NO. 01-06-00423-CV

In the First District Court of Appeals
Houston, Texas

CHRISTOPHER G. DECLAIRE,

Appellant,

v.

G&B MCINTOSH FAMILY LIMITED PARTNERSHIP,

Appellee.

ON APPEAL FROM THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS
TRIAL COURT CAUSE NO. 2004-32948-A

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

INDEX OF AUTHORITIES

Cases **Page**

INDEX OF AUTHORITIES (continued)

INDEX OF AUTHORITIES (continued)

INDEX OF AUTHORITIES (continued)

INDEX OF AUTHORITIES (continued)

Statutes, Rules and Restatements

Other

REFERENCE CITATION GUIDE

The Parties

This Brief may refer to the parties as follows:

Appellant Christopher G. DeClaire	"DeClaire"
Appellee G&B McIntosh Family Limited Partnership	"G&B"

The Record on Appeal

This Brief will refer to the record as follows:

Clerk's Record	"CR __"
Reporter's Record	"__ RR __"
G&B's Exhibits	"PX __"
DeClaire's Exhibits	"DX __"

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BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

COMES NOW Appellant Christopher G. DeClaire ("DeClaire") and respectfully files this Brief of Appellant in support of his request that this Court reverse the trial court's final judgment awarding Appellee G&B McIntosh Family Limited Partnership ("G&B" or "the Appellee") approximately $281,000 in damages, interest, and attorney's fees on its breach of contract claim against DeClaire in Cause No. 2004-32948-A, *G&B McIntosh Family Limited Partnership v. Christopher G. DeClaire,* in the 269th Judicial District Court of Harris County, Texas.

STATEMENT OF THE CASE

Nature of the Case:	DeClaire signed a promissory note to pay $212,260 to G&B, subject to an unambiguous provision stating that the sole recourse and source of repayment to G&B in the event of a default was 100,000 shares of stock that DeClaire owned in Coastal Caverns, Inc. *See* Promissory Note, Sept. 16, 2004 (attached to this Brief as Exhibit A). After the note matured, G&B demanded that DeClaire pay the full $212,260 face value of the note. Despite having held possession of the promissory note for over six months, G&B argued that it had never agreed to the limited recourse clause in the note. G&B intervened in a pending divorce proceeding between DeClaire and his former wife to assert claims against DeClaire for breach of contract, fraud and unjust enrichment. (CR 14).
Trial Court:	The Honorable John Wooldridge, 269th Judicial District Court, Harris County, Texas.
Trial Court's Disposition:	The trial court conducted a bench trial of this matter. On October 24, 2005, the trial court issued findings of fact and conclusions of law in favor of G&B. *See* Findings of Fact and Conclusions of Law, Oct. 24, 2005 (attached to this Brief as Exhibit B). Subsequently, on March 3, 2006, the trial court entered a final judgment against DeClaire for $213,000 in actual damages, $68,000 in attorneys' fees, and interest. *See* Final Judgment, March 3, 2006 (attached to this Brief as Exhibit C).

ISSUES PRESENTED

Pursuant to Rule 38.2(a) of the Texas Rules of Appellate Procedure, DeClaire identifies the following issues in this appeal:

I. Fraud

Steve Barth and Rob James are mutual acquaintances of Christopher DeClaire and Gerald McIntosh, a partner in the G&B McIntosh Family Limited Partnership. Acting as third party intermediaries, Barth and James volunteered to prepare a written promissory note for DeClaire and G&B. The promissory note contained a clause limiting DeClaire's liability under the note to 100,000 shares of stock that DeClaire owned in Coastal Caverns, Inc. DeClaire signed the note, and McIntosh accepted physical possession of the note without reading or reviewing it. G&B alleged, and the trial court found, that DeClaire committed fraud by misrepresenting to Barth and James that G&B had approved the limited recourse language in the promissory note. Consequently, the trial court's final judgment in favor of G&B raises the following issues:

A. Is the evidence in the record legally and factually insufficient to establish that DeClaire intended G&B to rely on any alleged misrepresentation where the evidence conclusively shows that DeClaire's representations, if any, to Barth and James as independent third party intermediaries never reached G&B or induced G&B to take any detrimental action?

B. Is the evidence in the record legally and factually insufficient to establish that G&B reasonably or justifiably relied on any alleged misrepresentation that DeClaire may have made to Barth or James where the evidence conclusively shows that G&B never read the executed written promissory note and instead relied on an oral conversation with someone other than DeClaire stating that the promissory note was consistent with G&B's understanding of the parties' agreement?

C. Are the trial court's findings that G&B never received a draft of the final version of the promissory note before DeClaire signed it and that G&B relied on DeClaire's representations under an alleged oral agreement insufficient to support a judgment in favor of G&B for fraud when G&B never alleged either a theory of fraud by nondisclosure or a false promise of future performance?

II. Breach of Contract

The promissory note, which DeClaire signed and which G&B accepted and held in its physical possession for more than six months, unambiguously limits G&B's recourse against DeClaire to 100,000 shares of DeClaire's stock in Coastal Caverns. G&B objects that the promissory note is inconsistent with an oral agreement that the parties allegedly reached at some unspecified time before DeClaire signed the promissory note. The trial court agreed that the parties had entered into an enforceable oral agreement and ruled that the promissory note was not binding on the parties because (a) the limited recourse clause in the note lacked consideration, (b) the limited recourse clause was the product of a mutual mistake, and (c) the parties formed no meeting of the minds with respect to the limited recourse clause. Consequently, the trial court's judgment in favor of G&B raises the following issues:

A. In the absence of any legally or factually sufficient evidence to establish that DeClaire committed any fraud against G&B, do the parol evidence rule and the merger doctrine bar G&B from asserting the existence of an alleged oral agreement inconsistent with the terms of the written promissory note?

B. As a matter of law, was any alleged oral agreement between G&B and DeClaire merely an unenforceable preliminary "agreement to agree" that lacked the essential terms necessary for the trial court to enforce the agreement as a valid contract under Texas law?

C. Is the evidence in the record legally and factually insufficient to establish that G&B and DeClaire entered into an enforceable oral agreement where G&B's

own witnesses admitted that G&B never came to an agreement with DeClaire on an essential component of their deal — the amount of the compensation that DeClaire would pay for the use of G&B's collateral over a period of three years — until DeClaire signed the written promissory note?

D. As a matter of law, did the trial court err in concluding that the written promissory note was unenforceable for lack of consideration where G&B filed no verified pleading raising the issue of consideration and where the written promissory note itself unambiguously identified the consideration supporting the note?

E. As a matter of law, did the trial court err in concluding that the limited recourse clause in the promissory note was the product of a mutual mistake where G&B never alleged mutual mistake as a defense in its pleadings and where the evidence is legally and factually insufficient to show that both parties acted under the same misunderstanding of fact, but instead at best showed only that G&B acted on a misunderstanding of fact arising solely from its failure to read the promissory note?

F. As a matter of law, did the trial court err in concluding that G&B did not accept, and that the parties did not reach a meeting of the minds with respect to, the limited recourse clause in the promissory note where Texas law presumes that a written contract accurately reflects the intent of the parties and where G&B, by its own admission, failed to protect its interests by reading the terms of the promissory note before accepting it?

III. Unjust Enrichment

The trial court concluded that DeClaire would be unjustly enriched if he did not both (a) compensate G&B for the use of its collateral from 2001 to 2004 and (b) repay $159,000 that G&B loaned DeClaire to satisfy a preexisting debt. Consequently, the trial court's judgment in favor of G&B raises the following issues:

A. As a matter of law, did the trial court err in concluding that G&B could maintain an equitable cause of action for unjust enrichment where the parties have a valid written contract — the September 16, 2004, promissory note?

B. Is the evidence in the record legally and factually insufficient to establish that DeClaire obtained a benefit from G&B by fraud, duress or the taking of an undue advantage?

C. Does Texas law bar G&B from recovering the full $213,000 in damages that it seeks to recover from DeClaire where the evidence conclusively shows that $54,000 of these damages represent a "benefit of the bargain" expense that is not recoverable under an unjust enrichment theory of liability?

IV. Usury

DeClaire alleged usury as an affirmative defense and a counterclaim against G&B, arguing that G&B charged excessive interest by adding $54,000 to the amount that it loaned to DeClaire as a fee for the use of collateral that G&B had previously made available from 2001 to 2004 as security on a debt that DeClaire owed to Bank One. DeClaire received no new or separate consideration for the $54,000 charge, and G&B lost nothing from making the collateral available to DeClaire: the assets that G&B made available as collateral were mutual funds that continued to draw interest and make money for G&B. Yet, the trial court concluded that DeClaire had no claim or defense for usury. Consequently, the trial court's judgment in favor of G&B raises the following issue:

- As a matter of law, if the parties entered into a valid oral agreement, did the $54,000 charge, combined with the 10% interest charged on the $159,000 loan, create a usurious transaction?

V. Declaratory Relief

In response to G&B's request for declaratory relief, the trial court issued conclusions of law declaring (a) that DeClaire had agreed to "reasonably compensate" G&B for the use of its collateral and (b) that G&B is entitled to "reasonable compensation" in the amount of

$54,000 for the use of its collateral. Consequently, the trial court's judgment in favor of G&B raises the following issue:

- Did the trial court err in issuing conclusions of law in favor of G&B's request for declaratory relief where G&B's request essentially asked the trial court to declare that G&B had a valid oral agreement — the very subject of G&B's breach of contract claim against DeClaire — and where the evidence in the record was legally and factually insufficient to establish that the parties had a valid oral agreement?

VI. Attorney's Fees, Costs and Interest

The trial court awarded G&B $68,000.00 in attorney's fees, plus appellate fees, postjudgment interest, and costs. Consequently, the trial court's judgment in favor of G&B raises the following issue:

- Did the trial court err in awarding attorney's fees, interest and costs to G&B when the court improperly granted judgment in favor of G&B?

STATEMENT OF FACTS

Pursuant to Rule 38.2(a)(1)(B) of the Texas Rules of Appellate Procedure, DeClaire offers the following Statement of Facts:

The Parties

Christopher DeClaire, a businessman in Houston, is a former owner of SkillMaster Staffing Services. (4 RR 208). In the late 1990s, a mutual friend introduced DeClaire to Gerald McIntosh, a successful entrepreneur. (4 RR 146, 209). McIntosh recruited DeClaire to join him and several other investors in forming ROI Group. (4 RR 151, 210). Although ROI Group proved to be unsuccessful, DeClaire returned the favor and invited McIntosh to join him as a partner in a new venture, Odyssey Capital. (4 RR 154, 211). DeClaire also solicited McIntosh to invest in Sports Express, a company in which DeClaire owned an interest. (4 RR 212). Through Sports Express, DeClaire introduced McIntosh to a couple of other investors, Steve Barth and Rob James. (3 RR 8; 4 RR 237).

As with many new ventures, ROI Group, Odyssey Capital and Sports Express were speculative investments: they each carried a risk that they might not be successful or profitable. (4 RR 111, 147). Yet, despite his willingness to gamble on speculative ventures, McIntosh has a track record for shrewd business decisions: he is a co-founder and former president of Administaff, at one time one of the fastest growing businesses in Houston. (4 RR 111, 148). McIntosh formed the McIntosh Revocable Trust as a vehicle for investing some of the proceeds that he generated from his business acumen. (4 RR 118). The Trust is the general partner of the G&B McIntosh Family Limited Partnership, while McIntosh is

a limited partner in G&B. (*Id.*). David Russell, an accountant, handles the financial affairs for McIntosh, including the G&B McIntosh Family Limited Partnership. (4 RR 181).

The Bank One Loan

Even before leaving SkillMaster, DeClaire formed a banking relationship with Ann Guin, a senior vice president of private client services at Bank One. (2 RR 62). In 2001, DeClaire obtained a $500,000 loan from Bank One. (*Id.*). He paid down most of the debt except approximately $159,000 — equal to the balance of the collateral that he had available at that time to secure the debt. (2 RR 64). When DeClaire later had to liquidate the collateral that he previously had pledged to the bank, Bank One asked that DeClaire pledge additional collateral — preferably marketable securities — to secure the debt. (2 RR 65). DeClaire advised Ann Guin that he believed McIntosh might be willing to pledge the collateral for DeClaire. (2 RR 66).

