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SUNIL KUMAR MEHTA AND MEHTA INVESTMENTS, LTD.,

Appellants,

v.

MOHAMMED AHMED,

Appellee.

On Appeal from the 295th Judicial District Court of Harris County, Texas
No. 2017-84654

BRIEF FOR APPELLANTS

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Oral Argument Requested

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Note on Record References

The Clerk's Record will be cited by volume number and page number, such as *xCRyy*.

The Reporter's Record is a bit confusing because a substitute court reporter first filed a few volumes of pretrial hearings before the Official Reporter filed the actual testimony from trial. All cited references in this brief, however, are to the record of the testimony filed by the Official Reporter. Like the citations to the Clerk's Record, they will be cited by volume and page number, such as *xRRyy*.

Statement of the Case

Nature of the case	Intent on "teaching [Mehta] a lesson by putting him through this litigation," *6RR202*, Ahmed sued Mehta and Mehta Investments, Ltd. for fraud, breach of fiduciary duty, and unjust enrichment over the purchase of two separate real-estate parcels, West Oaks Mall and an adjacent, vacant Macy's store. *2CR1084–95.*
Trial Court	295th Judicial District Court of Harris County, Hon. Donna Roth, presiding.
Jury verdict	Despite Ahmed's admission that a partnership "was never created in the first place" because "the conversations with Mr. Mehta did not get that far," *6RR145–49*, a jury found the existence of a partnership and corresponding breach of fiduciary duties. The jury also found fraud and unjust enrichment as to the West Oaks Mall. The jury rejected all claims about Macy's. The jury awarded damages of $586,000 for fraud, $1,000,000 for breach of fiduciary duties, and $586,000 for unjust enrichment. *App.2.*
Judgment	Ahmed recovers $1,586,000 for breach of fiduciary duty and unjust enrichment. *App.1.*

Statement Regarding Oral Argument

This case merits oral argument because of its complexity. The three liability theories contradict each other. Some of the theories are barred by the evidence;

others are barred by rules of law. And, there is a double recovery. Oral argument would enable the Court to explore these problems in more depth.

Issues Presented

1. Is the evidence legally and factually sufficient to prove Mehta and Ahmed actually formed an oral partnership as to West Oaks Mall?
2. If an oral partnership had been formed, would it justify the recovery of $1,000,000 as benefit-of-the-bargain damages?
3. If an oral partnership had been formed, would that bar Ahmed's claim for unjust enrichment as a matter of law?
4. Is the evidence legally and factually sufficient to prove Mehta received a benefit from Ahmed to justify a recovery for unjust enrichment?
5. Can Ahmed legally recover $586,000 as the disgorgement of profits without a fiduciary or confidential relationship?
6. Is the evidence legally and factually sufficient to prove the causation, materiality, and justifiable-reliance elements of fraud?
7. Is the award of $586,000 in benefit-of-the-bargain damages for fraud barred as a matter of law because any oral partnership would have been terminable at will and subject to the Statute of Frauds, or is the evidence legally and factually insufficient to support that award?

8. At a minimum, because Mehta owed Ahmed no duty of disclosure, would the *Casteel* doctrine require a remand of the fraud claim for a new trial?

9. Does the judgment impermissibly award a double recovery?

Statement of Facts

I. Because of his great reputation in the community, Mehta is invited to bid on the prospective sale of West Oaks Mall.

Appellant/Defendant Sunil Mehta is a successful Houston businessman. Born in India, Mehta first came to the United States in 1980, *7RR26*, and opened a chain of mall-based retail stores. *PX13.* In the early 1990s, Mehta also began investing in and developing commercial real estate. *5RR222*. He has developed and built residential communities, and he owns shopping centers and office buildings. *PX13.* In the Houston business community, Mehta is considered a man of "high standing" who "did everything he said he would do when he would do it." *5RR209–10, 213; DX46.*

Given Mehta's reputation, in June 2017 he was invited to bid on purchasing the West Oaks Mall by the owner's broker, Allied Advisors. *PX1; 5RR138.* Located at Highway 6 and Westheimer in Houston, West Oaks Mall had been struggling for many years. *7RR9.* Although Mehta's initial bid was low, *PX5,* the Mall's owner selected him to progress to the second round of bidding, indicating that $10 million was the goal. *PX6; DX32*.

Mehta was exploring borrowing about $7 million. *4RR33–34*. Mehta had discussions with Prosperity Bank, which was "very interested to underwrite" a loan. *PX13*. Mehta also approached Community Bank of Texas, where he had $789,000 in available cash. *4RR49*. He spoke at length with an executive vice president, Morag McInnes. *4RR30*. On June 27, McInnes gave him a term sheet for a $7 million loan with 5% interest and a 20 year term, pending appraisal. *PX7; 4RR38–43*.

Mehta's second bid was for $10 million, with $3 million of that in cash and the rest expected to come from a bank loan. *5RR157–58*. On June 28, he sent that offer, along with the term sheet from Community Bank, to the Mall's broker. *PX13; DX34*.

Together with his son, however, Mehta had sufficient assets available to pay the entire $10 million in cash. *7RR38*. So on June 29, he revised his offer to $10 million in cash funded solely by him and "his family." *PX14–15; 5RR166–68*.

II. **Community Bank brings Ahmed into the picture**.

Community Bank ultimately declined to grant Mehta a loan with which to acquire the Mall. *4RR52-53*. But that wasn't the end of Community Bank's involvement: on June 29, McInnes volunteered that Community Bank had another wealthy customer who might lend Mehta the money; the customer was plaintiff/appellee, Mohammed Ahmed. *4RR58*. Ahmed was born in Pakistan, but had lived in Houston for 35 years. *6RR90*. A wealthy businessman, he owns many

Jack-in-the-Box franchises. *4RR59*. He also had an existing $9,000,000 line of credit at Community Bank. *4RR60*.

Mehta and Ahmed did not know each other. McInnes portrayed Ahmed only as a good customer of the bank; however, she did not disclose that Ahmed had been her customer and confidant for more than a decade. *4RR64*. She and Ahmed often walk together in a nearby park and frequently text each other "about personal issues." *4RR69, 90–91*. When McInnes had left her prior bank, Ahmed and his money followed her to Community Bank. *4RR89–93*.

At McInnes's suggestion, Mehta called Ahmed on June 29, which was the first time they had ever communicated. *5RR259*. Accounts of that conversation diverge, perhaps due to language differences. While both parties speak English, their native languages are Hindi for Mehta and Urdu for Ahmed. *6RR90–91*. Some of the conversations occurred in Hindi, which Ahmed says he can understand. *Id*. Regardless, Ahmed says he told Mehta that he would not lend the money unless he could be some sort of partner in the Mall. *6RR106*. Mehta denied hearing Ahmed say that, testifying instead that he stressed to Ahmed that he wanted only to borrow funds from Ahmed. *5RR261–62*.

Whatever actually was discussed, Ahmed showed up at Mehta's office on the next day, June 30, to talk about himself and his accomplishments. *5RR266–67*. Mehta

informed Ahmed that the Mall had already accepted his cash offer. *6RR109*. Mehta and Ahmed proceeded from Mehta's office to the Mall to visit the property. Although Mehta denies the details, Ahmed's story is that—in the parking lot—they discussed (1) a split of 65% for Mehta and 35% for Ahmed regarding West Oaks Mall, and (2) a split of 35% for Mehta and 65% for Ahmed regarding a Macy's store adjacent to the Mall, even though the Macy's store was not then for sale. *6RR111–12*.

On Saturday, July 1, Ahmed and some of his family drove to the Mall to take a look around. *5RR273*. They later turned up at Mehta's house, and from there they went to a restaurant. *5RR269–71*. Mehta agrees that Ahmed raised the partnership issue at this time. *5RR271; 6RR10*.

According to Ahmed, he told Mehta that "now it's time for us to create an agreement between us, the partnership agreement between us." *6RR115*. Mehta replied that he didn't want any partners. *5RR272*. Ahmed admitted that he had been in significant litigation with his last partners. *Id.* Mehta told Ahmed that this was a red flag about why he did not want a partner. *5RR273–75; 6RR10*.

Mehta knew that the final condition for his offer being submitted with approval to the Mall's owner required a tour of the Mall. *5RR170*. Thus, Mehta toured the Mall with the broker on July 3. *PX18, 20; 5RR171*.

III. **Community Bank provides a reference letter to "Mehta Group."**

On July 5, Mehta visited Community Bank again; because McInnes had already reviewed Mehta's financial information, he requested a letter to send to the Mall's broker. *4RR74-75; 6RR38, 44*. McInnes of Community Bank had heard from Ahmed that he and Mehta had talked "about doing a partnership deal." *Id.* But she didn't know "where they stood with it." *4RR75.* Instead, she simply assumed that Ahmed and Mehta "were still proceeding towards a partnership." *4RR76.*

Nevertheless, she was clear that they had ***not yet*** formed a partnership:

> Q. [A]t the time you wrote the letter, you understood they were still in discussions, correct?
>
> A. That's correct, yes.
>
> Q. And you understood that absolutely nothing had been decided?
>
> A. That's correct.

4RR95. In fact, when she mentioned a partnership, she concedes that Mehta expressly told her to keep Ahmed's name off the documents and to make it solely in the name of the "Mehta Group." *4R77–78.*

McInnes testified that (on a separate call neither made in Mehta's presence nor with his knowledge) Ahmed gave his permission for her to provide the letter. *4RR81–82*. So McInnes gave Mehta a letter saying "This letter will serve to confirm

that Mehta Group has a good depository and loan relationships with the Bank. Currently they have cash of $10,000,000 available." *PX22; 7RR80.*

Mehta sent the letter to the Allied Advisors that afternoon, July 5. *PX22; 5RR179.* But the broker at Allied Advisors "didn't really consider it." *5RR174.* She had already made the decision to recommend acceptance of Mehta's bid five days earlier, on June 30. *5RR205.*

> Q. As of June 30th, 2017, had the seller of West Oaks Mall decided to go with Mr. Mehta?
>
> A. We had conditionally decided to go ahead with Mr. Mehta.
>
> Q. And what was the remaining condition that needed to be satisfied?
>
> A. The—largely, the property tour.
>
> Q. Were you satisfied that he had provided sufficient information as called for in the refinement period letter as far as financial information?
>
> A. We felt that given the timing in his offer, yes. We had seen documentation that we thought supported awarding—with the proper—the formal property tour awarding the asset, yes.
>
> Q. So the seller was not waiting for any other financial information regarding Mr. Mehta before determining—deciding to go with him as the buyer?
>
> A. Correct.

5RR205.

After inviting Mehta to progress to the second round of bidding on June 22, the broker had been performing a due diligence on Mehta, which disclosed not only his financial wherewithal, but his experience in the community and great reputation. *5RR210–13; DX46.* His references were in fact "perfect." *6RR43.* So when the Community Bank letter later reached the broker on July 5, it was barely reviewed before being included that same afternoon with the recommendation to accept Mehta's bid. *PX23; 5RR178–79.* Later that evening, the broker confirmed the Mall owner's decision to sell the Mall to Mehta. *7RR64.*

IV. **Denouement**

While engaged in bidding on the Mall, Mehta explored several opportunities to borrow some of that money through a short-term bridge loan and then to repay the loan quickly once the Mall was up and running. *6RR34, 88.* Mehta still wanted to explore whether Ahmed would lend him the money. *6RR16.* In the days following their June 29 introduction, Mehta and Ahmed called each other several times. *6RR20–27.* During the same period, Mehta also contacted Grand Bridge Realty and AskZeus.com about possible loans. *PX24–25; 6RR77.*

Yet within a week of their first contact, by July 7, Ahmed says he began to realize that Mehta did not want to become his partner. *6RR132.* When Ahmed pestered Mehta about going to a lawyer's office to draw up a partnership agreement,

Mehta continually made what Ahmed called "excuses." *6RR132–33, 138, 146*. Relations between the two deteriorated and became more "accusatory." *6RR 64–74*.

