

# **ANGELLE MARIE ADAMS**

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## Writing Sample

This writing sample is a Special Exceptions I prepared in a lawsuit involving an alleged breach of a brokerage agreement. The Special Exceptions were filed in the 201<sup>st</sup> Judicial District Court of Travis County, Texas.

FRAZIER LAND & LODGING LLC and  
LUKE THOMPSON,

*Plaintiffs,*

v.

MANCHESTER AUSTIN LLC d/b/a  
MANCHESTER AUSTIN HOTEL LLC and  
DOUGLAS W. MANCHESTER,

*Defendants.*

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

201<sup>ST</sup> JUDICIAL DISTRICT

**DEFENDANTS’ SPECIAL EXCEPTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants Manchester Austin, LLC d/b/a Manchester Austin Hotel, LLC and Douglas W. Manchester (hereinafter collectively referred to as “Defendants”), and file their Special Exceptions to Plaintiffs’ Original Petition, Request for Disclosure and Jury Demand (hereinafter “Petition”), and in support thereof would respectfully show unto the Court as follows:

**I.**

**INTRODUCTION**

1. Defendants specially except to Plaintiffs’ Petition and seek an order from this Honorable Court directing Plaintiffs to re-plead their Petition, and if Plaintiffs fail to do so, strike the Petition in its entirety.

2. Plaintiffs’ Petition fails to provide Defendants with the required fair notice of the claims asserted against them. To the extent that Plaintiffs have valid, sustainable claims against Defendants, which Defendants contend they do not; Defendants are entitled to have the

opportunity to receive sufficient details to be on fair notice of Plaintiffs' claims so that they may properly defend against them.

3. Plaintiffs' Petition reveals on its face that the claims asserted therein are not ripe and, therefore, are precluded by law. Plaintiffs fail to allege any viable cause of action, or live and justiciable controversy. Defendants, therefore, respectfully request that this Honorable Court order Plaintiffs to re-plead and cure the pleading defects in Plaintiffs' Petition with respect to its claims for breach of contract and fraud, as set forth *infra*.

## II.

### **LEGAL STANDARD**

4. Special exceptions are specifically authorized by Texas Rule of Civil Procedure 91 and are used when the pleading does not give fair and adequate notice of the facts supplying the basis of a plaintiff's claims. *Villarreal v. Martinez*, 834 S.W. 2d 450, 451 (Tex. App. – Corpus Christi 1992, no writ). The purpose of special exceptions is to furnish the adverse party a medium in which to force clarification of pleadings when they are not clear or sufficiently specific. *Id.*; *see also Adams v. First Nat. Bank of Bells/Savoy*, 154 S.W. 3d 859, 876 (Tex. App. – Dallas 2005, no pet.) (*citing Friesenhahn v. Ryan*, 960 S.W. 2d 656, 658 (Tex. 1998)).

5. Special exceptions are used (1) to complain of formal defects in the allegations, (2) to challenge the legal sufficiency of the plaintiff's claim, or (3) to present dilatory matters shown on the face of the pleading. *Brown v. Hawes*, 764 S.W.2d 855, 856 (Tex. App. – Austin 1989, no writ); *Martin v. Hunter*, 233 S.W.2d 354, 355-356 (Tex. Civ. App. – San Antonio 1950, ref. n.r.e.) (special exceptions may address substance or form of a pleading). In short, special exceptions are the proper way to challenge pleadings that are substantively defective because they fail to state a

cause of action. *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957 (Tex. App. – Dallas 1985, no writ).

6. A special exception must (1) point out the pleading at which it is aimed, and (2) describe clearly and with particularity the defect, omission, obscurity, duplicity, generality or other insufficiency complained about. TEX. R. CIV. P. 91; *see also Castano v. San Felipe Agricultural*, 147 S.W.3d 444, 453 (Tex. App. – San Antonio 2004, no pet.); *Dierlam v. Clear Lake Hosp.*, 593 S.W.2d 774, 775 (Tex. Civ. App. – Houston [14th Dist.] 1979, no writ).