DeClaire approached McIntosh to inquire whether McIntosh would be willing to pledge the collateral. McIntosh responded that he was "delighted" to consider the request, but that he would need to visit with Russell. (4 RR 120; *see also* 4 RR 215). DeClaire arranged a lunch meeting to allow McIntosh and Russell to visit with Guin. According to G&B, DeClaire offered vague assurances in the meeting that he would "compensate" G&B for pledging the collateral. (*See* 2 RR 189 ("Q: Did Mr. DeClaire at that time specify the type of compensation that he planned to give — A: No."); *see also* 4 RR 122). DeClaire understood only that he would convey to G&B some or all of his ownership shares in Odyssey Capital and Sports Express. (4 RR 215-16; 4 RR 267).

Subsequently, McIntosh visited with Guin and confirmed that he would pledge the collateral necessary to secure Bank One's loan to DeClaire. (2 RR 67-68). McIntosh advised Guin that the collateral would come from his "family trust." (2 RR 70). In late fall 2001, McIntosh placed with Bank One a sufficient amount of assets, primarily mutual funds, to secure DeClaire's debt. (2 RR 72; *see* PX 33).[1] Having received adequate collateral for the loan, Bank One extended the maturity date on its loan to DeClaire. (2 RR 70). At that time, Bank One's loan was an "interest only" obligation — *i.e.,* the bank expected only that DeClaire would pay the interest on the loan, not any further principal. (2 RR 72; *see* 4 RR 249). DeClaire paid his interest obligations on the loan from 2001 to 2004. (*See* 4 RR 234, 242; *see also* PX 19).

DeClaire left his partnership position with Odyssey Capital at the end of 2002. Upon leaving Odyssey Capital, DeClaire relinquished all of his ownership interests in Odyssey Capital and Sports Express. (4 RR 218-19; 4 RR 267).

Coastal Caverns

After leaving Odyssey Capital, DeClaire became a co-founder and CEO of Coastal Caverns, Inc., a company in the business of developing caverns for use in waste disposal. (4 RR 219-20). As CEO, DeClaire helped Coastal Caverns to acquire its principal asset — a tract of property in Jefferson County with significant underground storage capacity. (4 RR 221, 227). Although Coastal Caverns was a new entity with no history of revenue or earnings, the property in Jefferson County gave Coastal Caverns a tremendous potential for

[1]Although McIntosh apparently placed the assets with Bank One in 2001, he did not sign a formal pledge agreement with the bank until 2003. (2 RR 80; PX 20).

growth. (4 RR 220-25; *see also* 3 RR 84; 3 RR 220). DeClaire recruited Barth and James to join the management of Coastal Caverns. (3 RR 167; 4 RR 229).

The directors of Coastal Caverns removed DeClaire as CEO in August 2004 and replaced him with Steve Barth. (4 RR 230). DeClaire remained a stockholder in Coastal Caverns, but he no longer held any title or position with the company. (*Id.*; *see* DX 14).

Preliminary Discussions to Release the Collateral

Earlier in the summer of 2004, McIntosh and DeClaire had a conversation in which they discussed various options for releasing the collateral that G&B had pledged to Bank One. (4 RR 131; 4 RR 235). In particular, McIntosh and DeClaire discussed the idea of a "stock for debt" transaction in which G&B would pay off DeClaire's debt to Bank One in exchange for some of DeClaire's stock in Coastal Caverns. (4 RR 124; 4 RR 235-36).[2] McIntosh raised the idea with his financial advisor, David Russell, who allegedly advised McIntosh not to do the "stock for debt" transaction. (4 RR 24; 4 RR 124). Neither McIntosh nor Russell, however, informed DeClaire that G&B had decided against entering into such a transaction. (4 RR 243; *see* 4 RR 24-25).

Far from abandoning the concept of a "stock for debt" transaction, the parties instead entered into negotiations over the number of shares that DeClaire would convey to G&B. In a conversation with McIntosh in August 2004, DeClaire offered to convey 84,000 shares to G&B based on a $1.95 per share value that Coastal Caverns had calculated for an investor

[2]The parties have different recollections of this conversation. DeClaire recalls that McIntosh raised the suggestion of a "stock for debt" transaction to avoid a potential tax issue that would affect the family trust. (4 RR 235-36). McIntosh contends that DeClaire raised the suggestion. (4 RR 124) ("He wanted to do a swap of Coastal Caverns stock for the note.").

who had loaned $750,000 to the company. (4 RR 239-41; *see also* 4 RR 223; DX 13). After discussing the offer with Russell, McIntosh called DeClaire back and requested 100,000 shares of Coastal Caverns stock. (4 RR 130-31; 4 RR 241). DeClaire responded: "That's fine, Jerry." (4 RR 242). ***McIntosh had no further communications with DeClaire after their telephone conversation in August 2004.*** (4 RR 130; 4 RR 237; 4 RR 265).

From these preliminary discussions, DeClaire understood that the parties had agreed in principle to a "stock for debt" transaction. (4 RR 243). Indeed, Russell advised Guin that G&B intended to pay off DeClaire's debt in exchange for Coastal Caverns stock. (2 RR 158; *see* 2 RR 176 ("Q: Did you understand that the taking of the stock would be an exchange, or as collateral, or did you know? A: I don't think it was ever discussed as a collateral, only as exchange for paying off the debt.")). Up to this point, the parties had never discussed, much less agreed, whether DeClaire would pay any additional compensation for the use of G&B's collateral beyond the Odyssey Capital and Sports Express ownership interests that DeClaire had already relinquished to McIntosh. (4 RR 97; 4 RR 233; 4 RR 266).

The Written Promissory Note

The parties knew and contemplated that they would need to memorialize the terms of any agreement in writing. (4 RR 243, 260). When Steve Barth learned of the preliminary discussions between the parties, Barth warned DeClaire that he might incur tax income on a "stock for debt" transaction. (4 RR 243-44; *see also* 3 RR 199 (testimony of Steve Barth confirming his understanding that the proposed transaction was to be an exchange of debt for stock)). Barth suggested both to DeClaire and to Russell that the parties structure the

proposed transaction in the form of a promissory note with a "holding period" for the transfer of the stock. (3 RR 199; 4 RR 244). Rob James, a lawyer, volunteered to draft a note for the parties. (3 RR 9-10; 3 RR 175; 4 RR 244). Russell agreed to the suggestion of a promissory note. (3 RR 199).

Once Barth and James became involved, Russell communicated only with them, not with DeClaire. (4 RR 30; 4 RR 71; 4 RR 129). On August 26, 2004, Russell — on his own initiative — prepared a spreadsheet calculating 10% interest on the value of the collateral that G&B had pledged to Bank One over the previous three years. (PX 10; *see* 4 RR 73 ("Q: And that 10-percent number, that's just a number you came up with, isn't it? A: Yes."). Russell sent the spreadsheet to Barth, not to DeClaire. (4 RR 70). Although Russell assumed that Barth shared the spreadsheet with DeClaire, Russell had no personal knowledge whether DeClaire (who by this time was no longer an employee of Coastal Caverns) ever agreed to the proposed interest calculations in the spreadsheet. (4 RR 69-79, 93-99).

On September 7, 2004, James prepared a draft promissory note based on a form in his files. (4 RR 11). The draft note contained several blanks (including blanks for the amount of the note and the number of shares involved in the transaction) because at that time James did not "have all of the information about the parties and the amount." (4 RR 13; *see* PX 1). James sent the draft note both to Russell and to DeClaire. (PX 5; 4 RR 11-13; 4 RR 245). DeClaire understood that the draft note was exactly that — a preliminary draft that required further revision before he could sign it as a binding contract. (4 RR 261 ("Q: Would it make any sense for you to sign the September 7th promissory note? A: No, it wouldn't.")).

On September 16, 2004, DeClaire visited with Barth and James to finalize the terms of the promissory note. DeClaire reminded James that the proposed transaction was to be a "stock for debt" deal and asked whether the existing draft accomplished that purpose. (4 RR 246). James drafted a limited recourse clause to ensure that DeClaire could satisfy his obligation to G&B simply by tendering 100,000 shares of Coastal Caverns stock:

> This Note is solely secured by those ***100,000 shares of the common stock of Coastal Caverns, Inc.*** placed into escrow with the Payee as security for this Note. If the Note is not paid in full prior to the maturity date, the escrowed shares shall serve as ***the sole source of repayment*** for the outstanding principal and interest due under this Note.

(PX 3 (emphasis added); *see* 3 RR 29, 31-33; 3 RR 116; 3 RR 179). As of September 16, DeClaire learned for the first time that the face value of the note would be $213,000 rather than $159,000 — reflecting an additional $54,000 in interest on the use of G&B's collateral for three years. (4 RR 276-77).[3] DeClaire signed the promissory note only because the note limited his liability to 100,000 shares of Coastal Caverns stock. (4 RR 166, 276-77).

Barth alerted McIntosh that DeClaire had signed the note, anticipating that McIntosh would read and review the executed note. (3 RR 210-15; *see* 4 RR 140). McIntosh asked Russell whether he could accept the note, and Russell allegedly responded that McIntosh should accept the note only if it had not changed materially from the September 7 draft. (4 RR 46-47). Within a few days after DeClaire signed the note, McIntosh picked up the note from the front desk at Coastal Caverns. (4 RR 164; *see also* 3 RR 133). McIntosh asked

[3]DeClaire had not previously agreed to — or even previously known about — this $54,000 interest charge. (4 RR 266, 275-76). McIntosh admitted at trial that the parties had no prior agreement on this interest charge. (4 RR 189). Likewise, Russell admitted in his deposition testimony, which DeClaire's counsel used to cross-examine Russell at trial, that the parties had no prior agreement on this interest charge. (4 RR 97; *see also* 4 RR 189).

someone ***other than DeClaire***, most likely Barth, whether the promissory note was the same as the draft note that Russell had previously reviewed. (4 RR 141; 4 RR 164-65; 4 RR 265). The answer was "yes." (4 RR 141).

Having received a satisfactory answer (from someone other than DeClaire), McIntosh placed the executed promissory note in his briefcase and left on a hiking trip to Colorado. (4 RR 140). ***McIntosh did not read the note***. (4 RR 144 ("Q: Did you ever read the note upon taking — between the time you took possession of it at Coastal Caverns and the time you gave it to Mr. Russell? A: No. I did a lot of hiking."); *see also* 4 RR 169). When McIntosh returned from his trip, he delivered the promissory note to Russell, who apparently also did not read the note. (4 RR 1242; *see* 4 RR 93). Yet, despite the fact that neither McIntosh nor Russell had read the note, McIntosh sent a letter to Ann Guin on September 24, 2004, authorizing Bank One to liquidate the funds from G&B's collateral necessary to pay off DeClaire's remaining debt to Bank One. (PX 7; DX 11B).[4]

Procedural History

On June 25, 2004, DeClaire filed a petition for divorce in the 312th Judicial District Court. (CR 2). On March 15, 2005, G&B intervened in the divorce proceeding. (CR 14).[5] In its original pleadings, G&B did not suggest that it ever had any oral agreement with DeClaire; instead, it alleged that DeClaire had breached the terms of the written note and had

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[4]Although David Russell had sent a similar letter to Ann Guin on September 16, 2004, Russell did not have the authority to transfer funds out of G&B's accounts. (2 RR 165). Consequently, Bank One did not liquidate the funds to satisfy DeClaire's debt until after Guin received the September 24 letter from McIntosh. (2 RR 167, 170-71).

[5]G&B made no demand on DeClaire before filing the lawsuit, nor did McIntosh communicate with DeClaire before filing the lawsuit. (4 RR 179-80).

committed fraud by making a "unilateral alteration" to add the limited recourse clause. (CR 17-18). G&B asked the court to issue injunctive relief barring DeClaire from transferring either his Coastal Caverns stock or $250,000 in proceeds that DeClaire had received in settlement of a lawsuit that he had filed against Coastal Caverns. (CR 19). The court granted a temporary injunction (CR 32), and DeClaire deposited $250,000 and 100,000 shares of Coastal Caverns stock into the registry of the court. (DX 25).

