

**CASE LAW UPDATE:
A SURVEY OF RECENT TEXAS
PARTNERSHIP AND LLC CASES**

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Case Law Update: A Survey of Recent Texas Partnership and LLC Cases

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I. Introduction

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law. This paper only includes cases that have appeared since the paper for last year's program was prepared. Case law surveys that include cases from prior years are available on Professor Miller's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020).

The court held that Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied. Because the parties made such an agreement, the court upheld the court of appeals' reversal of the trial court's judgment, which was based on the jury's finding that the parties created a partnership applying the five-factor test set forth in the partnership statute.

In March 2011, Enterprise Products Partners, L.P. and Enterprise Products Operating LLC (collectively, "Enterprise") approached Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P. (collectively, "ETP") about converting a pipeline known as Old Ocean into one that could move oil south from Cushing, Oklahoma. ETP owned Old Ocean, but Enterprise held a long-term lease on it. Converting the pipeline to a pipeline for transporting oil and extending it the rest of the way to Cushing would require a large investment from the parties and commitments from customers. The parties agreed to explore the viability of the project, which they referred to as "Double E." In three written agreements, they stated that neither party would be bound to proceed until each company's board of directors had approved the execution of a formal contract.

A confidentiality agreement entered into in March 2011 included a provision that the parties would not be under any legal obligation other than the matters specifically agreed to in the confidentiality agreement "unless and until a definitive agreement between the Parties with respect to the Potential Transaction has been executed and delivered."

In April 2011, the parties signed a Letter Agreement with an attached "Non-Binding Term Sheet." The Letter Agreement stated:

Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and, except for the Confidentiality Agreement ..., no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties. Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.

The third agreement entered into by the parties was a Reimbursement Agreement signed in April 2011. That agreement provided the terms under which ETP would reimburse Enterprise for half the cost of the project's engineering work, and it recognized that the parties were "in the process of negotiating mutually agreeable definitive agreements" for the project and stated that nothing in it would "be deemed to create or constitute a joint venture, a partnership, a corporation, or any entity taxable as a corporation, partnership or otherwise." ETP's

pleadings acknowledged that “the parties had not yet formed a partnership” when the parties entered into these agreements.

As of May 2011, the parties had formed an integrated team to pursue Double E. During the spring and summer, they marketed Double E to potential customers as a “50/50 JV” and prepared engineering plans for the project. Because a federal rule governing new interstate pipelines requires an “open season” of 30 to 45 days in which shippers are asked to commit to daily barrel volumes and tariffs, the parties needed shipping commitments of at least 250,000 barrels a day for ten years at a tariff of \$3.00 per barrel if Double E was going to be viable. The first open season was unsuccessful, and the parties extended the open season twice. On August 12, the last day of the second extended open season, Chesapeake Energy Corp. committed to ship 100,000 barrels daily. ETP hoped that Chesapeake’s commitment would attract other shippers who had been holding out, but Enterprise had begun preparing its exit by resuming negotiations with Enbridge, a Canadian company with whom Enterprise had previously had discussions that did not materialize. Enterprise ended its relationship with ETP orally on August 15 and in writing a few days later.

The next month, ConocoPhillips announced that it would sell its interest in the Seaway pipeline, and Enbridge bought the interest, making Enbridge co-owner of the pipeline with Enterprise. Enterprise and Enbridge obtained an anchor shipper commitment from Chesapeake, which resulted in their securing many additional commitments during the open season. Enterprise and Enbridge invested billions to reverse the direction of the pipeline and make other modifications needed to move oil from Cushing to the Gulf. The new pipeline, known as Wrangler, opened in June 2012, and was a financial success.

ETP sued, alleging that it had formed a partnership with Enterprise to “market and pursue” a pipeline through their conduct, and Enterprise breached its statutory duty of loyalty by pursuing the Wrangler project with Enbridge. The jury found that “ETP and Enterprise [had] create[d] a partnership to market and pursue a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast” and further found that Enterprise had not complied with its duty of loyalty. The jury found that ETP suffered \$319,375,000 in compensatory damages and that the value to Enterprise of the benefit gained as a result of its misconduct was \$595,257,433. The trial court reduced the disgorgement award to \$150 million and otherwise rendered judgment on the verdict for ETP for a total of \$535,794,777 plus post-judgment interest.

The Dallas Court of Appeals reversed and rendered judgment for Enterprise on the basis that the Texas Business Organizations Code (TBOC) allows parties to contract for conditions precedent to partnership formation and that the Letter Agreement created two conditions that were not met: (1) execution of “definitive agreements memorializing the terms and conditions of the Transaction”, and (2) approval of the definitive agreements by the boards of each of the parties. The court of appeals concluded that ETP had the burden either to obtain a jury finding that the conditions were waived or to prove waiver conclusively, which it failed to do. ETP appealed to the Texas Supreme Court, which granted review.

The Texas Supreme Court began its analysis by reviewing provisions of Chapter 152 of the TBOC that address creation of a partnership. Under § 152.051(b), “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a ‘partnership,’ ‘joint venture,’ or other name.” Under § 152.052(a):

Factors indicating that persons have created a partnership include the persons’:

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

The court further pointed out that § 152.003 provides that “[t]he principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions.”

The court reviewed its previous analysis of the five-factor statutory test in *Ingram v. Deere*, in which the court traced the evolution of Texas partnership law from the early common law to the current statutory provision,

which sets out a nonexclusive list of factors to be considered in a totality-of-the-circumstances test. The court pointed out that “expression of an intent to be partners in the business” is just one factor of the totality-of-the-circumstances test, and this factor is not given any greater weight than the other factors. The court acknowledged that, under § 152.051(b), persons can create a partnership regardless of whether they intend to do so, and a comment to the analogous provision of the Revised Uniform Partnership Act warns that parties “may inadvertently create a partnership despite their expressed subjective intention not to do so.” The court pointed out, however, that it expressed skepticism in *Ingram* that the Legislature “intended to spring surprise or accidental partnerships on independent business persons.” The court then turned to the question of whether persons can override the default test for partnership formation in Chapter 152 by agreeing not to be partners until conditions precedent are satisfied, a question that was not presented or addressed in *Ingram*.

The court emphasized the importance of the principle of freedom to contract against the backdrop of the pronouncement in § 152.003 importing “principles of law and equity” into the partnership-formation analysis, and use of the word “include” in § 152.052(a) such that the enumerated factors are nonexclusive. The court quoted pre-TBOC case law relying on a 19th century British jurist regarding the “sacred” nature of freedom to contract, and the court stated that “Texas courts regularly enforce conditions precedent to contract formation and reject legal claims that are artfully pleaded to skirt unambiguous contract language, especially when that language is the result of arm’s-length negotiations between sophisticated business entities.”

The court then turned to the question of “whether parties’ freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor.” The court discussed cases relied on by each party and concluded that neither of the cases were directly on point.

ETP argued that the TBOC’s totality-of-the-circumstances test controls partnership formation to the exclusion of the common law and that the parties’ intent with respect to the creation of a partnership is just one factor to be weighed with the other statutory factors set forth in § 152.052(a). ETP argued that contract language cannot preclude the creation of a partnership until a specific condition has occurred or been performed, and the key to avoiding an accidental partnership is to “avoid the conduct that establishes a partnership under the statute.” Enterprise relied upon the primacy of freedom of contract and argued that detrimental economic consequences to the State and constant litigation would ensue if parties cannot protect themselves from the creation of an unwanted partnership. The court noted that it had received numerous amicus briefs weighing in on both sides. Reaffirming its statement in *Ingram* that the Legislature did not “intend[] to spring surprise or accidental partnerships” on parties, the court relied on the supplementation of the partnership-formation rules of Chapter 152 with “principles of law and equity” (as authorized by § 152.003) and the deeply ingrained common-law principle of freedom of contract to “hold that parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152 and that, as a matter of law, they did so here.”

The court stated that “[a]n agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties,” adding the caveat in a footnote that “[s]uch an agreement would not, of course, bind third parties, and we do not consider its effect on them.” Notwithstanding the conclusive effect that a failure to satisfy a condition to partnership formation will ordinarily have, the court acknowledged that performance of a condition precedent “can be waived or modified by the party to whom the obligation was due by word or deed.” The court held, however, that ETP was required either to obtain a jury finding on waiver or to prove waiver conclusively, and the court concluded that ETP had done neither.

Addressing the relationship between a waiver and evidence of the statutory factors indicating creation of a partnership, the court pointed out that it had explained in *Ingram* that courts should only consider evidence not specifically probative of the other factors when determining whether there is evidence of “expression of an intent to be partners.” That is, evidence of profit or loss sharing, control, or contribution of money or property should not be considered evidence of an expression of intent to be partners. The court explained that, if evidence of these other factors constituted evidence of intent to be partners, “all evidence could be an ‘expression’ of the parties’ intent, making the intent factor a catch-all for evidence of any of the factors, and the separate ‘expression of intent’ inquiry would be eviscerated.” Based upon this principle, the court reasoned as follows regarding evidence of waiver of a condition precedent to partnership formation:

Similarly, where waiver of a condition precedent to partnership formation is at issue, only evidence directly tied to the condition precedent is relevant. Evidence that would be probative of expression of intent under § 152.051(a)—such as “the parties’ statements that they are partners, one party

holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement”[footnote omitted]—is not relevant. Nor is evidence that would be probative of any of the other § 152.052(a) factors. Otherwise, a party in ETP’s position could claim waiver in virtually every case.

The court stated that ETP pointed to no evidence that Enterprise specifically disavowed the Letter Agreement’s requirement of definitive, board-approved agreements or that Enterprise intentionally acted inconsistently with that requirement. Because the only record evidence ETP pointed to—that the parties held themselves out as partners and worked closely together on the Double E project—was determined by the court not to be relevant to the issue of waiver of definitive, board-approved agreements, there was no evidence that ETP waived the conditions to partnership formation.

GR Fabrication, LLC v. Swan, No. 02-19-00242-CV, 2020 WL 2202325 (Tex. App.—Fort Worth May 7, 2020, no pet. h.) (mem. op.).

The court held that the evidence was sufficient to support the existence of a partnership between two individuals, breach of the partnership agreement, and damages.

Swan and Swartzwelder were involved in various aspects of oil and gas production. Swartzwelder formed GR Fabrication, LLC, to sell equipment that the men acquired and refurbished, but the two men disagreed as to the terms of their business arrangement, with Swan claiming that they had a partnership and Swartzwelder claiming that there was no partnership and that Swan was paid salary and bonuses through another company of Swartzwelder’s that employed Swan. The jury found that Swartzwelder breached his partnership agreement with Swan and awarded \$110,000 in damages. The jury found that Swan did not have a partnership with GR Fabrication. On appeal, the court examined the evidence with respect to the five-factor statutory test for creation of a partnership and concluded that four of the factors favored a partnership between the two individuals, thus supporting the jury’s finding of a partnership.

The court of appeals began its discussion of the sufficiency of the evidence by setting forth the applicable law. “[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a ‘partnership,’ ‘joint venture,’ or other name.” Tex. Bus. Orgs. Code § 152.051(b). Tex. Bus. Orgs. Code § 152.052(a) lists five factors that a court should review in determining whether a partnership exists:

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

The determination of whether a partnership exists requires an examination of the totality of the circumstances. Evidence of none of the factors precludes the recognition of a partnership, and conclusive evidence of only one factor is ordinarily insufficient to establish the existence of a partnership. Conclusive evidence of all five factors establishes a partnership as a matter of law. Cases that fall on the “continuum” between these two extremes will often present a question of fact.

The court characterized the sharing of profits as one of the two most important factors, and the court stated that Swan’s evidence demonstrated an agreement to share profits. Swan testified that he and Swartzwelder had agreed to split profits in the two equipment transactions at issue (50/50 for one and 75/25 for the other) and that the arrangement was consistent with many similar equipment transactions in the past. Although Swartzwelder disputed that there was any agreement to share profits and testified that Swan was fairly compensated through salary and bonuses as an employee of another entity of Swartzwelder’s, the jury was free to disbelieve Swartzwelder. The court also pointed out that the fact that Swan was a salaried employee of Swartzwelder did not preclude him from also being Swartzwelder’s partner in another venture. Swartzwelder argued that an email exchange and certain testimony of Swan showed that there was not an agreement to share profits, but the court explained how the jury

could have interpreted the email and testimony differently. Given the jury's apparent determinations on credibility, the court stated that this "highly important factor" favored the existence of a partnership.

Turning to the second factor, the court explained that a court's examination of expression of intent to be partners may involve examination of the putative partners' speech, writings, and conduct, such as the parties' statements that they are partners, one party holding the other party out as a partner on the business's letterhead or name plate, or a signed partnership agreement. Referring to a friend, employee, spouse, teammate, or fishing companion as a "partner" in a colloquial sense does not tend to show an expression of intent to form a business partnership. Courts should look to the terminology used by the putative partners, the context in which the statements were made, and the identity of the speaker and listener. Swan testified that for both of the equipment deals at issue, he and Swartzwelder agreed that the arrangement "would be a partnership." The court stated that the context of this testimony indicated that Swan was not describing a colloquial usage of the term "partnership," but rather a usage with legal significance. Swartzwelder emphasized that there was no written agreement regarding these equipment deals even though the parties had executed written agreements setting out their ownership rights for some of their other companies. The court stated, however, that the lack of a written contract is not dispositive as to the parties' intent because the law recognizes oral partnership agreements. The jury could have believed and placed greater weight on Swan's testimony that both men expressed their intent to be partners. Swartzwelder also emphasized evidence that certain documents for the equipment transactions at issue were not made out to Swartzwelder and Swan jointly. A purchase order for the first transaction was made out to a business solely owned by Swan, while a proposal for the other transaction was made out to a business majority-owned by Swartzwelder, but the court stated that these documents, when viewed together, could be interpreted as a loose manifestation of intent to be partners. The court explained that the jury could have believed that just as the duo evenly split which company's name would be held out to the public—half Swan's company and half Swartzwelder's company—the equity for these side transactions was split as well. In light of the jury's likely credibility determinations, the court said that this factor slightly favored the existence of a partnership.

The court explained that the third factor, the right to control a business, is the right to make executive decisions. Examples of the type of executive decisions that might indicate the right of control include exercising authority over the business's operations, the right to write checks on the business's checking account, control over and access to the business's books, and receiving and managing the business's assets. Swartzwelder argued that there were no signs of joint control and that the transactions were routed through GR Fabrication, an LLC for which Swartzwelder was the sole member and which he alone funded. But the court pointed out that Swan did not argue on appeal that GR Fabrication itself was a partnership; Swan argued, and the jury found, that he had a partnership with Swartzwelder outside of GR Fabrication. The court said that Swartzwelder's formal right to make decisions for GR Fabrication was not dispositive and the court could also look to the partners' de facto authority within the separate partnership. The court gave examples of evidence that showed Swartzwelder and Swan jointly made some executive decisions and decided to divide responsibility for others in their separate partnership. The court said that the partial division of control did not necessarily indicate that there was no joint control, pointing to cases in which the courts found that there was sufficient evidence of joint control where the parties made major decisions together but one partner was responsible for finance and the other was responsible for operations. In sum, "would-be partners may exercise different spheres of authority, so long as their mutual and separate spheres indicate that they are jointly wielding control," as was the case here, and "[t]his highly important factor speaks strongly in favor of a partnership."

As to the fourth factor, there was no evidence of an agreement to share losses. The statute provides that "[a]n agreement by the owners of a business to share losses is not necessary to create a partnership." Tex. Bus. Orgs. Code § 152.052(c). In any event, this factor weighed against the jury's finding of a partnership.

Finally, the court evaluated whether Swan agreed to contribute or did contribute money or property (which includes tangible and intangible property) to the business. Swan testified that for the second transaction, he contributed equipment for which he paid \$110,000 and thousands more to store and transport. The court also noted that the partnership derived substantial value from Swan's management and unpaid labor in buying, refurbishing, and marketing the equipment. The court said that while there is some authority for the proposition that unpaid work or "sweat equity" can establish the element of contribution, this seems to cut against the plain language of the statute. The court said that it need not decide whether Swan's labors could qualify as a contribution to the alleged partnership because his contribution of over \$100,000 in equipment and expenses tilted this factor in his favor.

In sum, the court concluded that four of the five factors favored the existence of a partnership, including the two most important factors; therefore, the evidence was legally and factually sufficient to support the jury's finding of a partnership.

Swartzwelder next contended that the evidence was legally and factually insufficient to show that he breached the partnership agreement, causing damages to Swan. Swan testified that, under the partnership agreement, he was entitled to 50% of the profit for the first transaction and 75% of the profit for the second transaction, as well as the value of his capital contributions for the second transaction. He also testified concerning the distributions that he received from the partnership. The court summarized Swan's testimony and concluded that his testimony concerning profits, expenses, and distributions was legally and factually sufficient to establish the amount owed and that Swartzwelder breached the partnership agreement by not paying any of that amount. The court further held that the evidence was legally and factually sufficient to support the measure of damages.

Swan pleaded a breach of partnership claim, for which attorney's fees are recoverable; however, he also pursued theories for which attorney's fees are not recoverable, including breach of fiduciary duty, shareholder oppression, and fraud. These other claims were resolved against Swan through dispositive motions and an appeal, and Swan thus bore the burden to demonstrate that his counsel's efforts in support of his unrecoverable claims were intertwined with and served the ends of his recoverable claim. Because Swan offered no evidence to show that these efforts were intertwined, he did not carry his burden to show that segregation was impossible. However, a failure to segregate attorney's fees does not necessarily preclude recovery of attorney's fees. A court may remand the issue for a new trial on attorney's fees, which the court in this case did.

Houle v. Casillas, No. 08-17-00189-CV, 2019 WL 4640082 (Tex. App.—El Paso Sept. 24, 2019, no pet.).

The court of appeals reversed the trial court's granting of summary judgment to Jose Casillas on Robert Houle's causes of action for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, constructive fraud, and other claims. The court determined that Houle provided at least a scintilla of evidence to raise a question of fact regarding whether Casillas breached a fiduciary duty owed to Houle based on a partnership theory.

Houle and Casillas purchased an older home that had already been divided into apartment units. They initially intended to renovate the home for resale, but they soon decided that they would keep it and lease out the apartment units after they were renovated. The parties agreed that Casillas would provide the financing and Houle would oversee the renovations. They also agreed that once Casillas had been reimbursed for his initial investment, the parties would split profits equally. Upon Houle's suggestion, Pershing LLC was formed to purchase the property (Houle and Casco Investments, Inc., an entity wholly owned by Casillas, were the members of Pershing.) Pershing purchased the property for \$100,000 (an amount loaned by Casillas to Pershing), and Casillas received a promissory note from Pershing that was secured by a deed of trust on the property. Unbeknownst to Houle, Casillas later obtained a second promissory note and deed of trust on the property to secure additional monies that he had advanced during the renovations.

The renovations did not go as planned. They took longer and cost more money than Houle had estimated. Eventually, Casillas foreclosed on the property and the parties sued each other. Part of Houle's lawsuit alleged that Casillas and Houle were partners and that Casillas had breached a fiduciary duty (as well as the duty of good faith and fair dealing) owed to Houle by ceasing to advance funds for the project and by failing to provide notice to Houle of the second deed of trust. The trial court dismissed Houle's fiduciary duty and good faith claims on summary judgment, and Houle appealed.

The court of appeals observed that, under Texas law, not all contracts contain an implied covenant of good faith and fair dealing. Nevertheless, the duty of good faith and fair dealing is one of many duties that fiduciaries owe to one another. As a consequence, the court decided to combine its discussion of the fiduciary duty and good faith claims as they both turned on whether Casillas owed a fiduciary duty to Houle.

Houle argued that he and Casillas were in a partnership, despite the fact that they had formed an LLC. The court noted that, in partnerships, fiduciary duty arises as a matter of law. In LLCs, however, it is less clear whether members owe each other a fiduciary duty. The court cited the Dallas Court of Appeals *Suntech* decision which determined that a member-to-member duty did not exist as a matter of law, but might arise as a question of fact based, at least in part, on whether the members were in unequal positions of power. Regardless, the court of appeals noted that Houle was not arguing that he was owed a fiduciary duty as a member of an LLC; instead, he was arguing that he and Casillas had formed a partnership and that the LLC was simply a means of effectuating the partnership.

To that extent, the court agreed with Houle’s argument, stating that “[t]he fact that the parties agreed to form an LLC to effectuate their agreement does not preclude the possibility that the parties already had a pre-existing—and continuing—partnership.” Thus, the court focused on whether the parties’ relationship could be considered a partnership.

In the trial court, Casillas argued that a partnership was not formed, primarily because the parties did not sign a written agreement to that effect. The court observed that the absence of a signed, written agreement is not dispositive of whether a partnership was actually formed, as the law has long recognized the existence of oral partnership agreements. Citing the Texas Supreme Court’s *Ingram* decision, the court stated that a partnership agreement may be either express or implied from the parties’ conduct. The court continued by citing the five partnership factors from TBOC § 152.051 (“(1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business”) and considering whether Houle presented more than a scintilla of evidence to establish the factors indicative of a partnership.

With respect to profit sharing, Houle presented evidence of the parties’ agreement to share equally in profits after renovations were completed and Casillas was reimbursed for his investment. Although the partnership ended before any profits were shared, the court found that the undisputed summary judgment evidence demonstrated that the parties had agreed they would share profits when profits were earned. This factor supported a finding of partnership.

As to the expression of intent to be partners, the court noted that direct proof of the parties’ intent to form a partnership is not needed. Nevertheless, whether the parties made a direct expression of their intent through speech, writings, or conduct is a factor that can be examined, although there must be evidence that both parties expressed their intent to be partners. The court found only one mention of the term “partner” in the communications between the parties and stated that “[a]lthough this indicates that Houle—at some point in their relationship—expressed to Casillas that he considered him to be a partner, there is no evidence that Casillas similarly expressed any such intent to Houle or to anyone else.” The court concluded that the record did not contain evidence that both parties made a direct expression of their intent to form a partnership.

With respect to control, the court stated that it is one of the most important factors in determining whether a partnership exists. The right to control a business is the right to make executive decisions, and several sub-factors are relevant to concluding that a party has the right to make executive decisions, including: (1) the exercise of authority over the operation of the business; (2) the right to write checks on the business checking account; (3) control over and access to the books of the business; and (4) the receipt of and management of all of the assets and monies of the business. The court found clear evidence that both parties controlled various aspects of the operation of the business and exercised control over the assets and monies of the business. The court also noted that “[t]he fact that the parties may have effectively controlled different aspects of the business operations does not foreclose a finding that they both had the right to make, and did in fact make, executive decisions about those operations.” This factor supported a finding that a partnership existed.

As to loss sharing, the court observed that an agreement to share losses is not necessary to create a partnership. While the parties did agree to share profits equally after Casillas was reimbursed, there was nothing in the record to suggest that they also agreed to share equally in the losses or liabilities of the partnership. Although acknowledging again that loss sharing is not necessary to the creation of a partnership, the court concluded that this factor weighed against finding a partnership.

With respect to the contribution of money or property, the parties agreed that Casillas would contribute money to fund the project by extending a loan to the LLC to purchase and renovate the property, while Houle would contribute by offering his skills and services. The court found that Casillas’ agreement to lend money to fund the project was the equivalent of contributing money to the partnership. The court also concluded that Houle’s agreement to provide his labor and time to supervise the renovations of the property was the equivalent of contributing money or property to the partnership. In reaching that conclusion, the court recognized that if Houle had simply been an employee of the company, and only contributed his services in that capacity, it would not result in a finding that he contributed anything of value to the partnership itself. “However, the undisputed summary judgment evidence established that Houle was not serving in an employee capacity during the renovations, and that

he instead contributed his time and skills, or in other words his ‘sweat equity’ in furtherance of the partnership itself. We find this to be sufficient to constitute a contribution to the partnership under the Code.”

In concluding its analysis, the court determined that the record contained more than a scintilla of evidence in support of three of the five factors: (1) an agreement to share profits, (2) control over the enterprise, and (3) a contribution of money and property to the enterprise by both parties. The court further noted that these factors were generally recognized as being the most dispositive and important factors in the analysis, and that there was sufficient evidence to raise a factual question regarding the existence of a partnership between the parties.

Because partners owe each other fiduciary duties, the court then turned to whether the evidence also raised a question of fact on breach of fiduciary duty. Houle argued that his affidavit, which chronicled Casillas’ conduct, starting with Casillas’ decision to stop funding the renovations, his subsequent decisions to sign a promissory note to himself and to take out a second deed of trust on the property without notice to Houle, and his steps taken to foreclose on the property without considering any interest that Houle may have had, all raised a question of fact as to whether Casillas breached his fiduciary duties. The court agreed:

In general, partners owe each other a strict duty of good faith and candor, as well as a duty to one another to make full disclosure of all matters affecting the partnership and to account for all partnership profits and property. The evidence that Casillas engaged in a course of conduct with regard to clearly significant matters affecting the partnership, such as signing the promissory note and deed of trust without notice to Houle, and subsequently foreclosing on the subject property, without considering any of Houle’s interests, was sufficient to raise a question of fact with respect to whether Casillas breached his fiduciary duties to Houle including his duty of good faith and fair dealing.

