

NO. 14-10046

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

G & C LAND  
PLAINTIFF - APPELLANT  
V.

FARMLAND MANAGEMENT SERVICES  
DEFENDANT - APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS

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APPELLANTS EXCERPTS OF RECORD

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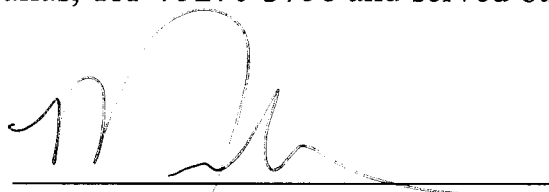
March 3, 2014

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## **CERTIFICATE OF SERVICE**

I, Merinda Condra, do hereby certify that I have on this 3rd day of March, 2014, mailed, by United States mail, postage prepaid, a true and correct paper copy and one electronic copy on CD of the Appendix to Jay Brandt, Bank of America Plaza, 901 Main Street, Suite 4800, Dallas, TX 75270-3758 and served other counsel of record by electronic mail.



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Merinda K. Condra

APPEAL,CLOSED,JURY

**U.S. District Court  
Northern District of Texas (Lubbock)  
CIVIL DOCKET FOR CASE #: 5:12-cv-00134-C**

G & C Land v. Farmland Management Services  
Assigned to: Judge Sam R Cummings  
Case in other court: USCA Fifth Circuit, 14-10046  
99th Judicial Distict, 12-502932  
Cause: 28:1332 Diversity-Fraud

Date Filed: 08/06/2012  
Date Terminated: 12/12/2013  
Jury Demand: Plaintiff  
Nature of Suit: 230 Rent Lease & Ejectment  
Jurisdiction: Diversity

**Plaintiff**

**G & C Land**

represented by **Merinda K Condra**  
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V.

**Defendant**

**Farmland Management Services**

represented by **Jay A Brandt**  
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Date Filed	#	Docket Text
08/06/2012	<u>1</u>	NOTICE OF REMOVAL WITH JURY DEMAND from 99th Judicial District, case number 2012-502932 filed by Farmland Management Services. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the <u>Judges Copy Requirements</u> is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. (Filing fee \$350; receipt number 0539-4737955) Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms and Instructions found at <a href="http://www.txnd.uscourts.gov">www.txnd.uscourts.gov</a> , or by clicking here: <u>Attorney Information - Bar Membership</u> (Attachments: # <u>1</u> Exhibit(s), # <u>2</u> Exhibit(s), # <u>3</u> Cover Sheet, # <u>4</u> Cover Sheet)

Supplement) (Spitaletto, Thomas) (Entered: 08/06/2012)

- 08/06/2012 2 CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Farmland Management Services. (Spitaletto, Thomas) (Entered: 08/06/2012)
- 08/06/2012 3 New Case Notes: A filing fee has been paid. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. (bdg) (Entered: 08/06/2012)
- 08/13/2012 4 MOTION for More Definite Statement filed by Farmland Management Services (Spitaletto, Thomas) (Entered: 08/13/2012)
- 08/13/2012 5 ANSWER to Complaint Subject to its 4 Motion for More Definite Statement filed by Farmland Management Services. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms and Instructions found at [www.txnd.uscourts.gov](http://www.txnd.uscourts.gov), or by clicking here: Attorney Information - Bar Membership. (Spitaletto, Thomas) Modified text on 8/13/2012 (cb). (Entered: 08/13/2012)
- 08/13/2012 6 NOTICE of Default Judgement in State Court filed by G & C Land (cb) (Entered: 08/13/2012)
- 08/13/2012 7 MOTION to Set Aside Judgment *and/or Vacate* filed by Farmland Management Services with Brief/Memorandum in Support. (Attachments: # 1 Exhibit(s) 1--Parts A through C), # 2 Exhibit(s) 1 (cont)--Parts D through J) (Spitaletto, Thomas) (Entered: 08/13/2012)
- 08/16/2012 8 ORDER denying 4 Motion for More Definite Statement and denying 7 Motion to Set Aside Judgment. Defendant's Motion for a More Definite Statement and Motion to Set Aside and/or Vacate Default Judgment, filed August 13, 2012, do not contain certificates of conference and are not supported by briefs. See Local Rule LR 7.1(a), (b), (d), and (h). (Ordered by Judge Sam R Cummings on 8/16/2012) (bdg) (Entered: 08/16/2012)
- 08/17/2012 9 Amended MOTION for More Definite Statement filed by Farmland Management Services with Brief/Memorandum in Support. (Spitaletto, Thomas) (Entered: 08/17/2012)
- 08/17/2012 10 ANSWER to Complaint filed by Farmland Management Services. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms and Instructions found at [www.txnd.uscourts.gov](http://www.txnd.uscourts.gov), or by clicking here: Attorney Information - Bar Membership. (Spitaletto, Thomas) (Entered: 08/17/2012)
- 08/17/2012 11 Amended MOTION to Set Aside Judgment *and/or Vacate* filed by Farmland Management Services with Brief/Memorandum in Support. (Spitaletto, Thomas) (Entered: 08/17/2012)

- 08/17/2012 12 Appendix in Support filed by Farmland Management Services re 11 Amended MOTION to Set Aside Judgment *and/or Vacate (Part 1)* (Attachments: # 1 Additional Page(s) (Part 2)) (Spitaletto, Thomas) (Entered: 08/17/2012)
- 08/20/2012 13 ORDER: Joinder of Parties and Amended Pleadings due by 3:00 p.m. on 12/14/2012. Discovery due by 3:00 p.m. on 1/13/2014. Motions due by 3:00 p.m. on 8/15/2013. Jury Trial set for 2/3/2014 at 9:00 AM in US Courthouse, Courtroom C-216, 1205 Texas Avenue, Lubbock, TX 79401-4091 before Judge Sam R Cummings. (Ordered by Judge Sam R Cummings on 8/20/2012) (cb) (Entered: 08/20/2012)
- 08/21/2012 14 NOTICE of Attorney in Charge and Appearance of Counsel filed by Farmland Management Services (Pollard, Bryan) (Entered: 08/21/2012)
- 08/21/2012 15 NOTICE of Attorney Appearance by Bryan D Pollard on behalf of Farmland Management Services. (Pollard, Bryan) (Entered: 08/21/2012)
- 08/21/2012 16 NOTICE of Attorney Appearance by Lee L Cameron, Jr on behalf of Farmland Management Services. (Cameron, Lee) (Entered: 08/21/2012)
- 08/21/2012 17 Second AMENDED MOTION to Set Aside Default *or Vacate Default Judgment* filed by Farmland Management Services (Cameron, Lee) Modified text on 8/22/2012 (cb). (Entered: 08/21/2012)
- 08/21/2012 18 Brief/Memorandum in Support filed by Farmland Management Services re 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* (Cameron, Lee) (Entered: 08/21/2012)
- 08/21/2012 19 Appendix in Support filed by Farmland Management Services re 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* (Attachments: # 1 Exhibit(s) A, # 2 Exhibit(s) B, # 3 Exhibit(s) C, # 4 Exhibit(s) D, # 5 Exhibit(s) E, # 6 Exhibit(s) F, # 7 Exhibit(s) G, # 8 Exhibit(s) H, # 9 Exhibit(s) I, # 10 Exhibit(s) J) (Cameron, Lee) (Entered: 08/21/2012)
- 08/22/2012 20 SUPPLEMENTAL CERTIFICATE of Conference re 17 Second AMENDED MOTION to Set Aside Default *or Vacate Default Judgment (First Supplemental Certificate of Conference)* by Bryan D Pollard on behalf of Farmland Management Services (Pollard, Bryan) Modified text on 8/22/2012 (cb). (Entered: 08/22/2012)
- 08/22/2012 21 Emergency MOTION to Expedite *Stay of any Proceedings to Enforce Default Judgment, and Brief in Support Thereof* filed by Farmland Management Services with Brief/Memorandum in Support. (Cameron, Lee) (Entered: 08/22/2012)
- 08/23/2012 22 ORDER: The time for responding to Defendant's Motion for Expedited Stay of Any Proceedings to Enforce Default Judgment, filed August 22, 2012, is hereby shortened to on or before August 31, 2012, at 9:00 a.m. No reply will be considered. (Ordered by Judge Sam R Cummings on 8/23/2012) (bdg) (Entered: 08/23/2012)
- 08/31/2012 23 \*\*\*UNFILED PER 25 \*\*\*Appendix in Support filed by G & C Land re 21 Emergency MOTION to Expedite *Stay of any Proceedings to Enforce Default Judgment, and Brief in Support Thereof* (Condra, Merinda) Modified (Unfiled) on



9/4/2012 (cb). (Entered: 08/31/2012)

- 08/31/2012 24 RESPONSE filed by G & C Land re: 21 Emergency MOTION to Expedite *Stay of any Proceedings to Enforce Default Judgment, and Brief in Support Thereof* (lkw) (Entered: 08/31/2012)
- 09/04/2012 25 Order Striking and Unfiling Document 23 Appendix in Support filed by G & C Land due to the following deficiency: Document not filed in proper form. (Ordered by Judge Sam R Cummings on 9/4/2012) (cb) (Entered: 09/04/2012)
- 09/07/2012 26 RESPONSE filed by G & C Land re: 9 Amended MOTION for More Definite Statement (Condra, Merinda) (Entered: 09/07/2012)
- 09/07/2012 27 RESPONSE AND OBJECTION filed by G & C Land re: 11 Amended MOTION to Set Aside Judgment *and/or Vacate*, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* (Condra, Merinda) (Entered: 09/07/2012)
- 09/07/2012 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* filed by G & C Land (Condra, Merinda) (Entered: 09/07/2012)
- 09/07/2012 29 \*\*\*REFILED - SEE 30 APPENDIX\*\*\* Appendix in Support filed by G & C Land re 27 Response/Objection, 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* (Condra, Merinda) Modified on 9/11/2012 (cb). (Entered: 09/07/2012)
- 09/07/2012 30 Appendix in Support filed by G & C Land re 27 Response/Objection, 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* , 29 Appendix in Support, *Part 2* (Attachments: # 1 Exhibit(s) 1-12) (Condra, Merinda) Modified text (Exhibits 1-12) on 9/11/2012 (cb). (Entered: 09/07/2012)
- 09/07/2012 31 Appendix in Support filed by G & C Land re 27 Response/Objection, 30 Appendix in Support, 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* , 29 Appendix in Support, *Part 3* (Attachments: # 1 Exhibit(s) 13-16) (Condra, Merinda) Modified text (Exhibits 13-16) on 9/11/2012 (cb). (Entered: 09/07/2012)
- 09/07/2012 32 Appendix in Support filed by G & C Land re 27 Response/Objection, 31 Appendix in Support, 30 Appendix in Support, 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* , 29 Appendix in Support, *Part 4* (Attachments: # 1 Exhibit(s) 17-19) (Condra, Merinda) (Entered: 09/07/2012)
- 09/07/2012 33 Appendix in Support filed by G & C Land re 27 Response/Objection, 31 Appendix in Support, 30 Appendix in Support, 28 MOTION to Strike 20 Certificate of Conference, 18 Brief/Memorandum in Support of Motion, 17 Second MOTION to Set Aside Default *or Vacate Default Judgment* , 29 Appendix in Support, 32 Appendix in

Support, *Part 5* (Attachments: # 1 Exhibit(s) 20-23, # 2 Exhibit(s) 24) (Condra, Merinda) (Entered: 09/07/2012)

- |            |           |  |
|------------|-----------|--|
| 09/07/2012 | <u>34</u> | ***REFILED - SEE <u>36</u> AMENDED BRIEF***Brief/Memorandum in Support filed by G & C Land re <u>27</u> Response/Objection, <u>31</u> Appendix in Support, <u>30</u> Appendix in Support, <u>28</u> MOTION to Strike <u>20</u> Certificate of Conference, <u>18</u> Brief/Memorandum in Support of Motion, <u>17</u> Second MOTION to Set Aside Default <i>or Vacate Default Judgment</i> , <u>29</u> Appendix in Support, <u>33</u> Appendix in Support, <u>32</u> Appendix in Support, (Condra, Merinda) Modified on 9/11/2012 (cb). (Entered: 09/07/2012) |
| 09/07/2012 | <u>35</u> | Appendix in Support filed by G & C Land re <u>31</u> Appendix in Support, <u>30</u> Appendix in Support, <u>29</u> Appendix in Support, <u>33</u> Appendix in Support, <u>32</u> Appendix in Support, (Attachments: # <u>1</u> Additional Page(s) Certificate of Service) (Condra, Merinda) (Entered: 09/07/2012)  |
| 09/08/2012 | <u>36</u> | Amended Brief in Support filed by G & C Land re <u>26</u> Response to <u>11</u> Amended MOTION to Set Aside Judgment <i>and/or Vacate</i> , <u>27</u> Response/Objection, <u>28</u> MOTION to Strike <u>20</u> Certificate of Conference, <u>18</u> Brief/Memorandum in Support of Motion, <u>17</u> Second MOTION to Set Aside Default <i>or Vacate Default Judgment</i> , <u>17</u> Second MOTION to Set Aside Default <i>or Vacate Default Judgment</i> (Condra, Merinda) (Entered: 09/08/2012)   |
| 09/24/2012 | <u>37</u> | NOTICE of Attorney Appearance by William J Akins on behalf of Farmland Management Services. (Akins, William) (Entered: 09/24/2012)   |
| 09/24/2012 | <u>38</u> | RESPONSE filed by Farmland Management Services re: <u>28</u> MOTION to Strike <u>20</u> Certificate of Conference, <u>18</u> Brief/Memorandum in Support of Motion, <u>17</u> Second MOTION to Set Aside Default <i>or Vacate Default Judgment</i> (Akins, William) (Entered: 09/24/2012)  |
| 10/08/2012 | <u>39</u> | MOTION for Protective Order <i>as to Plaintiff's Interrogatories in Aid of Judgment and Request for Expedited Consideration</i> filed by Farmland Management Services (Akins, William) (Entered: 10/08/2012)   |
| 10/08/2012 | <u>40</u> | Amended MOTION for Protective Order <i>as to Plaintiff's Interrogatories in Aid of Judgment and Request for Expedited Consideration</i> filed by Farmland Management Services (Attachments: # <u>1</u> Exhibit(s)) (Akins, William) (Entered: 10/08/2012)  |
| 10/09/2012 | <u>41</u> | NOTICE of <i>Withdrawal of Interrogatories</i> re: <u>39</u> MOTION for Protective Order <i>as to Plaintiff's Interrogatories in Aid of Judgment and Request for Expedited Consideration</i> , <u>40</u> Amended MOTION for Protective Order <i>as to Plaintiff's Interrogatories in Aid of Judgment and Request for Expedited Consideration</i> filed by G & C Land (Condra, Merinda) (Entered: 10/09/2012)   |
| 10/09/2012 | <u>42</u> | MOTION to Withdraw <u>40</u> Amended MOTION for Protective Order <i>as to Plaintiff's Interrogatories in Aid of Judgment and Request for Expedited Consideration</i> filed by Farmland Management Services (Cameron, Lee) (Entered: 10/09/2012)  |
| 10/09/2012 | <u>43</u> | ORDER granting <u>42</u> Motion to Withdraw, Without Prejudice, and Defendant's <u>40</u> Amended Motion for Protective Order <i>as to Plaintiff's Interrogatories in Aid of</i>   |

Judgment, (Ordered by Judge Sam R Cummings on 10/9/2012) (cb) Modified text on 10/24/2012 (cb). (Entered: 10/09/2012)

- 10/10/2012 44 MOTION for Leave to File Reply Brief in Support of Its Second Amended Motion to Set Aside or Vacate a Default Judgment and Brief in Support filed by Farmland Management Services (Akins, William) (Entered: 10/10/2012)
- 10/11/2012 45 RESPONSE filed by G & C Land re: 44 MOTION for Leave to File Reply Brief in Support of Its Second Amended Motion to Set Aside or Vacate a Default Judgment and Brief in Support (Condra, Merinda) (Entered: 10/11/2012)
- 10/12/2012 46 RESPONSE filed by G & C Land re: 44 MOTION for Leave to File Reply Brief in Support of Its Second Amended Motion to Set Aside or Vacate a Default Judgment and Brief in Support (Attachments: # 1 Declaration(s) Merinda K. Condra, # 2 Exhibit(s) FAQ USPS, # 3 Exhibit(s) Civil Docket Sheet) (Condra, Merinda) (Entered: 10/12/2012)
- 10/12/2012 47 ORDER denying as moot 44 Motion for Leave to File a Reply Brief; denying as moot 11 Motion to Set Aside Judgment; granting 17 Motion to Set Aside Default Judgment; denying as moot 21 Motion to Expedite; denying as moot 28 Motion to Strike. Default Judgment is VACATED. (Ordered by Judge Sam R Cummings on 10/12/2012) (cb) (Entered: 10/12/2012)
- 10/17/2012 48 MOTION for Reconsideration re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, filed by G & C Land with Brief/Memorandum in Support. (Attachments: # 1 Declaration(s) Merinda K. Condra) (Condra, Merinda) (Entered: 10/17/2012)
- 10/18/2012 49 RESPONSE filed by Farmland Management Services re: 48 MOTION for Reconsideration re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, (Cameron, Lee) (Entered: 10/18/2012)
- 10/24/2012 50 ORDER denying 9 Amended Motion for More Definite Statement. Came on for consideration Defendant's Amended Motion for More Definite Statement, filed August 17, 2012, and Plaintiff's response, filed September 7, 2012. After due consideration, the Court is of the opinion that Defendant's Amended Motion for More Definite Statement should be DENIED. SO ORDERED. (Ordered by Judge Sam R Cummings on 10/24/2012) (lkw) (Entered: 10/24/2012)
- 10/24/2012 51 ORDER denying 48 Plaintiff's Motion for Reconsideration. Came on for consideration Plaintiff's Motion for Reconsideration, filed October 17, 2012, and Defendant's Response, filed October 18, 2012. After considering the motion and the response, the Court is of the opinion that it did not make a manifest error of law or fact in deciding to vacate the default judgment. Accordingly, Plaintiff's Motion for Reconsideration is DENIED. SO ORDERED. (Ordered by Judge Sam R Cummings on 10/24/2012) (lkw) (Entered: 10/24/2012)

