--- F.3d ----, 2012 WL 3011021 (C.A.5 (Tex.))

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United States Court of Appeals,
Fifth Circuit.
WESTLAKE PETROCHEMICALS, L.L.C., Plaintiff–Appellee–Cross–Appellant,
v.
UNITED POLYCHEM, INC., and Lynne Van Der Wall, Defendants–Appellants–Cross Appellees.

No. 10–20634.
July 24, 2012.
As Revised Aug. 7, 2012.

Background: Seller of petroleum product brought action in state court against buyer, and buyer's president, alleging breach of contract. Buyer removed to federal court and brought counterclaim alleging seller breached the contract. Following jury trial, the United States District Court for the Southern District of Texas, David Hittner, J., entered final judgment awarding seller damages and attorney fees, and holding buyer's president jointly and severally liable under guaranty agreement. Defendants appealed.

Holdings: The Court of Appeals, Wiener, Circuit Judge, held that:
(1) parties formed binding contract;
(2) Uniform Commercial Code's (UCC) statute of frauds writing requirement was satisfied;
(3) Texas statute of frauds was satisfied;
(4) bilateral broker had authority to bind buyer to contract;
(5) seller was entitled to recover lost profits, but not difference between contract price and market price; and
(6) liability under ambiguous guaranty would be limited to amounts due on shipments made prior to guarantor's termination of guaranty.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Whether a particular agreement is an enforceable contract, under Texas law, is a question of law reviewed de novo.

[2] KeyCite Citing References for this Headnote

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk382 Court Rendering Decision
170Bk382.1 k. In General. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk390 k. Anticipating or Predicting State Decision. Most Cited Cases

To determine issues of state law, the court looks to final decisions of the state's highest court, and when there is no ruling by that court, then the court has the duty to determine as best it can what the state's highest court would decide.

[3] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k29 k. Questions for Jury. Most Cited Cases

Even though the question whether an agreement is legally binding, under Texas law, is a question of law, whether an agreement was reached at all is a question of fact.

[4] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk847 k. Verdicts in General. Most Cited Cases

A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did.

[5] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk799 k. Verdict. Most Cited Cases

The court of appeals is bound to consider the evidence and all reasonable inferences therefrom in the light most favorable to the jury verdict, and must not substitute for the jury's reasonable factual inferences other inferences that it may regard as more reasonable.

[6] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k50 k. In General. Most Cited Cases

Consideration, under Texas law, is a present exchange bargained for in return for a promise.

[7] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k50 k. In General. Most Cited Cases

Consideration, under Texas law, consists of either a benefit to the promisor or a detriment to the promisee.

[8] KeyCite Citing References for this Headnote

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k10 Mutuality of Obligation
95k10(1) k. In General. Most Cited Cases

A promise is illusory, under Texas law, if it does not bind the promisor, such as when the promisor retains the option to discontinue performance; such illusory promises, therefore, lack mutuality of obligation and do not constitute a contract.

[9] KeyCite Citing References for this Headnote

343 Sales
343I Requisites and Validity of Contract
343k1 Nature and Essentials of Contract for Sale of Personal Property in General
343k1(3) k. Agreement as to Price and Time of Payment. Most Cited Cases

Seller of petroleum product formed binding contract with buyer, under Texas law, even though terms of credit between seller and buyer had not been finalized; buyer gave bilateral broker permission to enter bid for product on behalf of buyer, broker matched buyer's bid with seller's offer, neither party objected after veil was lifted and identities of the parties to the sale were revealed, and industry custom permitted specific additional terms, such as payment and credit, to be worked out after formation of buy and sell contract.

[10] KeyCite Citing References for this Headnote

185 Frauds, Statute of
185IX Operation and Effect of Statute
185k127 k. Writing Subsequent to Oral Agreement. Most Cited Cases

Uniform Commercial Code's (UCC) statute of frauds writing requirement was satisfied in agreement to sell petroleum product, even though terms of credit between seller and buyer had not been finalized, where written confirmations sent by bilateral broker to seller and buyer immediately after deal was "done" confirmed the quantity, the price, the product, and the delivery terms. V.T.C.A., Bus. & C. § 2.201(a).