In reaching this conclusion, we note that Casillas, at some point, could have taken steps to foreclose on the original deed of trust and/or to end the partnership if he believed that Houle was not fulfilling his obligations. However, in exiting the partnership, Casillas was required to do so in a manner that was consistent with fiduciary duties owed to Houle and consistent with the terms of the parties’ partnership agreement. We believe that a question of fact exists on the issue of whether Casillas acted in accordance with his obligations by essentially terminating the partnership agreement in the manner in which he did.

The court then determined that Houle’s affidavit provided at least a scintilla of evidence to raise a question of fact on the issue of whether he suffered an injury as a result of Casillas’ conduct. In reaching that conclusion, the court found it significant that Casillas, in his motion for summary judgment, only argued in very general terms that Houle had no evidence to establish that Houle had suffered any injury as a result of Casillas’ alleged breach, or that Casillas had benefitted from such a breach. Moreover, in his motion, Casillas did not challenge Houle to provide evidence pertaining to the economic value of his alleged injury and/or the economic value of the benefit that Casillas received. Casillas only challenged Houle to come forward with evidence of an alleged “injury,” and the court did not believe that this would have put Houle on notice that he needed to provide an accounting of the monetary amount of the injury that he suffered. The court noted that Houle had provided evidence, albeit in general terms, that he was injured when Casillas took control over the property through his allegedly fraudulent course of conduct, thereby depriving Houle of his “interest” in the property, and without compensating Houle for the work that he performed over the course of the year-long renovations. Finally, the court observed that Houle did not simply seek monetary damages for Casillas’ alleged breach of fiduciary duty. Instead, he also requested equitable relief, such as a “Declaratory Judgment declaring the rights of the parties and imposing a constructive trust.” The court observed that in analogous situations, the Texas Supreme Court had determined that when a plaintiff seeks equitable relief for a breach of fiduciary duty, the plaintiff does not necessarily need to present evidence of actual damages stemming from the breach.

In summary, the court concluded that Houle provided at least a scintilla of evidence to raise a question of fact regarding whether Casillas owed him a fiduciary duty, whether that duty was breached, and whether Houle was injured by the breach and/or whether he was entitled to the equitable relief requested in his pleadings. The court therefore concluded that the trial court erred by granting Casillas’ motion for summary judgment on Houle’s causes of action for breach of fiduciary duty and the implied covenant of good faith and fair dealing. (The court also found

that the trial court erred in granting summary judgment on Houle's claim for constructive fraud, as "constructive fraud occurs when a party violates a fiduciary duty or breaches a confidential relationship.")

Chi Hua Lee v. Linh Hoang Lee, No. 02-18-00006-CV, 2019 WL 3024478 (Tex. App.—Fort Worth July 11, 2019, no pet.) (mem. op.) ("We turn now to the trial court's finding that Jessey's ownership interest in JoAnderson Capital [an LLC] was 50%. The trial court expressly based that finding on Jessey's declaration in the California proceeding that Huang was his business partner. JoAnderson Capital, Jim, and Jenny contend that Jessey's reference to Huang as his business partner is no evidence that they [Jessey and Huang] each owned a 50% interest in JoAnderson Capital. By relying on Jessey's reference to Huang as his business partner as its sole basis for finding that Jessey held a 50% interest in JoAnderson Capital, the trial court necessarily assumed Jessey's use of the term 'business partner' meant partner in the traditional, formal legal sense. *See Johnston v. Ballard*, 18 S.W. 686, 686 (Tex. 1892) (noting the rule at common law that in the absence of evidence to the contrary, partners in a partnership share equally in the partnership's profits, losses, and capital stock). There are at least two problems with that assumption. First, it is undisputed that JoAnderson Capital is a California limited liability company, not a partnership. Second, one's statement that another is his business partner in a limited liability company says nothing about their respective ownership interests, if any, in that company. Thus, in this context, Jessey's use of the term 'business partner' to describe his relationship with Huang, standing by itself, does nothing more than create a mere surmise or suspicion that he and Huang each owned 50% of the ownership interest in JoAnderson Capital. *See Ingram v. Deere*, 288 S.W.3d 886, 900 (Tex. 2009) (holding "'partner' is regularly used in common vernacular and may be used in a variety of ways' but using the term in 'a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership'). We therefore conclude that no evidence supports the trial court's finding that Jessey owned 50% of JoAnderson Capital.").

Stephens v. Three Finger Black Shale Partnership, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed).

The court of appeals reversed the portions of the trial court's judgment that awarded relief based upon findings that partnerships existed and that the fiduciary duties of partners were breached.

Richard Raughton, Lowry Hunt, Chester Carroll, and Kerwin Stephens each pledged to acquire oil and gas leases and options for such leases in Fisher County (the "Project"). They had no written agreement; instead, they operated on a "handshake." When they needed additional money to continue the Project, they recruited Tom Taylor, an oil and gas investor. The parties eventually entered into a letter agreement known as the "Alpine Letter Agreement." Those named in the Alpine Letter Agreement as members of the "Alpine Group" were (1) Alpine Petroleum (by Carroll); (2) Thunderbird Oil & Gas, LLC (by its sole member, Stephens); (3) Arapaho Energy, LLC (by its manager, Raughton); and (4) L.W. Hunt Resources, LLC (by its manager, Hunt). Paradigm Petroleum Corporation, acting through its president, Taylor, was also a party to the Alpine Letter Agreement, but was not a member of the Alpine Group.

The Alpine Letter Agreement contained a provision that Paradigm was to contribute \$4,500,000 to the project and that the Alpine Group was to contribute, collectively, \$500,000. The Alpine Group agreed to transfer to Paradigm all of the oil and gas leases and options "that it holds," and future leases and options were to be taken in Paradigm's name. Decisions as to future leases and options, the scope of the Project, and the terms of any future leases and options were at Paradigm's sole discretion and direction. The agreement also contained provisions for the division of the proceeds from sales. After payout, proceeds from sales of oil and gas leases were to be paid 82% to Paradigm and 18% to the Alpine Group. Although Thunderbird Land was not a named party to the Alpine Letter Agreement, the named parties specified that Thunderbird Land, Stephens's wholly owned landman entity, was to provide landman services for the project and that it would "charge its normal customary rates" for those services.

Taylor found investors who agreed to provide a portion of Paradigm's \$4,500,000 contribution. The investors signed a "Participation Agreement" that referred to the investors in some places as "Parties" and in other places as "Partners." Paradigm was not a partner, but Trek Resources, Inc. and Tiburon Land and Cattle were two of the eight named partners in the agreement. Ultimately, Trek and Tiburon pleaded that the Participation Agreement resulted in the creation of a partnership known as Three Finger Black Shale Partnership. By the terms of the agreement, Paradigm was to contribute \$1,000,000; each of the additional parties agreed to contribute \$500,000 each. The agreement contained other terms by which the signatories defined their relationship. Paradigm was to receive a 20% interest before payout and a 36% interest after payout; each of the other parties was entitled

to a 10% interest before payout and an 8% interest after payout. Each of the parties was also entitled to its percentage interest in any overriding royalties that were reserved in sales of the leases. The Participation Agreement was later amended to (a) substitute Lazy T Royalty Management, Ltd. for Paradigm, (b) reduce Paradigm's status to "agent for the Parties," and (c) add the Alpine Group as a party.

In January 2012, Devon Energy Production Company, L.P. agreed to buy 25,000 net mineral acres of oil and gas leases for \$900 per acre. The Devon agreement included an "option" provision whereby Devon agreed that it would not take oil and gas leases from Fisher County mineral owners directly. In return, Devon was given the right to purchase additional Fisher County acreage that Paradigm and its associates might acquire in the future.

Although the Participation Agreement proposed that 25,000 net mineral acres were involved in the Project, Devon's initial purchase comprised leases on 30,000 net mineral acres. As a part of the Devon transaction, Devon was to make a down payment of \$2,500,000 and was to pay the balance of the \$22,500,000 purchase price upon delivery of an assignment of the leases from Paradigm and Carroll to Devon.

The evidence showed that Taylor, Stephens, and Carroll, knowing that Devon was interested in acquiring leases of more mineral acreage, continued to buy Fisher County oil and gas leases, but they did so on their own to the exclusion of the "Partners" in the amended Participation Agreement and, to some extent, Raughton and Hunt Resources. The record contains evidence that Taylor, Stephens, and Carroll used money from the initial sale to Devon—money that belonged to Plaintiffs—to fund the acquisition of the additional acreage. At some point in time, it came to light that Taylor, Stephens, and Carroll had sold leases on more than the initial 30,000 acres but that the proceeds of those sales were not shared with those involved in the Participation Agreement. When it did not receive satisfactory responses to its inquiries about the additional acreage, Tiburon filed a lawsuit. Trek and Three Finger were eventually added as plaintiffs, and Raughton and Hunt Resources later intervened in the suit.

Three Finger basically claimed that Taylor, through Paradigm and Lazy T, breached fiduciary duties owed to Three Finger in connection with the calculation and distribution of the proceeds from the sale of leases on the initial 30,000 acres. Three Finger claimed that through creative (albeit dishonest) accounting, Taylor made it appear that he, through his entities, had funded his required contribution when he had not fully funded it. Three Finger also claimed that Stephens and his Thunderbird-related entities had knowingly participated in those breaches. As the court summarized: "There are other claims, but, at this point, suffice it to say that Three Finger basically takes the position that one or more of the appellants [Stephens, Stephens & Myers, LLP, the Thunderbird-related entities, and Carroll], individually or collectively, had lied, cheated, and stolen from them and overtly, covertly, silently, and via creative accounting procedures had attempted to execute a cover-up of their ill-intentioned activities. The result of those activities, as well as overcharges by Thunderbird Land, was that Three Finger did not receive its rightful share of the profits from the sale of either the initial deal for 30,000 acres or in connection with the sales of additional acreage."

At trial, Three Finger was awarded actual damages of \$4,560,433 against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources, jointly and severally, specifically for, as stated by the trial court in its judgment, "injuries sustained because of [A] the contribution failures of entities affiliated with ... Taylor and [B] Thunderbird Land's role in determining and charging expenses to the Project for the Initial 30,000 Acres." (Taylor had died before trial and the plaintiffs settled their claims against Taylor's estate and his entities before trial began.) Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources under its equitable powers to award "disgorgement and restitution." The trial court also awarded Three Finger a judgment against Stephens, Thunderbird Land, and Carroll, jointly and severally, in the amount of \$6,584,440 for damages that related to Three Finger's exclusion from transactions over and above the initial 30,000 acres. Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Land, and Carroll under its equitable powers to award "disgorgement and restitution."

The court of appeals examined the jury's determination that Three Finger was a partnership. Appellants argued that, if Three Finger was not a partnership, it cannot recover as such and the court of appeals should render a take-nothing judgment against Three Finger. Alternatively, Appellants claimed that the evidence was factually insufficient to prove that Three Finger was a partnership. The court cited the five partnership factors in § 152.052 of the Business Organizations Code—(1) "receipt or right to receive a share of profits of the business"; (2) "expression of an intent to be partners in the business"; (3) "participation or right to participate in control of the business"; (4) "agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties

against the business”; and (5) “agreement to contribute or contributing money or property to the business.” The court noted that when it reviews these factors, it applies a totality-of-the-circumstances test.

With respect to profit sharing, Appellants argued that Three Finger, as an entity, never received any profits to share. They contended that all distributions came directly from Paradigm to the individuals listed as “Parties,” not to the partnership first and then distributed to the partners. The court of appeals noted that “[a] partnership is an entity distinct from its partners.” It then pointed out that, under the Participation Agreement, if an individual party paid the amount shown in the agreement, that individual would own its percentage interest in the leases rather than in the alleged partnership. Additionally, that individual party would also own its interest in any overriding royalty interests and carried working interests that might be reserved when the leases were sold. The court also observed that the Participation Agreement named Paradigm as an agent for the “Parties” and not for a partnership. Thus, the court concluded that “[i]n accordance with the agreement that the parties made, distributions were not made to a partnership, but to the individual parties, and the overriding royalty interests were also made directly to individuals—not to a partnership as partnership property.” The court noted that “[a]lthough the evidence to which we have referred shows that the parties were investors in the project, it does not show that the parties participated in the profits as owners or principals of a business.”

As to the expression of intent to be partners, the court stated that “the question is separate and apart from a review of the other factors; we are to consider only that evidence that is not specifically probative of other factors; and the terms used by the parties do not control—except that we consider the terminology used by ‘the putative partners,’ and the context in which any statements were made, as well as who made the statements and to whom the statements were made.” Although the court stated that the Participation Agreement used the word “Partner,” that fact alone did not signal the expression of an intent to form a partnership. The court also observed that there was evidence contradicting an intent to form a partnership:

The context and circumstances surrounding the conduct of the project contradicts a claim that the parties expressed an intent to form a partnership. Here, as pointed out by Carroll and by Stephens and his related entities, there is no evidence that the alleged partnership ever had a bank account, that any of the putative partners ever wrote checks on behalf of a partnership—or for that matter had a right to write checks, that any formal filings were made to the State of Texas in connection with the formation of a partnership, that any partnership tax returns were filed, that any K-1s were ever provided by the alleged partnership, or that the alleged partnership ever executed any operating agreements. ... In *Hoss v. Alardin*, the Dallas Court of Appeals noted that the absence of partnership tax returns, a separate federal tax identification number for the alleged partnership, or K-1 tax forms for the alleged partners were evidentiary items contradicting the existence of a partnership that a jury could not reasonably disregard.

As to control, the court cited *Ingram* for some of the factors that may be considered on the issue of control: “the exercise of authority over business operations; the right to write checks on the business checking account; access to the books of the business; and the receipt of assets and monies of the business.” According to the court, evidence of such factors was not present:

Lett, one of the Parties to the Participation Agreement, testified that he did not know whether he had any rights to determine the acreage that would be bought, that he had no right to direct the amount of acreage that Taylor could buy, that he could not tell Taylor what to pay for acreage that he acquired, that he could not tell Taylor who to sell the acreage to, and that he had no right to write checks for the group (as far as he knew). Michael Montgomery, another Party to the Participation Agreement, testified that he “[d]idn’t want to” control the leases that Taylor acquired. He also testified that those matters were within Taylor’s control.

There is no evidence in the record that any of the signatories to the participation agreements could write checks in connection with the project, that they received any of the assets or monies related to the project from Three Finger, or that they had access to the books related to the project except for sporadic reports furnished them—in fact they had accounting questions that went unanswered. The receipt of sporadic information is not an indication of control.

As a matter of control, in accordance with the agreement, neither Lazy T nor Paradigm could sell any leases to third parties for less than the acquisition costs without the approval of the “Partners.” We believe that this one provision does not show that the “Partners” had the right to make executive decisions in the operation of the project; the signatories to the agreement lodged control of the project solely in Taylor through his entities. We hold that the Appellees have not established that the parties either participated in or had the right to participate in the control of the project contemplated in the participation agreements.

With regard to sharing losses and liabilities, the court pointed out that the Business Organizations Code specifically provides that an agreement to share losses is not necessary to the creation of a partnership. In addition, Lett and Montgomery testified that they were only at risk of losing the amount of their investment. The court concluded that there was no evidence of an agreement to share losses and no evidence that the parties had ever discussed liability to third parties.

As to contributions, some of those named as “Parties” in the Participation Agreement did make contributions to the Project by sending funds directly to Paradigm. The agreement also provided that the failure to contribute monies resulted in a person not being a party to the agreement. Nevertheless, the court was unpersuaded: “The possibility of exclusion upon failure to contribute is evidence more akin to contributions as investors, not partners. Also, as noted by Carroll, no additional contributions were made by the Alpine Group or Carroll under the participation agreements; any contributions that they made were made pursuant to the Alpine Letter Agreement. If we are wrong, and if Appellants have established the contribution element ... even conclusive proof of one element is generally not enough to prove the existence of a partnership.” As the court concluded:

The court in *Ingram* noted the difficulty encountered in the application of the totality-of-the-circumstances test and set forth a continuum along which the cases might fall. Normally, proof of more than one factor is necessary to establish a partnership. As we have said, in general, even conclusive evidence of only one factor will be insufficient to establish the existence of a partnership. At the other end of the spectrum, a partnership is established as a matter of law if there is conclusive evidence of all five factors. But when there is no evidence of any of the factors, recognition of a partnership is precluded. Of the five factors, the first and third factors (the receipt or right to receive a share in the profits and the participation or right to participate in the control of the business) are the most important. Consequently, depending on the facts developed in it, each case falls somewhere along the continuum.

Regardless of the version of the document that underlies Three Finger’s lawsuit, they all bear the title “Participation Agreement” as opposed to “Partnership Agreement.” We believe that the agreement is just what its title purports it to be: an agreement whereby the parties agree to participate in a project as investors, not partners. Headings and titles can supply context and can also inform meaning. The title of an instrument “like every other portion of a contract, may be looked to in determining its meaning.”

Although there may be some evidence of one or more of the factors that we are to consider, that evidence in and of itself, when we consider the totality of the circumstances, is no more than a scintilla to support a finding that a partnership exists. Accordingly, we sustain Appellants’ issues on appeal wherein they challenge the claim that Three Finger was a partnership because we determine that there is no evidence of a partnership.

The trial court’s judgment, at the election of Appellees, was in favor of Three Finger, not the individual parties. Because the trial court’s judgment was in favor of a partnership to which Appellants could owe no fiduciary duties because, as a matter of law, it did not exist, we reverse the judgment of the trial court insofar as Three Finger is concerned and render judgment that Three Finger take nothing in its suit against Stephens, Thunderbird Land, Thunderbird Oil and Gas, Thunderbird Resources, and Carroll.

The conclusion that there was no evidence to support a partnership also doomed the disgorgement award. The court stated that “[t]he purpose of the equitable remedy of disgorgement is to protect relationships of trust,” and “[h]ere, in the absence of proof of such a relationship, and a breach of the duties arising from it, we hold that

the trial court erred when it awarded Three Finger damages in the form of disgorgement.” Moreover, the court noted that “[a] trial court is without authority to award disgorgement contingent upon a reversal of the award of actual damages.” The court reformed the judgment to delete all awards of disgorgement to Three Finger.

The court of appeals then turned to the claims of Raughton and Hunt Resources as intervenors, who had prevailed on a breach of fiduciary duty claim in the trial court. That claim was premised in part on the jury’s finding that the Alpine Group was a partnership. The court noted that even if it assumed that the Alpine Letter Agreement created a partnership known as the Alpine Group, the parties had expressly disclaimed any partner-related fiduciary duties that existed under that agreement. The court quoted the following language from the agreement: “It is not intended and it is agreed that the parties have not entered into and do not enter into any partnership, joint venture or agency relationship. None of the parties owe a fiduciary duty or obligation to the other and the relationship shall be considered as a normal customary commercial relationship with the ownership interest of the parties in and to the properties the subject of this letter agreement as provided herein.” According to the court, the disclaimer was dispositive:

The record in this case reflects that those named in the Alpine Letter Agreement were sophisticated businessmen. We must honor the terms that they used when they made their contract, including those that define the scope of their obligations and agreements, even those that limit fiduciary duties that might otherwise exist. Accordingly, we hold that any fiduciary duty that might have existed as a result of an alleged partnership growing out of the Alpine Letter Agreement was expressly disclaimed in that agreement and that no recovery may be had by Hunt Resources in relation to those alleged fiduciary duties. We have already dealt with Raughton’s inability to recover Arapaho’s damages that are connected to the Alpine Letter Agreement. We sustain Appellants’ issues on appeal wherein they assert that the disclaimer contained in the Alpine Letter Agreement insulates them from liability for any breach of disclaimed fiduciary duties.

To escape the effects of the fiduciary duty disclaimer, the intervenors also argued that the original parties—those in the deal before the Alpine Letter Agreement was signed—formed a partnership that was not evidenced by a writing but, rather, was sealed with a handshake. The court rejected that claim as well: “If Intervenor, to establish a breach of fiduciary duty, rely upon a position that the Alpine Group was a partnership that existed by handshake prior to the Alpine Letter Agreement, then they have failed to present any evidence to prove that, and we have found none. Thus, under the well-recognized standard of review for a no-evidence challenge, we hold that there is no evidence beyond a scintilla that the Alpine Group was a partnership that existed before the date of the Alpine Letter Agreement.”

In summary, the court of appeals reversed the portions of the trial court’s judgment in favor of Three Finger and rendered judgment that Three Finger take nothing in the lawsuit. The court also reversed those portions of the trial court’s judgment by which relief was awarded to Raughton or Hunt Resources based upon the existence of a partnership.

Axford Consulting, L.P. v. Foster Jordan, LLC, Civ. A. No. H-09-1899, 2009 WL 10711347 (S.D. Tex. Sept. 24, 2009). (Although the court issued this opinion in 2009, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court granted Safwan’s motion to dismiss for lack of personal jurisdiction after determining that Safwan was not in a partnership with Foster Jordan, LLC. Because there was no partnership, Foster Jordan’s contacts with Texas were not relevant to Safwan’s personal jurisdiction analysis.

Axford was a Texas limited partnership based in Harris County, Texas that provided consulting and procurement services to the power generation industry. Defendant Foster Jordan, LLC was organized in the United Arab Emirates with its base of operations in Amman, Jordan. Foster Jordan’s primary business was project management of power generation contracts. Defendant Safwan was an oil and gas services company headquartered in Kuwait.

Axford and Foster Jordan entered into a contract where Axford agreed to source two electrical generation units in exchange for a commission of \$500,000 per unit. When Foster Jordan did not pay the full commission, Axford sued Foster Jordan and Safwan.

Safwan contended that Axford's claims against it should be dismissed for lack of personal jurisdiction. Based on the theory that Foster Jordan and Safwan operated as a partnership, Axford argued that the contacts of both Foster Jordan and Safwan with Texas should be considered on the question of whether Safwan was subject to personal jurisdiction. The court declined to consider Forster Jordan's contacts, as it found that a partnership between the defendants did not exist:

As a preliminary matter, the court must determine which of the contacts attributed by Axford to Safwan are relevant for personal jurisdiction analysis. Many of the contacts mentioned by Axford occurred between Foster Jordan and Axford directly, and may be attributed to Safwan only through Axford's theory that Safwan and Foster Jordan operated as a partnership. Axford argues that the nature of Safwan and Foster Jordan's business relationship makes the two companies a partnership under Texas law, and that therefore their cumulative contacts should be counted together as for a single entity. Axford does not, however, explain why Texas partnership law should apply to companies based in Jordan and Kuwait that are not incorporated in Texas and have no offices in Texas. The Texas statute cited by Axford states, "An association or entity created under a law other than [the Texas Revised Partnership Act, the Texas Uniform Partnership Act, the Texas Revised Limited Partnership Act, or a comparable statute in another jurisdiction] is not a partnership." Tex. Rev. Civ. Stat. art. 6132b-2.02(a)-(b). Axford has given the court no reason to believe that this association was created under the Texas Revised Partnership Act or one of the other listed statutes. In the absence of such evidence, the court concludes that under the terms of the Texas Revised Partnership Act the alleged association is not a partnership under Texas law.

Even assuming that Texas partnership law did apply to Safwan's and Foster Jordan's activities in Texas, the court is not persuaded that a partnership existed. The Texas Supreme Court has stated that "a partnership consists of an express or implied agreement containing four required elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176. In *Schlumberger* the Court found that there was no partnership between the parties because even though there was an entitlement to royalties and the payment of a consultation fee, there was no evidence of an agreement to share profits. Likewise, in this action Axford has presented no evidence of an agreement between Safwan and Foster Jordan to share profits or losses. The fact that Safwan made a partial payment to Axford for the electrical generators that Foster Jordan ordered does not establish an agreement to share profits. Such a payment is equally consistent with the relationship of a subcontractor to a general contractor that has ordered materials for the subcontractor's use. Nor does the mention of a "Consortium of Partners" in one of Foster Jordan's letters indicate that the individual parties had agreed to operate as a single legal entity. The letter also describes the group as a "consortium of subcontractors," and there is nothing in the letter that would lead a reasonable reader to conclude that the multinational companies described had all agreed to share profits and losses henceforth. Since there is no evidence that Safwan and Foster Jordan agreed to share profits and losses, the court concludes that under the standard articulated in *Schlumberger*, Axford has not shown that the two parties operated as a partnership.

Since Axford has not established that Safwan and Foster Jordan operated as a partnership, the court declines to consider Foster Jordan's independent contacts with Texas as part of the minimum contacts analysis for [Safwan].

The court went on to conclude that Axford failed to present a prima facie case of minimum contacts between Safwan and Texas. As a result, the court granted Safwan's motion to dismiss for lack of personal jurisdiction.

B. Partner's Personal Liability

Southern California Sunbelt Developers, Inc. v. Grammar, No. 03-19-00192-CV, 2019 WL 7342249 (Tex. App.—Austin Dec. 31, 2019, no pet. h.) (mem. op.).