- 10/26/2012 52 \*\*\*RE-FILING DOCUMENT DUE TO ILLEGIBLE SIGNATURE AND DATE\*\*\* AFFIDAVIT re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, *Affidavit in Support of Attorney Fees* by G & C Land. (Condra, Merinda) Modified on 10/29/2012 (bdg). (Entered: 10/26/2012)
- 10/29/2012 53 AFFIDAVIT re 52 Affidavit, 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, *Affidavit in Support of Attorney's Fees* by G & C Land. (Attachments: # 1 Additional Page(s), # 2 Additional Page(s), # 3 Additional Page(s)) (Condra, Merinda) (Entered: 10/29/2012)
- 11/02/2012 54 RESPONSE with Brief in Support filed by Farmland Management Services re: 53 Affidavit, (Attachments: # 1 Exhibit(s) Affidavit of Lee L. Cameron, Jr.) (Cameron, Lee) Modified on 11/2/2012 (clf). (Entered: 11/02/2012)
- 11/07/2012 55 ORDER: As a condition to setting aside the default judgment in this case, the Court ordered an award of Plaintiff's attorney's fees incurred both in obtaining the default judgment and in responding to Defendant's efforts to set aside the judgment. To determine the fee award, the Court ordered the submission of affidavits by the parties' counsel. For the reasons stated herein, the Court awards Plaintiff \$16,039.50 in attorney's fees. so ORDERED. (Ordered by Judge Sam R Cummings on 11/7/2012) (lkw) (Entered: 11/07/2012)
- 12/07/2012 56 NOTICE of Attorney Appearance by Jay A Brandt on behalf of Farmland Management Services. (Filer will update contact info in ECF.) (Brandt, Jay) (Entered: 12/07/2012)
- 12/14/2012 57 MOTION to Amend/Correct *Plaintiff's Original Petition* filed by G & C Land with Brief/Memorandum in Support. (Attachments: # 1 Exhibit(s) Plaintiff's Original Petition, # 2 Exhibit(s) Defendant's Original Response, # 3 Proposed Amendment Plaintiff's Proposed Amended Complaint (Petition)) (Condra, Merinda) (Entered: 12/14/2012)
- 01/02/2013 58 Amended MOTION for Leave to File Plaintiff's Amended Complaint filed by G & C Land with Brief/Memorandum in Support. (Attachments: # 1 Exhibit(s) Plaintiff's Amended Petition) (Condra, Merinda) (Entered: 01/02/2013)
- 01/23/2013 59 RESPONSE filed by Farmland Management Services re: 58 Amended MOTION for Leave to File Plaintiff's Amended Complaint (Attachments: # 1 Exhibit(s)) (Spitaletto, Thomas) (Entered: 01/23/2013)
- 01/23/2013 60 MOTION for Leave to File Amended Answer filed by Farmland Management Services (Attachments: # 1 Exhibit(s)) (Spitaletto, Thomas) (Entered: 01/23/2013)
- 01/28/2013 61 \*\*\*UNFILED PER 62 ORDER\*\*\* MOTION for Leave to File Reply in Support of Plaintiff's Motion for Leave to Amend *Complaint* filed by G & C Land (Attachments: # 1 Exhibit(s) Reply in Support of Plaintiffs Motion for Leave to Amend, # 2 Check Cover, # 3 Check to Proposed Defendant) (Condra, Merinda) Modified text on 1/28/2013 (lkw). (Entered: 01/28/2013)

01/28/2013	<u>62</u>	ORDER: On January 28, 2013, Merinda Condra, counsel for Plaintiff, electronically filed as Document 61 "Defendant's Motion for Leave to File a Reply Brief in Support of Its Second Amended Motion to Set Aside or Vacate a Default Judgment and Brief in Support." The Amended Motion to Set Aside or Vacate a Default Judgment is no longer pending; furthermore, counsel for Plaintiff cannot file a document on behalf of Defendant. IT IS, THEREFORE, ORDERED that Document 61 is UNFILED. (Ordered by Judge Sam R Cummings on 1/28/2013) (lkw) (Entered: 01/28/2013)
01/28/2013	<u>63</u>	MOTION for Leave to File Reply in Support of Motion for Leave to Amend Complaint filed by G & C Land (Attachments: # <u>1</u> Exhibit(s) Proposed Reply, # <u>2</u> Cover Sheet, # <u>3</u> Exhibit(s) Check from Plaintiff to Proposed Defendant) (Condra, Merinda) (Entered: 01/28/2013)
02/15/2013	<u>64</u>	RESPONSE filed by Farmland Management Services re <u>63</u> MOTION for Leave to File Reply in Support of Motion for Leave to Amend Complaint (Spitaletto, Thomas) Modified text on 2/19/2013 (lkw). (Entered: 02/15/2013)
02/19/2013	<u>65</u>	ORDER denying <u>57</u> Motion Amend/Correct Plaintiff's Original Petition filed by G & C Land; denying <u>58</u> Amended MOTION for Leave to File Plaintiff's Amended Complaint filed by G & C Land ; granting <u>60</u> Motion for Leave to File Amended Answer filed by Farmland Management Services; granting <u>63</u> Motion Leave to File Reply in Support of Motion for Leave to Amend Complaint filed by G & C Land. G & C's Reply is deemed filed. Farmland shall file its amended answer within seven days of the date of this Order. SO ORDERED. (Ordered by Judge Sam R Cummings on 2/19/2013) (lkw) (Entered: 02/19/2013)
02/26/2013	<u>66</u>	ANSWER to Complaint filed by Farmland Management Services. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms and Instructions found at <a href="http://www.txnd.uscourts.gov">www.txnd.uscourts.gov</a> , or by clicking here: <a href="#">Attorney Information - Bar Membership</a> . (Spitaletto, Thomas) (Entered: 02/26/2013)
04/29/2013	<u>67</u>	MOTION for Sanctions <i>against Jay A. Brandt, Wilson Elser Moskowitz Edelman &amp; Dicker LLP, and Farmland Management Services</i> filed by G & C Land with Brief/Memorandum in Support. (Attachments: # <u>1</u> Exhibit(s) Exhibit A -- Email Exchange) (Condra, Merinda) (Entered: 04/29/2013)
04/29/2013	<u>68</u>	MOTION <i>to Appoint Magistrate as Special Master</i> filed by G & C Land with Brief/Memorandum in Support. (Attachments: # <u>1</u> Exhibit(s) Exhibit A -- Email Exchange) (Condra, Merinda) (Entered: 04/29/2013)
05/01/2013	<u>69</u>	Brief in Opposition filed by Farmland Management Services re <u>67</u> MOTION for Sanctions <i>against Jay A. Brandt, Wilson Elser Moskowitz Edelman &amp; Dicker LLP, and Farmland Management Services</i> Defendant's Response Brief in Opposition to Plaintiff's Motion to Impose Sanctions (Attachments: # <u>1</u> Exhibit(s), # <u>2</u> Exhibit(s), # <u>3</u> Exhibit(s), # <u>4</u> Exhibit(s), # <u>5</u> Exhibit(s)) (Spitaletto, Thomas) Modified text on 5/2/2013 (bdg). (Entered: 05/01/2013)
05/15/2013	<u>70</u>	MOTION to Compel Farmland Management Services to Respond to Request for

Production of Documents with Memorandum in Support Thereof filed by G & C Land. (Condra, Merinda) Modified text on 5/15/2013 (bdg). (Entered: 05/15/2013)

05/20/2013 71 RESPONSE BRIEF IN OPPOSITION filed by Farmland Management Services re: 68 MOTION to Appoint Magistrate as Special Master (Spitaletto, Thomas) Modified text on 5/20/2013 (bdg). (Entered: 05/20/2013)

05/22/2013 72 ORDER denying 67 Motion to Impose Sanctions. (Ordered by Judge Sam R Cummings on 5/22/2013) (bdg) (Entered: 05/22/2013)

05/22/2013 73 ORDER denying 68 Motion to Appoint Magistrate as Special Master. There is no indication that the undersigned cannot timely and effectively address these matters. (Ordered by Judge Sam R Cummings on 5/22/2013) (bdg) (Entered: 05/22/2013)

06/05/2013 74 RESPONSE BRIEF IN OPPOSITION filed by Farmland Management Services re: 70 MOTION to Compel *Farmland to Produce Documents* and Defendant's Motion for Entry of Protective Order (Attachments: # 1 Exhibit(s), # 2 Exhibit(s), # 3 Exhibit(s), # 4 Exhibit(s), # 5 Exhibit(s), # 6 Exhibit(s), # 7 Exhibit(s), # 8 Exhibit(s), # 9 Exhibit(s)) (Spitaletto, Thomas) Modified text on 6/6/2013 (bdg). (Entered: 06/05/2013)

06/05/2013 MOTION for Protective Order filed by Farmland Management Services. \*\*\*SEE DOC. NO. 74 FOR IMAGE\*\*\* (bdg) (Entered: 06/06/2013)

06/19/2013 75 RESPONSE AND OBJECTION filed by G & C Land re: MOTION for Protective Order (Condra, Merinda) (Entered: 06/19/2013)

06/21/2013 76 ORDER granting Motion for Protective Order; denying 70 Motion to Compel. (Ordered by Judge Sam R Cummings on 6/21/2013) (bdg) (Entered: 06/21/2013)

06/21/2013 77 PROTECTIVE ORDER: The Court hereby enters this Protective Order with respect to documents produced in this lawsuit which the parties have designated as "Confidential." This Protective Order is applicable to all parties hereto for the sole purpose of facilitating the production of documents. (Ordered by Judge Sam R Cummings on 6/21/2013) (bdg) (Entered: 06/21/2013)

08/15/2013 78 MOTION for Summary Judgment filed by Farmland Management Services (Attachments: # 1 Proposed Order) (Spitaletto, Thomas) (Entered: 08/15/2013)

08/15/2013 79 Brief/Memorandum in Support filed by Farmland Management Services re 78 MOTION for Summary Judgment (Spitaletto, Thomas) (Entered: 08/15/2013)

08/15/2013 80 Appendix in Support filed by Farmland Management Services re 78 MOTION for Summary Judgment (Spitaletto, Thomas) (Entered: 08/15/2013)

09/05/2013 81 MOTION to Continuance of Summary Judgment to Permit Discovery filed by G & C Land (Condra, Merinda) Modified text on 9/6/2013 (bdg). (Entered: 09/05/2013)

09/05/2013 82 RESPONSE filed by Farmland Management Services re: 78 MOTION for Summary Judgment (Condra, Merinda) (Entered: 09/05/2013)

09/05/2013 83 Brief/Memorandum in Support filed by Farmland Management Services re 82

Response/Objection *Defendant's Motion for Summary Judgment* (Condra, Merinda)  
(Entered: 09/05/2013)

- 09/05/2013 84 Appendix in Support filed by G & C Land re 82 Response/Objection to *Defendant's Motion for Summary Judgment* (Condra, Merinda) (Entered: 09/05/2013)
- 09/06/2013 85 ORDER denying 81 Motion for Continuance of Summary Judgment to Permit Discovery for the lack of a certificate of conference. (Ordered by Judge Sam R Cummings on 9/6/2013) (bdg) (Entered: 09/06/2013)
- 09/06/2013 86 Amended MOTION to Continue *Consideration of Summary Judgment* filed by G & C Land (Condra, Merinda) (Entered: 09/06/2013)
- 09/08/2013 87 AMENDED Appendix in Support to Plaintiff's Response to Defendant' 78 Motion for Summary Judgment filed by G & C Land (Attachments: # 1 Exhibit(s) Appendix) (Condra, Merinda) Modified text on 9/9/2013 (lkw). (Entered: 09/08/2013)
- 09/09/2013 88 Counsel Appearance on Behalf of Plaintiff filed by G & C Land (Harlan, Bruce) Modified on 9/9/2013 (clf). (Entered: 09/09/2013)
- 09/20/2013 89 RESPONSE IN OPPOSITION filed by Farmland Management Services re: 81 MOTION for Continuance of Summary Judgment to Permit Discovery. (Spitaletto, Thomas) Modified text on 9/20/2013 (bdg). (Entered: 09/20/2013)
- 09/20/2013 90 OBJECTIONS AND MOTION to Strike 87 Appendix in Support filed by Farmland Management Services (Spitaletto, Thomas) Modified text on 9/20/2013 (bdg). (Entered: 09/20/2013)
- 09/20/2013 91 MOTION to Strike 87 Appendix in Support - Specific Portions of Gauger Affidavit filed by Farmland Management Services with Brief in Support. (Spitaletto, Thomas) Modified text on 9/20/2013 (bdg). (Entered: 09/20/2013)
- 10/10/2013 92 OBJECTIONS TO AND MOTION to Strike 91 MOTION to Strike 87 Plaintiff's Summary Judgment Evidence - Appendix in Support filed by G & C Land (Condra, Merinda) Modified text on 10/10/2013 (bdg). (Entered: 10/10/2013)
- 10/11/2013 93 RESPONSE AND OBJECTION filed by G & C Land re: 91 MOTION to Strike 87 Appendix in Support (Attachments: # 1 Exhibit(s) A) (Condra, Merinda) (Entered: 10/11/2013)
- 10/11/2013 94 Appendix in Support filed by G & C Land re 84 Appendix in Support, 82 Response/Objection, 87 Appendix in Support, 83 Brief/Memorandum in Support of Motion *Second Amended* (Condra, Merinda) (Entered: 10/11/2013)
- 10/11/2013 95 RESPONSE AND OBJECTION filed by G & C Land re: 91 MOTION to Strike 87 Appendix in Support , 90 MOTION to Strike 87 Appendix in Support (Condra, Merinda) (Entered: 10/11/2013)
- 10/14/2013 96 MOTION for Reconsideration re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, 51 Order on Motion for

Reconsideration,, , MOTION to Amend/Correct 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, () filed by G & C Land with Brief/Memorandum in Support. (Condra, Merinda) (Entered: 10/14/2013)

- 10/14/2013      97      Appendix in Support filed by G & C Land re 96 MOTION for Reconsideration re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, 51 Order on Motion for Reconsideration, MOTION to Amend/Correct 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, (Condra, Merinda) (Entered: 10/14/2013)
- 10/15/2013      98      Amended Appendix in Support filed by G & C Land re 84 Appendix in Support, 82 Response/Objection, 87 Appendix in Support, 94 Appendix in Support, 83 Brief/Memorandum in Support of Motion *Refiled to Correct Page Numbers* (Condra, Merinda) Modified text on 10/16/2013 (lkw). (Entered: 10/15/2013)
- 10/16/2013      99      MOTION to Compel *Mediation* filed by G & C Land with Brief/Memorandum in Support. (Condra, Merinda) (Entered: 10/16/2013)
- 10/18/2013      100      RESPONSE filed by Farmland Management Services re: 96 MOTION for Reconsideration re 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, 51 Order on Motion for Reconsideration, MOTION to Amend/Correct 47 Order on Motion for Leave to File,, Order on Motion to Set Aside Judgment,, Order on Motion to Set Aside Default,, Order on Motion to Expedite,, Order on Motion to Strike, (Brandt, Jay) (Entered: 10/18/2013)
- 10/22/2013      101      MOTION to Strike 98 Appendix in Support, *Response to Summary Judgment* filed by Farmland Management Services with Brief/Memorandum in Support. (Brandt, Jay) (Entered: 10/22/2013)
- 11/05/2013      102      AFFIDAVIT of Service for Subpoena served on Kyle Freeman, Registered Agent of Silver Star Crop Insurance Group, Inc. on 9/24/13. (Spitaletto, Thomas) (Entered: 11/05/2013)
- 11/05/2013      103      AFFIDAVIT of Service for Subpoena served on Donald D. Whittenburg, Registered Agent for Whittenburg Insurance Agency, Inc. on 9/24/2013. (Spitaletto, Thomas) (Entered: 11/05/2013)
- 11/06/2013      104      RESPONSE filed by Farmland Management Services re: 99 MOTION to Compel *Mediation* (Spitaletto, Thomas) (Entered: 11/06/2013)
- 11/22/2013      105      MOTION to Compel *Production of Documents Responsive to Farmland's Request for Production and Motion to Overrule Plaintiff's Objections* filed by Farmland Management Services (Attachments: # 1 Exhibit(s), # 2 Exhibit(s), # 3 Exhibit(s), # 4 Exhibit(s)) (Spitaletto, Thomas) (Entered: 11/22/2013)