After McIntosh admitted in his deposition that DeClaire had not altered the note, G&B amended its pleadings (a) to claim that DeClaire had breached an alleged oral agreement with G&B, (b) to withdraw its claim that DeClaire had altered the promissory note and contend that DeClaire misrepresented to Barth and James that G&B had approved the limited recourse language in the note, and (c) to assert a claim for unjust enrichment. (CR 151, 273). Because G&B had obtained a temporary injunction on the basis of a false allegation that DeClaire had "altered" the written promissory note, DeClaire filed a motion to dissolve the temporary injunction. (CR 182-217).[6] Before hearing DeClaire's motion to dissolve the temporary injunction, the 312th District Court transferred the case to the 269th District Court. (CR 222). The 269th District Court denied DeClaire's motion, but it agreed to set the case promptly for a bench trial. (CR 291).

The case proceeded to trial on October 11, 2005. On October 24, 2005, the trial court issued findings of fact and conclusions of law. (CR 328). The court concluded that DeClaire

[6]Russell asserted that James had told him that DeClaire altered the note. (4 RR 50). James, who testified unequivocally that he drafted the limited recourse clause, denied ever having told anyone with G&B that DeClaire had altered the note. (3 RR 115-16).

had breached an oral agreement with G&B, that DeClaire had committed fraud against G&B, and that DeClaire would be unjustly enriched if DeClaire did not convey more than merely 100,000 shares of Coastal Caverns stock to G&B. (CR 328-37). On March 3, 2006, the trial court entered a final judgment in G&B's favor on its breach of contract claim, awarding G&B approximately $281,000 in damages, interest, and attorney's fees. (CR 382). DeClaire filed a motion for new trial, which the trial court denied by written order. (CR 286, 391). This appeal followed.

SUMMARY OF ARGUMENT

G&B has sought to enforce an alleged oral agreement that contradicts the plain terms of a written contract — the September 16, 2004, promissory note limiting G&B's recourse against DeClaire solely to 100,000 shares of Coastal Caverns stock. To escape the limited recourse clause, G&B argued — and the trial court found — that DeClaire committed fraud by misrepresenting to Barth and James that G&B had approved the clause. G&B, however, offered no evidence to show that DeClaire's representations to Barth and James ever reached G&B so that G&B could rely on them. Moreover, G&B offered no evidence to show that it did in fact reasonably and justifiably rely on any such representations, especially in light of the testimony of G&B's representatives admitting that they never even read the note.

Because G&B's central fraud theory fails, so too does the rest of G&B's case against DeClaire. For instance, if DeClaire did not commit any fraud, then the parol evidence rule and the merger doctrine bar G&B from asserting the existence of an alleged oral agreement to contradict the terms of the written promissory note. Moreover, if DeClaire did not commit

any fraud, then G&B may not validly argue either (a) that the limited recourse clause was the product of a mutual mistake or (b) that it did not accept the limited recourse clause and the parties never reached a meeting of the minds with respect to the clause. G&B also may not validly assert a cause of action under the doctrine of unjust enrichment in the absence of any evidence that DeClaire committed fraud against G&B or took advantage of G&B.

Not only does G&B's fraud theory fail, but G&B's underlying assumption of an oral agreement that trumps the parties' written promissory note also lacks any basis. Although G&B's witnesses proclaim that they formed an oral agreement with DeClaire, the evidence at trial was legally and factually insufficient to establish the existence of any such agreement, much less that the parties formed a consensus on all of the essential terms necessary to create such an agreement. The trial court's conclusion that the promissory note is unenforceable does not aid G&B in its case against DeClaire. G&B did not plead two of the defenses — the absence of consideration and mutual mistake — that the trial court cited to support its conclusion, and even if G&B had properly alleged these defenses, the trial court's conclusion is simply wrong as a matter of law: the promissory note was an enforceable contract.

Additionally, even assuming that G&B could trump the parties' written promissory note with an alleged preexisting oral agreement, the trial court erred in concluding that DeClaire could not maintain a usury claim or defense in response to the parties' alleged oral agreement. According to G&B, the oral agreement required DeClaire to pay $213,000, plus 10% interest, on a $159,000 loan. The $54,000 charge ($213,000 minus $159,000) that G&B imposed on DeClaire in addition to the 10% interest rate on the loan did not represent any

consideration to G&B for anything that it had lost; instead, it was simply a usurious device to enable G&B to charge DeClaire an interest rate in excess of the maximum allowable rate under Texas usury law. The trial court's conclusions of law in support of G&B's request for declaratory relief do not cure the usurious effect of the $54,000 charge.

Ultimately, the trial court erred in failing to give effect to the unambiguous terms of the parties' written promissory note. This Court should reverse the trial court's judgment in favor of G&B and render judgment that G&B recover only the 100,000 shares of Coastal Caverns stock that DeClaire has placed in the trial court's registry.

STANDARD OF REVIEW

After a bench trial, the trial court's findings of fact have the same effect as a jury's verdict. *Tigner v. City of Angleton*, 949 S.W.2d 887, 888 (Tex. App.—Houston [14th Dist.] 1997, no writ). Where, as here, the court reporter has filed a Reporter's Record, the trial court's findings of fact are not binding on this Court. *City of Beaumont v. Spivey*, 1 S.W.3d 385, 392 (Tex. App.—Beaumont 1999, pet. denied). In particular, this Court may review the Reporter's Record to determine whether the evidence is legally and factually sufficient to support the trial court's findings of fact. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex. 1994). Just as in a jury trial, a trial court after a bench trial need not make any factual findings with respect to issues that the evidence conclusively establishes as a matter of law. *Zac Smith & Co. v. Otis Elevator Co.,* 734 S.W.2d 662, 666 (Tex. 1987).

A trial court's conclusions of law likewise are not binding on this Court. *Austin Hardwoods, Inc. v. Vanden Berghe Co.*, 917 S.W.2d 320, 322 (Tex. App.—El Paso 1995,

writ denied). Indeed, this Court must review the trial court's conclusions of law de novo. *See Precast Structures, Inc. v. City of Houston,* 942 S.W.2d 632, 636 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also Sammons v. Elder,* 940 S.W.2d 276, 279 (Tex. App.—Waco 1997, writ denied) ("[C]onclusions of law are always reviewable."). "As the final arbiter of the law, the appellate court has the power and the duty to evaluate independently the legal determinations of the trial court." *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 121 (Tex. App.—Corpus Christi 1999, pet. denied).

ARGUMENT

Although the trial court signed a final judgment awarding damages to G&B on G&B's breach of contract claim, G&B's entire case against DeClaire ultimately hinged on G&B's fraud allegation. G&B has never denied that the promissory note means exactly what it says: that G&B's sole recourse against DeClaire is 100,000 shares of Coastal Caverns. Thus, to recover monetary damages from DeClaire, G&B had to find a way to escape the plain terms of the promissory note. Initially, G&B claimed that DeClaire had "altered" the note. (CR 18). When the discovery process revealed that G&B's alteration theory was false (*see* CR 182-97), G&B concocted a new fraud theory suggesting that DeClaire had "misrepresented" to Barth and James that G&B had agreed to the limited recourse clause. (CR 280).

G&B's case is a house of cards: if G&B's fraud theory fails, then G&B's remaining claims — which depend on its fraud theory — must necessarily fail as well. Specifically, G&B's fraud theory fails (a) because DeClaire's alleged "misrepresentation" never reached G&B and thus G&B cannot purport to have reasonably or justifiably relied on it, and (b)

because the evidence conclusively shows that G&B did not in fact reasonably or justifiably rely on any alleged "misrepresentation." Because G&B's fraud theory fails, G&B may not invoke the parol evidence rule to escape the unambiguous terms of the written promissory note. *See infra* at 25-29. Nor may G&B invoke the doctrine of unjust enrichment. *See infra* at 43-44. G&B is entitled only to recover the relief specified in the written promissory note: 100,000 shares of DeClaire's stock in Coastal Caverns.

I. The Trial Court Erred in Concluding that DeClaire Committed Fraud Against G&B

G&B alleged in its live pleadings at the time of trial that its fraud claim arose from DeClaire's purported misrepresentations to Steve Barth and Rob James. (*See* CR 278, 280). Consistent with G&B's pleadings, the trial court concluded that DeClaire had committed fraud by making misrepresentations to Barth and James:

> DeClaire misrepresented to Barth and James (who were acting as intermediaries) that McIntosh had agreed to revisions to the Promissory Note that would limit the repayment of that obligation solely to 100,000 shares of Coastal Caverns, Inc. common stock.

(CR 335). G&B did not allege, and the trial court did not identify, any other type of fraud attributable to DeClaire — in particular, no pleadings or findings of fraud by nondisclosure, false promises of future performance, or any theory of direct misrepresentations to G&B.

The trial court erred in concluding that DeClaire committed fraud. To recover for fraud, a plaintiff must prove (a) that the defendant made a material misrepresentation, (b) that the representation was false, (c) that the defendant either knew that the representation was false or made it recklessly, (d) that the defendant ***intended the plaintiff to act*** upon the

representation, (e) that the plaintiff ***reasonably and justifiably relied*** upon the representation, and (f) that the plaintiff suffered injury as a result of the fraud. *See Eagle Prop., Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990). The evidence here is legally and factually insufficient to show that DeClaire intended G&B to rely on any alleged misrepresentation or that G&B reasonably and justifiably relied on any such misrepresentation.

A. The Evidence in the Record is Legally and Factually Insufficient to Establish that DeClaire Intended G&B to Rely on Any Alleged Misrepresentation

Although Texas fraud law does not require that the defendant have made a false representation directly to the plaintiff, it nonetheless requires that the defendant have intended that a false representation would reach the plaintiff and induce reliance. *See Ernst & Young, L.L.P. v. Pacific Mutual Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001); *Neuhaus v. Kain*, 557 S.W.2d 125, 138 (Tex. App.—Corpus Christi 1977, writ ref'd n.r.e.).[7] The mere fact that the defendant has made a false representation to a third party intermediary will not support a cause of action for fraud. The evidence must show that the third party repeated the representation to the plaintiff, who then relied upon the representation to his detriment. *See Ernst & Young,* 51 S.W.3d at 578 ("[A] misrepresentation made through an intermediary is actionable if it is intended to influence a third person's conduct.").

As a matter of law, a misrepresentation will not support a cause of action for fraud if it never reached the plaintiff. *Marshall v. Kusch*, 84 S.W.3d 781, 785 (Tex. App.—Dallas

[7]In its findings of fact, the trial court did not specifically find that DeClaire intended G&B to act on any allegedly false representation. This Court may presume an omitted finding on an element of a cause of action *only* if it "is supported by the evidence." *American Nat'l Ins. Co. v. Paul*, 927 S.W.2d 239, 245 (Tex. App.—Austin 1996, writ denied).

2002, pet. denied). *Marshall* is precisely on point. The plaintiff in *Marshall* sued the prior owner of his property after discovering anthrax in his livestock. The evidence showed that the prior owner had misrepresented to a broker that he had never had an anthrax outbreak on the property. The broker, however, testified that he did not repeat the representation to the plaintiff. *Id.* The Dallas Court of Appeals reversed a jury verdict in favor of the plaintiff:

> Because the misrepresentation was not communicated to Kusch [the plaintiff], there is no evidence that Marshall made an affirmative misrepresentation that could have influenced Kusch. Therefore, there is no evidence to support a finding of fraud based on affirmative misrepresentations.

Id. See also Admiral Ins. Co. v. Heath Holdings USA, Inc., No. Civ. A. 3:03-CV-1634G, 2004 WL 1144062, *7 (N.D. Tex. May 21, 2004).