### III.

#### SPECIAL EXCEPTIONS

7. Defendants specially except to Plaintiffs' Original Petition in its entirety for failure to state a valid cause of action because the causes of action asserted therein are not ripe. A cause of action is not ripe when the determination of whether plaintiffs have a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass. *Waco Indep. School Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000). Plaintiffs' lawsuit is based on an allegation that Defendants did not pay Plaintiffs a brokerage fee resulting from the sale of the Fairmont Austin Hotel located at 101 Red River St., Austin, Texas 78701. (hereinafter the "Hotel"). The initial Engagement Letter was executed on June 12, 2017 by and between Defendant Douglas W. Manchester in his capacity as President of Defendant Manchester Austin, LLC d/b/a Manchester Austin Hotel, LLC, Owner of the Hotel ("Manchester") and Plaintiffs F10 Management, LLC and Frazier Land & Lodging, LLC. The Engagement Letter upon which Plaintiffs base their claim states that, "[t]he Success Fee shall be due and payable in cash

**concurrent with the closing by Manchester of the Capital Transaction on the Property.<sup>1</sup>**” (Emphasis added). *See* Exhibit A to Plaintiffs’ Petition at para. 6. Thus, any obligation by Defendants to pay Plaintiffs does not arise until the closing of a real estate transaction for which Plaintiffs are entitled to payment. The Engagement Letter further states, “[t]he Title Company or Closing Agent is also instructed that said Success Fee shall be paid from the proceeds of the transaction, at closing of the Capital Transaction....” (Emphasis added). *See* Exhibit A to Plaintiffs’ Petition at para. 13. The Engagement Letter makes it clear that any commission due is not owed until there is a closing. There has not been a closing on the sale of the Hotel, nor has a closing been alleged by Plaintiffs. The transaction upon which Plaintiffs base their causes of action against Defendants for breach of contract and fraud, the sale of the Hotel to Trinity Real Estate Investments, LLC (hereinafter “Trinity”), fell through and the Purchase and Sale Agreement (“PSA”) has been withdrawn. Without a sale and closing, Defendants’ are under no obligation to pay any alleged brokerage commission; the condition precedent has not and will not occur. As such, Plaintiffs’ claims are not ripe for litigation and Plaintiffs’ Petition should be stricken in its entirety.

8. Defendants specially except to Plaintiffs’ Original Petition in its entirety for failure to state a valid cause of action because the causes of action asserted therein are moot. A case is considered moot when there is no justiciable controversy between the parties – that is, if the issues presented are no longer “live,” or if the parties lack a legally cognizable interest in the outcome. *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012). If a case is or becomes moot, the court must dismiss for want of jurisdiction. *Id.* Plaintiffs’ alleged brokerage commission fee is due, if

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<sup>1</sup> Defendants dispute that the referenced Engagement Letter was in effect during the relevant time period, as discussed in more detail *infra*.

at all, and payable only on the closing of the sale with Trinity. Plaintiffs' Petition fails to allege that a closing, or sale, of the Hotel occurred. That is because the negotiations to sell the Hotel to Trinity fell through and there will not be a sale; the PSA with Trinity has been withdrawn and the transaction cancelled. Without a sale and closing, Defendants are under *absolutely no obligation* to pay any brokerage fee, and the sale and closing will not occur. The causes of action Plaintiffs assert against Defendants for breach of contract and fraud are moot because the issue is no longer live, and there is no justiciable controversy between the parties. Therefore, Plaintiffs' Petition should be stricken in its entirety.

9. Defendants specially except to Paragraphs 46 - 52 of Plaintiffs' Petition for failure to sufficiently plead facts to afford Defendants fair notice of the breach of contract claim. Tex. R. Civ. P. 45(b). Plaintiffs allege breach of contract against Manchester, however, by their own admission, they did not satisfy the terms of the Engagement Letter required for them to receive a Success Fee. The Engagement Letter had a finite time limit and expired on December 12, 2017. *See* Exhibit B of Plaintiffs' Petition. In order to be entitled to commission, Plaintiffs would have had to perform before the expiration of the parties' contract. Plaintiffs allege that pursuant to the terms of the Engagement Letter, the brokerage fee, referred to as a "Success Fee," shall be "considered earned upon receipt and acceptance by Manchester of a Letter of Intent." *See* Exhibit A to Plaintiffs' Petition at para. 6.<sup>2</sup> Plaintiffs admit that the Engagement Letter expired on December 12, 2017. *See* Petition at para. 29. The Engagement Letter provides for a two-month tail, or protection period, which allows Plaintiffs to still receive a commission should Manchester