12/04/2013	<u>106</u>	ORDER denying <u>86</u> Motion to Continuance of Summary Judgment to Permit Discovery; denying <u>96</u> Motion for Reconsideration and Modification of Prior Order to Vacate Default Judgment; denying <u>99</u> Motion for Mediation. (Ordered by Judge Sam R Cummings on 12/4/2013) (bdg) (Entered: 12/04/2013)
12/11/2013	<u>107</u>	RESPONSE filed by G & C Land re: <u>105</u> MOTION to Compel <i>Production of Documents Responsive to Farmland's Request for Production and Motion to Overrule Plaintiff's Objections</i> (Harlan, Bruce) (Entered: 12/11/2013)
12/12/2013	<u>108</u>	ORDER: G&C's amended appendices, filed September 8, October 11, and October 15, 2013, are UNFILED. G&C's Objections to Defendant's Motion to Strike Plaintiff's Summary Judgment are SUSTAINED, and granting <u>101</u> Motion to Strike; Granting <u>78</u> Motion for Summary Judgment and G&C's claims are DISMISSED with prejudice; denying <u>90</u> Motion to Strike ; denying <u>91</u> Motion to Strike ; granting Farmland's <u>92</u> Motion to Strike; Farmland's <u>105</u> Motion to Overrule Plaintiff's Objections and Compel Production of Documents Responsive to Farmland's Request for Production is DENIED as moot. (Ordered by Judge Sam R Cummings on 12/12/2013) (bdg) (Entered: 12/12/2013)
12/12/2013	<u>109</u>	JUDGMENT: IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff, G & C Land, take nothing as against Defendant, Farmland Management Services. Costs of court are taxed against Plaintiff. (Ordered by Judge Sam R Cummings on 12/12/2013) (bdg) (Entered: 12/12/2013)
01/10/2014	<u>110</u>	NOTICE OF APPEAL to the Fifth Circuit as to <u>109</u> Judgment by G & C Land. Filing fee \$505, receipt number 0539-5782992. T.O. form to appellant electronically at <u>Transcript Order Form</u> or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (Condra, Merinda) (Entered: 01/10/2014)
01/16/2014		USCA Case Number 14-10046 in USCA Fifth Circuit for <u>110</u> Notice of Appeal, filed by G & C Land. (bdg) (Entered: 01/16/2014)
01/17/2014	<u>111</u>	Transcript Order Form: re <u>110</u> Notice of Appeal transcript not requested - No hearings. (bdg) (Entered: 01/17/2014)
01/21/2014		Record on Appeal for USCA5 14-10046 (related to <u>110</u> appeal): Record consisting of 1 ECF electronic record certified to USCA. To request a copy of the record (on disk or on paper), <u>contact the appeals deputy</u> in advance to arrange delivery. (bdg) (Entered: 01/21/2014)
01/27/2014		Record on Appeal for USCA5 14-10046 (related to <u>110</u> appeal): transmitted to attorney Thomas M. Spitaletto on disk only by mail. (bdg) (Entered: 01/27/2014)
02/19/2014		Record on Appeal for USCA5 14-10046 (related to <u>110</u> appeal): transmitted to attorney Bruce Harlan on disk only by mail. (bdg) (Entered: 02/19/2014)

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION**

**G & C LAND,**

**Plaintiff,**

**V.**

**FARMLAND MANAGEMENT  
SERVICES,  
Defendant.**

§  
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§  
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§

**Civil Action No. 5:12-CV-00134-C**

**NOTICE OF APPEAL**

**Notice is hereby given** that G & C LAND, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 5<sup>th</sup> Circuit from a final judgment entered in this action on the 12<sup>th</sup> day of December, 2013.

Respectfully submitted,

CONDRA LAW OFFICE

By: 

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G & C LAND

Civil Action No. 5:12-CV-134-C

SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FARMLAND MANAGEMENT	)	
SERVICES,	)	
	)	
Defendant.	)	Civil Action No. 5:12-CV-134-C

**ORDER**

Before considering Defendant Farmland Management Services' ("Farmland") Motion for Summary Judgment, filed August 15, 2013, and Plaintiff G & C Land's ("G & C") response, the Court takes up the following evidentiary matters.

**I. PRELIMINARY EVIDENTIARY MATTERS**

G & C filed its response to Farmland's motion for summary judgment, brief, and appendix on September 5, 2013. Then, inexplicably and without seeking leave of court, G & C filed amended appendices on September 8, October 11, and October 15. Under the Court's Local Rules, a party must file a response and brief, along with an appendix, to an opposed motion within 21 days from the date the motion is filed. N.D. Tex. L.R. 7.1(e) & (I); 56.6. All three amended appendices were filed outside the 21-day deadline. Moreover, a party may not file supplemental evidence without the Court's permission. N.D. Tex. L.R. 56.7. Not only did G & C file amended appendices without leave of court, it did not file amended briefs citing to this new evidence. Because the Court will not search the record *sua sponte* for evidence

supporting G & C's opposition to Farmland's motion for summary judgment,<sup>1</sup> the amended appendices are of no use. Therefore, G & C's amended appendices, filed September 8, October 11, and October 15, 2013, are **UNFILED**.

In light of the Court's unfiling of G & C's amended appendices, Farmland's Motion to Strike Plaintiff's Amended Appendix in Support of Its Response to Motion for Summary Judgment, filed October 22, 2013, is **DENIED** as moot.

On September 20, 2013, Farmland also filed a Motion to Strike Specific Portions of Gauger Affidavit. By the motion, Farmland moves to strike an attachment to and footnote in the affidavit of Kiel Gauger, which is cited in G & C's response to Farmland's motion for summary judgment. The attachment to the Gauger affidavit is a blog article written by a stock broker about the suicide of Joe Silveira, Farmland's former president. In the article, the author raises questions about a possible connection between Silveira's suicide and an accounting probe of another company with which he was involved. In the footnote of the Gauger affidavit, the affiant states his belief that Silveira committed suicide because of possible fraud allegations against him. None of this information is relevant to the material issues raised in Farmland's motion for summary judgment, and the blog article is hearsay to which no exception applies. Therefore, Farmland's Motion to Strike is **GRANTED**. The Court will not consider the attachment to or the footnote in the affidavit of Kiel Gauger when deciding Farmland's motion for summary judgment.

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<sup>1</sup>Notably, G & C's citation to the record is sparse. The Court will not consider any summary judgment evidence that is not specifically cited in the response.

On October 10, 2013, G & C filed its Objections to and Motion to Strike Defendant's Motion to Strike Plaintiff's Summary Judgment Evidence, in which G & C complains that Farmland failed to confer about its motion to strike before filing it, in violation of this Court's Local Rule 7.1. G & C is correct that Farmland violated the Court's local rule by filing the motion to strike without conferring with opposing counsel. Such action is yet another example of a party's needless frustration of the pre-trial process, which has become an unfortunate theme in this case. Therefore, G & C's objections are **SUSTAINED**, and its Motion to Strike Defendant's Motion to Strike Plaintiff's Summary Judgment Evidence is **GRANTED**. Farmland's Motion to Strike Plaintiff's Summary Judgment Evidence, filed September 20, 2013, is **STRICKEN** from the record.

Finally, in light of the Court's dismissal of all of G & C's claims, detailed below, Farmland's Motion to Overrule Plaintiff's Objections and Compel Production of Documents Responsive to Farmland's Request for Production, filed November 22, 2013, is **DENIED** as moot.

Now that the Court has decided the above evidentiary issues, it considers Farmland's Motion for Summary Judgment.

## **II. FACTS**

G & C is a farming operation owned by Raymond Weldon Cudd and Keil Gauger. Farmland is in the business of leasing farmland for landowners. G & C and Farmland negotiated a lease for over 5,000 acres of farmland in Yoakum County, Texas. The lease was for five years. The parties executed the lease no later than June 7, 2007. When G & C took possession of the land in 2007, the irrigation system on the farm was run by diesel-powered generators.

Before and up to the execution of the lease, Farmland agents represented to G & C that, although electricity was not available on the farm at the time, Farmland intended to make electricity available to power the irrigation system by the second year of the lease. Specifically, David Baughman, a Farmland agent, represented to G & C before the execution of the lease, “within a year we will have [electricity]. We probably won’t get it this year, but by our second year, we are going to get the electricity put in this farm. We already have the money set back in an account to do that. And that is our intentions [sic].”

During the term of the lease, Farmland agents made numerous efforts to have electrical service extended to the farm, to no avail. Such efforts included imploring Lea County Electrical Cooperative, the local electric supplier, to make services available to the farm. Not until the fifth year of the lease was electrical service made available, and then only to a portion of the farm. For almost the entire duration of the lease, the irrigation system on the farm was run by diesel-powered generators. The cost to run the system on the generators far outweighed the would-be cost to run it on electricity.

Based on the unfulfilled promise of electrical service and the related increase in cost to run the irrigation system, G & C makes claims against Farmland for common law fraud, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices Act (“DTPA”).<sup>2</sup>

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<sup>2</sup>Curiously, in its response, G & C attempts to raise fact issues regarding conspiracy and negligent hiring, supervision, or management claims. Yet, these claims were never pleaded. While they are alleged in its first amended complaint, the Court denied G & C leave to file the amended pleading. Therefore, these claims are not before the Court. Moreover, in its brief in support of motion for summary judgment, Farmland makes mention in a footnote of a phantom claim for fraudulent inducement. Such a claim appears neither in the live pleading nor in the never-filed first amended complaint.

### III. STANDARD

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); that is, “[a]n issue is material if its resolution could affect the outcome of the action.” *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 409 (5th Cir. 2002). When reviewing a motion for summary judgment, the court views all facts and evidence in the light most favorable to the non-moving party. *United Fire & Cas. Co. v. Hixson Bros.*, 453 F.3d 283, 285 (5th Cir. 2006). In doing so, the court “refrain[s] from making credibility determinations or weighing the evidence.” *Nationwide Mut. Ins. Co. v. Lake Caroline, Inc.*, 515 F.3d 414, 418 (5th Cir. 2008).

### IV. DISCUSSION

#### *A. Common Law Fraud*

G & C contends that Farmland committed fraud when it made representations regarding the future availability of electrical service to operate the irrigation system on the farm. It is undisputed that electrical service was unavailable when the parties executed the lease.

To show fraud, a plaintiff must demonstrate “a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury.” *Formosa Plastics Corp. U.S. v. Presidio Eng'rs & Contrs.*, 960 S.W.2d 41, 47 (Tex. 1988) (quoting *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994)). “A promise of future performance constitutes an actionable misrepresentation if the promise was made with no



intention of performing at the time it was made.” *Id.* at 48. A plaintiff must present evidence of the defendant’s intent at the time the representation was made. *Id.* And the mere failure to perform a contract is not evidence of fraud. *Id.*

Again, G & C contends that Farmland committed fraud when it represented, before and up to the execution of the lease, that it would make electrical service available on the farm by the second year of the lease. No electrical service was available on the farm when the parties executed the lease, and Farmland did not represent that it was. Therefore, Farmland’s promise was one of future performance, and G & C must present specific evidence of Farmland’s intent not to perform its promise at the time it was made. This G & C cannot do.

In an attempt to demonstrate a fact issue regarding its fraud claim, G & C points to the Baughman quote, “within a year we will have [electricity]. We probably won’t get it this year, but by our second year, we are going to get the electricity put in this farm. We already have the money set back in an account to do that. And that is our intentions [sic].” It is undisputed that, over the course of the lease, Farmland agents engaged in numerous communications with Lea County Electrical Cooperative attempting to make electricity available on the farm. G & C makes the conclusory argument that Baughman’s statement could be construed as a current commitment, as opposed to a promise of future action, and that it is evidence of Farmland’s intent not to make good on its promise at the time it was made.

While the Court must view the facts in a light most favorable to G & C as the non-moving party, the inferences G & C attempts to draw from this evidence are unreasonable. It is undisputed that electricity was unavailable on the farm when the parties executed the lease and that Farmland made representations at the time that it would make electricity available by the

second year of the lease. It is incomprehensible how this representation can be construed as anything but a promise of future action.

Moreover, the fact that Baughman said Farmland has money in an account that it intends to use to make electricity available on the farm in the future cannot reasonably be construed as evidence that Farmland did not intend to fulfill its promise when the statements were made. If anything, this statement is evidence of Farmland's intent that it will make good on its promise. Notably, the Court is not attempting to make a credibility determination but is merely distinguishing between a reasonable inference and an unreasonable inference based on the same evidence.<sup>3</sup> Because G & C fails to raise a genuine dispute of fact that Farmland did not intend to make good on its promise of future conduct at the time it was made, Farmland is entitled to summary judgment on G & C's fraud claim.

*B. Negligent Misrepresentation*

To establish a claim for negligent misrepresentation, a plaintiff must prove that the defendant made a misrepresentation to the plaintiff in the course of the defendant's business or in

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<sup>3</sup> When presented with two alternative inferences urged from the same body of basic fact, the Court must identify whether only one or both of them are reasonable . . . . A party opposing summary judgment is entitled to the benefit of only reasonable inferences that may be drawn from the evidence put forth. If a summary judgment movant has produced "overwhelming" basic evidence to support its asserted inference, and the respondent has failed to produce significantly probative evidence countering the inference, it may be unreasonable to draw an inference contrary to the movant's interpretation of the facts. A court may grant summary judgment in such a case, even when subjective factors such as motive or intent are the fact issue in question.

*Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 593 (N.D. Tex. 1999) (internal quotation marks and citations omitted).

a transaction in which the defendant had a pecuniary interest; the defendant supplied false information for the guidance of others; the defendant did not exercise reasonable care or competence in obtaining or communicating the information; the plaintiff justifiably relied on the representation; and the defendant's negligent misrepresentation proximately caused the plaintiff's injury. *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999). Critically, "the misrepresentation at issue must be one of existing fact because 'under Texas law, promises of future action are not actionable as a negligent-misrepresentation tort.'" *Stapp v. Bank of Am., N.A.*, No. 4:11-CV-203, 2013 U.S. Dist. LEXIS 44791, at \*17 (E.D. Tex. Feb. 28, 2013) (quoting *De Franceschi v. BAC Home Loans Servicing, L.P.*, 477 F. App'x 200, 205 (5th Cir. 2012)).

As discussed above, Farmland has met its summary-judgment burden of demonstrating that the representation at issue was a promise of future action, not one of existing fact. G & C has presented no reasonable evidence to the contrary. Therefore, Farmland is entitled to summary judgment on G & C's negligent-misrepresentation claim.

### C. DTPA

G & C's claims for violations of the DTPA are governed by a two-year statute of limitations. Tex. Bus. & Com. Code §17.565 ("All actions brought under [the DTPA] must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."). Farmland represented to G & C when the lease was executed that it would make electricity available on the farm by the second year of the lease. The parties executed the lease on June 7, 2007. Accordingly, Farmland should have made electricity available on the farm

by June 7, 2008. When electricity was not made available on the farm by June 7, 2008, G & C should have discovered the occurrence of the false, misleading, or deceptive act or practice on that date. Therefore, the statute of limitations ran on the DTPA claims, at the latest, on June 7, 2010. G & C filed this case on July 7, 2012, over two years too late. Because G & C's claims for violations of the DTPA are barred by the statute of limitations, Farmland is entitled to summary judgment on these claims.<sup>4</sup>

#### V. CONCLUSION

For the reasons stated herein,

- (1) G & C's amended appendices, filed September 8, October 11, and October 15, 2013, are **UNFILED**;
- (2) Farmland's Motion to Strike Plaintiff's Amended Appendix in Support of Its Response to Motion for Summary Judgment is **DENIED** as moot;
- (3) Farmland's Motion to Strike is **GRANTED**;
- (4) G & C's Objections to Defendant's Motion to Strike Plaintiff's Summary Judgment are **SUSTAINED**, and its Motion to Strike the same is **GRANTED**;
- (5) Farmland's Motion to Overrule Plaintiff's Objections and Compel Production of Documents Responsive to Farmland's Request for Production is **DENIED** as moot; and
- (6) Farmland's Motion for Summary Judgment is **GRANTED**, and G & C's claims are **DISMISSED** with prejudice.

SO ORDERED this 12<sup>th</sup> day of December, 2013.



SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

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<sup>4</sup>G & C does not respond to Farmland's limitations argument; therefore, the Court assumes that G & C concedes the issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FARMLAND MANAGEMENT	)	
SERVICES,	)	
	)	
Defendant.	)	Civil Action No. 5:12-CV-134-C

**ORDER**

On this date, the Court considered:

- (1) Defendant Farmland Management Services' ("Farmland") Second Amended Motion to Set Aside or Vacate Default Judgment, Brief, and Appendix, filed August 21, 2012; and
- (2) Plaintiff G&C Land's ("G&C") Response and Appendix, filed September 7, 2012, and Amended Brief, filed September 8, 2012.

**I. BACKGROUND**

G&C, a Texas general partnership, filed suit in the 99th Judicial District Court of Lubbock County, Texas, against Farmland, a California corporation, on July 7, 2012. The case involves a dispute over a land lease. The Lubbock County District Clerk issued citation on July 10, 2012, and Farmland was served on July 13, 2012. On August 6, 2012, shortly after 10:00 a.m., G&C took a default judgment against Farmland in state court worth over \$3 million,

and Farmland filed its notice of removal in this court at 11:47 a.m. the same day. Farmland filed its first motion to set aside the default judgment on August 13, 2012.

## II. STANDARD

Federal Rule of Civil Procedure 55(c) states that a “court may set aside . . . a default judgment under Rule 60(b).” Fed. R. Civ. P. 55(c). Rule 60(b) provides, in relevant part, that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1). The Fifth Circuit applies Rule 60(b) “most liberally to judgments in default . . . [because] . . . truncated proceedings of this sort are not favored. . . . Thus, unless it appears that no injustice was done by the judgment, the equities in such cases will militate strongly in favor of relief.” *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1459 (5th Cir. 1992) (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 403 (5th Cir. 1981)) (internal quotation marks omitted) (alterations in the original).

In determining whether good cause exists to set aside a default judgment under Rule 60(b)(1), courts examine the following factors: “whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented.” *Jenkins & Gilchrist v. Groia & Co.*, 542 F.3d 114, 119 (5th Cir. 2008). This Court enjoys considerable discretion when determining whether the moving party has satisfied any of Rule 60(b)’s standards, *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1992), and the Court should resolve all doubts in favor of granting relief so that the matter may be determined on its merits. *See Jenkins*, 542 F.3d at 123.

### III. ANALYSIS

#### ***A. Defendant's Default Was Not Willful***

Farmland's default was not willful or sufficiently culpable to require the default judgment to stand. Affidavit testimony by Farmland's counsel indicates that he intended to remove the case to federal court before the state-court answer deadline and to answer or otherwise respond to G&C's petition in federal court.<sup>1</sup> He states that his delay was due to the need to research the amount in controversy and G&C's citizenship, which were not readily apparent from the face of the petition. Farmland's counsel also attributes his delay to the fact that his grandfather was hospitalized the weekend before the answer was due in state court and that he spent more time at his child's school than he had originally expected the day G&C took the default judgment.

While Farmland's counsel admits his own negligence, his failure to timely file an answer or remove before the deadline to answer in state court does not arise to willfulness or inexcusable neglect. G&C contends in its brief that Farmland's counsel's delay was part of an intentional litigation strategy; yet, the record contains no evidentiary support for such intent. In any event, even taking G&C's representation at face value, the Court cannot conclusively determine that Farmland's failure to timely answer or remove was willful. *Jenkins*, 542 F.3d at 123 (resolving doubts in favor of movant and setting aside default because record did not conclusively reveal that default was willful). Such negligence alone does not suffice to establish willful default. *See United States v. Tellez*, 678 F. Supp. 2d 437, 441 (W.D. Tex. 2009) (citing *New York v. Green*,

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<sup>1</sup>Farmland filed an answer seven days after filing its notice of removal, which, but for the state-court default judgment, would have been timely. *See* Fed. R. Civ. P. 81(c)(2)(C). Nevertheless, this alone does not excuse Farmland's failure to timely answer in state court.

420 F.3d 99, 108 (2d Cir. 2005) (“willfulness in the context of a judgment by default requires something more than mere negligence”)).

Moreover, there is no allegation that Farmland itself is culpable in any manner. To the contrary, fault is attributed only to Farmland’s counsel. Although not absolute, when the party is blameless and the attorney is at fault, default judgment is often set aside. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988); *see Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 60-61 (2d Cir. 1996). Without any evidence of Farmland’s culpability, equities balance toward setting aside the default judgment.

There is no dispute that Farmland failed to file an answer or remove before the deadline to answer in state court, which failure is attributed to the negligence of Farmland’s counsel. Yet, such negligence does not amount to willfulness, and Farmland’s prompt filing of an answer and motion to set aside the default judgment militate against an indication of a strategy of delay or intent to hinder the timely progression of the case. Therefore, this factor weighs in favor of setting aside the default judgment.

***B. Setting Aside the Judgment Would Not Prejudice Plaintiff***

G&C will not suffer prejudice if the default judgment is set aside. While it will be required to litigate its case on the merits, such action is insufficient prejudice to require the default judgment to stand. *United States v. One Parcel of Real Prop.*, 763 F.2d 181, 183 (5th Cir. 1985). Moreover, the Fifth Circuit has held that “mere delay does not alone constitute prejudice.” *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000). Therefore, this factor weighs in favor of setting aside the default judgment.



***C. Defendant Has Presented Meritorious Defenses***

Farmland pleaded a number of defenses in its answer. Among the defenses, Farmland contends that G&C's claims for relief are time-barred, in whole or in part, by various statutes of limitations. The lease agreement at issue was reportedly entered into on June 7, 2007. G&C filed suit on July 7, 2012, more than five years later, alleging several causes of action, including violations of the Texas Deceptive Trade Practices Act, violations of the Texas Business Opportunity Act, and negligent misrepresentation, all of which Farmland contends are barred, wholly or in part, by a two-year statute of limitation. *See* Tex. Bus. & Com. Code § 17.565; Tex. Bus. & Com. Code § 51.302; Tex. Civ. Prac. & Rem. Code § 16.003. Farmland also contends that G&C's fraud claim is barred by a four-year statute of limitation, *see* Tex. Civ. Prac. & Rem. Code § 16.004(4), and that G&C's real estate claims are barred by the statute of frauds. In addition to these affirmative defenses, Farmland raises a number of plausible factual defenses to G&C's claims.

If a meritorious defense is presented, setting aside a default judgment comports with the "policy in favor of resolving cases on their merits and against the use of default judgments." *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 936 (5th Cir. 1999). A party's "defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Jenkins*, 542 F.3d at 122 (quoting *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 98 (2d Cir. 1993)) (internal quotation marks omitted). Farmland provided factual allegations of a meritorious defense that, if believed at trial, would lead to a result contrary to that achieved by the default. Therefore, this factor weighs in favor of setting aside the default judgment.

***D. Conditions on Setting Aside the Default Judgment***

While the above factors weigh in favor of setting aside the default judgment, the Court is mindful of the fact that Farmland is not absolved of all culpability. The Court is authorized to condition the granting of Farmland's motion to set aside the default judgment on the requirement that it reimburse G&C for its attorney's fees and costs. *See Wokan v. Alladin Int'l, Inc.*, 485 F.2d 1232, 1234 (3d Cir. 1973) ("Rule 60(b) gives the district court explicit authority to impose terms upon the opening of a default judgment."); *see also Stelax Indus. v. Donahue*, No. 3:03-CV-923-M, 2004 U.S. Dist. LEXIS 29026, at \*32-33 (N.D. Tex. March 25, 2004) (setting aside default and ordering the defaulting defendants to reimburse plaintiff for the attorneys' fees related thereto). "The imposition on conditions in a order vacating a default is a device frequently used to mitigate any prejudice which plaintiff may suffer by allowing defendants to plead." *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974).

The Court is of the opinion that Farmland's Second Amended Motion to Set Aside or Vacate Default Judgment should be **GRANTED**, conditioned on Farmland's reimbursement of G&C's reasonable and necessary attorney's fees and costs incurred in obtaining the default judgment in state court and in responding to Farmland's efforts to set aside the judgment in this Court. Within 14 days of the date of this Order, G&C shall, in conformity with *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), submit the issue of attorney's fees and costs to the Court by the filing of affidavits. Farmland shall, within 7 days of G&C's filing, submit its own controverting affidavits or otherwise respond to G&C's filing.

**IV. CONCLUSION**

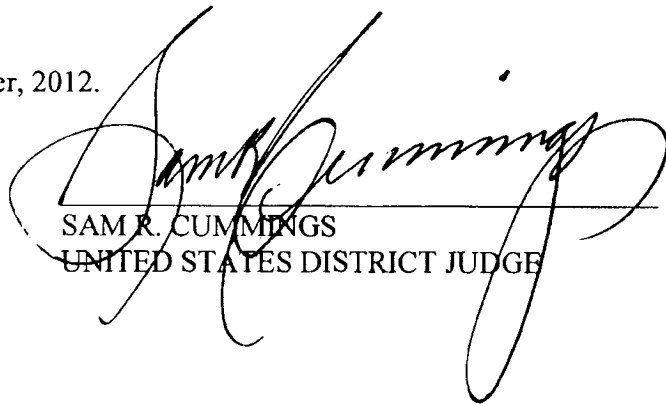
For the reasons stated herein,

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- (1) Defendant Farmland's Second Amended Motion to Set Aside or Vacate Default Judgment is **GRANTED** and the Default Judgment is **VACATED**;
- (2) Plaintiff G&C shall file a motion for reimbursement of attorney's fees and costs incurred in obtaining the default judgment in state court and in responding to Farmland's efforts to set aside the judgment in this Court, as set out above;
- (3) Farmland's Amended Motion to Set Aside and/or Vacate Default Judgment is **DENIED** as moot;
- (4) Farmland's Motion for Expedited Stay of Any Proceedings to Enforce Default Judgment is **DENIED** as moot;
- (5) Plaintiff G&C's Motion to Strike is **DENIED** as moot;
- (6) Farmland's Motion for Leave to File a Reply Brief in Support of its Second Amended Motion to Set Aside or Vacate a Default Judgment is **DENIED** as moot.

SO ORDERED.

Dated this 12<sup>th</sup> day of October, 2012.



SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FARMLAND MANAGEMENT	)	
SERVICES,	)	
	)	
Defendant.	)	Civil Action No. 5:12-CV-134-C

**ORDER**

1. Pursuant to Rule 16(b), Federal Rules of Civil Procedure, the Court establishes the following schedule for this case:
  - (a) Motions to join other parties and amend the pleadings must be filed by 3:00 p.m. on December 14, 2012.
  - (b) Motions for summary judgment must be filed by 3:00 p.m. on August 15, 2013.
  - (c) Discovery must be completed by 3:00 p.m. on January 13, 2014.

Deadlines will “not be extended except upon good cause shown and by order of the Court.” *See Saavedra v. Murphy Oil U.S.A., Inc. v. Lou-Con, Inc.*, 930 F.2d 1104, 1107 (5th Cir. 1991).
2. Unless further ordered by the Court, the parties are not required to make initial disclosures under Rule 26(a)(1), Federal Rules of Civil Procedure, and no conferences are required under Rule 26(f), Federal Rules of Civil Procedure.
3. Counsel are expected to cooperate with each other in conducting discovery, clarifying the issues, and getting the case ready for trial. Specifically, counsel must strictly comply with the mandates set forth in *Dondi Properties Corporation v. Commerce Savings & Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (per curiam).
4. Filing documents electronically is not mandatory. However, in all cases where electronic case filing is done, counsel may serve and respond to written discovery requests through

electronic mail service. This discovery practice will be governed by the Northern District of Texas Local Rules, this Court's Local Rules/Judge Specific Requirements, and the Clerk's ECF Administrative Procedures Manual regarding electronic case filing procedures.

5. Counsel are referred to the Local Rules of the Northern District of Texas, the Civil Justice Cost and Delay Reduction Plan of the Northern District of Texas, and the Local Rules/Judge Specific Requirements of this Court.
6. The above case is set for trial at 9:00 a.m. on February 3, 2014, in Lubbock, Texas.<sup>1</sup> Counsel shall comply with the following:

PLEASE NOTE: The trial of the above case is subject to the trials of any criminal cases which may be pending on the Court's docket.

- (a) All counsel shall jointly prepare a proposed pretrial order for the Court to enter, which shall contain the following:
  - (1) a summary of the claims and defenses of each party;
  - (2) a statement of stipulated facts;
  - (3) an estimate of the length of trial;
  - (4) a list of additional matters which would aid in the disposition of the case;
  - (5) the signature of each counsel; and
  - (6) a place for the date and signature of the Court.

Counsel are ordered to confer prior to the date of submission of the proposed pretrial order, and a certificate shall be attached to the proposed order, signed by counsel, stating that such a conference has been held, the stipulations are agreed upon, and that the proposed pretrial order is submitted to the Court for entry. Failure to agree upon the wording or terms of the proposed order will not be an excuse for not filing same, but counsel may place in such order their respective versions of the matters to be included.

- (b) At least twenty-one (21) days before the scheduled date for trial, counsel shall file with the Clerk and serve on opposing parties proposed jury instructions and issues in jury cases and proposed findings of fact and conclusions of law in non-jury cases, any trial briefs that counsel may desire to present to the Court, and the proposed pretrial order.

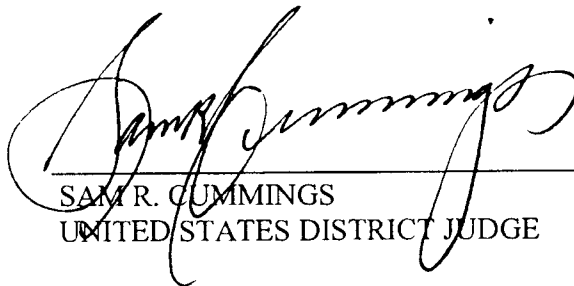
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<sup>1</sup>If the parties agree that an earlier trial setting is appropriate, the Court will consider a motion to reschedule trial.

- (c) At least twenty-one (21) days before the scheduled date for trial, counsel shall file with the Clerk and serve on opposing parties the information described under Rule 26(a)(3)(A), F.R.C.P. At the same time, exhibits shall be exchanged between the parties. Objections filed under Rule 26(a)(3)(B), F.R.C.P., shall be ruled on at time of trial.
  - (d) If a pretrial conference is deemed necessary, counsel shall notify the Court at the time of filing the proposed pretrial order, or sooner, and the Court will, at the Court's discretion, schedule such a conference.
  - (e) In jury cases, counsel are not required to submit proposed voir dire questions. Counsel will be permitted to conduct voir dire of the jury panel, subject to further order of the Court.
  - (f) The above trial setting will continue for the following weeks during the same month. This case has been scheduled for trial with other cases. **You are responsible for staying in contact with the Court Coordinator to determine where your case stands on the Court's docket.** There will be no docket call.
  - (g) Should counsel fail to appear at a scheduled pretrial conference or to timely submit a complete and correct pretrial order as required or fail to comply with the other directions set out herein, an ex parte hearing may be held and judgment of dismissal, default, or other appropriate order will be entered.
7. Any party not represented by counsel is expected to comply with the above.

SO ORDERED.

Dated August 20, 2012.

  
\_\_\_\_\_  
SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FARMLAND MANAGEMENT	)	
SERVICES,	)	
	)	
Defendant.	)	Civil Action No. 5:12-CV-134-C

**ORDER**

On this date, the Court considered:

- (1) Plaintiff G&C Land's ("G&C") Motion for Leave to Amend Plaintiff's Original Complaint, filed December 14, 2012;
- (2) G&C's Amended Motion for Leave to Amend Plaintiff's Original Complaint, filed January 2, 2013;
- (3) Defendant Farmland Management Services' ("Farmland") Response in Opposition to Plaintiff's Amended Motion for Leave to Amend Complaint, filed January 23, 2013;
- (4) G&C's Motion for Leave to File a Reply, filed January 28, 2013;
- (5) G&C's Reply, filed January 28, 2013; and
- (6) Farmland's Motion for Leave to File Amended Answer, filed January 23, 2013.

## **I. BACKGROUND**

G&C filed this case in state court, asserting claims pertaining to allegedly false representations regarding the availability of electricity on land leased by G&C from Farmland. Farmland is the only defendant named in G&C's original petition, and G&C obtained a default judgment against Farmland in state court. Farmland removed the case to this Court on August 6, 2012, and the Court entered a scheduling order on August 20, 2012. The Court's scheduling order set a December 14, 2012 deadline for the joinder of parties. On October 12, 2012, the Court granted Farmland's motion to set aside the default judgment. G&C moved to amend its complaint on December 14, 2012, and filed an amended motion to amend on January 2, 2013.

G&C seeks to add five defendants, two of whom, Kyle Amos and Highfield Farm Asset Services, LLC, are Texas citizens. G&C is also a Texas citizen. Therefore, the amendment would destroy diversity, the only jurisdictional basis of this case.

