In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-25-00254-CV

LON SMITH & ASSOCIATES, INC., AND A-1 SYSTEMS, INC. D/B/A LON SMITH ROOFING AND CONSTRUCTION, Appellants

V.

JOE AND STACCI KEY, Appellees

On Appeal from the 236th District Court
Tarrant County, Texas
Trial Court No. 236-267881-13

Before Bassel, Wallach, and Walker, JJ.
Opinion by Justice Wallach

OPINION

This is an interlocutory appeal from the trial court's Order Denying Defendants' (Appellants') First Amended Motion to Compel Arbitration (Order). *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.016; *see also* 9 U.S.C.A. § 16.[1] Because Appellants failed to meet their burden of proof regarding the existence of valid arbitration agreements with the class members who allegedly had arbitration agreements in their contracts with Appellants, we will affirm the judgment of the trial court.

I. Background

The general background of this litigation may be found in *Lon Smith* 1 and *Lon Smith* 2. Appellants are in the roofing repair business. Appellees (Keys) were their customers. As is pertinent here, the trial court certified a class of Appellants' customers as class plaintiffs with the Keys named individually and on behalf of all others similarly situated. The trial court's Order Certifying Class Action with Trial Plan, states "[t]he primary issue to be resolved is whether the contractual provision [with the customers] violates the Texas Insurance Code and, thereby, renders such contracts illegal, void, and unenforceable." The trial court ordered,

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[1]This is the third appeal in this case handled by this court. The first case was *Lon Smith & Associates, Inc. v. Key*, 527 S.W.3d 604 (Tex. App.—Fort Worth 2017, pet. denied) (*Lon Smith* 1). The second case was *Lon Smith & Associates, Inc. v. Key*, No. 02-21-00227-CV, 2022 WL 1112388 (Tex. App.—Fort Worth Apr. 14, 2022, no pet.) (*Lon Smith* 2). We also denied a petition for writ of mandamus without an opinion.

> this action will be certified as a class action as to (a) Plaintiffs' declaratory judgment claim, (b) Plaintiffs' DTPA claim based on Section 17.50(a)(3) (Unconscionability), and (c) Plaintiffs' DTPA claim based on Section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code)

The trial court ordered the certified class to consist of

> [a]ll Texas residents who from June 11, 2003, through the present signed agreements with Lon Smith that included the following language, or language substantially similar to the following: "This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction ("LSRC") to pursue homeowners['] best interest for all repairs at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.

In *Lon Smith* 1, this court affirmed the part of the Order Certifying Class Action with Trial Plan that "certifies for class treatment [the] Keys' declaratory judgment claim and the Keys' Deceptive Trade Practices Act (DTPA) claim based on section 17.50(a)(4) (Violation of Chapter 541 of the Texas Insurance Code)." *Lon Smith* 1, 527 S.W.3d at 610. We also reversed as to "the Keys' DTPA claim based on section 17.50(a)(3) (Unconscionability)." *Id.*

Among other issues resolved in *Lon Smith* 2, we held that there was an enforceable arbitration agreement between the Keys and Appellants and that the dispute in question fell within the scope of that arbitration agreement. 2022 WL 1112388, at *5. However, we also held that Appellants had waived their right to compel arbitration with the Keys individually by virtue of their litigation conduct. *Id.* at *6–9. Finally, we dealt with the trial court's denial of Appellants'

Motion to Compel Arbitration with the plaintiff class members. *Id.* at *10. We held that the trial court's denial of the motion should be affirmed because the issue of arbitration with the class members was not yet ripe since the class members had not been given notice and the opt-out period had not passed. *Id.* at *11. Hence, there was no justiciable controversy between the plaintiff class members and Appellants at the time the trial court denied Appellants' motion to compel arbitration. *Id.* at *12.