By July 17, at the latest, Ahmed admits he understood that they would never become partners:

> Q. Just so we're very clear, as of July 17th 2017, you understood unequivocally that you would not be going forward with any type of partnership with Mr. Mehta, true?
>
> A. That is true.
>
> Q. And since that date, you had—you've had no further dealings with him?
>
> A. No.

6RR147.

Ahmed also carefully clarified his claim:

> Q. Is it true that what you're really complaining about is the fact that you never actually formed a partnership with Mr. Mehta? Is that what you're complaining about?
>
> A. Yes.

6RR141.

> Q. You're saying or at least your lawsuit says that the partnership exists today, true?
>
> A. Yes.
>
> Q. Even though you admit now that it was never created in the first place, true?

A. Yes.

6RR148-49.

After Mehta declined to work with Ahmed and use Ahmed's Community Bank line of credit for the Mall acquisition, McInnes was miffed to lose out on a big loan for the bank. *6RR197.* She grew even more upset when Mehta, once litigation had begun, asked her not to voluntarily reveal the July 5 letter. *4RR87.*

In August, Mehta began pulling together funding from various sources, such as his other properties and his family. *6RR79–80; 7RR42.*[1] He also obtained a $2 million loan from an acquaintance, Mr. Bandari. *7RR66*. The closing on West Oaks Mall occurred on August 15. *6RR78.* Since then it has been owned by appellant/defendant Mehta Investments, Ltd. *5RR86; PX39.*

V. **Macy's**

Adjacent to West Oaks Mall was a shuttered Macy's store, owned by its Macy's corporate parent. *7RR9*. By October 2017, the Macy's owner commenced a sale process and an entity named Rankin Road Investments had submitted an offer of $5.1 million. *DX71.* CBRE, the selling broker for the Macy's owner, contacted Mehta about submitting a bid; Mehta believed the financial outlook for the Mall

[1] The trial court had excluded evidence that Mehta had a total of $40 million in assets, limiting the evidence solely to his cash assets. *6RR38–40*.

would improve if he could acquire the Macy's store and re-open it. *6RR81*. Given that the Macy's sale was a competitive process involving multiple bidders, Mehta submitted an initial bid and multiple revisions, culminating with an offer of $7.1 million in November 2017. *PX46; DX75*. Although discussions between the Macy's broker and Rankin Road were already underway, the Macy's owner accepted Mehta's subsequent, far higher bid. *7RR11; DX232*. The broker agreed that for the owner, "It's all about the money." *7RR12*.

Unknown to Mehta, the losing bidder for Macy's—Rankin Road—was owned by Ahmed. *6RR155, 7RR22*. But this was a deal on his own, not involving Mehta:

> Q. And you weren't trying to buy Macy's as a part of any partnership or any kind of deal with Mr. Mehta, correct?
>
> A. That is correct.

6RR153.

At trial, it became apparent his Macy's claim had no merit at all—according to Ahmed's own admissions:

> Q. Is it true that you don't have any issues, any complaints about Mr. Mehta's acquisition of Macy's, true?
>
> A. True.

6RR154.

VI. **Litigation**

After losing out on Macy's, Ahmed filed suit in the very next month, December 2017. *1CR11.* Ahmed concedes that his motivation is "teaching [Mehta] a lesson by putting him through this litigation." *6RR202*. Toward that end, Ahmed obtained a *lis pendens* on both the Mall and Macy's store, which prevented Mehta from refinancing or selling both properties, and even hindered leasing the properties, for more than two years. *6RR154; 7RR41.* When Mehta sought to remove the *lis pendens*, the trial court refused. *1CR209.*

At trial, Ahmed alleged fraud, based on Mehta's stringing him along to gain access to the reference letter from Community Bank for the West Oaks Mall purchase while never intending to be his partner. *2CR1090–93.* The jury found for Ahmed on his West Oaks Mall fraud claim, awarding "benefit-of-the-bargain" damages of $586,000. *6CR3512–13.* The jury rejected his fraud claim involving Macy's. *6CR3512.*

The jury also found that a partnership had actually been formed for the Mall and that Mehta had breached accompanying fiduciary duties to Ahmed. *6CR3514–15.* The jury awarded $1 million as benefit-of-the-bargain damages for the Mall. *6CR3516*. The jury rejected Ahmed's partnership theory regarding Macy's. *6CR3514.*

The jury awarded another $586,000 for unjust enrichment. *6CR3517–18.*

Ahmed elected his largest recovery (under fiduciary duty and unjust enrichment), *6CR3531–32*, so the final judgment awards him $1,586,000, plus interest. *6CR3634.* The trial court denied all of Mehta's postjudgment motions. *6CR3632, 3721–22.* Mehta has timely perfected this appeal. *6CR3767.*

Summary of the Argument

Ahmed cannot decide what type of claim he has, for his theories contradict each other. He has a jury verdict for fraud, breach of fiduciary duties based on a partnership, and unjust enrichment. But if there really were a partnership, then there was no fraud. And if there were a partnership, there can be no unjust enrichment. And if there were fraud, then there never was a partnership.

Before trial, Ahmed said that "this is a fraud case." *3CR1124.* But when the verdict gave him much more money for breach of fiduciary duty, he decided that it must be a partnership case. His election, however, was a mistake because there never was an existing partnership. Ahmed admitted as much—his complaint is that a partnership "was never created in the first place" because "the conversations with Mr. Mehta did not get that far." *6RR145–46, 148–49.* And he lacks the proof required under the statutory factors to establish a partnership. Thus, the $1,000,000 award for breach of fiduciary duty should be reversed.

Nor can Ahmed's unjust-enrichment claim stand. First, if there were a partnership agreement, then the theory of unjust enrichment is unavailable as a matter of law. Second, Mehta received no benefit from Ahmed. Even if one believes Ahmed's story, that Mehta strung him along to secure a reference letter from Community Bank, the letter did not benefit Mehta. The Mall owner had already conducted an independent due diligence on Mehta and his finances, deciding—five days earlier—to sell to Mehta. The Community Bank letter proved irrelevant to the Mall transaction.

Ahmed's distancing himself from his original fraud claim is understandable. Because any partnership would have been oral, it would have been terminable at will. Texas law is settled that a terminable-at-will promise cannot be material, because no one can justifiably rely on it. Nor could Ahmed recover benefit-of-the-bargain damages for a terminable-at-will promise. And, when as here, he repeatedly told the court that his *lis pendens* were justified because he was seeking the real-property assets themselves, then he is subject to the Statute of Frauds. That limits any recovery to out-of-pocket costs, which Ahmed never proved.

Ahmed didn't want to seek out-of-pocket expenses because any award would not be enough for Ahmed's avowed purpose of "teaching [Mehta] a lesson by

putting him through this litigation." *6RR202.* Now that the lesson has been learned, it's time to apply the law and reverse this judgment.

STANDARD OF REVIEW

Legal-sufficiency challenges are guided by the well-known standard set out in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). Although evidence supporting the verdict is credited, the reasonableness of inferences is reviewed through the lens of all the evidence. *Id.* at 813 ("[W]hen the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well."). Moreover, applicable legal and evidentiary rules determine what evidence is material to the issue being challenged. *Id.* at 810.

For factual-sufficiency challenges, the courts examine all the evidence to determine whether it is so contrary to the overwhelming weight of the evidence as to be manifestly unjust. *E.g.*, *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998).

Questions of law are, of course, reviewed de novo. *E.g.*, *Rieder v. Woods*, 603 S.W.3d 86, 94 (Tex. 2020).

ARGUMENT

Ahmed elected to base the judgment on his claims for breach of a fiduciary duty and unjust enrichment. *6CR3531.* The jury also found for him on his fraud theory regarding the Mall, *6CR3512–13,* though at present it is not part of the judgment. *6CR3634.* Part 1 of the argument section of this brief will reveal the flaws in the judgment flowing from the improper finding of a partnership. Part 2 will show that even if the partnership finding somehow survived, the judgment still could not withstand appellate review.

PART 1

I. Because the parties never actually formed a partnership, the judgment allowing recovery for breach of fiduciary duty should be reversed.

At most, Ahmed proved the parties had an unenforceable oral agreement to agree. Even taking Ahmed's version of events as true, there was no meeting of the minds on the elements required to prove a partnership. As Ahmed admitted, his "conversations with Mr. Mehta did not get that far." *6RR145-46*.

A. Statutory factors establish the absence of an existing partnership.

The current test for the existence of a partnership is statutory:

> (a) Factors indicating that persons have created a partnership include the persons':

> (1) receipt or right to receive a share of profits of the business;
>
> (2) expression of an intent to be partners in the business;
>
> (3) participation or right to participate in control of the business;
>
> (4) agreement to share or sharing:
>
> > (A) losses of the business; or
> >
> > (B) liability for claims by third parties against the business; and
>
> (5) agreement to contribute or contributing money or property to the business.

TEX. BUS. ORGS. CODE § 152.052. Courts review those factors by applying a totality-of-the-circumstances test. *E.g.*, *Ingram v. Deere*, 288 S.W.3d 886, 891 (Tex. 2009).

1. The parties never agreed to share "profits."

An agreement to share profits is essential. Ahmed's scant testimony was vague to non-existent, and even then confirmed the absence of an existing partnership:

> Q. All right. And did—what else did he say?
>
> A. He says: I can—yeah, I can get 35 and he can get 65, 65 percent of the Mall ***once we refinance that***.
>
> ....
>
> Q. Was there discussion about percentage splits with regard to the Macy's?
>
> A. Yes.

Q. And what was that discussion?

A. He will get 65 percent on the Mall. I'll get 65 percent on the Macy's. And then on the Mall, I would have 35 percent, and Macy's, he would have 35 percent.

….

Q. What was Mr. Mehta's response?

A. Yes. He ***will give*** me 35 percent on the Mall.

Q. On the Mall.

A. He will keep 65 percent.

Q. And where did this discussion take place?

A. In the parking lot of the Mall.

….

Q. What was said about that?

A. So I asked Mr. Mehta, since they have approved, they accepted our offer, and ***now it's time for us to create an agreement*** between us, the partnership agreement between us.

….

Q. [W]hy was it important to you to get an agreement—a written agreement in place?

A. Whatever we have agreed, it has to be on the paper so that nobody can have any conflict.

6RR112–15 (emphasis added).

Even crediting this version of their conversations, the discussion about splits is too vague. Thirty-five percent of what? What does "split" even mean?

- Is it gross revenues?
- Is it profits?
- Is it management responsibilities?
- Is it allocating who will open and lock up on which day?

The evidence is simply too tentative to show a meeting of the minds on all essential terms. Stretched to its legally permissible inferential limit, the most shown by this testimony is the possible existence of an unenforceable agreement to agree. That is insufficient: "A contract must address all of its essential and material terms with a reasonable degree of certainty and definiteness to be enforceable." *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 481 (Tex. 2019) (cleaned up); *McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 392 (Tex. 2019) (even implied contracts require a "meeting of the minds").

Perhaps these details would have been ironed out if the parties had ever gone to a lawyer to draw up an agreement, as Ahmed wanted. *6RR64-65, 133.* In other deals, Ahmed always had his lawyers handle negotiations and paper the deal. *6RR143-46.* But, in this instance, the "conversations with Mr. Mehta did not get that far." *6RR145-46*.

At any rate, even receiving a share of profits alone cannot establish a partnership:

> (b) One of the following circumstances, by itself, does ***not*** indicate that a person is a partner in the business:
>
> (1) the receipt or right to receive a share of profits as payment:
>
> . . .
>
> (E) of interest or other charge on a loan, regardless of whether the amount varies with the profits of the business, including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral . . . .

TEX. BUS. ORGS. CODE § 152.052(b)(1)(E) (emphasis added). We mention this because Mehta was adamant that he all he ever wanted was for Ahmed to lend him the money to buy the Mall. *6RR23, 102, 106.* But Ahmed did not want to be a lender, *6RR102–03*, so no loan ever came to fruition. *7RR46–47.*

The supreme court has even said that evidence of profit sharing is no evidence of an expression of intent to be partners:

> [E]vidence of profit or loss sharing, control, or contribution of money or property should ***not*** be considered evidence of an expression of intent to be partners. Otherwise, all evidence could be an "expression" of the parties' intent, making the intent factor a catch-all for evidence of any of the factors, and the separate "expression of intent" inquiry would be eviscerated.

Ingram, 288 S.W.3d at 900 (emphasis added).

And merely sharing gross revenues is insufficient, because it does not establish an agreement to share "profits." *Ingram*, 288 S.W.3d at 899 ("the receipt of gross revenue is not profit sharing"); *Murphy v. McDermott Inc.*, 807 S.W.2d 606, 613 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (sharing gross returns does not establish a partnership).

Nor can Ahmed salvage his claim by contending that Mehta's alleged comment about 35%, which Mehta denied making (*5RR267, 270*), referred to an ownership interest in the Mall, much less a partnership that would have owned 100% of the Mall. The statute itself forecloses Ahmed's reliance on the alleged comment to support his claim:

> (b) One of the following circumstances, by itself, does ***not*** indicate that a person is a partner in the business:
>
> . . .
>
> (2) co-ownership of property, regardless of whether the co-ownership:
>
> > (A) is a joint tenancy, tenancy in common, tenancy by the entirety, joint property, community property, or part ownership; or
> >
> > (B) is combined with sharing of profits from the property;
>
> (3) the right to share or sharing gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived . . . .

TEX. BUS. ORGS. CODE § 152.052(b)(2) (emphasis added).

In sum, the absence of an express agreement to share profits points to the absence of an existing partnership.

2. ***There was no mutual intention to be in an existing partnership.***

Historically, "[t]he parties' intent is the most important test in determining whether a partnership is formed." *Fed. Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 700 (5th Cir. 1991) (applying Texas law). As the Supreme Court of Texas has repeatedly said, "the 'intention of the parties to a contract is a prime element in determining whether or not a partnership or joint venture exists." *Ingram*, 288 S.W.3d at 894 (quoting *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex.1978)). There must have been a "meeting of the minds" on all essential terms. *E.g.*, *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018).

Regarding this "most important factor," let's now examine the evidence. Mehta always adamantly disavowed any intention of forming a partnership. *5RR272; 7RR46-47.* Instead, Mehta wanted Ahmed only to ***lend*** him the money with which to buy the Mall. *6RR16.* Mehta never wavered from that unequivocal position.

Ahmed's story differed somewhat. He said that he would not lend Mehta the money unless they agreed to become partners. *6RR106*. But Ahmed admitted that he anticipated only that they would ***eventually*** form a partnership. Ahmed, in fact,

admitted himself out of court when he testified the parties had "never actually formed a partnership":

> Q. Is it true that what you're really complaining about is the fact that you never actually formed a partnership with Mr. Mehta? Is that what you're complaining about?
>
> A. Yes.

6RR141. This was no slip of the tongue; Ahmed reiterated it eight pages later:

> Q. You're saying or at least your lawsuit says that the partnership exists today, true?
>
> A. Yes.
>
> Q. Even though you admit now that it was never created in the first place, true?
>
> A. Yes.

6RR148-49. So Ahmed admits no partnership was ever created.

Ahmed also admitted that actually forming the partnership depended on acquiring the Mall; otherwise, he would have no relationship with Mehta at all. *6RR147*. Yet Ahmed further admitted that all discussions with Mehta terminated on July 17, when he realized they would never become partners, a month ***before*** Mehta bought the Mall. *6RR147*.

Ahmed himself ultimately hammered the nail into his claim's coffin: "We have a promise. . . . Mr. Mehta has promised me that we [were] ***going to go*** into a partnership." *6RR173 (emphasis added)*. But that's simply a classic example of "an unenforceable agreement to agree." *See, e.g.*, *Fischer v. CTMI, L.L.C.*, 479 S.W.3d

231, 237 (Tex. 2016). At most it might be promissory estoppel, but Ahmed never pleaded that theory because he had no out-of-pocket losses to support it. *See, e.g.*, *Wheeler v. White*, 398 S.W.2d 93, 96–97 (Tex. 1965).

Despite all those repeated admissions by Ahmed, he tried to support the verdict by pointing to his answers to a couple of leading questions from his lawyer about Ahmed's own, self-serving, subjective belief:

> Q. Based upon what Mr. Mehta had told you over the course of time that you were dealing with him, *did you believe in your mind* that the two of you were partners?
>
> A. Yes.

6RR139 (emphasis added).

> Q. And even though you don't have a written partnership agreement, *did you believe* that you were already partners with Mr. Mehta?
>
> A. Yes.

6RR209 (emphasis added).

Those isolated comments about what Ahmed subjectively believed carry no legal weight. "Mere personal belief there may be a partnership is not probative evidence." *Westside Wrecker Serv., Inc. v. Skafi*, 361 S.W.3d 153, 170 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *Torres v. Kelley*, No. 13-04-313-CV, 2007 WL 528849, at *4 (Tex. App.—Corpus Christi Feb. 22, 2007, no pet.) (mem. op.). The reason is that "business people often use the words 'partner' and

'partnered' to mean any sort of close business relationship, and not strictly to mean legal partnerships." *Hoss v. Alardin*, 338 S.W.3d 635, 644 (Tex. App.—Dallas 2011, no pet.). Thus, "mere legal conclusions by a lay witness . . . . do not prove the existence of a partnership or joint venture," and 'are no evidence of a partnership agreement.'" *Id.* (quoting *Torres*, 2007 WL 528849, at *3); s*ee also Westside Wrecker*, 361 S.W.3d at 169.

This is venerable Texas law. Appellate courts "will sustain a challenge to the legal sufficiency of the evidence whenever

> (1) there is a complete lack of evidence of a vital fact,
>
> (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact,
>
> (3) there is no more than a scintilla of evidence offered to prove a vital fact, or
>
> (4) the evidence conclusively establishes the opposite of the vital fact."

Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 783 (Tex. 2020) (cleaned up). Here, each of the four situations exists.

First, there is no evidence of the actual fact. Ahmed never said the parties were in fact partners, just that he ***believed*** they were or might become so. *See Hoss*, 338 S.W.3d at 644 ("Alardin's testimony that he and Hoss 'specifically agree[d] to be partners' is conclusory and thus no evidence of an expression of intent to be partners in a partnership").

Second, rules of law prevent this Court from giving any weight to Ahmed's subjective belief. Under Texas law, a party's subjective belief is legally immaterial. *See Schlumberger Tech. Co. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) (even both parties' considering themselves partners was no evidence of a fiduciary relationship). So "terms used by the parties in referring to the arrangement do not control." *Ingram*, 288 S.W.3d at 900.

As with the meeting of the minds required to establish any contract, "it is objective, not subjective, intent that controls." *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006). In other words, "the determination of a meeting of the minds is based on the objective standard of what the parties said and did, not on their subjective state of mind." *Guajardo v. Hitt*, 562 S.W.3d 768, 778 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

Third, Ahmed's statement of his subjective belief is less than a scintilla of evidence. "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

Here, Ahmed simply has his subjective belief—contradicted by his own clear, repeated admissions that his only complaint is that

- the parties "never actually formed a partnership," *6RR141*,
- a partnership "was never created in the first place," *6RR148–49*,
- Mehta had promised only that they were "going to go in a partnership," *6RR173,*
- the formation of a partnership was "dependent on" first acquiring the Mall, *6RR147*, and
- by July 17, Mehta had unambiguously indicated they would never become partners, *6RR147*.

This has never been sufficient to establish a partnership. *See, e.g.*, *Hoss*, 338 S.W.3d at 649 (plaintiff presented "only weak evidence, much of its contradicted by his own testimony . . . . This alone is sufficient to compel the conclusion that the evidence supporting the jury's finding of a partnership is less than a scintilla of evidence.").

And ***fourth***, the evidence conclusively proved the absence of an existing partnership. Mehta testified repeatedly that he had no such intention. Mehta's testimony that there never was a partnership was corroborated by objective facts. Objective indicia of a partnership could have included

- the parties' telling others that they already were in an existing partnership,
- listing a partnership on a letterhead or name plate, or
- using the partnership name in a signed document.

Westside Wrecker, 361 S.W.3d at 168. But none of that occurred here. The alleged partnership did not even have a name; it had no bank account; it never filed tax returns. *7RR46-48.*

There is not even a single written document—be it letter, email, draft agreement, or text message—indicating that the parties were even discussing a partnership. All we have is Ahmed's testimony, which concluded by admitting that a partnership was never formed because the discussions never got that far. *6RR145–49.*

Moreover, in obtaining the letter from Community Bank, Mehta told McInnes to keep Ahmed's name off it and mention only the "Mehta Group." *4RR78.* No one, other than Mehta, knows what that meant: McInnes assumed it meant Ahmed and Mehta, but the broker believed it meant only Mr. Mehta. *4RR79; 5RR174.* Mehta said it included only his group of companies. *6RR55.* And Ahmed admits that he never had any interest in, or control over, defendant/appellant Mehta Investments, Ltd. *6RR170.*

In issuing the July 5 letter for the "Mehta Group," McInnes simply ***assumed*** Ahmed might be involved, because she had heard from Ahmed that "they had been discussing a partnership." *4RR78.* But she did ***not*** know whether Ahmed and Mehta had actually formed a partnership at that time, *see* p.20, above, even though, McInnes

claims to have spoken to Ahmed at the time of issuing the letter. *4RR81–82*. Thus, neither McInnes's assumption—nor the Bank's letter based on her assumption—provides any objective evidence that a partnership between Ahmed and Mehta had already been formed or existed. Ahmed's name appeared nowhere on the letter. *PX22*.

"The 'test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.'" *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 898 (Tex. 2020) (quoting *City of Keller*, 168 S.W.3d at 827). And the test for factual sufficiency is even higher. *See* p. 29, above. The evidence here meets neither test.

In short, the lack of mutual intention establishes the absence of any existing partnership. *See Hoss*, 338 S.W.3d at 645 (testimony of an oral agreement was conclusory and plaintiff's testimony did not prove an intention to create a partnership at the time the alleged partnership was allegedly formed).

3. ***Ahmed admitted that he never had any control***.

Under the predecessor statute, the right to control the business and the sharing of profits were the most important factors, and they may still be under the current statute. *E.g.*, *Nguyen v. Hoang*, 507 S.W.3d 360, 373 (Tex. App.—Houston

[1st Dist.] 2016, no pet.); *Hoss*, 338 S.W.3d at 642; *Ingram*, 288 S.W.3d at 895–96. As shown, here there was no agreement to share profits. *See* pp. 31–36, above.

Nor was there any agreement on the right of control. In deciding whether an individual had a right to control, courts have considered various facts including

- the exercise of authority over a business's operations,
- the right to write checks on a business's checking account,
- control over and access to a business's books, and
- receiving and managing all of a business's assets and monies.

Nguyen, 507 S.W.3d at 373; *Ingram*, 288 S.W.3d at 901–02.

Here, the exercise of authority was never discussed at all. In analyzing control, courts focus on the right to make executive decisions. *E.g.*, *Ingram*, 288 S.W.3d at 902. Here, there is no testimony about whether this would have been a general or limited partnership, much less a limited liability partnership. The characterization, of course, makes a huge difference when it comes to the right of control. *Compare* TEX. BUS. ORGS. CODE § 152.203 ("[e]ach partner has equal rights in the management and conduct of the business of a partnership") *with id.* § 153.103 ("a limited partner does not participate in the control of the business").

