**Opinion issued June 30, 2022**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00461-CV**

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**JETALL COMPANIES, INC. AND ALI CHOUDHRI, Appellants**

**V.**

**JEFFERSON SMITH, L.L.C. AND JOHN QUINLAN, Appellees**

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**On Appeal from the 215th District Court**
**Harris County, Texas**
**Trial Court Case No. 2018-69591**

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## MEMORANDUM OPINION

This appeal arises from the failed sale of a skyscraper in downtown Houston. The trial court granted partial summary judgment in favor of appellee Jefferson Smith, L.L.C., concluding that a two-page letter of intent ("LOI") signed by

Jefferson Smith and appellant Jetall Companies, Inc., was not an enforceable contract to sell the building. The trial court then granted final summary judgment in favor of appellees Jefferson Smith and John Quinlan (collectively "Jefferson Smith") on the parties' remaining claims.

Appellants Jetall Companies, Inc. and Ali Choudhri (collectively, "Jetall") challenge both summary judgment orders on appeal. In three issues, Jetall argues that (1) the trial court erred by entering the first summary judgment order because the LOI is enforceable; (2) the trial court erred by entering the second summary judgment order based on its prior conclusion that the LOI is unenforceable; and (3) the trial court erred by entering the second summary judgment order on Jetall's claims for fraud, unjust enrichment, and quantum meruit on grounds unrelated to the unenforceability of the LOI. We affirm.

## Background

Quinlan is the principal of Jefferson Smith, L.L.C., which owns a building at 500 Jefferson Street in downtown Houston ("500 Jefferson"). Choudhri is the principal of Jetall. In December 2017, Jetall sent Jefferson Smith a two-page LOI offering to purchase 500 Jefferson. Quinlan, on behalf of Jefferson Smith, signed the LOI as "accepted" and returned it to Jetall.

According to the terms of the LOI, Jetall would purchase the "land, buildings, personal property, leases and contracts comprising" 500 Jefferson for a purchase

price of $20 million and a $500,000 earnest money payment. The earnest money provision stated that the deposit was non-refundable and "subject to title, site environmental & survey only." The LOI included a sixty-day inspection period and a deadline to close forty-five days after the inspection period expired, although Jetall could choose to "close any time prior to [the] end of Inspections." The LOI stated that Jefferson Smith would "deliver [the] property free and clear of any and all liens or unencumbered [sic] and any defeasances, cost shall be borne by" Jefferson Smith. The LOI also apportioned closing costs, brokerage fees, and proration of rents, property taxes, and other operating expenses on the closing date to the parties. The LOI expressly stated that it "sets out the principal business terms of the purchase transactions." Above the signature lines, the LOI stated the following:

> Signature by [Jefferson Smith] in the space provided will indicate acceptance of the terms and conditions expressed herein. Return of an executed counterpart to this letter will constitute authorization for [Jetall] and [Jefferson Smith] to proceed to the fruition of the purchase and sale of the properties.

Both parties signed the LOI.

Soon thereafter, Jetall began inspecting 500 Jefferson. Jetall discovered asbestos in the building and obtained a remediation estimate of $6 million. Jetall also discovered that the building was 90% vacant.

In February 2018, Jefferson Smith sent Jetall a draft purchase and sale agreement ("PSA") for the sale of 500 Jefferson. This fifteen-page PSA included the

terms from the LOI as well as numerous additional terms. The parties exchanged six draft PSAs between February and June 2018, none of which the parties ever signed. In each PSA, the terms set forth in the LOI remained substantially similar with a few exceptions. For example, the third and fourth draft PSAs exchanged in April and May 2018 reduced the purchase price to $17 million. The PSAs did not use the term "earnest money," but they did require a $500,000 non-refundable deposit. The deadline to close in the PSAs changed several times. The PSAs first stated a closing date of forty-five days after the PSA became effective. However, this date changed in later drafts to forty-five business days after the PSA became effective and finally to a specific date. The deadline for inspections also changed in the PSAs to 5:00 p.m. on the date of closing. Later drafts stated that Jetall had completed its inspections.

