CAUSE NO. D-1-GN-06-0291

COLONY SQUARE OWNERS ASSOCIATION,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
ALLIANCE ASSOCIATION MANAGEMENT, INC.,	§	
	§	
Defendant.	§	250TH JUDICIAL DISTRICT

DEFENDANT'S MOTION TO SET ASIDE
DEFAULT JUDGMENT AND FOR NEW TRIAL

Pursuant to Texas Rules of Civil Procedure 324 and 329b, Defendant Alliance Association Management, Inc. ("Alliance") asks the Court to set aside the default judgment signed on March 15, 2006 and grant it a new trial. Alliance respectfully shows:

EVIDENCE IN SUPPORT OF MOTION

In addition to materials already in the Court's file and any exhibits and live testimony to be offered at the hearing, Alliance attaches the following evidence as support for this motion:

Exhibit A Reporter's record of March 15, 2006 hearing

Exhibit B Affidavit of Gregory Boling

Exhibit C Supplemental Affidavit of Gregory Boling

INTRODUCTION

On or about January 25, 2006, Plaintiff Colony Square Owners Association, Inc. ("Colony Square") filed suit against Alliance, alleging several causes of action. *See generally* Plaintiff's Original Petition. Alliance was served, but did not timely answer.

On March 15, 2006, following a hearing, the Honorable David Phillips signed a default judgment awarding Colony Square $80,512.90, plus court costs and postjudgment interest. *See*

Exhibit A and Default Judgment. Alliance seeks relief from the default judgment through this motion and its Motion to Determine Finality of Default Judgment or, Alternatively, Motion to Extend Postjudgment Deadlines, which is being filed concurrently with this document and is hereby incorporated by reference.

ARGUMENT

Because the default judgment is in fact interlocutory, this Court retains jurisdiction over the entire case and has the power to set it aside. *See In re Burlington Coat Factory Warehouse*, 167 S.W.3d 827, 831 (Tex. 2005) (orig. proceeding); *Fruehauf Corp. v. Carillo*, 848 S.W.2d 83, 84 (Tex. 1993). After asserting its ongoing jurisdiction, the Court should grant this motion for several independent reasons:

- Plaintiff's Original Petition fails to support the default judgment because it neither states a cause of action against Alliance, nor gives fair notice of the claims Colony Square is asserting.
- The default judgment does not specify which of Colony Square's asserted liability theories Judge Phillips relied upon in ordering Alliance to pay Colony Square $80,512.90.
- Colony Square presented legally and factually insufficient evidence to establish the required causal nexus between Alliance's conduct and the alleged injury.
- No evidence establishes the statutory prerequisites to recovery of attorney's fees.
- Although the Court need not resort to equity, the March 15, 2006 default judgment should be set aside under the test set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

ARGUMENT

I. A New Trial Is Required Because Plaintiff's Original Petition Does Not Support the Default Judgment

A. The petition fails to state any cause of action against Alliance

To support a default judgment, a plaintiff's petition must state a cause of action against the defendant. *Fairdale, Ltd. v. Sellers*, 651 S.W.2d 725, 726 (Tex. 1982). A cause of action

consists of a plaintiff's right and the defendant's act or omission that violated this right. *See Jones v. Ray*, 886 S.W.2d 817, 821 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding).

In this case, the only discernable act or omission alleged against Alliance is that it "represented to the Plaintiff, that a group insurance policy maintained by the Defendant would be less expensive for the Plaintiff, and a better policy." Plaintiff's Original Petition at 3. Colony Square never contends that this statement violates any right, nor otherwise explains how the statement supports any of the legal theories identified in the petition.

At its most basic level, Plaintiff's Original Petition fails to state any cause of action against Alliance. Accordingly, the default judgment is defective and should be set aside.

B The petition fails to provide fair notice of the claims asserted

A default judgment is erroneous if it is based a pleading that does not give fair notice to the defendant of the claim asserted. *Stoner v. Thompson*, 578 S.W.2d 679, 684-85 (Tex. 1979). A petition is sufficient if a cause of action may reasonably be inferred from what is stated in the petition, even if an element of the action is not specifically alleged. *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 470-71 (Tex. App.—Austin 2000, pet. denied).

Plaintiff's Original Petition alleges claims for breach of contract, negligence, and breach of fiduciary duty, and identifies "conditional" claims for fraud and violation of the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA").[1] However, as detailed in the special exceptions asserted in Alliance's amended answer, which is being filed concurrently with this motion and is hereby incorporated by reference, this pleading omits required elements and underlying factual allegations for ***every single liability theory raised***.

