

**CAUSE NO. CC-21-00138-E**

**JOSE REFUGIO TAPIA-SILVA,  
PLAINTIFF,**

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**IN THE COUNTY COURT**

**VS.**

**AT LAW NO. 5 OF**

**PERFORMANCE SPRAY FOAM, INC.,  
DEFENDANT.**

**DALLAS COUNTY, TEXAS**

**PLAINTIFF’S MOTION TO SEVER THIRD-PARTY ACTION AGAINST  
THIRD PARTY DEFENDANT HOWARD OKON HOMES, INC.**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff JOSE REFUGIO TAPIE-SILVA, who files this his Motion to Sever Third-Party Action Against Third Party Defendant HOWARD OKON HOMES, INC. and respectfully shows this Honorable Court the following:

I.

On September 21, 2021, Defendant PERFORMANCE SPRAY FOAM, INC. filed its Third-Party Petition against 2 Third Party Defendants. Third Party Defendant HOWARD OKON HOMES, INC. then filed its Original Answer in this cause on October 25, 2021. Plaintiff has not sued either of those Third Party Defendants in this cause.

II.

On January 31, 2022, Third Party Defendant HOWARD OKON HOMES, INC. filed its Notice of Bankruptcy in this cause, which states that its Chapter 7 bankruptcy proceeding remains pending in the United States Bankruptcy Court for the Northern District of Texas. Since Plaintiff will recover nothing from that Debtor and since Defendant PERFORMANCE SPRAY FOAM, INC. can file a claim and hope to be included in whatever plan is filed in that case, Plaintiff requests that this Court sever Defendant PERFORMANCE SPRAY FOAM, INC.’s

Third-Party action against Third Party Defendant HOWARD OKON HOMES, INC. into a separate cause in order to avoid a long automatic stay in this cause, so that discovery may proceed, and so that the remaining parties may be ready for trial sooner than later. Plaintiff, by filing this motion, does not seek, affect, or to in any way impair the bankruptcy estate and seeks only to remove from this Texas state court case a third-party defendant which has filed for Federal bankruptcy.

### III.

Rule 38(a) of the Texas Rules of Civil Procedure states, "Any party may move to strike the third-party claim or for its severance or separate trial." TEX. R. CIV. PROC. 38(a). Rule 40(b) states, "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice." TEX. R. CIV. PROC. 40(b). Rule 41 states, "Any claim against a party may be severed and proceeded with separately." TEX. R. CIV. PROC. 41. Rule 174(b) states, "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues." TEX. R. CIV. PROC. 174.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Court grant this motion and, after a hearing, enter an Order severing Defendant PERFORMANCE SPRAY FOAM, INC.'s Third-Party action against Third Party Defendant HOWARD OKON HOMES, INC. into a separate cause.

Plaintiff also prays for such other and further relief, at law or in equity, to which he may

be justly entitled, specific or general.

Respectfully submitted,

LAW OFFICES OF DOMINGO A. GARCIA, P.C.

By: /s/Paul R. Hornung

Paul R. Hornung

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I hereby certify that my paralegal telephoned the Defendant PERFORMANCE SPRAY FOAM, INC.'s lead attorney of record Rhonda J. Thompson at Thompson, Coe, Cousins & Irons, L.L.P. at approximately 3:30 p.m. on January 31, 2022 for conference purposes regarding this motion and that Ms. Thompson then telephoned my paralegal back and told him that her client is opposed to this motion at the present time and that she will file a motion to lift the bankruptcy stay in the Third Party Defendant HOWARD OKON HOMES, Inc.'s Chapter 7 proceeding in the United States Bankruptcy Court for the Northern District of Texas. Consequently, this motion is presented to this Court for a ruling on it, as no agreement could be reached.

Signed on February 4, 2022.

/s/Paul R. Hornung

Paul R. Hornung

CERTIFICATE OF SERVICE

A true and correct photocopy of this document was served upon all counsel of record in this cause by eService on February 4, 2022 in accordance with TEX. R. CIV. P. 8, 21, and 21a.

/s/Paul R. Hornung  
Paul R. Hornung

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Gracie Cisneros on behalf of Paul Hornung  
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Status as of 2/7/2022 7:33 PM CST

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