

Affirmed and Opinion Filed January 13, 2026



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-24-00237-CV

**BHARAT SANGANI AND SMITA B. SANGANI, Appellants
V.
PATRICK J. BARBER, Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-24-02128**

MEMORANDUM OPINION

Before Chief Justice Koch, Justice Wright,¹ and Justice Evans²
Opinion by Chief Justice Koch

This case involves breach-of-promissory-note claims severed from litigation between former business associates and the corporation they owned and operated. Bharat Sangani and Smita B. Sangani (together, the Sanganis) appeal the trial court's final judgment granting summary judgment in favor of Patrick J. Barber on his counterclaims for breach of the parties' "Secured, Restricted Promissory Note" (the Note), awarding him joint and several damages in the amount of \$19,715,247, and

¹ The Hon. Carolyn Wright, Justice, Assigned

² The Hon. David Evans, Justice, Assigned

denying the Sanganis' request for a declaratory judgment related to the Note. The Note incorporated by reference and was subject to the "Key Person Memorandum Agreement" (the Agreement) among Encore Enterprises, Inc., Barber, and the Sanganis, individually.

The Sanganis raise four issues on appeal arguing that:

- (1) the trial court erred when it denied the Sanganis' second traditional motion for summary judgment on their lack-of-consideration affirmative defense;
- (2) the trial court erred when it denied the Sanganis' second traditional motion for summary judgment on their failure-of-consideration affirmative defense;
- (3) because Barber did not conclusively prove they breached the Note, the trial court erred when it (a) granted Barber's traditional motion for partial summary judgment and his supplement to that motion on his breach-of-the-promissory-note counterclaims and the Sanganis' declaratory judgment action, and (b) denied the Sanganis' first traditional motion for partial summary judgment on Barber's breach-of-the-promissory-note counterclaims;³
- (4)(a) the trial court erred when it sustained Barber's objections to the declaration of Encore's CFO;
- (4)(b) the trial court erred when it granted Barber's traditional motion for partial summary judgment and his supplement to that motion on his breach-of-the-promissory-note counterclaims because the Sanganis raised genuine issues of material fact relating to the balance allegedly due under the Note; and
- (4)(c) the trial court erred when it denied the Sanganis' second traditional motion for summary judgment on the portion of

³ Because the Sanganis argue on appeal only that Barber did not conclusively prove they breached, we do not construe their issue to challenge the trial court's denial of their no-evidence motion for summary judgment on Barber's breach-of-the-promissory-note counterclaims.

their declaratory-judgment action requesting an offset on the balance of the Note by a \$1 million post-maturity distribution by Encore to Barber.

We conclude that the trial court did not err. Accordingly, we affirm the trial court's final judgment.

I. Factual and Procedural Background

A. The Parties Entered into Business Together

In 1999, Bharat Sangani and Barber entered into a business partnership and formed Encore, a holding company for real-estate investments. Bharat Sangani provided the capital and initially owned 100% of Encore, and he served as its chairman of the board. Barber was the president and chief executive officer of Encore, and he provided the industry knowledge and "sweat equity." Several years later, Barber obtained a 10% ownership interest in Encore.

In 2014, Encore, Barber, and the Sanganis, individually, executed the Agreement, which established how and when Barber would receive the following compensation: (1) the accumulated profits that Encore had not distributed to Barber valued at \$11,813,282 and that represented Barber's accumulated deferred profit share and accrued interest as of December 31, 2013 (Barber's Deferred Profit Share); and (2) future distributions related to Barber's 10% ownership interest in Encore.

The Agreement established a waterfall payment schedule to prioritize the order in which Encore would utilize and distribute its cash proceeds from asset sales,

investment sales, and income from operations on at least an annual basis. Under this waterfall payment schedule, Encore's proceeds and profits would be used in the following summarized order:

- (a) toward a discretionary bonus pool for employees;
- (b) toward a \$5,000,000 cash reserve;
- (c) toward a loan reserve and payment of the Suresh Sangani promissory note;
- (d) toward various Encore debt obligations;
- (e) toward an additional employee bonus pool;
- (f) toward a \$447,062 payment to Mahesh⁴ as partial payment of his deferred salary and accumulated profit participation and bonus and accrued interest (Mahesh Interest);
- (g) toward deferred salary, profit shares, or both owed to the Mahesh Interest and Barber's Deferred Profit Share and accrued interest;
- (h) after full payment of the preceding amounts to Barber and another individual, toward certain accumulated distributions and, thereafter, by pro rata dividends to shareholders if declared by the board of directors; and
- (i) notwithstanding the payment order in the waterfall, there are certain limitations on the ratio of aggregate payments to Barber and Bharat Sangani prior to the repayment of Barber's Deferred Profit Share, i.e., after payments were made under the first seven provisions, 21.1% of the available cash would be used to pay Barber's Deferred Profit Share and, notwithstanding the payment order, distributions to Bharat Sangani were subject to a limitation on the ratio of payments to Barber and Bharat

⁴ The Agreement does not otherwise disclose who or what "Mahesh" is.

Sangani until Barber's Deferred Profit Share was paid (Waterfall Notwithstanding Paragraph).⁵

However, the Agreement also permitted Encore to make adjustments to the waterfall figures based on "available cash" and directed the following:

Notwithstanding the foregoing, the parties acknowledge and agree that any figures set forth in items (a) through (e) [of the waterfall] above and/or the Spreadsheet are determined as of the date of this [Agreement] and may change from time to time, as necessary based upon available cash, as determined by Encore in its sole and absolute discretion. Encore shall review the waterfall set forth in items (a) through (i) [of the waterfall] and the Spreadsheet, on at least an annual basis, and make such adjustments as necessary based upon available cash.

[Barber's] [i]nterest shall be evidenced by [the Note] with a principal amount of \$11,813,282, subject to the forfeiture and vesting conditions therein, executed by Bharat [Sangani] and [Barber] contemporaneously with this [Agreement] and attached as Exhibit B []. In accordance with the terms of the [Note], payments thereunder shall only be made to the extent cash is available pursuant to the foregoing waterfall and such other terms as included in the [Note] and will not be reflected on Encore's books and records. . . .

As stated above, the parties also agreed that Barber's Deferred Profit Share would be evidenced by the Note with a principal amount of \$11,813,282, which was attached to the Agreement as Exhibit B. In addition, the Agreement stated that the

⁵ Specifically, subsection (i) of the waterfall stated that:

Notwithstanding the foregoing [waterfall distribution], the total distributions, including cash distributions and accumulated distributions according to the Spreadsheet, to Bharat [Sangani] and [Barber] under items (g) and (h) . . . shall not exceed 75/25 until December 31, 2019 [(i.e., one year after the maturity date of the Note and when interest on the Note stops accruing)], and 65/35 after December 31, 2019, until [Barber's Deferred Profit Share] is paid. Thereafter, the total distributions to Bharat [Sangani] and [Barber] shall be allocated 88.89% to Bharat [Sangani], and 11.11% to [Barber].

Note would stop accruing interest on December 31, 2019, one year after the Note's maturity date.

Further, the Agreement set Barber's base salary at \$600,000 and stipulated that any excess salary plus distributions and personal expenses over \$600,000 for the years 2014 and after would be adjusted as a return of equity or a pre-maturity reduction of the Note's principal amount. The Agreement also referenced a separate, \$100 million revolving promissory note made by Encore to the Sanganis (the Sangani Revolving Note) with an outstanding balance of \$45,698,984 that represented Bharat Sangani's accrued interest, which Bharat Sangani assigned to Smita B. Sangani, as Trustee of the Smita B. Sangani 2012 Irrevocable Trust. The Sangani Revolving Note was not attached to the Agreement.

Also, in 2014, Barber and the Sanganis executed the Note wherein the Sanganis, individually, agreed to pay Barber's Deferred Profit Share and accumulated interest as defined in the Agreement. This Note was labeled "Exhibit B" and was attached to the Agreement. The introductory language of the Note identified the Sanganis as the borrowers and Barber as the lender. The Note was non-transferrable and expressly incorporated the Agreement by reference and was subject to it. The Sangani Revolving Note served as the security for the Sanganis' payment obligations to Barber under the Note, but it was not attached to the Note. However, the Note provided that:

Purpose. . . . Accordingly, this Note is subject to [the Agreement] and the provisions of the [Agreement] are incorporated herein by reference (e.g., from time to time, if there is no available cash, as determined by Encore in its sole and absolute discretion, then there shall be no payments at such time under this Note).

. . . .

Other Terms. [The Sanganis] promise[] to pay to the order of [Barber] the Principal Amount plus interest at the annual Interest Rate. This Note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. After maturity, [the Sanganis] promise[] to pay any unpaid principal balance plus interest at the Annual Interest Rate on Matured Unpaid Amounts; provided however, notwithstanding any provision to the contrary contained herein, this Note shall stop accruing interest after December 31, 2019.

. . . .

[The Sanganis] may prepay this Note in any amount at any time before the Maturity Date without penalty or premium.

. . . .

Notwithstanding any provision to the contrary contained in this Note, in no event shall [the Sanganis] be in default or have any liability hereunder for the failure to make any payments to [Barber] hereunder to the extent that there is not available cash, as determined by [the Sanganis] in [their] sole and absolute discretion pursuant to the terms of the [Agreement]. [(the Note's Notwithstanding Paragraph)]

The Note specified a maturity date of December 31, 2018, and stated that no periodic payments were required.