## **II. STANDARD**

"If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e). The court should "use its discretion in deciding whether to allow that party to be added." *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987)). The Fifth Circuit in *Hensgens* pointed out factors to consider in determining whether to permit joinder of nondiverse parties, including "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if the amendment is not allowed, and any other factors bearing on the equities." *Id.*



### III. DISCUSSION

#### ***A. G&C's Motion for Leave to Amend Original Complaint***

1. The Extent to Which the Purpose of the Amendment Is to Defeat Federal Jurisdiction

Regarding joinder of nondiverse defendants, courts within in the Fifth Circuit frequently look at whether the plaintiff knew the identity of the party to be joined and the facts underlying the claim against that party when filing the original complaint. *See In re Norplant Contraceptive Prods. Liab. Litig.*, 898 F. Supp. 429, 432 (E.D. Tex. 1995); *O'Connor v. Auto Ins. Co. of Hartford Conn.*, 846 F. Supp. 39, 41 (E.D. Tex. 1994) (citing *Hensgens*, 833 F.2d at 1182). In fact,

[i]n cases applying *Hensgens* factors, when the plaintiff knew about the nondiverse party's activities at the time the suit was originally brought in state court but still chose not to include that party as an original defendant, courts have viewed any later attempt to add the nondiverse party as a defendant as nothing more than an attempt to destroy diversity.

*In re Norplant*, 898 F. Supp at 435. This is the case here.

G&C's factual allegations are made against all Defendants collectively; that is, G&C does not allege specific misrepresentations made by the nondiverse defendants but contends that all Defendants committed the same culpable conduct. Furthermore, the lease at issue ran its course before G&C filed suit in state court. Therefore, the Court concludes that G&C knew of the nondiverse parties' identities and activities when it filed suit in state court. As such, G&C's later attempt to add the nondiverse parties is nothing more than an attempt to destroy diversity. This factor weighs against amendment.

2. Whether Plaintiff Has Been Dilatory in Asking for Amendment

G&C filed this action in state court on July 7, 2012, and Farmland removed on August 6, 2012. The Court set aside G&C's default judgment on October 12, 2012, but G&C did not move to amend its complaint until December 14, 2012.<sup>1</sup> Therefore, G&C did not move to amend its complaint until over five months after it filed the case, over four months after Farmland removed, and over two months after the Court set aside the default judgment.

A delay of two months after the filing of the original complaint or almost thirty days after notice of removal has been found dilatory. *See Philips v. Delta Air Lines, Inc.*, 192 F. Supp. 2d 727, 792 (E.D. Tex. 2001). The Court is sympathetic to G&C in that it held a default judgment against Farmland at the time of removal and presumably thought its relief would be complete through the judgment. Nevertheless, it waited more than two months after the Court set aside the default judgment to move to amend. Judged against the benchmarks discussed above, G&C was dilatory in asking for amendment. Therefore, this factor weighs against amendment.

3. Whether Plaintiff Will Be Significantly Injured If the Amendment Is Not Allowed

When analyzing this third factor, courts consider, among other things, "whether a plaintiff can be afforded complete relief in the absence of the amendment." *Lowe v. Singh*, No. H-10-1811, 2010 U.S. Dist. LEXIS 86416, at \*6-7 (S.D. Tex. Aug. 23, 2010) (internal quotation marks omitted). Courts also consider whether, if the amendment is denied, plaintiffs will be forced to litigate their actions against the defendants they seek to add in state court. *Bonilla v. Am.*

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<sup>1</sup>In support of its argument that G&C was dilatory in asking for amendment, Farmland points out that G&C filed its amended motion for leave to amend complaint on January 2, 2013, more than two weeks after it filed its first motion to amend. However, G&C named Amos and Highland Farm Asset Services, the only nondiverse defendants, in its first motion to amend. This action mitigates G&C's delay slightly.

*Servicing Co.*, No. H-11-1974, 2011 U.S. Dist. 99348, at \*13-14 (S.D. Tex. Sept. 2, 2011); *Lowe*, 2010 U.S. Dist LEXIS 86416, at \*7.

Were the Court to deny the amendment, G&C would be prejudiced by having to bring a parallel action in state court. Such prejudice, however, would be tempered by Farmland's filing of its amended answer, as discussed below. In its amended answer, Farmland admits that it is liable for the acts and omissions of its agents, representatives, and employees. Because the parties G&C seeks to add are apparently Farmland's agents, representatives, or employees, G&C could ostensibly be afforded complete relief without the amendment based on Farmland's potential liability under agency theory and respondeat superior.

Additionally, G&C would not be precluded from bringing an action against these parties in state court because the parties G&C seeks to add are not indispensable parties to this action. Therefore, although G&C faces possible prejudice were the Court to deny leave to amend, that prejudice would not be significant.

#### 4. Analysis

The Court is mindful of the fact that denying leave to amend could lead to parallel proceedings in state court. However, G&C was dilatory in seeking the amendment, G&C sought the amendment to defeat jurisdiction, and G&C could still be afforded complete relief in the absence of the amendment. On balance, the *Hensgens* factors weigh against amendment. Therefore, G&C's Amended Motion for Leave to Amend Plaintiff's Original Complaint is **DENIED**.

***B. Farmland's Motion for Leave to File Amended Answer***

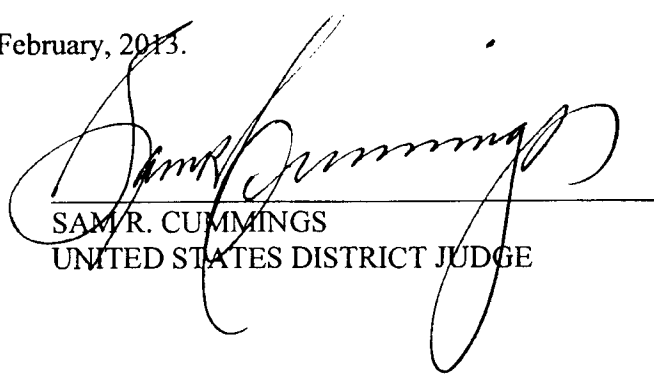
Farmland moves to amend its answer so that it can essentially admit that it is liable for the acts and omissions of its agents, representatives, and employees. It originally denied these allegations. Farmland's blatant, unexplained reversal does not escape the Court's attention. Nevertheless, allowing the amendment would serve G&C's interests.<sup>2</sup> Therefore, Farmland's Motion for Leave to File Amended Answer is **GRANTED**.

**IV. CONCLUSION**

For the reasons stated herein:

- (1) G&C's Motion for Leave to File a Reply is **GRANTED**;
- (2) G&C's Reply is deemed filed;
- (3) G&C's Amended Motion for Leave to Amend Plaintiff's Original Complaint is **DENIED**;
- (4) G&C's Motion for Leave to Amend Plaintiff's Original Complaint is **DENIED** as moot; and
- (5) Farmland's Motion for Leave to File Amended Answer is **GRANTED**. Farmland shall file its amended answer within seven days of the date of this Order.

SO ORDERED this 19<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>Also, G&C did not file a response to Farmland's motion.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FARMLAND MANAGEMENT	)	
SERVICES,	)	
	)	
Defendant.	)	Civil Action No. 5:12-CV-134-C

**ORDER**

On this date, the Court considered the following:

*A. Motion for Continuance*

On September 6, 2013, Plaintiff filed its Motion for Continuance of Summary Judgment to Permit Discovery. In this motion, Plaintiff asks for a continuance of the disposition of Defendant's pending motion for summary judgment because "no depositions of any representatives have been obtained and only a partial deposition of one representative of the Plaintiff has been obtained and there have been numerous and continue to be numerous outstanding objections to pending discovery that need to be resolved." Under Rule 56(d), a Court may defer considering a motion for summary judgment "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Plaintiff has failed to make this showing.

Not only does Plaintiff fail to attach an affidavit or declaration to the motion, it does not state any specific reasons as to why it could not obtain the evidence necessary to respond to the

motion for summary judgment. Plaintiff states that it needs to take more depositions, but it does not indicate that it ever noticed any depositions. Plaintiff also states that numerous outstanding objections to discovery need to be resolved, but it has not filed a motion to compel. This case was removed well over a year before Plaintiff filed this motion, which is plenty of time to obtain whatever discovery it needs to respond to Defendant's motion. Therefore, because it has failed to make the required showing under Rule 56(d), Plaintiff's Motion for Continuance of Summary Judgment to Permit Discovery is **DENIED**.

*B. Motion for Reconsideration and Modification of Prior Order to Vacate Default Judgment*

On October 14, 2013, Plaintiff filed its Motion for Reconsideration and Modification of Prior Order to Vacate Default Judgment. In this motion, Plaintiff asks the Court to reconsider its Order of October 12, 2012, in which it vacated a default judgment against Defendant or, in the alternative, to modify the Order in such a way essentially to allow Plaintiff to take an interlocutory appeal.

Plaintiff makes no argument that it either made or could have made when it petitioned the Court to take similar action over a year ago. As such, reconsideration at this point is unwarranted. Moreover, in light of the impending trial setting in this matter, an interlocutory appeal is also unwarranted. Therefore, Plaintiff's Motion for Reconsideration and Modification of Prior Order to Vacate Default Judgment is **DENIED**.

*C. Motion for Mediation*

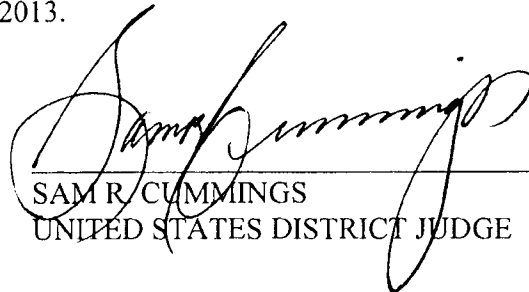
On October 16, 2013, Plaintiff filed its Motion for Mediation, in which it asks the Court to order the parties to participate in non-binding mediation. Such a court order is unnecessary; if

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the parties wish to participate in mediation, they may do so voluntarily. Therefore, Plaintiff's Motion for Mediation is **DENIED**.

SO ORDERED.

Dated this 4<sup>th</sup> day of December, 2013.



SAM R. CUMMINGS  
UNITED STATES DISTRICT JUDGE

Filed  
12 July 7 P8:51  
Barbara Sucsy  
District Clerk  
Lubbock District

NO. 2012-502932

G & C LAND  
Plaintiff,

V.

FARMLAND MANAGEMENT  
SERVICES  
Defendant.

IN THE DISTRICT COURT

99th JUDICIAL DISTRICT

OF LUBBOCK COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES G & C Land, hereinafter called Plaintiff, complaining of and about Farmland Management Services, hereinafter called Defendant, and for cause of action shows unto the Court the following:

**DISCOVERY CONTROL PLAN LEVEL**

1. Plaintiff intends that discovery be conducted under Discovery Level 2.

**PARTIES AND SERVICE**

2. Plaintiff, G & C Land, is a Texas Partnership.
3. G & C Land has not been issued a driver's license. G & C Land has not been issued a social security number.
4. Defendant Farmland Management Services, a Nonresident Corporation, may be served pursuant to sections 5.201 and 5.255 of the Texas Business Organizations Code by serving the registered agent of the corporation, CT Corp, at 350 N. St. Paul St., Ste. 2900 Dallas, TX 75201-4234, its registered office. Service of said Defendant as described above can be effected by certified mail, return receipt requested.

**JURISDICTION AND VENUE**

5. The subject matter in controversy is within the jurisdictional limits of this court.
6. This court has jurisdiction over Defendant Farmland Management Services, because said Defendant purposefully availed itself of the privilege of conducting activities in the State of Texas and established minimum contacts sufficient to confer jurisdiction over said Defendant, and



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PETN - PETITION FILED  
Case No: 2012-502,932



14-10046.46



the assumption of jurisdiction over Farmland Management Services will not offend traditional notions of fair play and substantial justice and is consistent with the constitutional requirements of due process.

7. Plaintiff would show that Defendant Farmland Management Services had continuous and systematic contacts with the State of Texas sufficient to establish general jurisdiction over said Defendant.

8. Plaintiff would also show that the cause of action arose from or relates to the contacts of Defendant Farmland Management Services to the State of Texas, thereby conferring specific jurisdiction with respect to said Defendant.

9. Furthermore, Plaintiff would show that Defendant Farmland Management Services engaged in activities constituting business in the State of Texas as provided by Section 17.042 of the Texas Civil Practice and Remedies Code, in that said Defendant contracted with a Texas resident and performance of the agreement in whole or in part thereof was to occur in Texas, said Defendant committed a tort in whole or in part in Texas, and said Defendant recruits or has recruited Texas residents for employment inside or outside this state.

10. Venue in Lubbock County is proper in this cause pursuant to Section 17.56 of the Texas Business and Commerce Code.

#### FACTS

11. Defendant purposefully and intentionally induced Plaintiff into a land lease transaction by making misrepresentations as to the availability of electricity.

12. Defendant's misrepresentations were ongoing throughout the relationship of the parties.

#### DECEPTIVE TRADE PRACTICES

13. Plaintiff would show that Defendant engaged in certain false, misleading and deceptive acts, practices and/or omissions actionable under the Texas Deceptive Trade Practices - Consumer Protection Act (Texas Business and Commerce Code, Chapter 17.41, et seq.), as alleged hereinbelow.



**RETURN OF SERVICE**  
**CITATION**

Issued: July 10, 2012

Lubbock County Cause Number: 2012-502,932  
99th District Court

G & C Land  
V.

Farmland Management Services

PERSON OR ENTITY TO BE SERVED AND ADDRESS FOR SERVICE:

Farmland Management Services,  
By serving the registered agent of the corporation: CT Corp  
350 N. St. Paul Street, Suite 2900, Dallas, TX 75201-4234

**VERIFICATION OF DISTRICT CLERK**  
**CITATION BY CERTIFIED MAIL**

Came to hand on Tuesday, July 10, 2012, at 10:23 AM, and executed in Lubbock County, Texas, by mailing to the defendant, by certified mail, restricted delivery, return receipt requested, a true copy of this Citation together with a copy of the Original Petition, to wit:

TO: Farmland Management Services,  
C/O CT Corp  
350 N. St. Paul Street, Suite 2900, Dallas, TX 75201-4234

CERTIFIED MAIL NUMBER: 91 7108 2133 3938 8962 3952

DATE MAILED: Tuesday, July 10, 2012

CITATION SIGNED FOR BY: \_\_\_\_\_

DATE CITATION WAS SIGNED FOR: \_\_\_\_\_

**OR NOT EXECUTED TO DEFENDANT;** The diligence used in finding said defendant, the cause of failing to execute this process and the information received as to the whereabouts of the said defendant, being:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



I, Barbara Sucsy, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 2 day of Aug, 2012, at Lubbock, Texas, ss. Barbara Sucsy Deputy Clerk of District Court, Lubbock County, Texas ss. 2 of 2

Barbara Sucsy, District Clerk  
904 Broadway, Room 105  
Lubbock, Texas 79401

By \_\_\_\_\_ Deputy  
Sammy W. Smith

\*\*\*\*\*PLEASE SEE THE ATTACHED RETURN RECEIPT OR RETURN ENVELOPE\*\*\*\*\*

NO. 2012-502,932

G & C LAND  
Plaintiff,

V.