[1] Colony Square stated an intent to raise fraud and DTPA claims "pending further discovery." *See* Plaintiff's Original Petition at 4. Alliance has specially excepted to this "conditional" pleading because no discovery has been taken in this case and the Texas Rule of Civil Procedure do not contemplate conditional causes of action.

In this case, one cannot reasonably infer all of the omitted facts and missing elements necessary to sustain Plaintiff's Original Petition as sufficient to support a default judgment. Accordingly, the default judgment should be set aside and a new trial ordered.

II. A New Trial Should Be Granted Because the Default Judgment Fails to Specify the Liability Theory Upon Which It Is Based

A party seeking redress for a single wrong under two or more theories of recovery must elect one remedy before the trial court renders judgment. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987); *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985). This concept derives from the "one satisfaction" rule, which bars double recovery for the same injury. *See Stewart Tit. Guar. Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991). When the prevailing party fails to make an election, the trial court should render judgment on the theory that affords the greatest relief available to that party. *See Parkway v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995); *Birchfield*, 747 S.W.2d at 367; *see also* TEX. R. CIV. P. 301 ("The judgment . . . shall be so framed as to give the party all the relief to which he may be entitled . . . .")

Here, the default judgment fails to identify the specific theory, if any, upon which Colony Square elected to recover judgment. Alliance is left to guess whether the judgment afforded Colony Square an improper double recovery by awarding damages under more than one of the theories alleged. *See* Plaintiff's Original Petition at 4 (specifying breach of contract, negligence, breach of fiduciary duty, fraud, and deceptive trade practices as potential causes of action). Because it purports to render judgment on all alternate grounds for recovery asserted in Plaintiff's Original Petition, the default judgment is erroneous and should be set aside. *See Southern County Mut. Ins. Co. v. First Bank & Trust*, 750 S.W.2d 170, 173-74 (Tex. 1988) (reversing judgment granting relief on both alternate grounds for recovery pleaded).

III. A New Trial Should Be Granted Because No Evidence or Insufficient Evidence Supports a Causal Nexus Between Alliance's Conduct and the Alleged Injury

In a no-answer default situation involving unliquidated damages, the plaintiff must establish a causal nexus between the defendant's conduct and the damages allegedly suffered. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984). As noted above, Colony Square's petition alleged that Alliance "represented to the Plaintiff, that a group insurance policy maintained by the Defendant would be less expensive for the Plaintiff, and a better policy." Plaintiff's Original Petition at 3. Colony Square presented no evidence or factually insufficient evidence to establish the necessary causal link between this conduct and its damages.

Diane Langness testified on behalf of Colony Square at the default judgment hearing. Led by Colony Square's counsel, Ms. Langness stated that Alliance made "certain representations . . . about the insurance [Alliance] obtained" and that "[o]ne of those representations included the deductible." Exhibit A at 6. Ms. Langness never described what Alliance's representations were, and she never attributes Colony Square's damages to Alliance's conduct. *See id.* Instead, she merely stated that, "[h]ad we known the deductible was changed, we would have changed policies." *Id.* at 7.

Colony Square was required to demonstrate a relationship between Alliance's alleged representation and the damages sought. Ms. Langness' testimony fails to establish any such link. Because the evidence of causal nexus is legally and factually insufficient, the Court should grant this motion and order a new trial.

IV. Colony Square Cannot Recover Attorney's Fees Because the Record Contains No Evidence of Presentment Under Section 38.002

Colony Square unconditionally pleaded only one liability theory—breach of contract—authorizing the recovery of attorney's fees. *See* Plaintiff's Original Petition at 4. In such actions, a plaintiff may recover attorney's fees by satisfying the requirements stated in Chapter

38 of the Civil Practice and Remedies Code.[2] *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999). Among other prerequisites, Chapter 38 requires a plaintiff to prove presentment of the claim to the opposing party as a condition precedent to recovering attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE § 38.002; *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981).

Colony Square's counsel testified in support of its request for attorney's fees at the March 15, 2006 hearing. *See* Exhibit A at 9-10. Although counsel's testimony stated the amount of fees requested, it did not address presentment under Chapter 38. *See id.* Without evidence of presentment, attorney's fees could not be awarded. Thus, to the extent the default judgment awards attorney's fees, it is unsupported by legally sufficient evidence and must be set aside.