In the course of reversing a Rule 91a motion in favor of the defendants, the court recited and discussed Nevada limited partnership law regarding personal liability of the general partners of two Nevada limited partnerships, enforcement of such liability, exceptions to such liability, and contribution obligations of general partners of limited partnerships. The court also discussed the impact of bankruptcy law on the assertion of claims against non-debtor parties in the case given that the limited partnerships had filed bankruptcy.

Judgment creditors brought this suit in Texas to enforce cost awards that were entered against Donald Grammar and two limited partnerships formed by Donald Grammar in out-of-state litigation. The plaintiffs alleged that Donald Grammar and other family members evaded payment of the cost awards through a conspiracy to fraudulently transfer and hide assets in multiple alter-ego entities. The plaintiffs also sought a declaration that two general partners, Donald Grammar and an LLC owned by Grammar, were liable for the debts of the two limited partnerships. The trial court granted a Rule 91a motion dismissing the suit, and the plaintiffs appealed.

In the course of the appellate court's discussion, the court recited provisions of the Nevada Limited Partnership Act governing personal liability of a general partner of a Nevada limited partnership, enforcement of such liability, exceptions to such liability, and contribution obligations of a general partner of a limited partnership. The court also discussed arguments raised under bankruptcy law. In concluding that the trial court erred in granting the Rule 91a dismissal motion, the appellate court held, *inter alia*, that the plaintiffs' cost awards and fraudulent transfer claims were not property of the bankruptcy estates of the limited partnerships, the trial court failed to address various fact-dependent determinations relating to the general partners' liability under non-bankruptcy law, and the automatic stay in the bankruptcy of the limited partnerships did not apply to the non-debtor defendants.

Austin Tapas, LP v. Performance Food Group, Inc., No. 03-18-00680-CV, 2019 WL 3486574 (Tex. App.—Austin Aug. 1, 2019, no writ) (mem. op.).

The court of appeals affirmed a judgment against a limited partnership and its general partner after concluding that they were jointly and severally liable for a partnership debt.

Austin Tapas, LP operated Malaga Tapas & Bar. PFG supplied food products to Malaga. After Austin Tapas failed to pay invoices totaling \$6,795.75, PFG filed suit on a sworn account against Austin Tapas and Greg Schnurr, Austin Tapas' alleged general partner. The trial court rendered judgment that Austin Tapas and Schnurr were jointly and severally liable to PFG.

On appeal, Austin Tapas and Schnurr first argued that they were not liable to PFG because the "Customer Account Application" that PFG had them sign named Austin Tapas, **LLC** as the purchaser. The court of appeals agreed that the wrong name was simply a misnomer, which occurs when a party misnames itself or another party, but the correct parties are involved in the transaction. The court concluded that "there is legally sufficient evidence to support the trial court's implied findings that 'Austin Tapas, LLC' was a misnomer subject to correction and that Austin Tapas, LP was the purchaser under the agreement, and the trial court's finding that, as a result, Austin Tapas, LP was a party to the Customer Account Application."

Austin Tapas and Schnurr then challenged the trial court's finding that Schnurr was personally liable as the general partner of Austin Tapas. The court quoted § 153.152(b) of the Business Organizations Code ("Except as provided by this chapter or the other limited partnership provisions, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to a person other than the partnership and the other partners") and cited case law for the proposition that general partners are jointly and severally liable for limited partnership debts. The record included a copy of the Customer Account Application, which was signed by Schnurr and named him as a "general partner." Further, "Schnurr admitted in testimony that he signed the application and he also acknowledged that his personal information in the document—his date of birth and his driver-license number—was correct and must have been provided to whomever filled out the document." The court concluded that this evidence constituted more than a scintilla to support the trial court's finding that Schnurr was the general partner of Austin Tapas, LP. As such, it was legally sufficient.

The court also concluded that the evidence was factually sufficient to support the trial court's finding. Even though Schnurr testified that he was not the general partner, the trial judge was entitled to resolve conflicts in the evidence. "Notably, neither Schnurr nor Austin Tapas, LP offered any additional evidence regarding Austin Tapas,

LP's formation or organizational structure. Accordingly, on the record before us we cannot conclude that the evidence supporting the trial court's finding regarding Schnurr's status as general partner is so weak as to make the judgment clearly wrong and manifestly unjust. Accordingly, the evidence is factually sufficient."

Impact Floors of Texas, L.P. v. At Your Disposal, Inc., No. 03-18-00294-CV, 2019 WL 2939261 (Tex. App.—Austin July 9, 2019, no pet.) (mem. op.) ("In its motion for summary judgment, Impact Floors [a limited partnership] asked the trial court to dismiss all claims against IFT, Inc. because IFT was not a party to the alleged contract between Impact Floors and AYD. The trial court denied that request. On appeal, Impact Floors argues that the trial court erred in not dismissing all claims against IFT. However, it is undisputed that IFT, Inc. is the general partner of Impact Floors of Texas, L.P. Therefore, IFT is always liable for Impact Floors debts and obligations.").

C. Authority and Power of Partner or Other Agent to Bind Partnership

Impact Floors of Texas, L.P. v. At Your Disposal, Inc., No. 03-18-00294-CV, 2019 WL 2939261 (Tex. App.—Austin July 9, 2019, no pet.) (mem. op.).

The court of appeals determined that a fact issue existed as to whether the "Operations Manager" of a limited partnership had the authority to enter into a contract on behalf of the limited partnership. The court of appeals also concluded that the general partner was liable for the limited partnership's obligations.

At Your Disposal, Inc. ("AYD") collected the trash of Impact Floors (a limited partnership) pursuant to a written contract. When Impact Floors informed AYD that it would no longer use AYD's services, AYD sued for breach of contract. In response, Impact Floors argued that the contract was not valid because the Impact Floors employee who signed the contract lacked the authority to do so. AYD filed a motion for summary judgment on its breach of contract claim, which the trial court granted. (Impact Floors also filed a summary judgment motion requesting the dismissal of AYD's breach of contract claim, which the trial court denied.) The court further found that IFT, Inc. was the general partner of Impact Floors and was therefore liable for Impact Floors' debts and obligations.

On appeal, the court first discussed the law related to actual and apparent authority. Actual authority, or express authority, "denotes that authority that a principal intentionally confers upon an agent, intentionally allows the agent to believe he possesses, or allows the agent to believe he possesses by want of due care." Actual authority "depends on some communication by the principal ... to the agent." In contrast, apparent authority "depends on some communication by the principal ... to the third party" and "is based on estoppel, arising either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise." According to the court, "the principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel." Moreover, "when making that determination, only the conduct of the principal is relevant." The court noted that "the standard is that of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority," so "to determine an agent's apparent authority we examine the conduct of the principal and the reasonableness of the third party's assumptions about authority." Declarations of the alleged agent, without more, are incompetent to establish either the existence of the alleged agency or the scope of the alleged agent's authority.

Lee Pachicano was the "Operations Manager" for Impact Floors who signed the contract. The court observed that several of the declarations submitted by the parties stated that only certain persons at Impact Floors' Dallas office had the authority to enter into contracts and that employees at the Austin office, such as Pachicano, would have been aware of this policy. The court concluded, therefore, that a genuine issue of material fact existed as to whether Impact Floors intentionally conferred upon Pachicano authority to sign the contract with AYD. Moreover, although uncontroverted evidence showed that Impact Floors bestowed the title of "Operations Manager" on Pachicano, the court determined that such title, standing alone, did not establish as a matter of law that Pachicano had apparent authority to sign a contract with AYD. As the court concluded: "Because we have determined that a fact question exists as to whether Pachicano had the authority to sign the contract with AYD, a fact question also exists as to whether Impact Floors is bound by the agreement that Pachicano signed. Accordingly, the trial court erred in granting summary judgment to the extent that it ruled in favor of AYD on its breach of contract claim. ... On the other hand, AYD has presented declarations that, taken as true, would establish that

Pachicano had the authority to sign the contract. Therefore, Impact Floors was not entitled to summary judgment dismissing AYD's breach of contract claim. Accordingly, the trial court did not err in denying that request."

Impact Floors also asked the trial court to dismiss all claims against IFT, Inc. because IFT was not a party to the alleged contract between Impact Floors and AYD. The trial court denied that request. On appeal, the court agreed with the trial court's decision because it was undisputed that IFT, Inc. was the general partner of Impact Floors. As a consequence, "IFT is always liable for Impact Floors' debts and obligations."

D. Fiduciary Duties of Partners and Affiliates

Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.—Corpus Christi Mar. 5, 2020, no pet. h.) (mem. op.).

The court held that a co-trustee of a trust that was a limited partner did not have the right to sue derivatively on behalf of the limited partnership where a majority of the co-trustees and the other limited partner opposed the derivative suit and determined that it was not in the best interest of the partnership. The court held that the filing of a memorandum of lease in the real estate records did not constitute constructive notice to the co-trustee for purposes of his claim for breach of fiduciary duty because deed records do not furnish constructive knowledge to a property owner of subsequent impairments to title.

Marvin and Laura Berry acquired a ranch in 1960 and created the Flying Bull Limited Partnership in 1996. They assigned a 2% general partner interest to FB Ranch, LLC (FB Ranch) and split between themselves the interests as limited partners. Marvin died in 1997. At some point, the Berry Dynasty Trust ("the Trust") received a limited partner interest for which the Berrys' four sons served as co-trustees. There were several other Berry-related entities, including an entity known as Berry Contracting that leased the ranch and made regular lease payments to the limited partnership from 2000 to 2005. In 2000, after a family dispute, Kenneth Berry (Marvin and Laura's son) resigned from nearly all of his functions within the family enterprises, and the family entered into a global release in 2005 under which Kenneth released certain Berry companies and individual family members in all capacities and they similarly released him from all causes of action related to facts that existed at that time.

In 2005, Kenneth sought lease and partnership records in his capacity as co-trustee of the Trust. In 2007, the limited partnership and Berry Contracting signed and recorded a lease agreement through 2024, back-dated to 2000. Several years thereafter, Kenneth continued to pursue partnership records and tax filings related to the Trust, including a 2014 demand for an accounting pursuant to the Texas Trust Code. These requests continued until 2016 when Kenneth and his trust-beneficiary daughter filed suit derivatively and individually against Kenneth's co-trustees and all of the Berry-related entities. The suit alleged, *inter alia*, breaches of fiduciary duty, breach of the partnership agreement, and breach of the 2005 release agreement between Kenneth and other family members and Berry entities. He also sought an accounting and a declaratory judgment declaring that contracts and agreements in violation of the partnership agreement and fiduciary duties were void.

In response, the defendants filed a plea to the jurisdiction and a motion for summary judgment on statute-of-limitations grounds. The defendants entered into a consent and release agreement among themselves pursuant to which they rectified Laura's inadvertent mishandling of lease payments owed to the ranch and released Laura from any liability related to the payments, modified the lease agreement, and declared that none of them believed that the suit was in the best interest of the Trust or the limited partnership. The trial court granted the plea to the jurisdiction as to Kenneth's standing in a derivative capacity on behalf of the partnership and granted defendants' motion for summary judgment as to limitations. Certain disputes were severed, and after a bench trial on the issue of attorney's fees, the court awarded attorney's fees in various amounts to Kenneth and the various defendants.

On appeal, Kenneth challenged the trial court's ruling that he did not have standing to sue derivatively on behalf of the partnership in his capacity as co-trustee of the limited partner and the trial court's summary-judgment ruling as to limitations.

With respect to Kenneth's standing to sue derivatively on behalf of the limited partnership, the appellate court examined the Texas Trust Code, the Texas Property Code, and the Texas Business Organizations Code. The court pointed out that under Tex. Bus. Orgs. Code §§ 153.402 and 153.403, a limited partner has no right to sue on behalf of the limited partnership if the limited partner does not fairly and adequately represent the interests of the partnership. Further, the court took note that under Tex. Prop. Code § 113.85(a) trustees act on behalf of a trust by majority decision. Additionally, Texas case law limits a beneficiary's ability to bring suit on behalf of a trust absent a trustee's wrongful refusal to bring suit. Accordingly, in light of Chapter 153 of the Texas Business Organizations

Code, the release agreement entered into among the defendants demonstrating a majority decision pursuant to Tex. Prop. Code § 113.85(a), and Texas case law, neither the Trust, as a limited partner, nor a trust beneficiary could sue third parties on behalf of the limited partnership. Consequently, the court affirmed the trial court's judgment with respect to the issue of standing.

Next, the court addressed Kenneth's challenge to the trial court's summary judgment in favor of the defendants as to the statute of limitations. A claim for breach of fiduciary duty is subject to a four-year statute of limitations. The court recited the elements of a claim for breach of fiduciary duty (a fiduciary relationship, breach, causation, and damages) and recited the following principles regarding the duties of a fiduciary:

"The fiduciary owes a duty of full disclosure of matters concerning the parties' interests and a strict duty of candor and good faith. The fiduciary may be punished for breaching these duties." *Bombardier Aerospace Corp. v. SPEG Aircraft Holdings, LLC*, 572 S.W.3d 213, 231 (Tex. 2019) (internal citations omitted). "A fiduciary relationship gives rise to a duty of full disclosure of all material facts." *Valdez v. Hollenbeck*, 465 S.W.3d 217, 230 (Tex. 2015); *see also Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (failing to disclose existence of an oil and gas lease on estate property was a breach of fiduciary duty by trustee). Furthermore, full disclosure of information concerning a partnership is required upon demand by a partner or the partner's representative. *See* TEX. BUS. ORG. CODE ANN. § 152.213. Additionally, a trustee is required to respond to a request for an accounting. *See* TEX. PROP. CODE ANN. § 113.151.

In his capacity as a co-trustee and beneficiary of the Trust, Kenneth sought copies of any lease agreements affecting the ranch from Laura, who operated the ranch as general partner beginning in 2006, and continuing intermittently through 2015. The court reviewed the history of various agreements and documents, including real estate records that were filed in the deed records. The defendants argued, and the trial court agreed, that the filing of a memorandum of lease in the deed records was sufficient to begin the statute of limitations on Kenneth's claim for breach of fiduciary duty regarding the lease. Kenneth argued that the general partner's and his co-trustees' failure to provide him with copies of the lease or to inform him of its terms was a breach of fiduciary duty and that he had no responsibility to search the deed records when all of the parties to the lease remained silent. In *Archer v. Tregallas*, 566 S.W.3d 281, 288 (Tex. 2018), the Texas Supreme Court upheld the use of the discovery rule in a case involving a right of first refusal even though the deed was recorded. The trial court and the parties did not have the benefit of the *Archer* case at the time of the summary-judgment hearing. According to the court, under *Archer* and the authorities it relied upon, a trustee would have no duty to search the deed records for impairments to its title by subsequent events. The defendants moved for summary judgment based only on constructive knowledge of the lease resulting from the filing of the memorandum of lease. Because *Archer* holds that deed records do not furnish constructive knowledge to a property owner of subsequent impairments to title, the court reversed the grant of summary judgment on statute-of-limitations grounds.

Ortiz v. Las Blancas Minerals, L.P., No. 04-18-00769-CV, 2020 WL 806652 (Tex. App.—San Antonio Feb. 19, 2020, pet. filed) (mem. op.).

The court affirmed summary judgment in favor of the defendants on the plaintiffs' claims for breach of a limited partnership agreement, fraud, breach of fiduciary duties, and conversion.

An individual and a trust that was purportedly the successor limited partner to the individual sued the limited partnership and the other partners for breach of the limited partnership agreement, breach of fiduciary duties, and conversion. The claims for breach of the partnership agreement, fraud, and breach of fiduciary duties were based on allegations that the other partners and the partnership diverted partnership profits to another entity. In this regard, the plaintiffs relied on monthly distribution tables that listed each partner's name, ownership percentage, distribution amount, and the net amount paid to the partner. The tables also displayed a column that showed capital contributions paid to another limited partnership. The column that showed this information contained the words "not partner" in parentheses next to the name of the other limited partnership. The distribution tables showed that several partners other than the plaintiffs elected to make a capital contribution to the other limited partnership each month, and that amount was then deducted from those partners' respective shares for the month. Because the court concluded that the distribution tables reflected that the amounts paid as capital contributions to the other limited partnership were paid after the partners were allocated their respective profit

distributions and that the capital contributions did not affect the plaintiff's share of the profits and distributions, the records were no evidence of breach of the partnership agreement, fraud, or breach of fiduciary duties. In the course of its discussion, the court recited the elements of a breach-of-fiduciary-duty claim and stated that “[p]artners owe certain fiduciary duties to other partners within the partnership, such as the duty of loyalty and the duty of care.”

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership, the court held that judicial dissolution on the ground that it was not reasonably practicable to carry on the partnership's business in conformity with its governing documents was unwarranted because there was no deadlock. The court also stated that the partnership agreement could not and did not disclaim the managing general partner's duty of care to the partnership, and the court held that there was evidence that the managing general partner breached its statutory duty of care and caused actual damages. There was no evidence to support a disgorgement award, however, because there was no evidence of the extent to which the managing general partner profited from excess rent paid by the limited partnership to the subsidiary of the managing general partner.

Shannon Medical Center (“Shannon”) and Triad Holdings III, L.L.C. (“Triad”) were general partners in a limited partnership that operated a regional cancer-treatment center (“RCTC”) on premises leased from Shannon's subsidiary, Shannon Real Estate Services, Inc. (“SRES”). Except for the limited partnership, Shannon and Triad were competitors. Under the terms of the partnership agreement, the general partners managed and controlled the limited partnership through a partnership committee (consisting of one representative of each of the two general partners) and a managing general partner. Shannon served as the managing general partner, for which the limited partnership paid Shannon management fees under a separate agreement.

For some time before the lawsuit, Shannon had been attempting to dissolve the limited partnership and take over RCTC. The partnership agreement provided that the limited partnership would dissolve upon the earliest of (a) December 31, 2038; (b) approval of 75% of the partnership units; (c) the partnership's ceasing to operate a radiotherapy facility; or (d) the occurrence of any other circumstance that, under the Texas Revised Limited Partnership Act, would require dissolution. Shannon attempted to obtain the right to vote 75% of the partnership units in favor of dissolution. There originally were three general partners and a varying number of limited partners, but the third general partner left the limited partnership and sold its partnership units to Shannon and Triad. With the addition of those units, Shannon owned 72.32% of the partnership units, Triad owned 24.35%, and three doctors who were limited partners owned, respectively, 1.72%, 0.86%, and 0.75%. To reach the 75% threshold needed for it to dissolve the limited partnership, Shannon proposed voting agreements with the limited partners, but Triad blocked this move by entering into a voting agreement with one of the limited partners, thus giving Triad votes of more than 26% of the partnership and preventing Shannon from forcing the partnership to dissolve without Triad's consent. By the time of trial, Shannon and Triad had purchased all of the limited partners' partnership units so that Shannon and Triad were the only partners of the partnership. Due to the voting agreements, Shannon had the right to vote slightly less than 74% of the partnership units, and Triad had the right to vote slightly more than 26%.

Prior to expiration of the partnership's lease, SRES, the partnership's landlord, informed the partnership that it would not renew the five-year lease upon its expiration in 2012. Three days before the lease expired, Bryan Horner, Shannon's chief executive officer and SRES's president, sent the partnership and Triad a lease amendment that he had executed on behalf of Shannon, as the Partnership's managing partner, and SRES, as its president. The amended lease almost doubled the partnership's annual rent. A significant portion of the increase was purportedly to reimburse SRES for vaults in the building that SRES represented were specialized tenant improvements it made to the building for the partnership's use. Contrary to these representations, however, Shannon knew that SRES had not modified the building and that the original owner had included the vaults as part of the building's original construction in 1988.

Shannon sued for judicial dissolution of the limited partnership so that Shannon could take over RCTC's operations. Triad, individually and derivatively on behalf of the limited partnership, sued Shannon for breach of common-law and statutory fiduciary duties in connection with the lease. Based on the jury verdict, the trial court denied Shannon's request for judicial dissolution and awarded the limited partnership actual damages in the amount of excess rent that Shannon obligated the limited partnership to pay to SRES. The trial court also ordered Shannon to pay the same amount to Triad as equitable disgorgement of profits. Shannon appealed.

Shannon first argued that the trial court erroneously charged the jury on breach of the statutory duty of care. The jury charge read as follows:

Did Shannon comply with its duty of care to [Triad] and the Partnership?

As a partner in the Partnership, Shannon owes [Triad] and the Partnership a duty of care. Shannon must discharge this duty and conduct the Partnership business (1) in good faith and (2) in a manner that Shannon reasonably believes to be in the best interest of the Partnership.

To prove it complied with its duty of care, Shannon must show that, in conducting the Partnership's business, it acted with the care of an ordinarily prudent person in similar circumstances. An error in judgment does not by itself constitute a breach of the duty of care.

A partner is presumed to have satisfied the duty of care if the partner acted on an informed basis, in good faith, and in a manner that the partner reasonably believed to be in the best interest of the Partnership.

A partner does not violate a duty or obligation merely because the partner's conduct furthers the partner's own interests.

The jury answered "no" as to both Triad and the partnership. A "no" answer to this question was one of several alternative predicates to a question asking the jury to determine the amount that would compensate the partnership for its damages caused by the non-compliant conduct. The jury was instructed to consider only "[t]he amount of any improperly charged rents, determined at the time and place of the payment."

In the trial court and on appeal, Shannon argued that the duty-of-care question did "not adequately address the partnership agreement and the alterations of the statutory duty of care." In response to Shannon's argument that the duty of care was contractually disclaimed and that Shannon's conduct was authorized, the court of appeals stated as follows:

As a matter of law, however, the duty of care cannot be disclaimed. *See id.* § 152.002(b)(3). A partner must conduct the partnership's business "with the care an ordinarily prudent person would exercise in similar circumstances." *Id.* § 152.206(a). A partner additionally must discharge the partner's duties "in good faith" and "in a manner the partner reasonably believes to be in the best interest of the partnership." *Id.* § 152.204(b). Although the Partnership Agreement authorizes contracts between the Partnership and a partner or a partner's affiliate, a partner entering into such a contract still must comply with the duty of care by acting in good faith and in a manner the partner reasonably believes to be in the partnership's best interest. The Partnership Agreement could not change this and did not purport to do so.

The court said that the instructions accompanying the jury question on the statutory duty of care tracked the statute and "additionally clarified that '[a] partner does not violate a duty or obligation merely because the partner's conduct furthers the partner's own interest' and that 'a[n] error in judgment does not by itself constitute a breach of the duty of care.'" The court stated that the jury could have found under these instructions that Shannon complied with its duty of care by entering into a contract with the partnership that furthered Shannon's interest so long as Shannon acted in good faith and reasonably believed that the contract also was in the partnership's best interest. The court concluded that the charge correctly reflected both the governing law and the terms of the partnership agreement.

The court next addressed Shannon's argument that there was no evidence to support the jury's finding that Shannon failed to comply with its statutory duty of care. Because Shannon bore the burden of proof on this issue and the jury returned a finding against Shannon, Shannon was required to demonstrate on appeal that the evidence conclusively established that it complied with its statutory duty of care. The court stated in a footnote that Shannon failed to preserve its objection that the breach-of-duty questions improperly shifted the burden to Shannon, but the court went on to note that "under the common law, when a fiduciary enters into a transaction in which its self-interest might conflict with the beneficiary's interests, the fiduciary bears the burden to show compliance with the duty of care." The court expressed the view that the Texas Business Organizations Code makes this burden-shifting rule applicable to alleged violations of statutory duties as well, citing Tex. Bus. Orgs. Code § 153.003 (providing that "the provisions of Chapter 152 governing partnerships that are not limited partnerships and

the rules of law and equity govern” limited partnerships in matters not addressed in Chapters 153, 151, and 154); Tex. Bus. Orgs. Code § 152.003 (stating that “[t]he principles of law and equity and the other partnership provisions supplement [Chapter 152] unless otherwise provided by [Chapter 152] or [Chapters 151 and 154].”); Tex. Bus. Orgs. Code §§ 152.004, 153.002(b) (providing that “[t]he rule that a statute in derogation of the common law is to be strictly construed does not apply” to Chapters 151-154). The court held that the evidence did not conclusively show that Shannon complied with its duty of care concerning the lease amendment because the evidence showed that Shannon knew that (1) the vaults at issue were not a modification to the building, and thus, they were not a “tenant improvement”; (2) the original owner of the building, not SRES, paid to construct the building, including the vaults; and (3) the vaults’ construction-costs were not part of the building’s fair-market rental value. There thus was no basis for Shannon, as the partnership’s managing general partner, to obligate the partnership to “reimburse” SRES for construction costs that Shannon knew had been paid by the building’s original owner pursuant to the original owner’s agreement with the partnership.

Shannon relied on the fact that the partnership agreement permitted the partnership to contract with a partner’s affiliate such as SRES, but the court pointed out that the agreement specified that contracts with affiliates “must be competitive with the terms that the Partnership could obtain from third parties in an arm’s length transaction.” There was evidence that the highest annual fair-market rental value for the property was \$19.25/sq. ft., and the record supported the finding that Shannon did not act “on an informed basis, in good faith, and in a manner [it] reasonably believed to be in the [Partnership’s] best interest” when Shannon obligated the partnership to pay SRES an additional \$11.79/sq. ft. The court thus affirmed the portion of the judgment awarding the partnership actual damages as found by the jury.