After *Lon Smith* 2, the plaintiff class members were eventually served with notice of the class action and the opt-out period passed. Appellants then filed their First Amended Motion to Compel Arbitration, seeking to compel arbitration under the Federal Arbitration Act as to the 22,258 plaintiff class members—out of the 36,899 in the entire plaintiff class—who allegedly have arbitration provisions in their customer agreements with Appellants. However, the motion was ambiguous regarding the nature of the arbitration relief sought by Appellants against the class members, e.g., class or collective arbitration for all, or some, of the class members, or 22,258 bilateral arbitrations between each class member and Appellants, or some combination thereof. In the First Amended Motion, Appellants

> *requested "that the Court grant this motion to compel arbitration *as to* the 22,258 customers in the class definition with arbitration provisions in their agreements";
>
> *quoted the trial court from the prior Motion to Compel Arbitration hearing as saying "*I don't think it's very efficient to have thousands of contests over whether or not the arbitration clauses are enforceable*";

> *stated that "there is nothing in this arbitration provision [the Better Business Bureau as arbiter form, one of four arbitration forms in question] showing the parties agreed to class action arbitration," and "[i]n fact, the Alabama Supreme Court noted the BBB's policy of not conducting class action arbitrations. *Univ. Toyota v. Hardeman*, 228 So.3d 394, 400–01 (Ala. 2017); *see Litman v. Cellco P'ship*, 381 Fed. Appx 140, 231 (3d Cir. 2010) (requiring arbitration of claims individually and not as a class action)[, *cert. granted, judgment vacated*, 563 U.S. 971 (2011)]"; and
>
> *requested in the prayer that the court "grant [the motion] and sign an order compelling arbitration *as to* those customers listed in the exhibits (including but not limited to Exhibit 9 and Exhibit 12) who contracted for roofing repairs and installations and whose written agreements include arbitration provisions." [Emphasis added and underlining omitted.]

Nothing said on the record during the hearing on the First Amended Motion to Compel Arbitration shed any light on the question of the type of arbitration process being requested. After sustaining the Keys' objections to Appellants' evidence tendered in support of the motion, the trial court denied the First Amended Motion to Compel Arbitration without specifying any reasons. This appeal ensued.

II. Standards of Review and Governing Legal Principles

A. Standards of Review

An order denying a motion to compel arbitration is reviewed under an abuse of discretion standard. *Robinson v. Home Owners Mgmt. Enters., Inc.*, 590 S.W.3d 518, 525 (Tex. 2019). A trial court abuses its discretion when it acts arbitrarily or unreasonably or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Branch Law Firm, L.L.P. v. Osborn*, 447 S.W.3d 390, 395 (Tex. App.—Houston [14th Dist.] 2014, no

pet.). Under this standard, we defer to a trial court's factual determinations if they are supported by evidence but review a trial court's legal determinations de novo. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). "An order denying arbitration must be upheld if it is proper on any basis considered by the trial court." *In re Weeks Marine, Inc.*, 242 S.W.3d 849, 854 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding); *see also Branch Law Firm L.L.P.*, 447 S.W.3d at 395.

Absent evidence raising a genuine issue of material fact, the trial court may summarily determine whether to compel arbitration. *Cai v. Sunward America, Corp.*, No. 02-24-00469-CV, 2025 WL 1085182, at *5 (Tex. App.—Fort Worth April 10, 2025, no pet.) (mem. op); *In re Est. of Guerrero*, 465 S.W.3d 693, 700 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (en banc). This summary procedure is akin to that of a motion for summary judgment and subject to the same evidentiary rules. *Cai*, 2025 WL 1085182, at *5; *Mobil Oil Fed. Credit Union v. Smith*, No. 09-22-00393-CV, 2024 WL 630000, at *5–6 (Tex. App.—Beaumont Feb. 15, 2024, no pet.) (mem. op.).

B. Governing Legal Principals

"The Federal Arbitration Act (FAA) embodies a 'liberal federal policy favoring arbitration agreements,' but because arbitration is 'a matter of consent, not coercion,' parties cannot be compelled to arbitrate any dispute absent an agreement to do so." *Robinson*, 590 S.W.3d at 522 (footnotes omitted); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010). Thus, the existence of an