IV. If Reached, Equity Also Demands a New Trial

Any of the foregoing legal defects present sufficient cause for the Court to set the March 15, 2006 default judgment aside and grant Alliance a new trial. Although Alliance need not resort to equity under these circumstances, equity independently demands the same relief.

The equitable elements for setting aside a default judgment are well established. A default judgment must be set aside when: (1) the failure to appear or answer was not intentional or the result of conscious indifference, but was due to accident or mistake; (2) the defendant has a meritorious defense; and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. *Craddock*, 133 S.W.2d at 126; *see also Bank One Tex., N.A. v. Moody*, 830 S.W.2d 81, 83 (Tex. 1992). A trial court abuses its discretion by refusing to grant a new trial when all three *Craddock* elements are met. *Bank One*, 830 S.W.2d at 85.

A. Alliance's failure to answer was due to a mistake of fact

The first prong of the *Craddock* test—that the failure to answer was not intentional but the result of an "accident" or "mistake"—is to be liberally applied. *Gotcher v. Barnett*, 757

[2] Colony Square did not assert a right to attorney fees under the alleged contract.

S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ). The absence of a purposeful or bad faith failure to answer is the controlling fact under this analysis. *See Craddock*, 133 S.W.2d at 125. Accordingly, the defaulting party must provide "some excuse, but not necessarily a good excuse" for failing to answer in a timely manner. *Id.*; *see Gotcher*, 757 S.W.2d at 401 (finding that "even a slight excuse will suffice"). If the factual assertions in the defendant's motion for new trial and accompanying affidavits are not controverted, the defendant satisfies its burden if it sets forth facts that, if true, negate intent or conscious indifference. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38-39 (Tex. 1984).

As established by the affidavits attached to this motion, and as summarized below, Alliance's failure to file a timely answer fits the definition of "accident" or a "mistake" set forth in *Craddock*. Gregory Boling, Alliance's president, testified that all lawsuits served upon Alliance are forwarded to the company's corporate parent in Dallas and to any insurance carriers whose policies may provide coverage. Exhibit C. When this lawsuit was served, however, no established procedure existed for determining who is responsible for following up on a lawsuit once served. *Id.* Had such a procedure been in place in early 2006, Alliance would have discovered that no answer had been filed and would have taken all necessary steps to preserve its rights. *Id.* Since the default judgment was rendered, internal controls have been established that would prevent this sort of event from happening again. *Id.*

When the default judgment was rendered on March 15, 2006, Alliance's corporate parent had tendered its defense to the relevant liability insurers and was still negotiating coverage for the defense and any resulting damages. Exhibit C. From the time this lawsuit was served on Alliance to the date of the default judgment, Mr. Boling does not recall receiving notification of any decision whether the insurers would be providing a defense or were denying the claim. *Id.*

Moreover, because the lawsuit involved an alleged error by an Alliance employee, Mr. Boling believed that insurance would cover the company's defense as well as any damages. Exhibits B & C. Mr. Boling's belief in that fact was ultimately mistaken, as Alliance has been notified of the insurers' position that the claims involved in this lawsuit are not covered under the relevant policies. Exhibit C. As of March 15, 2006, however, Mr. Boling was under the impression that the claim would be covered, and was, therefore, unaware of the need to answer the lawsuit. Exhibits B & C.

Mr. Boling's affidavits negate the existence of any purposeful or bad faith motive on Alliance's part. Alliance plainly failed to answer because it committed a mistake of fact, or was at most negligent in how it handled this matter upon receiving service. Under these circumstances, the first element of the *Craddock* test has been satisfied.

B. Alliance has meritorious defenses

The default judgment could only be based on one of the three liability theories pleaded unconditionally: breach of contract, negligence, or breach of fiduciary duty. Therefore, to meet *Craddock*'s second element, Alliance need only set up meritorious defenses to those theories. Out of an abundance of caution, however, this motion also sets up meritorious defenses to the "conditional" theories of fraud and DTPA violations.

For purposes of this motion, the Court must accept as true Alliance's factual assertions regarding meritorious defenses. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993). Alliance's defenses are sufficient if at least a portion of the judgment would not be sustained upon retrial of the case. *Gotcher v. Barnett*, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ).