The court sustained Shannon’s challenge to the disgorgement award to Triad, however, because there was no evidence that Shannon profited from the improperly charged rent as opposed to SRES. Texas law limits profit disgorgement to the amount of a fiduciary’s profits obtained as a result of the fiduciary’s breach of duty. The partnership paid the rent to its landlord SRES, and SRES was a separate entity distinct from Shannon, SRES’s sole shareholder. According to the court, “[t]he excess rent was SRES’s profit, not Shannon’s, and Triad did not plead or litigate any basis for ignoring the distinction between the two entities. The extent to which Shannon profited from the excess rent paid to SRES was a question of fact on which there is no finding and no evidence.”

Triad complained that the actual damages Shannon was required to pay to the partnership would primarily benefit Shannon as the majority owner of the partnership, but the court responded that “[t]he extent of Shannon’s partnership interest is irrelevant, because a partnership is ‘an entity distinct from its partners’ and ‘[p]artnership property is not property of the partners,’” citing Tex. Bus. Orgs. Code §§ 152.056, 152.101.

The court began its discussion of Shannon’s claim for judicial dissolution by stating that a district court may order the winding up and termination of a domestic partnership on application by a partner “if the court determines that it is not reasonably practicable to carry on the entity’s business in conformity with its governing documents.” Shannon relied on a voting deadlock as grounds for judicial dissolution, but Shannon admitted that it could “break the deadlock on its own because it holds the majority” of the partnership units. Additionally, the court said that a partnership can carry on its business in accordance with its governing documents despite litigation between partners, as had been done here. Thus, Shannon failed to establish that it was not “reasonably practicable to carry on the Partnership’s business in conformity with its governing documents.”

Finally, the court remanded for further proceedings on attorney’s fees in view of the reversal of Triad’s disgorgement award. The court first pointed out that, under the statute in effect at the time of trial, a trial court had discretion to award the plaintiff reasonable attorneys’ fees and expenses if the plaintiff is wholly or partly successful in prosecuting a derivative action. Tex. Bus. Orgs. Code § 153.405. In addition, the partnership agreement provided that the prevailing partner in litigation between partners relating to the partnership “shall be entitled to recover, in addition to all damages allowed by law and other relief, all court costs and reasonable attorney’s fees incurred in connection therewith from the Partner or Partners not prevailing.” Based on these provisions, the trial court ordered Shannon to pay Triad’s fees, expenses, and court costs incurred in pursuing the individual and derivative claims. The trial court also conditionally awarded additional attorney’s fees in the event of appeal. The court of appeals agreed with Shannon that reversal of the judgment required remand for a new trial solely on the issues of attorneys’ fees, reasonable expenses, and costs, and the court instructed the trial court to condition any award of appellate attorneys’ fees on a successful appeal.

Red Honor Ventures, Ltd. v. Edmonds (In re Edmonds), Case No. 14-40375-MXM-7, Adv. No. 14-4027, 2019 WL 4780921 (Bankr. N.D. Tex. Sept. 30, 2019).

The bankruptcy court concluded that Red Honor Ventures, Ltd. (the “Plaintiff”) proved that its liquidated state-law claims against Robert Edmonds (the “Debtor”) were nondischargeable on several bases, including § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity.

Plaintiff was a Texas limited partnership formed to produce a museum guide for the National Scouting Museum, to produce other original-content publications, and to publish and distribute books of third parties. Red Honor Management, Inc. (“Management”) was the general partner of Plaintiff. The Debtor, Greg White, and David Scott were the limited partners.

The Plaintiff asserted a number of claims against Debtor, including breach of fiduciary duty and conversion, based on allegations that Debtor (a) never made his \$10,000 capital contribution to Plaintiff, (b) misappropriated Plaintiff’s funds for personal expenses, and (c) misappropriated a business opportunity of the Plaintiff. Debtor filed for bankruptcy, and the bankruptcy court first determined that Plaintiff had established liquidated state-law claims against Debtor in the amount of \$101,378.75. The court then addressed whether the claims were dischargeable.

Section 523(a)(4) of the Bankruptcy Code does not allow the “discharge [of] an individual from any debt ... for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” To bar discharge, the debtor must have been acting in a fiduciary capacity at the time of the alleged defalcation. With respect to fiduciary capacity, the court made the following observations:

While the scope of fiduciary duties is determined by federal law, federal courts, including the Fifth Circuit, often look to state law to determine whether an obligation exists. For example, in *In re Harwood*, [637 F.3d 615 (5th Cir. 2011),] the Fifth Circuit relied on *Crenshaw v. Swenson* [611 S.W.2d 886 (Tex. Civ. App.—Austin 1980)] to hold that a managing partner of a partnership’s general partner owed the underlying partners “the highest fiduciary duty recognized in the law.” In accordance with state law, the court observed that the amount of control the director had over the company, and the confidence and trust placed into the director’s hands in managing the company’s operations, determined the scope of the director’s fiduciary duties. Where the business relationship shows that the director has a requisite degree of control over the business, and the director holds a considerable degree of trust from other partners, that director “act[s] in a fiduciary capacity ... within the meaning of Section 523(a)(4).”

In this case, the Partnership Agreement provides that each partner (including limited partners) agrees to act as a fiduciary of the Plaintiff with respect to matters of noncompetition, confidentiality, and other business opportunities. The Partnership Agreement also provides that “[e]ach Partner shall conduct the affairs of the Partnership in good faith toward the best interests of the Partnership.”

In addition, the Debtor was President of Management, which was the Plaintiff’s general partner. The Debtor was sole signatory for the Plaintiff’s bank accounts. Scott and White trusted the Debtor to conduct the Plaintiff’s financial affairs. There can be no dispute that the Debtor owed fiduciary duties to the Plaintiff and that the Debtor was acting in a fiduciary capacity.

Houle v. Casillas, No. 08-17-00189-CV, 2019 WL 4640082 (Tex. App.—El Paso Sept. 24, 2019, no pet.).

The court of appeals reversed the trial court’s granting of summary judgment to Jose Casillas on Robert Houle’s causes of action for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, constructive fraud, and other claims. The court determined that Houle provided at least a scintilla of evidence to raise a question of fact regarding whether Casillas breached a fiduciary duty owed to Houle based on a partnership theory.

Houle and Casillas purchased an older home that had already been divided into apartment units. They initially intended to renovate the home for resale, but they soon decided that they would keep it and lease out the apartment units after they were renovated. The parties agreed that Casillas would provide the financing and Houle would oversee the renovations. They also agreed that once Casillas had been reimbursed for his initial investment, the parties would split profits equally. Upon Houle’s suggestion, Pershing LLC was formed to purchase the property (Houle and Casco Investments, Inc., an entity wholly owned by Casillas, were the members of Pershing.) Pershing purchased the property for \$100,000 (an amount loaned by Casillas to Pershing), and Casillas received a promissory

note from Pershing that was secured by a deed of trust on the property. Unbeknownst to Houle, Casillas later obtained a second promissory note and deed of trust on the property to secure additional monies that he had advanced during the renovations.

The renovations did not go as planned. They took longer and cost more money than Houle had estimated. Eventually, Casillas foreclosed on the property and the parties sued each other. Part of Houle's lawsuit alleged that Casillas and Houle were partners and that Casillas had breached a fiduciary duty (as well as the duty of good faith and fair dealing) owed to Houle by ceasing to advance funds for the project and by failing to provide notice to Houle of the second deed of trust. The trial court dismissed Houle's fiduciary duty and good faith claims on summary judgment, and Houle appealed.

The court of appeals observed that, under Texas law, not all contracts contain an implied covenant of good faith and fair dealing. Nevertheless, the duty of good faith and fair dealing is one of many duties that fiduciaries owe to one another. As a consequence, the court decided to combine its discussion of the fiduciary duty and good faith claims as they both turned on whether Casillas owed a fiduciary duty to Houle.

Houle argued that he and Casillas were in a partnership, despite the fact that they had formed an LLC. The court noted that, in partnerships, fiduciary duty arises as a matter of law:

[T]he Texas Supreme Court has recognized that in certain formal relationships, including partnerships, a fiduciary duty arises as a matter of law. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998). As the Court explained, "[t]he relationship between ... partners ... is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 264 (1951) (quotation omitted); *Bohatch*, 977 S.W.2d at 545; see also *Home Comfortable Supplies, Inc. v. Cooper*, 544 S.W.3d 899, 907 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (partners share "the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise").

The court stated that it is less clear whether members owe each other a fiduciary duty in an LLC. The court cited the Dallas Court of Appeals *Suntech* decision which determined that a member-to-member duty did not exist as a matter of law, but might arise as a question of fact based, at least in part, on whether the members were in unequal positions of power. Regardless, the court of appeals noted that Houle was not arguing that he was owed a fiduciary duty as a member of an LLC; instead, he was arguing that he and Casillas had formed a partnership and that the LLC was simply a means of effectuating the partnership. To that extent, the court agreed with Houle's argument, stating that "[t]he fact that the parties agreed to form an LLC to effectuate their agreement does not preclude the possibility that the parties already had a pre-existing—and continuing—partnership." Thus, the court focused on whether the parties' relationship could be considered a partnership. After citing the Texas Supreme Court's *Ingram* decision and analyzing the five partnership from TBOC § 152.051, the court concluded that Houle presented sufficient evidence to raise a factual question regarding the existence of a partnership between the parties.

Because partners owe each other fiduciary duties, the court then turned to whether the evidence also raised a question of fact on breach of fiduciary duty. Houle argued that his affidavit, which chronicled Casillas' conduct, starting with Casillas' decision to stop funding the renovations, his subsequent decisions to sign a promissory note to himself and to take out a second deed of trust on the property without notice to Houle, and his steps taken to foreclose on the property without considering any interest that Houle may have had, all raised a question of fact as to whether Casillas breached his fiduciary duties. The court agreed:

In general, partners owe each other a strict duty of good faith and candor, as well as a duty to one another to make full disclosure of all matters affecting the partnership and to account for all partnership profits and property. *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890–91 (Tex. App.—Texarkana 2005, pet. denied) (citing *Brosseau v. Ranzau*, 81 S.W.3d 381, 394 (Tex. App.—Beaumont 2002, pet. denied)). The evidence that Casillas engaged in a course of conduct with regard to clearly significant matters affecting the partnership, such as signing the promissory note and deed of trust without notice to Houle, and subsequently foreclosing on the subject

property, without considering any of Houle’s interests, was sufficient to raise a question of fact with respect to whether Casillas breached his fiduciary duties to Houle including his duty of good faith and fair dealing.

In reaching this conclusion, we note that Casillas, at some point, could have taken steps to foreclose on the original deed of trust and/or to end the partnership if he believed that Houle was not fulfilling his obligations. *See, e.g., Bohatch*, 977 S.W.2d at 545 (quoting *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 394 N.Y.S.2d 867, 870–71, 363 N.E.2d 573, 577 (1977)) (recognizing that even though partners owe each other a fiduciary duty, they have “no obligation to remain partners,” because, at the “heart of the partnership concept is the principle that partners may choose with whom they wish to be associated”); *see also Bendalin v. Youngblood & Associates*, 381 S.W.3d 719, 738 (Tex. App.—Texarkana 2012, pet. denied); *LG Ins. Mgmt. Services, L.P. v. Leick*, 378 S.W.3d 632, 643 (Tex. App.—Dallas 2012, pet. denied). However, in exiting the partnership, Casillas was required to do so in a manner that was consistent with fiduciary duties owed to Houle and consistent with the terms of the parties’ partnership agreement. *See generally Bohatch*, 977 S.W.2d at 547 (holding that a partner who was expelled from a partnership was entitled to damages where the partnership reduced her tentative distribution for that year to zero without requisite notice to her in violation of the partnership agreement). We believe that a question of fact exists on the issue of whether Casillas acted in accordance with his obligations by essentially terminating the partnership agreement in the manner in which he did.

The court then determined that Houle’s affidavit provided at least a scintilla of evidence to raise a question of fact on the issue of whether he suffered an injury as a result of Casillas’ conduct. In reaching that conclusion, the court found it significant that Casillas, in his motion for summary judgment, only argued in very general terms that Houle had no evidence to establish that Houle had suffered any injury as a result of Casillas’ alleged breach, or that Casillas had benefitted from such a breach. Moreover, in his motion, Casillas did not challenge Houle to provide evidence pertaining to the economic value of his alleged injury and/or the economic value of the benefit that Casillas received. Casillas only challenged Houle to come forward with evidence of an alleged “injury,” and the court did not believe that this would have put Houle on notice that he needed to provide an accounting of the monetary amount of the injury that he suffered. The court noted that Houle had provided evidence, albeit in general terms, that he was injured when Casillas took control over the property through his allegedly fraudulent course of conduct, thereby depriving Houle of his “interest” in the property, and without compensating Houle for the work that he performed over the course of the year-long renovations. Finally, the court observed that Houle did not simply seek monetary damages for Casillas’ alleged breach of fiduciary duty. Instead, he also requested equitable relief, such as a “Declaratory Judgment declaring the rights of the parties and imposing a constructive trust.” The court observed that in analogous situations, the Texas Supreme Court had determined that when a plaintiff seeks equitable relief for a breach of fiduciary duty, the plaintiff does not necessarily need to present evidence of actual damages stemming from the breach.

In summary, the court concluded that Houle provided at least a scintilla of evidence to raise a question of fact regarding whether Casillas owed him a fiduciary duty, whether that duty was breached, and whether Houle was injured by the breach and/or whether he was entitled to the equitable relief requested in his pleadings. The court therefore concluded that the trial court erred by granting Casillas’ motion for summary judgment on Houle’s causes of action for breach of fiduciary duty and the implied covenant of good faith and fair dealing. (The court also found that the trial court erred in granting summary judgment on Houle’s claim for constructive fraud, as “constructive fraud occurs when a party violates a fiduciary duty or breaches a confidential relationship.”)

Trinkets and Tea, LLC v. Hunt (In re Hunt), 605 B.R. 758 (Bankr. N.D. Tex. 2019).

The court concluded that the debtor, who was the individual sole member and manager of one of two LLC partners of a general partnership, personally owed fiduciary duties to the partnership and the other partner because the debtor’s LLC “would have ‘no life’ without” the debtor. The objections to discharge by the other partner were without merit, however, because, in part, the representations made by the debtor were not shown to be materially false when made and did not rise to the level of fraud or defalcation in a fiduciary capacity.

Jeffrey Hunt owned and operated retail tea stores under the name Tea 2 Go. Brooks Heise invested \$90,000 in two Tea 2 Go stores—\$50,000 in the “Hub” store and \$40,000 in the “Glenna” store. He made the investments

through an LLC (Trinkets and Tea, LLC) that he owned. In exchange for the investments, Trinkets and Tea received a 10% partnership interest in the Hub store and a 49% partnership interest in the Glenna store. The other partner for both stores, and the entity to which the \$90,000 payment was made, was Tea 2 Go, LLC, which was owned by Hunt. Hunt was the designated manager of both general partnerships.

Hunt ran the businesses, at least in part, through the bank account of Tea 2 Go, LLC, the controlling general partner of both partnerships. From this account, Hunt made numerous payments and distributions on items not related to either of the two stores. Separate bank accounts and accounting records were not kept for the two stores.

Hunt eventually filed for bankruptcy. Trinkets and Tea objected to Hunt receiving a general discharge; alternatively, it objected to Hunt receiving a discharge of the specific debt owed to Trinkets and Tea.

Initially, the court found that it would not give collateral estoppel effect to a state court judgment finding in favor of Hunt on Trinkets and Tea's breach of fiduciary duty claim. The court then discussed Hunt's personal liability in the "two-tier" general partnerships at issue in the dispute (Tea 2 Go, LLC was a partner in both partnerships, and Hunt was the sole member of Tea 2 Go, LLC). After citing a number of basic partnership law principles (partners are liable to the partnership and the other partners for breach of the partnership agreement or a violation of duty to the partnership or the other partners that causes harm; partners owe a duty of loyalty and care; partners must exercise good faith and act in the best interests of the partnership when conducting partnership business; a partner doesn't violate a duty or obligation "merely because" the partner's actions further the partner's own interests; the duty of loyalty requires, among other things, that the partner account to and hold partnership property and that the partner refrain from taking actions adverse to the partnership; the duty of care is measured by consideration of what an ordinarily prudent person would do under similar circumstances; the duty of care requires a partner to act on an informed basis, in compliance with the partner's duties to the partnership, in good faith, and in the partnership's best interest; individual partners may maintain actions against other partners "for legal or equitable relief" to enforce their rights under the partnership agreement or for breach of the duties of loyalty and care), the court framed its task as needing to determine if Tea 2 Go, LLC breached its duties to the partnership, and, if so, whether the court could impose that liability against Hunt, the sole manager of Tea 2 Go.

After discussing the bankruptcy decision of *In re Harwood* and the Fifth Circuit's decision of *In re Bennett*, the court recognized that "where an individual substantially controls the actions of the named partner in a two-tier partnership arrangement, that individual could have a fiduciary duty to the partnership." The court observed that despite Hunt's attempt to avoid individual liability by creating a two-tiered entity, Hunt exercised a substantial degree of control and direction over Tea 2 Go, LLC. For that reason, the court determined that Hunt personally owed fiduciary duties to the partnership and the partners. The court concluded, however, that Hunt's conduct was not culpable enough to amount to "fraud or defalcation while acting in a fiduciary capacity," and Trinkets and Tea failed to prevail on its objection to discharge of Hunt under Section 523(a)(4).

Brown v. Outlaw, No. 05-17-01270-CV, 2019 WL 2647791 (Tex. App.—Dallas June 27, 2019, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's judgment that a partner wrongfully withdrew from the partnership and breached her fiduciary duty to her fellow partner.

Regina Dell Brown, Gwendolyn Gabriel, and Merry Outlaw formed a partnership to purchase, renovate, and sell a residence in Cedar Hill, Texas. The property was purchased on May 21, 2010. Less than two months later, Gabriel withdrew from the project following what she called a "suspicious" withdrawal by Outlaw of \$600 from the partners' joint account. The city declared the residence complete in January 2014, but efforts to sell the property were unsuccessful. Eventually, a receiver sold the property, and the proceeds were placed in the registry of the court.

Gabriel and Brown sued Outlaw alleging fraud, deceptive trade practices, and breach of fiduciary duty. Their petition also sought an equal division of the proceeds among Gabriel, Brown, and Outlaw. Outlaw counterclaimed for wrongful withdrawal from the partnership, breach of fiduciary duty, intentional interference with the business relationship of Outlaw and Brown, and defamation. The trial court granted summary judgment in favor of Outlaw on the deceptive trade practices claim, and all of the remaining actions were tried to a jury. Outlaw prevailed on every claim.

On appeal, Gabriel and Brown challenged the evidentiary support for the jury's finding that Gabriel wrongfully withdrew from the partnership. The trial court instructed the jury on this issue by stating that "[a] partner wrongfully withdraws if the partnership is formed for the completion of a specific undertaking and the

partner voluntarily withdraws from the partnership before the undertaking is complete.” The trial court also defined “Partnership” in the charge as “the arrangement between Regina Brown, Gwendolyn Gabriel, and Merry Outlaw to purchase, repair and/or rehabilitate, and sell for profit the [Property.]” None of the parties objected to the instruction or the definition.

Gabriel and Brown argued that nothing in the parties’ agreement required any partner to stay in the project until the actual sale of the house, in effect arguing that the partnership was not “formed for the completion of a specific undertaking” that included sale of the property. The court rejected the argument:

But the charge’s very definition of the parties’ undertaking, the “Partnership,” included their arrangement to purchase, repair and/or rehabilitate, and sell the Property for profit. The jury was not free to disregard the court’s instructions when making its finding.

The evidence does not support appellants’ argument either. It is true that the parties testified to conflicting understandings of how the repairs and improvements to the Property were to be financed and how the proceeds of the sale were to be divided. But throughout trial, all three parties testified that their agreement was to purchase, renovate, and sell the Property. And Gabriel’s own testimony was specific: “I made an agreement that I would contribute to the project until we got it finished.” Nevertheless, it is undisputed that Gabriel withdrew from the partnership effective July 2, 2010, less than two months after the purchase of the Property and some seven years before it was sold.

The jury’s finding that Gabriel wrongfully withdrew from the partnership was supported by the parties’ testimony concerning the purpose of their partnership. The finding is not clearly wrong or manifestly unjust.

The trial court instructed the jury that a fiduciary relationship existed between Gabriel and Outlaw “as partners in the real estate project.” Gabriel and Brown challenged the factual sufficiency of the jury’s finding that Gabriel breached that fiduciary duty to Outlaw. They argued that the only possible violation of Gabriel’s duty was her wrongful withdrawal from the partnership, and they reasserted their position that there was insufficient evidence of such a wrongful withdrawal. The court reiterated its conclusion that “ample evidence supports the jury’s finding on wrongful withdrawal.” The court also noted that the trial court’s charge (which mirrored the pattern jury charge on breach of fiduciary duty) gave the jury guidance on what conduct by Gabriel would amount to a breach:

The record supports the jury’s finding that—employing one or more of these standards—Gabriel breached her fiduciary duty. For example, one standard required evidence that Gabriel did not make reasonable use of the confidence that Outlaw placed in her. Gabriel testified that “when we first started we thought I was going to be doing the most work and I was going to possibly be the one putting in the most money.” She testified that she had built her own large home and that she had done “all the labor” on the homes that Outlaw had purchased as rental properties. Gabriel believed she would be performing most of the labor on this project as well. Outlaw testified that when the three women had decided to buy the Property, she was counting on Gabriel’s expertise as well as her monetary contributions for repairs and improvements. Given Gabriel’s early withdrawal, jurors could have found that she did not “make reasonable use of the confidence that Merry Outlaw put in her.” Another standard listed in the charge required evidence that Gabriel had placed her own interest before Outlaw’s. Gabriel acknowledged that the parties had “all committed to contribute as much as we possibly could, given our individual circumstances.” Despite this commitment, Gabriel withdrew from the partnership and left Outlaw and Brown to complete the project on their own. Jurors could have found that Gabriel had “placed her own interest before Merry Outlaw’s.”

We conclude the jury’s finding that Gabriel breached her fiduciary duty to Outlaw is supported by testimony from both Gabriel and Outlaw. It is neither clearly wrong nor manifestly unjust.

The court of appeals also concluded that sufficient evidence supported the jury’s finding that Gabriel interfered with the modified partnership agreement between Brown and Outlaw. Brown had signed a deed that

granted “all of her interest in the Property” to Outlaw, “save and except” eight percent. (The opinion notes that Gabriel, Brown, and Outlaw “agreed that each of them would own one third of the Property.”) The court stated that the jury could have reasonably inferred that Gabriel persuaded Brown to stop cooperating with Outlaw on the project. There was also evidence that Gabriel and Brown attempted to have Outlaw “‘change’ the modification of Brown’s agreement.” As the court stated: “We conclude sufficient evidence supports the jury’s finding that Gabriel interfered with the modified partnership agreement between Brown and Outlaw. The finding is neither clearly wrong nor manifestly unjust.”

Finally, the court found that factually sufficient evidence supported the jury’s defamation finding. According to the court, reasonable jurors could have believed that Outlaw had the right to withdraw \$600 from the partners’ joint account, and that Gabriel’s allegation that Outlaw stole the funds was therefore untrue.

Lopez v. Quiroz Hernandez (In re Quiroz Hernandez), Case No. 15-50173-rbk, Adv. No. 15-5028-rbk, Adv. No. 16-5004-rbk, 2019 WL 2402998 (Bankr. W.D. Tex. June 3, 2019).

In its original opinion, the bankruptcy court concluded that a portion of Jorge Quiroz Hernandez’s debt to Magdalena Lopez was not dischargeable under § 523(a)(4) of the Bankruptcy Code. The district court vacated the judgment and remanded the proceeding back to the bankruptcy court, which again concluded that \$271,270 of Quiroz’s debt to Lopez was nondischargeable under § 523(a)(4).

The bankruptcy court noted that a partner’s duties to other partners falls squarely within the definition of a fiduciary duty under § 523(a)(4). The court observed that a partnership was created under Texas law between Quiroz and Lopez when they signed a subscription agreement on July 3, 2012. According to the court, “[t]he parties intended to and did become partners, intended to share profits, had the right to participate in control of the partnership, and agreed to contribute to the partnership.” The creation of the partnership was sufficient to trigger liability under § 523(a)(4). Quiroz intended to breach his fiduciary duties to Lopez when he drew checks from the company to himself, paid his credit card balances with partnership funds, disbursed fees to himself in excess of his salary, and refused to disclose financial information to Lopez.