The undisputed evidence is that Mehta prefers his family to manage the properties he owns and that Ahmed had no control over his business. *7RR34, 48.* Ahmed agreed that he had no control over the Mall:

> Q. Is it true that you've never had any control over West Oaks Mall or Macy's?
>
> A. I don't have any control. Yes.

6RR170.

But the other factors remain important, too—especially the contribution of money to the partnership. For instance, a partnership never existed between the parties when one party

- contributed no money to the alleged partnership,
- lacked authority to hire or fire employees,
- lacked authority to withdraw monies from any checking accounts on behalf of the alleged partnership,
- lacked authority to enter into any agreement with any third persons that would bind defendant; and
- invested nothing, so there was no capital to lose.

Meeker v. Meyer, 391 S.W.2d 787, 789 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.).

Here, the parties never discussed any of those matters. And it remains undisputed that Ahmed never contributed even one penny to the alleged

partnership. *7RR46-47*. Further, not only did Ahmed lack the power to write checks, *7RR48*, but the alleged partnership didn't even incorporate with the state, apply for an EIN number, or have a bank account. *7RR103.* Nor was there testimony about control and access to any books, because no books existed. The same is true for assets and monies. *See Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 712 (Tex. App.—Eastland 2019, pet. denied) (reversing judgment because plaintiff had no proof of ability to sign checks or to review records).

Another key factor in analyzing control is the sharing of information. *See Stephens*, 580 S.W.3d at 712 ("The receipt of sporadic information is not an indication of control."); *see also Ingram*, 288 S.W.3d at 902. Here, Ahmed had no information about the Mall sale. *6RR133.* Ahmed eventually sought information from the Mall's broker—who appropriately ignored Ahmed as a stranger to the transaction. *5RR164–65, 219.* Ahmed reached out to the broker because Mehta had never provided him with any pertinent information on the Mall sale—again demonstrating the absence of a partnership.

4. ***The parties never agreed on sharing losses and third-party liabilities.***

Although unnecessary, TEX. BUS. ORGS. CODE § 152.052(c), the parties' failure to agree to share losses suggests that they had no intention of creating a

partnership. *E.g.*, *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 108 (Tex. App.—Corpus Christi 1991, writ denied); *cf. Gutierrez v. Yancey*, 650 S.W.2d 169, 172 (Tex. App.—San Antonio 1983, no writ) (also precludes joint venture).

There were no discussions about liabilities. Perhaps the parties would have formed a limited liability partnership. That certainly would alter any liabilities to third parties. *See generally* TEX. BUS. ORGS. CODE § 152.801. Yet the issue never arose because "the discussions never got that far." *6RR145–46.* So, this factor, too, suggests the absence of an existing partnership.

5. ***Ahmed never contributed any money***.

Another important statutory factor is whether the parties contributed money to the partnership. This prevented the formation of a partnership when a plaintiff had contributed no money to the alleged partnership, so that there was no capital to be lost since he had invested nothing. *Meeker*, 391 S.W.2d at 789.

It remains undisputed that Ahmed had "not contributed a single dollar" to the alleged partnership. *6RR151, 7RR46-47*. He never paid any expenses. *6RR169-70.*

Q. [H]ave you ever provided any money to Mr. Mehta?

A. No, I did not.

Q. Have you ever contributed to the acquisition of West Oaks Mall in a financial way?

A. No.

6RR150. No funding; no financing; *nada*. *6RR150*.

That fact takes on special significance given Ahmed's testimony that the proposed deal would require him eventually to contribute $10 million, 100% of the proceeds for the Mall purchase. *6RR106*. It also is compelling that Ahmed may not even have had that amount of money available to contribute, because he had already used the funds for another project involving only him. *6RR191*.

Ahmed's story is so contradictory that if Ahmed is going to recover damages based on the existence of a partnership, then he should owe Mehta $10 million as an offset:

> Q. But you're not actually seeking to recover any money from him or Mehta Investments, correct? And you said?
>
> . . . .
>
> A: Yes, yes.
>
> . . . .
>
> Q. Is it true you don't want to jointly own anything with Mr. Mehta or Mr.—or Mehta Investments? And you said?
>
> A. No.
>
> Q. Said: No, you do not. Answer?
>
> A. No, I do not.

Q. Keep going.

A. I don't want to be joint partner with him.

Q. The only thing that you do want is you want one of the properties, right, either West Oaks Mall or Macy's. Is that what you want?

A. That's what—that is correct.

Q. Okay. But you admit that if you were to get one of those properties, that you would have to pay for it, right?

A. Yes.

6RR205-08. If Ahmed's contentions were correct, a net judgment should have been rendered in favor of Mehta for more than $8 million.

B. **Without an existing partnership, the jury's findings of noncompliance with fiduciary duties and resulting damages are immaterial**.

Without an existing partnership agreement, Mehta owed Ahmed no fiduciary duties. *See Gregan v. Kelly*, 355 S.W.3d 223, 227 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). Ahmed neither pleaded nor submitted a fiduciary relationship based on a relationship of special trust and confidence, *2CR1094*, because the parties had never met before this encounter. *See, e.g.*, *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). Absent an existing partnership, the jury's findings of a breach of fiduciary duties and resulting

damages are legally immaterial. The $1,000,000 recovery for breach of fiduciary duties should be reversed.

II. **Ahmed's unjust-enrichment recovery should also be reversed**.

Because there was no partnership, Ahmed's unjust-enrichment theory could be available—in theory. But it would still be flawed because nothing Ahmed claims to have done actually benefitted Mehta.

To prevail on an unjust-enrichment claim, "a plaintiff must show that the defendant obtained a benefit from the plaintiff." *Mary E. Bivins Found. v. Highland Capital Mgmt. L.P.*, 451 S.W.3d 104, 111–12 (Tex. App.—Dallas 2014, no pet.). "Unjust enrichment occurs when the person sought to be charged has wrongfully secured or passively received a benefit that would be unconscionable to retain." *Id.* at 112. "To prevail, a plaintiff must show that the defendant obtained a benefit from the plaintiff by fraud, duress, or the taking of an undue advantage." *Id.*

A. **Mehta did not receive a benefit from Ahmed**.

Ahmed admits that he never provided any money to buy the Mall. *6RR150.* Mehta funded the closing solely with his own funds and loan proceeds from his family and another acquaintance. *7RR66*. So there was no money had and received from Ahmed to be returned.

Ahmed contends only that Mehta misled him into agreeing to allow Community Bank to consider Ahmed's assets so that it would issue a letter for the "Mehta Group." Yet Ahmed's permitting his line of credit to be considered by the Bank simply to provide a reference letter for the Mehta Group is light-years different from actually providing Mehta with $10 million in cash to purchase the Mall. Providing non-cash assistance for a transaction does not entitle Ahmed to restitution as if he had provided cash.

Nor did the Community Bank letter actually benefit Mehta. The testimony was undisputed that the Mall's broker "didn't really consider it." *5RR174.* She had already made the decision to recommend acceptance of Mehta's bid five days earlier, on June 30. *PX32; 5RR205.* From the outset of the entire bidding process, the broker had been performing an independent due-diligence review on Mehta, which disclosed not only his financial wherewithal, but his experience in the community and his great reputation: Mehta was uniformly considered a man "of high standing," who "did everything he said he would do when he would do it." *5RR210-13; DX46.*

Because neither the broker nor the seller had specifically asked Mehta to submit the Community Bank letter, it was barely reviewed when received on July 5 before being included that same day with the other documents and the broker's recommendation. *5RR178-79.*

The letter ultimately played no part in Mehta's purchase of the Mall. This is so important that it's worth quoting the broker's testimony in full:

> Q. As of June 30th, 2017, had the seller of West Oaks Mall decided to go with Mr. Mehta?
>
> A. We had conditionally decided to go ahead with Mr. Mehta.
>
> Q. And what was the remaining condition that needed to be satisfied?
>
> A. The—largely, the property tour.
>
> Q. Were you satisfied that he had provided sufficient information as called for in the refinement period letter as far as financial information?
>
> A. We felt that given the timing in his offer, yes. We had seen documentation that we thought supported awarding—with the proper—the formal property tour awarding the asset, yes.
>
> Q. So the seller was not waiting for any other financial information regarding Mr. Mehta before determining—deciding to go with him as the buyer?
>
> A. Correct.

5RR205.

Thus, by June 30, the Mall owner had completed its financial investigation of Mehta; the one open condition—the property tour—was completed on July 3, two days ***before*** the letter was issued by Community Bank on July 5. *5RR171.* So Mehta would get the Mall even without the letter. Ahmed and the letter ultimately proved irrelevant to Mehta's ability to buy the Mall.

As plaintiff, Ahmed accepted the burden of proof on this issue. *6CR3509.* He could have asked the broker's witness point blank: "Would you have recommended that the Mall owner accept Mehta's offer without Community Bank's letter?" Knowing that the answer would have been unfavorable, Ahmed's counsel carefully avoided asking that key question. Likewise, Ahmed chose not to call the seller of the Mall to ask whether the seller would have accepted Mehta's offer without the letter. Having made those strategic choices, Ahmed must live with their consequences and the record as it stands. Community Bank's letter did not affect the Mall owner's decision to sell the property to Mehta. It therefore conferred on Mehta no benefit.

In finding unjust enrichment, this jury responded not to the evidence and the charge submitted, but to the repeated exhortations of Ahmed's counsel that in the absence of material evidence the jury should simply do "justice." *7RR169-70, 223.* That, of course, contravenes the instructions given to the jury in the opening charge instructions:

> 2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions.
>
> . . . .
>
> 7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

6CR3508 (tracking TEX. R. CIV. P. 226a, Instructions for Court's Charge). When a lawyer has evidence to support the jury's answers, the closing argument presents that evidence, instead of making a naked appeal to "justice."

An appeal to justice is particularly inappropriate because unjust enrichment is not an all-purpose, gap-filler remedy that allows a jury to award relief based on feeling sympathy for a plaintiff or dislike for a defendant. As the supreme court cautions: "Unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall." *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 42 (Tex. 1992) (cleaned up). Accordingly, damages for unjust enrichment are unavailable.

B. **Without an existing partnership, Ahmed cannot recover any disgorgement of profits**.

Faced with all these obstacles to his unjust-enrichment theory, Ahmed retreated in posttrial briefing to arguing that his unjust-enrichment recovery somehow represented the disgorgement of profits. *6CR3450*. Yet disgorgement of profits is available only when there has been a fiduciary relationship. *E.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237-40 (Tex. 1999).

And Ahmed's precise argument that disgorgement can be a "remedy [for] unjust enrichment" absent a fiduciary duty has been rejected by the supreme court. *See In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (orig. proceeding). As the supreme court has observed, "courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty." *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

More recently, this Court has explained the rationale for disgorgement as depending on an established fiduciary relationship:

> The central purpose of the equitable remedy of profit disgorgement or fee forfeiture is to remedy a breach of fiduciary duty or violation of trust by discouraging disloyalty. Thus, the remedy presupposes a valid relationship, whether created by contract or otherwise, in which one party has violated the other party's trust and must forfeit its benefits under the contract.

Bigham v. Se. Tex. Envtl., LLC, 458 S.W.3d 650, 674 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

The supreme court has turned to the issue again, though in dicta, by observing that a special relationship of trust and confidence might support disgorgement: "While equitable disgorgement is a viable remedy for breach of trust by a fiduciary … we have not expressly limited the remedy to fiduciary relationships nor foreclosed equitable relief for breach of trust in other types of confidential relationships." *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 729 (Tex. 2016). But here there

never was any partnership—as shown by Ahmed's own admissions that "the conversations with Mr. Mehta did not get that far." *6RR145-46; see* pp. 23–24, above. And because Ahmed never contended there was a confidential relationship, there was no informal fiduciary relationship. As a matter of law, the award of disgorgement of profits for unjust enrichment is unavailable.