Encore made few payments on the Agreement and the Note because the Sanganis claimed Encore lacked available cash. However, Encore did reduce the Note's balance based on the Agreement's excess-salary provision. As a result, after the maturity date passed and while still employed by Encore, Barber notified the

Sanganis that they were in default and made a written demand for payment of the Note. The Sanganis refused to pay, so Barber hired an accounting firm to assess Encore's financial condition. According to Barber, the accounting firm found that, from 2014 to 2019, the Sanganis had used roughly \$22 million of Encore's funds for their personal expenses.⁶

B. Encore and the Sanganis Filed a Declaratory Judgment Action

On December 11, 2020, Encore and the Sanganis filed their original petition seeking a declaratory judgment (1) that the Agreement is unenforceable because Barber did not provide consideration, (2) that the Note is unenforceable because Barber did not provide consideration, (3) that no distributions or payments are due under the Agreement or the Note because the Sanganis have determined in their sole and absolute discretion that no cash is available for distribution or payment to Barber, and (4) that Encore and the Sanganis are not in default under the Note for the same reason that no payments or distributions are due under the Agreement and the Note. After filing suit, Sangani involuntarily terminated Barber from Encore and purportedly sought to acquire Barber's 10% interest in Encore under certain provisions in the Agreement.

⁶ In his brief, Barber refers to a sealed appendix filed with the brief and a sealed supplemental clerk's record that had not yet been filed. He cites the sealed appendix in support of his allegation that the accounting firm found that the Sanganis had used roughly \$22 million of Encore's funds for their personal expenses. However, neither the sealed appendix nor the sealed supplemental clerk's record were ever filed in this Court.

On August 13, 2021, in his first amended answer, Barber generally denied the allegations and asserted several defenses. The parties subsequently filed multiple pleadings and motions.

C. Barber Asserted Counterclaims Against Encore and the Sanganis

Also, on August 13, 2021, Barber filed his second amended counterclaims, asserting counterclaims against Encore and the Sanganis⁷ for breach of the Note and breach of the Agreement as well as other claims for torts and equitable relief. With respect to the Note, Barber alleged (1) the Note was valid and binding, (2) between Barber and (3) the Sanganis, and (4) the Note matured and the Sanganis were in default of the Note because payment in an amount exceeding \$20 million is owed but has not been paid.⁸

On October 22, 2021, Encore and the Sanganis answered generally denying Barber's counterclaims. They also asserted several defenses, including the affirmative defenses of lack of consideration and failure of consideration.

⁷ We note that Barber also asserted a breach-of-the-promissory-note counterclaim against Smita Sangani in her capacity as trustee for the Smita B. Sangani 2012 Irrevocable Trust. However, the trial court's final judgment does not appear to render a judgment against her in that capacity, and she has not filed a notice of appeal or brief in that capacity.

⁸ Although these counterclaims appear under the heading, "Count One: Breach of [the Agreement]," the substance of that section makes it clear that Barber was asserting two separate counterclaims: (1) breach of the Note; and (2) breach of the Agreement. With respect to his breach-of-contract claim, Barber alleged: (1) there was a contract; (2) Barber performed as contractually required by continuing to perform his job duties and continuing to help Encore be successful; (3) Encore and the Sanganis breached the Agreement by diverting available cash to pay Bharat Sangani's personal expenses rather than the promissory note as required by the Agreement; and (4) Barber sustained damages in excess of \$20 million as a result of Encore's and the Sanganis' breach of the Agreement.

D. The Parties Filed Competing Motions for Summary Judgment

On November 19, 2021, Encore and the Sanganis filed two separate motions for summary judgment: (1) a no-evidence motion for summary judgment; and (2) their first traditional motion for partial summary judgment. In their no-evidence motion for summary judgment, the Sanganis set out only the elements for a breach-of-contract claim and argued that, with respect to Barber's breach-of-the-promissory-note, there was no evidence of the following: (1) mutuality of consideration; (2) Barber's performance; (3) the Sanganis' breach; or (4) damages. In their first traditional motion for partial summary judgment, Encore and the Sanganis argued they were entitled to judgment on Barber's breach-of-the-promissory-note counterclaims because, as matter of law, based on the plain unambiguous language of the Note and the Agreement, they did not breach the Note because those agreements gave them the sole and absolute discretion to determine that no cash was available to pay Barber, which they exercised.

On November 22, 2021, Barber filed a competing traditional motion for partial summary judgment on his breach-of-the-promissory-note counterclaims and on the Sanganis' declaratory-judgment action. With respect to his breach-of-the-promissory note counterclaims, Barber argued he was entitled to judgment as a matter of law because (1) there was a promissory note, (2) Barber and the Sanganis are parties to the Note, (3) the Note has matured and is due in full, and (4) the Sanganis have refused to pay. He also argued that proof of the elements of his

breach-of-the-promissory-note counterclaims entitled him to summary judgment on the Sanganis' declaratory-judgment action.

On January 17, 2022, the trial judge signed an order relating to the parties' competing motions for summary judgment. The trial judge expressly concluded that the Note had matured and, according to its terms, the unpaid principal amount and all accrued interest were due and immediately payable without regard to "available cash" as that term was used in both the Agreement and the Note. The order did not address the other terms contained in the Note's Notwithstanding Paragraph. The trial court granted (1) the portion of Barber's traditional motion for partial summary judgment on Encore and the Sanganis' declaratory-judgment action, and (2) denied the portions of Encore and the Sanganis' no-evidence motion for summary judgment and first traditional motion for partial summary judgment to the extent they requested the trial court to construe the Note inconsistent with its ruling.

E. The Parties Amend Their Pleadings

On March 18, 2022, Barber filed his third amended counterclaims against Encore and the Sanganis, request for injunctive relief, and request for the appointment of a receiver. Again, Barber asserted against Encore and the Sanganis counterclaims for breach of the Note, among others.⁹ His factual allegations did not differ from those contained in his second amended counterclaims.

⁹ Again, we note that, although these counterclaims appear under the heading, "Count One: Breach of [the Agreement]," the substance of that section makes it clear that Barber was asserting two separate counterclaims: (1) breach of the Note; and (2) breach of the Agreement.

On April 28, 2022, Encore and the Sanganis filed their second amended answer generally denying the allegations and asserted a verified denial under Texas Rule of Civil Procedure 93(9) that the Agreement on which Barber's claims were founded was without consideration, or in the alternative, that the consideration had failed. The Sanganis did not file a verified denial with respect to the Note. They also asserted several defenses to Barber's counterclaims, including the affirmative defenses of lack of consideration and failure of consideration.

On December 19, 2022, Encore and the Sanganis filed their first amended petition and request for declaratory judgment. In this pleading, they sought a declaratory judgment with respect to the Note as follows: (1) the Agreement is unenforceable because Barber never provided consideration in connection with it; (2) the Note is unenforceable because Barber never provided consideration and Barber breached by failing to provide the Sanganis with any promised value; (3) the Note is unenforceable due to a failure of consideration; (4) no distribution or payments are due to Barber under the Agreement or Note because Encore and the Sanganis determined in their sole and absolute discretion that no cash was available for distribution or payment to Barber; (5) the Sanganis are not in default of the Note; and (6) pursuant to the Agreement, (a) they requested that any excess salary plus distributions and personal expenses over \$600,000 paid to Barber for the years 2014 and thereafter were to be credited toward the Note's balance, and (b) they requested that the Note's balance be offset by Encore's post-maturity distributions benefitting

Barber. They also included in their first amended petition a verified denial pursuant to Texas Rule of Civil Procedure 93(9) that the Note on which Barber's counterclaims were based was without consideration or, in the alternative, that the consideration for the Note had failed.

F. The Parties Filed Additional Competing Summary-Judgment Motions

Meanwhile, on October 24, 2022, Barber filed a supplement to his traditional motion for partial summary judgment, asserting that there were no disputed issues of material fact and the Note remained unpaid. He also referred to the trial court's January 17, 2022 order holding that the Note was valid and enforceable and that it was fully due and payable. Further, he provided additional argument and evidence to support the element of consideration. The Sanganis filed a response that incorporated their second traditional motion for summary judgment.

On December 15, 2022, Encore and the Sanganis filed their second traditional motion for summary judgment. With respect to the breach-of-the-promissory-note counterclaims, they sought traditional summary judgment on their affirmative defenses, among other defenses, that the Note was unenforceable due to a lack of consideration and a failure of consideration. They also sought traditional summary judgment on the part of their declaratory-judgment action requesting an offset.

A series of replies and objections by both sides followed.

G. Barber’s Breach-of-the-Promissory-Note Counterclaims Were Severed

On March 3, 2023, the trial judge signed an order granting partial summary judgment in favor of Barber on his breach-of-the-promissory-note counterclaims. The trial judge sustained Barber’s objections to and struck the declaration of Encore’s CFO. The trial judge also memorialized his prior order holding that the Note had fully matured on December 31, 2018, and therefore was due and payable in full without regard to “available cash.” The trial judge denied Encore and the Sanganis’ second traditional motion for summary judgment in its entirety, except to the extent that the parties had agreed that pre-judgment interest would not accrue on the Note after December 31, 2019. The trial judge also granted Barber’s traditional motion for partial summary judgment as to his breach-of-the-promissory-note counterclaims in their entirety and awarded Barber \$19,715,247, the amount calculated as owed on the Note after subtracting all valid pre-maturity payments.