Even if Quiroz lacked the specific intent to breach his fiduciary duties, the U.S. Supreme Court in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), established that “where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary ‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.” The evidence presented at trial established that Lopez requested financial information from Quiroz on several occasions, but Quiroz repeatedly refused to produce it. Instead, he misappropriated the funds that Lopez provided for the partnership to purchase personal items and to pay personal debts. The court concluded that Quiroz consciously disregarded a substantial and unjustifiable risk that his conduct would violate his fiduciary duties to Lopez. As a result, the \$ 271,270 that Lopez loaned or contributed to the partnership was held to be a nondischargeable debt under § 523(a)(4).

E. Partnership Property and Partnership Interest

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership, the court held that judicial dissolution on the ground that it was not reasonably practicable to carry on the partnership’s business in conformity with its governing documents was unwarranted because there was no deadlock. The court also held that the partnership agreement could not and did not disclaim the managing general partner’s duty of care to the partnership, and there was evidence that the managing general partner breached its statutory duty of care and caused actual damages. There was no evidence to support a disgorgement award, however, because there was no evidence of the extent to which the managing general partner profited from excess rent paid by the limited partnership to the subsidiary of the managing general partner.

The partner who prevailed on its claim for breach of the managing partner’s duty of care complained that the actual damages the managing general partner was required to pay to the partnership would primarily benefit the managing general partner as the majority owner of the partnership, but the court responded that “[t]he extent of Shannon’s partnership interest is irrelevant, because a partnership is ‘an entity distinct from its partners’ and ‘[p]artnership property is not property of the partners,’” citing Tex. Bus. Orgs. Code §§ 152.056, 152.101.

Poole v. Poole, No. 07-18-00415-CV, No. 07-19-00051-CV, 2019 WL 3952834 (Tex. App.—Amarillo Aug. 21, 2019, no pet.) (mem. op.) (“Indeed, our jurisprudence has long recognized that a partner does not own a specific interest in particular chattel or property of a partnership. What is owned is a right to receive distributive shares of the partnership’s profits and surpluses.”).

Etheridge v. Opitz, 580 S.W.3d 167 (Tex. App.—Tyler 2019, pet. dismiss’d).

In a post-divorce action for division of several tracts of property that the ex-wife claimed were purchased by the couple during marriage and were not divided in the divorce decree, the court of appeals held that certain tracts were owned by the couple and other tracts were owned by a partnership formed during the marriage (the couple’s community interest in the partnership was awarded to the ex-husband in the divorce). Thus, the ex-wife was entitled to partition of the tracts that were owned as community property, but the ex-wife had no interest in the tracts that were partnership property.

Jaime Etheridge brought a post-divorce action for division of six tracts of land purchased during her marriage to Eric Opitz. Jaime asserted that these tracts of land were community property that had not been divided in the divorce decree. The divorce decree awarded the couple’s residence and the community interest in a dairy business known as Summit Dairy to Eric and imposed the debt associated with both the residence and Summit Dairy on Eric. Jaime was awarded \$50,000 for “her community interest in the marital residence and in the business known as Summit Dairy.” The tracts of land at issue, title to which was held in the names of Eric and Jaime (and in the case of three of the tracts, in the names of Eric, Jaime, and Eric’s parents), were not specifically mentioned in the divorce decree.

Eric’s theory at trial, which was not pleaded by Eric, was that the property at issue was partnership property belonging to Summit Dairy, and Jaime complained that this assertion required a verified plea. The court of appeals held that Eric’s assertion that the property was owned by the partnership under partnership law was not an argument of lack of capacity or a defect in parties and thus did not require a verified plea under Texas Rule of Civil Procedure 93.

At trial, the jury found that Jaime had no interest in any of the tracts, and the trial court entered judgment that Jaime take nothing on her claims of ownership in the six tracts of land. Jaime argued on appeal that the trial court erred in submitting an instruction that included the text of Tex. Bus. Orgs. Code § 152.102 regarding the classification of partnership property. The charge also included an instruction based on the presumption under the Texas Family Code that property acquired during marriage is community property. The court of appeals concluded that the trial court did not err in submitting the instruction on partnership property.

With regard to the sufficiency of the evidence, the court of appeals concluded that there was no evidence to rebut the community presumption as to three of the six tracts of land at issue. The first three tracts were acquired in 2002 in the names of Eric, Jaime, and Eric’s parents. At this time, Eric and Jaime were married, but the partnership was not yet in existence. Eric attempted to rebut the community presumption with evidence that the properties were purchased with partnership funds, but the court pointed out that the partnership was not yet in existence at the time of the deeds and stated that “[t]he community character of property is determined by the date of the deed, not by the date the purchase price is paid.” In the absence of evidence rebutting the community presumption, the court examined the record for any evidence of a conveyance of these tracts to the partnership. “To convey to the partnership title to property owned by one partner at the formation of the partnership, or to make such property a partnership asset, there must be a written agreement, the same as any other contract for the sale of land.” There was no evidence of such a conveyance. The court of appeals concluded that all vital facts in support of Jaime’s community property interest were established as a matter of law. Thus, with respect to the three tracts, the court of appeals found the trial court erred in divesting Jaime of her community interest.

The court of appeals then examined the evidence relating to the remaining three tracts of land. The court found that there was sufficient evidence to support the implied finding that these three tracts were partnership property. These tracts were acquired in the names of Eric and Jaime after Eric and his father formed Summit Dairy as a partnership. Although these properties were presumptively community based on their acquisition during marriage, “Eric’s testimony that the existing partnership paid for these properties, from the purchase date, is sufficient to rebut the community property presumption.” The court stated that this testimony “also launched the presumption that the property is partnership property” pursuant to Tex. Bus. Orgs. Code § 152.102. The burden then fell on Jaime to rebut that presumption, and she did not do so. “Unlike the scenario involving the first three properties, when land is acquired for purposes of a existing partnership but is held in a partner’s name, the

partnership's claim to the land is not barred by the absence of a written document of conveyance.... Whether property used in the partnership operation is owned by the partnership is a question of intention." Both Jaime and Eric testified as to the payment of the down payment and monthly payments out of partnership funds, and Eric testified that neither he nor Jaime ever wrote a personal check to pay for "anything on that property." The court stated that this evidence showed that the parties intended the property to be partnership property, and it was of no consequence that legal title was in the names of Jaime and Eric or that Jaime was not a partner. Thus, the evidence supported the jury's finding that Jaime had no interest in these three tracts, and the appellate court affirmed the trial court's judgment as to the ownership of the tracts.

F. Interpretation and Enforcement of Partnership Agreement

1. Financial Rights and Obligations

Ortiz v. Las Blancas Minerals, L.P., No. 04-18-00769-CV, 2020 WL 806652 (Tex. App.—San Antonio Feb. 19, 2020, pet. filed) (mem. op.).

The court affirmed summary judgment in favor of the defendants on the plaintiffs' claims for breach of a limited partnership agreement, fraud, breach of fiduciary duties, and conversion.

An individual and a trust that was purportedly the successor limited partner to the individual sued the limited partnership and the other partners for breach of the limited partnership agreement, breach of fiduciary duties, and conversion. The claims for breach of the partnership agreement, fraud, and breach of fiduciary duties were based on allegations that the other partners and the partnership diverted partnership profits to another entity. In this regard, the plaintiffs relied on monthly distribution tables that listed each partner's name, ownership percentage, distribution amount, and the net amount paid to the partner. The tables also displayed a column that showed capital contributions paid to another limited partnership. The column that showed this information contained the words "not partner" in parentheses next to the name of the other limited partnership. The distribution tables showed that several partners other than the plaintiffs elected to make a capital contribution to the other limited partnership each month, and that amount was then deducted from those partners' respective shares for the month. Because the court concluded that the distribution tables reflected that the amounts paid as capital contributions to the other limited partnership were paid after the partners were allocated their respective profit distributions and that the capital contributions did not affect the plaintiff's share of the profits and distributions, the records were no evidence of breach of the partnership agreement, fraud, or breach of fiduciary duties.

2. Voting Rights

Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.).

The court of appeals affirmed the trial court's judgment in favor of a limited partnership, including a declaration that the sole general partner was removed and the successor general partner was properly admitted and appointed under the terms of the partnership agreement.

The U.S. Citizenship and Immigration Services ("USCIS") administers the EB-5 immigrant investor program, which permits foreign investors to obtain a green card by making a minimum capital investment in a U.S. business that creates ten jobs. Under this program, the foreign investor's capital is invested in a new commercial enterprise which then deploys that capital to a job-creating entity. The EB-5 program allows investment through USCIS-approved regional centers.

Great Southwest Regional Center, LLC ("Great Southwest") operated as an USCIS-approved regional center and sponsored an EB-5 project involving salt water disposal wells in west Texas. Frost Rains Holdings, LLC ("Frost Rains") was Great Southwest's sole owner. Great Southwest organized ACSWD, LP ("ACSWD") to serve as the new commercial enterprise for the salt water project. ACSWD was advertised to potential investors as a \$500,000 investment in exchange for a limited partnership interest in ACSWD. These partnership interests were offered pursuant to multiple documents, including ACSWD's partnership agreement. Lu Jun was a Chinese citizen and sought to obtain a green card through the EB-5 program. Jun agreed to invest in ACSWD, wired Great Southwest \$575,550 (\$500,000 for the EB-5 investment and the remainder for various fees), and signed ACSWD's

partnership agreement. Jun was the only EB-5 investor secured for ACSWD, and she served as the sole limited partner with a 99% interest.

When Jun did not receive a refund as requested, she sought a return of her money by intervening in Great Southwest's suit against a separate entity that was involved in the EB-5 project. Jun's pleadings included claims against ACSWD and Great Southwest as well as a statement that she, in her capacity as the sole limited partner, removed Great Southwest as ACSWD's general partner and appointed SWD Investment Recovery Fund, LLC ("SWD Investment") to the role. After Jun nonsuited her claims against ACSWD and the limited partnership filed its own plea in intervention, the trial court signed an agreed order to realign the parties such that ACSWD was the sole plaintiff asserting various claims against Great Southwest, Frost Rains, and certain officers of Frost Rains. ACSWD also requested a declaratory judgment regarding the status of its general and limited partners. Following a bench trial, the trial court signed a final judgment in favor of ACSWD that included a declaratory judgment stating: (1) Great Southwest was removed as ACSWD's general partner and became a limited partner without the right to vote owning a .99% interest; (2) SWD Investment became the general partner of ACSWD with a 1% interest; and (3) Jun's limited partnership interest was reduced from 99% to 98.01%. Great Southwest asserted multiple issues on appeal.

In challenging the trial court's second declaration and interpretation of the ACSWD partnership agreement, Great Southwest argued that SWD Investment could neither be admitted as a partner nor appointed as successor general partner without the current general partner's written consent and there was no general partner to provide such consent. The court of appeals began its analysis by reviewing traditional principles of contract interpretation and construction. Next, the court focused on two sections of the partnership agreement: section 13 (governing the limited partners' rights and powers) and section 14 (listing prohibited transactions). Then, the court cited the relevant parts of each section as follows:

13.2 Removal of a General Partner:

A. Upon written notice to the General Partner, Limited Partners owning at least seventy-five percent (75%) of the Limited Partners' Interests may remove the General Partner for cause. As used herein, the term "cause" shall mean (I) a General Partner's action in violation of any one or more of the prohibitions set forth in Article XIV of this Agreement, (ii) the issuance of a charging order or writ of attachment or other action, against a General Partner's interest in the Partnership, (iii) any action or omission by a General Partner which constitutes fraud, deceit, or a wrongful taking, or (iv) the death, dissolution or bankruptcy of a General Partner.

B. Upon written notice to the General Partner, the Limited Partners owning at least seventy-five percent (75%) of the Limited Partners' Interests may remove a General Partner without cause.

C. Upon the removal of a General Partner as provided above, all remaining Partners may agree in writing to continue the business of the Partnership and to appoint a new successor general partner meeting the requirements of Section 13.3.

* * *

13.3 Successor General Partner:

A person or entity shall qualify as a successor general partner only upon satisfaction of the following conditions:

A. The person or entity shall have accepted and agreed to be bound by all the terms and provisions of this Agreement, by executing a counterpart hereof and any other such document or instrument as may be required or appropriate in order to effect the admission of the person or entity as a substitute General Partner;

B. The person or entity shall have a net worth which will be sufficient to meet all then-current requirements of applicable statutes, cases, treasury regulations or IRS rulings to ensure classification of the Partnership as a partnership for federal income tax purposes;

C. The person or entity shall make any such contribution to the capital of the Partnership as may be determined by Majority Vote of the Limited Partners; and

D. An amendment to this Agreement and to the Partnership's Certificate of Limited Partnership evidencing the admission of the person or entity as a successor General Partner shall be filed for recondition, as required by the Act.

* * *

14.1 Prohibited Transactions:

During the term of this Partnership, neither a General Partner nor any Limited Partner shall do any one of the following:

* * *

I. Do any of the following, or allow any of the following to occur, *without first obtaining the written consent of the General Partner and Limited Partners* owning more than fifty percent (50%) of the Sharing Ratios owned by all the Limited Partners:

* * *

iv. *The admission of another person or entity as a General or Limited Partner*, except as provided in Section 16.3 regarding the admission of transferees of a Limited Partner's Interest as substitute Limited Partners.

[emphasis added by court]

According to Great Southwest's interpretation of the partnership agreement, SWD Investment could not be admitted to ACSWD as a new partner, much less appointed as successor general partner, without the approval of a general partner because section 14.1(I)(iv) prohibited the admission of a successor general partner without the general partner's written consent. Because Great Southwest was removed as general partner, it contended that there was no current general partner to consent to SWD Investment's admission or appointment as successor general partner.

The court of appeals rejected Great Southwest's interpretation of the partnership agreement and concluded that SWD Investment was properly admitted to ACSWD as successor general partner under the terms of the partnership agreement. Despite acknowledging that section 14.1(I)(iv), if read in isolation, appeared to prohibit the admission of a successor general partner without the current general partner's written consent, the court stated that it was required to consider other relevant sections in order to construe the partnership agreement as a whole. First, the court pointed to sections 13.2(B), 13.2(C), and 13.3 as prescribing the specific procedures that limited partners may utilize to remove ACSWD's general partner and appoint a successor. The court reasoned that these sections, directly applicable here, did not condition the appointment of a successor general partner on the approval of the current general partner. Instead, section 13.2 stated that limited partners owning at least 75% of the limited partners' interest can, upon written notice, remove the general partner without cause and then the remaining partners may agree to appoint a new successor general partner satisfying the four conditions of section 13.3. Because Jun was the sole limited partner with a 99% limited partner interest, she could remove Great Southwest as general partner without cause and appoint SWD Investment as successor general partner without approval of the current general partner. Second, the court determined that the more specific provisions of sections 13.2 and 13.3 applied to this issue and controlled over the broad conditions of section 14.1(I)(iv). Third, the court declined to adopt Great Southwest's interpretation of the partnership agreement because doing so would render sections 13.2 and 13.3 meaningless.

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership against the only other remaining partner, the court held that judicial dissolution was unwarranted because there was no deadlock. The managing partner attempted for some time to gain control of the partnership and obtain the right to vote 75% of the partnership units, which was the threshold needed to authorize dissolution, but this attempt was blocked due to a voting agreement entered into between the other partner with a prior limited partner. The court rejected the managing general partner's argument that there was a deadlock making it not reasonably practicable to carry on the partnership, however, because the partnership agreement provided that a deadlock may be broken by the approval of general partners holding a majority of the partnership units, and the managing general partner admitted that it could "break the deadlock on its own because it holds the majority" of the partnership units.

Shannon Medical Center ("Shannon") and Triad Holdings III, L.L.C. ("Triad") were general partners in a limited partnership that operated a regional cancer-treatment center ("RCTC") on premises leased from Shannon's subsidiary, Shannon Real Estate Services, Inc. ("SRES"). Except for the limited partnership, Shannon and Triad

were competitors. Under the terms of the partnership agreement, the general partners managed and controlled the limited partnership through a partnership committee (consisting of one representative of each of the two general partners) and a managing general partner. Shannon served as the managing general partner, for which the limited partnership paid Shannon management fees under a separate agreement.

For some time before the lawsuit, Shannon had been attempting to dissolve the limited partnership and take over RCTC. The partnership agreement provided that the limited partnership would dissolve upon the earliest of (a) December 31, 2038; (b) approval of 75% of the partnership units; (c) the partnership's ceasing to operate a radiotherapy facility; or (d) the occurrence of any other circumstance that, under the Texas Revised Limited Partnership Act, would require dissolution. Shannon attempted to obtain the right to vote 75% of the partnership units in favor of dissolution. There originally were three general partners and a varying number of limited partners, but the third general partner left the limited partnership and sold its partnership units to Shannon and Triad. With the addition of those units, Shannon owned 72.32% of the partnership units, Triad owned 24.35%, and three doctors who were limited partners owned, respectively, 1.72%, 0.86%, and 0.75%. To reach the 75% threshold needed for it to dissolve the limited partnership, Shannon proposed voting agreements with the limited partners, but Triad blocked this move by entering into a voting agreement with one of the limited partners, thus giving Triad votes of more than 26% of the partnership and preventing Shannon from forcing the partnership to dissolve without Triad's consent. By the time of trial, Shannon and Triad had purchased all of the limited partners' partnership units so that Shannon and Triad were the only partners of the partnership. Due to the voting agreements, Shannon had the right to vote slightly less than 74% of the partnership units, and Triad had the right to vote slightly more than 26%.

The court began its discussion of Shannon's claim for judicial dissolution by stating that a district court may order the winding up and termination of a domestic partnership on application by a partner "if the court determines that it is not reasonably practicable to carry on the entity's business in conformity with its governing documents." The jury was asked whether it was reasonably practicable to carry on the partnership's business in conformity with the governing documents, and the jury answered "Yes." Shannon contended that it conclusively established that it was entitled to judicial dissolution based on a voting deadlock between the two partners. However, the court stated that the evidence, and Shannon's own admission, distinguished the facts here from case law relied upon by Shannon. The partnership agreement here provided that a deadlock may be broken by the approval of general partners holding a majority of the partnership units, and Shannon admitted that it could "break the deadlock on its own because it holds the majority" of the partnership units. Shannon speculated that Triad would object to Shannon's resolving the deadlock on its own and "would resort to a lawsuit," but the court said that "speculation is not evidence." Additionally, the court said that a partnership can carry on its business in accordance with its governing documents despite litigation between partners, as had been done here. Thus, Shannon failed to establish that it was not "reasonably practicable to carry on the Partnership's business in conformity with its governing documents."

Poole v. Poole, No. 07-18-00415-CV, No. 07-19-00051-CV, 2019 WL 3952834 (Tex. App.—Amarillo Aug. 21, 2019, no pet.) (mem. op.).

The court of appeals rejected a claim that a general partner and its affiliate breached fiduciary duties and the partnership agreement by not getting the consent of the majority owner to a loan and security agreement entered into by the limited partnership.

Entrania Springs L.P. was a family limited partnership. Its general partner was Poole IV, Inc., which was managed by Danny Poole and Jayme Poole Rittenberry. Karen Poole, Danny's and Jayme's mother, owned or controlled 99.5% of the limited partnership through various means.

Poole IV and Entrania Springs obtained a loan from AXA Equitable Life Insurance Company for approximately \$9.9 million. Repayment of the debt was secured by realty of the limited partnership. Karen purportedly did not know of the loan and objected upon discovering it. She undertook several actions in response, including the removal of funds from various family entities or businesses. Danny, Jayme, and multiple family businesses sued Karen, alleging theft, breach of fiduciary duty, and other causes of action. Karen counterclaimed and asserted breach of fiduciary duty claims against her children. A jury ultimately found in favor of Danny and Jayme, and Karen appealed.

Karen argued that the evidence at trial established that Danny and Poole IV breached their fiduciary duties to Entrania Springs and failed to comply with the partnership agreement. Her argument was premised upon her

belief that the borrowers were obligated under the partnership agreement to obtain her consent to the loan and security agreement (which she never gave). She relied on two specific provisions of the partnership agreement:

Partnership Interest Pledge or Encumbrance. No Partner may grant a security interest in or otherwise pledge, hypothecate, or encumber his interest in this Partnership or such Partner's distributions without 70 Percent in Interest of Limited Partners. It is understood that the Partners are under no obligation to give consent nor are they subject to liability for withholding consent. [XIII.C. of the Entrania Springs Partnership Agreement]

[and]

Restrictions on General Partner. The General Partner will not have the authority to enter into any of the following transactions without the consent of 70 Percent in Interest of the Limited Partners/Unanimous Consent (5) make, execute, or deliver any assignments for the benefit of creditors, or on the Assignee's promise to pay the debts of the Partnership. [VII.F.5. of the Entrania Springs Limited Partnership Agreement]

With respect to the first provision, the court concluded that it did not require Karen's consent to the loan and security agreement:

Regarding the first provision, we see that it refers to "partners" granting security interests or encumbrances. The subject of those encumbrances is the partner's or "his interest in this Partnership or such Partner's distributions." (Emphasis added). "[H]is" interest in and his distributions from the partnership refer to the property rights or interests which the partner may have in the partnership itself. Indeed, our jurisprudence has long recognized that a partner does not own a specific interest in particular chattel or property of a partnership. What is owned is a right to receive distributive shares of the partnership's profits and surpluses. The aforementioned section of the limited partnership agreement reflects that right by prohibiting a partner from encumbering his interest in his distributive shares of partnership profits or surpluses without approval.

Neither Danny nor Poole IV pledged or otherwise encumbered his or its own respective interest in any partnership, that is, in their own respective right to receive distributive shares of partnership profits or surpluses. The property being pledged or encumbered was not a partnership interest as we know that term to mean. It consisted of realty apparently owned by Entrania, the limited partnership. Consequently, neither Poole IV nor Danny had an obligation to obtain Karen's consent under the provision at issue before executing the deed of trust in favor of AXA.

With respect to the second provision, the court also concluded that it did not require Karen's consent, largely because of the meaning of "assignment for the benefit of creditors":

As for the second paragraph and its prohibition against Poole IV, the general partner, executing an "assignment for the benefit of creditors" or an assignment "on the Assignee's promise to pay the debts of the Partnership," we say the following. Over the years, the phrase "assignment for the benefit of creditors" has come to refer to or mean a particular type of conveyance. More importantly, it differs from a conveyance reflected in a mortgage or deed of trust. The latter generally describes a conveyance of an estate or property by way of pledge for the security of a debt and which estate ends upon payment of the debt. The former denotes a conveyance of all interest in and control over property by an insolvent debtor to its creditors in payment or discharge of debts. It is these technical definitions developed over time that we accord to the verbiage within the limited partnership agreement.

Here, the deed of trust executed by Entrania simply granted a third party the authority to sell the realty described therein and pay AXA if the debtor defaulted on the loan made by AXA. Additionally, the power of the individual granted the authority to sell was finite and triggered only by Entrania's default. Entrania also retained possession of the realty as well as the obligation to care for and pay taxes imposed upon it. Given these attributes, the deed of trust executed by Poole

IV was nothing more than a security for the repayment of a debt. It was a mortgage and not an assignment for the benefit of creditors.

The court also upheld the judgment against Karen for theft and breach of fiduciary duty. According to the court, Karen did not question on appeal that (1) she took funds belonging to Entrania, (2) Poole IV, as the general partner, had the exclusive authority to manage the limited partnership, and (3) she took the funds without Poole IV's consent, rendering them unavailable to Entrania or Poole IV. This evidence supported the finding of theft. Moreover, the court determined that Karen inadequately briefed her argument contesting the breach of fiduciary duty finding against her, and she therefore waived the issue.

3. Contractual Modification of Fiduciary Duties

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership, the court held that judicial dissolution on the ground that it was not reasonably practicable to carry on the partnership's business in conformity with its governing documents was unwarranted because there was no deadlock. The court also stated that the partnership agreement could not and did not disclaim the managing general partner's duty of care to the partnership, and the court held that there was evidence that the managing general partner breached its statutory duty of care and caused actual damages. There was no evidence, however, to support a disgorgement award because there was no evidence of the extent to which the managing general partner profited from excess rent paid by the limited partnership to the subsidiary of the managing general partner.

Shannon Medical Center ("Shannon") and Triad Holdings III, L.L.C. ("Triad") were general partners in a limited partnership that operated a regional cancer-treatment center ("RCTC") on premises leased from Shannon's subsidiary, Shannon Real Estate Services, Inc. ("SRES"). Except for the limited partnership, Shannon and Triad were competitors. Under the terms of the partnership agreement, the general partners managed and controlled the limited partnership through a partnership committee (consisting of one representative of each of the two general partners) and a managing general partner. Shannon served as the managing general partner, for which the limited partnership paid Shannon management fees under a separate agreement.

