went on a five minute tirade directed towards Dominguez about parties, balloons and envelopes, giving American Express time to use one of their peremptories against one venire member, who's challenge for cause had been overruled, and to select other five venire members for the remaining peremptory challenges. Afterwards, the judge told both parties to turn in their peremptory challenges to the clerk, the clerk made the list of the petit jurors, the bailiff read the names and the judge immediately had the petit jury sworn and empanelled.

Batson v Kentucky was about the blatant discrimination based on race in the making of peremptory challenges of the Black venirmembers. In this case the ethnicity of the veniremembers was used as the basis of the peremptory strikes and the record shows that the peremptory challenges were not disclosed to the defendant; after the jury panel was called back in, the names were read; the jury panel sworn and the remainder venire dismissed. 2RR 44; 2RR45.

The peremptory challenges made by American Express violated the Dominguez's constitutional rights to a fair trial. In *Edmonson v. Leesville Concrete Co.,* the U.S. Supreme Court held that race-based exclusion of jurors in civil trials denies them their equal protection rights under the U.S. Constitution. *Batson v. Kentucky* and its progeny have extended the protection in cases

in which the race or ethnicity of a party's key witness differs from the racial or ethnic composition of the Jury because it may affect credibility determinations.

In this case the American Express used its six peremptory challenges to strike all of the Hispanic members of the jury panel within the strike zone. As per *Gambel v. State*:

> "To establish a prima facie case of purposeful discrimination in selection of the jury, the U.S. Supreme Court has stated: that the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove the venire members of the defendant's race. These fact and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."

II. THIS ISSUE IS OF GREAT LEGAL/NATIONAL SIGNIFICANCE

The significance of this case goes beyond the scope of this case. This Court should not continue to allow credit card companies to deceitfully use the "business purpose" exemption to violate the statutory protections afforded to consumers, who, as consumers and owners of small companies apply for a credit or charge card for their small business. As for owners of small corporations and limited liability companies, as in this case, credit card companies should not be allowed to continue to consider themselves exempt from obtaining a personal guaranty, or from keeping the approved and signed credit applications in order to bypass the

requirements of the statute of frauds. The current practices of credit card companies does not provide owners of small companies with the proper cost of interest disclosures and allows credit card companies to use strong-arm tactics to harass, intimidate, threaten, and enter derogatory comments on the applicant's consumer credit report, among other prohibited activities.

III. SUMMARY

In summary, this case is about American Express wanting Dominguez to stand in the Corporation's shoes, and as The Honorable James H. Shoemake put it, "it's just sloppy."

But it's one thing to be sloppy in elementary school and use excuses like, "my dog ate my homework," and another to deceive a court of law. A close inspection of the record will show that American Express uses deceitful practices. Those practices range from using documents from a California notary to notarize the signatures from employees in Utah, Florida, and Arizona; using unscrupulous collection practices, including non-stop calls and putative death threats; using ambiguous agreements to bypass consumer protection laws; giving false statements under oath, such as "a small business is not a corporation" to deceive the jury; to violating the defendant's equal protection rights under the XIV Amendment of the Constitution of the United States of America.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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