[11] KeyCite Citing References for this Headnote

185 Frauds, Statute of
185IX Operation and Effect of Statute
185k127 k. Writing Subsequent to Oral Agreement. Most Cited Cases

Texas statute of frauds was satisfied in agreement to sell petroleum product, even though terms of credit between seller and buyer had not been finalized, where written confirmations sent by bilateral broker to seller and buyer immediately after deal was "done" confirmed quantity, price, product, and delivery terms, and industry norm was to negotiate payment and credit terms after formation of contract. V.T.C.A., Bus. & C. § 26.01.

[12] KeyCite Citing References for this Headnote

185 Frauds, Statute of
185VIII Requisites and Sufficiency of Writing
185k105 Contents of Memorandum
185k113 Statement of Terms and Conditions
185k113(2) k. Necessity That Writing Show All the Terms. Most Cited Cases

To satisfy the Texas statute of frauds, the writing must contain all of the essential elements of the agreement so that the contract can be ascertained from the writing. V.T.C.A., Bus. & C. § 26.01.

[13] KeyCite Citing References for this Headnote

65 Brokers
65VIII Rights, Powers, and Liabilities as to Third Persons
65k93 Purchases, Sales, and Conveyances
65k94 k. In General. Most Cited Cases

Bilateral broker had authority to bind buyer of petroleum product to contract for sale of product, as required to satisfy the Uniform Commercial Code (UCC) statute of frauds and Texas statute of frauds, where buyer's president authorized broker to bid $1.54 per pound for 5 million pounds of ethylene per month. V.T.C.A., Bus. & C. §§ 2.201(a), 26.01.

[14] KeyCite Citing References for this Headnote

343 Sales
343I Requisites and Validity of Contract
343k1 Nature and Essentials of Contract for Sale of Personal Property in General
343k1(3) k. Agreement as to Price and Time of Payment. Most Cited Cases

Under Texas law, seller's approval of credit terms for buyer was not a condition

precedent to formation of final, binding contract for sale of petroleum product; inclusion of phrases "subject to" approval of credit and "pending credit" in bilateral broker's confirmations of deal were merely reminders that credit would need to be worked out between parties, credit issue was related to pre-condition to seller's performance, and it was industry custom to work out credit details closer to performance, and well after deal was reached.

[15] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(E) Conditions
95k221 Conditions Precedent in General
95k221(1) k. In General. Most Cited Cases

95 Contracts KeyCite Citing References for this Headnote
95II Construction and Operation
95II(E) Conditions
95k221 Conditions Precedent in General
95k221(2) k. What Are Conditions Precedent in General. Most Cited Cases

A condition precedent to an obligation to perform does not prevent contract formation, under Texas law, but does prevent a duty to perform from arising except upon realization of the condition; as such, a condition precedent to an obligation to perform may be one of several terms of an already formed contract.

[16] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

The court of appeals reviews a district court's ruling regarding a proper measure of damages de novo.

[17] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court

⇦170Bk617 k. Sufficiency of Presentation of Questions. Most Cited Cases

Defendant did not waive issue regarding correct measure of damages, even though issue was not raised in motion for judgment as matter of law, where defendant raised issue in open court before plaintiff rested its case and raised the issue in their renewed motion for judgment as matter of law. Fed.Rules Civ.Proc.Rule 50(a, b), 28 U.S.C.A.

[18] KeyCite Citing References for this Headnote

⇦343 Sales
⇦343VII Remedies of Seller
⇦343VII(F) Actions for Damages
⇦343k384 Damages
⇦343k384(1) k. In General. Most Cited Cases

Seller's action, at time of breach, of not acquiring the ethylene needed to satisfy contract to sell the ethylene to buyer, made it tantamount to a "jobber," even if it had purchased enough ethane, the feedstock for ethylene, to meet its obligations to buyer, and thus, seller was entitled to recover lost profits, but not the difference between contract price and market price; parties contracted for delivery of ethylene, not ethane, and seller's acquisition of ethane was also for purpose of supplying one of its subsidiaries. V.T.C.A., Bus. & C. § 2.708(a, b).