For some time before the lawsuit, Shannon had been attempting to dissolve the limited partnership and take over RCTC. The partnership agreement provided that the limited partnership would dissolve upon the earliest of (a) December 31, 2038; (b) approval of 75% of the partnership units; (c) the partnership's ceasing to operate a radiotherapy facility; or (d) the occurrence of any other circumstance that, under the Texas Revised Limited Partnership Act, would require dissolution. Shannon attempted to obtain the right to vote 75% of the partnership units in favor of dissolution. There originally were three general partners and a varying number of limited partners, but the third general partner left the limited partnership and sold its partnership units to Shannon and Triad. With the addition of those units, Shannon owned 72.32% of the partnership units, Triad owned 24.35%, and three doctors who were limited partners owned, respectively, 1.72%, 0.86%, and 0.75%. To reach the 75% threshold needed for it to dissolve the limited partnership, Shannon proposed voting agreements with the limited partners, but Triad blocked this move by entering into a voting agreement with one of the limited partners, thus giving Triad votes of more than 26% of the partnership and preventing Shannon from forcing the partnership to dissolve without Triad's consent. By the time of trial, Shannon and Triad had purchased all of the limited partners' partnership units so that Shannon and Triad were the only partners of the partnership. Due to the voting agreements, Shannon had the right to vote slightly less than 74% of the partnership units, and Triad had the right to vote slightly more than 26%.

Prior to expiration of the partnership's lease, SRES, the partnership's landlord, informed the partnership that it would not renew the five-year lease upon its expiration in 2012. Three days before the lease expired, Bryan Horner, Shannon's chief executive officer and SRES's president, sent the partnership and Triad a lease amendment he had executed on behalf of Shannon, as the Partnership's managing partner, and SRES, as its president. The amended lease almost doubled the partnership's annual rent. A significant portion of the increase was purportedly to reimburse SRES for vaults in the building that SRES represented were specialized tenant improvements it made to the building for the partnership's use. Contrary to these representations, however, Shannon knew that SRES had not modified the building and that the original owner had included the vaults as part of the building's original construction in 1988.

Shannon sued for judicial dissolution of the limited partnership so that Shannon could take over RCTC's operations. Triad, individually and derivatively on behalf of the limited partnership, sued Shannon for breach of common-law and statutory fiduciary duties in connection with the lease. Based on the jury verdict, the trial court denied Shannon's request for judicial dissolution and awarded the limited partnership actual damages in the amount of excess rent that Shannon obligated the limited partnership to pay to SRES. The trial court also ordered Shannon to pay the same amount to Triad as equitable disgorgement of profits. Shannon appealed.

After addressing the claims against Shannon for breach of its duty of care, the court turned to Shannon's claim for judicial dissolution.

The court began its discussion of Shannon's claim for judicial dissolution by stating that a district court may order the winding up and termination of a domestic partnership on application by a partner "if the court determines that it is not reasonably practicable to carry on the entity's business in conformity with its governing documents." Shannon relied on a voting deadlock as grounds for judicial dissolution, but Shannon admitted that it could "break the deadlock on its own because it holds the majority" of the partnership units. Additionally, the court said that a partnership can carry on its business in accordance with its governing documents despite litigation between partners, as had been done here. Thus, Shannon did not establish that it was not "reasonably practicable to carry on the Partnership's business in conformity with its governing documents."

Finally, the court remanded for further proceedings on attorney's fees in view of the reversal of Triad's disgorgement award. The court first pointed out that, under the statute in effect at the time of trial, a trial court had discretion to award the plaintiff reasonable attorneys' fees and expenses if the plaintiff is wholly or partly successful in prosecuting a derivative action. Tex. Bus. Orgs. Code § 153.405. In addition, the partnership agreement provided that the prevailing partner in litigation between partners relating to the partnership "shall be entitled to recover, in addition to all damages allowed by law and other relief, all court costs and reasonable attorney's fees incurred in connection therewith from the Partner or Partners not prevailing." Based on these provisions, the trial court ordered Shannon to pay Triad's fees, expenses, and court costs incurred in pursuing the individual and derivative claims. The trial court also conditionally awarded additional attorney's fees in the event of appeal. The court of appeals agreed with Shannon that reversal of the judgment required remand for a new trial solely on the issues of attorneys' fees, reasonable expenses, and costs, and the court instructed the trial court to condition any award of appellate attorneys' fees on a successful appeal.

Stephens v. Three Finger Black Shale Partnership, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed).

The court of appeals reversed the portions of the trial court's judgment that awarded relief based upon findings that partnerships existed and that the fiduciary duties of partners were breached.

Richard Raughton, Lowry Hunt, Chester Carroll, and Kerwin Stephens each pledged to acquire oil and gas leases and options for such leases in Fisher County (the "Project"). They had no written agreement; instead, they operated on a "handshake." When they needed additional money to continue the Project, they recruited Tom Taylor, an oil and gas investor. The parties eventually entered into a letter agreement known as the "Alpine Letter Agreement." Those named in the Alpine Letter Agreement as members of the "Alpine Group" were (1) Alpine Petroleum (by Carroll); (2) Thunderbird Oil & Gas, LLC (by its sole member, Stephens); (3) Arapaho Energy, LLC (by its manager, Raughton); and (4) L.W. Hunt Resources, LLC (by its manager, Hunt). Paradigm Petroleum Corporation, acting through its president, Taylor, was also a party to the Alpine Letter Agreement, but was not a member of the Alpine Group.

The Alpine Letter Agreement contained a provision that Paradigm was to contribute \$4,500,000 to the project and that the Alpine Group was to contribute, collectively, \$500,000. The Alpine Group agreed to transfer to Paradigm all of the oil and gas leases and options "that it holds," and future leases and options were to be taken in Paradigm's name. Decisions as to future leases and options, the scope of the Project, and the terms of any future leases and options were at Paradigm's sole discretion and direction. The agreement also contained provisions for the division of the proceeds from sales. After payout, proceeds from sales of oil and gas leases were to be paid 82% to Paradigm and 18% to the Alpine Group. Although Thunderbird Land was not a named party to the Alpine Letter Agreement, the named parties specified that Thunderbird Land, Stephens's wholly owned landman entity, was to provide landman services for the project and that it would "charge its normal customary rates" for those services.

Taylor found investors who agreed to provide a portion of Paradigm's \$4,500,000 contribution. The investors signed a "Participation Agreement" that referred to the investors in some places as "Parties" and in other

places as “Partners.” Paradigm was not a partner, but Trek Resources, Inc. and Tiburon Land and Cattle were two of the eight named partners in the agreement. Ultimately, Trek and Tiburon pleaded that the Participation Agreement resulted in the creation of a partnership known as Three Finger Black Shale Partnership. By the terms of the agreement, Paradigm was to contribute \$1,000,000; each of the additional parties agreed to contribute \$500,000 each. The agreement contained other terms by which the signatories defined their relationship. Paradigm was to receive a 20% interest before payout and a 36% interest after payout; each of the other parties was entitled to a 10% interest before payout and an 8% interest after payout. Each of the parties was also entitled to its percentage interest in any overriding royalties that were reserved in sales of the leases. The Participation Agreement was later amended to (a) substitute Lazy T Royalty Management, Ltd. for Paradigm, (b) reduce Paradigm’s status to “agent for the Parties,” and (c) add the Alpine Group as a party.

In January 2012, Devon Energy Production Company, L.P. agreed to buy 25,000 net mineral acres of oil and gas leases for \$900 per acre. The Devon agreement included an “option” provision whereby Devon agreed that it would not take oil and gas leases from Fisher County mineral owners directly. In return, Devon was given the right to purchase additional Fisher County acreage that Paradigm and its associates might acquire in the future.

Although the Participation Agreement proposed that 25,000 net mineral acres were involved in the Project, Devon’s initial purchase comprised leases on 30,000 net mineral acres. As a part of the Devon transaction, Devon was to make a down payment of \$2,500,000 and was to pay the balance of the \$22,500,000 purchase price upon delivery of an assignment of the leases from Paradigm and Carroll to Devon.

The evidence showed that Taylor, Stephens, and Carroll, knowing that Devon was interested in acquiring leases of more mineral acreage, continued to buy Fisher County oil and gas leases, but they did so on their own to the exclusion of the “Partners” in the amended Participation Agreement and, to some extent, Raughton and Hunt Resources. The record contains evidence that Taylor, Stephens, and Carroll used money from the initial sale to Devon—money that belonged to Plaintiffs—to fund the acquisition of the additional acreage. At some point in time, it came to light that Taylor, Stephens, and Carroll had sold leases on more than the initial 30,000 acres but that the proceeds of those sales were not shared with those involved in the Participation Agreement. When it did not receive satisfactory responses to its inquiries about the additional acreage, Tiburon filed a lawsuit. Trek and Three Finger were eventually added as plaintiffs, and Raughton and Hunt Resources later intervened in the suit.

Three Finger basically claimed that Taylor, through Paradigm and Lazy T, breached fiduciary duties owed to Three Finger in connection with the calculation and distribution of the proceeds from the sale of leases on the initial 30,000 acres. Three Finger claimed that through creative (albeit dishonest) accounting, Taylor made it appear that he, through his entities, had funded his required contribution when he had not fully funded it. Three Finger also claimed that Stephens and his Thunderbird-related entities had knowingly participated in those breaches. As the court summarized: “There are other claims, but, at this point, suffice it to say that Three Finger basically takes the position that one or more of the appellants [Stephens, Stephens & Myers, LLP, the Thunderbird-related entities, and Carroll], individually or collectively, had lied, cheated, and stolen from them and overtly, covertly, silently, and via creative accounting procedures had attempted to execute a cover-up of their ill-intentioned activities. The result of those activities, as well as overcharges by Thunderbird Land, was that Three Finger did not receive its rightful share of the profits from the sale of either the initial deal for 30,000 acres or in connection with the sales of additional acreage.”

At trial, Three Finger was awarded actual damages of \$4,560,433 against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources, jointly and severally, specifically for, as stated by the trial court in its judgment, “injuries sustained because of [A] the contribution failures of entities affiliated with ... Taylor and [B] Thunderbird Land’s role in determining and charging expenses to the Project for the Initial 30,000 Acres.” (Taylor had died before trial and the plaintiffs settled their claims against Taylor’s estate and his entities before trial began.) Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources under its equitable powers to award “disgorgement and restitution.” The trial court also awarded Three Finger a judgment against Stephens, Thunderbird Land, and Carroll, jointly and severally, in the amount of \$6,584,440 for damages that related to Three Finger’s exclusion from transactions over and above the initial 30,000 acres. Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Land, and Carroll under its equitable powers to award “disgorgement and restitution.”

The court of appeals addressed the claims of Raughton and Hunt Resources as intervenors, who had prevailed on a breach of fiduciary duty claim in the trial court. That claim was premised in part on the jury’s finding

that the Alpine Group was a partnership. The court noted that even if it assumed that the Alpine Letter Agreement created a partnership known as the Alpine Group, the parties had expressly disclaimed any partner-related fiduciary duties that existed under that agreement. The court quoted the following language from the agreement: “It is not intended and it is agreed that the parties have not entered into and do not enter into any partnership, joint venture or agency relationship. None of the parties owe a fiduciary duty or obligation to the other and the relationship shall be considered as a normal customary commercial relationship with the ownership interest of the parties in and to the properties the subject of this letter agreement as provided herein.” According to the court, the disclaimer was dispositive:

The record in this case reflects that those named in the Alpine Letter Agreement were sophisticated businessmen. We must honor the terms that they used when they made their contract, including those that define the scope of their obligations and agreements, even those that limit fiduciary duties that might otherwise exist. Accordingly, we hold that any fiduciary duty that might have existed as a result of an alleged partnership growing out of the Alpine Letter Agreement was expressly disclaimed in that agreement and that no recovery may be had by Hunt Resources in relation to those alleged fiduciary duties. We have already dealt with Raughton’s inability to recover Arapaho’s damages that are connected to the Alpine Letter Agreement. We sustain Appellants’ issues on appeal wherein they assert that the disclaimer contained in the Alpine Letter Agreement insulates them from liability for any breach of disclaimed fiduciary duties.

4. Transfer or Assignment of Interest

Estate of Streightoff v. Commissioner of Internal Revenue, 954 F.3d 713 (5th Cir. 2020).

The court affirmed the tax court’s ruling that an estate held a substituted limited partnership interest, and not an unadmitted assignee interest, in a Texas limited partnership.

In 2008, Frank Streightoff formed Streightoff Investments, LP (“SILP”), a Texas limited partnership [although identified by the court as a “limited liability partnership”], and established the Frank D. Streightoff Revocable Living Trust (the “Revocable Trust”) for estate-planning purposes. Frank later died testate in 2011. SILP was funded using Frank’s assets and its ownership was structured as follows: Streightoff Management, LLC (“LLC GP”) held a 1% limited partnership interest as SILP’s sole general partner, Frank held an 88.99% limited partnership interest, his daughters each held a 1.54% limited partnership interest, and his sons and former daughter-in-law each held a 0.77% limited partnership interest. Elizabeth Streightoff, one of Frank’s daughters, was the trustee of the Revocable Trust, the managing member of LLC GP, his power of attorney, and the executor of his estate (the “Estate”). On the same day that he created SILP and the Revocable Trust, Frank assigned his 88.99% interest in SILP to the Revocable Trust. Elizabeth executed the Assignment of Interest to the Revocable Trust (the “Assignment”) as Frank’s power of attorney. She also signed (1) the approval of the transfer as LLC GP’s managing member, SILP’s general partner; and (2) for the assignee, as trustee for the Revocable Trust. The Assignment stated, “Assignor’s interest ... together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Assignee, its beneficiaries and assigns forever.”

The Estate filed its tax return in May 2012 with a taxable estate that included the SILP interest as an assignee interest with a purported valuation that claimed discounts for lack of marketability, lack of control, and lack of liquidity. The Commissioner of Internal Revenue (the “Commissioner”) issued a Notice of Deficiency (the “Notice”) to the Estate in January 2015. Attached to the Notice was a form in which the Commissioner stated that the fair market value of the Estate’s 88.99% interest was corrected and increased because the net asset value should only be discounted for a lack of marketability. The Estate petitioned the tax court for a redetermination of the estate tax deficiency. Following a bench trial, the tax court sustained the Commissioner’s determinations and ruled, in part, that the Estate held a substituted limited partnership interest in SILP. According to the tax court, the Assignment validly assigned to the Revocable Trust the 88.99% interest as a limited partnership interest both in substance and form. Therefore, the Estate, as the beneficiary of the Revocable Trust, included a limited partnership interest in SILP. The Estate appealed.

With respect to the characterization of the assigned interest in SILP, the Estate contended that the tax court’s substance-over-form rationale stood contrary to Texas partnership law. The court of appeals began its analysis by stating that a tax court relies on state law to discern the types of assets held within an estate. Because

the SILP partnership agreement (the “SILP Agreement”) provided that Texas was the governing jurisdiction, the court would look to § 153.251(b) of the Business Organizations Code if the SILP Agreement was silent. Tex. Bus. Orgs. Code § 153.251(b) (outlining provisions for partnership assignments that apply *unless* “otherwise provided by the partnership agreement”) (emphasis supplied by the court). By its terms, the Assignment was governed by the SILP Agreement. Therefore, the court would look only to the SILP Agreement because it was not silent as to the nature of the interest transferred under the Assignment. The court then focused on the following two provisions of the SILP Agreement:

9.2 Permitted Transfers.... [A]n Interest Holder may at any time [t]ransfer his Interests to (a) any member of transferor’s Family, (b) the transferor’s executor, administrator, trustee or personal representative to whom such interests are transferred at death or involuntarily by operation of law, or (c) [to any purchaser, but subject to the right of first refusal held by the persons listed in section 9.4]

...

9.7 Admissions of Interest Holders as Partners. A transferee of an Interest may be admitted to the Partnership as a Substituted Limited Partner only upon satisfaction of the conditions set forth below:

(a) Each General Partner consents to such admission which consent may be granted or withheld in the sole and absolute discretion of each General Partner;

(b) The Interests with respect to which the transferee is being admitted were acquired by means of a Permitted Transfer

The Estate argued that the Assignment conveyed only an unadmitted assignee interest to the Revocable Trust as a matter of form because (1) LLC GP did not consent to the admission of a transferee or assignee as a Substituted Limited Partner under Section 9.7(a); and (2) the Assignment’s written approval was limited to effectuate the transfer under Section 7.2, which required written approval for an assignment of interest. The Commissioner argued, and the court agreed, that the Assignment’s broad language transferred Frank’s full partnership rights to the Revocable Trust and Elizabeth consented to that transfer as a substituted limited partnership interest when she signed and approved the Assignment.

The court of appeals concluded that LLC GP consented to the transfer of a substituted limited partnership interest to the Revocable Trust when Elizabeth signed the Assignment. First, the court stated that Section 9.7(b) was satisfied because the parties had stipulated that the Assignment was a Permitted Transfer under Section 9.2. Second, the court reasoned that Section 9.7(a) was satisfied when Elizabeth, as managing member of LLC GP, SILP’s general partner, signed the Assignment under the “Approved By” legend. The court observed that, while the SILP Agreement used consent and approval interchangeably, the words were only distinguished with the qualifier “written.” Because this qualifying language was absent in Section 9.7(a), Elizabeth had unilateral discretion to admit the assigned interest as a Substituted Limited Partner. The court explained that, when Elizabeth gave written approval with her signature, it was binding on SILP and represented SILP’s recognition that the Assignment conveyed “all and singular ... [SILP] rights and appurtenances” of Frank, which encompassed his 88.99% limited partnership interest. Third, the court determined that this stipulated Section 9.2 Permitted Transfer did not need to adhere to Section 7.2 and, in any event, Elizabeth’s signature could satisfy both Section 7.2 and Section 9.7 because Section 9.7(a) did not specify the type of approval necessary. The court further reasoned that her signature made no attempt to either disclaim the portion of the Assignment purporting to convey the entirety of Frank’s limited partnership interest or otherwise confine the written approval to any particular section of the SILP Agreement. Fourth, the court noted that the unambiguous language of the Assignment purported to convey more than an assignee interest, which was limited to allocations and distributions under the SILP Agreement. The court commented that, notwithstanding the document’s label, it was “difficult to reconcile the Estate’s characterization of the Assignment given [its] language.”

Next, the court of appeals concluded that the Assignment was the functional equivalent of transferring a limited partnership interest because the transfer lacked economic substance outside of tax avoidance. The court referenced case law for the proposition that the substance-over-form doctrine permits it to determine the characterization of a transaction based on the underlying substance and not the legal form. After acknowledging that SILP limited partners appeared to have managerial power that unadmitted assignees did not, the court noted that there were no practical differences after executing the Assignment and observed that no limited partners other than Elizabeth exercised their partnership rights and responsibilities. The court further reasoned that, even if it were to assume that the Assignment transferred to the Revocable Trust an unadmitted assignee interest as a matter of form, there was no substantial difference before and after the transfer.

In sum, the court of appeals held that the Assignment transferred to the Revocable Trust the 88.99% interest as a substituted limited partnership interest as opposed to an unadmitted assignee interest, stating that this interpretation complied with the SILP Agreement and did not offend Texas partnership law. Thus, the court of appeals affirmed the tax court's ruling that the Estate, in turn, held a substituted limited partnership interest in SILP.

Ortiz v. Las Blancas Minerals, L.P., No. 04-18-00769-CV, 2020 WL 806652 (Tex. App.—San Antonio Feb. 19, 2020, pet. filed) (mem. op.).

The court affirmed summary judgment in favor of the defendants on the plaintiffs' claims for breach of a limited partnership agreement, fraud, breach of fiduciary duties, and conversion.

An individual and a trust that was purportedly the successor limited partner to the individual sued the limited partnership and the other partners for breach of the limited partnership agreement, breach of fiduciary duties, and conversion. In support of their conversion claim, the plaintiffs relied on an amended certificate of limited partnership that they argued showed that the partnership interest of Rolando Rafael Saenz ("Rolando") had been transferred to the Rolando Rafael Saenz Trust without his consent, but the court concluded that the amended certificate was no evidence that the defendants unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the rights of the owner of the property, which is a required element of a conversion claim. The plaintiffs asserted that the purpose of the amended certificate was to effectuate a transfer of Rolando's individual partnership interest in Las Blancas Minerals, L.P. into the Rolando Rafael Saenz Trust. Among other provisions, the amended certificate set forth the names of the partners and listed as a limited partner the Rolando Rafael Saenz Trust, with the words "successor in interest to Rolando R. Saenz" in parentheses below. The amended certificate did not state anywhere in the document, however, that the purpose of the document was to effectuate a transfer of Rolando's individual partnership interest in Las Blancas Minerals, L.P. into the Rolando Rafael Saenz Trust. The amended certificate also did not state that it amended the listed partners. On the signatory page of the amended certificate, the trustee of the Rolando Rafael Saenz Trust signed on behalf of that trust. The plaintiffs emphasized that Rolando's signature was missing from the amended certificate, but the court stated that Rolando's signature was on the signatory page of the amended certificate in his capacity as trustee of the Rolando Rafael Saenz Children's Trust. According to the court, this evidence was at best a mere scintilla of evidence to show that the defendants wrongfully exercised dominion and control over Rolando's property by transferring his individual partnership interest in Las Blancas Minerals, L.P. to the Rolando Rafael Saenz Trust without his consent. The court thus affirmed the trial court's summary judgment against the plaintiffs on their conversion claim.

MetroMarke Multifamily Development Fund I, L.P. v. RRAC Development G.P., LLC, No. 05-18-00900-CV, 2019 WL 6522181 (Tex. App.—Dallas Dec. 4, 2019, no pet. h.) (mem. op.).

Based on the terms of the limited partnership agreement, the court held that a buyout provision of the limited partnership agreement required the selling partner to indemnify the purchasing partner for claims that the selling partner asserted in a pending lawsuit against the purchasing partner, not just claims relating to the partnership interest that would protect the purchasing partner from a claim of competing ownership.

RRAC Development G.P., LLC ("RRAC"), MetroMarke Multifamily Development Fund I, LP ("MetroMarke"), and GFD Market Rate Group I, LLC ("GFD") were the partners of a limited partnership. MetroMarke, a limited partner, filed a lawsuit against RRAC, the general partner, alleging violations of the partnership agreement and seeking a declaratory judgment regarding its right to remove RRAC as general partner. While the lawsuit was pending, MetroMarke issued a buyout notice to RRAC pursuant to section 13.1 of the partnership agreement, under which each partner had the right to issue a buyout notice to any other partner requiring

that partner to either sell its partnership interest to the issuing partner or buy out the issuing partner's interest for a purchase price based on the selling partner's total capital contributions. Section 13.1 provided that "[t]he interest being conveyed shall be transferred free and clear [of] any and all Claims, and shall include an indemnity from the Partner conveying its interest in a form acceptable to the Partner acquiring such interest." The partnership agreement defined "Claim" to include "actions or causes of action of any kind or character whatsoever, whether at law, in equity, by statute or otherwise, whether known, unknown, suspected or unsuspected."

RRAC elected to buy out MetroMarke; however, RRAC and MetroMarke differed as to the terms of indemnity required by the partnership agreement. RRAC sought to be indemnified against MetroMarke's claims brought in the lawsuit while MetroMarke proposed an agreement under which it retained its rights and claims asserted against RRAC in the lawsuit. GFD was added to the lawsuit, and RRAC and GFD counterclaimed that MetroMarke's buyout proposal was in breach of the partnership agreement. RRAC and GFD also pursued a declaratory judgment authorizing RRAC to reject MetroMarke's proposal and enforcing RRAC's right to buy out MetroMarke for the agreed price and requiring an indemnity in a form acceptable to RRAC.

RRAC prevailed in the trial court, which declared that MetroMarke was required under Section 13.1 to agree to indemnify RRAC against all claims and causes of action MetroMarke had brought against RRAC in the lawsuit and that RRAC had the contractual right to reject as unsatisfactory an indemnification that did not indemnify it against those claims and causes of action. The trial court also awarded RRAC and GFD damages against MetroMarke and ordered MetroMarke to transfer its partnership interest for the agreed purchase price less offsets for damages adjudged against MetroMarke in the judgment and provide RRAC with "an indemnity in form acceptable to" RRAC.

On appeal, MetroMarke argued that the trial court erroneously interpreted the requirement that the seller provide the purchaser an "acceptable *form*" of indemnity as empowering the purchasing partner to expand the *scope* of indemnity to embrace claims and risks unrelated to the interest being conveyed. MetroMarke argued that section 13.1 of the partnership agreement only required indemnification of claims and risks related to the partnership interest conveyed so that a purchaser was protected from a competing claim of ownership. The court of appeals rejected MetroMarke's arguments and agreed with the trial court that the plain language of the partnership agreement required indemnification for all claims in the lawsuit, rather than just indemnification related to competing claims of ownership. The court stated that, contrary to MetroMarke's argument that the claims it sought to reserve were not associated with ownership of the conveyed interest, its claims pertained directly to rights and obligations under the partnership agreement. Because the partnership agreement defined the "claims" that the seller must indemnify as including "actions or causes of action of any kind or character whatsoever, whether at law, in equity, by statute or otherwise, whether known, unknown, suspected or unsuspected," the trial court did not err by concluding that section 13.1 required MetroMarke to agree to indemnify RRAC against all claims in the lawsuit.

MetroMarke also argued that there was insufficient evidence to support the award of damages against it. The damages were based on increased construction costs resulting from delays for which RRAC and GFD blamed MetroMarke, and MetroMarke argued that the testimony on which RRAC and GFD relied to show that the partnership would have been able to close the construction loan was only speculative. The court reviewed the testimony and distinguished case law relied upon by MetroMarke, and the court concluded that the record constituted more than a scintilla of evidence to support causation regarding the damages in this case.