On February 2, 2024, the trial judge signed an order that memorialized his prior summary-judgment rulings and severed the parties’ claims related to the Note. The trial judge expressly stated that the following claims remained: (1) Barber’s counterclaims for breach of the Agreement, fraud, conversion, unjust enrichment, promissory estoppel, fraudulent transfer, and request for an accounting; and (2) Encore and the Sanganis’ request for a declaratory judgment with respect to the Agreement.

On February 12, 2024, the trial judge signed a final judgment in the severed action. The judgment memorialized the trial judge's prior rulings relating to the parties' motions for summary judgment with respect to Barber's breach-of-the-promissory-note counterclaims and the Sanganis' request for a declaratory judgment on the Note. The trial judge also (1) granted a judgment in favor of Barber on his breach-of-the-promissory-note counterclaims against the Sanganis and ordered that the Sanganis were jointly and severally liable to Barber in the amount of \$19,715,247, and (2) denied the Sanganis' declaratory-judgment action with respect to the Note and their request for offset.

II. Standards of Review

A. Summary Judgment Standard of Review

An appellate court reviews a trial court's decision to grant a motion for summary judgment de novo. *Helix Energy Sols. Grp., Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017). An appellate court reviews the evidence presented in the motion and response in the light most favorable to the party against whom summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When a trial court's order granting summary judgment does not specify the grounds on which it was granted, an appellate court will affirm the judgment if any of the grounds presented to the trial court in the motion for summary judgment that

have been preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). Further, when the trial court grants one motion and denies the other, an appellate court reviews both sides' summary-judgment evidence and determines all questions presented. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law; neither party can prevail because of the other's failure to discharge its burden. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 50 (Tex. App.—Dallas 2006, pet. denied). A reviewing court may determine all questions presented; it may affirm the summary judgment entered, reverse and render a judgment for the other party, if appropriate, or reverse and remand if neither party has met its summary-judgment burden. *Hackberry Creek*, 205 S.W.3d at 50.

B. Promissory Note Construction and Interpretation

A court's sole objective in interpreting the language of a promissory note is to determine the parties' true intentions as expressed in the writing. *See Scout Energy Mgmt., LLC v. Taylor Props.*, 704 S.W.3d 544, 547 (Tex. 2024) (per curiam). In the usual case, the promissory note alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls. *See U.S. Polyco, Inc. v. Tex. Cent. Bus. Lines Corp.*, 681 S.W.3d 383, 387 (Tex. 2023) (per curiam).

As a result, courts look first to the promissory note's text. *See U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 23 (Tex. 2015). Courts presume the drafters chose the language of the promissory note with care, purposefully choosing each word, while purposefully omitting words not chosen. *See In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 158–59 (Tex. 2021) (orig. proceeding). Unless the promissory note shows that the parties used a term in a technical or different sense, courts give the terms their plain, ordinary, and generally accepted meaning. *See Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

Courts consider the entire writing and attempt to harmonize and give effect to all the provisions of the promissory note, analyzing the provisions with reference to the whole agreement. *See Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (per curiam). Each provision in the promissory note is interpreted with reference to the entire note, as opposed to giving one provision controlling effect. *See Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). All writings that pertain to the same transaction will be considered together, even if they were executed at different times. *DeWitt Cnty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 102 (Tex. 1999).

When the parties disagree about the meaning of their promissory note, courts engage in a two-step analysis: (1) a court decides whether the promissory note is ambiguous or unambiguous by applying the applicable rules of contract construction; and (2) if the court concludes the promissory note is ambiguous, then

the trier of fact may consider the parties' interpretations and other extraneous evidence. *See Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Whether a promissory note is ambiguous is a question of law, and the parties need not plead or argue ambiguity for a court to determine that a promissory note is ambiguous. *See Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC*, 639 S.W.3d 682, 690 (Tex. 2022); *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 808 (Tex. 2009) (per curiam) (holding a contract ambiguous despite neither party's arguing ambiguity); *Hackberry Creek*, 205 S.W.3d at 56.

If the language of a promissory note can be given a certain or definite legal meaning or interpretation, it is unambiguous. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). The interpretation of an unambiguous promissory note is a question of law, which appellate courts review de novo. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999). When the parties disagree over the meaning of an unambiguous promissory note, the court must determine the parties' intent by examining and considering the entire writing in an effort to give effect to the parties' intentions as expressed in the promissory note. *See Coker*, 650 S.W.2d at 393. The parties' intent must be taken from the promissory note itself, and the promissory note must be enforced as written. *See Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P.*, 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied). Further, under the “Four Corners Rule,” the parties' intent

must be ascertained from the promissory note as a whole and not from isolated parts thereof. *Calpine Producer Servs., L.P. v. Wiser Oil Co.*, 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.).

A promissory note is ambiguous if it is reasonably susceptible to more than one meaning and cannot be given a certain or definite legal meaning or interpretation. *See Coker*, 650 S.W.2d at 393. Further, if a court is unable to harmonize the provisions and give effect to all of its clauses, the promissory note is susceptible to more than one reasonable interpretation and is thus, ambiguous. *See Innovate Tech. Sols., L.P. v. Youngsoft, Inc.*, 418 S.W.3d 148, 151 (Tex. App.—Dallas 2013, no pet.); *Hackberry Creek*, 205 S.W.3d at 56. When a promissory note contains an ambiguity, it is improper for a trial court to grant summary judgment because the intent of the contracting parties is an issue of fact. *See Coker*, 650 S.W.2d at 394; *Innovate Tech.*, 418 S.W.3d at 152; *Hackberry Creek*, 205 S.W.3d at 56.

However, a promissory note is not ambiguous simply because the parties put forward different interpretations of a contract term. *See Scout Energy Mgmt.*, 704 S.W.3d at 547. Whenever possible, courts must assess adverse arguments and resolve a text's meaning as a matter of law. *See U.S. Polyco*, 681 S.W.3d at 389.

III. Traditional Summary Judgment on Barber's Breach-of-the-Promissory-Note Counterclaims

In issues three and four, the Sanganis argue the trial court erred when it granted Barber's traditional motion for partial summary judgment on his breach-of-

the-promissory-note counterclaims and their declaratory-judgment action with respect to the Note and denied their competing first traditional motion for partial summary judgment with respect to Barber's breach-of-the-promissory-note counterclaims.

A. Applicable Law—Breach of a Promissory Note

A promissory note is a contract evincing an obligation to pay money by the maker to the payee. *See Collins Asset Grp., LLC v. Ayres*, No. 05-21-00295-CV, 2022 WL 951004, at *2 (Tex. App.—Dallas Mar. 30, 2022, no pet.) (mem. op.). Although a promissory note is a type of contract, a plaintiff suing on a promissory note need not prove the elements of a breach of contract claim to recover. *Kroesche v. Wassar Logistics Holdings, LLC*, No. 01-20-00047-CV, 2023 WL 1112002, at *8 (Tex. App.—Houston [1st Dist.] Jan. 31, 2023, pet. denied) (mem. op.). To recover on a promissory note, the plaintiff must prove the following four elements: (1) a note exists; (2) the plaintiff is the note's legal owner and holder; (3) the defendant is the maker of the note; and (4)(a) the note is due and a balance is owed and (b) that balance is for a certain amount. *See Collins Asset Grp.*, 2022 WL 951004, at *2; *Cooper v. Campbell*, No. 05-15-00340-CV, 2016 WL 4487924, at *5 (Tex. App.—Dallas Aug. 24, 2016, no pet.) (mem. op.).

If the plaintiff proves the four elements of a promissory-note claim, he is entitled to recover on the promissory note unless the defendant establishes a defense to recovery. *Kroesche*, 2023 WL 1112002, at *8. Defenses to recovery on a

promissory note include lack of or failure of consideration, non-performance of a condition precedent, non-delivery, delivery for a special purpose, fraud in the inducement, or other defenses that would be available in an action on a simple contract. *Id.* at *8.

B. Barber Established He Was Entitled to Traditional Summary Judgment on His Breach-of-the-Promissory-Note Counterclaims

In issue one, the Sanganis argue that Barber did not conclusively prove they breached the Note. They contend that the Note “does not represent an independent payment obligation” owed by them to Barber. Also, they argue that, under the express terms of the Note’s Notwithstanding Paragraph, they had the sole and absolute discretion to determine that there was no available cash for distribution of any pre-maturity and post-maturity payments to Barber. As a result, they could not have breached the Note because they acted in a manner expressly permitted by it. The Sanganis do not argue, in the alternative, that they raised an issue of material fact precluding traditional summary judgment.

Barber responds that the Agreement and the Note “must be construed together.” He also claims that the unambiguous language of the Note shows the Sanganis unconditionally promised to pay the Note when it matured and the discretion afforded to the Sanganis in the Note’s Notwithstanding Paragraph applies only to their ability to determine whether there was available cash for distribution to make pre-maturity payments; the Note’s Notwithstanding Paragraph does not apply to payment of the Note at maturity.