[19] KeyCite Citing References for this Headnote

⇦170B Federal Courts
⇦170BVIII Courts of Appeals
⇦170BVIII(K) Scope, Standards, and Extent
⇦170BVIII(K)1 In General
⇦170Bk776 k. Trial De Novo. Most Cited Cases

⇦195 Guaranty KeyCite Citing References for this Headnote
⇦195I Requisites and Validity
⇦195k1 k. Nature of Obligation. Most Cited Cases

A guaranty is a form of contract, and the court of appeals reviews a district court's construction of any contract de novo.

[20] KeyCite Citing References for this Headnote

⇦195 Guaranty
⇦195II Construction and Operation
⇦195k27 k. General Rules of Construction. Most Cited Cases

In Texas, a guarantor is a "favorite" of the law, and a creditor's claim against a guarantor is strictly construed.

[21] KeyCite Citing References for this Headnote

195 Guaranty
195II Construction and Operation
195k27 k. General Rules of Construction. Most Cited Cases

195 Guaranty KeyCite Citing References for this Headnote
195II Construction and Operation
195k36 Scope and Extent of Liability
195k36(1) k. In General. Most Cited Cases

Under Texas law, a guarantor's obligation should not be extended by implication beyond the written terms of the guaranty, and any ambiguity must be construed in favor of the guarantor.

[22] KeyCite Citing References for this Headnote

195 Guaranty
195II Construction and Operation
195k27 k. General Rules of Construction. Most Cited Cases

Under Texas law, any ambiguity in a guaranty is construed most strongly against the party who selected the language.

[23] KeyCite Citing References for this Headnote

195 Guaranty
195II Construction and Operation
195k36 Scope and Extent of Liability
195k36(5) k. Guaranties of Sales and Credits. Most Cited Cases

Ambiguous guaranty, under Texas law, which could be construed as covering entire contract for purchase of petroleum product, or as guarantor's liability incrementally incurring with each shipment, was construed in favor of guarantor, and thus any liability under guaranty would be limited to amounts due on shipments made prior to guarantor's termination of guaranty; guaranty stated that guarantor was responsible for all liabilities and obligations of buyer which were outstanding or incurred thereafter by buyer to seller, and also contained termination provision which expressly stated that guarantor was not liable for any indebtedness incurred after he terminated the

guaranty by furnishing 30 days' written notice.

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Appeals from the United States District Court for the Southern District of Texas.
Before JONES, Chief Judge, and WIENER and GRAVES, Circuit Judges.

WIENER, Circuit Judge:

***1** Defendants–Appellants–Cross–Appellees United Polychem, Inc. ("UPC") and Lynne Van Der Wall ("Van Der Wall") (collectively, "Appellants") and Plaintiff–Appellee–Cross–Appellant Westlake Petrochemicals, L.L.C. ("Westlake") appeal different results of a jury trial. At the core of that trial was an agreement between UPC as buyer and Westlake as seller of ethylene, a petroleum product. The jury found that (1) the parties had formed a binding contract, (2) UPC breached that contract, and, as a result, (3) UPC was liable to Westlake for $6.3 million in actual damages and $633,199.67 in attorneys fees. The district court entered a final judgment in which it awarded Westlake damages and attorney's fees against UPC under the jury's verdict and also held Van Der Wall jointly and severally liable under the terms of a guaranty agreement (the "Guaranty"). UPC and Van Der Wall appeal those aspects of the jury verdict and the district court's ruling, contending that (1) a binding contract was not established, (2) the district court did not apply the correct measure of damages, and (3) Van Der Wall is not jointly and severally liable for the jury verdict under the terms of the Guaranty. We affirm in part and reverse and remand in part.