agreement to arbitrate must be proven before the court must compel arbitration. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018); *Dang v. Van Tran*, No. 05-22-00518-CV, 2023 WL 3772809, at *3 (Tex. App.—Dallas June 2, 2023, no pet.) (mem. op.). The initial evidentiary burden for proving the existence of an arbitration agreement rests on the party seeking to compel arbitration. *Dang*, 2023 WL 3772809, at *3; *United Rentals v. Smith*, 445 S.W.3d 808, 812 (Tex. App.—El Paso 2014, no pet.). This evidentiary burden encompasses threshold evidentiary issues such as mutual assent and authenticity. *Dang*, 2023 WL 3772809, at *3; *Est. of Guerrero*, 465 S.W.3d at 703. It also includes proof of exceptions to the hearsay rule. *Zhu v. Lam*, 426 S.W.3d 333, 342 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The standards for determining the admissibility of evidence is the same in a summary judgment proceeding as at trial. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 163–64 (Tex. 2018) (citing *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997)); *Ewing Ins. Servs v. Tex. Ind. Auto. Dealers Ass'n*, No. 06-18-00090-CV, 2019 WL 1575397, at *8 (Tex. App.—Texarkana April 12, 2019, no pet.) (mem. op.). The admission or exclusion of evidence rests in the sound discretion of the trial court. When reviewing a trial court's decision to exclude evidence, we apply an abuse of discretion standard. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) (op. on reh'g); *Zhu*, 426 S.W.3d at 340. In determining whether the trial court abused its discretion, we review the entire record. *See Interstate Northborough*, 66 S.W.3d at 220. An evidentiary ruling will be upheld if there is any legitimate basis to do so,

regardless of whether that basis was asserted in the trial court. *Zhu*, 426 S.W.3d at 340. An erroneous evidentiary ruling will be reversed only if it probably caused the rendition of an improper judgment. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). This usually requires a demonstration that the judgment turns on the excluded evidence. *See Interstate Northborough*, 66 S.W.3d at 220.

Determining if the parties have agreed to arbitrate their dispute in a class or collective arbitration is a threshold question of arbitrability presumptively to be decided by the trial court unless the parties have otherwise agreed in clear and unmistakable terms. *Robinson*, 590 S.W.3d at 525, 531 n.66. Class arbitration and collective arbitrations differ from consolidated bilateral arbitrations. *Herrington v. Waterstone Mort. Corp.*, 907 F.3d 502, 510 (7th Cir. 2018). As the *Herrington* court noted,

> We explained in *Blue Cross Blue Shield* that class actions "always have been treated as special" because of numerous characteristics not present in consolidated arbitration. *Blue Cross Blue Shield* [*of Mass., Inc. v. BCS Ins. Co.*], 671 F.3d [635,] 640 [7th Cir. 2011]. In class and collective actions, a "self-selected plaintiff represents others"; the rules entitle the represented parties "to protection from the representative's misconduct or incompetence"; there is often a costly process to notify individual class members; the lawyers are effectively in charge of the process because of the representative plaintiff's small stake in the suit; and the class nature of the actions can dramatically increase the amount of money at stake. *Id.* We categorized the "[c]onsolidation of suits that are going to proceed anyway" as procedural precisely because it poses none of those same concerns.

Id. at 510–11.

In *Robinson*, our supreme court recognized fundamental differences between class or collective arbitration and bilateral arbitration,

> [D]ue to enhanced complexity and multiplicity of claims, class arbitration is a high-stakes endeavor that "sacrifices the principal advantage of arbitration—its informality," making "the process slower, more costly, and more likely to generate procedural morass than final judgment." Due process rights of absent class members, loss of speed and efficiency, increased costs, and confidentiality concerns are among the unique difficulties class arbitration presents.

590 S.W.3d at 530 (footnote omitted).

As a result, class arbitration must be explicitly referenced and not merely inferred from an agreement to arbitrate. *Id.* at 534; *see Stolt-Nielsen S.A.*, 559 U.S. at 684, 130 S. Ct. at 1775. Likewise, an arbitration agreement that is ambiguous about whether the parties have agreed to class arbitration is not sufficient to compel class arbitration. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 185, 139 S. Ct. 1407, 1416 (2019). While there is a strong presumption favoring arbitration, and all doubts regarding the scope of an arbitration agreement are resolved in favor of arbitration, no such presumptions exist until the party seeking to compel arbitration proves the existence of a valid arbitration agreement. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737–38 (Tex. 2005) (orig. proceeding).