In his traditional motion for partial summary judgment and his supplement to that motion, Barber sought summary judgment on his breach-of-the-promissory-note counterclaims against the Sanganis. He asserted that there were no disputed issues of material fact and the Note remained unpaid. Barber also sought summary judgment on the Sanganis' declaratory-judgment action. In the Sanganis' first traditional motion for partial summary judgment, they argued that they could not breach the Note as a matter of law because it was undisputed that they exercised their sole and absolute discretion and determined there was no available cash to pay Barber. In its January 17, 2022 order, the trial court held that the Note was valid and enforceable and that it was fully due and payable, and it (1) granted Barber's traditional motion for partial summary judgment as to the Sanganis' declaratory judgment action and (2) denied the Sanganis' first traditional motion for partial summary judgment on Barber's breach-of-the-promissory-note counterclaims to the extent the Sanganis requested the trial court to construe the Note differently from its holding. Further, in its March 3, 2023 order, the trial court granted partial summary judgment in favor of Barber on his breach-of-the-promissory-note counterclaims. These orders were incorporated into the trial court's February 12, 2024 judgment.

In order to be entitled to traditional summary judgment on his breach-of-the-promissory-note counterclaims, Barber had to show there were no genuine issues of material fact and he was entitled to judgment as a matter of law because (1) the Note existed, (2) Barber was the legal owner and holder of the Note, (3) the Sanganis were

the makers of the Note, and (4)(a) the Note was due and the Sanganis owed a balance on it (i.e., breach) and (b) that the balance was for a certain amount (i.e., damages). *See Collins Asset Grp.*, 2022 WL 951004, at *2; *Cooper*, 2016 WL 4487924, at *5.

1. The Note

The Sanganis do not dispute the existence of the Note. Rather, they contend that it “does not represent an independent payment obligation” owed by them to Barber. Instead, they argue it describes how the Agreement works and how Encore would make future distribution payments under the Agreement. Barber responds that these instruments “must be construed together.”

First, we address Barber’s contention that the Agreement and the Note must be construed together. Barber attached the Agreement and the Note to his traditional motion for partial summary judgment on his breach-of-the-promissory-note counterclaims and the Sanganis’ declaratory-judgment action. The Agreement clearly incorporated the Note when it stated, “[Barber’s] [i]nterest shall be evidenced by [the Note] with a principal amount of \$11,813,282, subject to the forfeiture and vesting conditions therein, executed by Bharat [Sangani] and [Barber] contemporaneously with this [Agreement] and attached as Exhibit B [.]” The Agreement also specified that the Note would stop accruing interest on December 31, 2019, the Note’s maturity date. The Note was clearly labeled “Exhibit B” and was attached to the Agreement. Similarly, the Note incorporated the Agreement, stating “this Note is subject to [the Agreement] and the provisions of the

[Agreement] are incorporated herein by reference.” We agree with Barber that the Agreement and the Note must be construed together. *See DeWitt Cnty. Elec. Co-op.*, 1 S.W.3d at 102 (all writings that pertain to same transaction will be considered together, even if executed at different times).

Next, we address the Sanganis’ contention that, because the Agreement and Note must be read together, they constitute a single obligation to pay Barber by Encore. In effect, they maintain that this means the Note was not a separate obligation to pay Barber by the Sanganis. The Agreement was among Encore, the Sanganis, and Barber and required that Barber’s Deferred Profit Share would be evidenced by the Note. The Note was between the Sanganis and Barber and stated (1) that it was secured by the Sangani Revolving Note, which according to the Agreement was a debt owed by Encore to the Sanganis, (2) that there was a specific maturity date, (3) that it was non-transferable, (4) that the Sanganis promised to pay any unpaid principal balance plus interest after maturity; and (5) that there was a default procedure for Barber and a cure process for the Sanganis. Accordingly, although the Agreement and the Note must be read together, we conclude that those instruments demonstrate that it was the parties’ intention for the Note to be a separate obligation of the Sanganis to pay Barber.¹⁰

¹⁰ Promissory notes may be negotiable or non-negotiable. A “negotiable instrument” means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, so long as the promise or order does not state any other undertaking or instruction by the person promising or ordering payment to do any action in addition to the payment of money. TEX. BUS. & COM. CODE ANN. § 3.104(a). In Texas, negotiable instruments are governed by the

2. Barber Is the Legal Owner and the Sanganis Were the Makers of the Note

The Sanganis do not argue that Barber is not the legal owner of the Note. The introductory language of the Note identifies Barber as the “Lender,” and Barber signed both the Note and the Agreement in his individual capacity. Further, the Note states that it is non-transferrable.

Also, the parties do not argue that the Sanganis were not the makers of the Note. The introductory language of the Note identifies the Sanganis as the “Borrower[s].” And the Note was signed by Bharat Sangani and Smita Sangani in their individual capacities. Also, the Agreement, which was incorporated into the Note by reference, was signed by Bharat Sangani as both chairman of Encore’s board and in his individual capacity and by Smita Sangani in her individual capacity.

Further, Texas Rule of Civil Procedure 93(7) requires a sworn denial of the execution of a written instrument. *See* TEX. R. CIV. P. 93(7). Also, Rule 93(8)

Uniform Commercial Code (UCC), as adopted by the Texas Legislature and codified in the Texas Business and Commerce Code. *See Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 793 (Tex. 1992); TEX. BUS. & COM. CODE ANN. §§ 1.101–12.004 (“Uniform Commercial Code”). A promise or order is unconditional unless it states an express condition to payment, that the promise or order is subject to or governed by another record, or that rights or obligations with respect to the promise or order are stated in another record. TEX. BUS. & COM. CODE ANN. § 3.106(a). However, a promissory note does not have to meet the UCC’s definition of a negotiable instrument to be enforceable and the effect of non-negotiability is simply that such notes are governed by contract law rather than by the UCC. *Collins Asset Grp.*, 2022 WL 951004, *2; *see also Kroesche*, 2023 WL 1112002, at *8.

The parties do not address whether the Note is a negotiable instrument. The Note states that it “is subject to [the Agreement] and the provisions of the [Agreement] are incorporated herein by reference.” Because the Note is governed by the terms of another writing, requiring one to look outside the Note to determine if payment is conditional or if the terms of the Agreement alter the rights of the parties with respect to payment, it is not a negotiable instrument and is therefore governed by the common law relating to promissory notes. *See* TEX. BUS. & COM. CODE ANN. § 3.106(a); *Santos v. Yellowfin Loan Servicing Corp.*, No. 14-21-00151-CV, 2022 WL 2678846, at *3 (Tex. App.—Houston [14th Dist.] July 12, 2022, pet. denied) (mem. op.).

requires a sworn denial of the genuineness of the indorsement of a written instrument. *Id.* 93(8). The Sanganis did not file a sworn denial of the execution of the Note or the Agreement on which Barber's pleadings were founded, or a sworn denial of the genuineness of their indorsements of the Note and the Agreement. *See id.* 93(7), (8). In the absence of such a sworn plea, the instruments and the indorsements shall be received in evidence as fully proved. *See id.*

3. The Note Was Due and a Balance Was Owed

The parties' disagreement with respect to whether a balance was due and owing under the Note, i.e., whether the Sanganis breached the Note, is based on their differing interpretations of the Note's Notwithstanding Paragraph. This is an issue of contract construction that requires us to interpret the Note.

The Note's Notwithstanding Paragraph appears at the end of the Note and states:

Notwithstanding any provision to the contrary contained in this Note, in no event shall [the Sanganis] be in default or have any liability hereunder for the failure to make any payments to [Barber] hereunder to the extent that there is not available cash, as determined by [the Sanganis] in [their] sole and absolute discretion pursuant to the terms of the [Agreement].

This paragraph is made up of a phrase that modifies the paragraph (i.e., notwithstanding any provision to the contrary contained in this Note), an independent clause that creates an exception to the Sanganis' duty to pay (i.e., in no event shall the Sanganis be in default or have any liability hereunder for failure to make any payments to Barber hereunder), and another phrase that defines or

qualifies the exception (i.e., the exception applies to the extent that there is not available cash, as determined by the Sanganis in their sole and absolute discretion pursuant to the terms of the Agreement).

a. The Parties' Interpretations of the Note's Notwithstanding Paragraph Are Unreasonable

Although both the Sanganis and Barber do not argue the Note is ambiguous, they offer two competing theories about how to interpret the text of the Note's Notwithstanding Paragraph. Because they disagree about the meaning of the Note, we must engage in a two-step analysis: (1) we must determine whether the Note is ambiguous or unambiguous by applying the applicable rules of contract construction; and (2)(a) if we conclude the Note is ambiguous, then the trier of fact may consider the parties' interpretations and other extraneous evidence or (b) if we conclude the Note is unambiguous, we must resolve the text's meaning as a matter of law. *See U.S. Polycy*, 681 S.W.3d at 289; *Cook Composites*, 15 S.W.3d at 131.

Under the Sanganis' interpretation of the Note's Notwithstanding Paragraph, they could never breach the Note by failing to pay Barber and Barber could never enforce the Note because the Note provides that under no circumstances can the Sanganis be held legally responsible when they fail to perform their obligation to pay Barber what he is owed under the Note when in their unfettered discretion they determine that there is no available cash to pay him. Moreover, under the Sanganis' interpretation, the Note's Notwithstanding Paragraph creates a situation where the Note does not impose any obligation on the Sanganis to pay Barber. The Sanganis'

interpretation of the Note's Notwithstanding Paragraph would render all of the remaining provisions of the Note surplusage, preventing a court from giving effect to all provisions of the Note. *See Innovate Tech.*, 418 S.W.3d at 152.