C. **Nor could the Macy's claim support unjust enrichment**.

We include this brief subsection only out of an abundance of caution. The unjust-enrichment charge was not expressly limited to the Mall. *6CR3517*. Ahmed, however, never said posttrial that it should apply to his Macy's claim. Instead, he mentioned only the Mall. *6RR3534, 3613*. This was no surprise. The damages awarded for unjust enrichment match to the penny the amount awarded for fraud involving solely the Mall. *6CR3513, 1318*. And the jury roundly rejected his Macy's claim whenever it was mentioned in the charge. *6CR 3512-16, 3519*.

The jury's rejection was probably because of the following testimony from Ahmed that his attempted Macy's purchase was purely a deal belonging to him:

> Q. And you weren't trying to buy Macy's as a part of any partnership or any kind of deal with Mr. Mehta, correct?
>
> A. That is correct.

6RR153.

> Q. Is it true that you don't have any issues, any complaints about Mr. Mehta's acquisition of Macy's, true?

A. True.

6RR154. Thus, because Mehta received no benefit from Ahmed, Macy's should have no bearing on unjust enrichment, either. *See, e.g.*, *Mary E. Bivins Found.*, 451 S.W.3d at 111–12.

III. **Nor can Ahmed resurrect his alternative fraud theory**.

Under the doctrine of election, when the Court reverses part of the judgment either as to fiduciary duty or unjust enrichment, Ahmed's alternative theory of fraud is restored to life and can be challenged on appeal. *See, e.g.*, *2001 Trinity Fund LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 455 (Tex. App.—Houston [1st] Dist. 2012, pet denied) (citing *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988)). Yet Ahmed faces insurmountable problems with his fraud claim, too.

A. **Ahmed failed to prove any fraud caused his damages**.

An essential element of a fraud claim is that the material misstatement "caused injury." *Mercedes-Benz USA, LLC v. Carduco, Inc.,* 583 S.W.3d 553, 557 (Tex. 2019); *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018). The testimony was undisputed that the decision to sell the Mall to Mehta had been made five days before the Community Bank letter was even written. *See* pp. 21–22, above. This

undisputed fact eliminates the element of causation, barring Ahmed's claim for fraud.

B. **An at-will promise is legally immaterial**.

Another problem for Ahmed's fraud claim is the lack of a further required element—materiality of the misrepresentation. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*, 341 S.W.3d 323, 337 (Tex. 2011). Ahmed's precise problem is that Texas law considers the promise of an at-will venture to be illusory. When a promise is "illusory," it cannot be material: "A representation dependent on continued at-will employment cannot be material because employment can terminate at any time." *Sawyer v. E.I. Du Pont des Nemours & Co.*, 430 S.W.3d 396, 401 (Tex. 2014).

Texas law considers an oral partnership to be terminable at will. *See, e.g.*, *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545-47 (Tex. 1998); *Gregan*, 355 S.W.3d at 230. Thus, any representation about it should be legally immaterial. So Ahmed has no claim for fraud.

C. **There can be no justifiable reliance on an at-will promise**.

A claim for fraud also requires the plaintiff to prove justifiable reliance. *E.g.*, *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018). But "an illusory promise can no more support an action for fraud

than one for breach of contract. To recover for fraud, one must prove justifiable reliance on a material misrepresentation." *Sawyer*, 430 S.W.3d at 401. As the supreme court points out, whenever the parties "can avoid performance of a promise by exercising a right to terminate the at-will relationship, which each is perfectly free to do with or without reason at any time, the promise is illusory." *Id.*

The promise of an at-will relationship is so illusory that—as a matter of law—a party cannot justifiably rely on it: "Nor can one justifiably rely on the continuation of employment that can be terminated at will. 'I will if I want to' is not fraud. And no one can claim recovery of damages for the loss of an employment relationship he had no right to continue." *Id.*

While the supreme court precedent factually concerns an employment relationship, the rule should be the same for any terminable-at-will relationship, including an oral partnership. *See Gregan,* 355 S.W.3d at 230 (treating the two relationships identically). In both instances, the promise is simply "I will if I want to." That "is not fraud," because no one can justifiably rely on it. *Sawyer*, 430 S.W.3d at 401.

Here, the Court confronts two wealthy, very experienced investors, who were complete strangers, engaging in "conversations" (not even "negotiations") for a

little over two weeks. *See* pp. 17–19, above. This is not an auto-mechanic and her dental-hygienist neighbor orally agreeing to share the cost of a new fence between their backyards. It defies imagination that these sophisticated players would not paper a multi-million-dollar deal—if one had really existed. That's why Ahmed admitted at trial that the "conversations with Mr. Mehta did not get that far." *6RR145–46*.

Ahmed neither justifiably relied on nor was harmed by any material misrepresentation or failure to disclose. The recovery for fraud should be eliminated.

D. **Ahmed's damages model also is legally flawed**.

In answer to Question No. 2.1, the jury found that $586,000 would fairly and reasonably compensate Ahmed for his damages resulting from fraud. *6RR3513.* That finding is legally flawed because it hinges on what Ahmed called "benefit-of-the-bargain damages," *6CR3442*:

> The difference, if any between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of purchase by Mehta that Ahmed would have derived if not for the fraud found by you in answer to Question No. 1.

6CR3513.

This benefit-of-the-bargain damages measure matched his expert's sole damages model:

> Q. What were you asked to do in this case?

> A. To develop two opinions of market value, one on the West Oaks Mall property as of August [1]5 of 2017,[2] and—and then a second analysis, a valuation of the Macy's property as of November 17th—November 17, 2017.

5RR14. But benefit-of-the-bargain damages were not available here.

1. *Because an oral partnership agreement would have been terminable at will, Ahmed could not recover benefit-of-the-bargain damages for fraud.*

Rightly or wrongly, currently "Texas recognizes two measures of direct damages for common-law fraud: the out-of-pocket measure and the benefit-of-the-bargain measure. . . . [T]he benefit-of-the-bargain measure computes the difference between the value as represented and the value received." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). *Contra George v. Hesse*, 93 S.W. 107, 107–08 (Tex. 1906) (Texas permits recovery ***only*** of out-of-pocket damages for fraud).

But Texas never allows benefit-of-the-bargain damages for terminable-at-will relationships. As the Texas Supreme Court has explained:

> To allow a promise that is contingent on continued at-will employment to be enforced in a suit for fraud would mock the refusal of enforcement in a suit for breach of contract, making the non-existence of a contract action largely irrelevant, and would significantly impair the at-will rule.

[2] The record says August 5, but all other evidence and discovery says August 15, so we believe it is indisputably a transcription error by the court reporter.

Sawyer, 430 S.W.3d at 401-02.

Here, any promised partnership would have been terminable at will because there would have been only an oral partnership. *See, e.g.*, *Bohatch*, 977 S.W.2d at 545-47; *Gregan*, 355 S.W.3d at 230. Ahmed was adamant that at most he had an oral promise to become partners: "We have a promise. . . . Mr. Mehta has promised me that we [were] ***going to go*** into a partnership." *6RR173 (emphasis added).* Ahmed admitted that he had nothing in writing. Again, his testimony is so compelling that it bears repeating:

> Q. Is it true that you could have had a lawyer draft some kind of an agreement as to this prospective partnership that you were thinking about with Mr. Mehta? You could have done that?
>
> A. Yes.
>
> …
>
> Q. Did you not do that?
>
> A. No, sir.
>
> Q. No, you did not?
>
> A. No, I did not.

6RR145.

To end an oral partnership, all one partner has to do is essentially say that it's over. *See Sawyer*, 430 S.W.3d at 399-402. Ahmed admits that—at the latest—Mehta had conveyed by July 17 that they never would be partners. *6RR147.* At that time,

there were no partnership assets. *5RR244.* There was no corporate entity formed, no EIN, no bank accounts, no employees. Nothing. The Mall closing did not occur until a month later. *6RR78.* Because Ahmed's benefit-of-the-bargain damages finding is legally immaterial and contemplates a Mall value a month after Ahmed admits any partnership would have terminated, Ahmed cannot recover his alleged benefit-of-the-bargain damages from any fraud.

2. *When the alleged oral fraud concerns a matter within the Statute of Frauds, benefit-of-the-bargain damages are unavailable.*

Ahmed's fraud claim falls for another reason—the Statute of Frauds. Ahmed has repeatedly said the only purpose of the partnership was to purchase specific real estate:

> Ahmed respectfully requests that the Court declare that, based upon the facts of the parties dealings with one another, a partnership between Ahmed and Mehta was formed for the purpose of acquiring and developing commercial real estate. Finally, additionally and in the alternative, Ahmed requests that the Court impose a constructive trust and declare that Ahmed has a real property interest in both the Mall Parcels and the Macy's Parcels and to award him his interest therein.

2CR1086 ¶ 43.

In obtaining and maintaining two *lis pendens* for more than two years, Ahmed repeatedly said that the transaction involved real-estate: "the parties agreed to form a partnership with the intended purpose of acquiring certain parcels of the West

Oaks Mall." *1CR176*. This written admission was no casual slip of the finger. He reiterated: "**Ahmed's pleading asserts a direct claim for real property**." *1CR179 (bold in original).* And again Ahmed says that "he has asserted a claim for real property." *1CR180.* Ahmed added: "Ahmed's claim seeks to secure his interest in such real property assets and is, therefore, a claim for real property . . . ." *1CR181.* He concluded: "Ahmed clearly seeks a constructive trust on **the** subject matter and product of the alleged fraudulent conduct—**the** properties themselves . . . ." *1CR180 (bold in original).*

These judicial admissions about the nature of his own claims should be binding. *See generally Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000). Consistently with those continual admissions, Ahmed asked for and received a damages measure for fraud based on what he contends are "benefit-of-the-bargain damages": the difference in value between the purchase price of the Mall and its actual market value. *6CR3442, 3513.*

For more than two years, Ahmed contended that his *lis pendens* on the Mall was proper, *1CR24–27, 47, 63, 130–41*, and the trial court agreed. *1CR209*. But the only way the *lis pendens* could have been proper is if Ahmed had sought ownership of the Mall. *See, e.g.*, *In re Chong*, No. 14-19-00368-CV, 2019 WL 2589968, at *2 (Tex. App.—Houston [14th Dist.] June 25, 2019, orig. proceeding) (mem. op.); *In*

re Moreno, 14-14-00929-CV, 2015 WL 225049, at *2 (Tex. App.—Houston [14th Dist.] Jan. 15, 2015, no pet.) (mem. op.) (per curiam).

By seeking ownership of the Mall, however, Ahmed's claim violates the Statute of Frauds. Texas law is clear that "an interest in real estate cannot become a partnership asset unless the agreement concerning the property is in writing the same as any other contract concerning the sale of land." *Bakke Dev. Corp. v. Albin*, No. 04-15-00008-CV, 2016 WL 6088980, at *3 (Tex. App.—San Antonio Oct. 19, 2016, no pet.) (mem. op.) (citing *Carpenter v. Phelps,* 391 S.W.3d 143, 153 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).

As a transaction involving the purchase of specific real estate, the promised deal would fall within the Statute of Frauds. *See, e.g.*, *Pappas v. Gounaris*, 311 S.W.2d 644, 646-47 (Tex. 1958); *Leach v. Conoco, Inc.*, 892 S.W.2d 954, 960 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.). As this Court analyzes the issue: "In determining whether a fraud cause of action is barred by the Statute of Frauds, we must consider the following: (1) the relationship of the promise to the purpose of the statute . . . and (2) the nature of damages sought." *Leach*, 982 S.W.2d at 960. Ahmed's fraud claims fails both elements of the *Leach* analysis.

a. *Relationship of promise to purpose of statute*

Regarding the relationship of the promise to the statute, Ahmed says that Mehta promised to form a partnership specifically to buy the Mall:

> Q. If the partnership that you discussed with Mr. Mehta never actually acquired West Oaks Mall, did you agree you would have no relationship with him at all?
>
> A. Yes.
>
> Q. Right? It was dependent on the partnership acquiring that property?
>
> A. That is correct.