While there is no United States Supreme Court or Texas authority addressing the question, the federal circuits are split on whether an arbitration agreement that does not expressly reference class arbitration is sufficient to compel class arbitration under the FAA if the agreement adopts a specific arbitration organization's arbitration rules and those rules provide for class arbitration. *Robinson*, 590 S.W.3d at 523 n.8 (noting that the issue was not present in that case and was not decided); *see*

Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599–600 (6th Cir. 2013) (holding that arbitration agreement, which required arbitration before the American Arbitration Association (AAA) using AAA's commercial rules, which in turn incorporate AAA's class arbitration rules, but which did not reference class arbitration specifically, was not sufficient to compel class arbitration); *cf. Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972–73 (8th Cir. 2017) (holding that the arbitration agreement that provided for arbitration under AAA rules, which incorporate AAA's class arbitration rules, did not delegate the question of whether the arbitrator should decide if the agreement authorized class arbitration, the court noted that the arbitration agreement was silent on class arbitration); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 758–59 (3d Cir. 2016) (holding that an arbitration agreement that did not expressly delegate arbitrability to arbitrator on non-signatory claims did not delegate such decision authority); *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632–33 (Tex. 2018) (same). To the contrary, the Fifth Circuit, in *Sullivan v. Feldman*, 132 F.4th 315, 329–31 (5th Cir. 2025), after acknowledging the split in the circuits, held that an arbitration agreement's incorporation of AAA rules, which incorporate AAA's supplementary rules delegating class arbitrability issues to the arbitrator, is clear and unmistakable evidence of the parties' clear agreement for class arbitration.

III. Analysis

Appellants raise what can be described as one general issue with subparts. The general issue is that the trial court abused its discretion in denying their First Amended Motion to Compel Arbitration. Under that general issue, Appellants contend that the trial court erred in sustaining the Keys' objections to several of Appellants' exhibits offered in support of the Motion. We will overrule Appellants' issue and subparts and affirm the trial court's Order.

A. Class or Collective Arbitration, in whole or in part

In a traditional motion for summary judgment where a defendant as movant is asserting an affirmative defense as the basis for the motion, the movant has the burden to conclusively establish that defense. *Draughon v. Johnson*, 631 S.W.3d 81, 88 (Tex. 2021). Similarly, to be entitled to an order compelling class or collective arbitration, the movant has the burden to establish the existence of a valid arbitration agreement expressly authorizing it. *Robinson*, 590 S.W.3d at 531 n.66, 533; *Herrington*, 907 F.3d at 508–09. In this case, the arbitration agreements proffered by Appellants failed to establish a right to class or collective arbitration.

Appellants pleaded four arbitration provisions in support of their First Amended Motion to Compel Arbitration, two Better Business Bureau provisions and two AAA provisions. For purposes of our review, we will assume that these provisions were properly before the trial court for consideration as they relate to class or collective arbitration. The four provisions provided

a. "All parties agree to settle any disputes regarding damages, quality of materials or workmanship through binding arbitration with the local Better Business Bureau before either party may officially file suit with any court. ARBITRATION SHALL BE BINDING."

b. "Purchaser and Contractor both agree to settle any disputes regarding damages, quality of materials or workmanship though binding arbitration with the local Better Business Bureau."

c. "9.01 Arbitration. Except as provided herein, all claims, disputes and other matters in question arising out of or relating to this Agreement or the breach thereof shall be decided by Arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

d. "All parties agree to settle any disputes regarding damages, quality of materials or workmanship through arbitration with the American Arbitration Association before either party may officially file suit with any court."

Regarding the Better Business Bureau provisions, a. and b. above, Appellants conceded that there is no evidence that the parties agreed to class arbitration and that the Better Business Bureau does not even offer class arbitration. As a result, to the extent that class or collective arbitration was being sought by Appellants under these provisions, they were not entitled to it, and the trial court's order was correct. *See Largent v. Cassius Classic Cars & Exotics, LLC*, No. 02-22-00043-CV, 2023 WL 2179465, at *4, *8 (Tex. App.—Fort Worth Feb. 23, 2023, no pet.) (mem. op.) (holding that summary judgment was improper where motion and supporting evidence was insufficient to support summary judgment); *see also Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

The same result is true for the two AAA provisions, c. and d. above. Neither AAA arbitration provision expressly referenced class or collective arbitration. Therefore, under the authorities referenced above, no enforceable agreement for class or collective arbitration was established under the AAA arbitration provisions and the trial court's order was correct. *See Robinson*, 590 S.W.3d at 534; *see also Stolt-Nielsen S.A.*, 559 U.S. at 684, 130 S. Ct. at 1775; *Reed Elsevier, Inc.*, 734 F.3d at 599; *Largent*, 2023 WL 2179465, at *4.