Further, the Sanganis' interpretation of the Note is inconsistent with the principle that, in seeking to determine the intent of the parties, we construe contracts from a utilitarian standpoint, bearing in mind the particular business activity sought to be performed. *See Hackberry Creek*, 205 S.W.3d at 62. Here, Encore, Barber, and the Sanganis entered into an arrangement to establish how and when Barber would receive the following compensation: (1) Barber's Deferred Profit Share; and (2) future distributions related to Barber's 10% ownership interest in Encore. The text of the Note and the Agreement, which was incorporated by reference, yields no clear indication that the parties understood they were leaving any and all payment of Barber's Deferred Profit Share to the sole and absolute discretion of the Sanganis with no standard for determining whether there was available cash. *See Hackberry Creek*, 205 S.W.3d at 60. To allow the Sanganis to unilaterally decide not to pay some or all of Barber's Deferred Profit Share undercuts the parties' negotiated, contractual payment arrangements in both the Note and the Agreement. Their interpretation fails to bind them to perform because it would cause the Note to lack consideration, rendering the Note illusory and void, and therefore, unenforceable. *See Innovate Tech.*, 418 S.W.3d at 152. But we must favor an interpretation that affords some consequence to each part of the Note, which incorporated the

Agreement, so that none of its provisions will be rendered meaningless. *See id.* An interpretation of the Note that makes it illusory is unreasonable. *See Hackberry Creek*, 205 S.W.3d at 63. Accordingly, we conclude the Sanganis' interpretation is unreasonable.

On the other hand, Barber's interpretation—the Note's Notwithstanding Paragraph applies only to the pre-maturity payments that Encore was obligated to pay under the Agreement—gives effect to the other provisions of the Note. The Note incorporated the Agreement, which contained a specific waterfall of payment priorities that expressly referenced the Note. In addition, the Agreement required that Barber's Deferred Profit Share would be evidenced by the Note and that the Note would be secured by the Sangani Revolving Note. However, Barber's interpretation renders meaningless the plain language of the Note's Notwithstanding Paragraph's introductory, modifying phrase and concluding phrase that modifies the exception created by the independent clause. *See Innovate Tech.*, 418 S.W.3d at 152. As a result, we also conclude that Barber's interpretation is unreasonable.

However, the Note is not ambiguous simply because the parties put forward different interpretations of a contract term. *See Scout Energy Mgmt.*, 704 S.W.3d at 547. Concluding that the Note is ambiguous must always come after a court has exhausted all of the traditional tools of interpretation and still cannot reach a definite conclusion about the meaning conveyed by the text. *See U.S. Polyco*, 681 S.W.3d at 389 n.1. Accordingly, we must attempt to determine the parties' objective intent

by examining and considering both the Note and the Agreement together in an effort to give effect to the parties' intentions as expressed in the Note in a way that harmonizes the provisions and gives effect to all of its clauses, including those contained in the Agreement. *See Coker*, 650 S.W.2d at 393.

b. The Plain Language of the Notwithstanding Clause

Because we need not embrace either of the parties' strained interpretations of the Note, we will commence our analysis by looking first to the Note's text. *See U.S. Metal*, 490 S.W.3d at 23. Context, the surrounding words and structure of the text, is a permissible indicator of meaning. *See U.S. Polyco*, 681 S.W.3d at 389 & n.3.

We begin by examining the modifying phrase—notwithstanding any provision to the contrary contained in this Note. The Note does not define the term “notwithstanding.” When a promissory note does not define a term or provide otherwise, we interpret its language according to its plain, ordinary, and generally accepted meaning in an effort to give effect to the written expression of the parties' intent. *See Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019). To do so, we look to dictionaries to discern the meaning of commonly used terms. *See In re Davenport*, 522 S.W.3d 452, 456–57 (Tex. 2017) (orig. proceeding).

“Notwithstanding” is a preposition that means “despite” or “in spite of.” *Notwithstanding*, BLACK'S LAW DICTIONARY (12th ed. 2024). When parties use

notwithstanding language in a promissory note, they contemplate the possibility that other parts of the promissory note may conflict with that clause and agree that this clause must be given effect regardless of any contrary provision of the promissory note. *See Exco Res., Inc. v. Cudd Pressure Control, Inc.*, No. 05-14-01364-CV, 2016 WL 2726539, at *5 (Tex. App.—Dallas May 9, 2016, no pet.) (mem. op.). The clause “notwithstanding any provision to the contrary” in a promissory note provides the means for resolving any conflict with other provisions in the promissory note and requires that the “notwithstanding” clause controls over any conflicting provision. *See id.*; *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 531–32 (Tex. 2015) (discussing arbitration agreements).¹¹ Accordingly, this modifying phrase means that the Note’s Notwithstanding Paragraph supersedes all other contrary provisions in the Note.

Next, we examine the independent clause that creates an exception to the Sanganis’ duty to pay—in no event shall the Sanganis be in default or have any liability hereunder for failure to make any payments to Barber hereunder. The Note does not define what constitutes “default” or “liability.” In this context, “default” is

¹¹ Scalia and Garner explain the impact of a ‘notwithstanding’ clause on the meaning of a contract:

[T]he catch-all notwithstanding is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail. . . . Whether resolving a conflict of application, signaling an addition to other requirements, or merely making assurance doubly sure, subject to and notwithstanding phrases mean what they say: The provision to which they accord priority prevails.

ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 127 (2012) (emphasis in original).

a noun that means “failure to meet an obligation” or “the omission or failure to perform a legal or contractual duty; esp[ecially], the failure to pay a debt when due.” *Default*, BLACK’S LAW DICTIONARY. “Liability” is a noun that means “the quality or state of being legally obligated or accountable; legal responsibility to another . . . enforceable by civil remedy” or “a financial or pecuniary obligation in a specified amount.” *Liability*, BLACK’S LAW DICTIONARY. The plain language of this exception means that under no circumstances will the Sanganis be held legally responsible because they have failed to perform their obligation to pay Barber what he is owed under the Note. The parties dispute whether the word “payments” refers to pre-maturity payments, post-maturity payments, or both. Under the Note, the Sanganis owe Barber the principal amount plus interest less any amounts that Encore has paid Barber under the Agreement before the Note’s maturity date. Neither the Agreement nor the Note requires the Sanganis to make pre-maturity payments to Barber. Under the Agreement, (1) only Encore has an obligation to make pre-maturity payments on Barber’s Deferred Profit Share, which was evidenced by the Note, (2) the Sanganis agreed to receive distributions after the other prioritized payments and distributions in the waterfall, including Barber’s Deferred Profit Share, (3) the Sanganis agreed that the distributions to Bharat Sangani were subject to a limitation on the ratio of payments to Barber and Bharat Sangani until the Note was paid, and (4) the parties agreed that Bharat Sanganis and Barber would execute the Note as evidence of Barber’s Deferred Profit Share. Further, the Note expressly

states that the Sanganis “may prepay this [Note] in any amount at any time before the Maturity Date without penalty or premium” and its failure to make any such statement with respect to payment at maturity. Instead, the Note states, “All unpaid amounts are due by the Maturity Date. After maturity, [the Sanganis] promise[] to pay any unpaid principal balance plus interest” However, we observe that the Note anticipates the possibility that there will be multiple post-maturity payments because both the Note and the Agreement state that interest on the Note stops accruing one year later on December 31, 2019.

Finally, we examine the phrase that defines or qualifies the exception—to the extent that there is not available cash, as determined by the Sanganis in their sole and absolute discretion pursuant to the terms of the Agreement. “Available cash” is not defined by the Note. “Available cash” is referenced, but not defined, in the Agreement as “cash available for distributions arising from the proceeds and profits from any asset, sale of investments and income from operations.” But that provision of the Agreement refers to Encore’s available cash, not the Sanganis’, and the Agreement gives Encore the “sole and absolute discretion” to determine whether it has “available cash.” The Note is between Barber and the Sanganis, individually, and although it does not define “available cash” the Sanganis’ discretion to determine whether or not there is “available cash” is limited by the Agreement.

In addition, “sole and absolute discretion” is not defined in the Note. “Sole,” an adjective, is defined as “functioning independently and without assistance or

interference.” *Sole*, MERRIAM-WEBSTER, merriam-webster.com; *see also Legacy Ests., LLC v. Signal Hill Ests. Homeowners Ass’n, Inc.*, 697 S.W.3d 165, 175 (Tex. App.—El Paso 2023, no pet.). “Discretion,” a noun, means “wise conduct and management exercised without constraint; the ability coupled with the tendency to act with prudence and propriety,” and “freedom in the exercise of judgment; the power of free decision-making.” *Discretion*, BLACK’S LAW DICTIONARY. Bringing those two terms together, “sole discretion” ordinarily describes “an individual’s power to make decisions without anyone else’s advice or consent.” *Sole Discretion*, BLACK’S LAW DICTIONARY; *see also Legacy Ests.*, 697 S.W.3d at 175. By its plain terms, the Note’s Notwithstanding Paragraph provides that the Sanganis operate independently and without need for agreement or consent from Barber or Encore when deciding whether they have available cash to pay Barber under the Note. *See Legacy Ests.*, 697 S.W.3d at 175.