In April 2018, Jetall submitted a new LOI to Jefferson Smith offering to purchase 500 Jefferson for $17 million. Jefferson Smith did not sign this LOI. Around this time, Jefferson Smith signed a tenant to a lucrative lease at 500 Jefferson, which increased the value of the building. The parties dispute whether Jefferson Smith or Jetall was responsible for obtaining the tenant. In July 2018, Jefferson Smith notified Jetall by email that it would no longer pursue negotiations regarding the sale of 500 Jefferson. But Jefferson Smith informed Jetall that it was willing to contact Jetall if it decided to sell the property in the future.

In October 2018, Jefferson Smith sued Jetall and Choudhri. Jefferson Smith sought a declaratory judgment that Jetall had repudiated the LOI, which expired on its own terms in April 2018 when the sale did not close. Jefferson Smith also asserted a cause of action for fraud against Choudhri, alleging that he never intended to perform under the executed LOI, but he instead used the LOI "to lock [500 Jefferson] down" and "then use that as leverage to renegotiate the terms of the transaction." Jefferson Smith also alleged that Choudhri never paid any earnest money.

Jetall and Choudhri filed an answer, asserting counterclaims against Jefferson Smith and third-party claims against Quinlan for breach of contract and fraud. Jetall also sought a temporary injunction, which the trial court denied.

Jefferson Smith moved for partial summary judgment on its claim for declaratory relief. It argued that the LOI was not enforceable because (1) it lacked several essential and material terms; (2) the parties did not intend to be bound by it; and (3) any assignment of leases in the LOI violated the statute of frauds. Jefferson Smith supported its motion with numerous exhibits, including a declaration by Quinlan, the December 2017 signed LOI and the April 2018 unsigned LOI, the six draft PSAs, excerpts from the depositions of Choudhri and Jetall's corporate representative, and email and text message exchanges between Choudhri and Quinlan. It also attached the deed conveying 500 Jefferson from the previous owner

to Jefferson Smith as well as an easement agreement between Jefferson Smith and the previous owner.

Jetall filed a response to the motion disputing Jefferson Smith's argument that the LOI did not contain all the essential terms of the parties' contract for the purchase of 500 Jefferson. It contended that the LOI was at most ambiguous and thus created fact issues. Jetall supported its response with Choudhri's declaration, in which Choudhri averred that the parties entered into a binding agreement to sell 500 Jefferson for $20 million. Choudhri denied that the parties lacked a binding agreement, and he stated that the parties agreed to all material terms in the executed LOI. He also stated that he "tendered the earnest money to Quinlan several times and each time [Quinlan] gave an excuse as to why he wanted it in a different form." He also stated that he "worked to get new tenants to the building increasing its value significantly by 8 figures" before "Quinlan moved to breach the agreement to sell the building to be able to keep the increase in value."

Jefferson Smith filed a reply as well as objections to Choudhri's declaration on the ground that the statements in the declaration were conclusory.[1] The trial court

[1] Jefferson Smith contends on appeal that the trial court sustained its objections to Choudhri's declaration in a signed, written order. However, the record on appeal does not include this order. *See* TEX. R. APP. P. 33.1(a)(2) (requiring, as prerequisite to presenting complaint on appeal, that record show trial court ruled or refused to rule on objection). We discuss Jefferson Smith's objections below.

granted Jefferson Smith's motion for partial summary judgment on its declaratory relief claim, effectively concluding that the signed LOI was not enforceable.

After the trial court entered the interlocutory summary judgment order, Jefferson Smith moved for summary judgment on all of Jetall's counterclaims and third-party claims. Jetall amended its petition to add causes of action for promissory estoppel, unjust enrichment, and quantum meruit in addition to its claims for breach of contract and fraud. Jefferson Smith filed an amended motion for summary judgment seeking dismissal of all of Jetall's claims asserted in its amended petition. Jefferson Smith primarily argued that Jetall's remaining claims relied on the existence of an enforceable contract, but the trial court had already determined that the LOI was unenforceable. Jefferson Smith asserted other grounds for summary judgment on Jetall's claims for fraud, unjust enrichment, and quantum meruit. Jetall filed a response, and Jefferson Smith filed a reply.

The trial court signed an order granting summary judgment in favor of Jefferson Smith dismissing Jetall's claims. Jefferson Smith filed a motion to sever the dismissed claims, which the trial court granted.

Jetall filed a motion for new trial. It argued that, based upon the record evidence, the issue of whether the executed LOI contained all essential and material terms presented a question of fact requiring resolution by a jury, not a question of law for the trial court to decide in summary judgment proceedings. Jetall filed a

second motion for new trial arguing that the trial court erred by concluding that the LOI was not enforceable. The trial court did not rule on the motions for new trial, which were overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). This appeal followed.