6RR147.

Ahmed never asserted any other purpose for the partnership. He never said it would be a general holding entity that would look for other prospects in the future. Its only reason for existing would be to acquire title to the Mall. That fits within the statute's requirement that an acquisition of an interest in real estate must be in writing to be enforceable. TEX. BUS. & COM. CODE § 26.01(b)(4).

After all, the purpose of the Statute of Frauds is to ***prevent*** fraudulent claims: "The Statute exists to prevent fraud and perjury in certain kinds of transactions by requiring agreements to be set out in a writing signed by the parties. But that purpose is frustrated and the Statute easily circumvented if a party can use a fraud claim

essentially to enforce a contract the Statute makes unenforceable." *Haase v. Glazner*, 62 S.W.3d 795, 799 (Tex. 2001).

Although Ahmed has, at times, tried to wriggle around this issue, his favorite authority is distinguishable on this very ground. In *Sewing v. Bowman*, 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd), this Court confronted a partnership agreement that "[m]erely . . . contemplate[d] transactions in real estate." This Court held that "an agreement to share in the profits of contemplated speculative deals in real estate simply does not involve the transfer of real estate, or an interest in real estate, within the meaning of the Statute of Frauds." *Id.* (cleaned up).

This case, however, is different. Ahmed did not seek the value of his partnership interest; instead, he was awarded the difference in value of the Mall itself at the time of conveyance, and (as mentioned above) he repeatedly asked the trial court to award him the real property itself: "Ahmed seeks a constructive trust on the Mall Parcels and the Macy's Parcels, both of which are the precise subject matter of Mehta's wrongdoing. . . . Ahmed's claim seeks to secure his interest in such real property assets and is, therefore, a claim for real property that supports the filing of a notice of lis pendens." *1CR181.*

Sewing was distinguished on this precise point when another court applied the Statute of Frauds to a partnership agreement for the conveyance of specific property in *Bakke Dev. Corp. v. Albin*, No. 04-15-00008-CV, 2016 WL 6088980, at *3 (Tex. App.—San Antonio Oct. 19, 2016, no pet.) (mem. op.) (citing *Carpenter v. Phelps*, 391 S.W.3d 143, 153 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).

In short, the alleged promise here—to form a partnership to acquire the Mall—falls within and is barred by the Statute of Frauds. Ahmed's recovery of benefit-of-the-bargain damages is therefore legally foreclosed.

b. *Nature of the damages sought*

Turning to the second element in *Leach*'s analysis, this Court observed: "The essential inquiry in determining whether a plaintiff is attempting to use a fraud claim to circumvent the Statute of Frauds is to examine the nature of the injury that he alleges." *Leach*, 892 S.W.2d at 960. This Court held that "a plaintiff's fraud cause of action is barred by the Statute of Frauds when he seeks to obtain the benefit of the bargain that he would have obtained had the promise been performed." *Id.*

That is the same thing Ahmed tries to do here, but his improper ploy fails. The supreme court later echoed that whenever a transaction is subject to the Statute of Frauds, benefit-of-the-bargain damages are unavailable. *See, e.g.*, *Haase*, 62 S.W.3d at 799. As the supreme court reasoned, the purpose of the Statute of Frauds is to

avoid these very type of swearing matches: "The purpose of the Statute of Frauds is to remove uncertainty, prevent fraudulent claims, and reduce litigation." *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 735 (Tex. 2018).

So "benefit-of-the-bargain damages are not available for fraud that induces a nonbinding contract:

> We therefore hold that the Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds.

Haase, 62 S.W.3d at 799 (footnote omitted). Rather, if there is a defect in contract formation, the only potentially viable measure of fraud damages is the out-of-pocket measure." *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). Because Ahmed has nothing in writing, he cannot recover his alleged benefit-of-the bargain damages. He could have sought reliance (out-of-pocket) damages, *see id.*, but chose not to—presumably because that measure was not sufficiently punitive to teach Mehta "a lesson." *6RR202.* Consequently, the fraud findings are legally immaterial and cannot support a judgment for Ahmed.

3. *Ahmed's proof of separate damages was deficient.*

Ahmed presented no other damages model or evidence. Everything was tied to the difference in value. Counsel for Mehta pointed this out in closing arguments:

> They have not put on any evidence of any loss suffered by Mr. Ahmed in any way. The only damage calculation that they have provided is this retrospective market value analysis. The—like—like I said, they've not said that he spent money, when he wants it back. They have not said that he suffer[ed] lost profits. They're not saying that there were any kind of damages that will compensate him for some loss that he's sustained.

7RR218.

The value of the Mall as purchased versus its retrospective value is not the value of a partnership. The damages model Ahmed presented has no relation to any true benefit-of-the-bargain theory from not having a partnership. The partnership never had any assets and never made any profits. In fact, Ahmed admits that any partnership (assuming one even existed) was over—at the latest—by July 17, 2017. *6RR147*. Therefore, July 17, not the Mall closing date of August 15, is the relevant day to value the partnership.

Ahmed's damage model is irrelevant because it calculates the value of the mall a full month after Ahmed admits his discussions with Mehta ended. As of July 17, the alleged partnership owned nothing. The closing on West Oaks Mall was not until a month later. *6RR148*. Just as often happens with the sale of residential homes, until the Purchase and Sale Agreement was actually signed a month later at the closing on August 15, 2017, the deal could have fallen through. Mehta had no binding contract with the Mall owner until the closing occurred on August 15. *See generally Gray &*

Co. Realtors v. Atl. Hous. Found., Inc., 228 S.W.3d 431, 435 (Tex. App.—Dallas 2007, no pet).

After July 17, Mehta would have owed Ahmed no duties other than winding up any existing partnership affairs. But, even assuming an oral partnership had briefly existed, there were no partnership assets to be distributed. *6RR143–44.* A take-nothing judgment is appropriate.

E. **Allowing Ahmed to recover for both fraud and another theory would constitute an impermissible double recovery**.

For both fraud and fiduciary duty, Ahmed asserted what he calls a benefit-of-the-bargain model: Ahmed's share of the difference between the price that Mehta paid for the property and the retrospective "fair market value" of the property. In both the jury charge for fraud and fiduciary duty, the jury was asked to calculate damages using the following instruction:

> "Consider the following element of damages, if any, and none other.
>
> - "The difference, if any, between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of purchase by Mehta that Ahmed would have derived if not for the fraud . . . ." *6CR3513.*
>
> - "The value of Ahmed's partnership interest, if any, as measured by the difference between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of the purchase by Mehta." *6CR3516.*

The jury's $1 million damages award for breach of fiduciary duty considered Ahmed's share of both the land and future profit in its calculation. *See* p. 80, below. Despite being given the same calculation instructions for fraud and partnership damages, the jury awarded only $586,000 for fraud, again inclusive of both land value and income from future profit.

And, because the jury awarded exactly the same number for unjust enrichment as for fraud, the jury was considering the same components of "fair market value" in its analysis, making its award of damages for unjust enrichment entirely duplicative of the other findings. Ahmed even told the jury that "the question on unjust enrichment . . . is . . . fraud." *7RR192*; *see also* p. 80, below. As a result, at most, Ahmed could recover under only one of this three theories.

F. At a minimum, the fraud claim would have to be remanded because of the *Casteel* doctrine.

Question 4 violates the *Casteel* doctrine by combining actual misrepresentations with concealment when there was no duty to disclose. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (submitting valid and invalid theories in the same question presumes reversible error). In fact, this Court has applied *Casteel* to reverse a case when no duty was commingled with duty. *Strebel v.*

Wimberly, 371 S.W.3d 267, 282 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (combining duty and no duty in same jury question requires reversal).

Here, the fraud theory is flawed by including a duty to disclose where none exists. Whether such a duty [to disclose information] exists is a question of law." *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 562 (Tex. 2019). "As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information." *Id.* (quoting *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001)). "Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship." *Id.* (quoting *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998)).

Although a few courts of appeals have relied on *Restatement (Second) of Torts* § 551 to impose a duty in other situations, the supreme court has repeatedly pointed out that it has "never expressly adopted" that section. *Id.* (citing *Bradford*, 48 S.W.3d at 755-56 ("We have never adopted [that] section") (citing *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 352 (Tex. 1995) (have "never embraced it as a rule of law in Texas.")).

Without an existing partnership agreement—which Ahmed admits did not exist because "the conversations with Mr. Mehta did not get that far," *6RR145–46*—Mehta owed him no duty of disclosure. Thus, by commingling an invalid legal

theory with a potentially available valid one, the jury finding is mortally wounded. *See Crown Life v. Casteel*, 22 S.W.3d at 388.

To avoid a retrial, Mehta made the proper no-duty and no-evidence objections. *7RR140–41. See Thota v. Young*, 366 S.W.3d 678, 689–91 (Tex. 2012) (no-duty and no-evidence objections suffice to preserve *Casteel* error). But those valid objections were erroneously overruled. *7RR141.* So even if there had been a fraudulent misrepresentation, the jury may have based its answer on a failure to disclose for which Mehta had no duty as a matter of law. Thus, Ahmed's fraud claim would—at a minimum—have to be remanded for a new trial under the *Casteel* doctrine.

We'll now turn to part 2—the flaws that would remain in the judgment even if the partnership finding somehow remained standing.

PART 2

IV. **Even if there had been an existing partnership, the judgment could not stand**.

This section of the brief assumes, contrary to all the evidence related at pages 30–49, above, that there was in fact an existing partnership between Ahmed and Mehta. Even if that had been the case, the trial court's judgment would remain flawed.

A. Because any oral partnership agreement would have been terminable at will, Ahmed should not recover benefit-of-the-bargain damages for breach of fiduciary duty.

The jury found that a partnership ***was*** formed to acquire and develop the Mall. *6CR3514.* But even if Ahmed and Mehta had in fact formed a partnership, it would have indisputably been only an oral partnership:

> Q. Is it true that you could have had a lawyer draft some kind of an agreement as to this prospective partnership that you were thinking about with Mr. Mehta? You could have done that?
>
> A. Yes.
>
> ….
>
> Q. Did you not do that?
>
> A. No, sir.
>
> Q. No, you did not?
>
> A. No, I did not.

6RR145-46.

While valid, an oral partnership is terminable at will. *E.g.*, *Bohatch*, 977 S.W.2d at 545–47; *Gregan*, 355 S.W.3d at 230. Like a romance, to end an at-will relationship one need say only that it's over. *See Sawyer*, 430 S.W.3d at 399–402. Ahmed admits that—at the latest—Mehta had indicated by July 17 that they would not be partners:

> Q. Just so we're very clear, as of July 17th 2017, you understood unequivocally that you would not be going forward with any type of partnership with Mr. Mehta, true?

A. That is true.

6RR147. So even assuming they had previously formed an oral partnership, it was terminated no later than July 17.

Partners would normally split the existing partnership assets and go their separate ways. But here, and at that time, there were no partnership assets to be divided, *6RR144*, presumably because the "conversations with Mr. Mehta did not get that far." *6RR145-46*. There was nothing even to wind up. *See In re Leal*, 360 B.R. 231, 235 (Bankr. S.D. Tex. 2007). On July 17 and until the Mall closing date in the middle of August, Mehta had only an accepted bid, but had no binding contract with the seller of the Mall. *6RR78.* Until closing on August 15, the transaction could have fallen through. *See generally Gray & Co.*, 228 S.W.3d at 434. And, after closing in the middle of August, the Mall belonged to Mehta Investments, Ltd.—not to any former, unnamed partnership involving Ahmed and not even to the "Mehta Group." *See Barnett v. Matz*, 483 S.W.2d 315, 319 (Tex. Civ. App.—Austin 1972, no writ) (after the initial effort to buy certain real-estate property in a partnership failed, the parties had no agreement that if one party later purchased the property, he would take title for both parties).