FARMLAND MANAGEMENT  
SERVICES  
Defendant.

~~~~~

IN THE DISTRICT COURT

99TH JUDICIAL DISTRICT

OF LUBBOCK COUNTY, TEXAS.

RECEIVED RECORD CO.  
SPRINGFIELD ILLINOIS  
OFFICE

2012 AUG -6 AM 10:15

EX-108

WILLIAM DUCAT

### DEFAULT JUDGMENT

The hearing on this cause was held after 10:00am on August 6, 2012. Plaintiff, G & C Land, appeared and Defendant, Farmland Management Services, although duly cited to appear by filing an answer herein, failed to file an answer within the time allowed by law.

1. On the claim of violations of the Deceptive Practices Act, the court finds in favor of Plaintiff, G & C Land, and against Defendant, Farmland Management Services;
2. On the claim of Common Law Fraud, the court finds in favor of Plaintiff, G&C Land, and against Defendant, Farmland Management Services;
3. On the claim of Negligent Misrepresentation, the court finds in favor of Plaintiff, G&C Land and against Defendant, Farmland Management Services;
4. On the claim of Breach of Warranties, the court finds in favor of Plaintiff, G&C Land and against Defendant, Farmland Management Services;
5. On the claim of violation of Business Opportunity Act (Texas Business & Commerce Code, Section 51.302), the court finds in favor of Plaintiff, G&C Land and against Defendant, Farmland Management Services.

## DAMAGES

6. The court finds that the plaintiff sustained the following economic and actual damages as a result of the actions and/or omissions of Defendant described hereinabove:
- (a) Out-of-pocket expenses, including but not limited to increased fuel costs.
  - (b) Loss of use.

A

*Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989) (“default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations”).

i. Farmland’s Failure to Answer Was Not Willful

11. In this case, good cause exists to set aside the judgment against Farmland. Specifically, the failure to file an Answer on August 6, 2012 was inadvertent and not willful. *See* Declaration at APP 002 - 003.

12. The Fifth Circuit has described a “willful default” as an “intentional failure” to respond to the litigation. *In re OCA, Inc.*, 551 F.3d 359, 370 n. 32 (5<sup>th</sup> Cir. 2008)). Negligence alone does not establish a willful refusal to answer. *United States v. Tellez*, 678 F. Supp. 2d. 437, 441 (W.D. Tex. Jan. 27, 2010). Any doubts regarding the defendant’s willfulness must be resolved in favor of the moving party. *Id.* It was Farmland’s intent to respond to the lawsuit. To this end, it notified its insurance carrier, who in turn retained defense counsel. Defense counsel noted that diversity of citizenship existed, and took steps to timely remove the case to Federal court and answer as permitted by law. *See* APP at 002 – 003 and 016 – 089.

ii. G&C Will Not Suffer Prejudice

13. G&C will not be prejudiced by the Court vacating the default judgment. Counsel for G&C received the Notice of Removal in federal court electronically on the same day it was filed, August 6, 2012—less than two hours after the Default Judgment was apparently presented in state court. APP at 096 (file-stamped at 10:15 a.m.). The Notice of Removal filed in state court by mail was thereafter delivered on August 8, 2012, presumably at the same time that G&C would have received an Answer if one had been mailed. If the default is vacated and/or set

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION**

**G & C LAND**  
*Plaintiff,*

vs.

**FARMLAND MANAGEMENT SERVICES,**  
*Defendant.*

§  
§  
§  
§  
§  
§  
§

Civil Action No. 5:12-CV-00134-C

**DECLARATION OF THOMAS M. SPITALETTO**

I, Thomas M. Spitaletto, hereby declare as follows:

1. I am legally competent to make this declaration, and the facts stated herein are within my personal knowledge and are true and correct.

2. I am counsel for Defendant, Farmland Management Services ("Farmland"), in the above-styled lawsuit.

3. Attached to this Declaration are true and correct copies of the following:

- Exhibit "A" Plaintiff's Original Petition in Cause No. 2012-502932, in the 99<sup>th</sup> Judicial District Court of Lubbock County, Texas
- Exhibit "B" Citation of Service of Plaintiff's Original Petition
- Exhibit "C" Notice of Removal [Doc. #1 in this Court]
- Exhibit "D" Notice of Removal to Federal Court (filed in state court)
- Exhibit "E" Proof of Electronic Filing of Notice of Removal [Doc. #1]
- Exhibit "F" Proof of Service by Certified Mail of Notice of Removal to Federal Court (filed in state court)
- Exhibit "G" August 6, 2012 Default Judgment in Cause No. 2012-502932, in the 99<sup>th</sup> Judicial District Court of Lubbock County, Texas
- Exhibit "H" CT Corporation Service of Process Transmittal

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MERINDA K. CONDRA  
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Tel: 806/741-1859  
Fax: 806/741-0142  
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

|                               |   |                 |
|-------------------------------|---|-----------------|
| G&C LAND,                     | § |                 |
| Plaintiff,                    | § |                 |
|                               | § | 5:12-CV-00134-C |
| v.                            | § |                 |
|                               | § |                 |
| FARMLAND MANAGEMENT SERVICES, | § |                 |
| Defendant.                    | § |                 |

**PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION TO VACATE AND/OR SET ASIDE AND OBJECTION**

Comes now G&C Land, Plaintiff, and files this its Response to Defendant's Motion to Vacate and/or Set Aside Default Judgment and would show the Court the following:

**FACTS**

1. G&C filed suit against Farmland Management Services (Farmland) on July 7, 2011. Plaintiff's Original Petition.
2. In its petition, G&C alleged that Defendant had "[p]urposefully and intentionally induced Plaintiff into a land lease transaction by making misrepresentations regarding the availability of electricity" and that said "misrepresentations were ongoing throughout the relationship of the parties."

3. Plaintiff alleged that the Defendant violated the Texas Deceptive Trade Practices Act; committed Common Law Fraud, and committed Negligent misrepresentation. In its petition, Plaintiff pled all of the elements of each cause of action.
4. Plaintiff alleged that it suffered from Economic and Actual Damages and Damages for Mental Anguish.
5. Plaintiff further alleged that it was entitled to Multiple Damages as provided for in the Texas Deceptive Trade Practices Act, 17.50(b)(1).
6. Plaintiff alleged it was entitled to Exemplary Damages as provided in the Texas Civil Practices and Remedies Code, 41.003(a)(1).
7. Finally, Plaintiff alleged it was entitled to attorney's fees pursuant to Texas Business and Commerce Code 17.50(d); Texas Civil Practice and Remedies Code 37.009, and the common law.
8. The Lubbock County District Clerk's Office issued citation on July 10, 2012.
9. On July 13, 2012, CT Corp, the registered agent for Defendant was served.
10. That same day, July 13<sup>th</sup>, CT Corp sent the Citation with Original Petition to Farmland Management Services via Fedex.
11. Defendant's date to answer was August 6, 2012 at or before 10:00 am.
12. Defendant did not answer and the State District Court entered a Default Judgment.

### **OBJECTION**

Defendant's Motion is almost entirely based on its erroneous contention that service was improper and/or the state district court did not have personal jurisdiction. Defendant failed to raise such issues in its first responsive pleading, or its second or third or fourth . . . Rather, Defendant raised the issues for the first time in its eighth pleading. Accordingly, the Defendant has waived any issues related to service of process or jurisdiction.

Plaintiff would further show that Defendant made admissions in those first seven pleading to which it is bound and thus cannot raise the issue of service or jurisdiction.

Accordingly, Plaintiff objects to the Defendant's pleadings in so far as those pleadings raise issues waived under the Federal Rules of Civil Procedure.

10. Plaintiff alleged it was entitled to Exemplary Damages as provided in the Texas Civil Practices and Remedies Code, 41.003(a)(1). App 7.
11. Finally, Plaintiff alleged it was entitled to attorney's fees pursuant to Texas Business and Commerce Code 17.50(d); Texas Civil Practice and Remedies Code 37.009, and the common law. App 7.
12. The Lubbock County District Clerk's Office issued citation on July 10, 2012. App 19-20.
13. On July 13, 2012, CT Corp, the registered agent for Defendant was served. App 22-23.
14. That same day, July 13<sup>th</sup>, CT Corp sent the Citation with Original Petition to Farmland Management Services via Fedex. App 24-25. CT Corp provided Defendant the following information:

DATE AND HOUR OF SERVICE: By Certified Mail on 7/13/2012  
postmarked 07/11/2012

APPEARANCE OR ANSWER DUE: BY 10:00 a.m. on the Monday next  
following the expiration of 20 days.

*Id.*

15. On July 16, 2012, the Lubbock County District Clerk filed the Return of Citation in the case file. Return of Service. App. 22.
16. Plaintiff's Original Petition and Citation were delivered to Farmland Management Services. The package was signed for by E. Zachery. App 26.
17. On July 25, 2012, a minimum of two law firms, three attorneys, Defendant, Defendant's insurance company, and three others discussed, by email, obtaining an extension of the answer date – indicating full knowledge of the impending answer date.<sup>1</sup> App 28.
18. The first firm was Winstead, which according to its website has over 120 attorneys in its Dallas office alone. App 30-46. The second of course is Wilson Elser Moskowitz Edelman & Dicker, LLP, with over 800 attorneys. App 13-15.
19. Defendant's current counsel misrepresented to this Court that former counsel requested an extension of time to answer from Plaintiff's counsel. ***That is simply not true.*** Plaintiff's counsel informed Defendant's counsel of the misrepresentation

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<sup>1</sup> The email lists Jamie Bryan of Winstead, Raj Jaswinder (?), Thomas Spitaletto of Wilson Elser; Sue Gleason of Wilson Elser; Sgetler of Endurance Services (insurer); David with Farm Management Services; and Carl (?). App 28.



25. Plaintiff was further awarded multiple damages of three times based on Defendant's knowing and intentional acts. Plaintiff was further awarded \$5,000 in attorney's fees. App 55-57.
26. After the default had been entered in State Court, the Defendant filed a Notice of Removal to Federal Court. In that Notice of Removal, Defendant admitted:

"Plaintiff, G&C Land ("G&C"), filed its Original Petition in the state court action on July 7, 2012. **On July 13, 2012, CT Corporation was served with copy of the citation and the Original Petition, as service agent for Farmland.**" App 62. (emphasis added)). Defendant goes on to allege, "This Notice of Removal is timely filed within thirty (30) days after the **Farmland was served with a copy of the Petition and summons in the state court action.**" App 63. (emphasis added).
27. **Defendant's Notice of Removal did not contain any challenge to the sufficiency of the service or the Court's jurisdiction over Defendant.**
28. On August 13, 2012, Defendant filed its Motion for a More Definite Statement. In that motion, Defendant admitted: "On July 7, 2012, G&C, a Texas partnership, filed suit in state court against Farmland, a California corporation. **Farmland was served on July 13, 2012** and timely removed . . ." App 98 (emphasis added).
29. **Defendant's Motion for a More Definite Statement did not contain any challenge to the sufficiency of service or the Court's jurisdiction over Defendant.**
30. On August, 13, 2012, Defendant filed its Original Answer to Plaintiff's Original Petition. App 104.
31. **Defendant's Answer did not contain any challenge to the sufficiency of service or the Court's jurisdiction over Defendant. *Id.***
32. Also on August 13, 2012, Defendant filed its Motion to Set Aside and/or Vacate Default Judgment. App 122-133.
33. In its Motion to Set Aside and/or Vacate, Defendant admitted Farmland was served on July 13, 2012. App 112.
34. In that Motion, Defendant indicates that it never had any intention of answering the state court suit. Rather, Defendant states it "filed Notices of Removal on August 6,

2012 pursuant to 28 U.S.C. § 1446(a), which are not required to be filed by any particular time of day” – flouting completely Texas law which provides that the answer must be filed by 10:00am on the Monday following the expiration of twenty days from the date of service. App 112.

35. In his Declaration in support of the Motion to Vacate, Defendant’s counsel indicates again that he had no intention of answering the state court suit, but rather intended to remove to federal court and buy more time before the answer was due. Defendant’s counsel indicates the failure to remove timely “resulted from miscommunication between [him] and [his] office staff, whom assisted [him] on the morning of the filing and mailing.” App 122.
36. In same Declaration, Defendant’s counsel admits under penalty of perjury that “Farmland was served with Plaintiff’s Petition in state court on July 13, 2012 . . .” App 121.
37. **Defendant’s Motion to Set Aside and/or Vacate did not contain any challenge to the sufficiency of the service or the Court’s jurisdiction over Defendant.**
38. The Court denied Defendant’s Motion on August 16, 2012 for failure to file a supporting brief and certificate of conference.
39. Defendant filed a new motion to vacate (and titled it Amended Motion to Vacate) on August 17, 2012. App 124-133.
40. In support of that motion Defendant continued to admit that “Farmland was served on July 13, 2012. . .” *Id.*
41. In his Declaration in support of that motion, Defendant’s attorney continues to state under penalty of perjury that, “Farmland was served with Plaintiff’s Petition in state court on July 13, 2012 . . .” *Id.*
42. Defendant’s counsel continued to allege that “his failure to remove timely resulted from miscommunication between [him] and [his] office staff, whom assisted [him] on the morning of the filing and mailing.” *Id.*
43. **Defendant’s “Amended” Motion to Set Aside and/or Vacate did not contain any challenge to the sufficiency of the service or the Court’s jurisdiction over Defendant.**

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44. On August 17, 2012, Defendant filed an Amended Answer. App 135-138.
45. **Defendant's Amended Answer did not contain any challenge to the sufficiency of the service or the Court's jurisdiction over Defendant.**
46. On August 17, Defendant filed an Amended Motion for a More Definite Statement and Brief in Support. App 140-146.
47. In that Motion, Defendant again admitted that "Farmland was served on July 13, 2012." App 140.
48. On August 21, 2012, a different attorney from the same firm, Lee Cameron, filed a "Second Amended" Motion to Set Aside and/or Vacate. App 147-185.
49. After having filed an Answer, one denied Motion to Set Aside and/or Vacate, another Motion to Set Aside and/or Vacate, one denied Motion for More Definite Statement, another Motion for more Definite Statement – for the first time, Defendant challenged the service and/or personal jurisdiction in its Motion and Brief. *Id.*
50. However, the in its Declaration in support of its "Second Amended" Motion, Defendant continued to admit that "Farmland was served on July 13, 2012. App 148.
51. In its brief, Mr. Cameron (Second Defendant's Lawyer) represents to this Court that Mr. Spitaletto's (First Defendant's Lawyer) grandfather was purportedly hospitalized the weekend before the answer was due. App 162. Such representation contradicts Mr. Spitaletto's Declaration in support of that motion in which the new excuse is he spent more time than expected at his child's school – with no mention of a grandfather. App 148.
52. No pleading provide any excuse for the failure of the other 799 attorneys in the firm to answer, remove, or otherwise respond. No pleading provide any reason for the failure of the firm to implement some system to avoid such failures.
53. In actuality, it would appear that Defendant did not understand the interplay between the Federal Removal Procedures and the State Court Procedures. However, ignorance of the rule and/or law is insufficient to grant relief under Fed R. Civ P 60. *See Bolin Co. v Banning Co.* 6 F.3d 350 (5<sup>th</sup> Cir.) 1993.

**DEFENDANT'S PLEADING MAKE CLEAR THAT IT WRONGFULLY  
BELIEVED THE TEXAS "MAIL BOX" RULE APPLIED  
TO A NOTICE OF REMOVAL – WHICH RESULTED IN THIS DEFAULT**

**Defendant relied upon the Texas Mailbox Rule to Make its Decision to File only a  
Removal – and not file an Answer**

6. Defendant states that it intended to file a notice of removal before 10:00 am on August 6, 2012.
7. In its Motion to Vacate and/or Set Aside the Default, Defendant stated:

Pursuant to the "mailbox rule" in Texas, the Notice of Removal to state court was deemed filed on the "day" it was placed in the mail – August 6, 2012 – even though it had not been received by the state court clerk in the mail at the time G&C requested default.

Defendant's Motion to Vacate pg 2.

8. Defendant went on to state "[t]he filing of the Notices of Removal effectively removed the case from state court on August 6, 2012, and also extend the Answer deadline."

Id at 3. In support, Defendant cites Fed R. Civ. P. 81 (c)(2)(C).

9. The Defendant continues to make the misguided argument that it intended to remove before 10:00 am on the answer day in its Second Amended Motion to Vacate and/or Set Aside (pg 17, 22, and 23).
10. To this day, Defendant erroneously argues that under the Texas Mailbox Rule, filing on the answer day, but after default was sufficient. Defendant's Second Amended Motion to Vacate, 22.
11. So, Defendant has represented to this Court that it intended to file a notice of removal and mail a copy of said filing to the Lubbock County District Clerk before 10:00 am on August 6, 2012 – *which could NOT have stopped the default.*

**The Texas Mailbox Rule Does Not Apply to a Notice of Removal**

12. Fifth Circuit case law is clear that the state court continues to have jurisdiction until such time as the state court receives actual or constructive notice of the removal.

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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

|                               |   |                 |
|-------------------------------|---|-----------------|
| G&C LAND,                     | § |                 |
| Plaintiff,                    | § |                 |
|                               | § | 5:12-CV-00134-C |
| v.                            | § |                 |
|                               | § |                 |
| FARMLAND MANAGEMENT SERVICES, | § |                 |
| Defendant.                    | § |                 |

**PLAINTIFF'S MOTION FOR LEAVE TO AMEND PLAINTIFF'S  
ORIGINAL COMPLAINT AND BRIEF IN SUPPORT THEREOF**

COMES NOW PLAINTIFF, G&C Land, and files this its Motion for Leave to Amend its Original Petition pursuant to Rule 15, Rule 19, Rule 20, and 28 U.S.C. § 1447 and would show the Court as follows:

**I. PROCEDURAL HISTORY**

1. Plaintiff, G&C Land filed suit against Farmland Management Services in the 99<sup>th</sup> District Court, in Lubbock County, Texas on July 7, 2012.
2. On, August 6, 2012, the 99<sup>th</sup> District Court entered an order of default.
3. On August 6, 2012, Defendant filed its Notice of Removal in the Federal District Court, Northern District of Texas, Lubbock Division and mailed a copy of that removal to the Lubbock County District Clerk's Office.
4. On August 8, 2012, the Notice of Removal was received by the Lubbock County District Clerk.

5. On August 13, 2012, Defendant filed its Motion for a More Definite Statement and its Original Answer.
6. Also on August 13, 2012, Defendant filed its Motion to Set Aside Judgment and/or Vacate.
7. On August 16, 2012, the Court entered an order denying Defendant's Motion for More Definite Statement and Motion to Set Aside Judgment for failure to include certificates of conference and failure to support with briefs.
8. On August 17, Defendant filed another Motion for More Definite Statement, an Answer, and Another Motion to Set Aside Judgment and/or Vacate.
9. On August 20, 2012, the Court Entered an Order, "establishing the following schedule for this case: (a) Motions to join other parties and amend pleadings must be filed by 3:00 pm on December 14, 2012. . ."
10. On August 21, 2012, Defendant filed an Amended Motion to Set Aside Default or Vacate Default Judgment.
11. On September 7, 2012, G&C filed its response to Defendant's Motion for More Definite Statement and Defendant's latest Motion to Set Aside Judgment and/or Vacate Default Judgment.
12. On October 10, 2012, Defendant filed a Motion for Leave to File a Reply Brief in Support of Its Amended Motion to Set Aside or Vacate a Default Judgment.
13. On October 10, 2012, Plaintiff filed its Response to Defendant's Motion for Leave to File Reply Brief.
14. On October 12, 2012, the Court entered an ORDER denying as moot Defendant's Motion for Leave to File a Reply Brief; granting Defendant's Motion to Set Aside Default Judgment; and vacating the Default Judgment. The Court's Order was contingent upon Defendant paying Plaintiff's attorney's fees.
15. On October 17, 2012, Plaintiff filed a Motion for Reconsideration of the Court's Order vacating the Default Order.
16. On October 18, 2012, the Defendant's filed its response to Plaintiff's Motion to Reconsider.
17. On October 24, 2012, the Court denied Defendant's Motion for More Definite Statement and Plaintiff's Motion for Reconsideration.
18. On October 26, 2012, Plaintiff filed its affidavit in regarding attorney's fees.

19. On November 2, 2012, Defendant filed its response regarding attorney's fees.
20. On November 7, 2012, the Court entered an order awarding attorney's fees.
21. On November 21, 2012, Plaintiff received payment of attorney's fees in compliance with the Court's Order.
22. As the foregoing establishes, a default judgment was removed to federal court. The Court entered an order vacating that default order, contingent upon Defendant paying Plaintiff's attorneys fees. Those fees were finally paid on November 21, 2012. It has been less than thirty days since the Court's Order Vacating the Default Judgment.
23. Plaintiff G&C files this its Motion to Amend its Complaint to Add Additional Parties, December 14, 2012 – as required by the Court's scheduling order and also less than 30 days after Defendant complied with the Court's Order Vacating the Default Judgment.

## **II. PROPOSED DEFENDANTS TO BE ADDED**

24. Plaintiff initially filed its Original Petition against Farmland Management Services alleging that “any acts and/or omissions committed by an agent, representative or employee of Farmland Management Services, Defendant, occurred within the scope of the actual or apparent authority of such person on behalf of Defendant.”
25. In its answer, Defendant denied that allegation.
26. Plaintiff alleged that “Defendant is therefore liable to Plaintiff for the acts and/or omissions of any such agent, representative or employee complained of [] by virtue of such agency relationship.”
27. In its answer, Defendant denied that it was liable for the acts of its agents, representatives, and/or employees.
28. Plaintiff further alleged that “acts and/or omissions of any employee of Farmland Management Services, Defendant, occurred within the scope of the general authority and for the accomplishment of the objectives for which such employee was employed.”
29. Defendant denied that allegation.
30. Plaintiff alleged that Defendant was liable for the “acts and/or omissions of any such employee. . .”
31. Defendant denied that allegation.
32. As an affirmative defense to Plaintiff's Original Petition, Defendant alleges that “[P]laintiff's damages, if any, were caused by third parties over whom Defendant had no control or right of control.

33. Defendant further demands “apportionment of responsibility among Plaintiff, any liable Defendants, settling parties and responsible third parties.”
34. Defendant denies that the acts of its employees and/or agents complained of in this case were committed in furtherance of those roles and/or the business of Defendant.
35. Defendant denies that it can be held liable for the acts of its agents and/or employees and asks that responsibility be apportioned between it and other “responsible parties”.
36. However, those parties are not before the Court.
37. Plaintiff seeks to bring those parties before this Court for full adjudication of the issues.
38. Specifically, Plaintiff seeks to add:
  - a. Kyle Amos: Mr. Amos represented himself to be the authorized representative of Farmland Management Service. Mr. Amos fraudulently misrepresented the availability of electricity to the land involved in this case on an ongoing basis. Mr. Amos misrepresented that electricity was not available when it was available. Mr. Amos misrepresented when electricity would be available. Mr. Amos misrepresented the efforts made to obtain electricity. Mr. Amos misrepresented that Farmland Management Services was a division of John Hancock Insurance. Mr. Amos threatened the John Hancock Insurance and Farmland Management Services would destroy Plaintiff through litigation if it attempted to discontinue its business relationship with Defendant. Mr. Amos further threatened physical violence against Plaintiff when it tried to express concerns over its relationship with Farmland Management Services. Mr. Amos is a resident of the State of Texas.
  - b. Highfield Farm Asset Services, LLC: Highfield is a Limited Liability Company formed in the State of Texas whose registered agent is Kyle Amos. On information and belief, Defendant contracted with Highfield Farm Asset Services to interact with Plaintiff regarding the issues involved in this suit. Highfield fraudulently misrepresented the availability of electricity to the land involved in this case on an ongoing basis. Highfield misrepresented that electricity was not available when it was available. Highfield misrepresented when electricity would be available. Highfield misrepresented the efforts made to obtain electricity. Highfield misrepresented that Farmland Management Services was a division of John Hancock Insurance. Highfield threatened that John Hancock Insurance and



Farmland Management Services would destroy Plaintiff through litigation if it attempted to discontinue its business relationship with Defendant.

- c. Chester Birch: Mr. Birch represented himself to be the authorized representative of Farmland Management Services. On information and belief, Mr. Birch was employed by Farmland Management Services during a portion of the term of the relationship of the parties. On information and belief, Mr. Birch was under contract with Farmland Management Services during a portion of the term of the relationship of the parties. Mr. Birch misrepresented the availability of electricity to the land involved in this case on a regular basis as well as the efforts to obtain electricity. Mr. Birch misrepresented that Farmland Management Services was a division of John Hancock Insurance. Mr. Birch is a resident of the State of Indiana.

40. As two of the proposed Defendant's are residents of the State of Texas, granting Plaintiff's Motion to Amend will have the effect of destroying diversity and require remand pursuant to 28 USC 1447. Thus Plaintiff's Amended Petition is captioned both with the federal heading and the state heading.

### **III. PROPOSED CAUSE OF ACTION TO BE ADDED**

41. Now, that Plaintiff is aware that Defendant maintains the proposed defendants were not acting in a representational capacity Plaintiff seeks to add a claim of Conspiracy.
42. Plaintiff has further added a claim of Negligent Supervision, Hiring, and Management.
43. Plaintiff has added more detailed factual allegations and an additional DTPA laundry list element.

### **IV. ARGUMENT AND AUTHORITIES**

#### **A. Rule 15 Amended Pleadings**

44. "Motions to amend under Rule 15(a) may be filed to cure a defective pleading, to correct insufficiently stated claims, to amplify a previously alleged claim, to change the nature or theory of the case, to state additional claims, to increase the amount of damages sought, to elect different remedies, or to add, substitute or drop parties to the action." *Wausau Underwriters Ins. Co. v. Schifler*, 190 F.R.D. 341, 343. (E.D. Pa. 1999) (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1474 (1990)); *see also Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 569 (3d Cir. 1976) (district court improperly denied

amendment to add claims and substitute parties), cert. denied, 429 U.S. 1038(1977); *Martin Herend Imports, Inc. v. Diamond and Gem Trading*, 195 F.3d 765, 777 (5th Cir. 1999) (absent substantial reason, discretion of trial court not broad enough to support denial of motion to amend).

45. The decision on a motion to amend is within the sound discretion of the district court. Nonetheless, “the leave sought should, as the rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Absent “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment,” the moving party should be allowed to test his claim on the merits. *Id.* Courts have interpreted Rule 15(a) “liberally, in line with the Federal Rules overall goal of resolving disputes, insofar as possible, on the merits and in a single judicial proceeding.” *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214, 220 (5th Cir. 1975); *see also Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1254 (9th Cir. 1981) (leave to amend should be freely given since “the purpose of pleadings is to facilitate a proper disposition on the merits”); *Shipner v. Eastern Air Lines*, 868 F.2d 401, 407 (11th Cir.) (The policy of Rule 15 “circumscribes the exercise of the district court’s discretion; unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial”).

**B. Plaintiffs Motion for Leave to Amend Should be Granted Under 28 U.S.C. § 1447**

46. 28 U.S.C. 1447(e) provides that “if after removal the Plaintiff seeks to join additional defendants who would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court.” In this determination, the Court must balance the original defendant’s interest in maintaining a federal forum with the competing interest in not having parallel lawsuits. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987).
42. In *Hensgens*, the U.S. Court of Appeals for the Fifth Circuit identified four criteria to consider in balancing these competing interests (the *Hensgens* factors): (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether the plaintiff has been dilatory in asking for the amendment; (3) whether Plaintiffs will be

significantly injured if the amendment is not allowed; and (4) any other factors bearing on the equities. Id. at 1182.

**i. Plaintiff Has Not Been Dilatory In Requesting Amendment**

- 47. Plaintiff clearly has not been dilatory in asking for this amendment.
- 48. During most of the pendency of this cause, a default order against Defendant has been in effect.
- 49. In fact, Plaintiff G&C files this its Motion to Amend its Complaint to Add Additional Parties on December 14, 2012 – as required by the Court’s scheduling order and also less than 30 days after Defendant complied with the Court’s Order Vacating the Default Judgment.

**ii. The Sole Purpose of Amendment is Not To Destroy Diversity But Rather Avoid Prejudice To Plaintiff**

- 50. The Court must consider whether the “sole” purpose of the amendment is to destroy diversity.
- 51. Plaintiff clearly has legitimate causes of action against each of the Proposed Defendants.
- 52. The purpose of this proposed amendment is not to destroy diversity, but rather to obtain complete relief.
- 53. Plaintiff would be prejudiced by a denial of its motion because it would force Plaintiff to unnecessarily bear the time and expense of parallel proceedings and assume the risk of inconsistent verdicts.
- 54. Filing duplicate proceedings in state court would prove inefficient and be a waste of judicial resources since the Plaintiff claims that acts of Farmland Management Services and the Proposed Defendants jointly caused Plaintiff’s damages.
- 55. Considerations of cost, judicial efficiency, and possible inconsistent results militate in favor of not requiring Plaintiff to prosecute two separate claims in two separate forums when both claims arise from the same set of facts.
- 56. Combining all claims and defendants in one case would present common questions of fact regarding the cause of Plaintiff’s damage, amount of the resulting damages that might be awarded if liability is found, as well as common questions of law relating to damages. *See Lyons v. Lutheran Hospital of Indiana*, 2004 U.S. Dist. LEXIS 20255 at \*5 (N.D. Ill. Sept. 15, 2004); *see also Cashman v. Montefiore Medical Center*, 191 B.R. 558,

562-63 (S.D.N.Y. 1996) (judicial economy did not weigh in favor of severance of third-party products liability claim from medical malpractice action stemming from silicone implants).

57. Additionally, Plaintiffs will be prejudiced by disallowance of the amendment because they will bear the risk of inconsistent verdicts. In a series of separate trials, each defendant can defend itself by blaming the absent party.
58. In other words, Farmland will and has argued that the Proposed Defendants acted without authority, while the Proposed Defendants may argue that they had no knowledge of misrepresentations and simply relayed information provided by Farmland.
59. Denying Plaintiff's Motion to Amend will "permit each defendant in separate trials to defend itself by putting a proverbial 'empty chair' on trial, thus posing a significant risk of inconsistent verdicts that would all go against plaintiff." *B.D. v. DeBuono*, 193 F.R.D. 117, 126 (S.D.N.Y. 2000); *Kirk v. Metro. Transp. Auth.*, 2001 U.S. Dist. LEXIS 85 (S.D.N.Y. Jan. 3, 2001) (courts generally abstain from severing claims where separate trials risk inconsistent jury verdicts).
60. Farmland and the Proposed Defendants in the instant case are clearly "joint" tortfeasors in the sense that the Plaintiff's claims against each arise from the same series of occurrences.

iii. **The Farmland is Not Prejudiced by Allowance of the Amendment.**

61. Defendant Farmland will not be prejudiced if the amendment is permitted. While Farmland may argue it is stripped of its "right" to a federal forum. Defendant has no "right" to a federal forum in the absence of complete diversity. *See Bank One, N.A. v. Brainard*, 144 F. Supp. 2d 640, 2001 U.S. Dist. LEXIS 5699 (S.D. Miss. 2001) ("In this case...[Defendant] would have no "right" to a federal forum in the absence of diversity jurisdiction.)
62. Additionally Defendant has not initiated any discovery this case and thus Farmland has no grounds upon which it may claim to be prejudiced by addition of the Proposed Defendants and/or causes of action.

25 any of these -- or as you know, sitting here today, or  
 26 do you expect, sitting here today, if any of those --  
 27 let me start off with again, I have asked the same  
 28 question. I'm going to start a new question.  
 29 Do you expect, sitting here today, that any  
 30 of the statements made to you by Farland in these March  
 31 /April 2007 meetings were false or do you just not know  
 32 how any of this works?  
 33 MR. CHAMBERLAIN: Objection, leading.  
 34 A. I -- today I feel like they're false, because  
 35 they never came through.  
 36 Q. Do you believe sitting here today that the  
 37 statement that Farland would have money set aside to  
 38 cover your electricity was false?  
 39 A. I have no idea.  
 40 Q. Do you believe the statement that Farland was  
 41 going to try to get electricity to all of the property,  
 42 sitting here today, do you believe that that was false?  
 43 A. I have -- I would -- I think it was false,  
 44 because we didn't receive it until the fifth year.  
 45 Q. Well, was it your belief at the time that they  
 46 said they were going to try to do that?  
 47 MR. CHAMBERLAIN: Objection, asked and  
 48 answered.  
 49 A. I just -- I don't know, I mean.  
 50 Q. What aspect of what was said to you by Farland  
 51 by or on behalf of Farland in these March or April 2007  
 52 meetings do you believe, sitting here today, was false?  
 53 A. That we would get the electricity by the end  
 54 year, the next crop year.  
 55 Q. And they -- and that was something that was  
 56 said to you, "you will have electricity?"  
 57 A. Correct.  
 58 Q. Do you remember those words?  
 59 A. I remember the words that "we have the money  
 60 set aside, we are going to get electricity to you in the  
 61 next year. It won't be the first year. It won't be the  
 62 first year, it does not look like, but we will get it in  
 63 five."  
 64 Q. Okay. And do you specifically remember the  
 65 words that you just said, "we are going to get it" as  
 66 opposed to "we are going to try to get it"?  
 67 A. I don't -- no, "we are going to get it" is what  
 68 they had said.  
 69 Q. Do you know whether Mr. Lauger was there when  
 70 he made those statements that you recall, "we're  
 71 going to get electricity the second year"?  
 72 A. I don't know if he was there or not. I just  
 73 don't recall.  
 74 Q. And did it sound like anything in relation to  
 75 this statement that Farland was going to get  
 76 electricity?

77 G. Okay.  
 78 Q. -- that was any different concern about the fact.  
 79 Q. I'm asking you about the very first  
 80 representative that you recall. Is it if you can work  
 81 in your mind. The statement telling me -- it's not saying  
 82 3025  
 83 To confuse you. And you started talking, we about a  
 84 March or April 2007 meeting. And then you said that you  
 85 met Mr. Lauger a couple times before this.  
 86 A. Well, now, when I met him a couple times, I  
 87 would say twice in that March and April -- in that March  
 88 and April, that's when I met Mr. Lauger.  
 89 Q. Okay.  
 90 A. And we talked to him on both -- all occasions  
 91 about the electricity on that land.  
 92 Q. Okay. On the very first time that you met him,  
 93 do you recall whether it was in Lubbock or whether it  