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<sup>2</sup> It is important to note an ambiguity in the Engagement Letter regarding when the Success Fee is considered earned. Although Paragraph 6 of the Engagement Letter states that the Success Fee is earned upon acceptance of a Letter of Intent, Paragraph 13 of the same contract states that the Success Fee is "earned and owed at closing." Defendants contend that Paragraph 13 is controlling because a brokerage commission fee should logically be predicated on the sale of the subject real estate.

accept a Letter of Intent from an investor with whom Plaintiffs had begun discussions or negotiations during the time period the Engagement Letter was in effect. *See* Exhibit A to Plaintiffs’ Petition at para. 8. Plaintiffs do not fall within this protection period because prospective buyer, Trinity, was not revealed to Manchester in the list provided at the expiration of the Engagement Letter. Plaintiffs admit that they did not identify Trinity as a potential buyer until January 2019, after the Engagement Letter expired. *Id.* at 31. Plaintiffs further admit that the Letter of Intent from Trinity was not accepted by Manchester until August 30, 2018, clearly beyond the two-month tail which ended February 12, 2017. *See* Exhibit A to Plaintiffs’ Petition at para. 32. Therefore, not only was Trinity not identified by Plaintiffs until after the expiration of the Engagement Letter, which alone prevents Plaintiffs from receiving a Success Fee, but the Letter of Intent was accepted beyond the two-month tail. Under Texas law, “where the writing relied upon allows the broker a specified time in which to effect a sale, such time stipulation or provision must be complied with in order to entitle the broker to any commission.” *McCarty v. Brown*, 460 S.W.2d 450, 453 (Tex. Civ. App. – Tyler 1970, writ ref’d n.r.e.); *Edwards v. Parker*, 438 S.W.2d 141, 144 (Tex. Civ. App. -- Dallas 1969, no writ); *Friedlander v. Christianson*, 320 S.W.2d 404, 408 (Tex. Civ. App. – Houston 1959, no writ). Plaintiffs fail to plead any facts which would support a breach of contract claim because Plaintiffs, by their own admission, did not fulfill the required conditions which would entitle them to receive a Success Fee prior to the expiration of the Engagement Letter, including the two month tail. Thus, Defendants request that the Court order Plaintiffs to re-plead their Petition to cure this defect.

10. Defendants further specially except to Paragraphs 46 – 52 for failure to state a claim because there was no contract in effect when Plaintiffs performed the work for which they allege a Success Fee is due. The general doctrine is that “in order for a broker to be entitled to a

commission under a contract with stated terms, a purchase must have been produced through the broker's efforts, who is able and willing to buy the property upon the contract terms; and the commission is earned if, *while the contract is in force*, the broker procures a purchaser to whom the owner directly makes a sale." *Snoddy v. Wallace* 625 S.W.2d 81, 83 (Tex. App. – Tyler, 1981) (citing *Goodwin v. Gunter*, 185 S.W. 295, 296 - 97 (Tex. 1916)). Plaintiffs admit that the Engagement Letter expired on December 12, 2017. *See* Petition at para. 29. Plaintiffs assert that they continued to expend time, resources and effort to identify prospective investors after the contract expired. *Id.* at 32. The Letter of Intent, which allegedly triggers entitlement to the Success Fee, was accepted in August 2018, at which time Plaintiffs did not have a contract with Manchester. *Id.* at 34. It was not until *after* the Letter of Intent was accepted that Plaintiffs tried to enter into a contract to extend the Engagement Letter and receive commission for which they were never entitled. *Id.* By Plaintiffs' own admission, there was no contract in effect during the relevant time period. As such, Defendants request that the Court order Plaintiffs to re-plead and assert facts which put Defendants on fair notice of the basis for their breach of contract claim.