I. Facts & Proceedings

A. Facts

UPC is a distributor of petrochemicals and plastics. In 2008, it sought to enter the market for ethylene, a petroleum product used in making plastics, with the intention of buying and reselling the compound. To facilitate UPC's acquisition of ethylene, Van Der Wall, as UPC's President, gave permission to a bilateral broker, Lawson Brice,[FN1] to bid for five million pounds of ethylene per month during calendar year 2009 at a fixed price of $0.54 per pound. On July 2, 2008, Brice matched UPC's bid with an offer from Westlake, and Westlake agreed to the transaction, subject to credit approval.

Under industry custom, after a bilateral broker matches a bid with an offer, the broker "lifts the veil," revealing the buyer's and seller's respective identities to one another. It is at this point that a deal is considered to be "done," *i.e.,* the parties have reached an agreement. The broker typically sends a written confirmation to each party notifying them that the deal is done, meaning that there is a contract. Following the lifting of the veil, the parties have a brief window of time during which either may

cancel the transaction, with or without any grounds.[FN2]

After matching UPC's bid with Westlake's offer on July 2, 2008, Brice sent an instant message to Westlake's ethylene commercial manager, Bryan Chappelle, informing him that the deal was done. Brice also sent Chappelle an email that same day stating "Please find your attached confirmation (pending credit with UPC)." That attachment identified the product and stated the price, the volume, and the method, time, and place of delivery. Brice also sent Van Der Wall an email setting out the same transactional terms and stating "... please accept this email as a 'pre-confirmation,' detailing today's transaction."

At trial, Brice testified that his email to Van Der Wall was in fact a confirmation of the deal that he had brokered that afternoon. He further testified that he had used the term "pre-confirmation" because his company had decided to delay billing UPC for the transaction because UPC was to pay additional fees for access to an exchange market of buyers and sellers of ethylene. Westlake presented additional testimony at trial indicating that parties to such transactions typically negotiate specific credit arrangements after a contract has been reached, usually about one or two months before shipment.

***2** Neither party cancelled the transaction either immediately or within five days after the veil was lifted on July 2, 2008. Instead, they began negotiating credit terms and planning for performing the transaction. UPC's Chief Financial Officer, Mark Selawski, sent credit references and banking and financial information to one of Westlake's credit analysts, Leticia Aleman. Concurrently, Westlake began purchasing ethane, the feedstock for ethylene, for the dual purposes of fulfilling its obligation to UPC and supplying one of its subsidiaries with ethylene.

After reviewing UPC's financial information, Westlake rejected "open credit" for UPC whereby it would simply deliver the ethylene and await payment. In response, UPC proposed that Van Der Wall would execute a personal guaranty as security for UPC's credit. It was at this point that Westlake provided a printed guaranty form to Van Der Wall which Westlake had drafted. It stated that Van Der Wall is responsible for:

> all liabilities or obligations of [UPC] whether from invoices, promissory notes, drafts, checks, and all other charges, which may now be outstanding or owing from, or which may be incurred hereafter by [UPC] to [Westlake] ...

Westlake's form also states that Van Der Wall has the right to terminate the Guaranty on 30 days' written notice, and that, on such termination, Van Der Wall:

> shall not be responsible for any indebtedness created or incurred by [UPC] hereafter, but shall remain liable hereunder for any indebtedness created or incurred by [UPC] prior to such termination.

Van Der Wall signed the guaranty form and returned it to Westlake on July 23, 2008.

In August, Westlake rejected extending credit to UPC based on the Guaranty alone. On September 22, 2008, Selawski sent an email to Aleman proposing to secure UPC's credit with a $2 million letter of credit in addition to Van Der Wall's Guaranty. On October 3, 2008, Aleman updated Westlake's system with the proposal. She testified that she left Selawski a voicemail message requesting that UPC open the letter of credit before the first shipment and inquiring about the bank that would issue the letter of credit. Selawski testified that he never received that message.