5. Removal of Partner

Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.).

The court of appeals affirmed the trial court's judgment in favor of a limited partnership, including a declaration that the sole general partner was removed and the successor general partner was properly admitted and appointed under the terms of the partnership agreement.

The U.S. Citizenship and Immigration Services ("USCIS") administers the EB-5 immigrant investor program, which permits foreign investors to obtain a green card by making a minimum capital investment in a U.S. business that creates ten jobs. Under this program, the foreign investor's capital is invested in a new commercial enterprise which then deploys that capital to a job-creating entity. The EB-5 program allows investment through USCIS-approved regional centers.

Great Southwest Regional Center, LLC (“Great Southwest”) operated as an USCIS-approved regional center and sponsored an EB-5 project involving salt water disposal wells in west Texas. Frost Rains Holdings, LLC (“Frost Rains”) was Great Southwest’s sole owner. Great Southwest organized ACSWD, LP (“ACSWD”) to serve as the new commercial enterprise for the salt water project. ACSWD was advertised to potential investors as a \$500,000 investment in exchange for a limited partnership interest in ACSWD. These partnership interests were offered pursuant to multiple documents, including ACSWD’s partnership agreement. Lu Jun was a Chinese citizen and sought to obtain a green card through the EB-5 program. Jun agreed to invest in ACSWD, wired Great Southwest \$575,550 (\$500,000 for the EB-5 investment and the remainder for various fees), and signed ACSWD’s partnership agreement. Jun was the only EB-5 investor secured for ACSWD, and she served as the sole limited partner with a 99% interest.

When Jun did not receive a refund as requested, she sought a return of her money by intervening in Great Southwest’s suit against a separate entity that was involved in the EB-5 project. Jun’s pleadings included claims against ACSWD and Great Southwest as well as a statement that she, in her capacity as the sole limited partner, removed Great Southwest as ACSWD’s general partner and appointed SWD Investment Recovery Fund, LLC (“SWD Investment”) to the role. After Jun nonsuited her claims against ACSWD and the limited partnership filed its own plea in intervention, the trial court signed an agreed order to realign the parties such that ACSWD was the sole plaintiff asserting various claims against Great Southwest, Frost Rains, and certain officers of Frost Rains. ACSWD also requested a declaratory judgment regarding the status of its general and limited partners. Following a bench trial, the trial court signed a final judgment in favor of ACSWD that included a declaratory judgment stating: (1) Great Southwest was removed as ACSWD’s general partner and became a limited partner without the right to vote owning a .99% interest; (2) SWD Investment became the general partner of ACSWD with a 1% interest; and (3) Jun’s limited partnership interest was reduced from 99% to 98.01%. Great Southwest asserted multiple issues on appeal.

In challenging the trial court’s second declaration and interpretation of the ACSWD partnership agreement, Great Southwest argued that SWD Investment could neither be admitted as a partner nor appointed as successor general partner without the current general partner’s written consent and there was no general partner to provide such consent. The court of appeals began its analysis by reviewing traditional principles of contract interpretation and construction. Next, the court focused on two sections of the partnership agreement: section 13 (governing the limited partners’ rights and powers) and section 14 (listing prohibited transactions). Then, the court cited the relevant parts of each section as follows:

13.2 Removal of a General Partner:

A. Upon written notice to the General Partner, Limited Partners owning at least seventy-five percent (75%) of the Limited Partners’ Interests may remove the General Partner for cause. As used herein, the term “cause” shall mean (I) a General Partner’s action in violation of any one or more of the prohibitions set forth in Article XIV of this Agreement, (ii) the issuance of a charging order or writ of attachment or other action, against a General Partner’s interest in the Partnership, (iii) any action or omission by a General Partner which constitutes fraud, deceit, or a wrongful taking, or (iv) the death, dissolution or bankruptcy of a General Partner.

B. Upon written notice to the General Partner, the Limited Partners owning at least seventy-five percent (75%) of the Limited Partners’ Interests may remove a General Partner without cause.

C. Upon the removal of a General Partner as provided above, all remaining Partners may agree in writing to continue the business of the Partnership and to appoint a new successor general partner meeting the requirements of Section 13.3.

* * *

13.3 Successor General Partner:

A person or entity shall qualify as a successor general partner only upon satisfaction of the following conditions:

A. The person or entity shall have accepted and agreed to be bound by all the terms and provisions of this Agreement, by executing a counterpart hereof and any other such document or instrument as may be required or appropriate in order to effect the admission of the person or entity as a substitute General Partner;

- B. The person or entity shall have a net worth which will be sufficient to meet all then-current requirements of applicable statutes, cases, treasury regulations or IRS rulings to ensure classification of the Partnership as a partnership for federal income tax purposes;
- C. The person or entity shall make any such contribution to the capital of the Partnership as may be determined by Majority Vote of the Limited Partners; and
- D. An amendment to this Agreement and to the Partnership's Certificate of Limited Partnership evidencing the admission of the person or entity as a successor General Partner shall be filed for recondition, as required by the Act.

* * *

14.1 Prohibited Transactions:

During the term of this Partnership, neither a General Partner nor any Limited Partner shall do any one of the following:

* * *

- I. Do any of the following, or allow any of the following to occur, *without first obtaining the written consent of the General Partner and Limited Partners* owning more than fifty percent (50%) of the Sharing Ratios owned by all the Limited Partners:

* * *

- iv. *The admission of another person or entity as a General or Limited Partner*, except as provided in Section 16.3 regarding the admission of transferees of a Limited Partner's Interest as substitute Limited Partners.

[emphasis added by court]

According to Great Southwest's interpretation of the partnership agreement, SWD Investment could not be admitted to ACSWD as a new partner, much less appointed as successor general partner, without the approval of a general partner because section 14.1(I)(iv) prohibited the admission of a successor general partner without the general partner's written consent. Because Great Southwest was removed as general partner, it contended that there was no current general partner to consent to SWD Investment's admission or appointment as successor general partner.

The court of appeals rejected Great Southwest's interpretation of the partnership agreement and concluded that SWD Investment was properly admitted to ACSWD as successor general partner under the terms of the partnership agreement. Despite acknowledging that section 14.1(I)(iv), if read in isolation, appeared to prohibit the admission of a successor general partner without the current general partner's written consent, the court stated that it was required to consider other relevant sections in order to construe the partnership agreement as a whole. First, the court pointed to sections 13.2(B), 13.2(C), and 13.3 as prescribing the specific procedures that limited partners may utilize to remove ACSWD's general partner and appoint a successor. The court reasoned that these sections, directly applicable here, did not condition the appointment of a successor general partner on the approval of the current general partner. Instead, section 13.2 stated that limited partners owning at least 75% of the limited partners' interest can, upon written notice, remove the general partner without cause and then the remaining partners may agree to appoint a new successor general partner satisfying the four conditions of section 13.3. Because Jun was the sole limited partner with a 99% limited partner interest, she could remove Great Southwest as general partner without cause and appoint SWD Investment as successor general partner without approval of the current general partner. Second, the court determined that the more specific provisions of sections 13.2 and 13.3 applied to this issue and controlled over the broad conditions of section 14.1(I)(iv). Third, the court declined to adopt Great Southwest's interpretation of the partnership agreement because doing so would render sections 13.2 and 13.3 meaningless.

6. Admission of Partner

Surge Busy Bee Holdings, LLC v. Wiszniewski, Civil Action No. 3:19-CV-127-L, 2020 WL 1846781 (N.D. Tex. Apr. 13, 2020).

The court interpreted the provisions of a Delaware limited partnership agreement and related subscription agreement and convertible note to determine when an investor was admitted as a limited partner in order to ascertain the citizenship of the limited partnership, and the LLC of which the limited partnership was the sole member, for purposes of diversity jurisdiction. Even if the schedule of partners attached to the partnership agreement was not amended at the time to include the investor, the court concluded that an email exchange among the investor, his lawyer, and the general partner effectuated the admission of the investor as a limited partner based on terms of the partnership agreement and convertible note, the authority granted to the general partner under the partnership agreement to determine the procedure for admitting limited partners, and the authority granted to carry out that procedure by executing any documents, including side letters and amendments to subscription agreements, that the general partner deemed necessary.

The defendant removed an action brought against him by an LLC, and the plaintiff sought to remand the case based on a lack of diversity of citizenship. Because LLCs and partnerships have the citizenship of each of their members, diversity of citizenship in this case turned on whether the defendant was a limited partner of the Delaware limited partnership that was the sole member of the LLC plaintiff. The plaintiff claimed that the defendant was admitted as a limited partner when the defendant exercised his right under a convertible note to receive units in the partnership, but the defendant claimed that he did not become a partner at that time because the partner schedule attached to the partnership agreement was not amended at the time to reflect that he was a limited partner. The defendant relied on provisions of the partnership agreement that provided for “[i]nclusion of the limited partner’s name, capital contribution, and number and type of units on the Partner Schedule” and that “amendment of the Partnership Schedule is necessary to admit additional partners.” The court pointed out, however, that the partnership agreement preamble defined a limited partner to include “limited partners listed from time to time on the Partner Schedule, together with any other Persons admitted as limited partners from time to time pursuant to the terms of this Agreement.” Furthermore, even though Section 3.02 of the partnership agreement provided that, “[u]pon the amendment of the Partner Schedule, such Person shall be deemed to have been admitted as a Limited Partner and shall be listed as such on the books and records of the Partnership,” Section 3.02 applied to a person “admitted as a Limited Partner with respect to an Additional Unit.” The court pointed out that the partnership agreement distinguished between “Additional Units” and “LP Units,” and the court concluded that the evidence submitted by the parties established that the defendant was allocated and issued LP Units, not Additional Units. “Additional Units” were defined as having “the meaning set forth in Section 3.02,” which stated: “Subject to Section 3.03, the General Partner shall have the right to cause the Partnership to authorize and issue or sell to any Person (including Partners and Affiliates of Partners) any of the following (which for purposes of this Agreement shall be ‘Additional Units’): (i) additional Units (including new classes or series of Units thereof having rights which are preferential to or otherwise different than the rights of any then-existing class or series of Units) and (ii) obligations, evidences of indebtedness or other securities or interests in each case convertible into or exchangeable for Units.” The term “LP Unit” was defined by the Partnership Agreement as “an ownership unit in the Partnership, issued to Limited Partners, representing a fractional part of the Partnership Interests of all Limited Partners, and having the rights and obligations specified with respect to LP Units in this Agreement.” All of the limited partners other than the defendant were admitted the same date the partnership agreement was executed, and the court concluded that the terms of the partnership agreement, the defendant’s subscription agreement, and the defendant’s convertible note led to the conclusion that the defendant received LP Units rather than Additional Units upon his exercise of the conversion right under the note and that the defendant was admitted as a limited partner at that time. The court relied on provisions of the partnership agreement that gave the general partner authority and discretion in determining the manner in which limited partners were admitted and that allowed, but did not require, the general partner to “amend and modify the provisions of the [Partnership] Agreement and the Partner Schedule to the extent necessary to reflect the issuance of Units in the Partnership, the admission or substitution of any Partner permitted under this Agreement.” The court also pointed to a provision that authorized the general partner to enter into side letters, supplemental agreements, and subscription agreements having different terms than subscription agreements of other limited partners or that had the effect of “establishing rights under, or alternating or supplementing the terms of, or providing an interpretation (and which rights, terms or interpretation may be more favorable than the

rights, terms and interpretation applicable to other Limited Partners) of certain provisions of, this Agreement or such Limited Partners' Subscription Agreement (each such side letter, agreement or different Subscription Agreement, a 'Side Letter')." In view of these provisions, the court concluded that an email exchange among the defendant, the defendant's lawyer, and the general partner regarding the defendant's exercise of his conversion right under the note effectuated the admission of the defendant as a limited partner on the date of the email exchange.

The court noted the choice-of-law clauses in the subscription agreement (Texas), convertible note (Texas), and partnership agreement (Delaware) and concluded that the outcome of the dispute as to whether the defendant was a limited partner at the time of removal of the action would be the same under either Texas or Delaware law. The court noted by way of a footnote that the rules of contract interpretation in Texas are similar to those followed by Delaware and that Section 17-301 of the Delaware Revised Uniform Limited Partnership Act (regarding admission of a limited partner) is similar to Section 153.101 of the Texas Business Organizations Code. The court assumed, as the defendant contended, that Delaware law applied, and the court concluded that the partnership agreement in this case provided for the time at which a person is admitted as a limited partner, and the default provisions of DRULPA regarding admission of a partner (which provide that a limited partner is admitted when the person's admission is reflected in the records of the partnership) thus did not come into play. The court also found no ambiguity in the partnership agreement that would support the application of the principle of *contra proferentem*.

Estate of Streightoff v. Commissioner of Internal Revenue, 954 F.3d 713 (5th Cir. 2020).

The court affirmed the tax court's ruling that an estate held a substituted limited partnership interest, and not an unadmitted assignee interest, in a Texas limited partnership.

In 2008, Frank Streightoff formed Streightoff Investments, LP ("SILP"), a Texas limited partnership [although identified by the court as a "limited liability partnership"], and established the Frank D. Streightoff Revocable Living Trust (the "Revocable Trust") for estate-planning purposes. Frank later died testate in 2011. SILP was funded using Frank's assets and its ownership was structured as follows: Streightoff Management, LLC ("LLC GP") held a 1% limited partnership interest as SILP's sole general partner, Frank held an 88.99% limited partnership interest, his daughters each held a 1.54% limited partnership interest, and his sons and former daughter-in-law each held a 0.77% limited partnership interest. Elizabeth Streightoff, one of Frank's daughters, was the trustee of the Revocable Trust, the managing member of LLC GP, his power of attorney, and the executor of his estate (the "Estate"). On the same day that he created SILP and the Revocable Trust, Frank assigned his 88.99% interest in SILP to the Revocable Trust. Elizabeth executed the Assignment of Interest to the Revocable Trust (the "Assignment") as Frank's power of attorney. She also signed (1) the approval of the transfer as LLC GP's managing member, SILP's general partner; and (2) for the assignee, as trustee for the Revocable Trust. The Assignment stated, "Assignor's interest ... together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Assignee, its beneficiaries and assigns forever."

The Estate filed its tax return in May 2012 with a taxable estate that included the SILP interest as an assignee interest with a purported valuation that claimed discounts for lack of marketability, lack of control, and lack of liquidity. The Commissioner of Internal Revenue (the "Commissioner") issued a Notice of Deficiency (the "Notice") to the Estate in January 2015. Attached to the Notice was a form in which the Commissioner stated that the fair market value of the Estate's 88.99% interest was corrected and increased because the net asset value should only be discounted for a lack of marketability. The Estate petitioned the tax court for a redetermination of the estate tax deficiency. Following a bench trial, the tax court sustained the Commissioner's determinations and ruled, in part, that the Estate held a substituted limited partnership interest in SILP. According to the tax court, the Assignment validly assigned to the Revocable Trust the 88.99% interest as a limited partnership interest both in substance and form. Therefore, the Estate, as the beneficiary of the Revocable Trust, included a limited partnership interest in SILP. The Estate appealed.

With respect to the characterization of the assigned interest in SILP, the Estate contended that the tax court's substance-over-form rationale stood contrary to Texas partnership law. The court of appeals began its analysis by stating that a tax court relies on state law to discern the types of assets held within an estate. Because the SILP partnership agreement (the "SILP Agreement") provided that Texas was the governing jurisdiction, the court would look to § 153.251(b) of the Business Organizations Code if the SILP Agreement was silent. Tex. Bus. Orgs. Code § 153.251(b) (outlining provisions for partnership assignments that apply *unless* "otherwise provided by the partnership agreement") (emphasis supplied by the court). By its terms, the Assignment was governed by

the SILP Agreement. Therefore, the court would look only to the SILP Agreement because it was not silent as to the nature of the interest transferred under the Assignment. The court then focused on the following two provisions of the SILP Agreement:

9.2 Permitted Transfers.... [A]n Interest Holder may at any time [t]ransfer his Interests to (a) any member of transferor's Family, (b) the transferor's executor, administrator, trustee or personal representative to whom such interests are transferred at death or involuntarily by operation of law, or (c) [to any purchaser, but subject to the right of first refusal held by the persons listed in section 9.4]

...

9.7 Admissions of Interest Holders as Partners. A transferee of an Interest may be admitted to the Partnership as a Substituted Limited Partner only upon satisfaction of the conditions set forth below:

(a) Each General Partner consents to such admission which consent may be granted or withheld in the sole and absolute discretion of each General Partner;

(b) The Interests with respect to which the transferee is being admitted were acquired by means of a Permitted Transfer

The Estate argued that the Assignment conveyed only an unadmitted assignee interest to the Revocable Trust as a matter of form because (1) LLC GP did not consent to the admission of a transferee or assignee as a Substituted Limited Partner under Section 9.7(a); and (2) the Assignment's written approval was limited to effectuate the transfer under Section 7.2, which required written approval for an assignment of interest. The Commissioner argued, and the court agreed, that the Assignment's broad language transferred Frank's full partnership rights to the Revocable Trust and Elizabeth consented to that transfer as a substituted limited partnership interest when she signed and approved the Assignment.

The court of appeals concluded that LLC GP consented to the transfer of a substituted limited partnership interest to the Revocable Trust when Elizabeth signed the Assignment. First, the court stated that Section 9.7(b) was satisfied because the parties had stipulated that the Assignment was a Permitted Transfer under Section 9.2. Second, the court reasoned that Section 9.7(a) was satisfied when Elizabeth, as managing member of LLC GP, SILP's general partner, signed the Assignment under the "Approved By" legend. The court observed that, while the SILP Agreement used consent and approval interchangeably, the words were only distinguished with the qualifier "written." Because this qualifying language was absent in Section 9.7(a), Elizabeth had unilateral discretion to admit the assigned interest as a Substituted Limited Partner. The court explained that, when Elizabeth gave written approval with her signature, it was binding on SILP and represented SILP's recognition that the Assignment conveyed "all and singular ... [SILP] rights and appurtenances" of Frank, which encompassed his 88.99% limited partnership interest. Third, the court determined that this stipulated Section 9.2 Permitted Transfer did not need to adhere to Section 7.2 and, in any event, Elizabeth's signature could satisfy both Section 7.2 and Section 9.7 because Section 9.7(a) did not specify the type of approval necessary. The court further reasoned that her signature made no attempt to either disclaim the portion of the Assignment purporting to convey the entirety of Frank's limited partnership interest or otherwise confine the written approval to any particular section of the SILP Agreement. Fourth, the court noted that the unambiguous language of the Assignment purported to convey more than an assignee interest, which was limited to allocations and distributions under the SILP Agreement. The court commented that, notwithstanding the document's label, it was "difficult to reconcile the Estate's characterization of the Assignment given [its] language."

Next, the court of appeals concluded that the Assignment was the functional equivalent of transferring a limited partnership interest because the transfer lacked economic substance outside of tax avoidance. The court referenced case law for the proposition that the substance-over-form doctrine permits it to determine the characterization of a transaction based on the underlying substance and not the legal form. After acknowledging that SILP limited partners appeared to have managerial power that unadmitted assignees did not, the court noted

that there were no practical differences after executing the Assignment and observed that no limited partners other than Elizabeth exercised their partnership rights and responsibilities. The court further reasoned that, even if it were to assume that the Assignment transferred to the Revocable Trust an unadmitted assignee interest as a matter of form, there was no substantial difference before and after the transfer.

In sum, the court of appeals held that the Assignment transferred to the Revocable Trust the 88.99% interest as a substituted limited partnership interest as opposed to an unadmitted assignee interest, stating that this interpretation complied with the SILP Agreement and did not offend Texas partnership law. Thus, the court of appeals affirmed the tax court's ruling that the Estate, in turn, included a substituted limited partnership interest in SILP.

Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.).

The court of appeals affirmed the trial court's judgment in favor of a limited partnership, including a declaration that the sole general partner was removed and the successor general partner was properly admitted and appointed under the terms of the partnership agreement.

The U.S. Citizenship and Immigration Services ("USCIS") administers the EB-5 immigrant investor program, which permits foreign investors to obtain a green card by making a minimum capital investment in a U.S. business that creates ten jobs. Under this program, the foreign investor's capital is invested in a new commercial enterprise which then deploys that capital to a job-creating entity. The EB-5 program allows investment through USCIS-approved regional centers.

Great Southwest Regional Center, LLC ("Great Southwest") operated as an USCIS-approved regional center and sponsored an EB-5 project involving salt water disposal wells in west Texas. Frost Rains Holdings, LLC ("Frost Rains") was Great Southwest's sole owner. Great Southwest organized ACSWD, LP ("ACSWD") to serve as the new commercial enterprise for the salt water project. ACSWD was advertised to potential investors as a \$500,000 investment in exchange for a limited partnership interest in ACSWD. These partnership interests were offered pursuant to multiple documents, including ACSWD's partnership agreement. Lu Jun was a Chinese citizen and sought to obtain a green card through the EB-5 program. Jun agreed to invest in ACSWD, wired Great Southwest \$575,550 (\$500,000 for the EB-5 investment and the remainder for various fees), and signed ACSWD's partnership agreement. Jun was the only EB-5 investor secured for ACSWD, and she served as the sole limited partner with a 99% interest.

When Jun did not receive a refund as requested, she sought a return of her money by intervening in Great Southwest's suit against a separate entity that was involved in the EB-5 project. Jun's pleadings included claims against ACSWD and Great Southwest as well as a statement that she, in her capacity as the sole limited partner, removed Great Southwest as ACSWD's general partner and appointed SWD Investment Recovery Fund, LLC ("SWD Investment") to the role. After Jun nonsuited her claims against ACSWD and the limited partnership filed its own plea in intervention, the trial court signed an agreed order to realign the parties such that ACSWD was the sole plaintiff asserting various claims against Great Southwest, Frost Rains, and certain officers of Frost Rains. ACSWD also requested a declaratory judgment regarding the status of its general and limited partners. Following a bench trial, the trial court signed a final judgment in favor of ACSWD that included a declaratory judgment stating: (1) Great Southwest was removed as ACSWD's general partner and became a limited partner without the right to vote owning a .99% interest; (2) SWD Investment became the general partner of ACSWD with a 1% interest; and (3) Jun's limited partnership interest was reduced from 99% to 98.01%. Great Southwest asserted multiple issues on appeal.

In challenging the trial court's second declaration and interpretation of the ACSWD partnership agreement, Great Southwest argued that SWD Investment could neither be admitted as a partner nor appointed as successor general partner without the current general partner's written consent and there was no general partner to provide such consent. The court of appeals began its analysis by reviewing traditional principles of contract interpretation and construction. Next, the court focused on two sections of the partnership agreement: section 13 (governing the limited partners' rights and powers) and section 14 (listing prohibited transactions). Then, the court cited the relevant parts of each section as follows:

13.2 Removal of a General Partner:

A. Upon written notice to the General Partner, Limited Partners owning at least seventy-five percent (75%) of the Limited Partners' Interests may remove the General Partner for cause. As used herein, the term "cause" shall mean (I) a General Partner's action in violation of any one or more of the prohibitions set forth in Article XIV of this Agreement, (ii) the issuance of a charging order or writ of attachment or other action, against a General Partner's interest in the Partnership, (iii) any action or omission by a General Partner which constitutes fraud, deceit, or a wrongful taking, or (iv) the death, dissolution or bankruptcy of a General Partner.

B. Upon written notice to the General Partner, the Limited Partners owning at least seventy-five percent (75%) of the Limited Partners' Interests may remove a General Partner without cause.

C. Upon the removal of a General Partner as provided above, all remaining Partners may agree in writing to continue the business of the Partnership and to appoint a new successor general partner meeting the requirements of Section 13.3.

* * *

13.3 Successor General Partner:

A person or entity shall qualify as a successor general partner only upon satisfaction of the following conditions:

A. The person or entity shall have accepted and agreed to be bound by all the terms and provisions of this Agreement, by executing a counterpart hereof and any other such document or instrument as may be required or appropriate in order to effect the admission of the person or entity as a substitute General Partner;

B. The person or entity shall have a net worth which will be sufficient to meet all then-current requirements of applicable statutes, cases, treasury regulations or IRS rulings to ensure classification of the Partnership as a partnership for federal income tax purposes;

C. The person or entity shall make any such contribution to the capital of the Partnership as may be determined by Majority Vote of the Limited Partners; and

D. An amendment to this Agreement and to the Partnership's Certificate of Limited Partnership evidencing the admission of the person or entity as a successor General Partner shall be filed for recondition, as required by the Act.

* * *

14.1 Prohibited Transactions:

During the term of this Partnership, neither a General Partner nor any Limited Partner shall do any one of the following:

* * *

I. Do any of the following, or allow any of the following to occur, ***without first obtaining the written consent of the General Partner and Limited Partners*** owning more than fifty percent (50%) of the Sharing Ratios owned by all the Limited Partners:

* * *

iv. ***The admission of another person or entity as a General or Limited Partner***, except as provided in Section 16.3 regarding the admission of transferees of a Limited Partner's Interest as substitute Limited Partners.