 94 was at the property?  
 95 A. I don't recall. That's been like years ago.  
 96 Q. But it was either in Lubbock or at the property  
 97 or could it have been somewhere else, too?  
 98 A. It could have been. It could have been. I'm  
 99 not positive.  
 100 Q. Okay. And tell me what was represented to you  
 101 by someone we believe at Farland regarding electricity  
 102 at this very first meeting.  
 103 A. David Naughton had said to me, he said, "we  
 104 will" -- he said, "within 6 years we will have this. We  
 105 probably won't get it this year, but by our second year  
 106 we are going to get the electricity put in that area."  
 107 We already have the money set back in an account to do  
 108 3030  
 109 that. And that is our intention."  
 110 Q. And in terms of the statement they had the  
 111 money -- I picture you saw Farland had the money set  
 112 aside to do that?  
 113 A. Correct.  
 114 Q. Do you believe that that was false?  
 115 A. I have no idea said of that one.  
 116 Q. So you don't know that it's false, you just  
 117 don't know?  
 118 A. I have no way of knowing.  
 119 Q. And whether at that Farland's intention to get  
 120 electricity at the property within the time frame that  
 121 you described, do you believe that that was false?  
 122 A. I just don't know, is that the truth?  
 123 Q. Do you know if anything that Mr. Naughton told  
 124 you at this first meeting is false or do you assist that  
 125 it is?  
 126 A. I don't know. It just never happened, is -- or  
 127 it did happen the end of the fifth year.  
 128 Q. Okay. And I think you used the term "we"  
 129 somewhere in there. Was anyone else at this meeting  
 130 there on behalf of G or C land, that very first meeting,  
 131 3035

anything other than a calculated litigation strategy which had determined to **not** file and answer in the state court action and to file the Notice of Removal by placing in the United States mail on August 6, 2013 whereby the state court judge absolutely would not receive Notice of Removal any sooner than two (2) days after the deadline. The Court's order also mentions the purported hospitalization of the Defendant's counsel's grandfather (Joseph Gouveia) as a mitigating factor for missing the deadline, but this declaration is made by a colleague attorney in the Defendant's counsel's law firm -- not Thomas M. Spitaletto, counsel for the Defendant.

## **II. NEWLY DISCOVERED EVIDENCE HIGHLIGHTS THE WILLFUL NATURE OF DEFENDANT'S COUNSEL'S DECISION NOT TO ANSWER SUIT IN STATE COURT**

In fact, as this newly discovered evidence further highlights, Mr. Spitaletto was not kept from attending his cases in the days leading up to the answer due date in this case. Just a few of his activities are listed below:

- On Monday, July 25, 2012, Thomas Spitaletto attended a mediation in Federal Cause Number 4:11-CV-00445Y at the offices of Ross Stoddard in Irving, Texas. See Exhibit A
- On Tuesday, July 26, 2012, Thomas Spitaletto attended a mediation in Federal Cause Number 4:11-CV-02679-L at the offices of Earl Hale in Dallas, Texas. See Exhibit B.
- On Friday August 3, 2012, Thomas Spitaletto filed an Original Answer on behalf of Defendants Commercial Insurance Solutions Group, LLC and Ray Deaton in Case No. DC-12-06750 in the Dallas District Court. See Exhibit C. That case would

presumably have had the same answer day as this case – August 6, 2012. Rather than risking missing that deadline – the record shows that Mr. Spitaletto had the answer in that case hand delivered to the Dallas County Courthouse on the Friday before it was due.

Defendant's counsel took no such action in this case. According to his own declaration, Defendant's counsel had no intention of filing an answer in the state court. His only intention was to file a notice of removal earlier that day – which still would not have been effective to deprive the State Court of jurisdiction until it was received two days later – after the default was entered.

The state court entered the default judgment on August 6, 2013, without actual or constructive notice of the notice of removal filed by Defendant's counsel in this case, which the record clearly indicates would be after August 8, 2013, two days after the default was entered. The state court continued to have jurisdiction to enter the default at the time the judgment was entered. *Medrano v. Texas*, 580 F.2d 803,804 (5<sup>th</sup> Cir. 1978). As stated by the 5<sup>th</sup> Circuit in *Pettle v. Bickam*, 10 F. 3d 189 (5<sup>th</sup> Cir. 2005), "...the broad power granted by Rule 60 (b)(6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made". The decision by Defendant's counsel in this case to not timely file an answer in the state court action was a free, calculated and deliberate choice as was the decision to mail the Notice of Removal such that it was not received by the state court until well after the default judgment was entered.

Also, as stated in the Plaintiff's original Motion for Reconsideration and Brief in Support Thereof filed on October 17, 2012, the allegation by the Defendant that they had meritorious defenses was of no consequence, as since there was a willful and intentional failure to answer the

25 any of these -- or do you know, sitting here today, at  
26 1029

1 do you assert, sitting here today, if any of these --  
2 let me start all over again. I have asked the same  
3 question. I'm going to start a new question.

4 do you assert, sitting here today, that any  
5 of the statements made to you by Farmland in those March  
6 /April 1987 meetings were false or do you just not know  
7 one way or the other?

8 MS. CONNOR: Objection. Leading.  
9 A. I -- today I feel like they're false, because  
10 they never ran through.

11 Q. Do you believe sitting here today that the  
12 statements that Farmland would have money set aside to  
13 deal with electricity was false?

14 A. I have no idea.

15 Q. Do you believe the statement that Farmland was  
16 going to try to get electricity to all of the property,  
17 sitting here today, do you believe that that was false?

18 A. I have -- I mean I -- I think it was false,  
19 because we didn't receive it until the fifth year.

20 B. Well, but do you believe it was false that they  
21 said they were going to try to do that?

22 MS. CONNOR: Objection. Asked and  
23 answered.

24 A. I just -- I don't know, I mean.

25 Q. What aspect of what was said to you by someone

26 1030  
1 by or on behalf of Farmland in those March or April 1987  
2 meetings do you believe, sitting here today, was false?

3 A. That we would get the electricity by the next  
4 year, the next crop year.

5 Q. And that -- and what was something that was  
6 said to you, "you will have electricity?"

7 A. Correct.

8 Q. Do you remember those words?

9 A. I remember the words that "we have the money  
10 set aside, we are going to get electricity by you in the  
11 next year. It won't be the first year. It won't be the  
12 first year, it does not look like, but we will get it in  
13 there."

14 Q. Okay. And do you specifically remember the  
15 words that you just said, "we are going to get it" as  
16 opposed to "we are going to try to get it"?

17 A. I don't -- no, "we are going to get it" is what  
18 they had said.

19 Q. Do you know whether Mr. Sawyer was there three  
20 or four times those specific words that you recall, "we're  
21 going to get electricity the second year?"

22 A. I don't know if he was there or not. I just --  
23 I don't recall.

24 Q. And did G & C Land do anything in reliance on  
25 this statement that Farmland was going to get  
26 1031

27 Q. Okay.

28 A. -- that was our biggest concern about the farm.  
29 Q. I'm asking you about the very first  
30 representation that you recall. So if you can go back  
31 in your mind. You started telling me -- I'm not trying  
32 1032

1 to confuse you. But you started telling me about a  
2 March or April 1987 meeting. And then you said that you  
3 met Mr. Baughman a couple times before that.

4 A. Well, now, when I met him a couple times, I  
5 would say twice in that March and April -- in that March  
6 and April, that's when I met Mr. Baughman.

7 Q. Okay.

8 A. And we talked to him on both -- all occasions  
9 about the electricity on that land.

10 Q. Okay. As the very first time that you met him,  
11 do you recall whether it was in Lubbock or whether it  
12 was at the property?

13 A. I don't recall. That's been five years ago.  
14 Q. But it was either in Lubbock or at the property  
15 or could it have been somewhere else, too?

16 A. It could have been. It could have been, it's  
17 not possible.

18 Q. Okay. And tell me what was represented to you  
19 by someone on behalf of Farmland regarding electricity  
20 at this very first meeting.

21 A. David Baughman had said to me, he said, "we  
22 will" -- he said, "within a year we will have this. We  
23 probably won't get it this year, but by our second year  
24 we are going to get the electricity put in this farm.  
25 We already have the money set back in an account to be  
26 1033

1 there. And that is our intention."

2 Q. And in terms of the statement that had the  
3 money -- I presume you mean Farmland had the money set  
4 aside to do that?

5 A. Correct.

6 Q. Do you believe that that was false?

7 A. I have no idea [sic] on that one.

8 Q. So you don't assert that it's false, you just  
9 don't know?

10 A. I have no way of knowing.

11 Q. And whether it was Farmland's intention to get  
12 electricity at the property within the time frame that  
13 you described, do you believe that that was false?

14 A. I just don't know, to tell you the truth.

15 Q. Do you know if anything that Mr. Baughman told  
16 you at this first meeting is false or do you assert that  
17 it is?

18 A. I don't know. It just never happened, so -- so  
19 it did happen the end of the fifth year.

20 Q. Okay. And I think you used the term "we"  
21 somewhere in there. Use anyone else at this meeting  
22 there on behalf of G & C Land, this very first meeting,

Page 5

Page 5



UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

G & C LAND  
Plaintiff,

5:12-CV-00134-C

V.

FARMLANDMANAGEMENT  
SERVICES

Defendant

AFFIDAVIT OF KEIL GAUGER

My name is Keil Gauger. I am over the age of eighteen (18) years, I have never been convicted of a felony or a crime involving moral turpitude, and I am otherwise competent to make this affidavit. I am a co-owner of G & C Land, the Plaintiff in the above styled case. I have been engaged in the agriculture industry for 25 years in various capacities, specifically as a farmer and rancher, a landowner, a lessor and lessee of land, and making decisions as to the selling and purchasing of farm commodities and equipment and fuel costs. I have personal knowledge of the facts surrounding the case and the allegations contained in our Original Petition and our First Amended Complaint (Petition). The following statements are based upon my actual personal knowledge and not just my belief.

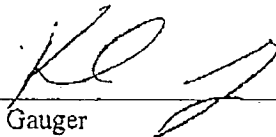
I have reviewed the data contained on the attached spreadsheet and I know it to be accurate and to represent the dollar amount of our fuel costs we had to pay for diesel generators to run irrigation equipment on the 5000 acre farm that we leased from Farmland Management Services in Yoakum County, Texas as opposed to the costs we would have paid if we would have had electricity instead of generators to run the irrigation equipment as promised by Farmland Management Services prior to our entering into the lease the subject of this lawsuit.

Case 5:12-cv-00134-C Document 98 Filed 10/15/13 Page 7 of 110 PageID 1737  
 Plaintiff's Amended Appendix Pg. 007

Joe Silveira, the then President of Farmland Management Services<sup>1</sup> and David Baugman, the Vice President of Farmland Management Services both represented to myself and my partner that Farmland Management Services had the present ability to provide electricity to the property. Both told me and my partner that we "would have electricity by the second year of the lease" -- otherwise we would not have entered into the lease as it would not have made financial sense as the fuel costs for diesel were too high to grow either cotton or peanuts.

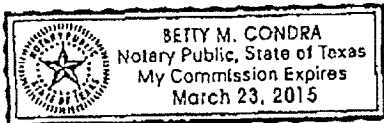
Every time we discussed the issue of electricity with any representative of Farmland, we were told that we would have electricity very soon. When we tried to talk to Farmland about terminating the lease, I was specifically told by Kyle Amos, a representative of Farmland, that Farmland Management was part of John Hancock Insurance and they had in house lawyers. I was told that John Hancock would sue and it was clear that we would be ruined.

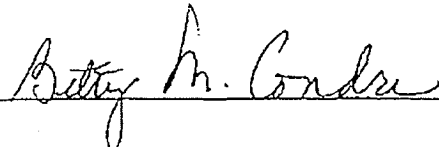
I have attached a copy of an email provided to me (through my attorney) by Farmland Management Services (through their attorney) indicating the lease price was based upon the representation that the entire leased property would be converted to electrical power (attachment A).

  
 Keil Gauger

STATE OF TEXAS  
 COUNTY OF LUBBOCK

SUBSCRIBED AND SWORN TO BEFORE ME Keil Gauger on the  
4 day of September, 2013 under penalty of perjury by  
TX ID with identity proven to me by government issued identification.



  
 Betty M. Condra

<sup>1</sup> Mr. Silveira is no longer the President of Farmland Management Services. It is my understanding that he committed suicide under possible allegations of fraud. I have attached a news article hereto that is a true and correct copy of the original (attachment B).

Yoakum 380

From: JNeyhard <JNeyhard@HNRG.COM>  
To: chester <chester@fmslurlock.com>; davidfms <davidfms@aol.com>  
Subject: Yoakum 380  
Date: Wed, May 26, 2010 10:37 pm

Chester / Dave,  
In regards to the Yoakum 380 capital request for bringing electricity onto the north parcel, I know I've asked a lot of questions already but I'm still trying to get enough info. to communicate the full value of the project to the client.  
- How will this affect operating expenses after it's completed? We're jumping from about \$40k in last year's budget to \$81k in this year's budget? Will the budget come back down in future years post-conversion? The other way to look at it would be how much would rent decrease if we don't convert? I get the impression that the current rent is based partly on the assumption that the entire property will be converted to electrical power.

Thanks for your help!

Jim Neyhard  
Investment Analyst  
Hancock Agricultural Investment Group  
99 High Street, 26th Floor  
Boston, MA 02110-2320  
617-747-1672 (Tel)  
617-674-8758 (Cell)  
617-230-3615 (Fax)  
[jneyhard@hancq.com](mailto:jneyhard@hancq.com)

STATEMENT OF CONFIDENTIALITY

The information contained in this email message and any attachments may be confidential, proprietary, and legally privileged intended for the use of the addressee(s) only. If you are not an intended recipient, please: (1) do not disseminate, immediately by replying to this message; (2) do not use, copy, or reproduce any part of the message or any attachments; and (3) destroy all copies of this message and any attachments.

## AFFIDAVIT OF DAN KRIEG

"I am over the age of 18 years. I have never been convicted of a felony or a crime involving moral turpitude and I am otherwise competent to make this affidavit. Attached hereto is a true and correct copy of my curriculum vitae.

The following is my professional opinion concerning the cost of pumping irrigation water in Yoakum County Texas using diesel to power electric generators versus using 460 Volt, 3 phase electricity provided by Lea County Electric Cooperative.

C&G Farms, operated by J.R.Cudd and Kyle Gauger, cash leased 5280 acres of irrigated land in Yoakum County Texas from Farmland Management Services in 2007. The power to operate the submersible irrigation pumps and to move the pivots was provided by large diesel generators. The lessee's were under the assumption that the power source would be provided by Lea County Electric Co-op very shortly after starting the farming operation in 2007. Over the course of the lease (2007-2011) the cost of producing ground water for irrigation using the diesel generators was considerably greater than it would have been if electricity had been provided by Lea County Electric Co-op as the lessee's thought would occur.

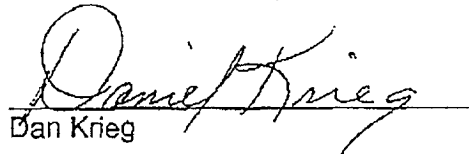
The cost to produce an acre inch of water with Diesel Generators versus purchased electricity from Lea County Electric Co-op for 2007 through 2010 is presented in table format. The assumptions used are that the total dynamic head was 300 feet and the pumping system had 75% efficiency. No direct cost has been assigned for maintenance of the generators. Engine oil had to be changed every 200 hours of operation and required 14 gallons/generator.

| YEAR | \$/GAL DIESEL | GALLONS DIESEL/ACRE INCH | \$/ACRE INCH | ACRES INVOLVED |
|------|---------------|--------------------------|--------------|----------------|
| 2007 | 2.60          | 2.18                     | 5.67         | 2040           |
| 2008 | 3.40          | 2.18                     | 7.42         | 2520           |
| 2009 | 1.98          | 2.18                     | 4.32         | 2520           |
| 2010 | 2.20          | 2.18                     | 4.80         | 2040           |
| YEAR | \$/KWH        | KWH/ACRE INCH            | \$/ACRE INCH | ACRES INVOLVED |
| 2007 | 0.0472        | 33.5                     | 1.57         | 360            |
| 2008 | 0.0478        | 33.5                     | 1.60         | 360            |
| 2009 | 0.0715        | 33.5                     | 1.60         | 360            |
| 2010 | 0.0715        | 33.5                     | 2.39         | 840            |

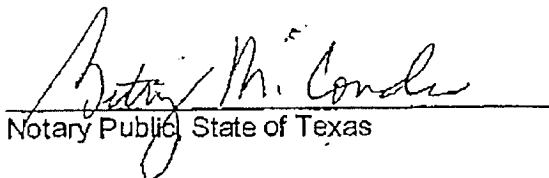
It is obvious that the use of the diesel generators cost at least 2-3 times more per acre inch of water produced than the cost of electricity provided by Lea County Electric Co-op.

The excess cost of irrigation (excluding maintenance of the generators) caused using the generators versus electricity provided by Lea County Electric per year is presented in the following table.

| Year        | Acres | Total Cost Diesel | Total Cost If Provided Electricity | Excess Cost of Diesel |  |
|-------------|-------|-------------------|------------------------------------|-----------------------|--|
| 2007        | 2040  | 410,240           | 113,634.15                         | 296,605.85            |  |
| 2008        | 2520  | 662,760           | 143,067.20                         | 519,692.80            |  |
| 2009        | 2520  | 526,680           | 195,228.80                         | 331,451.20            |  |
| 2010        | 2040  | 410,040           | 204,335.44                         | 205,704.56            |  |
| Total Costs |       | 2,009,720         | 656,265.59                         | 1,356,454.30          |  |

  
Dan Krieg

SUBSCRIBED AND SWORN TO BEFORE ME Daniel Krieg on the  
5 day of September, 2013 under penalty of perjury by  
TX ID identified by government issued identification.

  
Notary Public, State of Texas