## First Summary Judgment Order

In its first issue, Jetall challenges the trial court's first, interlocutory summary judgment order determining that the LOI was unenforceable. Jetall contends that the two-page LOI is an enforceable agreement to sell 500 Jefferson because it contains all the essential and material terms of the parties' agreement, a fact issue exists regarding whether the parties intended to be bound by the LOI, and the LOI complied with the statute of frauds in its assignment of leases.

### A. Standard of Review

We review a trial court's ruling on a motion for summary judgment under a de novo standard of review. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018). To prevail, the movant must show that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Tarr*, 556 S.W.3d at 278. We may consider the evidence, including affidavits, as well as the pleadings on file at the time of the summary judgment hearing. TEX. R. CIV. P. 166a(c).

In our summary judgment review, we must indulge every reasonable inference in favor of the nonmovant, take all evidence favorable to the nonmovant as true, and resolve any doubts in favor of the nonmovant. *Bauer v. Gulshan Enters., Inc.*, 617 S.W.3d 1, 20 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (op. on reh'g). If the trial court grants summary judgment without specifying the grounds for its ruling, we must uphold the trial court's judgment if any of the grounds asserted in the motion are meritorious. *Id.*

## B. Governing Law

### 1. Elements of a Contract

The elements of an enforceable contract are: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 318 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). A letter of intent to enter into a future agreement can itself be an enforceable contract if it satisfies the elements of an enforceable contract. *John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 19 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). While the enforceability of an agreement is generally a question of law, the issue of whether parties intended to enter into a binding agreement is usually a fact issue. *Gaede v. SK Invs., Inc.*, 38 S.W.3d 753, 757–58 (Tex. App.—Houston [14th Dist.] 2001, pet.

denied); *Meru v. Huerta*, 136 S.W.3d 383, 390 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.); *see Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988) (stating that parties' intent to enter into binding contract is generally question of fact, although courts may determine that parties did not intend to be bound to contract as matter of law).

"Meeting of the minds" refers to the parties' mutual understanding and assent regarding the subject matter and the essential terms of the agreement. *Izen*, 322 S.W.3d at 318. "To be enforceable, a contract must address all of its essential and material terms with 'a reasonable degree of certainty and definiteness.'" *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (Tex. 1955)). The terms of the contract must be sufficiently definite to confirm that the parties intended to be bound, to enable a court to understand the parties' obligations, and to provide an appropriate remedy if the terms are breached. *Id.*; *see T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("In order to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook. . . . Where an essential term is left open for future negotiation, there is no binding contract."). The material and essential terms of a contract are those that parties would reasonably regard as "vitally important ingredients" of their bargain. *Barrow-Shaver*

*Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 481 (Tex. 2019) (quoting *Fischer*, 479 S.W.3d at 237).

Non-essential terms, by contrast, need not be addressed with the same certainty and definiteness in order for a contract to be enforceable. *Id.*; *Fischer*, 479 S.W.3d at 237. The parties may leave such non-essential matters open for further negotiation. *Barrow-Shaver*, 590 S.W.3d at 481; *Burrus v. Reyes*, 516 S.W.3d 170, 179 (Tex. App.—El Paso 2017, pet. denied) ("Texas law confers upon the parties [to a contract] the ability to agree to leave non-essential matters open for later negotiation."). The Texas Supreme Court has repeatedly stated that the material terms of a contract are to be determined on a case-by-case basis, and each contract should be considered separately to determine its material terms. *E.g.*, *Barrow-Shaver*, 590 S.W.3d at 479; *Fischer*, 479 S.W.3d at 237.

**2. Interpretation of Contracts**

When interpreting a contract, courts "look to the language of the parties' agreement." *Barrow-Shaver*, 590 S.W.3d at 479. We must give effect to the parties' intentions as expressed in the contract. *Id.*; *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019) (stating that courts' primary objective when construing contracts is "to give effect to the written expression of the parties' intent"). Several fundamental principles of contract interpretation guide our analysis.

First, we may not rewrite the parties' contract or add to its language. *Fischer*, 479 S.W.3d at 239. We must construe the contract as a whole and evaluate the entire agreement to determine what purposes the parties had in mind when they signed it. *Id.* "A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.'" *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)).