Instead, the award of $1,000,000 for breach of fiduciary duty rested on what Ahmed asserted was his "benefit of the bargain," *6CR3442*, ***as if***

- the partnership had never been terminated,
- Ahmed had contributed $10 million,
- the Mall had been sold to the partnership before Ahmed admits any partnership was over (by July 17),
- the Mall had been subsequently resold after August 15 for a profit, and
- Ahmed had subsequently cashed out of his share.

But the Mall was neither sold to the alleged Partnership nor resold after August 15 for a subsequent gain.

The charge instructed the jury to find:

> The value of Ahmed's partnership interest, if any, as measured by the difference between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of purchase by Mehta.

6CR3516. Texas law prohibits that recovery because terminable-at-will relationships do ***not*** permit the recovery of benefit-of-the-bargain damages, but only out-of-pocket expenses. *See, e.g.*, *Sawyer*, 430 S.W.3d at 400 ("[r]ecovery of expenses incurred in reliance on a fraudulent promise . . . has been allowed").

For these reasons, Ahmed cannot recover the benefit of his oral bargain—even assuming he had one. And, because he chose not to present any out-of-pocket damages, a take-nothing judgment should be rendered.

B. If there were a partnership, then unjust enrichment is unavailable.

As repeatedly mentioned, Mehta contends—as Ahmed admitted—that a partnership was never formed because the "conversations with Mr. Mehta did not get that far." *6RR145-46*. If this Court, however, were to conclude to the contrary, then the judgment awarding damages of $586,000 for unjust enrichment would automatically fall.

That's because an existing agreement would "foreclose any claims for unjust enrichment." *Fortune Prod Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). "Unjust enrichment claims are based on quasi-contract. . . . [W]hen a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory." *Id.* at 683-84.

As another court correctly said:

> We have been unable to locate any case in which an unjust enrichment remedy was allowed when the contested issue was governed by a valid contract. We hold that the trial court erred in submitting to the jury the questions regarding unjust enrichment and that the jury's awards pursuant to those questions are therefore improper.

Burlington N. R.R. v. Sw. Elec. Power Co., 925 S.W.2d 92, 98 (Tex. App.—Texarkana 1996), *aff'd*, 925 S.W.2d 92, 97–98 (Tex. 1996).

The current award of $586,000 in damages for unjust enrichment should be eliminated.

C. The judgment currently awards a double recovery.

Finally, as the judgment now stands, it awards Ahmed damages for breach of fiduciary duty and unjust enrichment, which violates the rule against double recoveries. Under the fiduciary-duty theory, Ahmed would recover all he claims as his share of the partnership profits. What remains would be—by definition—Mehta's share of the profits. Mehta could not have been unjustly enriched by retaining what Ahmed agrees is Mehta's share of the profits.

Thus, if the partnership theory were to survive—despite Ahmed's admissions to the contrary—there should be no second recovery of the same damages. For decades, Texas law prohibits double recoveries for the same injury. Termed the "one-satisfaction rule," this bedrock principle of Texas law does not look to how many theories of liability there are, but simply how many injuries:

> [T]he fundamental consideration in applying the one-satisfaction rule is whether the plaintiff has suffered a single, indivisible injury—not the causes of action the plaintiff asserts: "There can be but one recovery for one injury, and the fact that more than one defendant may have caused the injury or that there may be more than one theory of liability, does not modify this rule."

Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101, 107 (Tex. 2018) (quoting *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991)). "Thus, the rule applies both 'when the defendants commit the same act as well as when defendants

commit technically differing acts which result in a single injury.'" *Id.* (quoting *Stewart*, 822 S.W.2d at 7).

There should be no doubt that a double recovery has been awarded. As calculated by Ahmed's expert, the market value of the Mall at the time of the closing, was the sum of both:

(1) the land value $13,069,150; and

(2) the value of income from future profit $1,676,078.

5RR64, 66. The expert said a buyer would pay for the income stream plus the value of the land. *5RR65.* The total market value was therefore $14,745,000. *5RR67.*

Thus, under Ahmed's own analysis, the damages for breach of fiduciary duty already includes the income stream. Yet the only way he has tried to justify the award of $586,000 for unjust enrichment (and the same amount for fraud) is to say it represents income stream in addition to market value. *6CR3613–14.* As shown above, his own expert's testimony forecloses that argument. So the double recovery should not stand.

Conclusion and Prayer

As repeatedly demonstrated throughout this brief, Ahmed's real claim, if any, might have been for promissory estoppel. But those damages weren't enough for "teaching [Mehta] a lesson by putting him though this litigation," *6RR202*, while

his lawyer urged the jury simply to "do justice." *7RR169–70, 223.* This spitefulness explains why Mehta originally decided, within two weeks of meeting him, not to do any business with Ahmed: Mehta did not want to get into a deal with Ahmed because Ahmed had been in protracted litigation with previous partners. *5RR272–73.* Even so, any "lesson" has now been learned by the grief, attorney's fees, and damages suffered by Mehta while his properties were tied up by two *lis pendens* for several years. (And that ignores the waste of judicial resources.)

Mehta asks this Court now to apply the law to the evidence, to reverse the judgment, and to render a take-nothing judgment, or alternatively, to remand the case for a new trial. Mehta also asks for all other relief to which the appellants are entitled, including without limitation, modification of the judgment.

Respectfully submitted,

WINSTEAD PC

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Certificate of Compliance

Based on a word count run in Microsoft Word 2016, this brief contains 14,044 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Roger D. Townsend
Roger D. Townsend

Certificate of Service

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No. 01-20-00568-CV

IN THE FIRST COURT OF APPEALS

SUNIL KUMAR MEHTA AND MEHTA INVESTMENTS, LTD.,

Appellants,

v.

MOHAMMED AHMED,

Appellee.

On Appeal from the 295th Judicial District Court of Harris County, Texas
No. 2017-84654

APPENDIX TO BRIEF FOR APPELLANTS

TAB 1 FINAL JUDGMENT

TAB 2 CHARGE OF THE COURT

TAB 3 RELEVANT STATUTES

TAB 1

Final Judgment

4/17/2020 2:35:31 PM
Marilyn Burgess - District Clerk
Harris County
Envelope No: 42388119
By: KOSSIE, KENYA
Filed: 4/17/2020 2:35:31 PM
Pgs-2

CAUSE NO. 2017-84654

MOHAMMED AHMED	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
SUNIL KUMAR MEHTA and MEHTA INVESTMENTS, LTD.	§	
	§	
Defendants.	§	295TH JUDICIAL DISTRICT

FINAL JUDGMENT

On January 22, 2020, this case was called for trial. Plaintiff Mohammed Ahmed appeared and announced ready for trial. Defendants Sunil Kumar Mehta and Mehta Investments, Ltd. appeared and announced ready for trial.

After a jury was impaneled and sworn, it heard the evidence and arguments of counsel. In response to the jury charge, the jury made findings that the Court received, filed, and entered of record. The Charge of the Court and the verdict of the jury are incorporated for all purposes by reference in this Final Judgment. Mohammed Ahmed moved for judgment on the verdict. The Court hereby RENDERS judgment for Mohammed Ahmed and orders that Mohammed Ahmed recover the following items from Sunil Kumar Mehta and Mehta Investments, Ltd.:

a. Actual damages in the amount of $1,586,000.00;

b. Prejudgment interest on the actual damages awarded at the rate of 5.00% from December 21, 2017 until the date of this judgment in the amount of $190,319.96;

c. Court costs; and

d. Post-judgment interest on all of the above at the rate of 5%, compounded annually, from the date this judgment is rendered until all amounts are paid in full.

This judgment finally disposes of all claims and all parties and is appealable. All other relief not expressly granted in this judgment is denied.

SIGNED on this _____ day of _____, 2020.

Signed:
5/12/2020
2:49 PM

PRESIDING JUDGE

Tab 2

Charge of the Court

ORIGINAL p.14

FILED
Marilyn Burgess
District Clerk
JAN 29 2020
Time: ____
Harris County, Texas
By ____
Deputy

CAUSE NO. 2017-84654

MOHAMMED AHMED	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
SUNIL KUMAR MEHTA and	§	
MEHTA INVESTMENTS, LTD.	§	
	§	
Defendants.	§	295TH JUDICIAL DISTRICT

CHARGE OF THE COURT

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. I have given you a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions presented to you.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

RECORDER'S MEMORANDUM
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at the time of imaging

2. Base your answers to the questions below only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence. Whenever a questions requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence.

   The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. A fact may be established by direct evidence or circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by a witness who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

8. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

9. Do not answer questions by drawing straws or by any method of chance.

10. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

11. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

12. The answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

DEFINITIONS

In this charge these terms have the following meaning:

1. "Ahmed" means plaintiff Mohammed Ahmed.

2. "Mehta" means defendant Sunil Mehta.

3. "Mehta Investments" means defendant Mehta Investments, Ltd.

4. "West Oaks Mall" means the parcel of the West Oaks Mall that was for sale in June 2017.

5. "Macy's" means the parcel containing the Macy's that was for sale in October 2017.

Question No. 1

Did Mehta commit fraud against Ahmed?

Fraud occurs when:

(1) A party makes a material misrepresentation, and

(2) the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

(3) the misrepresentation is made with the intention that it should be acted on by the other party, and

(4) the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a false statement of fact, or a promise of future performance made with an intent, at the time the promise was made, to not perform as promised.

Fraud also occurs when:

(1) a party fails to disclose a material fact within the knowledge of that party, and

(2) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and

(3) the party intends to induce the other party to take some action or refrain from acting by failing to disclose the fact, and

(4) the other party suffers injury as a result of action without knowledge of the undisclosed fact.

Answer "Yes" or "No" as to each of the following:

1. West Oaks Mall: Yes
2. Macy's: NO

If you answered "Yes" to Question No. 1, then answer the applicable question(s) below. Otherwise, do not answer the following question.

Question No. 2

What sum of money, if any, paid now in cash, would fairly and reasonably compensate Ahmed for his damages, if any, that resulted from the fraud found by you in answer to Question No. 1.

Consider the following element of damages, if any, and none other.

The difference, if any, between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of purchase by Metha that Ahmed would have derived if not for the fraud found by you in answer to Question No. 1.

The difference, if any, between the purchase price of the Macy's and the fair market value of the Macy's on the date of purchase by Metha that Ahmed would have derived if not for the fraud found by you in answer to Question No. 1.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer each separately in dollars and cents for damages, if any.

1. Damages for fraud related to the West Oaks Mall.

Answer: $ 586,000.00

2. Damages for fraud related to the Macy's.

Answer: $ 0

Question No. 3

Did Ahmed and Mehta form a partnership to acquire and develop the West Oaks Mall, the Macy's, or both?

An association of two or more persons to carry on business for profit as owners creates a partnership, regardless of whether they intend to create a partnership, or the association is called a "partnership," "joint venture," or other name.

A written agreement to form a partnership is not required. The parties' intent to engage in the conduct that creates a partnership determines if a partnership exists between the parties.

Factors indicating that parties have formed a partnership include:

(1) right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share losses of the business;

(5) agreement to contribute or contributing money or property to the business.

Not all of these factors must be established for a partnership to exist. The issue of whether a partnership exists should be decided considering all of the evidence that bears on these factors.

Answer "Yes" or "No" as to each of the following:

1. West Oaks Mall: yes

2. Macy's: No

If you answered "Yes" to any part of Question No. 3, answer this question. Otherwise, do not answer this question.

Question No. 4

Did Mehta fail to comply with his fiduciary duty to Ahmed as to the West Oaks Mall, the Macy's, or both?

Because of the partnership that you have found between Ahmed and Mehta in answer to Question No. 3, Mehta owed Ahmed a fiduciary duty. To prove that Mehta complied with his fiduciary duty, Ahmed must show:

1. the transactions in question were not fair and equitable to Ahmed; or
2. Mehta did not make reasonable use of the confidence that Ahmed placed in him; or
3. Mehta failed to act in the utmost good faith or exercised the most scrupulous honesty towards Ahmed; or
4. Mehta placed his own interests before Ahmed's, used the advantage of his position to gain any benefit for himself at the expense of Ahmed, or placed himself in a position where his self-interest might conflict with his obligations as a fiduciary; or
5. Mehta failed to fully and fairly disclosed all important information to Ahmed concerning the transactions.