The trial court expressly found that Steve Barth and Rob James were third party intermediaries, not agents or representatives of G&B. (CR 335). Likewise, both Barth and James testified that they were uninterested third party intermediaries to the transaction between G&B and DeClaire. (*See* 3 RR 10 ("Q: Were you acting as counsel for the McIntosh Family Partnership? A: No. Q: Just doing it as a favor? A: Yes."); 3 RR 168 ("Q: What was your role basically in — in dealing with the parties to this case? A: Essentially as an intermediary to formulate a plan for how there would be an exchange of collateral for surrender of equities.")). Thus, any false representations that DeClaire made to Barth or James were actionable only if they actually reached G&B and influenced its conduct. *See Ernst & Young,* 51 S.W.3d at 578; *Marshall*, 84 S.W.3d at 785.

The record in this case contains no evidence that DeClaire's representations to Barth and James ever reached G&B. To the contrary, G&B complained in its pleadings that it was

entirely unaware of DeClaire's representations to Barth and James. (*See* CR 278, 280). G&B's financial advisor, David Russell, testified at trial that he did not believe that he spoke with either Barth or James on September 16, 2004 — the date on which DeClaire signed the promissory note and allegedly made the false representations to Barth and James. (3 RR 104). Gerald McIntosh testified that he relied on Russell and did not have any conversations with anyone, including Barth and James, about the specific contents of the promissory note. (3 RR 141).

Even if DeClaire's representations to Barth and James had reached G&B, they could not possibly have induced G&B to take any detrimental action. G&B asserts that DeClaire's fraud was to tell Barth and James that G&B had approved the limited recourse clause. But if DeClaire's representations were indeed false,[8] then G&B, upon learning of them, would have known them to be false — and, presumably, would have rejected them, not relied on them: after all, G&B was in the best position to confirm or deny whether it had approved the limited recourse clause. As a matter of law, a representation cannot be the cause of injury if, at the time of the representation, the plaintiff was already aware that the representation was false. *See, e.g., Airborne Freight Corp. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 294 (Tex. App.—El Paso 1993, writ denied).

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[8]The evidence in the record is equally, if not more, consistent with the conclusion either (a) that G&B had approved the concept of a "stock for debt" transaction or (b) that DeClaire reasonably believed that G&B had approved the concept of a "stock for debt" transaction. (1 RR 161, 174-75; 4 RR 243; *see also supra* at 4-5). But even if DeClaire knew that G&B had *not* approved such a transaction, the evidence at worst shows only that DeClaire had extended a counteroffer by changing the terms of the parties' proposed written contract. *See Antonini v. Harris County Appraisal Dist.*, 999 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also infra* at 40. If this were to constitute fraud, then a lawyer commits fraud when, after striking through and revising the terms of a proposed Rule 11 agreement, he signs the revised Rule 11 agreement and sends it back to opposing counsel.

Because no false representation ever reached G&B or induced G&B to do anything, the trial court erred in holding that DeClaire had committed fraud against G&B.

B. The Evidence in the Record is Legally and Factually Insufficient to Establish that G&B Reasonably or Justifiably Relied on Any Alleged Misrepresentation

G&B complains that DeClaire fraudulently secured the limited recourse clause in the promissory note by misleading Barth and James to believe that G&B had consented to the clause. Apparently, G&B suggests that when it received the promissory note from Barth and James, G&B relied on its understanding of its previous discussions with DeClaire to presume that the promissory note contained no limited recourse language. A fraud claim, however, requires more than the mere fact of reliance. A plaintiff in a fraud action must prove that it ***reasonably or justifiably*** relied on an alleged misrepresentation. *See Ernst & Young,* 51 S.W.3d at 577; *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997). The record here contains no evidence of reasonable or justifiable reliance.

A plaintiff cannot purport to have reasonably or justifiably relied on a representation that, with the exercise of prudence, it would have easily determined to be false. *See Bartlett v. Schmidt*, 33 S.W.3d 35, 38 (Tex. App.—Corpus Christi 2000, pet. denied). "[T]he party claiming fraud has a duty to use reasonable diligence in protecting his own affairs." *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962). "The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself. . . ." *Bradford v. Vento*, 48 S.W.3d 749, 756 (Tex. 2001) (quoting RESTATEMENT (SECOND) OF TORTS § 551 cmt. k (1977). *See Pellegrini v. Cliffwood-Blue Moon Joint Venture, Inc.*, 115 S.W.3d 577, 580 (Tex. App.—Beaumont 2003, no pet.).

In particular, a plaintiff may not reasonably rely on oral negotiations that conflict with the terms of a subsequent written contract. *See Boggan v. Data Sys. Network Corp.,* 969 F.2d 149, 153 (5th Cir. 1992); *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 541 (Tex. 1987). The parties in *Fina Supply* signed several amendments extending a letter of credit. Although a bank representative, Kathy Kiser, told Fina that the last two amendments extended the coverage for oil exchange imbalances, the amendments themselves extended only the expiration date of the letter of credit, not the coverage for oil exchange imbalances. The Texas Supreme Court ruled that the bank did not commit any fraud:

> The president of Fina Supply testified that Fina has had extensive experience with the use of letters of credit as financing mechanisms. No artifice or fraud was employed *which prevented Fina from making an examination of the amendments* to determine whether they accomplished the desired extension of the coverage under the credit. . . . Fina enjoyed the opportunity of verifying Kiser's statement, *an opportunity which Fina declined.* Fina will not now be heard to complain that it is excused from the exercise of ordinary care in its business relations because it chose to accept as a fact that an extension of the expiration date of a letter of credit also extends the coverage of the credit.

Id. at 540-51 (emphasis added). *See Fisher Controls, Inc. v. Gibbons*, 911 S.W.2d 135, 141-42 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (noting that experienced executives "should not be allowed to claim fraud in any earlier oral statement inconsistent with a specific contract provision").

Nor may a plaintiff seek to justify its reliance on oral negotiations by protesting that it never read the written agreement. A party has an obligation to protect itself by reading the terms of a contract before accepting it. *See G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982); *cf. Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App.—

Eastland 2001, pet. denied) (applying the same rule to unsigned contracts in an electronic format). "Consequently, a party to a contract may not successfully claim that he believed the provisions of the contract were different from those plainly set out in the contract or that he did not understand the meaning of the language used." *In re Media Arts Group, Inc.*, 116 S.W.3d 900, 908 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

Here, Gerald McIntosh testified that he accepted the written promissory note by picking up the note from the front desk at Coastal Caverns within a day or two after DeClaire signed it on September 16, 2004. (4 RR 164; *see also* 3 RR 133). McIntosh, a sophisticated businessman, admitted that he ***did not read the promissory note*** after picking it up from Coastal Caverns. (4 RR 144, 169). Instead, McIntosh placed the note in his briefcase and left on a hiking trip to Colorado. (4 RR 140; CR 332). After returning home from his trip, McIntosh delivered the original note to David Russell, who apparently likewise did not read the note. (4 RR 142; *see* 4 RR 93). Despite holding physical possession of the note, G&B purportedly did not learn "of the potential problem" with the limited recourse language in the note until February or March 2005. (4 RR 144; *see* 4 RR 50).

As with the defendant in *Fina Supply*, DeClaire employed no artifice or fraudulent device to prevent G&B from reviewing the note. Quite to the contrary, McIntosh testified that someone at Coastal Caverns, most likely Barth, induced him not to read the note:

> Q: Did you do anything else after you picked up the envelope?
> A: Yes, I asked someone again if it was the same as before because that's been my style; and I trusted everybody there. So I asked, "Is it the same as we saw before?" And the answer was "yes." So I took it and left.
> . . .
> Q: How was it that you came to ask that question?

A: Well, we had had some — David has had some concerns about Chris for a long time; so we just wanted to make sure that everything was handled the same way.

(4 RR 141; *see also* 4 RR 165, 265).[9] Thus, while G&B may have a cause of action for fraud against someone at Coastal Caverns, ***it has no fraud claim against DeClaire***. McIntosh relied on his conversation with Coastal Caverns; he did not reasonably rely on anything DeClaire did or did not do.

There is no fraud in this case. Steve Barth testified that he expected McIntosh to read the promissory note. (3 RR 215). Neither McIntosh nor his agent, David Russell, exercised the opportunity to verify that the note accurately reflected their understanding of G&B's agreement with DeClaire. (4 RR 140, 142, 169).[10] If McIntosh had read the note and raised any concerns about its terms, Barth could have spoken with DeClaire about revising the limited recourse language in the note. (3 RR 216; *see* 3 RR 133). Or alternatively, G&B could have placed a hold on the liquidation of the funds necessary to pay off Bank One's loan

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[9]David Russell testified that he "believed" that McIntosh had told him that *DeClaire* had represented that the terms of the note had not changed. (4 RR 83 ("I believe [McIntosh] asked Chris if it was the same note that I reviewed.")). McIntosh, however, testified that he remembered no such conversation with DeClaire. (4 RR 164-65 ("Q: You don't know who called you? A: I think it might have been Steve, but I'm not sure. . . . Q: So you don't remember Chris DeClaire telling you that there weren't any changes to the note? A: No.")). Consequently, Russell's testimony is no evidence that DeClaire made any false representations to McIntosh. *See City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005) ("[E]vidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evidence' when contrary evidence shows it to be incompetent.").

[10]The trial court stated in its findings of fact that the text of the limited recourse clause "differed from the body of the Promissory Note." (CR 333). Yet, at the same time, the trial court acknowledged that Rob James had drafted the limited recourse clause. (*Id.*). Presumably, if the style of the text of the limited recourse clause truly differed from the remainder of the promissory note, the different style of the text should have given G&B even greater notice of the change in the terms of the note — assuming that G&B had protected its own interests by reading the note. *Cf. Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993) (holding that an indemnity clause must be conspicuous enough — *i.e.,* in bold type or in contrasting colors — to ensure that the indemnitor will notice it).

to DeClaire — at least long enough for G&B to address any concerns that it may have had about the terms of the note. (2 RR 166-67; PX 2).[11]

G&B may not now cry fraud to excuse itself from the terms of a promissory note that it accepted, and held in its physical possession for six months, without any effort to exercise diligence in protecting its interests. Absent any evidence of reasonable or justifiable reliance, the trial court erred in holding that DeClaire committed fraud against G&B.

C. The Trial Court's Findings Will Not Support a Judgment in G&B's Favor on Any Unpleaded Fraud Theory

G&B did not allege either that DeClaire committed fraud by nondisclosure or that he made a false promise of future performance. Although the trial court issued findings that swept beyond the limits of G&B's pleadings, the trial court's findings will not support a judgment in G&B's favor on any unpleaded fraud theory. This is true as a matter of law. *See Stoner v. Thompson*, 578 S.W.2d 679, 682-83 (Tex. 1979); *see also Payne v. Laughlin*, 486 S.W.2d 192, 194 (Tex. Civ. App.—Dallas 1972, no writ) ("A party cannot properly be awarded a judgment upon a theory not disclosed by his pleadings."). But even if G&B had asserted any other fraud theory in its pleadings, the trial court's findings do not permit the conclusion that DeClaire committed *any* type of fraud against G&B.

For instance, the trial court concluded that "[n]either McIntosh nor Russell were ever provided a copy of the revised Promissory Note prior to DeClaire signing it." (CR 335). The trial court did not suggest that DeClaire breached any duty of disclosure, and in fact he did

[11]DeClaire signed the written promissory note on September 16, 2004. (PX 3). Bank One did not liquidate the funds to satisfy its loan to DeClaire until after it received an authorization letter from McIntosh on September 27, 2004. (2 RR 166-67; PX 2; *see* CR 332-33).

not: generally, the parties to a commercial transaction owe no duty of disclosure to each other. *Consolidated Gas & Equip. Co. v. Thompson*, 405 S.W.2d 333, 336-37 (Tex. 1966). In any event, the fact that James did not send a copy of the final version of the note to G&B before DeClaire signed it was no source of injury to G&B. McIntosh had an opportunity to read the note and protect G&B's interests long before he authorized Bank One to release the funds to pay off DeClaire's debt. (4 RR 140; 2 RR 166-67). He simply failed to do so.

