(1) Accord and satisfaction;
   (a) The **affirmative** defense of **accord** and **satisfaction** requires a new contract, express or implied, in which the parties agree to discharge the existing obligations by other means. *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex.1969); *see also* *City of Houston v. First City*, 827 S.W.2d 462, 472 (Tex.App.--Houston [1st Dist.] 1992, writ denied).

(2) Failure to mitigate;
   (a) A PERSON IS REQUIRED TO EXERCISE REASONABLE CARE AND DILIGENCE TO AVOID LOSS AND TO MINIMIZE THE CONSEQUENCES OF DAMAGES. IF WITH REASONABLE CARE AND DILIGENCE HE CAN DO SO, HE MUST PROTECT HIMSELF FROM THE INJURIOUS CONSEQUENCES OF THE ACT OF ANOTHER. AND IF HE FAILS TO DO SO AND BY REASON OF HIS FAILURE, HIS DAMAGES BECOME AGGRAVATED, HE MAY NOT RECOVER

(3) "Clean hands" doctrine;
   (a) The law is well-established that one who comes into a court of equity must come with "clean hands," and courts generally refuse to grant relief to a party who has been guilty of unlawful or inequitable conduct regarding the issue in dispute. *See Lazy M Ranch Ltd. v. TXI Operations*, 978 S.W.2d 678, 683 (Tex.App.–Austin 1998, pet denied); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 571 (Tex.App.– Houston [14th Dist.] 1987, writ denied); *Grohn v. Marquardt*, 657 S.W.2d 851, 855 (Tex.App.–San Antonio 1983, writ ref'd n.r.e.).
   (b) One whose acts are in violation of a statute is deemed to have "unclean hands." *See El Paso Nat'l Bank v. Southwest Numismatic Inv. Group, Ltd.*, 548 S.W.2d 942, 949 (Tex.Civ.App.–El Paso 1977, no writ); *Riley v. Davidson*, 196 S.W.2d 557, 559 (Tex.Civ.App.–Galveston 1946, writ ref'd n.r.e.).
   (c) Because of his admitted violations of the referenced statutes, Defendant has "unclean hands" as a matter of law.
   (d) The affirmative defenses asserted by Defendant seek relief that is equitable in nature. Accordingly, pursuant to the "clean hands" doctrine, each of such affirmative defenses fails as a matter of law.

(4) Fraud;
   (a) The foregoing representations were material, were false, were known to be false when made and/or were made recklessly without concern for the truth or falsity therof, and were made with the intent that such representations be relied upon by Counter-Plaintiff. Such representations were, in fact, relied on by Counter-Plaintiff to his detriment.

(5) Payment;
   (a) Defendant's paid for the months they used, quantum meruit can not be applied where they didn't use them.

(6) Fraudulent inducement;
   (a) Those **elements** are: a material misrepresentation; which was false; which was known to be false when made or was made recklessly as a positive assertion without knowledge of its truth; which was intended to be acted upon; which was relied upon; and which caused injury. *Id.* (citing *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674

(Tex.1998)).
Prior breach;

(7) Penalty;

(a) For Plaintiff to succeed on a liquidated damages clause it must prove (1) that the harm caused by the breach is incapable or difficult of estimation; and (2) that the amount of liquidated damages called for is a reasonable forecast of just compensation. The court emphasized that damages, to be enforceable as liquidated damages, must be uncertain and the stipulation must be reasonable.

(8) Impracticability;

(a) The **doctrine** of **commercial impracticability** constitutes a defense to the performance of a contract in Texas. *See Centex Corporation v. Dalton,* 840 S.W.2d 952, 954 (Tex.1992); *Tractebel Energy Marketing, Inc. v. E.I. Du Pont De Nemours and Company,* 118 S.W.3d 60, 66 (Tex.App.-Houston [14th Dist.] 2003, no pet. h.). Section 261 of the Restatement (Second) of Contracts provides:

§ 261. Discharge by Supervening Impracticability.

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981).