1. Defenses to breach of contract

Plaintiff's Original Petition fails to identify or attach the contract upon which Colony Square sues. Alliance denies the existence of any such contract and asserts the legal defense that any such contract would be subject to the Statute of Frauds. *See* Exhibit C. Alternatively, Alliance contends that the terms of any such contract are ambiguous or that such terms resulted from a unilateral mistake rendering the contract unenforceable. *See id.* To the extent Colony Square could recover damages from Alliance for breach of contract, those damages must be offset because Colony Square failed to mitigate them. *See id.*

2. Negligence defenses

Colony Square alleges that, "[i]n early 2003," Alliance "represented to the Plaintiff, that a group insurance policy maintained by the Defendant would be less expensive for the Plaintiff, and a better policy." Plaintiff's Original Petition at 3. Yet, Colony Square did not bring this lawsuit until January 25, 2006, about three years later. Alliance therefore contends that Plaintiff failed to bring this lawsuit within the two-year limitations period applicable to negligence actions. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a). Alliance further denies the existence of any duty of ordinary care owed to Colony Square. Moreover, to the extent Colony Square could recover damages from Alliance for negligence, those damages must be offset because Colony Square was at least partially at fault and because it failed to mitigate. *See* Exhibit C.

3. Defenses to breach of fiduciary duty

Plaintiff's Original Petition fails to allege that Alliance owed Colony Square a fiduciary duty. Alliance denies the existence of any such duty, as it deals with Colony Square at arms length and the parties have no special relationship. *See* Exhibit C. Moreover, to the extent Colony Square could recover damages from Alliance for breach of fiduciary duty, those damages must be offset because Colony Square was at least partially at fault. *See id.*

4. Defenses to fraud

Plaintiff's Original Petition fails to identify a fraudulent representation. Alliance denies that any such representation occurred and asserts the legal defense that any such representation would be subject to the Statute of Frauds. *See* Exhibit C. Alternatively, to the extent Colony Square could recover damages from Alliance for fraud, those damages must be offset because Colony Square was at least partially at fault. *See id.*

5. Defenses to DTPA violations

Colony Square alleges that, "[i]n early 2003," Alliance "represented to the Plaintiff, that a group insurance policy maintained by the Defendant would be less expensive for the Plaintiff, and a better policy." Plaintiff's Original Petition at 3. Yet, Colony Square did not bring this lawsuit until January 25, 2006, about three years later. Alliance therefore contends that Plaintiff failed to bring this lawsuit within the two-year limitations period applicable to DTPA actions. *See* TEX. CIV. PRAC. & REM. CODE § 17.565. Alliance further contends that this suit, if valid at all, is merely one for breach of contract and thus is not actionable under the DTPA. *See Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14-15 (Tex. 1996). Moreover, to the extent Colony Square could recover damages from Alliance under the DTPA, those damages must be offset because Colony Square was at least partially at fault and because it failed to mitigate. *See* Exhibit C.

C. Granting this motion will cause Colony Square no harm

Craddock's last element is intended to protect the plaintiff from "the sort of *undue* delay or injury which disadvantages him in presenting the merits of his case at a new trial, such as loss of witnesses or other valuable evidence upon retrial." *Jackson v. Mares*, 802 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied). No such delay or injury exists in this case. As the March 15, 2006 hearing transcript indicates, Colony Square called only two witnesses and

offered no documents into evidence at the hearing. *See* Exhibit A. Nothing would prevent Colony Square from offering this same evidence if the default judgment were set aside. Alliance is ready for trial and is willing, if necessary, to reimburse Colony Square's reasonable expenses incurred in obtaining the default judgment.

The only conceivable argument Colony Square might make to assert harm is the loss of the immediate economic benefit of the March 15, 2006 default judgment. This argument is not relevant to the question of undue delay. *See Jackson*, 802 S.W.2d at 48. In any event, "once the defendant has alleged that the granting of a new trial will not delay or otherwise injure the plaintiff, the burden of going forward with proof of injury shifts to the plaintiff[,] for these are matters peculiarly within the plaintiff's knowledge." *Cliff*, 724 S.W.2d at 779; *see Angelo v. Champion Restaurant Equip. Co.*, 713 S.W.2d 96, 98 (Tex. 1986). Accordingly, unless Colony Square satisfies this burden by bringing forth evidence of harm (which Alliance must receive an opportunity to rebut), the Court should find that the third *Craddock* element has been met.

CONCLUSION AND PRAYER

For the foregoing reasons, Alliance asks the Court to set aside the March 15, 2006 default judgment and grant it a new trial. Alliance requests all other appropriate relief to which it is entitled.