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OPINIONS AND ORDERS

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ORDER OF THE TEXAS SUPREME COURT DENYING PETITION FOR REVIEW (JUNE 18, 2021)

SUPREME COURT OF TEXAS

DOMINGUEZ

v.

AM. EXPRESS BANK FSB

Re: Case No. 20-0928

COA #: 14-17-00157-CV

TC#: 12-DCV-202842

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Mr. Christopher A. Prine (14th COA)
Clerk, Fourteenth Court of Appeals
Harris County 1910 Courthouse,
301 Fannin Suite 245
Houston, TX 77002
* Delivered via E-mail *

MEMORANDUM OPINION OF THE FOURTEENTH COURT OF APPEALS (MAY 29, 2020)

IN THE FOURTEENTH COURT OF APPEALS

JOSE DOMINGUEZ,

Appellant,

v.

AMERICAN EXPRESS BANK, FSB,

Appellee.

No. 14-17-00157-CV

On Appeal from the 434th Judicial District Court
Fort Bend County, Texas Trial Court
Cause No. 12-DCV-202842

Before: Kem Thompson FROST, Chief Justice.,
SPAIN and POISSANT, Justices.

MEMORANDUM OPINION

Appellant/defendant Jose Dominguez appeals a final judgment in favor of appellee/plaintiff American Express Bank, FSB on its breach-of-contract claims based on Dominguez's failure to comply with agreements pertaining to credit cards that Dominguez obtained for his two businesses. We affirm.

I. Factual and Procedural Background

American Express sued Dominguez individually, asserting breach-of-contract claims against him based on his alleged breach of two Cardmember Agreements Dominguez allegedly entered into pertaining to credit cards Dominguez obtained for two of his businesses. The case proceeded to a bench trial, after which the trial court rendered judgment in favor of Dominguez. After the trial court granted American Express's timely motion for new trial and vacated the judgment, the case proceeded to a jury trial. The jury found in favor of American Express on its breach-of-contract claims. The trial court rendered judgment on the jury verdict ordering that American Express recover $87,512.10, plus costs of court against Dominguez.

II. Issues and Analysis

A. Subject-Matter Jurisdiction

On appeal, Dominguez, representing himself, asserts under his first issue that the trial court lacked subject-matter jurisdiction over this case because (1) a federal district court would have diversity jurisdiction over the claims by American Express (a Utah citizen) against Dominguez (a Texas citizen) under title 28, section 1332(a) of the United States Code; and (2) one of Dominguez's lawyers in the trial court and American Express's lawyer "appear to have acted in bad faith" to prevent Dominguez from timely removing this case to federal court. *See* 28 U.S.C. §§ 1332(a), 1446(c). Under his second issue, Dominguez claims American Express filed a frivolous response in this court to a motion in which Dominguez challenged the trial court's subject-matter jurisdiction, and

Dominguez asserts that this court should reconsider its denial of this motion.

We presume, without deciding and for argument's sake, that a federal district court would have diversity jurisdiction over this case and that the lawyers for both parties acted in bad faith to prevent Dominguez from trying to remove this case to federal court. Dominguez has cited no statute giving federal courts exclusive jurisdiction over the subject matter of this case. In this context, the ability of federal courts to exercise diversity jurisdiction over this case or any bad-faith action by these lawyers would not show that the trial court lacked subject-matter jurisdiction over this case. *See* Tex. Const. art. V, § 8; Tex. Gov't Code Ann. § 24.007. Dominguez does not claim that he ever attempted to remove this case to federal court. If, as Dominguez asserts, a federal district court would have jurisdiction over this case solely based on diversity jurisdiction, then regardless of any bad faith by the lawyers, Dominguez would not have been able to remove this case to federal court because Dominguez is citizen of the state in which American Express brought this suit. *See* 28 U.S.C. § 1441(b)(2). We conclude that the trial court had subject-matter jurisdiction, and we overrule Dominguez's first and second issues.