B. Multiple Bilateral Arbitrations

1. Overview

As noted above, to establish a right to compel arbitration with another party to an arbitration agreement, the burden is on the movant to establish the existence of a valid arbitration agreement, the procedure for doing so mirrors a summary judgment process, and the rules of evidence must be followed for the admission of evidence. Here, the trial court sustained the Keys' objections to several affidavits and exhibits on which Appellants relied to establish the existence of valid arbitration agreements with the class members individually. We hold that the trial court did not abuse its discretion in sustaining the Keys' evidentiary objections and in denying Appellants' First Amended Motion to Compel Arbitration as it relates to individual bilateral arbitration proceedings with the individual class members.[2]

[2]A trial court is not required to sort through voluminous exhibits where the movant fails to specifically identify the documents upon which it relies. *Riley v. Bank of*

NY Mellon, No. 09-23-00085-CV, 2025 WL 919925, at *4 (Tex. App.—Beaumont Mar. 27, 2025, no pet.); *Gonzales v. Shing Wai Brass & Metal Wares Factory, Ltd.*, 190 S.W.3d 742, 746 (Tex. App.—San Antonio 2005, no pet.). Further, a trial court does not abuse its discretion in failing to consider summary judgment evidence that is not specifically brought to its attention. *Walker v. Eubanks*, 667 S.W.3d 402, 409 (Tex. App.—Houston [1st Dist.] 2022, no pet.); *see Kastner v. Gutter Mgt., Inc.*, No. 14-09-00055-CV, 2010 WL 4457461, at *8 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010, pet. denied) (mem. op.) (citing *Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex. App.—Houston [1st Dist.] 1996, no writ)); *Shelton v. Sargent*, 144 S.W.3d 113, 120 (Tex. App.—Fort Worth 2004, pet. denied). Given the incredibly voluminous documents presented by Appellants to the trial court and the sparsity of specific references, the trial court could have disregarded the voluminous documents without having abused its discretion. Appellants' Exhibits 17 and Supplemental 17 were an electronic Drop Box purportedly containing the customer files, including contracts, of the 22,258 customers in the class who had an arbitration provision in their contracts based solely on optical scanning of the documents that revealed the word "arbitration." With limited exceptions discussed below, and without having to sort through the voluminous documents in Exhibits 17 and Supplemental 17 to find the actual contracts of the class members, Appellants did not otherwise introduce their actual contracts with the class members, referring instead to "standard" contract provisions regarding arbitration without specifying which contract applied to each member or identifiable group of members.

Additionally, courts should not look solely to the arbitration provisions of a contract standing alone; they should examine and consider the entire contract to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Branch Law Firm*, 447 S.W.3d at 395. Where the party seeking to compel arbitration does not introduce the entire contract, it is not an abuse of discretion to deny the motion to compel arbitration. *Sunnova Energy Corp. v. Spruce Lending, Inc.*, No. 14-19-00438-CV, 2021 WL 1881368, at *5 (Tex. App.—Houston [14th Dist.] May 11, 2021, pet. dism'd) (mem. op.) (holding that there was no abuse of discretion in denying arbitration where party moving to compel arbitration presented a heavily redacted contract); *Branch Law Firm, L.L.P.*, 447 S.W.3d at 398 (holding that there was no abuse of discretion in trial court's denying motion to compel arbitration where movant did not introduce entire contract for review by the trial court). Here, Appellants only argued from four sets of "standard" contract provisions. For the trial court to have considered each customer's contract in its entirety, it would had to have sorted through 22,528 customer files looking for the contract for each customer. Thus, regardless of the evidentiary rulings, the trial court here did not abuse its discretion in denying the First Amended Motion to Compel Arbitration.

2. Rulings on Evidentiary Objections by Trial Court/Impact on Proof of Contracts with Class Members

a. Affidavit of Shawn McCaskill

Mr. McCaskill is one of the attorneys representing Appellants. His affidavit stated that he has personal knowledge of the facts stated in his affidavit; that he reviewed Exhibits 1–15 to the Amended Motion to Compel Arbitration and they are true and correct copies of the original documents; that Exhibits 9 and 12-2S are the summary lists of 22,258 customers whose agreements include arbitration provisions; and that Exhibit 17 is the electronic Drop Box file of all agreements and documents of customers within the class definition which were scanned by Platinum Intelligent Data Solutions in 2018 and provided to class counsel (36,899 customers).