11. Defendants specially except to Paragraphs 53 - 61 of Plaintiffs' Petition for failure to sufficiently plead facts to afford Defendants fair notice of the basis for their cause of action against both Defendants for fraud. TEX. R. CIV. P. 45(b). Plaintiffs allege that they relied upon Defendants' representations that if Plaintiffs continued working to identify a prospective buyer, Defendants would approve an extension of the Engagement Letter and pay Plaintiffs a brokerage fee. Plaintiffs complain that they continued to expend time, resources and effort to secure a prospective buyer and were not compensated as promised. These paragraphs of Plaintiffs' Petition are defective because the allegations are not plead with sufficient particularity for Defendants to be afforded fair notice. Specifically, there cannot be a fraudulent misrepresentation to pay a Success Fee upon

closing when the sale never occurred; it fell through. Plaintiffs' Petition fails to allege this condition precedent, the closing on the sale of the Hotel. There has not, and will not, be a closing between Manchester and Trinity for the sale of the Hotel. As such, Defendants cannot ascertain from Plaintiffs' Petition the facts upon which Plaintiffs' allege a cause of action for fraud. Defendants request that the Court order Plaintiffs to re-plead and correct this defect in their Petition.

12. Defendants specially except to Paragraph 62 of Plaintiffs' Petition because it fails to state facts sufficient to give Defendants proper notice. Specifically, Plaintiffs fail to plead facts that describe how Defendant Douglas W. Manchester's actions were fraudulent, malicious or grossly negligent, one of which must be proven for Plaintiffs to be entitled to exemplary damages. TEX. CIV. PRAC. & REM. CODE Chapter 41. Plaintiffs' allegations are defective due to omission, generality and insufficiency. TEX. R. CIV. P. 91. To establish malice, Plaintiffs must plead facts evidencing Defendants' specific intent to cause substantial injury. TEX. CIV. PRAC. & REM. CODE § 41.001(7). Plaintiffs failed to do so. To be entitled to exemplary damages based on fraud, Plaintiffs must plead facts evidencing actual fraud. TEX. CIV. PRAC. & REM. CODE § 41.001(6). They failed to do so. For a gross negligence claim, Plaintiffs must plead facts that Defendants actions meet the conscious-indifference standard as set forth in Texas Civil Practices and Remedies Code section 41.001(11), which they have not. Therefore, Plaintiffs have failed to sufficiently plead facts that would put Defendants on fair notice of the basis for this claim for exemplary damages. Defendants request that the Court order Plaintiffs to re-plead and correct this defect in their Petition.

13. Defendants specially except to Paragraphs 53 - 62 of Plaintiffs' Petition as defective for failure to accurately state facts upon which relief can be granted. Texas courts make it clear that if

the agreed-upon performance required to earn a commission is not completed “within the limited period provided for in the contract,” then there is no entitlement to commission. *Parks v. Underwood*, 280 S.W.2d 320, 324 (Tex. Civ. App. – Dallas, 1955). Plaintiffs allege Defendants made oral representations that the terms of the expired Engagement Letter would be extended, and Plaintiffs relied upon those representations to their detriment. However, Plaintiffs acknowledge that these oral representations were made when no written contract for commission was in effect. Oral modifications of a commission agreement for the sale of real estate are unenforceable regardless of the timing of the alleged oral modifications; such agreements must be in writing. TEX. OCC. CODE § 1101.806(c). The Real Estate License Act, Texas Occupational Code Section 1101, et al., which makes a written agreement a prerequisite to recovery of any brokerage commission is plain, unequivocal and mandatory. *McConnell v. Columbia Co*, 326 S.W.2d 20, 23 (Tex. Civ. App. – Fort Worth, 1959). Thus, the alleged oral misrepresentations upon which Plaintiffs base their fraud claims cannot ever be the basis for Plaintiffs to recover a brokerage fee commission. As such, Defendants request that the Court order Plaintiffs to re-plead and correct this defect in their Petition.

14. Defendants specially except to Paragraphs 34 – 37 and 46 of Plaintiffs’ Petition as defective for failure to accurately state facts upon which relief can be granted. Plaintiffs allege that the Engagement Letter was extended by written agreement among the parties on or about August 23, 2017 and November 30, 2018. Defendants do not dispute the first extension, which was granted on or about August 23, 2017 and extended the term period to December 12, 2017. However, Plaintiffs further allege the Engagement Letter expired on December 12, 2017 and was not extended until almost a year later on November 30, 2018. This allegation that the Engagement Letter was extended on November 30, 2018 is factually wrong and insufficient to legally support