B. Third Issue

Under the third issue, Dominguez asserts that by not suing his two companies American Express "effectively held [Dominguez] as the surety of the businesses" and thus under Texas Rule of Civil Procedure 31, American Express may not sue Dominguez (the surety) unless American Express joins the

principals (the two companies) in the suit or already had a judgment against the principals before suing Dominguez. *See* Tex. R. Civ. P. 31 (stating that "[n]o 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"). 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.

Dominguez also asserts that one business was a corporation that he owned, and the other business was a limited liability company in which Dominguez was the sole member. Dominguez appears to assert that the trial court ignored the separate existence of each entity from him individually and improperly held Dominguez liable for the debts of each entity. The pleadings, jury charge, jury verdict, and judgment reflect that the trial court held Dominguez liable for his own breach of two contracts to which he was a party. The record does not reflect that the trial court held him liable for a corporate entity's debt because Dominguez was the owner or member of that entity.

Under his third issue, Dominguez appears to assert that (1) the trial court erred in granting American Express's motion for new trial; (2) American Express improperly based its jury argument on inapplicable laws; (3) American Express misled the jury during opening statement; and (4) American Express did not offer into evidence any credit reports on Dominguez. Dominguez does not discuss the standard of review for any of these challenges, nor does Dominguez discuss the grounds American Express asserted in its motion for new trial. Dominguez has not provided any argument, analysis, or citations to legal authority in support of any of these four assertions. Even construing Dominguez's opening brief liberally, we cannot conclude that Dominguez adequately briefed any of these points and so we find briefing waiver. *See* Tex. R. App. P. 38.1(i); *Marathon Petroleum Co. v. Cherry Moving Co.*, 550 S.W.3d 791, 798 (Tex. App.—Houston [14th Dist.] 2018, no pet.). We overrule the third issue.

C. Failure to Prove Dominguez's Credit-Card Applications

Under his fourth and fifth issues, Dominguez appears to assert that the trial evidence is legally insufficient to support the jury's verdict because American Express did not submit any evidence of either of Dominguez's original, signed credit-card applications (the "Applications") or the actual document containing the contract terms that Dominguez received when he obtained each credit card (the "Original Documents"). Each of the Cardmember Agreements contains a provision stating that "[w]hen you . . . use the Account (or sign or keep a card), you . . . agree to the terms of the [Cardmember Agreement]." American

Express relied on Dominguez's use of each credit-card account to prove Dominguez's agreement to the terms of each Cardmember Agreement. *See Arshad v. Am. Express Bank, FSB,* 580 S.W.3d 798, 804-05 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Ghia v. Am. Express Travel Related Services,* No. 14-06-00653-CV, 2007 WL 2990295, at *2-3 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, no pet.) (mem. op.). Proof of the Applications or the Original Documents is not an essential element of American Express's breach-of-contract claim, and American Express had no obligation to submit proof of the Applications or the Original Documents to prove its case. *See Arshad,* 580 S.W.3d at 804-05; *Ghia,* 2007 WL 2990295, at *2-3. The trial evidence is not legally insufficient due to a lack of proof of the Applications or the Original Documents. *See Arshad,* 580 S.W.3d at 804-05; *Ghia,* 2007 WL 2990295, at *2-3.

In the *Barajas* case on which Dominguez relies, the plaintiff did not submit any evidence that established the terms to which the parties agreed. *See Barajas v. Harvest Credit Management, VI-B, LLC,* No. 14-07-00048-CV, 2008 WL 4308334, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, no pet.) (mem. op.). In today's case, American Express did so. In *Barajas,* an appeal based on the granting of a motion for summary judgment, the plaintiff submitted no summary-judgment evidence about any transactions or cash advances associated with the credit-card account or any statements issued to the defendant. *See id.* The plaintiffs summary-judgment motion and evidence also presented conflicting statements regarding the basis for the alleged indebtedness. *See id.* The *Barajas* case is not on point.