But the Note also uses the term “absolute,” an adjective that means “free from restriction, qualification, or condition.” *Absolute*, BLACK’S LAW DICTIONARY. As a result, not only were the Sanganis empowered to act independently when determining whether there was cash available to pay Barber, but their discretion was unfettered. *See Legacy Ests.*, 697 S.W.3d at 175. Because the parties contracted that the Sanganis would have “sole and absolute discretion,” no reasonableness standard is imposed on the Sanganis’ decisions. *See id.*

Significantly, the Sanganis' sole and absolute discretion to determine whether they have available cash is limited by the Agreement, which gives Encore the sole and absolute discretion to determine whether it has available cash. The Note expressly acknowledges Encore's sole and absolute discretion when it states:

Accordingly, this Note is subject to [the Agreement] and the provisions of the [Agreement] are incorporated herein by reference (e.g., from time to time, if there is no available cash, as determined by Encore in its sole and absolute discretion, then there shall be no payments at such time under the Note).

However, the Agreement provides that:

Notwithstanding the foregoing, the parties acknowledge and agree that any figures set forth in items (a) through (e) [of the waterfall] above and/or the Spreadsheet are determined as of the date of this [Agreement] and may change from time to time, as necessary based upon available cash, as determined by Encore in its sole and absolute discretion.

Barber's Deferred Profit Share was set out in item (g) of the waterfall, so it was not subject to Encore's determination that there was available cash in its sole and absolute discretion. Further, the Agreement states that payments on the Note are subject to the waterfall and "such other terms as included in the Note."

c. A Reasonable Interpretation of the Note that Harmonizes All Provisions

The task of harmonizing the provisions of the Note, which incorporated the Agreement, requires us to reconcile otherwise conflicting provisions. *See U.S. Polycy*, 681 S.W.3d at 390. As a result, in order to resolve the parties' dispute, we must interpret the Note and the Agreement, which contain a total of five notwithstanding paragraphs combined. Each notwithstanding paragraph controls

discrete aspects of the parties' contractual relationship. After reviewing the Note and the Agreement together, we conclude that the Note's Notwithstanding Paragraph must be construed with the Waterfall Notwithstanding Paragraph.

The phrase in the Note's Notwithstanding Paragraph that defines or qualifies the exception—to the extent that there is not available cash, as determined by the Sanganis in their sole and absolute discretion pursuant to the terms of the Agreement—clearly states that the Sanganis' sole and absolute discretion is determined by the terms of the Agreement. As a result, the Note's Notwithstanding Paragraph cannot be interpreted in isolation, and the Sanganis' discretion to determine whether there is available cash is subject to the Agreement. Accordingly, we must look to the Agreement in order to determine what limits the Sanganis' sole and absolute discretion.

The Agreement defines available cash as “cash available for distributions arising from the proceeds and profits from any asset sales, sale of investments and income from operations of Encore.” The Waterfall Notwithstanding Paragraph establishes how the Sanganis determine whether there is available cash. It states:

Notwithstanding the foregoing [waterfall distribution], the total distributions, including cash distributions and accumulated distributions according to the Spreadsheet, to Bharat [Sangani] and [Barber] [under the waterfall distribution] shall not exceed 75/25 until December 31, 2019 [(i.e., one year after the maturity date of the Note when interest stops accruing)], and 65/35 after December 31, 2019, until the [Barber's Deferred Profit Share, evidenced by the Note] is paid. Thereafter, the total distributions to Bharat [Sangani] and

[Barber] shall be allocated 88.89% to Bharat [Sangani], and 11.11% to [Barber].

Under the plain language of the Note's Notwithstanding Paragraph, the Sanganis' sole and absolute discretion to determine whether there was available cash to pay Barber was subject to the Agreement. Under the Agreement's Waterfall Notwithstanding Paragraph, if Encore made a distribution to Bharat Sangani it must (a) be in a 75/25 ratio to distributions made to Barber before December 31, 2019, and (b) be in a 65/35 ratio to distributions made to Barber after December 31, 2019. This requirement continues until Barber's Deferred Profit Share is paid in full. In other words, anytime the Sanganis received a distribution from Encore, they concluded in their sole and absolute discretion that there was cash available to pay Barber's Deferred Profit Share, which was evidenced by the Note. The Sanganis do not dispute that they received distributions from Encore or argue, in the alternative, on appeal that they raised an issue of material fact on this element of the Barber's breach-of-the-promissory-note counterclaims precluding summary judgment.

We believe that this interpretation of the Note considers both the Note and the Agreement which was incorporated by reference, it harmonizes and gives effect to all the provisions of both the Note and the Agreement, and it analyzes the provisions with reference to the entirety of the parties' agreement. *See Frost Nat'l Bank*, 165 S.W.3d at 312. Under our interpretation, each provision in the Note is interpreted with reference to the entire Note, which includes the Agreement, as opposed to giving one provision controlling effect. *See Moayedi*, 438 S.W.3d at 7. As a result,

all writings that pertain to the same transaction—the Note and the Agreement—are considered together.

We conclude that Barber conclusively established as a matter of law that the Note was due on December 31, 2018, (the maturity date) and a balance was owed by the Sanganis.

d. The Balance Owed on the Note Was for a Certain Amount

In first and second part of issue four, the Sanganis argue (1) that the trial judge erred when he sustained Barber’s objection to the declaration of Encore’s CFO, and (2) that the trial court erred when it granted Barber’s traditional motion for partial summary judgment on his breach-of-the-promissory-note counterclaims and denied their competing first traditional motion for partial summary judgment because the Sanganis raised genuine issues of material fact relating to the balance owed on the Note.

i. Barber’s Objections to Declaration of Encore’s CFO

In the first part of issue four, the Sanganis argue the trial court erred when it sustained Barber’s objections to the declaration of Encore’s CFO. They contend that Barber’s objections do not have sufficient specificity to make the trial court aware of his complaints, identify the objectionable parts of the declaration, or provide any reasons why some parts of the declaration violate the legal principles on which he objected. In effect they maintain that Barber’s objections were conclusory. Barber

responds that the Sanganis did not object to the trial judge's ruling on their summary-judgment evidence, so they failed to preserve this argument for appellate review.

An appellate court reviews a trial court's ruling sustaining an objection to summary-judgment evidence for an abuse of discretion. *Beinar v. Deegan*, 432 S.W.3d 398, 402 (Tex. App.—Dallas 2014, no pet.). A trial court abuses its discretion if it acts arbitrarily and unreasonably. *Id.*

An appellant has the burden to bring forth a record that is sufficient to show the trial court abused its discretion when it sustained the objections to his summary-judgment evidence. *Id.* When a proponent of summary-judgment evidence fails to object to the trial court's ruling that sustains an objection to his summary-judgment evidence, he has not preserved the right to complain on appeal about the trial court's ruling. *E.g., id.*

The Sanganis attached the declaration of Encore's CFO to their second traditional motion for summary judgment, which they incorporated into their response to Barber's supplement to his traditional motion for partial summary judgment. In that declaration, Encore's CFO concluded that the potential amount owed to Barber on the Note was no more than \$15,568,851 based on his review of Encore's accounting payments to Barber and the Sanganis as well as Encore's accounting of the Note's balance. Barber filed a written objection to the declaration of Encore's CFO on the grounds of hearsay, incomplete summary, relevance, lack of foundation, authenticity, and the purported calculation does not comport with the

Agreement or the Note. The trial court's order granting partial summary judgment states that it granted Barber's objection to the declaration of Encore's CFO and struck the same. That order also granted summary judgment in favor of Barber and states that it was based on the trial court's prior summary-judgment ruling and all of the pleadings on file, the evidence presented, and the arguments made.

The Sanganis argue that the Texas Supreme Court's opinion in *Browder v. Moree*, 659 S.W.3d 421 (Tex. 2022) (per curiam), is contrary to and impliedly overruled this Court's precedent requiring a proponent of summary-judgment evidence to object to the trial court's ruling that sustains an objection to his summary-judgment evidence in order to preserve error for appellate review. However, *Browder* involved whether a party was required to renew his request or object to the trial court's adverse ruling to preserve his complaint that he had been denied a jury trial and did not repudiate this Court's precedent. *Id.* at 423–24.

The record does not show that the Sanganis objected to the trial judge's order sustaining Barber's objections. Accordingly, we conclude the Sanganis have not preserved their complaint that the trial judge abused his discretion when he sustained Barber's objections to the declaration of Encore's CFO. *See Beinar*, 432 S.W.3d at 402.

The first part of issue four is decided against the Sanganis.

ii. Barber Conclusively Established the Balance Owed on the Note and Sanganis Did Not Raise an Issue of Material Fact

In the second part of issue four, the Sanganis argue (1) that Barber did not conclusively prove that a certain balance was owed on the Note, and (2) that they raised a genuine issue of material fact as to the alleged balance owed on the Note. Barber responds that he presented competent summary-judgment evidence supporting that the balance owed to him on the Note was \$19,715,247.

First, the Sanganis contend that their evidence—the declaration of Encore’s CFO—established a genuine issue of material fact as to the outstanding balance on the Note. However, we have already concluded that the Sanganis failed to preserve their complaint that the trial judge abused his discretion when he sustained Barber’s objections to and struck the declaration of Encore’s CFO. Accordingly, we conclude the Sanganis have not shown they raised a genuine issue of material fact as to the balance owed on the Note.