The Keys objected to the McCaskill affidavit as hearsay and conclusory and that it failed to show the witness's competence by not setting forth the factual basis for the affiant's claimed personal knowledge of the facts. The trial court sustained these objections, which we hold was not an abuse of discretion. As we have previously held,

> An affidavit must "be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Tex. R. Civ. P. 166a(f). Therefore, for a summary-judgment affidavit to have probative value, the affiant must swear that the facts in the affidavit reflect his personal knowledge. *Kerlin v. Airas*, 274 S.W.3d 666, 668 (Tex. 2008). *But the mere recitation that the affidavit is based on personal knowledge is inadequate if the affidavit does not affirmatively show a factual basis for the knowledge. Valenzuela v. State & Cnty. Mut. Fire Ins. Co.*, 317 S.W.3d 550, 553–54 (Tex. App.—Houston [14th Dist.] 2010, no pet.). In short, the

> affidavit must explain how the affiant has personal knowledge and must provide factual specificity such as place and time regarding its alleged facts. *Id.* A statement that does not provide underlying, supportive facts is conclusory and cannot serve as competent summary-judgment evidence. *La China v. Woodlands Operating Co.*, 417 S[.]W.3d 516, 520 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Sauls v. Munir Bata, LLC, Nos. 02-14-00208-CV, 02-14-00214-CV, 2015 WL 3905671, at *5 (Tex. App.—Fort Worth June 11, 2015, no pet.) (mem. op.) (emphasis added).

Additionally, "[a] party's attorney may verify a pleading by affidavit only where he has personal knowledge of the facts, not based merely on his status as counsel." *Hinojosa Auto Body & Paint, Inc. v. Finishmaster, Inc.*, No. 03-08-00361-CV, 2008 WL 5210871, at *6 (Tex. App.—Austin Dec. 12, 2008, no pet.) (mem. op.); *see also Vaccaro v. Raymond James & Assoc., Inc.*, 655 S.W.3d 485, 491–92 (Tex. App.—Fort Worth 2022, no pet.) (counsel's unsworn statement to the court, even if considered as testimony, was an inadmissible conclusion about his client's ownership of property because it did not demonstrate the basis of counsel's knowledge). Similarly, a company officer who does not have personal knowledge of certain matters cannot deny them under oath, since those matters would be hearsay to him. *Gorrell v. Tide Prods., Inc.*, 532 S.W.2d 390, 395 (Tex. App.—Amarillo 1975, no writ).

Here, Mr. McCaskill did not demonstrate any factual basis for his "personal knowledge" of the accuracy of the copies to the originals. He did not establish himself as the creator or custodian of any of the original documents or that he had ever seen the original documents to be able to compare them to the copies. Failure to

demonstrate the basis for such claimed personal knowledge rendered his testimony regarding these documents inadmissible, and the trial court's ruling sustaining the Keys' objections was not an abuse of discretion. *Vaccaro*, 655 S.W.3d at 492; *Hinojosa Auto Body & Paint, Inc.*, 2008 WL 5210871, at *6.

b. David Cox Affidavit

No objections were lodged against this affidavit by the Keys. Mr. Cox was the Appellants' president. He testified that Appellants maintained a separate file for every customer and each file included the agreement with Appellants along with change orders, correspondence with the customer, maps, and all other documentation relating to the customer's roof repair or replacement work. He further stated that Appellants provided boxes containing all of its Texas customer files and contracts from June 11, 2003 to present, as defined in the Order Certifying Class Action With Trial Plan, to Platinum Intelligent Data Solutions, which transported those boxes to its office in Dallas, Texas, for scanning and coding of each and every page. He further stated that Platinum retained control and custody of the boxes while it scanned each and every page of every Texas customer file for customers from June 11, 2003 to the date of his affidavit. Mr. Cox did not address any of the authenticity or business record predicate requirements under Rules 803(6) and 902(10). Tex. R. Evid. 803(6), 902(10).

c. Michael Holmes Affidavit

Michael Holmes was the President and Chief Executive Officer of Platinum Intelligent Data Solutions. He stated that Platinum scanned the files provided by