The trial court further concluded that "the Partnership relied to its detriment on the representations of DeClaire under the terms of the oral contract." (CR 335). Neither the trial court nor G&B, however, ever identified any such representations other than DeClaire's alleged comment to Barth and James that G&B had approved the limited recourse clause. The evidence is legally and factually insufficient to support the existence of any oral contract between the parties. *See infra* at 29-34. And even if the parties had entered into such an oral contract, G&B cannot purport to have reasonably relied on any oral promises different from the terms of the subsequent written note. *See U.S. Quest Ltd. v. Kimmons*, 228 F.3d 399, 403 (5th Cir. 2000); *In re Media Arts Group, Inc.*, 116 S.W.3d at 908.

The trial court's findings do not support any type of fraud theory against DeClaire. Accordingly, the trial court erred in holding that DeClaire committed fraud against G&B.

II. The Trial Court Erred in Entering Judgment Against DeClaire for Breach of an Alleged Oral Agreement Inconsistent With the Terms of the Promissory Note

As of the time of trial, G&B alleged in its pleadings that DeClaire had breached an oral agreement and asserted in a footnote that "[a]lthough DeClaire eventually signed the Note, it does not accurately reflect the agreement between him and the Partnership." (CR

279). The trial court entered judgment against DeClaire on the basis of G&B's breach of contract claim, concluding that G&B and DeClaire had entered into an oral agreement that DeClaire breached when he "failed to pay his obligation to the Partnership." (CR 334; *see* CR 414). Although recognizing that DeClaire signed a written promissory note, the trial court ruled that the written note was not binding on the parties because (a) the limited recourse clause lacked consideration, (b) the clause was the product of a mutual mistake, and (c) the parties formed no meeting of the minds with respect to the clause. (CR 334).

G&B has never denied that the promissory note is unambiguous and, as written, would limit G&B's recourse to 100,000 shares of DeClaire's stock in Coastal Caverns. *See Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993) (noting that a court generally should enforce an unambiguous contract as the contract is written). Indeed, Rob James, who drafted the limited recourse clause, testified that the purpose of the clause was to limit G&B's recourse to 100,000 shares of stock. (3 RR 33-34). Thus, for the trial court's judgment in G&B's favor to be valid, the trial court had to have correctly concluded *both* that the parties entered into an enforceable oral agreement *and* that the subsequent written promissory note was not binding on the parties. The trial court erred on both counts.

A. <u>As a Matter of Law, G&B and DeClaire Never Entered Into a Valid and Enforceable Oral Agreement</u>

To recover for breach of contract, a plaintiff must prove that it is a party to a valid and enforceable contract. *See Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.). G&B did not — and cannot — meet its burden of proof. First, the parol evidence rule and the merger doctrine bar G&B from asserting the existence

of any alleged oral agreement inconsistent with the terms of its subsequent written contract with DeClaire. Second, any alleged oral agreement between G&B and DeClaire lacked the essential terms necessary for a court to enforce the agreement as a valid contract under Texas law. Third, the evidence at trial was legally and factually insufficient to establish that G&B and DeClaire entered into a valid and enforceable oral agreement.

1. *The Parol Evidence Rule and the Merger Doctrine Bar G&B From Asserting the Existence of an Alleged Oral Agreement Inconsistent with the Terms of the Written Promissory Note*

The parol evidence rule is a doctrine of substantive law. *Haden v. David J. Sacks, P.C.*, No. 01-01-00200-CV, 2006 WL 2567672, *8 (Tex. App.—Houston [1st Dist.] Sept. 7, 2006, no pet. h.). Under the parol evidence rule, "a written instrument may not be varied by evidence of an oral agreement that contravenes its terms." *Litton v. Hanley*, 823 S.W.2d 428, 430 (Tex. App.—Houston [1st Dist.] 1992, no writ) (emphasis omitted). The rule "presumes that all prior agreements of the parties relating to the transaction have been merged into the written agreement." *Thompson v. Chrysler First Bus. Credit Corp.*, 840 S.W.2d 25, 33 (Tex. App.—Dallas 1992, no writ). *See* Mark A. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 710 (1997).[12]

The merger doctrine is an analogue of the parol evidence rule. *See Leon Ltd. v. Albuquerque Commons Partnership*, 862 S.W.2d 693, 701 (Tex. App.—El Paso 1993, no writ). "Under the merger doctrine, prior or contemporaneous agreements between the same

[12]Whether the parol evidence rule applies in a case is a question of law. *See Haden*, 2006 WL 2567672, at *8.

parties, concerning the same subject matter, are absorbed into a subsequent agreement." *Springs Window Fashions Div., Inc. v. The Blind Maker, Inc.*, 184 S.W.3d 840, 869 (Tex. App.—Austin 2006, vacated). *See also Fish v. Tandy Corp.*, 948 S.W.2d 886, 898 (Tex. App.—Fort Worth 1997, pet. denied) ("Merger happens when the same parties to an earlier agreement later enter into a written integrated agreement covering the same subject matter.") (emphasis omitted).

Fraud in the inducement is an exception to the parol evidence rule and the merger doctrine.[13] Specifically, if the plaintiff can show that the defendant fraudulently procured a written contract, then the plaintiff may offer evidence of a prior oral agreement to establish the true intent of the parties. *See Fish*, 948 S.W.2d at 898; *Pan Am. Bank v. Nowland*, 650 S.W.2d 879, 885 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). Not just any kind of fraud, however, will enable a plaintiff to escape the requirements of the parol evidence rule. The plaintiff must plead and prove some type of "trickery, artifice or device" going beyond merely that the defendant orally agreed to terms other than those contained in the written contract. *Town North Nat'l Bank v. Broaddus*, 569 S.W.2d 489, 494 (Tex. 1978). *See Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd).

The fraud exception does not apply to parties who could have protected themselves by reading the terms of their contracts. *Broaddus*, 569 S.W.2d at 494. In *Broaddus*, a bank sued two of the co-signers on a promissory note after the principal debtor defaulted on a loan.

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[13] Another exception to the parol evidence rule arises where the written contract is ambiguous. *First Victoria Nat'l Bank v. Briones*, 788 S.W.2d 632, 635 (Tex. App.—Corpus Christi 1990, writ denied). However, a party seeking to argue that a contract is ambiguous must raise the issue in its pleadings. *Gult & Basco Co. v. Buchanan*, 707 S.W.2d 655, 656 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). G&B has not alleged that the written promissory note is ambiguous.

The co-signers objected that the bank had orally represented to them that the principal debtor was solely responsible for repaying the loan. The Texas Supreme Court concluded that the co-signers could not rely on oral representations to vary the plain terms of the note:

> "[A] party to a written agreement [promissory note] is ***charged as a matter of law with knowledge of its provisions*** and as a matter of law cannot claim fraud when he is bound to the provisions unless he can demonstrate that he was tricked into its execution." . . . Were we to . . . [permit] extrinsic evidence of the type sought to be shown in this instance, the result would be uncertainty and confusion in the law of promissory notes.

Id. at 492 (quoting *Texas Export Development Corp. v. Schleder*, 519 S.W.2d 134, 139 (Tex. Civ. App.—Dallas 1974, no writ)) (emphasis added). *See DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 859 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[A] party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract.").

The trial court here entered a judgment against DeClaire on the basis of an alleged oral agreement that, by G&B's admission, is inconsistent with the terms of a subsequent written promissory note. The parties, however, never intended that their agreement would only be an oral handshake deal: as early as August 2004, the parties expressly contemplated that they would memorialize any agreement in the form of a written note. (4 RR 260; *see* 3 RR 10; 3 RR 199). G&B's financial advisor, David Russell, admitted at trial that any prior oral agreement between G&B and DeClaire was merged into the written note:

> Q: But it's only after your deposition that you dropped the idea of the promissory note and decided that you didn't have a promissory, that you had an oral agreement?

. . .
A: We had an agreement prior to the note.
Q: And it was merged into the promissory note, wasn't it?
A: ***The two agreements were merged into the note.***

(4 RR 116-17 (emphasis added); *see also* 4 CR 260). Under the parol evidence rule and the merger doctrine, G&B cannot do what it did at trial in this case and seek to vary the terms of a written note with evidence of an inconsistent prior oral agreement.

G&B may not rely on the fraud exception to escape the parol evidence rule or the merger doctrine. Although at one time G&B alleged that DeClaire had altered the written promissory note, G&B advanced to trial on the theory that DeClaire misrepresented to Barth and James that G&B had consented to the limited recourse language. (*Compare* CR 18 *with* CR 280). The evidence at trial was legally and factually insufficient to sustain *any* finding that DeClaire committed fraud (*see supra* at 14-23) — much less the necessary finding of some type of "trickery, artifice or device" which prevented G&B from reading the promissory note and protecting its interests. Indeed, Gerald McIntosh admitted at trial that he did not read the promissory note and, moreover, that if someone misled him about the contents of the note, it was someone *other than DeClaire*. (4 RR 140-41; 4 RR 165-69).

Without the protection of the parol evidence rule, "a promissory note would be reduced to a 'meaningless scrap of paper.'" *Broaddus,* 569 S.W.2d at 492 (quoting *Howeth v. Davenport*, 311 S.W.2d 480, 482 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.)). The promissory note here is not a meaningless scrap of paper: it represents the unambiguous agreement of the parties that G&B's sole recourse in the event of a default was 100,000 shares of DeClaire's stock in Coastal Caverns. Because DeClaire tendered 100,000 shares

of Coastal Caverns stock to G&B, DeClaire did not breach the terms of his promissory note to G&B. Accordingly, the trial court erred in granting judgment in G&B's favor on G&B's breach of contract claim against DeClaire.

2. *Any Alleged Oral Agreement Between G&B and DeClaire Was Preliminary and Lacked the Essential Terms Necessary for a Court to Enforce the Agreement as a Valid Contract under Texas Law*

Under Texas law, an *agreement* is different from a *contract.* "*Agreement* is a broader term than the word *contract*, and an agreement might lack an essential element of a contract." *Wiley v. Bertelsen*, 770 S.W.2d 878, 882 (Tex. App.—Texarkana 1989, no writ) (emphasis in original). An agreement is unenforceable when it lacks one or more of the essential terms necessary for a contract. *See Neeley v. Bankers Trust Co.,* 757 F.2d 621, 628 (5th Cir. 1985); *Solis v. Evins*, 951 S.W.2d 44, 49 (Tex. App.—Corpus Christi 1997, no writ). *See Weitzman v. Steinberg*, 638 S.W.2d 171, 175 (Tex. App.—Dallas 1982, no writ) ("A contract, whether written or oral, must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties.").[14]

In particular, an agreement is unenforceable when it leaves essential terms open for the parties to address in a subsequent written contract. *CRSS, Inc. v. Runion*, 992 S.W.2d 1, 5 (Tex. App.—Houston [1st Dist.] 1995, no writ). Such an agreement is nothing more than an "agreement to agree." *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1425 (5th Cir. 1995). *See Oakrock Expl. Co. v. Killam*, 87 S.W.3d 685, 690 (Tex. App.—San Antonio 2002, pet. denied) (noting that when an essential term is left open for subsequent negotiation,

[14]Whether an agreement is sufficiently definite to create a binding contract is a question of law. *See Meru v. Huerta*, 136 S.W.3d 383, 390 (Tex. App.—Corpus Christi 2004, no pet.).

"there is nothing more than an unenforceable agreement to agree"). An agreement to agree is "unenforceable because it is indefinite and uncertain." *Traweek v. Radio Brady, Inc.*, 441 S.W.2d 240, 242 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

An "essential" term is one that the parties would necessarily believe to be an important ingredient in their transaction. *Neeley v. Bankers Trust Co.,* 757 F.2d 621, 628 (5th Cir. 1985). *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). In *T.O. Stanley*, for example, a boot company alleged that its bank had breached an oral contract to provide the company with a $500,000 line of credit. The Texas Supreme Court observed:

> In a contract to loan money, the material terms will generally be: the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms.