Dominguez also makes several statements in which he appears to challenge the propriety of the jury charge. At the charge conference, Dominguez stated that he had no objections to the jury charge, and Dominguez did not preserve error as to any complaints as to the wording of the charge. *See Shell Oil Co. v. Chapman,* 682 S.W.2d 257, 259 (Tex. 1984). When a party fails to preserve this type of error in the trial court, the party waives that point. *See id.*

Dominguez further asserts that American Express's arguments and evidence at trial were inconsistent with its Original Petition and First Amended Original Petition. American Express went to trial on its Second Amended Original Petition, which superseded and supplanted all of American Express's prior pleadings. *See Amerigroup Texas, Inc. v. True View Surgery Ctr., L.P.,* 490 S.W.3d 562, 570 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Dominguez has not shown that the law required American Express's arguments and evidence at trial to be consistent with prior pleadings that had been superseded before trial.

Dominguez also appears to complain that American Express did not sue either of his companies and that the evidence is insufficient to hold him liable in his individual capacity. Dominguez has not provided any argument or analysis in support of either of these points. Even construing Dominguez's opening brief liberally, we cannot conclude that he adequately briefed either proposition, and so we find briefing waiver. *See* Tex. R. App. P. 38.1(i); *Marathon Petroleum Co.*, 550 S.W.3d at 798. We overrule the fourth and fifth issues.

D. Sixth Issue

Under his sixth issue Dominguez asserts that the trial court erred as a matter of law in holding him liable for the debts of his two companies, which are separate legal entities. As discussed above, the trial court held Dominguez liable for his own breach of two contracts to which he was a party, not for a breach by either company. Under the sixth issue Dominguez also asserts that (1) although the agreements had Utah choice-of-law provisions, American Express did not plead or prove Utah law; (2) American Express "hoodwinked" the jury into thinking that Dominguez was liable for the debts of his companies based on the Utah law governing consumer credit cards; (3) the monthly credit-card statements American Express submitted fail to comply with the Truth in Lending Act, such as the interest disclosures; and (4) the statute of frauds bars enforcement of the contracts on which American Express recovered judgment. Dominguez has not provided argument or analysis in support of any of these assertions, and even after giving Dominguez's opening brief a liberal construction, we cannot conclude that he adequately briefed any of these points. So, we find briefing waiver. *See* Tex. R. App. P. 38.1(i); *Marathon Petroleum,* 550 S.W.3d at 798. We overrule the sixth issue.

E. Preservation of Error as to the Seventh and Eighth Issues

Under his seventh issue, Dominguez asserts that the venire members were sworn on January 31, 2017, and told to return the following day. Dominguez complains that the trial court failed to give an instruction under Texas Rule of Civil Procedure 226a to the venire

members before dismissing them on this date. According to Dominguez, the trial court gave the instruction to the venire members on the following day, but the trial court should have given the instruction the day before. In his eighth issue, appellant complains that American Express's use of its peremptory challenges during jury selection violated Dominguez's constitutional rights. The record shows that Dominguez waived these complaints by failing to preserve error in the trial court as to either complaint. *See In re D.G.,* No. 06-1500025-CV, 2015 WL 6520251, at *10-11 (Tex. App.—Texarkana Oct. 28, 2015, no pet.) (waiver of a Rule 226a complaint by failing to preserve error in the trial court) (mem. op.); *Pierson v. Noon,* 814 S.W.2d 506, 507-08 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (waiver of *Batson* complaint by failure to timely assert it in the trial court); *see also Williams v. State,* 301 S.W.3d 675, 68788 (Tex. Crim. App. 2009) (waiver of *Batson* complaint by failure to obtain ruling on *Batson* objection). Dominguez suggests that the trial court did not allow him to preserve error as to any challenge he had to American Express's use of its peremptory challenges, but the record does not support this proposition. We overrule the seventh and eighth issues.