The Texas Supreme Court has recognized that a governmental regulation or order that makes the performance of a duty impossible "is an event the non-occurrence of which was made a basic assumption on which the contract was made." *Centex,* 840 S.W.2d at 954, *quoting* Restatement (Second) of Contracts § 264 (1981). In *Centex,* a company agreed to pay a finder's fee to Dalton if it could successfully acquire four thrift institutions. *Centex,* 840 S.W.2d at 953. The Federal Home Loan Bank Board, however, approved the acquisition conditioned on a prohibition against the payment of finder's fees. *Centex,* 840 S.W.2d at 953. Centex refused to pay the finder's fee and Dalton sued for breach of contract. The trial court granted summary judgment in favor of Dalton and the court of appeals affirmed. The Supreme Court reversed, holding that the contract was unenforceable because a governmental regulation prohibited Centex's performance under the agreement.

Due to its purchase of Kimball's interest in the Coyanosa Facility in 1977, Northern became obligated to pay its proportionate share of facility expenses. Northern purchased gas from Kimball under a separate contract which expired by its own terms in 1991. Thus, Northern ceased purchasing gas from Kimball in 1991, but it remained obligated thereafter to pay its share of the Coyanosa Facility expenses under the C & O Agreement. Unlike *Centex,* FERC Order No. 636-C does not address Northern's obligation to pay facility expenses. We recognize that FERC Order No. 636-C leaves Northern with an expense obligation and no corresponding income but it does not rise to the level of the direct prohibition involved in *Centex.* Northern's commercial impracticability argument is essentially founded upon its insistence that it did not purchase Kimball's interest in the Coyanosa Facility but merely agreed to assume Kimball's expense obligation during the term of the GPC Agreement. If that were the case, Northern's argument might be more persuasive but we have already rejected its interpretation of the PSA. While economic and regulatory circumstances have undoubtedly changed since Northern purchased Kimball's interest in the Coyanosa Facility, FERC

Order No. 636-C does not relieve Northern of its obligations under the C & O Agreement.

(9) Mistake of fact;

(a) To avoid summary judgment, the party relying on mutual mistake as an **affirmative defense** must present some evidence of each **element** of a mutual mistake. The **elements** of mutual mistake are:
(1) a **mistake** of **fact**,
(2) held mutually by the parties,
***607** (3) which materially affects the agreed-upon exchange.
de Monet, 877 S.W.2d at 357 (citing restatement (Second) of Contracts § 152 (1981)).

(10) Failure of consideration

(a) An affirmative defense will prevent summary judgment only if the defendant comes forward with summary judgment evidence sufficient to raise an issue of material fact on each element of the defense. *Parker,* 98 S.W.3d at 300.
The defense of failure of consideration defeats summary judgment if the nonmovant alleges facts and presents evidence that the consideration in the agreement was not received. *Stewart v. U.S. Leasing Corp.,* 702 S.W.2d 288, 290 (Tex.App.-Houston [1st Dist.] 1985, no writ). Generally, failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails. *Id.* A complete failure of consideration constitutes a defense to an action on a written agreement. *Parker,* 98 S.W.3d at 301.
Under common law, as long as something of real and legally cognizable value is given in exchange for a promise to pay under a promissory note, the note is supported by adequate consideration. *See, e.g., Windham v. Alexander, Weston & Poehner, P.C.,* 887 S.W.2d 182, 184 (Tex.App.-Texarkana 1994, writ denied). Similarly, under the Uniform Commercial Code, a promissory note is issued for "value" if it is issued as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due. Tex. Bus. & Com.Code Ann. § 3.303(a)(3)

(11) Waiver.

(a) Waiver is an affirmative defense and is proven by showing a party's "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Jernigan v. Langley,* 111 S.W.3d 153, 156 (Tex.2003) (quoting *Sun Exploration & Prod. Co. v. Benton,* 728 S.W.2d 35, 37 (Tex.1987)); *Robinson v. Robinson,* 961 S.W.2d 292, 299 (Tex.App.-Houston [1st Dist.] 1997, no writ). In determining if a waiver has in fact occurred, a court must examine the acts, words, or conduct of the parties, and it must be "unequivocally manifested" that it is the intent of the party to no longer assert its right. *Robinson,* 961 S.W.2d at 299. Estoppel by silence will operate when a claimant has a duty to speak. *Williams v. Stansbury,* 649 S.W.2d 293, 296 (Tex.1983).