T.O. Stanley, 847 S.W.2d at 221. Because the boot company offered no evidence that the parties had agreed to the interest rate or the repayment terms at the time of the alleged oral contract, the supreme court concluded: "These elements were material to this contract, and a court is not free to supply them." *Id.* at 222. *See Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 653 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

The same result should be equally as true here as it was in *T.O. Stanley*. Although Russell boldly asserted on the stand that G&B had formed an oral agreement with DeClaire, he ultimately admitted that he did not himself communicate directly with DeClaire and instead relied on Barth and James. (4 RR 71). McIntosh likewise admitted that he did not communicate directly with DeClaire. (3 RR 130, 141). Barth, who actually had personal knowledge of the discussions with DeClaire, testified that any oral agreement between G&B

and DeClaire before DeClaire signed the promissory note lacked all of the essential terms necessary for a contract: "[M]y understanding was that there was ***an agreement in principle that still had definition that had to be resolved***. . . ." (3 RR 169) (emphasis added).

The trial court found that G&B and DeClaire had entered into an oral agreement under which, among other things, DeClaire would pay interest on his obligation to G&B "at a reasonable rate" and the obligation would mature "in the spring of 2005." (CR 334). On its face, this finding reflects that the parties had reached only a preliminary understanding and had not yet determined the exact interest rate or maturity date — two of the essential terms for an enforceable loan. *T.O. Stanley*, 847 S.W.2d at 221.[15] G&B suggests that the alleged oral agreement between the parties is reflected in a September 7 draft promissory note. The September 7 draft note, however, is no help to G&B: it is missing several essential terms, including (a) the amount of the loan and (b) the number of shares of stock that DeClaire was supposed to furnish as collateral for the loan. (PX 1; 4 RR 82-83).

In fact, the testimony at trial from G&B's own witnesses confirmed that the parties never had an agreement on each of the essential terms of their transaction until September 16, 2004, when Rob James memorialized the transaction for the parties in the form of a written promissory note. *See infra* at 32-34. Essentially, G&B asked the trial court, and now

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[15]The trial court also found that DeClaire agreed to "reasonably compensate" G&B for the use of its collateral from 2001 to 2004. (CR 334). But even assuming for the sake of argument that DeClaire had promised to "reasonably compensate" G&B, DeClaire's alleged promise would not rise to the level of an enforceable oral agreement. *Cf. Fort Worth Indep. School Dist. v. City of Fort Worth,* 22 S.W.3d 831, 846 (Tex. 2000) (holding that a letter was not sufficiently definite to create an enforceable contract where it stated: "[W]e commit the City to arriving at an *appropriate arrangement* with the FWISD to share in [certain] revenue.") (emphasis added). G&B and DeClaire did not agree on the amount of this "reasonable compensation" until DeClaire signed the written promissory note with the limited recourse clause. (4 RR 97, 189; *see infra* at 32-34).

asks this Court, to enforce as an "oral agreement" all of the terms of the written note except the one provision that it does not like — the limited recourse clause. A Texas court may not create a contract for the parties. *Lynx Expl. & Prod. Co. v. 4-Sight Operating Co.*, 891 S.W.2d 785, 789 (Tex. App.—Texarkana 1995, writ denied). Accordingly, the trial court erred in granting judgment in G&B's favor on G&B's breach of contract claim.

3. *The Evidence is Legally and Factually Insufficient to Establish That G&B and DeClaire Entered into a Valid and Enforceable Oral Agreement*

To prove the existence of a valid and enforceable contract, a plaintiff must offer evidence showing that each of the parties consented to the terms of the contract. *Searcy v. DDA, Inc.*, No. 05-05-00982-CV, 2006 WL 2373530, *3 (Tex. App.—Dallas Aug. 17, 2006, no pet. h.). There is no such evidence here. Although G&B's witnesses declared at trial that G&B had an oral agreement with DeClaire, their own testimony in fact established the exact opposite — that DeClaire never consented to the terms which G&B sought to enforce as an oral agreement. *See Dolcefino v. Randolph,* 19 S.W.3d 906, 918 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (recognizing that conclusory testimony is no evidence); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005).

G&B's witnesses admitted that they lacked any basis for affirming the existence of any alleged oral agreement. McIntosh testified that he had no personal knowledge of any oral agreement with DeClaire and that, if such an agreement existed, it had to have been reached between DeClaire, Russell, Barth and James. (4 CR 177-80). Russell testified that he did not communicate directly with DeClaire and instead relied on Barth and James to formulate the oral agreement. (4 RR 71). James testified that he had no personal knowledge

of any oral agreement between G&B and DeClaire. (3 RR 114-15). Barth testified that his understanding was merely that G&B and DeClaire had reached an agreement in principle which the parties still needed to define in a written promissory note. (3 RR 169).

In fact, Russell's testimony negates the existence of any alleged oral agreement. G&B itself asserts that an essential component of the agreement was DeClaire's consent to pay $54,000 (10% over three years) for the use of G&B's collateral. (CR 279; *see* CR 334). Yet, Russell admitted in his deposition: "***No, we never came to a formal agreement.***" (4 RR 97 (emphasis added); *see also* 4 RR 189 (same from McIntosh)). Russell's subsequent effort to explain his testimony failed to establish DeClaire's consent. On the contrary, Russell testified that he unilaterally came up with the idea of a 10% charge, which he memorialized in a spreadsheet that he sent to Barth in August 2004. (4 RR 75). Russell assumed that Barth shared the spreadsheet with DeClaire, but Russell did not himself know whether DeClaire consented to the $54,000 charge prior to September 16, 2004. (4 RR 69-79, 93-99).[16]

DeClaire testified that he had no oral agreement with G&B and that he ultimately agreed to sign the written promissory note, with the $54,000 charge, only because the limited recourse clause in the note limited his liability to 100,000 shares of Coastal Caverns stock. (4 RR 266, 276-77). G&B has offered no evidence — none whatsoever — to show that

[16]Russell prepared the spreadsheet on August 26, 2004. (PX 10). He sent the spreadsheet to Barth, but he does "not know when they talked to him about it." (4 RR 70). Russell did not send the spreadsheet to DeClaire and does not know if DeClaire ever saw the spreadsheet. (4 RR 72). His understanding that DeClaire agreed to the 10% compensation was based solely on a communication from Barth that "Chris was going to sign the note." (4 RR 75). DeClaire signed the promissory note on September 16, 2004. (PX 3). McIntosh confessed at trial that he was unaware of any agreement on the 10% compensation prior to the written promissory note. (4 RR 189 ("Q: But you put the interest into this September 16 promissory note, right? A: Yes. Q: And prior to that there had never been an agreement to pay any specific amount of interest, was there? A: ***No.***") (emphasis added)).

DeClaire consented to the $54,000 charge independently from any terms limiting his liability to G&B. To enforce an oral agreement requiring DeClaire to pay 10% compensation for use of G&B's collateral, without limiting DeClaire's liability to his Coastal Caverns stock, would deprive DeClaire of the benefit of his bargain. Absent any evidence that DeClaire consented to the terms of the alleged oral agreement, the trial court erred in granting judgment in G&B's favor on G&B's breach of contract claim.

B. The Unambiguous Terms of the Written Promissory Note, Which DeClaire Signed and Which G&B Accepted, Are Binding on the Parties

The trial court concluded that the written promissory note was unenforceable on the basis of three contractual defenses: (a) that the limited recourse clause lacked consideration; (b) that the limited recourse clause was the product of a mutual mistake; and (c) that G&B did not accept, and the parties formed no meeting of the minds with respect to, the limited recourse clause. (CR 334). Of these defenses, G&B itself only raised the third — lack of acceptance — in its pleadings. None of these defenses is valid.[17]

1. *As a Matter of Law, the Trial Court Erred in Concluding that the Written Promissory Note Was Unenforceable for Lack of Consideration*

The absence of consideration is an affirmative defense to the existence of a contract. TEX. R. CIV. P. 93(9). To argue that a contract lacks consideration, a party must affirmatively raise the issue in a verified pleading. *Id. See Brown v. Aztec Rig Equip., Inc.,* 921 S.W.2d 835, 845 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Murphy v. Canion*, 797

[17]Even if any of these defenses had any validity (and they do not), this Court still should not affirm the judgment that the trial court entered in favor of G&B. Because G&B has not adequately established the existence of an underlying oral agreement, *see supra* at 29-34, G&B is at best relegated to a recovery under the doctrine of unjust enrichment. *But see infra* at 42-44.

S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no writ). G&B filed no verified pleading raising any objection that the written promissory note lacked consideration. Nor did DeClaire try the issue by consent: DeClaire's trial counsel repeatedly objected to the trial court's unilateral effort to inject consideration as an issue in the lawsuit. (*See, e.g.,* 3 RR 73; 3 RR 152-53; 3 RR 166; 4 RR 7).

But even if G&B had properly raised the issue, G&B cannot validly claim that the written promissory note lacked consideration. Several times during the course of trial, the trial court protested that the value of the stock that DeClaire agreed to convey to G&B was not equivalent to the $159,000 in value that DeClaire received from G&B. (*See, e.g.,* 2 RR 51; 2 RR 178; 3 RR 78-81; 4 RR 247-48). The requirement of consideration, however, does not protect a party against the consequences of a bad deal. *See Slade v. Phelps*, 446 S.W.2d 931, 933-34 (Tex. Civ. App.—Tyler 1969, no writ) ("Even though the consideration was small, it was a valuable and legal one. . . ."). While the value of the stock may have been speculative, G&B never denied that the stock had at least *some* value sufficient to represent consideration for the $159,000 loan. (*See, e.g.,* 3 RR 232; 4 RR 114; DX 13).[18]

Moreover, G&B cannot validly contend that the limited recourse language in the written promissory note lacked consideration. The trial court concluded that DeClaire did

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[18]The trial court found that DeClaire's "Coastal Caverns, Inc. common stock was speculative and had little or no market value." (CR 332). The fact that proffered performance has only speculative value, however, does not mean that the performance is inadequate consideration for a contract. *See Curry v. Texas Co.*, 18 S.W.2d 256, 262 (Tex. Civ. App.—Eastland 1929, writ denied). Otherwise, all contingency fee agreements and lottery ticket transactions would lack consideration: the parties to such agreements can only speculate that a lawsuit or lottery ticket will be successful enough to generate a return on the investment. The benefit that a party obtains from such "speculative" agreements is the *potential* for a substantial return. DeClaire explained at trial that Coastal Caverns had tremendous potential for future stock growth. (4 RR 220-25; *see* 3 RR 84; 3 RR 220).

not furnish any consideration for the limited recourse clause, apparently reasoning that DeClaire improperly attempted to modify the parties' alleged oral agreement without providing any new consideration for the modification. (2 RR 36; CR 334-35). By definition, however, a modification requires something to modify — specifically, a valid preexisting contract. *See Priest v. First Mortgage Co.*, 659 S.W.2d 869, 871 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). There was no valid preexisting oral agreement between the parties. *See supra* at 29-34.

Consideration requires only a mutual exchange of promises between the parties, not a mutual exchange of promises *for each term in a contract. See Federal Sign v. Texas So. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). The only contract between the parties here was the written promissory note, which unambiguously identified the consideration supporting the note: G&B promised to loan $159,000 to DeClaire, who in turn promised either (a) to repay the $159,000 loan with interest from the date of the loan or (b) to convey 100,000 shares of Coastal Caverns stock to G&B. (PX 3). DeClaire fulfilled his part of the deal by tendering 100,000 shares of his Coastal Caverns stock to G&B. (DX 25). Accordingly, the trial court erred in holding that the promissory note was unenforceable for lack of consideration.

2. *As a Matter of Law, the Trial Court Erred in Concluding that the Limited Recourse Clause in the Promissory Note Was the Product of a Mutual Mistake*

Not only did the trial court assert that the limited recourse clause lacked consideration, but it also concluded that the limited recourse clause was the product of a mutual mistake. (CR 334). Mutual mistake, like the absence of consideration, is a defense that a party must affirmatively raise in its pleadings. TEX. R. CIV. P. 94. *See Centerpoint Energy Houston*

Elec., L.L.P. v. The Old TJC Co., 177 S.W.3d 425, 430 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Durham v. Uvalde Rock Asphalt Co.*, 599 S.W.2d 866, 869 (Tex. Civ. App.—San Antonio 1980, no writ). G&B never raised mutual mistake as a defense in its pleadings. Absent any pleadings raising the defense of mutual mistake, the trial court should not have itself unilaterally raised the issue whether the limited recourse clause was the product of a mutual mistake.