F. Remaining Issues

Under his ninth issue, Dominguez states in a conclusory manner that the record contains no evidence of his personal liability. Though he cites one case, Dominguez does not discuss the trial evidence or provide any argument or analysis in support of this proposition. Dominguez also lists issues ten through twenty-seven. In his opening brief, Dominguez does not provide any argument, analysis, or citations to

the record or legal authority in support of these issues. Even construing Dominguez's opening brief liberally, we cannot conclude that Dominguez adequately briefed the ninth through twenty-seventh issues. *See* Tex. R. App. P. 38.1(i); *Marathon Petroleum Co.*, 550 S.W.3d at 798; *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 337 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Based on this briefing waiver, we overrule each of these issues. *See Marathon Petroleum Co.*, 550 S.W.3d at 798; *San Saba Energy, L.P.*, 171 S.W.3d at 337.

Having overruled all of Dominguez's issues, we affirm the trial court's judgment.

/s/ Kern Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant.

JUDGMENT OF THE
FOURTEENTH COURT OF APPEALS
(MAY 29, 2020)

IN THE FOURTEENTH COURT OF APPEALS

JOSE DOMINGUEZ,

Appellant,

v.

AMERICAN EXPRESS BANK, FSB,

Appellee.

No. 14-17-00157-CV

Before: Kem Thompson FROST, Chief Justice.,
SPAIN and POISSANT, Justices.

This cause, an appeal from the judgment signed by the presiding judge of the district court below on March 1, 2017, was heard on the appellate record. We have inspected the record and find no error in the judgment. We order the judgment of the district court below AFFIRMED. We order appellant Jose Dominguez to pay all costs incurred in this appeal. We further order this decision certified below for observance.

Judgment Rendered May 29, 2020.

Panel Consists of Justices Chief Justice Frost and Justices Spain and Poissant.

Memorandum Opinion delivered by Chief Justice Frost

JUDGMENT OF THE DISTRICT COURT OF THE 434TH JUDICIAL DISTRICT, FORT BEND COUNTY, TEXAS (FEBRUARY 2, 2017)

IN THE DISTRICT COURT
FORT BEND COUNTY, TEXAS
434TH JUDICIAL DISTRICT

AMERICAN EXPRESS BANK, FSB,

Plaintiff,

v.

JOSE DOMINGUEZ,

Defendant.

Cause No. 12-DCV-202842

Before: James Harold SHOEMAKE, Presiding Judge.

On this day this cause of action came before the court for Trial. The Defendant having made a request for a jury trial, the case was tried with jury. Plaintiff, AMERICAN EXPRESS BANK, FSB, appeared in person and by Counsel and JOSE DOMINGUEZ, appeared in person.

A jury was duly accepted, impaneled, and sworn. The jury returned its verdict after hearing evidence,

arguments of counsel, and the Court's instructions and after receiving questions to be answered.

Based on the jury's verdict, it is ORDERED, ADJUDGED AND DECREED that AMERICAN EXPRESS BANK, FSB, INC., Plaintiff, have and recover from JOSE DOMINGUEZ, Defendant, Judgment for:

1. $87,572.10 as the principal amount due; and

2. Costs of the Court.

Plaintiff is allowed such writs and processes as may be necessary in the enforcement and collection of this Judgment.

This Judgment finally disposes of all parties and all issues and is appealable.

SIGNED this 2nd day of February, 2017.

/s/ James Harold Shoemake
Presiding Judge

Approved as to form and Content:

DeGrasse Law Firm, P.C.

By: /s/ Donald D. DeGrasse

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Attorney for Plaintiff

ORDER OF THE DISTRICT COURT OF THE 434TH JUDICIAL DISTRICT, FORT BEND COUNTY, TEXAS GRANTING NEW TRIAL (NOVEMBER 16, 2015)

IN THE DISTRICT COURT
FORT BEND COUNTY, TEXAS
434TH JUDICIAL DISTRICT

AMERICAN EXPRESS BANK, FSB,

Plaintiff,

v.

JOSE DOMINGUEZ,

Defendant.

Cause No. 12-DCV-202842

Before: James Harold SHOEMAKE,
Presiding Judge.