Appellants, and the scanned documents were then processed by optical character recognition (OCR). Platinum scanned and delivered "the digitized files" to Appellants' counsel and coded the files by customer name. Platinum created the summary list by compiling all scanned files that contained the queried search terms "arbitration" and "best interest," and Platinum identified the files that met these criteria based on the OCR digitalization and generated the list of attached customer names (Exhibits 12 and 17, Supp. 17). The Drop Box files (Exhibits 17, Supp. 17) are Appellants' digitized agreements and documents for those customers within the class definition. The Keys objected to Exhibit 9, 12-2S, 17, and Supp. 17 on lack of authentication, best evidence, and hearsay grounds. The trial court sustained the objections.

For these documents referenced above to be admissible, they must be authenticated and subject to an exception to the hearsay rule. *Washington v. LVNV Funding, LLC*, No. 02-25-00213-CV, 2025 WL 3248091, at *1 (Tex. App.—Fort Worth Nov. 20, 2025, no pet.) (mem. op.). An affidavit that complies with Texas Rule of Evidence 902(10) meets the predicate for authentication and the business record exception to the hearsay rule. *Id.* Although the affidavits proffered by Appellants did address the chain of custody of the documents, they did not establish the authenticity of the documents and did not establish the predicates for any exceptions to the hearsay rule.

So, what other evidence establishes the existence of valid arbitration agreements between Appellants and the class members? Appellants contend that the

summary lists of customers with arbitration agreements (see above discussion) created by Platinum from the documents transmitted to Platinum by Appellants are admissible as summaries of Appellants' voluminous documents under Texas Rules of Evidence Rule 1006. Appellants point to agreements and notices between the parties regarding production of these documents as being Appellants' standard form agreements and as satisfying the requirements of Rule 1006 for voluminosity, inconvenience for in court examination, and production for inspection. Tex. R. Evid. 1006; *see Aquamarine Assocs. v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 821 (Tex. 1983).[3] But, none of the agreements or notices established the predicate elements for any exception to the hearsay rule. Without proof that the underlying records were admissible, the summaries were not admissible. *Harpst v. Fleming*, 566 S.W.3d 898, 908–09 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Therefore, the trial court's order sustaining the Keys' objections to the affidavits and documents was not an abuse of discretion and constituted a failure by the Appellants to meet their burden of

[3]Appellants argue that after the underlying documents were produced to the Keys' counsel in 2019, they did not object to them so the summaries should have been admitted, citing *Victor M. Solis Underground Utility & Paving Co., Inc. v. City of Laredo*, 751 S.W.2d 532, 536 (Tex. App.—San Antonio 1988, writ denied). That case is distinguishable. There, the only objections were to the summaries, and no trial objection was made to the underlying documents, which had been established to be admissible as business records. Here, objections were made at the hearing to both the admissibility of the underlying documents and the summaries, and the objections were properly sustained. Rule 1006 does not require objections to the underlying documents or summaries thereof to be made in advance of hearings or trials.

proof to establish enforceable arbitration agreements with each class member, except those addressed below.

d. Purported Agreements between Appellants and Laura Park, Innovative Developers, Inc./Healthpoint, and Burgundy Tower (Exhibits 5, 6 & 7 to Appellants First Amended Motion to Compel Arbitration)

These documents are identified in Mr. McCaskill's affidavit as Exhibits 5, 6, & 7 to the First Amended Motion to Compel Arbitration. As discussed above, these exhibits are not properly authenticated. Mr. McCaskill likewise did not offer any testimony establishing a predicate for any exception to the hearsay rule. Therefore, the trial court's order sustaining the Keys' objections to these documents was not an abuse of discretion. *Dang*, 2023 WL 3772809, at *5 (holding that agreement attached to motion to compel arbitration for which no predicate of admissibility is laid fails to establish a valid arbitration agreement); *Est. of Guerrero*, 465 S.W.3d at 704 (merely attaching a contract to a motion to compel arbitration does not make it admissible).

We overrule Appellants' issue and subparts.[4]

IV. Conclusion

Having overruled Appellants' issue and subparts, we affirm the trial court's order and remand the case to the trial court for further proceedings.

[4]The Keys advanced other arguments for affirmance of the trial court's order, but our disposition renders consideration of those points unnecessary. *See* Tex. R. App. P. Rule 47.1.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: April 2, 2026