Second, terms of a contract are sufficiently definite when the language of the terms are reasonably susceptible to a particular interpretation. *Fischer*, 479 S.W.3d at 239. Texas law disfavors forfeitures of contract, and courts construe contracts to avoid them. *Id.* Thus, if a contract is susceptible to two constructions, one which would make the contract valid and the other invalid, the former will prevail. *Id.*

Third, courts may reasonably imply terms to avoid interpreting a contract in a manner that would result in its forfeiture. *Id.* Common usage and reasonable implications of fact may clarify terms that initially appear incomplete or uncertain. *Id.* Usage of trade and the course of dealing between the parties can also make contract terms definite. *Id.*

Finally, "[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed." *Id.* at 240 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 34(2) (1981)). When "the

actions of the parties . . . show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon[,] . . . courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain." *Id.* at 239 (quoting Restatement (Second) of Contracts § 33 cmt. a). The law favors finding terms of an agreement sufficiently definite to enforce. *Id.* at 240.

If the language in a contact can be given a definite or certain legal meaning, then courts construe the contract as a matter of law. *Barrow-Shaver*, 590 S.W.3d at 479. But if the contractual language is susceptible to two or more reasonable interpretations, then the contract is ambiguous, which raises a fact issue regarding the parties' intent. *Id.*; *Title Res. Guar. Co. v. Lighthouse Church & Ministries*, 589 S.W.3d 226, 232 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating that ambiguity in contract arises only after application of established rules of interpretation leaves contractual language susceptible to more than one reasonable meaning); *see E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc.*, 242 S.W.3d 117, 122 (Tex. App.—El Paso 2007, no pet.) ("There is a significant legal difference between a contract's silence—i.e., its failure to address a particular issue—and the presence of an ambiguity in the contract language."). Only if a contract is ambiguous may courts consider the parties' interpretations and admit extraneous evidence to

prove the true meaning of the contractual language. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam).

### C. Essential and Material Terms of the Contract

The parties primarily dispute whether the LOI contains all the essential and material terms of the parties' agreement to sell 500 Jefferson. Specifically, the parties dispute whether the earnest money provision in the LOI is addressed with sufficient certainty and definiteness to constitute an enforceable contract. They also dispute whether certain terms that are not included in the LOI are essential and material to their agreement, including the type of deed to be conveyed, permitted exceptions for easements and rights of way, which party bears the risk of loss, and identification of the leases and contracts purportedly assigned under the LOI. Jetall contends that, at best, the LOI is ambiguous, which raises a question of fact precluding summary judgment.[2]

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[2] Jefferson Smith contends that Jetall waived its ambiguity argument by failing to raise it in the trial court. In its response to Jefferson Smith's motion for partial summary judgment, Jetall characterized Jefferson Smith's arguments as challenging ambiguities in the LOI terms. Jetall argued (albeit in a footnote), "An ambiguous contract is a matter of contract construction and will not support summary judgment because it creates a question of fact about the parties' intent." Jetall supported this argument with a citation to *Sifuentes v. Carrillo*, 982 S.W.2d 500, 504 (Tex. App.—San Antonio 1998, pet. denied), which states that the trial court must determine whether contractual language is ambiguous and, if so, interpretation of the language is a fact issue. Jetall argued that the terms of the LOI are not ambiguous but, if they were ambiguous, "that issue would go to the meaning not the enforceability of the contract." Because Jetall expressly presented its ambiguity arguments to the trial court, *see* TEX. R. CIV. P. 166a(c), we conclude that it did not waive these arguments.

### 1. The Face of the LOI

We begin our interpretation of the signed LOI by considering its language to give effect to the parties' intentions as expressed in the LOI. *See Barrow-Shaver*, 590 S.W.3d at 479; *Pathfinder Oil*, 574 S.W.3d at 888. The LOI expressly states that it "sets out the principal business terms of the purchase transactions." It identifies the buyer and the seller, the address of the property, a purchase price of $20 million, a non-refundable earnest money provision of $500,000, and deadlines for inspections and closings. The LOI also assigns payment of the closing costs and brokerage fees to each party and includes a provision for the proration of rents, property taxes, and other operating expenses on the day of closing. Courts have determined that many of these items are essential and material to a real property sales contract, particularly the price, the description of the property, and the seller's signature. *See Naumann v. Johnson*, No. 03-19-00380-CV, 2021 WL 2212725, at *3 (Tex. App.—Austin June 1, 2021, no pet.) (mem. op.) (citing cases); *Rus-Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 927–28 (Tex. App.—Tyler 2007, no pet.). Nevertheless, we review contracts on a case-by-case basis, and the parties dispute whether several essential terms are either too indefinite or missing from the LOI rendering it unenforceable. *See Barrow-Shaver*, 590 S.W.3d at 479; *Fischer*, 479 S.W.3d at 237.