On this day came on to be heard the Motion of AMERICAN EXPRESS BANK, FSB, Plaintiff, for New Trial and the Court, being duly advised in the facts and circumstances surrounding same, finds that said Motion should be and is hereby granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the directed verdict entered in favor of Defendant in this cause be set aside and the

Final Judgment entered in this cause on October 24, 2015 be vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a new trial be granted in this case.

SIGNED this 16 day of November, 2015.

/s/ James Harold Shoemake
Presiding Judge

Approved as to form and Content:

DEGRASSE & ROLNICK

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Attorney for Plaintiff

FINAL JUDGMENT OF THE DISTRICT COURT OF THE 434TH JUDICIAL DISTRICT, FORT BEND COUNTY, TEXAS (SEPTEMBER 1, 2015)

IN THE DISTRICT COURT
434TH JUDICIAL DISTRICT
FORT BEND COUNTY, TEXAS

AMERICAN EXPRESS BANK, FSB,

Plaintiff,

v.

JOSE DOMINGUEZ,

Defendant.

Cause No. 12-DCV-202842

Before: James Harold SHOEMAKE,
Presiding Judge.

On the 10th day of August 2015, came on to be heard the above-entitled and numbered cause. Plaintiff AMERICAN EXPRESS BNK, FSB (hereinafter American Express), appeared in person, and by and through their counsel, and announced ready for trial. Defendant Jose Dominguez (hereinafter Defendant Dominguez), appeared in person, and announced ready for trial since it appeared that Defendants counsel was going to be a no show. This court has jurisdiction over the parties and subject matter of this cause.

A Bench Trial was started and the parties sworn. The Defendants attorney arrived late to trial and entered a Motion to Withdraw, duly objected by Defendant Dominguez, and SUSTAINED by the Court.

At the close of the evidence the Judge reached a decision. The Court renders Judgment in favor of Defendant Dominguez and against American Express.

Plaintiff American Express is not entitled to any of its claims in its entirety.

Defendant Dominguez is entitled to judgment on the decision based on the findings against Plaintiff American Express and in favor of Defendant Dominguez. Specifically, the Judge's decision entitles Defendant Dominguez to a judgment against Plaintiff American Express for the following monetary and non-monetary damages:

(a) Derogatory comments on Defendant Dominguez credit reports must be deleted from all credit rating agencies, in particular the three national credit rating companies, within 14 days of the signing of this Final Judgment.

(b) Documents submitted by Plaintiff on 7/21/15 to the Court shall be deleted within 14 days of the signing of this Final Judgment. The documents include over 2,000 pages of Business Records of two corporations that are not a party to this lawsuit and contain Sensitive Data that was not properly redacted nor the Court notified of the inclusion of Sensitive Data.

(c) Defendant Dominguez is entitled to future mental anguish in the amount of 9,500.00.

(d) Defendant Dominguez is entitled to recover American Express the reasonable fees for the necessary services of his attorneys in this case for representation in the Bench Trial in the Amount of $30,000.00.

(e) Defendant Dominguez is entitled to recover from American Express damages related to the adverse actions caused by the derogatory comments on Defendant Dominguez' credit reports in the amount of $50,000.00.

(f) Defendant Dominguez is entitled to recover from American Express the reasonable fees for the necessary services of his attorneys for representation through appeal to the court of appeals in the amount of $25,000.00 in the event Defendant Dominguez is successful in any appeal of this final judgment.

(g) Defendant Dominguez is entitled to recover the reasonable fees for the necessary services of his attorney for representation at the petition for review stage in the Supreme Court of Texas in the amount of $7,500.00; and for representation through oral argument and the completion of proceedings in the Supreme Court of Texas in the amount of $17,500.00.

(h) Defendant Dominguez is entitled to recover from American Express all taxable court costs.