Westlake presented evidence indicating that the market price for ethylene dropped sometime in the fall of 2008, thus turning against UPC's ethylene position. On October 30, 2008, Chappelle sent an email to Van Der Wall, informing him that Westlake was setting up billing in its system for the sale. Van Der Wall replied, "[w]e never closed the deal. We were not approved for credit." On November 4, Westlake contacted UPC to inform it that Westlake had approved UPC's credit on the terms of Selawski's September 22 offer of security and sought assurance of performance on the contract. Later that day, Van Der Wall informed Westlake that UPC would not perform under the contract because Westlake had not confirmed credit. After UPC repudiated, Westlake decided not to proceed with acquiring ethylene from a supplier in anticipation of delivering ethylene to UPC, although it had procured ethane, the feedstock of ethylene, for the purpose of supplying one of its subsidiaries in addition to meeting its obligation to UPC.

Westlake filed this suit in state court on November 10. On December 10, 2008, Van Der Wall formally notified Westlake, through his attorney, that he was terminating his Guaranty. The Guaranty's termination took effect thirty days later, on January 9, 2009.

B. Proceedings

***3** As noted, Westlake filed suit in state court against UPC and Van Der Wall on November 10, 2008, claiming that UPC breached its contract by refusing to perform and that Van Der Wall breached the Guaranty by refusing to satisfy UPC's obligations. UPC removed the case to federal court under diversity jurisdiction pursuant to 28 U.S.C. § 1332 and counterclaimed that Westlake had breached the agreement.

At the conclusion of a two-week trial in April 2010, the jury found that UPC and Westlake had formed a binding contract in July of 2008 and that UPC had breached that contract. The jury awarded Westlake $6.3 million in damages and $633,199.67 in attorneys fees. The jury did not decide whether Van Der Wall had breached the Guaranty because the parties had agreed to have the presiding judge decide this issue.[FN3]

The district court entered a Final Judgment in which Westlake was awarded damages

and attorneys fees pursuant to the jury verdict. The district court later entered an Amended Final Judgment in which it awarded interest to Westlake and held that Van Der Wall was jointly and severally liable under the Guaranty for the full amount of the award.

Appellants now appeal the jury verdict and the district court's judgment, asserting that (1) they and Westlake never formed a binding contract, (2) the district court did not apply the correct measure of damages, and (3) Van Der Wall is not jointly and severally liable with UPC under the Guaranty. Westlake conditionally cross-appeals, asserting that the district court had jurisdiction to enter its Amended Final Judgment, and Appellants agrees with Westlake's position.[FN4]

II. UPC and Westlake's Contract

A. Standard of Review

[1] [2] [3] "Whether a particular agreement is an enforceable contract is a question of law reviewed *de novo.*"[FN5] Even though the question whether an agreement is legally binding is a question of law, whether an agreement was reached at all is a question of fact.[FN6]

[4] [5] In this case, the jury made a factual determination that the parties intended to bind themselves to a contract. This court is "wary of upsetting jury verdicts," and, accordingly, "[a] jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did."[FN7] Furthermore, "we are bound to consider the evidence and all reasonable inferences therefrom in the light most favorable to the jury verdict."[FN8] Finally, "[w]e must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable."[FN9]

Appellants have presented a number of arguments why a binding contract was not formed between UPC and Westlake. We address each of these below.

B. Analysis

1. Mutuality of Obligation

***4** Appellants contend that UPC's agreement with Westlake lacked consideration and cannot be enforced. Specifically, Appellants assert that there was no mutual obligation between the parties because Westlake retained the unilateral discretion to subject delivery to its approval of UPC's credit, which it never did. According to Appellants, therefore, Westlake's promise under the agreement was illusory; and, because Westlake was not truly bound to perform, its agreement is not an enforceable contract under Texas law.