### 2. Earnest Money

Jetall argues that Jefferson Smith did not meet its summary judgment burden to prove that the earnest money provision was so indefinite that the LOI is not enforceable. Jetall responds by contending that the earnest money provision is not indefinite even though it does not provide a deadline for payment or identify to whom it would be paid. Jetall argues that it attempted to pay the earnest money to Jefferson Smith, which shows that it attempted to perform under the contract and intended to be bound by it. Jetall also argues that the language "subject to title, site environmental & survey only" in the earnest money provision is perhaps ambiguous but not indefinite.[3]

Jefferson Smith responds that the earnest money provision is indefinite because it does not set a deadline for payment of the earnest money, does not specify what happens to the money if the transaction does not close, does not specify whether the earnest money is included in the purchase price or is in addition to the purchase

[3] Jetall also argues that Jefferson Smith did not rely on evidence supporting this issue, but we disagree. In arguing that the LOI is unenforceable because the earnest money provision is too indefinite, Jefferson Smith's motion included a screenshot of the earnest money provision, as we do below, as well as a citation to the LOI which Jefferson Smith attached as an exhibit to its motion. The heart of the issue is the interpretation of various provisions of the LOI, including the earnest money provision, and the LOI is the key piece of evidence. Thus, Jefferson Smith's arguments challenging the earnest money provision were sufficiently supported by summary judgment evidence.

price, and does not explain the parties' obligations regarding the "title, site environmental & survey only" language in the provision.

The earnest money provision in the LOI states:

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|---|---|
| **Earnest Money:** | **$500,000.00 NON-REFUNDABLE**<br>subject to title, site environmental & survey only |

This Court has previously considered an earnest money provision in a case with similar facts. In *RHS Interests, Inc. v. 2727 Kirby Ltd.*, the parties exchanged various letters concerning the sale of an office building, but they later disputed whether these letters constituted an enforceable agreement. 994 S.W.2d 895, 896 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Kirby argued that RHS did not deposit any earnest money, and therefore there was no valid, enforceable agreement. *Id.* at 897. The parties' purported contract stated that it was a summary of the parties' transaction, which would be more fully described in an earnest money contract to be negotiated in good faith. *Id.* Both of RHS's written offers called for earnest money in the amount of $15,000 to be held in escrow, and Kirby later increased the earnest money to $30,750 in a letter to RHS. *Id.* at 897, 898. The purported agreement did not state a deadline for payment of earnest money, and no earnest money was ever paid. *Id.* at 897–99.

Based on the lack of terms and deadlines for payment of earnest money, we concluded that "[m]ore negotiations plainly lay ahead, among the most important being the terms and deadlines for payment of earnest money." *Id.* at 899. Although

we acknowledged that earnest money is not required to bind a contract, we found it important that "RHS never paid or attempted to pay any earnest money to bind this alleged new agreement, and Kirby never demanded any." *Id.* We concluded that the failure of the parties to request and demand payment of the earnest money demonstrated that the parties knew the agreement was not intended to bind either party. *Id.*

Like the purported contract at issue in *RHS Interests*, the LOI does not state a deadline to pay earnest money. *See id.* Jetall argues that the earnest money could be paid at any time between the signing of the LOI and closing. But if the earnest money could be paid at closing, it would be superfluous of the purchase price.[4] *See In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (orig. proceeding) (stating that courts interpret "contractual provisions so none of the terms of the agreement are rendered meaningless or superfluous").