(i) Defendant Dominguez is entitled to recover from American Express post-judgment interest on past damages, additional damages, attorneys' fees through and including trial, prejudgment interest, additional interest,

> and court costs awarded in this judgment at the legal rate of 5% per year, compounded annually, beginning on the day this judgment is signed, until the judgment is paid.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED:

(1) Defendant Dominguez shall have and recover of and from American Express the sum of $89,500.00, calculated by adding $9,500.00 plus $30,000.00 plus $50,000.00, inclusive of past damages, additional damages, prejudgment interest, additional interest, attorney's fees for representation in the trial court, and taxable court costs, for which let execution issue;

(2) Defendant Dominguez shall have and recover of and from American Express post-judgment interest at the rate of 5% per year, compounded annually on the amount of 89,500.00 beginning on the date this judgment is signed, until that amount is paid;

(3) Defendant Dominguez shall have and recover of and from American Express the sum of $25,000.00 in the event Defendant Dominguez is successful in any party's appeal of this final judgment.

(4) Defendant Dominguez shall have and recover of and from American Express the sum of $7,500.00 in the event a petition for review is filed in the Supreme Court of Texas and Defendant Dominguez is successful in any party's Appeal of this final judgment.

(5) Defendant Dominguez shall have and recover of and from American Express the sum of $10,000.00 in the event briefs on the merits are filed in the Supreme Court of Texas and Defendant Dominguez is successful in any party's appeal of this final Judgement;

(6) Defendant Dominguez shall have and recover of and from American Express the sum of $7,500.00 for oral argument and the completion of proceeding in the Supreme Court of Texas in the event Defendant Dominguez is successful in any party's appeal of this final judgment.

(7) Defendant Dominguez shall have and recover of and from American Express all taxable court costs.

(8) Plaintiff American Express shall have 14 days from the date this judgment is signed to remove all comments, including derogatory comments from all credit reporting agencies regarding for the two American Express accounts ending in 4263 and 9103. American Express will be held in contempt for failure to delete comments on a timely basis.

All relief not herein expressly granted is denied. This Final Judgment disposes of all claims between ail parties and is a final, appealable Judgement.

Signed on this 24 day of October, 2015.

/s/ James Harold Shoemake
Presiding Judge

ORDER OF THE TEXAS SUPREME COURT DENYING MOTION FOR REHEARING (OCTOBER 8, 2021)

SUPREME COURT OF TEXAS

DOMINGUEZ

v.

AM. EXPRESS BANK FSB

Re: Case No. 20-0928

COA #: 14-17-00157-CV

TC#: 12-DCV-202842

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

Mr. Christopher A. Prine (14th COA)
Clerk, Fourteenth Court of Appeals
Harris County 1910 Courthouse,
301 Fannin Suite 245
Houston, TX 77002
* Delivered via E-mail *

AFFIDAVIT OF JOSE DOMINGUEZ
(MAY 12, 2014)

IN THE DISTRICT COURT
FORT BEND COUNTY, TEXAS
464TH JUDICIAL DISTRICT

AMERICAN EXPRESS BANK, FSB,

Plaintiff,

v.

JOSE DOMINGUEZ,

Defendant.

Cause No. 12-DCV-202842

Before me, the undersigned authority, on this day personally appeared Jose Dominguez, personally known to me, and who after first being duly sworn, upon oath stated:

1. My name is Jose Dominguez, I am over the age of 21 years and a resident of Harris County, Texas. I am of sound mind and fully competent and able to make this affidavit. I am also able to swear, as I do hereby swear, that all facts and statements contained herein are true and correct and within my personal knowledge.

2. Not each and every item of the account made the basis of Plaintiff's suit is just or true. To

the best of my knowledge, the alleged debt that Plaintiff claims is due is incorrect. The claim is not true and is untimely filed. All just and lawful offsets, payments and credits have been allowed. To the best of my knowledge, the notice and proof of the claim filed against me have not been given."

FURTHER AFFIANT SAYETH NOT.

/s/ Jose Dominguez

SUBSCRIBED AND SWORN TO BEFORE ME, by the said JOSE DOMINGUEZ, on this the 12th day of May, 2014.

/s/ Fabiola R. Roman
Notary Public,
State of Texas