But even if G&B had properly raised the issue, the trial court incorrectly applied the doctrine of mutual mistake. To establish a mutual mistake, "the evidence must show that *both parties* were acting under the *same misunderstanding* of the same material fact." *McGoodwin v. McGoodwin,* 181 S.W.3d 870, 875 (Tex. App.—Dallas 2006, pet. denied) (emphasis added). "'The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, . . . but rather solely by objective circumstances surrounding execution' of the contract." *Phoenix Network Technologies (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 617 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (quoting *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990)).

By definition, a *mutual* mistake contemplates that both parties to a contract acted on the same misunderstanding of fact, *not* that one of the parties acted on a misunderstanding of fact arising solely from its failure to read the contract. *Estes v. Republic Nat'l Bank*, 462 S.W.2d 273, 275 (Tex. 1970). In *Estes*, a bank sued the defendant to recover on a series of notes and to foreclose on a deed of trust. The defendant argued that because he had paid one of the notes, the bank had a duty to release his land from the deed of trust. He acknowledged

that his argument was inconsistent with a "dragnet" clause in the deed, but he asserted that the clause was the product of a mutual mistake. The Texas Supreme Court disagreed:

> Estes's testimony amounts to no evidence of a mutual mistake regarding the existence or nonexistence of the "dragnet" clause in the deed of trust. Assuming without deciding that Estes met the first requirement set out in *Sun Oil Co.* by adducing proof of the parties' true agreement, he failed to satisfy the second, that of adducing evidence that the challenged terms in the writing were placed there by mutual mistake. It is plain that Estes cannot adduce proof on the vital second element, because according to his own testimony ***he failed to read the deed of trust or note before signing them***.

Id. at 275-76 (emphasis added) (citing *Sun Oil Co. v. Bennett,* 125 Tex. 540, 84 S.W.2d 447, 451-52 (1935)). The supreme court in *Estes* emphasized that Texas law presumes that a written contract "is an accurate expression of the agreement the parties reached in prior oral negotiations." *Id.* at 275.[19] *See also Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 588-89 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Here, G&B's representatives, Gerald McIntosh and David Russell, self-servingly testified that they had an oral agreement with DeClaire before DeClaire signed the written promissory note. But significantly, McIntosh and Russell testified only that *they* had not agreed to limit DeClaire's liability to his 100,000 shares of Coastal Caverns stock. (4 RR 24-25; 4 RR 124-25). G&B offered no legally sufficient evidence to show that *DeClaire* had agreed to *forego* any provision limiting his liability to 100,000 shares of Coastal Caverns stock. (*See* 4 RR 25-26; 4 RR 130). On the contrary, DeClaire consistently testified that his understanding of the deal was that he could extinguish his debt at any time simply by

[19]The supreme court in *Estes* noted that evidence of fraud may allow a party to avoid the terms of an otherwise unambiguous contract even if the party did not read the contract. *Estes*, 462 S.W.2d at 276. Here, however, there is no evidence of fraud. *See supra* at 14-23.

conveying his stock to G&B. (4 RR 236-37, 241-42; *see also* 4 RR 243 ("I believed that we reached a stock for debt 100,000 share agreement.")).[20]

The evidence conclusively shows that there was no *mutual* mistake: DeClaire knew and intended that the written promissory note would be subject to a limited recourse clause. Any evidence showing merely that G&B had a contrary intent does not establish a mutual mistake.[21] Especially given that McIntosh and Russell failed to read the note, G&B — like the defendant in *Estes* — cannot claim that the parties had a *mutual* misunderstanding of fact with respect to the limited recourse clause. *See* Glasser & Rowley, *supra* page 25, at 724-25 (noting that a party cannot "complain that it was ignorant of, or mistaken about, the contents of an agreement, nor can a party complain that it failed to read the agreement . . ."). Accordingly, the trial court erred in holding that the limited recourse clause in the written promissory note was unenforceable on the basis of the doctrine of mutual mistake.

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[20]G&B concedes that the parties discussed the idea of a "stock for debt" deal. (4 RR 24). Russell testified that he advised McIntosh not to do the "stock for debt" deal, but he admitted that he could only "assume" that McIntosh relayed that information to DeClaire. (4 RR 25-26). A third party witness, Ann Guin from Bank One, testified that she understood that the parties had agreed to a "stock for debt" deal: Russell advised her that G&B would pay off the $159,000 loan to DeClaire in exchange for Coastal Caverns stock. (2 RR 158).

[21]The trial court invoked only the doctrine of mutual mistake, not the doctrine of unilateral mistake. And just as G&B did not plead the defense of mutual mistake, G&B likewise did not plead the defense of unilateral mistake. TEX. R. CIV. P. 94. Regardless, the doctrine of unilateral mistake would not permit a court to rescind an otherwise valid written contract in favor of a disputed oral agreement. "As a general rule, a mistake that justifies rescission must be a mutual, not a unilateral, mistake." *Cigna Ins. Co. v. Rubalcada*, 960 S.W.2d 408, 412 (Tex. App.—Houston [1st Dist.] 1998, no pet.). *See Holley v. Grigg*, 65 S.W.3d 289, 295 (Tex. App.—Eastland 2001, no pet.) ("[A] unilateral mistake does not provide grounds for relief even if this results in inequity to one of the parties."); *see also Partners in Building, L.P. v. Jamail*, No. 03-03-00709-CV, 2004 WL 2900475, *7 (Tex. App.—Austin Dec. 16, 2004, no pet. h.) (holding that the doctrine of unilateral mistake was not a valid basis for rescinding a Rule 11 agreement despite allegations that the defendant "[s]lipped a material revision of the parties' actual agreement past PIB's attorney") (not designated for publication).

3. *As a Matter of Law, the Trial Court Erred in Concluding that G&B Did Not Accept, and that the Parties Did Not Reach a Meeting of the Minds With Respect to, the Limited Recourse Clause in the Promissory Note*

As yet another basis for declining to enforce the promissory note, the trial court concluded that G&B did not accept the limited recourse clause and that there was "no meeting of the minds with regard to the inclusion of the limited recourse language in the Promissory Note." (CR 334-35). A "meeting of the minds" contemplates that each of the parties has agreed on the material terms. *Searcy,* 2006 WL 2373530, at *3. By concluding that there was no meeting of the minds, the trial court necessarily must have found that the parties had a difference of understanding — *i.e.,* that DeClaire understood that the agreement was to include limited recourse language, while G&B understood that the agreement would not include such language. Inexplicably, however, the trial court favored one understanding over the other, choosing to enforce an undefined oral agreement over the written note.

If there was no meeting of the minds, then there was ***no contract at all***. *B&M Mach. Co. v. Avionic Enters., Inc.*, 569 S.W.2d 624, 626 (Tex. Civ. App.—Texarkana 1978, no writ). At worst, there would only be an unaccepted counteroffer. *Antonini v. Harris County Appraisal Dist.*, 999 S.W.2d 608, 611 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that a proposed contract is an offer, and if the other party then revises the contract with additional terms, the party has rejected the offer and extended a counteroffer). Thus, if G&B never accepted the limited recourse clause and the parties never reached a meeting of the minds, then neither the oral agreement nor the promissory note ever became a valid contract — and the oral agreement could not form the basis for a contract claim.

Regardless, the trial court erred in ruling that G&B did not accept the limited recourse clause and that the parties did not form a meeting of the minds with respect to the clause. Texas law presumes that a written contract accurately reflects the intent of the parties. *Estes*, 462 S.W.2d at 275. "The failure by a party to read a document, without a showing of fraud, is generally not a defense to its enforcement." *De Villagomez v. First Nat'l Bank*, No. 13-04-367-CV, 2005 WL 1832800, *2 (Tex. App.—Corpus Christi Aug. 4, 2005, pet. denied) (not designated for publication). *See In re Prudential Ins. Co.*, 148 S.W.3d 124, 134 (Tex. 2004) (noting that the parties to a written contract are charged with knowledge of all of its provisions "absent some claim that they were tricked into agreeing to them").

By its own admission, G&B did not read the promissory note. (4 RR 93, 140, 142, 169). McIntosh is a sophisticated businessman who reasonably should know that a prudent person ought to read the terms of a contract to which he intends to bind himself. (4 RR 148). G&B has offered no legally or factually sufficient evidence to show that DeClaire tricked or fraudulently induced G&B into accepting the note. *See supra* at 14-23, 25-29. In fact, the evidence conclusively shows that DeClaire himself did nothing to prevent G&B from reading the note. McIntosh confessed that someone from Coastal Caverns, *not DeClaire*, misled McIntosh to believe that the terms of the note had not changed materially from the September 7 draft that Russell had previously reviewed on behalf of G&B. (4 RR 141, 165).

The very purpose of the parol evidence rule is to bar a party from seeking to vary the plain terms of a written contract by protesting, "I did not agree to those terms! There was no meeting of the minds!" While fraud and trickery (neither of which is present here) may be

exceptions to the parol evidence rule, the alleged absence of a meeting of the minds is no exception. *See Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.); *Enos v. Leediker*, 214 S.W.2d 694, 696 (Tex. Civ. App.—Galveston 1948, no writ) (noting that a court must determine from the contract itself, and not oral testimony, whether there was a meeting of the minds because "[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it, nor did not know what it contained."); *see also supra* at 25-29.

The promissory note plainly states that G&B's sole recourse against DeClaire in the event of a default is 100,000 shares of stock in Coastal Caverns. G&B has never suggested that the note permits any other interpretation. McIntosh accepted the note on behalf of G&B, which maintained physical possession of the note for over six months before ever raising any complaint about its terms. (3 RR 133; 4 RR 82; 4 RR 164; 4 RR 179-80).[22] Having accepted the note without reading or otherwise protecting its interests, G&B may not now argue that it never accepted the terms of the note. Accordingly, the trial court erred in holding that G&B did not accept the limited recourse clause and that the parties did not reach a meeting of the minds with respect to the limited recourse clause in the written promissory note.

III. The Trial Court Erred in Concluding that DeClaire Was Liable to G&B Under the Doctrine of Unjust Enrichment

Although the trial court did not enter judgment in G&B's favor on G&B's unjust enrichment claim, it nonetheless concluded that DeClaire would be unjustly enriched if he

[22]Moreover, G&B acknowledged its acceptance when it intervened in DeClaire's pending divorce and sued on the promissory note. (CR 17).

did not both (a) compensate G&B for the use of its collateral and (b) repay the $159,000 that G&B paid to satisfy DeClaire's debt to Bank One. (CR 336). The trial court reasoned that "[t]he 100,000 shares of Coastal Caverns, Inc. common stock is wholly insufficient to fully repay the Partnership." (*Id.*). Under the trial court's final judgment, G&B may elect to recover for unjust enrichment if its breach of contract theory fails on appeal. (CR 383). If this Court were to reverse the judgment in G&B's favor on G&B's breach of contract claim, then it should likewise hold that G&B may not recover on its unjust enrichment claim.

First, as a matter of law, the equitable cause of action for unjust enrichment arises only where the parties do not have a valid contract. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). "The doctrine of unjust enrichment does not operate to rescue a party from the consequences of a bad bargain. . . ." *First Union Nat'l Bank v. Richmont Capital Partners I, L.P.*, 168 S.W.3d 917, 931 (Tex. App.—Dallas 2005, no pet.). G&B has a valid contract with DeClaire — the promissory note of September 16, 2004. (PX 3). Whether the 100,000 shares of Coastal Caverns stock is "sufficient" to repay G&B is irrelevant: the parties have already determined, by the plain terms of their written contract, that G&B's sole recourse against DeClaire is 100,000 shares of Coastal Caverns stock.