Moreover, the earnest money provision contains the following statement: "subject to title, site environmental & survey only." The meaning of this phrase is not readily apparent, and the LOI does not clarify it. The LOI also does not state whether payment of the earnest money itself—or rather its refundability—is "subject

[4] Jetall argues that the earnest money was part of the purchase price, not in addition to it. But this dispute underscores the uncertainty and indefiniteness in the earnest money provision.

to title, site environmental & survey only." Nor is there any indication on when such things would occur, that is, the timing of "title, site environmental & survey only." Thus, we are unable to determine Jetall's obligation to pay earnest money by any certain date or the parties' obligations to keep or refund the earnest money.

Furthermore, it is undisputed that no money ever changed hands, so this is not a case of partial performance. *See Fischer*, 479 S.W.3d at 240 (stating that part performance under agreement "may remove uncertainty and establish that a contract enforceable as a bargain has been formed") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 34(2)); *RHS Interests*, 994 S.W.2d at 899. Jetall argues that it attempted to tender the earnest money, and it relies on a declaration from Choudhri to support this argument.[5] Quinlan, however, averred in a declaration supporting Jefferson Smith's motion that Jefferson Smith never requested that Jetall pay any earnest money. *See RHS Interests*, 994 S.W.2d at 899 (concluding that parties' failure to pay or demand payment of earnest money demonstrated parties'

[5] Jefferson Smith argues that Choudhri's declaration is conclusory and constitutes no evidence. We disagree. A statement in an affidavit is conclusory "if it provides no facts to support its conclusion." *In re I-10 Poorman Invs., Inc.*, 549 S.W.3d 614, 617 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding). Choudhri does not merely state the conclusion that Jetall performed under the contract or intended to be bound by it, which without more would constitute a conclusory statement. *See id.* Rather, Choudhri averred facts showing that he attempted to tender earnest money under the LOI, which supports Jetall's broader argument that Choudhri's actions indicate that Jetall attempted to perform and intended to be bound by the LOI. Thus, Jefferson Smith is incorrect that Choudhri's declaration is incompetent summary judgment evidence.

knowledge that letter agreement was not intended to bind parties). Choudhri's declaration in support of Jetall's response stated that Quinlan gave excuses as to why he wanted the earnest money in a different form, but the declaration did not state that Jefferson Smith demanded any earnest money. Therefore, Jefferson Smith's evidence on this point is uncontroverted. Jefferson Smith's failure to demand any earnest money indicates that it did not intend to be bound by the LOI. *See id. See id.* (stating that no binding contract existed where "there was no earnest money paid to bind it, despite a sizeable amount being called for in the letter").

It is also undisputed that after the parties signed the LOI, they exchanged numerous draft PSAs for the sale of 500 Jefferson. These agreements, which the parties never signed, show that the parties continued negotiating over several provisions, including the earnest money provision. Under these drafts, the earnest money was not due until the parties executed a PSA. Furthermore, the terms of the deadline to pay the earnest money under the PSA as well as the terms of its refundability were changed by the parties throughout their exchanges of the various drafts of the PSAs. Thus, on the record before us, we conclude that the earnest money provision in the LOI is not addressed with a reasonable degree of certainty and definiteness, nor does it indicate the parties' intent to be bound. *See Fischer*, 479 S.W.3d at 237.

### 3. Permitted Exceptions

Jetall also argues that a term permitting exceptions to a free and clear conveyance of 500 Jefferson in connection with the LOI's closing provision is not material and essential to the parties' agreement. According to Jetall, the LOI's failure to address any permitted exceptions might make the agreement ambiguous, but such a failure would not render the LOI indefinite. Jetall further contends that the parties' exchange of draft PSAs after execution of the LOI does not show that such a term would be essential.[6]

Jefferson Smith responds that 500 Jefferson is a downtown skyscraper subject to numerous easements and right-of-way agreements, including for pedestrian walkways elevated over the street that connect 500 Jefferson to adjacent buildings and for a shared-use parking garage. It argues that these easements are obvious and

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[6] Jetall also argues that Jefferson Smith did not rely on evidence to support its summary judgment arguments regarding permitted exceptions. We again disagree. In support of its motion, Jefferson Smith relied on the language of the LOI and inserted a screenshot of the provision requiring Jefferson Smith to deliver 500 Jefferson to Jetall "free and clear" of any encumbrances. Jefferson Smith also attached to its motion the LOI, the deed granting 500 Jefferson to Jefferson Smith, and agreements subjecting 500 Jefferson to easements and rights of way. One of the easement agreements includes a diagram of the property with two over-street pedestrian walkways connected to it. The body of Jefferson Smith's motion included photographs of 500 Jefferson and its two elevated pedestrian walkways connecting it to adjacent buildings. Finally, Jefferson Smith attached drafts of six PSAs exchanged between the parties, all of which contained a provision permitting exceptions to delivery of 500 Jefferson free and clear of all encumbrances. Thus, we disagree with Jetall that Jefferson Smith did not rely on any evidence in support of its argument regarding permitted exceptions.