[6] [7] [8] "Consideration is a present exchange bargained for in return for a promise."[FN10] "It consists of either a benefit to the promisor or a detriment to the

promisee."[FN11] "A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance."[FN12] Such illusory promises, therefore, lack mutuality of obligation and do not constitute a contract.[FN13]

[9] In this case, the jury found that Westlake and UPC intended to form a binding contract. Although we note that Appellants refer—out of context—to various statements made by witnesses during the trial that some such deals are "subject to credit approval," we can find no testimony or other record evidence indicating that Westlake had the unilateral right to rescind the contract without being subject to a breach of contract claim. By contrast, Westlake adduced evidence at trial that a deal such as this becomes binding once the "veil is lifted" and no party rejects the counterparty during a short period of time that follows. Westlake also presented testimony that industry custom permits specific additional terms, such as payment and credit, to be worked out after formation of the buy and sell contract.

Van Der Wall gave Brice permission to enter a bid for ethylene on behalf of UPC. Brice matched UPC's bid with Westlake's offer. It is undisputed that neither party timely objected after the veil was lifted. Thus, a binding contract was formed. Furthermore, any contention that the deal was subject to a condition precedent of UPC providing credit acceptable to Westlake lacks merit because, as further discussed below, the record makes clear that the condition of obtaining acceptable credit was at most a condition precedent to *performance,* not to the formation of the contract.[FN14]

Having determined that there is a "legally sufficient evidentiary basis" for the jury to have concluded that the parties formed a binding contract, we will not disturb the jury's verdict on the basis of Appellants' assertion that the contract lacked consideration.

2. Statute of Frauds

Appellants assert that the agreement fails to satisfy both the Texas and the Uniform Commercial Code's ("UCC") statutes of frauds because (1) the written confirmations of the deal failed to contain any agreement on UPC's credit, an essential element of the agreement, and (2) Brice was not authorized to bind UPC in a contract. We now address each of these points.[FN15]

a. Credit as an essential element

***5** Appellants insist that credit was essential to UPC's agreement with Westlake, so that the putative contract does not satisfy either the UCC or the Texas statutes of frauds. Under the UCC, the only essential term that must be contained in a written agreement for the sale of goods over $500 is the quantity. Specifically, the UCC statute of frauds's writing requirement states:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the

parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.[FN16]

In addition, a comment to this provision states:

The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. *The only term which must appear is the quantity term* which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.[FN17]

[10] In this case, the written confirmations sent by Brice to both parties by instant message and email immediately after the deal was "done" meet the requirements of the UCC's statute of frauds.[FN18] These confirmations included the essential quantity provision (5 million pounds per month), as well as the price ($0.54 per pound), the product (ethylene), and the delivery terms (monthly during the 2009 calendar year, delivered via pipeline to Mont Belvieu–Williams). Regardless of the credit term, the UCC's statute of frauds writing requirement was met in this case.

[11] [12] The agreement between UPC and Westlake also satisfies the Texas statute of frauds. The Texas general statute of frauds requires "[a] promise or agreement ... or memorandum ... [to be] in writing; and signed by the person to be charged with the promise or ... by someone lawfully authorized to sign for him."[FN19] The writing also must contain "all of the essential elements of the agreement so that the contract can be ascertained from the writing ..." [FN20] As previously discussed, we are satisfied that UPC did not present any evidence at trial (or pointed to any on appeal) which firmly establishes that credit terms were "essential" to the contract. In fact, trial evidence indicates that the industry norm is to negotiate payment and credit terms *after* formation of the contract. Therefore, the writing requirement of the Texas statute of frauds was met in this case.

b. Brice's Authority

***6** [13] Appellants also contend that the contract violated the statutes of frauds because Westlake did not obtain a specific jury finding that Brice had authority to bind UPC to a contract. Appellants concede, however, that there is evidence showing that Van Der Wall authorized Brice to agree to price, quantity, delivery, and location terms.