Second, the Sanganis argue that Barber did not conclusively prove that a certain balance was owed on the Note because his evidence creates a genuine issue of material fact. They contend that in his traditional motion for partial summary judgment, Barber stated that, according to Encore’s records, the balance owed on the Note was \$19,303,394 as of December 31, 2019, but he believed that the actual balance was higher. They claim this contradicts Barber’s February 15, 2023 second supplemental declaration, which was attached to his supplement to his traditional motion for partial summary judgment, that detailed his methodology for calculating

the outstanding balance on the Note and calculated that the balance owed was \$19,715,247 after crediting all excess payments made by Encore and ceasing any interest accrual as of December 31, 2019. The Sanganis maintain this \$400,000 discrepancy as to the balance owed on the Note creates a fact issue. However, the Sanganis' argument fails because Barber's traditional motion for partial summary judgment is not summary-judgment evidence. *See Thomas v. Omar Invs., Inc.*, 156 S.W.3d 681, 684 (Tex. App.—Dallas, no pet.).

We conclude that Barber conclusively proved that a certain balance was owed on the Note and the Sanganis did not raise an issue of material fact.

The second part of issue four is decided against the Sanganis.

e. Conclusions Relating to Barber's Counterclaims for Breach-of-the-Promissory-Note

We conclude the trial court did not err when it granted Barber's traditional motion for partial summary judgment and his supplement to that motion on his breach-of-the-promissory-note counterclaims and the Sanganis' declaratory judgment action as to the Note. We also conclude the trial court did not err when it denied the Sanganis' competing first traditional motion for partial summary judgment on Barber's breach-of-the-promissory-note counterclaims. Further, we conclude that the Sanganis did not preserve their complaint that the trial court erred when it sustained Barber's objections to and struck the declaration of Encore's CFO.

Issue three and the first two parts of issue four are decided against the Sanganis. The trial court correctly granted Barber's summary judgment motion

unless the Sanganis established that they were entitled to judgment on one of their defenses to recovery.¹² *See Kroesche*, 2023 WL 1112002, at *8. Accordingly, we must also review the Sanganis' first and second issues arguing that the trial court erred when it denied their second traditional motion for summary judgment on their affirmative defenses of lack of consideration and failure of consideration.

IV. The Sanganis' Lack-of-Consideration Affirmative Defense

In issue one, the Sanganis argue that the trial court erred when it denied their second traditional motion for summary judgment because they conclusively proved their affirmative defense of lack of consideration as a matter of law. The Sanganis argue that (1) the Note is illusory based on the Note's Notwithstanding Paragraph, (2) it was an "artificial construct" to help Barber with tax planning and references a nonexistent loan, (3) Barber's decision to continue working for Encore is not consideration for the Note because he was an at-will employee, (4) Barber's decision to continue investing in Encore is not consideration for the Note, and (5) Encore did not provide consideration for the Note by agreeing to the waterfall. Barber responds that the Agreement, which was incorporated into the Note, recites that it is supported by consideration and the Sanganis cannot overcome the strong presumption under Texas law that this recital is conclusive evidence of adequate consideration. He contends that the Note and the Agreement, which must be construed together, are

¹² On appeal, the Sanganis do not argue that they raised a genuine issue of material fact on any of their affirmative defenses precluding Barber's right to summary judgment. Rather, they argue only that they were entitled to summary judgment based on their affirmative defenses.

replete with bargained-for promises. Barber maintains that the Sanganis' argument ignored these bargained-for promises and focuses only on the Sanganis' payment obligations, which the Sanganis contend are illusory.

Although we have already concluded that Barber showed he was entitled to summary judgment on his breach-of-the-promissory-note counterclaims against the Sanganis, we must address this issue because Barber would still not be able to recover on the Note if the Sanganis showed they were entitled to traditional summary judgment on their affirmative defense of lack of consideration. *See Kroesche*, 2023 WL 1112002, at *8.

A. Applicable Law

Consideration is a present exchange bargained for in return for a promise. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). Promises are illusory if they lack bargained-for consideration because they fail to bind the promisor. *See Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 505 (Tex. 2015). A lack of consideration occurs when a promissory note, at its inception, does not impose obligations on both parties. *See Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 747 (Tex. App.—Dallas 2012, no pet.). Without a mutuality of obligation, a promissory note is illusory and void and, therefore, unenforceable. *See id.*; *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 725 (Tex. App.—Fort Worth 2008, pet. dismiss'd).

Under the common law, lack of consideration is an affirmative defense to a claim for breach of a promissory note that must be pleaded. *See Tex. Soccer Found. v. Sting Soccer Found.*, No. 05-19-01228-CV, 2021 WL 4451439, at *7 (Tex. App.—Dallas Sept. 29, 2021, pet. denied) (mem. op.); *see also Koepke, Inc. v. Steve Lewis, LLC*, No. 13-24-00331-CV, 2025 WL 2253667, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 7, 2025, no pet.) (mem. op.). Because a written promissory note is presumed to be supported by consideration, the burden is on the party asserting the affirmative defense to prove there was a lack of consideration. *See Stride Staffing v. Holloway*, No. 05-14-00811-CV, 2015 WL 4554341, at *3 (Tex. App.—Dallas July 29, 2015, pet. denied) (mem. op.) (when agreement in writing, consideration is presumed and party alleging lack of consideration must rebut presumption). When an instrument recites that consideration has been given, courts presume that consideration to be sufficient. *Hoagland v. Finholt*, 773 S.W.2d 740, 743 (Tex. App.—Dallas 1989, no writ). However, courts allow parol evidence to prove a lack of consideration and to establish the actual consideration given. *See Kroesche*, 2023 WL 1112002, at *11; *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 335 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

B. The Sanganis Did Not Conclusively Prove Their Lack-of-Consideration Affirmative Defense

The Note states that it incorporates and is subject to the Agreement. The Agreement states that Barber’s Deferred Profit Share would be evidenced by the Note, which was attached to the Agreement as Exhibit B. Further the Agreement

states, “Now, therefore, for and in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows.” The Note refers to consideration through its incorporation of the Agreement and, as a result, we presume that consideration to be sufficient unless the Sanganis overcome that presumption. *See Hoagland*, 773 S.W.2d at 743.

First, the Sanganis argue that the Note was illusory because (1) it gave the Sanganis the sole and absolute discretion to determine whether there was available cash pursuant to the Agreement, (2) the Agreement gave Encore the sole and absolute discretion to determine when to make a distribution, and (3) Sangani controls Encore’s sole and absolute discretion because he is the 90% owner of Encore. We rejected this argument in our analysis of the elements of Barber’s breach-of-the-promissory-note counterclaims.

Second, the Sanganis argue that the Note refers to a nonexistent loan and does not refer to consideration. The introductory language of the Note identifies the Sanganis as the “Borrower[s]” and Barber as the “Lender.” It lists the principal amount as \$11,813,282 and states that it is secured by the Sangani Revolving Note. Although the Note identifies Barber as the “lender,” it does not include any language indicating that he promised to lend the Sanganis money. Rather, the Note states that its purpose is to evidence Barber’s Deferred Profit Share as defined in the Agreement. It also states that the Note incorporates and is subject to the Agreement. The Agreement states that Barber’s Deferred Profit Share is an estimated

\$11,813,282 and that it is evidenced by the Note. The Agreement contains no promise by Barber to lend the Sanganis money therefore, the consideration for the Note is not a loan by Barber.

Finally, the Sanganis argue there was a lack of consideration because (1) Barber's decision to continue working for Encore is not consideration for the Note because he was an at-will employee, (2) Barber's decision to continue investing in Encore is not consideration for the Note, and (3) Encore did not provide consideration for the Note by agreeing to the waterfall. However, in his response to the Sanganis' second motion for traditional summary judgment, Barber argued that the undisputed facts showed there were multiple bargained-for exchanges or compromises in the Note and the Agreement that the Sanganis do not challenge on appeal including: (1) the parties compromised as to the amount of Barber's Deferred Profit Share; (2) the parties compromised as to how profits would be paid in the waterfall, and Barber gave Encore and the Sanganis the right to determine whether there was available cash to make distributions; (3) Barber agreed to move the obligation to pay Barber's Deferred Profit Share to a Note secured by the Sangani Revolving Note because the Sanganis did not want the obligation to encumber Encore's balance sheet; (4) Sangani obtained the ability to have Encore use available cash to pay the Note during the term of the Note and to apply toward the Note any excess salary plus distributions and personal expenses over \$600,000 paid to Barber; (5) Barber agreed to stop demanding payment of Barber's Deferred Profit Share and

continue working for Encore; (6) the Sanganis resolved their dispute with Barber; (7) Encore and the Sanganis could continue to use Barber's Deferred Profit Share to fund Encore; (8) Encore's balance sheet was improved, which benefitted Bharat Sanganis as the 90% shareholder of Encore; (9) Bharat Sangani was able to collateralize the Note by pledging the amounts owed to him under the Sangani Revolving Note; and (10) Encore and the Sanganis obtained the right to buyout Barber under certain specified events. This evidence raised a genuine issue of material fact on the Sanganis' lack-of-consideration affirmative defense.

We conclude that the Sanganis did not conclusively prove as a matter of law their affirmative defense that the Note lacked consideration.

Issue one is decided against the Sanganis.

V. The Sanganis' Failure-of-Consideration Affirmative Defense

In issue two, the Sanganis argue in the alternative that the trial court erred when it denied their second traditional motion for summary judgment on their affirmative defense of failure of consideration. They contend that their breaches of the Note were excused because the Note was a multi-million-dollar loan from Barber to the Sanganis that did not occur. Barber responds that the Note was never intended to be a traditional loan and the Note and the Agreement were supported by numerous bargained-for promises, not just payment obligations. He argues that the Sanganis did not present summary-judgment evidence in support of their affirmative defense. He also argues that the Sanganis have not maintained that they did not receive the

benefits of the bargained-for promises and, in fact, they have sought to exercise the Agreement's buyout provision.