of public record. According to Jefferson Smith, the LOI's failure to account for and permit exceptions from the requirement that Jefferson Smith deliver 500 Jefferson free and clear without encumbrances proves that a provision permitting exceptions to an unencumbered conveyance is essential and material to the parties' agreement.

The closing provision at issue states as follows: "Seller [Jefferson Smith] shall deliver property free and clear of any and all liens or unencumbered and [sic] any defeasances, cost shall be borne by seller." No other provision in the LOI limits or permits exceptions to the "free and clear" delivery of 500 Jefferson.

Jefferson Smith proved that the property is encumbered by several easements, including two over-the-street pedestrian walkways between 500 Jefferson and other buildings and a parking garage. The pedestrian walkway easement agreements expressly require Jefferson Smith to transfer its interest in the easements to any successor in interest. Therefore, it would be impossible for Jefferson Smith to comply with the requirement in the LOI to deliver the property free and clear of these easements. *See Marx v. FDP, LP*, 474 S.W.3d 368, 376 (Tex. App.—San Antonio 2015, pet. denied) (stating that courts should be reluctant to hold contract unenforceable for uncertainty and should instead construe contract to render performance possible rather than impossible, but this does not mean courts possess authority to interpolate essential elements to uphold contract).

Furthermore, as Jefferson Smith correctly notes, the easements were obvious and the easement agreements were filed of record. Under Texas law, "[a]n instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public." TEX. PROP. CODE § 13.002. Quinlan's declaration averred that the easement agreements were "recorded in the Harris County Real Property Records" and included file numbers for the recorded agreements. Jefferson Smith also relied on the easement agreements themselves, which certify that they were recorded in the official public records of the Harris County Clerk. Furthermore, Jefferson Smith's motion included photographs showing that the walkway easements were obvious to anyone viewing 500 Jefferson in person or even on Google maps. Thus, Jetall had notice that 500 Jefferson was encumbered by several easements, *see id.*, yet the LOI requires Jefferson Smith to deliver the property free and clear of these easements.[7]

Most of the draft PSAs exchanged between the parties after signing the LOI include a provision stating that Jetall must take title to the property subject to several listed "permitted exceptions," including "all covenants, restrictions, easements, reservations and other agreements of record, if any." One of the draft PSAs included

[7] Jetall's offer to purchase 500 Jefferson free and clear of encumbrances while Jetall had notice of the easements indicates that the parties understood further essential terms had to be negotiated.

a provision for permitted exceptions, but it did not list any specific exceptions. A subsequent draft revised by Jetall includes a provision for permitted exceptions, but Jetall struck through all of the listed exceptions, including the exception cited above. These continued negotiations over the precise interest in 500 Jefferson to be conveyed to Jetall further confirm that permitted exceptions to conveyance were essential to the parties' agreement.

Jetall argues that the parties' continued negotiations and exchange of draft PSAs merely establishes an attempted novation. "Novation is the substitution of a new agreement between the same parties or the substitution of a new party on an existing agreement." *N.Y. Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). An essential element of novation is the existence of a prior, valid obligation. *Id.* Because Jetall has not established that the LOI is a valid agreement, it cannot show a novation of the LOI. *See id.*

Without explanation, Jetall characterizes the LOI provision at issue as ambiguous at best. However, the provision at issue is reasonably susceptible to only one interpretation: Jefferson Smith was required to convey 500 Jefferson free and clear of any encumbrances. *See Barrow-Shaver*, 590 S.W.3d at 479 (stating that ambiguity in contract arises when contract is susceptible to two or more reasonable interpretations). What is missing from the LOI—and therefore cannot be an ambiguity in the LOI—is a term permitting exceptions for the obvious easements.