Plaintiffs' cause of action for breach of contract. No written contract was formed on November 30, 2018 for a number of reasons, including but not limited to, indefiniteness, absence of mutual assent and absence of a valid signature by Manchester. Even if it were possible to find an enforceable extension as a result of the letter and text messages exchanged on that date, Plaintiffs are precluded as a matter of law from claiming entitlement to commission because the performance alleged to justify the commission occurred outside of the time frame provided for by any written agreement in existence at the time of the alleged performance. To the extent Plaintiffs assert that the communications on November 30, 2018 somehow resurrected the expired Engagement Letter and allow for Plaintiffs to receive a Success Fee, the terms of the contract itself provide otherwise. By their own admission, Plaintiffs did not satisfy the terms of the Engagement Letter required for them to receive a Success Fee. The Engagement Letter had a finite time limit and expired on December 12, 2017. Pursuant to the terms of the Engagement Letter, the Success Fee shall be "considered earned upon receipt and acceptance by Manchester of a Letter of Intent." *See* Exhibit A to Plaintiffs' Petition at para. 6. Plaintiffs admit that the Engagement Letter expired on December 12, 2017. *See* Petition at para. 29. The Engagement Letter provides for a two-month tail, or protection period, which allows Plaintiffs to receive compensation should Manchester accept a Letter of Intent from an investor with whom Plaintiffs had begun discussions or negotiations during the time period the Engagement Letter was in effect. *See* Exhibit A to Plaintiffs' Petition at para. 8. Plaintiffs admit that they did not identify Trinity as a potential buyer until January 2019, after the Engagement Letter expired. *Id.* at 31. Plaintiffs further admit that the Letter of Intent from Trinity was not accepted by Manchester until August 30, 2018, beyond expiration of the two-month protection period. *Id.* at para. 32. Therefore, even if the text messages constitute an extension of the Engagement Letter, Plaintiffs still are not entitled to their alleged

damages. Thus, Defendants request that the Court order Plaintiffs to re-plead and correct this defect.

15. Defendants specially except to Paragraphs 53 – 62 of Plaintiffs’ Petition for failure to state a claim upon which relief may be granted and failure to provide Defendants with fair notice. As held by the Texas Supreme Court, tort claims seeking recovery of a real estate commission based upon an oral agreement are barred. *Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (1997). Plaintiffs are precluded from attempting to bootstrap their claim for failure to pay a brokerage commission by attempting to plead a tort claim of fraud, or even an equitable remedy. In *Trammell*, broker Harkinson did not have a written commission agreement and attempted to recover his brokerage fee by asserted claims in tort. *Id.* at 631. The Texas Supreme Court barred his claims because “to hold otherwise would be in direct opposition to the expressed will of the Legislature and would unduly expose the public to fraudulent claims for commissions.” *Id.* at 636; *see also Boyert v. Tauber*, 834 S.W.2d 60 (Tex. 1992). Plaintiffs did not have a written contract meeting all the requirements of the Texas Real Estate Licensing Act during the time period in which the alleged work was performed. Even an equitable theory of recovery cannot salvage a claim for a real estate commission absent a written agreement meeting the requirements under Texas law. *Trammell*, 944 S.W.2d at 635. Accordingly, Defendants request that the Court order Plaintiffs to re-plead their Petition to cure this defect.

16. Defendants specially except to Paragraphs 51 and 52 of Plaintiffs’ Petition because Plaintiffs have not sufficiently plead any cause of action that would entitle it to recover attorneys’ fees. Plaintiffs allege they are entitled to attorneys’ fees, but have not provided fair notice of any claim upon which such relief may be granted. As discussed in detail above, Plaintiffs have failed to state a claim for breach of contract against Manchester or fraud against either Defendant and,

therefore, have not provided fair notice of the basis for their alleged entitlement to attorneys' fees. Thus, Defendants request that Plaintiffs be ordered to re-plead their Petition to correct this defect.

**IV.**

**PRAYER**

WHEREFORE, Defendants pray that this Court sustain Defendants special exceptions and order Plaintiffs to re-plead their case, or, in the alternative, strike Plaintiffs' Original Petition in its entirety. Defendants further pray that the Court grant such other and further relief, both at law and in equity, to which it may be justly entitled.

Dated: May 28, 2019

Respectfully submitted,

**MAZZARELLA & MAZZARELLA, LLP**

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