Although we have already concluded that Barber showed he was entitled to summary judgment on his breach-of-the-promissory-note counterclaims against the Sanganis, we must address this issue because Barber would still not be able to recover on the Note if the Sanganis showed they were entitled to traditional summary judgment on their affirmative defense of failure of consideration. *See Kroesche*, 2023 WL 1112002, at *8.

A. Applicable Law

The contention that a party's performance on a promissory note is excused by the other party's prior material breach or failure to perform is a contract-avoidance affirmative defense.¹³ *701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193-CV, 2017 WL 3634335, at *5 (Tex. App.—Dallas Aug. 24, 2017, pet. denied) (mem. op.); *see also* TEX. R. CIV. P. 94; *Cheung-Loon*, 392 S.W.3d at 747–48 (failure of consideration occurs when promised performance failed because of supervening cause that arose after contract was formed). Whether a breach is material is ordinarily a fact question. *701 Katy Bldg.*, 2017 WL 3634335, at *5.

¹³ This Court has noted the interchangeability of the terms “prior material breach” and “failure of consideration.” *701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193-CV, 2017 WL 3634335, at *12 (Tex. App.—Dallas Aug. 24, 2017, pet. denied) (mem. op.); *see also State Farm Lloyds v. Fuentes*, 597 S.W.3d 925, 934 n.4 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (addressing failure-of-consideration affirmative defense as prior material breach). Also, the *Restatement (Second) of Contracts* has abandoned the term “failure of consideration” and adopted the term “failure of performance” because “failure of consideration” is misleading and can be confused with a lack of consideration. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. & reporter's note (AM. L. INST.1981).

Because a written promissory note is presumed to be supported by consideration, the burden is on the party asserting the affirmative defense to prove there was a failure of consideration. *See Rodriguez v. Ginsburg*, No. 05-17-01266-CV, 2019 WL 4010770, at *8 (Tex. App.—Dallas Aug. 26, 2019, no pet.) (mem. op.).

B. The Sanganis Did Not Conclusively Prove a Failure of Consideration

As we previously noted, the introductory language of the Note identifies the Sanganis as the “Borrower[s]” and Barber as the “Lender.” The principal amount is \$11,813,282 and the Note is secured by the Sangani Revolving Note. Again, although the Note identifies Barber as the “lender,” it does not include any language indicating that he promised to lend the Sanganis money. Rather, the Note states that its purpose is to evidence Barber’s Deferred Profit Share as defined in the Agreement. It also states that the Note incorporates and is subject to the Agreement. Further, the Agreement states that Barber’s Deferred Profit Share is an estimated \$11,813,282, that it is evidenced by the Note, and it contains no promise by Barber to lend the Sanganis money. A breach of contract occurs when a party fails to perform an act it has explicitly or impliedly promised to perform. *Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.). The Sanganis have identified no contractual promises by Barber that he failed to perform.

We conclude that the Sanganis did not meet their summary-judgment burden to conclusively show that Barber breached the Note. Accordingly, we conclude the

trial court did not err when it denied the Sanganis' second traditional motion for summary judgment on their affirmative defense of failure of consideration.

Issue two is decided against the Sanganis.

VI. The Sanganis' Request for a Declaratory Judgment for an Offset

In the third part of issue four, the Sanganis argue that the trial court erred when it denied their second traditional motion for summary judgment on the portion of their declaratory-judgment action requesting an offset. The Sanganis argue they conclusively proved that they were entitled to an offset on the balance that they owed on the Note by Encore's \$1 million post-maturity distribution to Barber in 2020. They contend that under the Note's Notwithstanding Paragraph they had the sole and absolute discretion over payments applied to the Note and that the Note contemplates that Encore would pay some of the principal balance over time because it does not specify a date when Encore's distributions to Barber would cease reducing the Note's principal.

Barber responds that the Note's full balance was due and payable at the Note's maturity date and the Sanganis were responsible for paying the Note, not Encore. As a result, he contends that any post-maturity payment made by Encore to Barber was independent from the balance owed on the Note. Also, Barber argues that the Agreement's excess-salary provision functioned only while Barber was employed by Encore, and Encore and the Sanganis lost the ability to reduce the Note's balance through excess payments when Sangani terminated Barber's employment with

Encore. Barber asserts that Encore’s \$1 million post-maturity distribution was toward his 10% equity interest in Encore, which according to the Agreement “is a distinct and separate interest from the [] Note” that evidenced his Deferred Profit Share. As a result, denying the Sanganis an offset does not result in a double recovery.

A. Applicable Law

The affirmative defense of offset or setoff, which is sometimes also called “payment” or “credit,” refers to a debtor’s right to have payments to the obligee credited against the total amount owed. *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980); *Ganguly Holdings, L.L.C. v. Ker-Seva Ltd.*, No. 05-21-00124-CV, 2022 WL 3024320, at *6 (Tex. App.—Dallas July 29, 2022, no pet.) (mem. op.); *Sanati v. Arab*, No. 01-18-00325-CV, 2020 WL 826724, at *3 (Tex. App.—Houston [1st Dist.] Feb. 20, 2020, no pet.) (mem. op. on reh’g). A defendant may also raise offset as a counterclaim. *See LAKXN Income, Inc. v. TLC Hospitality, LLC*, No. 02-20-00415-CV, 2021 WL 3085755, at *3 (Tex. App.—Fort Worth July 22, 2021, no pet.) (mem. op.).

The party asserting offset has the burden of proving facts necessary to support it. *Brown*, 601 S.W.2d at 936; *Sanati*, 2020 WL 826724, at *3. The evidence must show the specific amounts paid and that the payments were made in satisfaction of the debt sued upon. *See Sanati*, 2020 WL 826724, at *3. Thus, a defendant may defeat a plaintiff’s entitlement to summary judgment by raising a fact issue on offset.

See Stucki v. Noble, 963 S.W.2d 776, 781 (Tex. App.—San Antonio 1998, pet. denied) (“[T]he burden was upon Stucki to produce competent summary judgment proof sufficient to raise a fact question regarding whether offsets or payments had been credited to the note.”).

B. The Sanganis Did Not Conclusively Prove that They Were Entitled to an Offset of Encore’s Post-Maturity Distributions to Barber

First, with respect to the Sanganis’ argument that the Note’s Notwithstanding Paragraph gave them absolute discretion over the payments, we have already rejected that interpretation of the Note and the Agreement.

Second, we address the Sanganis’ argument that the Note contemplates that Encore would pay the principal balance over time and does not specify a date when Encore’s distributions to Barber would stop being credited toward the Note’s principal. In their first amended petition, the Sanganis sought a declaratory judgment asserting their right to offset the Note by a \$1 million post-maturity distribution made by Encore to Barber in 2020, approximately two years after the Note’s maturity date. And, in their second traditional motion for summary judgment, they argued that under the terms of the Note and the Agreement, “any Encore distributions benefitting Barber reduces the outstanding balance of his Note dollar-for-dollar in the amount of the distribution(s).” This is the entirety of the Sanganis’ summary-judgment argument, which we interpret to relate to Encore’s \$1 million post-maturity payment to Barber. In support of their argument, the Sanganis cite paragraph 24 of Barber’s first amended answer to their third amended

petition and request for declaratory judgment. However, the parties do not point us to nor could we find in the record either the Sanganis' third amended petition and request for declaratory judgment or Barber's first amended answer to that particular pleading.

In Barber's second supplemental declaration, which was attached to his response to the Sanganis' second traditional motion for summary judgment, he acknowledged that the Note's balance of \$19,715,247 does not include any reduction for Encore's \$1 million post-maturity distribution. He also stated that, at the time he received the \$1 million distribution from Encore, both the Sanganis and Encore were denying the existence of the Note, Encore submitted the \$1 million distribution as a "dividend or distribution" to the Internal Revenue Service, and he paid taxes on this distribution in his 2020 filing. This evidence raised a genuine issue of material fact on the Sanganis' right to an offset.

We conclude that the Sanganis did not conclusively prove as a matter of law that they were entitled to traditional summary judgment on their claim for offset on the balance that they owed on the Note by Encore's \$1 million post-maturity distribution to Barber in 2020.

The third part of issue four is decided against the Sanganis.

VII. Conclusion

The trial court did not err when it granted summary judgment in favor of Barber and against the Sanganis on Barber's breach-of-the-promissory-note

counterclaims and the Sanganis' declaratory-judgment action as to the Note and their claim for an offset. Also, it did not err when it denied the Sanganis' competing summary-judgment motions.¹⁴

VIII. Disposition

We affirm the trial court's final judgment.

/J.J. Koch/

J.J. KOCH
CHIEF JUSTICE

Evans, J., concurring and dissenting

¹⁴ We express no opinion as to the parties' claims and counterclaims in the suit from which these claims and counterclaims were severed.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BHARAT SANGANI AND SMITA
B. SANGANI, Appellants

No. 05-24-00237-CV V.

PATRICK J. BARBER, Appellee

On Appeal from the 134th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-24-02128.
Opinion delivered by Chief Justice
Koch. Justices Wright and Evans
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee PATRICK J. BARBER recover his costs of this appeal from appellants BHARAT SANGANI AND SMITA B. SANGANI.

Judgment entered this 13th day of January 2026.