Jetall also argues that these draft PSAs do not prove that the terms are material rather than boilerplate. However, Jefferson Smith included a provision permitting exceptions in the first draft PSA it sent to Jetall, and Jetall's final draft PSA it sent to Jefferson Smith deleted all listed permitted exceptions. Contrary to Jetall's argument that the provision permitting exceptions was boilerplate, the parties focused on this term and negotiated its contents during their exchange of the draft PSAs. Along with Jetall's notice of these easements from the public record, the evidence establishes that the transfer of Jefferson Smith's prior easement agreements was essential and material to any sale of 500 Jefferson by Jefferson Smith.

Finally, Jetall argues that parties may agree to terms in a letter of intent while simultaneously contemplating "a more *definite* transaction [that] necessarily will include more terms." (Emphasis added.) This is true, but the agreement to agree must still address all material terms with reasonable certainty and definiteness to bind the parties to the initial agreement. *See Fischer*, 479 S.W.3d at 237–38 (stating that "an agreement that contains all of its essential terms is not unenforceable merely because the parties anticipate some future agreement"). An agreement to agree does not bind the parties if it leaves material terms to be stated more definitely in a later transaction. *See id.* Thus, that parties may provide more definite terms in a later agreement does not answer the question whether the initial agreement addresses all the material terms in a sufficiently definite manner to bind the parties.

We conclude that the parties reasonably believed that permitting exceptions to a "free and clear" conveyance of 500 Jefferson was essential and material to their agreement. *See id.* (stating that material and essential terms of contract are those that contracting parties would reasonably regard as vitally important ingredients of their bargain). On the record before us, we cannot conclude that the parties intended to be bound by a two-page letter agreement for the sale of a multi-million-dollar skyscraper encumbered by several easements of public record. Rather, the record evidence establishes that the parties intended the LOI to facilitate their complex real estate transaction requiring costly groundwork and "to structure their agreement without entering into a binding contract." *See John Wood Grp.*, 26 S.W.3d at 19. We hold that the trial court did not err by granting summary judgment in favor of Jefferson Smith on its declaratory relief claim.[8]

We overrule Jetall's first issue.

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[8] Our conclusion that the LOI did not address all material terms with sufficient definiteness to constitute a binding agreement supports the trial court's first summary judgment order effectively concluding that the LOI was not enforceable. Accordingly, we need not address the parties' remaining arguments in issue one. *See Concierge Nursing Ctrs., Inc. v. Antex Roofing, Inc.*, 433 S.W.3d 37, 41 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (stating that reviewing courts "will affirm the judgment if any of the theories advanced in the summary judgment motions is meritorious"); TEX. R. APP. P. 47.1.

**Second Summary Judgment Order**

Jetall's second and third issues challenge the trial court's second summary judgment order, which granted judgment in favor of Jefferson Smith on all of Jetall's remaining counterclaims and third-party claims of fraud, statutory fraud, quantum meruit, unjust enrichment, and promissory estoppel. In its second issue, Jetall contends that the trial court erred by granting summary judgment on its remaining claims to the extent it relied on its prior determination that the LOI is unenforceable. We have determined that the LOI is not enforceable. Accordingly, we conclude that the trial court properly granted Jefferson Smith's second summary judgment motion on the ground that the LOI is not enforceable. We overrule Jetall's second issue.

In its third issue, Jetall argues that the trial court erred by entering summary judgment on its claims for fraud, quantum meruit, and unjust enrichment regardless of whether the LOI is enforceable. Rule of Appellate Procedure 38.1(i) requires appellate briefs to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). "A brief is sufficient and does not waive an issue if it 'contains all points of error relied upon, argument and authorities under each point of error, and all facts relied upon for the appeal with references to the pages in the record where those facts can be found.'" *Guimaraes v. Brann*, 562 S.W.3d 521, 545 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting *City of Arlington v. State Farm Lloyds*, 145 S.W.3d

165, 167 (Tex. 2004) (per curiam)). However, "a brief that does not contain citations to appropriate authorities and to the record for a given issue waives that issue." *Id.*; *see Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 242 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (concluding that appellant waived issue because appellant's brief provided "no citation to the record, nor any discussion of relevant or analogous authorities to assist the Court in evaluating its claims"). Jetall did not cite to any legal authority supporting its arguments challenging the trial court's second summary judgment order. We therefore conclude that Jetall has waived its third issue.

## Conclusion

We affirm the trial court's summary judgment orders and entry of final judgment.

April L. Farris
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.