Answer "Yes" or "No" as to each of the following:

1. West Oaks Mall: Yes
2. Macy's: No

If you answered "Yes" to any part of Question No. 4, answer the applicable question(s) below. Otherwise, do not answer this question.

Question No. 5

What ~~some~~ sum of money, if any, if paid now in cash, would fairly and reasonably compensate Ahmed for his damages, if any, that were proximately caused by the conduct found by you in answer to Question No. 4?

Consider the following element of damages, if any, and none other.

The value of Ahmed's partnership interest, if any, as measured by the difference between the purchase price of the West Oaks Mall and the fair market value of the West Oaks Mall on the date of purchase by Metha.

The value of Ahmed's partnership interest, if any, as measured by the difference between the purchase price of the Macy's and the fair market value of the Macy's on the date of purchase by Metha.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

1. Damages related to the West Oaks Mall.

Answer: $ 1,000,000.00

2. Damages related to the Macy's.

Answer: $ 0

Question No. 6

Was Mehta unjustly enriched by his actions, if any, against Ahmed?

> Unjust enrichment is an equitable principle requiring one who receives benefits unjustly to make restitution for those benefits, and is typically found where one person obtained a benefit from another by fraud, duress, or taking of undue advantage.

Answer "Yes" or "No":

Answer: Yes

If you answered "Yes" to Question No. 6, answer this question. Otherwise, do not answer this question.

Question No. 7

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Ahmed to prevent Mehta from being unjustly enriched by his conduct.

Answer in dollars and in cents, if any.

Answer: $ 586,000.00

If you answered "Yes" to Question No. 4, answer this question. Otherwise, do not answer this question.

Question No. 8

Was Metha's breach of fiduciary duty excused?

Mehta's breach of fiduciary duty is excused if the following circumstances occurred:

1. Mohammad Ahmed

   a. by words or conduct made a false representation or concealed material facts, and

   b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

   c. with the intention that Mehta would rely on the false representation or concealment in acting or deciding not to act; and

2. Sunil Mehta

   a. did not know and had no means of knowing the real facts, and

   b. relied to his detriment on the false representation or concealment of material facts.

Metha's breach of fiduciary duty may also be excused based on silence or inaction, rather than on affirmative misrepresentations, if one under a duty to speak or act has by his silence or inaction misled the opposing party to his detriment.

Failure to comply by Metha is excused if compliance is waived by Ahmed. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No" as to each of the following:

1. West Oaks Mall: NO
2. Macy's: _____

Instructions For The Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has the following duties:

   a. Have the complete charge read aloud if it will be helpful to your deliberations.
   b. Preside over your deliberations. This means the presiding juror will manage the discussions, and see that you follow these instructions.
   c. Give written questions or comments to the bailiff who will give them to the judge.
   d. Write down the answers you agree on.
   e. Get the signatures for the verdict certificate.
   f. Notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict. If 11 jurors agree on every answer, those 11 jurors sign the verdict. If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 or 11 who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not, please tell me now.

D. Rich

JUDGE PRESIDING

January 28, 2020

VERDICT CERTIFICATE

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us..

_____ _____

Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

✓ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE	NAME PRINTED
1.	David Kerly
2.	Cherry Cook-Scott
3.	EDWARD E. TISDEL
4.	KARIM BOUDAH
5.	Kari Lafleur
6.	Reginald Craver
7.	Teresa Casillas
8.	Gayle DuBroc
9.	Joseph Cruz
10.	Andrew Manner
11.	

Tab 3

Relevant Statutes

V.T.C.A., Bus. & C. § 26.01

§ 26.01. Promise or Agreement Must Be in Writing

Effective: September 1, 2005
Currentness

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

(1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;

(2) a promise by one person to answer for the debt, default, or miscarriage of another person;

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

(4) a contract for the sale of real estate;

(5) a lease of real estate for a term longer than one year;

(6) an agreement which is not to be performed within one year from the date of making the agreement;

(7) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;

(B) an oil or gas royalty;

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(C) minerals; or

(D) a mineral interest; and

(8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

Credits

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1. Amended by Acts 1977, 65th Leg., p. 2053, ch. 817, § 21.01, eff. Aug. 29, 1977; Acts 1987, 70th Leg., ch. 551, § 1, eff. Aug. 31, 1987; Acts 2005, 79th Leg., ch. 187, § 1, eff. Sept. 1, 2005.

Notes of Decisions (2240)

V. T. C. A., Bus. & C. § 26.01, TX BUS & COM § 26.01
Current through the end of the 2019 Regular Session of the 86th Legislature

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V.T.C.A., Business Organizations Code § 152.052

§ 152.052. Rules for Determining if Partnership is Created

Effective: January 1, 2006
Currentness

(a) Factors indicating that persons have created a partnership include the persons':

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

(b) One of the following circumstances, by itself, does not indicate that a person is a partner in the business:

(1) the receipt or right to receive a share of profits as payment:

(A) of a debt, including repayment by installments;

(B) of wages or other compensation to an employee or independent contractor;

(C) of rent;

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(D) to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;

(E) of interest or other charge on a loan, regardless of whether the amount varies with the profits of the business, including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or

(F) of consideration for the sale of a business or other property, including payment by installments;

(2) co-ownership of property, regardless of whether the co-ownership:

(A) is a joint tenancy, tenancy in common, tenancy by the entirety, joint property, community property, or part ownership; or

(B) is combined with sharing of profits from the property;

(3) the right to share or sharing gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or

(4) ownership of mineral property under a joint operating agreement.

(c) An agreement by the owners of a business to share losses is not necessary to create a partnership.

Credits
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

Notes of Decisions (169)

V. T. C. A., Business Organizations Code § 152.052, TX BUS ORG § 152.052
Current through the end of the 2019 Regular Session of the 86th Legislature

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V.T.C.A., Business Organizations Code § 152.203

§ 152.203. Rights and Duties of Partner

Effective: January 1, 2006
Currentness

(a) Each partner has equal rights in the management and conduct of the business of a partnership. A partner's right to participate in the management and conduct of the business is not community property.

(b) A partner may use or possess partnership property only on behalf of the partnership.

(c) A partner is not entitled to receive compensation for services performed for a partnership other than reasonable compensation for services rendered in winding up the business of the partnership.

(d) A partner who, in the proper conduct of the business of the partnership or for the preservation of its business or property, reasonably makes a payment or advance beyond the amount the partner agreed to contribute, or who reasonably incurs a liability, is entitled to be repaid and to receive interest from the date of the:

(1) payment or advance; or

(2) incurrence of the liability.

Credits
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

Notes of Decisions (18)

V. T. C. A., Business Organizations Code § 152.203, TX BUS ORG § 152.203
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V.T.C.A., Business Organizations Code § 152.801

§ 152.801. Liability of Partner

Effective: September 1, 2011
Currentness

(a) Except as provided by the partnership agreement, a partner is not personally liable to any person, including a partner, directly or indirectly, by contribution, indemnity, or otherwise, for any obligation of the partnership incurred while the partnership is a limited liability partnership.

(b) Sections 2.101(1), 152.305, and 152.306 do not limit the effect of Subsection (a) in a limited liability partnership.

(c) For purposes of this section, an obligation is incurred while a partnership is a limited liability partnership if:

(1) the obligation relates to an action or omission occurring while the partnership is a limited liability partnership; or

(2) the obligation arises under a contract or commitment entered into while the partnership is a limited liability partnership.

(d) Subsection (a) does not affect:

(1) the liability of a partnership to pay its obligations from partnership property;

(2) the liability of a partner, if any, imposed by law or contract independently of the partner's status as a partner; or

(3) the manner in which service of citation or other civil process may be served in an action against a partnership.

(e) This section controls over the other parts of this chapter and the other partnership provisions regarding the liability of partners of a limited liability partnership, the chargeability of the partners for the obligations of the partnership, and the obligations of the partners regarding contributions and indemnity.

Credits
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006. Amended by Acts 2009, 81st Leg., ch. 84, § 47, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 139 (S.B. 748), § 46, eff. Sept. 1, 2011.

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Notes of Decisions (8)

V. T. C. A., Business Organizations Code § 152.801, TX BUS ORG § 152.801
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V.T.C.A., Business Organizations Code § 153.103

§ 153.103. Actions Not Constituting Participation in Business for Liability Purposes

Effective: September 1, 2011
Currentness

For purposes of this section and Sections 153.102, 153.104, and 153.105, a limited partner does not participate in the control of the business because the limited partner has or has acted in one or more of the following capacities or possesses or exercises one or more of the following powers:

(1) acting as:

(A) a contractor for or an officer or other agent or employee of the limited partnership;

(B) a contractor for or an agent or employee of a general partner;

(C) an officer, director, or stockholder of a corporate general partner;

(D) a partner of a partnership that is a general partner of the limited partnership; or

(E) a member or manager of a limited liability company that is a general partner of the limited partnership;

(2) acting in a capacity similar to that described in Subdivision (1) with any other person that is a general partner of the limited partnership;

(3) consulting with or advising a general partner on any matter, including the business of the limited partnership;

(4) acting as surety, guarantor, or endorser for the limited partnership, guaranteeing or assuming one or more specific obligations of the limited partnership, or providing collateral for borrowings of the limited partnership;

(5) calling, requesting, attending, or participating in a meeting of the partners or the limited partners;

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(6) winding up the business of a limited partnership under Chapter 11 and Subchapter K [1] of this chapter;

(7) taking an action required or permitted by law to bring, pursue, settle, or otherwise terminate a derivative action in the right of the limited partnership;

(8) serving on a committee of the limited partnership or the limited partners; or

(9) proposing, approving, or disapproving, by vote or otherwise, one or more of the following matters:

(A) the winding up or termination of the limited partnership;

(B) an election to reconstitute the limited partnership or continue the business of the limited partnership;

(C) the sale, exchange, lease, mortgage, assignment, pledge, or other transfer of, or granting of a security interest in, an asset of the limited partnership;

(D) the incurring, renewal, refinancing, or payment or other discharge of indebtedness by the limited partnership;

(E) a change in the nature of the business of the limited partnership;

(F) the admission, removal, or retention of a general partner;

(G) the admission, removal, or retention of a limited partner;

(H) a transaction or other matter involving an actual or potential conflict of interest;

(I) an amendment to the partnership agreement or certificate of formation;

(J) if the limited partnership is qualified as an investment company under the federal Investment Company Act of 1940 (15 U.S.C. Section 80a-1 et seq.), as amended, any matter required by that Act or the rules and regulations of the Securities and Exchange Commission under that Act, to be approved by the holders of beneficial interests in an investment company, including:

(i) electing directors or trustees of the investment company;

(ii) approving or terminating an investment advisory or underwriting contract;

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(iii) approving an auditor; and

(iv) acting on another matter that that Act requires to be approved by the holders of beneficial interests in the investment company;

(K) indemnification of a general partner under Chapter 8 or otherwise;

(L) any other matter stated in the partnership agreement;

(M) the exercising of a right or power granted or permitted to limited partners under this code and not specifically enumerated in this section; or

(N) the merger, conversion, or interest exchange with respect to a limited partnership.

Credits

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006. Amended by Acts 2007, 80th Leg., ch. 688, § 121, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 84, § 51, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 139 (S.B. 748), § 52, eff. Sept. 1, 2011.

Notes of Decisions (1)

Footnotes

1 V.T.C.A., Business Organizations Code § 153.501 et seq.

V. T. C. A., Business Organizations Code § 153.103, TX BUS ORG § 153.103
Current through the end of the 2019 Regular Session of the 86th Legislature

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