Second, even if the note was not a valid contract, the doctrine of unjust enrichment requires proof that the defendant obtained a benefit from the plaintiff by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). The evidence here is legally and factually insufficient to show that DeClaire committed any fraud. *See supra* at 14-23. Moreover, the evidence is legally and factually

insufficient to show that DeClaire exercised any duress against G&B or took undue advantage against G&B: McIntosh is perfectly capable of protecting his own interests and, in fact, sought and received assurances from someone at Coastal Caverns, not DeClaire, that it was safe for him to accept the note. (4 RR 46, 141, 164-65; *see supra* at 20-21).

Third, G&B seeks to recover the wrong measure of damages on its unjust enrichment claim. Unjust enrichment is an equitable theory, which permits a prevailing plaintiff to recover only "out of pocket" damages, not "benefit of the bargain" damages. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.—Fort Worth 2005, no pet.). G&B contends that DeClaire is liable not only for the $159,000 that G&B furnished to pay off the Bank One loan, but also $54,000 that DeClaire allegedly agreed to pay G&B as compensation for the use of G&B's collateral. The $54,000 does not represent any "out of pocket" expense to G&B; rather, it is a purely "benefit of the bargain" damages representing the benefit that DeClaire allegedly promised to pay G&B for using its collateral. (*See* 4 RR 95-96).[23]

Texas law does not support either G&B's theory of unjust enrichment or G&B's theory of damages on its unjust enrichment claim.

IV. The Trial Court Erred in Concluding that DeClaire Could Not Maintain a Usury Claim or Defense

DeClaire alleged, both as a defense and as a counterclaim, that G&B committed usury in charging $54,000 for the use of its collateral from 2001 to 2004. (CR 299, 303, 309; *see*

[23]G&B also may not recover attorney's fees on its unjust enrichment claim. *See Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 635-36 (Tex. App.—Houston [14th Dist.] 2004, pet. abated) (holding that a party seeking fees under Section 38.001 of the Texas Civil Practice & Remedies Code "must first prevail on a valid contract claim," not on a claim that is only available in the absence of a contract).

also CR 55).[24] The trial court concluded that G&B did not charge usurious interest. (CR 336). Usurious interest is "interest that exceeds the applicable maximum amount allowed by law." TEX. FIN. CODE ANN. § 301.002(a)(17) (Vernon Supp. 2006). "[I]n determining whether a loan transaction is usurious, it is [the] substance rather than [the] form that is investigated." *Fears v. Mechanical Indus. Technicians, Inc.*, 654 S.W.2d 524, 530 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). *See also Skeen v. Slavik*, 555 S.W.2d 516, 521 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

Typically, where a creditor advances a sum of money with the understanding that the debtor will repay the advance and an "added amount," the "added amount" is interest subject to the usury laws. *Johns v. Jaeb*, 518 S.W.2d 857, 859 (Tex. Civ. App.—Dallas 1974, no writ). Unless the creditor offers new or separate consideration for the "added amount," the creditor may not avoid the usury laws by characterizing the "added amount" as a fee or commission. *Najarro v. SASI Int'l, Ltd.*, 904 F.2d 1002, 1008 (5th Cir. 1990). *See* Scott G. Night & Terry W. Conner, *Overview of Texas Usury Laws and Recurring Usury Problems*, 36 TEX. J. BUS. L. 1, 17-18 (1999). Such a characterization is "nothing but a device for the collection of additional interest." *Terry v. Teachworth*, 431 S.W.2d 918, 925 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

The facts in *Sapphire Homes* are analogous to those here. *Sapphire Homes, Inc. v. Gilbert*, 426 S.W.2d 278, 284 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.). In *Sapphire*

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[24]Usury is a defense to a claim for the amount due on a promissory note. *Robinson v. Rudy,* 666 S.W.2d 507, 509 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). In addition, usury also gives rise to an affirmative cause of action. TEX. FIN. CODE ANN. § 305.001(a) (Vernon Supp. 2006).

Homes, a bank loaned $120,000 to a corporation, which then loaned the same amount to the plaintiffs at 5½% interest, plus a $20,000 "fee" for procuring the loan. *Id.* at 279. The court of appeals ruled that the "fee" was a "spurious transaction to cloak the loan with an aspect other than that which actually existed." *Id.* at 280. Because the plaintiffs received no return benefit for the $20,000 fee, the court concluded that the fee was additional interest which rendered the transaction usurious. *Id.* at 285. *See Fears*, 654 S.W.2d at 530-31 & n.8 (noting that where the creditor loaned $35,000 but prepared a note in the amount of $46,000, the amount "in excess of the money actually received must be considered interest").

G&B protests that the $54,000 charge was a fee for the use of the collateral that it pledged to secure Bank One's loan to DeClaire. (CR 275). Promptly after DeClaire signed the promissory note, however, Bank One released the collateral back to G&B. (PX 36). DeClaire received no new or separate consideration for the $54,000, and indeed, Russell admitted that G&B lost nothing from making its mutual funds available as collateral:

> The Court: Now, during the time that it was placed for whatever purposes it was being pledged, was it drawing interest? Was it still generating [interest] —
>
> The Witness: It was working in a market, and I did pull off gains.
>
> . . .
>
> The Court: So while it was still pledged and held up as collateral for Mr. DeClaire, it was still drawing interest and making money?
>
> The Witness: Yes, yes.

(4 RR 95-96). DeClaire testified that he agreed to the $54,000 charge only because he had the protection of the limited recourse clause in the written promissory note. (4 RR 277). If, as the trial court ruled, DeClaire is liable to G&B under an oral agreement that lacks limited recourse terms, then the $54,000 charge is interest subject to the usury laws.

G&B alleged that DeClaire orally promised to pay 10% interest on the $159,000 that G&B gave DeClaire to satisfy his debt to Bank One. (CR 278). The $54,000 charge, at least according to G&B, represented an additional 10% per year on the mutual funds that G&B had pledged for three years as collateral. A court must determine whether a contract is usurious as of the time of its inception — here, September 2004. *See Pinemont Bank v. DuCroz*, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). As of September 2004, the $54,000 charge did not compensate G&B for anything that it had lost and, instead, was merely a device to enable G&B to double its interest and effectively charge DeClaire an interest rate of more than ***20% per year,*** which exceeds the maximum interest rate under Texas law. TEX. FIN. CODE ANN. § 302.001(b) (Vernon Supp. 2006).

G&B argued to the trial court that the usury savings clause in the written promissory note defeated any claim that the $54,000 charge created a usurious transaction. (CR 78; *see* PX 3).[25] The trial court agreed. (CR 336). G&B, however, cannot have it both ways: it cannot assert a claim for breach of an oral agreement to avoid the limited recourse clause in the promissory note and then, at the same time, assert the savings clause in the promissory note to avoid a usury claim. If the parties entered into a valid oral agreement (and DeClaire, of course, denies any such agreement), then the $54,000 charge, combined with the 10% interest charged on the $159,000 loan, created a usurious transaction. In that event, the trial court erred in concluding that DeClaire could not maintain a usury claim or defense.

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[25]G&B suggested that DeClaire had agreed back in 2001 to compensate G&B for the use of its collateral. However, David Russell admitted that while that parties had discussed the issue, they had never come to a formal agreement on the terms under which DeClaire would compensate G&B for the use of its collateral. (4 RR 97; *see supra* at 33-34).

Because the trial court's usury conclusions are erroneous, this Court should remand DeClaire's usury defense for a determination of its effect on G&B's claims, and it should remand DeClaire's usury claim for a determination of the extent of DeClaire's damages. *See* TEX. FIN. CODE ANN. §§ 305.001(a) & 305.002(a) (Vernon Supp. 2006).

V. The Trial Court Erred in Issuing Conclusions of Law in Support of G&B's Request for Declaratory Relief

In response to G&B's request for declaratory relief, the trial court issued conclusions of law declaring (a) that DeClaire had agreed to "reasonably compensate" G&B for the use of its collateral and (b) that G&B is entitled to "reasonable compensation" of $54,000 for the use of its collateral. (CR 335).[26] The trial court's conclusions are improper. A court should not grant declaratory relief "where the cause of action has fully matured and invokes a present remedy at law." *US Bank, N.A. v. Prestige Ford Garland L.P.*, 170 S.W.3d 272, 278 (Tex. App.—Dallas 2005, no pet.). G&B's request for declaratory relief essentially asked the trial court to declare that G&B had a valid oral agreement with DeClaire — the very subject of G&B's breach of contract claim against DeClaire. (*See* CR 279, 281).

Just as G&B's breach of contract claim lacks merit, G&B's request for declaratory relief equally lacks merit. With respect to the trial court's conclusion that DeClaire agreed to "reasonably compensate" G&B for the use of its collateral, the evidence is legally and factually insufficient to establish the existence of any such agreement. *See supra* at 32-34. David Russell admitted that the parties never agreed on the amount of this "reasonable

[26]The trial court did not grant any declaratory relief in its final judgment. (CR 382-84). Nonetheless, out of an abundance of caution to avoid any appearance of waiver, DeClaire objects here to the trial court's improper and incorrect conclusions of law in support of G&B's request for declaratory relief.

compensation" prior to the date on which DeClaire signed the note. (4 RR 97). Even if the parties had an *understanding* that DeClaire would "reasonably compensate" G&B, their alleged understanding would lack an essential term necessary to enforce it as a contract — the amount of the compensation. *T.O. Stanley*, 847 S.W.2d at 221. *See supra* at 29-32.

With respect to the trial court's conclusion that G&B is entitled to receive "reasonable compensation" in the amount of $54,000, the trial court's conclusion is legally inappropriate. G&B had no right to recover backdated interest on a completed transaction absent an agreement with DeClaire, and the evidence is legally and factually insufficient to support any such agreement. *See supra* at 32-34. Nor is there any legally or factually sufficient evidence to show that the $54,000 charge was "reasonable," as G&B did not lose any money from making its mutual funds available to DeClaire as collateral. (4 RR 95-96). Moreover, whether or not the $54,000 charge was "reasonable," it had the legal effect of rendering usurious any alleged oral agreement between G&B and DeClaire. *See supra* at 44-48.

Ultimately, the trial court's conclusions are immaterial. Even if G&B and DeClaire had a preexisting agreement, they entered into a subsequent written contract that specified their obligations to each other. *See supra* at 25-29. The trial court's conclusions in support of G&B's request for declaratory relief do not change the fact that the parties unambiguously agreed that G&B's sole recourse was 100,000 shares of Coastal Caverns stock.

VI. The Trial Court Erred in Awarding Attorney's Fees, Postjudgment Interest and Costs Where G&B Failed to Establish Its Right to Judgment

In its final judgment, the trial court awarded G&B $68,000.00 in attorney's fees, plus appellate fees, postjudgment interest, and costs. (CR 384). An appellate court should reverse

an award of attorney's fees, interest and costs where it has reversed the trial court on liability grounds. *See Wilson & Wilson Tax. Serv., Inc. v. Mohammed*, 131 S.W.3d 231, 240 (Tex. App.—Houston [14th Dist.] 2004, no pet.). This is true even if the appellate court reverses the underlying judgment only in part, as the award of attorney's fees may no longer be reasonable under the circumstances. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon Supp. 2006); *cf. Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 896 (Tex. App.—San Antonio 1996, no writ) (noting that an award of attorney's fees must "bear some relationship to the amount recovered").

Because the trial court erred in granting judgment in favor of G&B, this Court should reverse the trial court's award of attorney's fees, interest and costs to G&B.

CONCLUSION

For the above reasons, Appellant Christopher G. DeClaire respectfully requests that this Court reverse the trial court's judgment in favor of G&B and render judgment that G&B recover only the 100,000 shares of Coastal Caverns stock that DeClaire has placed in the trial court's registry. Alternatively, if this Court should affirm the trial court's conclusion that the parties had a valid oral agreement, DeClaire requests that the Court reverse the trial court's judgment on DeClaire's usury claim and defense and remand the case to the trial court for further proceedings consistent with this Court's opinion. DeClaire further requests all other relief to which he may show himself to be justly entitled.

Respectfully submitted,

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_____
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APPENDIX

Tab	Document
A	Promissory Note, Sept. 16, 2004
B	Findings of Fact and Conclusions of Law, Oct. 24, 2005
C	Final Judgment, March 3, 2006