We agree with Westlake that the jury properly found that Brice was authorized to

bind UPC to a contract. The jury heard Van Der Wall's testimony that he authorized Brice to bid $0.54 per pound for 5 million pounds of ethylene per month. The jurors also heard Brice testify that he was authorized to do so by Van Der Wall. At the least, this evidence shows that Brice was authorized to enter into a binding contract under both the UCC and Texas state statutes of frauds. Brice was authorized to agree to quantity, the only essential term under the UCC. And, as we have already concluded, credit was not an essential term. Therefore, the agreement meets the requirements of both statutes of frauds.

3. Condition Precedent

[14] Lastly, Appellants claim that the only reasonable view of the trial evidence is that Westlake's approval of credit for UPC was a condition precedent to the formation of a final, binding contract. We disagree.

As discussed above, the evidence in the record does not firmly establish that the parties intended the credit issue to be a condition precedent to the contract. Appellants repeatedly point to phrases such as "subject to" approval of credit and "pending credit" contained in Brice's confirmations in an effort to support their contention that credit was a condition precedent to a binding contract. At trial, however, Brice testified that such notations were merely reminders that credit would need to be worked out between the parties. He stated that it is industry custom to work out credit details closer to performance, well after a deal is reached. Brice also explained that his reference to credit meant that both parties had the right to reject the counterparty at the moment the "veil was lifted." Yet, neither party objected after the veil was lifted. After the time for objecting lapsed, a binding contract was established. The credit term simply was not a condition precedent to the formation of a binding contract.

[15] More sensibly, the credit issue was related to a pre-condition to Westlake's *performance.* "A condition precedent to an obligation to perform [ ] does not prevent contract formation, but does prevent a duty to perform from arising except upon realization of the condition. As such, a condition precedent to an obligation to perform may be one of several terms of an already formed contract."[FN21] We conclude that Westlake and UPC did indeed form a binding contract when neither objected following the lifting of the veil.

III. Damages

A. Standard of Review

[16] [17] We review a district court's ruling regarding a proper measure of damages *de novo.*[FN22]

B. Analysis

The determinative issue relating to the proper quantum of damages is whether to apply subsection (a) or subsection (b) of Tex. Bus. & Com.Code § 2.708. Subsection (a) states:

***7** Subject to Subsection (b) and to the provisions of this chapter with respect to proof of market price (Section 2.723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 2.710), but less expenses saved in consequence of the buyer's breach.

Subsection (b) states:

If the measure of damages provided in Subsection (a) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (Section 2.710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

In this dichotomy, § 2.708(a) provides damages in the amount of the difference between the contract and the market price at the time and place of tender, and § 2.708(b) provides damages in the amount that the non-breaching party would have realized under the contract had the breaching party fully performed. At trial, Chappelle testified for Westlake that its lost profits under the contract with UPC amounted to $2 million. In contrast, Westlake's damages expert testified that the average price for ethylene in 2009 was 26.81 cents per pound, so that, applying this price, Westlake should be awarded $16.3 million in damages, *i.e.,* the difference between the contract price and the market price.

After discussion at trial, the district court agreed with Westlake to instruct the jury to award damages under § 2.708(a), the difference between contract and market prices. Without elaboration or explanation, the jury awarded Westlake $6.3 million in damages, and the district granted Westlake the jury amount $6.3 million in damages in its Final Judgment.

Appellants insist that the proper measure of damages in this case should be calculated pursuant to § 2.708(b). They emphasize that Westlake never actually purchased ethylene in anticipation of fulfilling the contract. According to Appellants, then, awarding more than Westlake's lost profit would constitute a windfall. Westlake counters that, before UPC breached the contract, Westlake purchased enough ethane, the feedstock for ethylene, to cover its obligation to UPC. To this, Appellants respond that Westlake purchased the ethane for a dual purpose: to make ethylene for UPC *and* to supply its own subsidiary.

We have previously ruled on this issue in a case involving similar circumstances. In *Nobs Chem., U.S.A., Inc. v. Koppers Co., Inc.,*[FN23] the plaintiffs contracted to sell