[emphasis added by court]

According to Great Southwest's interpretation of the partnership agreement, SWD Investment could not be admitted to ACSWD as a new partner, much less appointed as successor general partner, without the approval of a general partner because section 14.1(I)(iv) prohibited the admission of a successor general partner without the general partner's written consent. Because Great Southwest was removed as general partner, it contended that there was no current general partner to consent to SWD Investment's admission or appointment as successor general partner.

The court of appeals rejected Great Southwest's interpretation of the partnership agreement and concluded that SWD Investment was properly admitted to ACSWD as successor general partner under the terms of the partnership agreement. Despite acknowledging that section 14.1(I)(iv), if read in isolation, appeared to prohibit the

admission of a successor general partner without the current general partner's written consent, the court stated that it was required to consider other relevant sections in order to construe the partnership agreement as a whole. First, the court pointed to sections 13.2(B), 13.2(C), and 13.3 as prescribing the specific procedures that limited partners may utilize to remove ACSWD's general partner and appoint a successor. The court reasoned that these sections, directly applicable here, did not condition the appointment of a successor general partner on the approval of the current general partner. Instead, section 13.2 stated that limited partners owning at least 75% of the limited partners' interest can, upon written notice, remove the general partner without cause and then the remaining partners may agree to appoint a new successor general partner satisfying the four conditions of section 13.3. Because Jun was the sole limited partner with a 99% limited partner interest, she could remove Great Southwest as general partner without cause and appoint SWD Investment as successor general partner without approval of the current general partner. Second, the court determined that the more specific provisions of sections 13.2 and 13.3 applied to this issue and controlled over the broad conditions of section 14.1(I)(iv). Third, the court declined to adopt Great Southwest's interpretation of the partnership agreement because doing so would render sections 13.2 and 13.3 meaningless.

Great Southwest then cited § 1.002(33) of the Texas Business Organizations Code for the proposition that general partner approval was necessary to appoint SWD Investment as successor general partner. The court of appeals observed that, in the limited partnership context, § 1.002(33) defines "General partner" as "a person who is admitted to a limited partnership in accordance with the governing documents of the limited partnership." Having concluded that SWD Investment was properly admitted to ACSWD as successor general partner under the partnership agreement, the court determined that § 1.002(33) did not support Great Southwest's argument that approval from the general partner was necessary to appoint a successor general partner.

7. Arbitration

Gray v. Ward, No. 05-18-00266-CV, 2019 WL 3759466 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.).

The court of appeals reversed the trial court's order that had denied arbitration on the plaintiff's wrongful termination and defamation claims. The court of appeals concluded that all of the claims between the parties fell within the scope of the partnership's arbitration clause.

In 2012, Steve Gray, Bryan Ward, and Ken Burge started Primal Health LP, which sells herbal and vitamin supplements online. Burge later departed, and Primal Health purchased his interest. This left Gray and Ward as the only remaining limited partners and Happy Accidents, Inc. ("Accidents") as the general partner. Gray is the partnership's majority owner and is Happy Accidents' CEO.

Neither Gray nor Ward have an employment agreement with Primal Health. The parties both signed the partnership agreement, however, which provided in section 13.2:

All disputes and claims relating to this Agreement, the rights and obligations of the parties hereto, or any claims or causes of action relating to the performance of either party that have not been settled through mediation will be settled by arbitration by the American Arbitration Association in either Boca Raton, Florida or Arizona in accordance with the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association. The costs of the arbitration proceedings will be borne by the losing party if such party is found to have been in material breach of its obligations hereunder....

At some point, Ward approached Gray and Accidents about his desire to leave the Partnership and asked Gray to buy out his interest. A dispute arose concerning the valuation of Ward's partnership interest. Ward ultimately filed suit asserting breach of contract, breach of fiduciary duty, wrongful discharge, and defamation claims. His petition alleged that Ward and Gray initiated discussions for Gray to buy out Ward's partnership interest and that Gray (i) manipulated the partnership interest appraisal process to drive down the price of Ward's interest, (ii) forced Ward to involuntarily resign, (iii) used the forced resignation "as a tactic to preclude the Partnership's obligation to repurchase Ward's interest under the Partnership Agreement," (iv) refused to complete the buy-out, and (v) refused to make partnership distributions to Ward. Ward's first two counts were his breach of fiduciary duty

and partnership claims; his succeeding wrongful termination and defamation counts incorporated all of the earlier factual allegations.

Accidents moved to compel arbitration according to the arbitration clause. The court initially ordered all of Ward's claims to arbitration. But following Ward's motion for reconsideration, the trial court ordered that Ward's breach of fiduciary duty and breach of contract claims were subject to arbitration while the wrongful discharge and defamation claims were not. This appeal followed.

The court of appeals first discussed the issue of arbitrability—that is, whether the scope of the arbitration clause was to be determined by the court or the arbitrator. Accidents argued that the arbitration provision's reference to the AAA Rules constituted clear and unmistakable evidence that the parties intended that an arbitrator decide issues of arbitrability because those rules grant an arbitrator the power to rule on his own jurisdiction, including the scope of an arbitration agreement. The court, however, determined that the issue was not preserved for its review, as Accidents urged the trial court to compel arbitration without arguing that the parties agreed to refer the arbitrability issue to arbitration. "Because the arbitrability of the scope issue was first raised on appeal, we do not consider whether the parties agreed to arbitrate arbitrability and instead limit our review to whether the excluded claims fall within the clause's scope."

The court then discussed whether Ward's wrongful termination and defamation claims fell within the scope of the arbitration clause. The court concluded that they did because of the existence of the broad "relates to" language, and because those claims related to the agreement which was the focal point of the parties' dispute:

Here, the arbitration clause applies to "all disputes and claims relating to" (I) "this Agreement," (ii) "the rights and obligations of the parties hereto," and (iii) "any claims or causes of action relating to the performance of either party."

Ward insists that two independent relationships are at issue: (I) his employment relationship as the Partnership's Director of Advertising and (ii) his relationship with and interest in the Partnership. According to Ward, only the latter relationship pertains to the LP Agreement containing the arbitration provision, and thus the claims that do not relate to the Agreement itself (the employment relationship claims) are not subject to arbitration. We disagree.

The LP Agreement concerning the parties' relationship informs our analysis. The agreement provides that no general partner or interest holder will receive any salary for services rendered on the Partnership's behalf except as provided in the agreement. It further provides that if a limited partner serves as an employee or agent of the Partnership, the agent or employee will not be deemed to be participating in the control of the business for liability purposes. Thus, at a minimum, the LP Agreement relates to Ward's employment by the Partnership.

Significantly, Ward did not sue the Partnership for wrongful termination. Instead, he sued Accidents (its general partner) and Gray (the Partnership's CEO). Ward's petition alleges that Gray forced Ward's resignation to preclude the Partnership's obligation to purchase Ward's interest. According to Ward, Accidents wrongfully discharged him and he has lost income and not received any severance from his forced resignation. In addition, Ward alleges that Accidents made defamatory statements about his employment status when Partnership employees were told that Ward resigned.

These allegations demonstrate that Ward's claims pertain to: (I) his employment by the Partnership; (ii) his right to receive a salary from the Partnership; and (iii) Gray's authority, as CEO of the Partnership, to terminate Ward's employment.

Additionally, the LP Agreement provides that if a party resigns while he owns a limited partnership interest, the Partnership is obligated to purchase that party's interest within ninety days. But the parties disagree about this provision's applicability when the limited partner's employment status is terminated. The disagreement concerning the Partnership buy-out terms is the linchpin of the parties' dispute. According to Ward, he was forcibly terminated following the parties' disagreement about the buy-out terms. Thus, there can be no question that Ward's employment status "relates to" the LP Agreement.

Similarly, the wrongful termination and defamation claims also relate to the breach of fiduciary duty and contract claims that Ward does not dispute are arbitrable.

Indeed, according to his petition, Ward's wrongful termination and defamation claims expressly incorporate and rely on the same factual allegations as do his contract and fiduciary breach claims. In fact, Ward actually incorporated those claims into his wrongful termination and defamation claims. Under that petition, Ward's wrongful termination and defamation claims are intertwined with, let alone related to, his partnership agreement and fiduciary breach claims.

Ward also insisted that his wrongful termination and defamation claims were "stand alone" claims that arose out of a separate oral employment agreement. Ward noted that the partnership agreement did not expressly reference his employment and that Gray confirmed, on multiple occasions, that Ward's employment would be terminated regardless of the buy-out. The court observed, however, that there were no details concerning this alleged oral agreement, nor any explanation as to why such a contract was made between Ward and the general partner and CEO as opposed to between Ward and Primal Health. Even if there was a separate oral employment agreement that existed apart from the partnership agreement, the court stated that its analysis did not change. The partnership agreement expressly related to such employment and "an arbitrable claim can relate to two agreements at the same time." The court concluded with the following observations:

As Ward's petition demonstrates, the factual allegations supporting his contract and fiduciary duty breach claims are intertwined with the LP Agreement and Ward's wrongful termination and defamation claims. Indeed, the only way the statement about Ward's resignation could be defamatory is in the context of the limited partnership's operation. The LP Agreement controls the terms of the buy-out from which the entire dispute arises.

Under these circumstances, we cannot conclude that Ward's wrongful termination and defamation claims are completely independent of and can be maintained without reference to the LP Agreement. Applying the strong presumption favoring arbitration in this context, we conclude the trial court erred in its determination that the employment and defamation claims were not encompassed in the broad arbitration clause.

The dissent argued that Ward's employment-related claims had no significant relationship to the partnership agreement. Similarly, it argued that the arbitration agreement applied only to Ward's role as a limited partner of Primal Health and not to his distinct role as an employee of Primal Health, Gray, or Accidents. The partnership agreement's provisions, according to the dissent, showed that individual employment operated outside of the partnership agreement.

Romero v. Herrera, No. 04-18-00845-CV, 2019 WL 2439107 (Tex. App.—San Antonio June 12, 2019, no pet.).

The court of appeals reversed the trial court's order denying a motion to compel arbitration. The court of appeals concluded that the parties, by incorporating American Arbitration Association rules, had agreed to delegate the question of arbitrability to an arbitrator and not to a court.

Frank Herrera, Jr. and Raymond Romero entered into four agreements for the purpose of forming a business entity that would provide wheel and tire manufacturing and assembly services to Toyota Motor Manufacturing Texas, Inc. Two of the four agreements, the Limited Partnership Agreement and the Company Agreement, contained arbitration provisions. The Joint Venture Agreement and the Non-Compete Agreement did not.

In February 2018, Romero filed claims in arbitration against Herrera for allegedly starting a competing company in Mexico. In the arbitration proceeding, Romero alleged that Herrera breached the Non-Compete Agreement and further alleged that Herrera breached the other three agreements as a result. Herrera filed a lawsuit against Romero in district court seeking a declaratory judgment that Romero's claims arising from or relating to the Joint Venture Agreement could not be arbitrated. Herrera filed a motion for summary judgment on the ground that the Joint Venture Agreement did not contain an arbitration provision, and Romero filed a motion to compel arbitration. The trial court signed orders denying Romero's motion to compel arbitration and granting Herrera's motion for partial summary judgment. The partial summary judgment order granted Herrera declaratory relief that Romero "cannot compel the arbitration of [his] claims against [Herrera] regarding the interpretation or enforcement of the [Joint Venture] agreement." Romero appealed the trial court's denial of his motion to compel arbitration and the partial summary judgment order.

On appeal, Herrera emphasized that the Joint Venture Agreement did not contain an arbitration provision and suggested that the parties' arbitration clauses did not apply to disputes about the Joint Venture Agreement. The court disagreed: "But the scope of an arbitration agreement turns on its terms, not on the particular written instrument in which the arbitration agreement appears. Thus, for purposes of the first motion-to-compel inquiry—the existence of a valid arbitration agreement—it is immaterial that the parties' arbitration agreement is not contained within the four-corners of the Joint Venture Agreement."

The court then considered whether the claims at issue fell within the scope of either of the two arbitration agreements. This inquiry, according to the court of appeals, is ordinarily committed to the trial court, but parties can agree to arbitrate arbitrability. "In other words, parties can agree to entrust an arbitrator, rather than a trial court, to fairly and correctly construe an arbitration agreement to determine what claims fall within the agreement's scope, and to act as the gatekeeper to determine what claims are arbitrable." That said, "[a] presumption favors adjudication of arbitrability by the courts absent clear and unmistakable evidence of the parties' intent to submit that matter to arbitration."

The court of appeals noted that Herrera's claims in the trial court sought the trial court's determination of the meaning and scope of the arbitration provisions in the Limited Partnership Agreement and the Company Agreement. Consequently, to prevail on his motion to compel, Romero had the burden to establish that the parties clearly and unmistakably intended to "agree to arbitrate arbitrability" and to submit disputes about the scope of the arbitration agreements to arbitration.

The arbitration provision in the Limited Partnership Agreement provided that "[a]ny dispute regarding interpretation or enforcement of any of the Partners' rights or obligations hereunder shall first be referred to non-binding mediation for resolution, and only if the dispute is not resolved through non-binding mediation shall it be resolved by binding arbitration according to the rules of the American Arbitration Association in San Antonio, Texas." Similarly, the arbitration provision in the Company Agreement stated that "[a]ny dispute regarding interpretation or enforcement of any of the Members' rights or obligations hereunder shall first be referred to non-binding mediation for resolution, and only if the dispute is not resolved through non-binding mediation shall it be resolved by binding arbitration according to the rules of the American Arbitration Association in San Antonio, Texas." According to the court, the American Arbitration Association rules state that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. The court also observed that "[a] number of our sister courts have adopted a general rule that when a broad arbitration agreement exists between the parties, and when that agreement incorporates arbitration rules that specifically empower the arbitrator to decide issues of arbitrability, then the incorporation of those rules constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability to the arbitrator." As the court concluded:

The arbitration provisions in the Company and Limited Partnership Agreements expressly incorporate the AAA rules. The AAA rules specifically empower the arbitrator to decide issues of arbitrability and establish Romero and Herrera "agree[d] to arbitrate arbitrability." Romero and Herrera thereby expressed their clear and unmistakable "intent to delegate arbitrability to the arbitrator." In doing so, both agreed to entrust an arbitrator, not a trial court, with making fair and correct determinations as to the meaning and scope of an arbitration agreement and whether certain claims were arbitrable. Consistent with our sister courts and the vast majority of federal courts, we hold the parties agreed to arbitrate arbitrability, and thus a dispute about the scope of the arbitration agreements must be decided in arbitration, not in the trial court. Romero has therefore satisfied his burden to establish the parties' disputes about the meaning and scope of the arbitration provisions, themselves, fall within the scope of the arbitration provisions.

The court of appeals reversed the trial court's order denying Romero's motion to compel arbitration. The case was remanded to the trial court with instructions to render an order compelling the parties to arbitrate the claims that Herrera alleged in the underlying suit filed in the trial court, which pertained to whether the alleged breach of the Joint Venture Agreement was a dispute that fell within the scope of the arbitration provisions. (The court also dismissed Romero's appeal of the partial summary judgment order for lack of jurisdiction.)

8. Venue Selection

In re Fox River Real Estate Holdings, Inc., 596 S.W.3d 759 (Tex. 2020).

The court held that Tex. Civ. Prac. & Rem. Code § 65.023(a), which provides for mandatory venue in actions for injunctive relief, did not control over the contractual venue provision included in a limited partnership agreement pursuant to Tex. Civ. Prac. & Rem. Code § 15.020, a conflicting mandatory venue provision, because injunctive relief was not the primary and principal relief requested in the action.

A group of limited partners of a limited partnership sued the general partner and related parties alleging that the defendants fraudulently misappropriated partnership assets, breached the limited partnership agreement, and violated fiduciary duties owed to the partnership. The plaintiffs sought actual and exemplary damages, attorney's fees and expenses, and declaratory, injunctive, and other equitable relief. The plaintiffs filed the lawsuit in Washington County, where the defendants are domiciled. The defendants moved to transfer venue to Harris County, Texas, based on a venue-selection clause in the limited partnership agreement. Section 15.020 of the Texas Civil Practice and Remedies Code requires enforcement of a contractual venue provision in a "major transaction" (defined as "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than \$1 million"), and the plaintiffs conceded that the limited partnership agreement was a major transaction, the underlying dispute arose from that agreement, and the agreement provides for venue in Harris County. Subsection (d)(3) of Section 15.020 states, however, that "[t]his section does not apply to an action if ... venue is established under a statute of this state other than this title." Section 65.023(a) is in a different title than Section 15.020 and requires injunction suits to be heard in the defendant's county of domicile. Because the court had previously held that Section 65.023(a) is operative only when a party's pleadings in the underlying suit establish that the relief sought is "purely or primarily injunctive," this case turned on whether the plaintiff was "primarily" seeking injunctive relief despite pleading for significant damages, attorney's fees, declaratory relief, and other equitable relief. The court discussed other cases addressing the question of whether injunctive relief was the primary relief sought, and the court concluded that injunctive relief was not the dominant purpose of the plaintiffs' lawsuit in this case. Although the plaintiffs sought injunctive relief preventing the defendants from further action on the partnership's behalf and disgorgement of wrongfully appropriated partnership assets, the court concluded that all the injunctive relief was ancillary to the plaintiffs' primary goal of removal of the general partner in accordance with Section 152.501(b) of the Business Organizations Code and recovery of monetary damages. Because the injunctive relief was not the primary and principal relief requested, Section 65.023(a) did not apply, and Section 15.020 required enforcement of the parties' venue-selection clause.

G. Assignment of Partnership Interest; Admission of Assignee as Partner

Malouf v. Sterquell PSF Settlement, L.C., No. 05-17-01343-CV, 2019 WL 5799988 (Tex. App.—Dallas Nov. 7, 2019, pet. filed) (mem. op.).

The court of appeals affirmed the trial court's judgment that Sterquell PSF was a limited partner and could therefore assert claims for breach of fiduciary duty and breach of contract against the general partner and its sole manager. The court also upheld the trial court's award of exemplary damages and attorney's fees.

In 1996, Hapsmith Texas Corporation entered into a Reimbursement Agreement which entitled it to receive future payments from the City of Irving. In 2002, 635 LP, a Texas limited partnership, acquired Hapsmith's interest in the Reimbursement Agreement. 635 LP's general partner was 635 LLC.

In 2008, Matt Malouf and Steve Sterquell formed Irving Reimbursement, LLC ("IRLLC") for the sole purpose of acquiring 635 LP's right to receive the payments under the Reimbursement Agreement. IRLLC had three members at its inception: Matt Malouf, IRA owned 45%; Sterquell Profit Sharing Trust (the "Trust") owned 45%; and American Housing Foundation, of which Sterquell was President, owned 10%. Malouf and Sterquell were IRLLC's managers, and IRLLC ultimately acquired sole ownership of both 635 LP and 635 LLC (IRLLC came to own a 99% limited partner interest in 635 LP, and 635 LLC owned a 1% general partner interest).

In 2009, Sterquell died. His creditors and others filed lawsuits against his estate and a bankruptcy proceeding ensued. A group of Sterquell's creditors formed Sterquell PSF to receive and manage assets obtained through settlement proceedings. Pursuant to those proceedings, the Trust assigned Sterquell PSF its 45% interest in IRLLC and "whatever interest" it held in 635 LP.

After Sterquell's death, Malouf became the sole manager of both IRLLC and 635 LLC. He signed tax returns for IRLLC which indicated that IRLLC had transferred all of its assets in 2011. He also signed tax returns for 635 LP in 2012, 2013, and 2014, all of which listed Sterquell PSF as a 635 LP partner.

Sterquell PSF filed a lawsuit against Malouf, 635 LP, 635 LLC, and Minerva Partners (collectively "Appellants") in March 2015. Among other allegations, it contended that it was a partner in 635 LP and that 635 LLC, as the general partner, had made \$305,000 of improper payments to Minerva, an entity owned and managed by Malouf. It also alleged that Malouf had made an unauthorized transfer of \$2,290,449.65 from 635 LP to Malouf's IRA. Sterquell sought a declaration that it was entitled to a share of the Reimbursement Agreement payments that 635 LP had received in 2014 and 2015 and, among other claims, it asserted breach of fiduciary duty and breach of contract. The defendants contended that Sterquell PSF had no limited partner interest in 635 LP and therefore "lack[ed] standing" to bring its claims.

After a bench trial, Sterquell PSF was awarded actual and exemplary damages against Malouf individually, plus prejudgment interest and attorney's fees. The trial court also issued findings of fact and conclusions of law supporting Sterquell PSF's recovery on the grounds of breach of fiduciary duty, breach of the 635 LP partnership agreement, theft, conversion, misappropriation of fiduciary property, and fraud.

On appeal, the court noted that, although the question of whether a party is entitled to sue on a contract is often referred to as a question of standing, it is not truly a standing issue because it does not affect the jurisdiction of the court. Instead, it is a challenge to capacity and, unlike standing, a challenge to a party's capacity to participate in a suit can be waived and tried by consent.

Appellants asserted that the trial court erred in concluding that Sterquell PSF was a partner in 635 LP and therefore could assert claims for breach of fiduciary duty and breach of contract regarding Malouf's management of 635 LP and 635 LLC. Sterquell PSF argued that Malouf's failure to deny partnership status under oath (pursuant to TRCP 93(5)) resulted in an admission of partnership with Sterquell PSF that could not be controverted at trial. The court of appeals disagreed:

To the extent Sterquell PSF contends appellants waived their right to challenge ... Sterquell PSF's status as a 635 LP partner, we disagree. Although appellants did not file a rule 93 verified "denial of partnership," the record shows Sterquell PSF did not assert their "admission" argument below. Rather, Sterquell PSF's claimed status as a 635 LP partner was a primary focus of both sides' arguments at trial. On this record, we conclude capacity was tried by consent.

The court of appeals went on to conclude that the evidence was "legally sufficient to support the trial court's findings that Sterquell PSF [was] a partner in 635 LP and therefore could properly assert claims for breach of contract and breach of fiduciary duty":

The record shows Malouf (1) fully controlled IRLLC and 635 LLC, the general partner of 635 LP; (2) signed IRLLC's 2011 federal income tax return, which stated it was a "final" return and described "distribution" and "transfer" of all of IRLLC's assets during 2011, resulting in total IRLLC assets of "0"; and (3) signed 635 LP's tax returns in 2012, 2013, and 2014, all of which listed Sterquell PSF as a 635 LP partner and owner. Additionally, at trial, (1) Malouf testified 635 LP's 2011 tax accountant was Mike Carter; (2) Sterquell PSF introduced into evidence a handwritten note on Carter's file copy of 635 LP's 2011 tax return that stated "Per T/C w/Matt, Irving Reimbursement transferred its 99% interest to Matt Malouf IRA (49%) and Sterquell PSF Settlement, LC (50%);" and (3) Malouf testified he does not "deny telling [Carter] that."

In light of that evidence, appellants' arguments that the record contains no "asset transfer agreement or assignment" and that "the contents of a tax return cannot change or affect the parties' legal relationships" are immaterial. The evidence described above allows for reasonable inferences that Malouf, acting within his authority as manager of both IRLLC and 635 LLC, (1) directed the transfer of a portion of IRLLC's interest in 635 LP to Sterquell PSF and (2) obtained unanimous consent of 635 LP's partners—which were fully controlled by him—to make Sterquell PSF a "substitute limited partner" in 635 LP.

Appellants claimed that there was no legal basis for the recovery of exemplary damages, but the court observed that a recovery for breach of fiduciary duty is not limited to an accounting of profits received by the fiduciary; it can also include exemplary damages. Given the breach-of-fiduciary-duty finding by the trial court, the court disagreed that there was no legal basis for the award. The court of appeals also noted the trial court's finding that Malouf had committed fraud.

With respect to the award of attorney's fees, Appellants only argued that the trial court's rulings on declaratory judgment, breach of contract, and civil theft were subject to reversal. Other than that argument, Appellants did not explain how the attorney's fee award was improper. The court stated that "based on our conclusion above that appellants' sole basis for challenging liability for breach of contract—lack of capacity—is without merit, we disagree with their contention that there is no basis for awarding attorney's fees. See CIV. PRAC. & REM. § 38.001 (allowing for attorney's fees recovery if claim is for 'an oral or written contract')."

See also Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.); *Estate of Streightoff v. Commissioner of Internal Revenue*, 954 F.3d 713 (5th Cir. 2020), summarized above under "Interpretation and Enforcement of Partnership Agreement—Admission of Partner."

H. Withdrawal or Expulsion of Partner

Brown v. Outlaw, No. 05-17-01270-CV, 2019 WL 2647791 (Tex. App.—Dallas June 27, 2019, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's judgment that a partner wrongfully withdrew from the partnership and breached her fiduciary duty to her fellow partner.

Regina Dell Brown, Gwendolyn Gabriel, and Merry Outlaw formed a partnership to purchase, renovate, and sell a residence in Cedar Hill, Texas. The property was purchased on May 21, 2010. Less than two months later, Gabriel withdrew from the project following what she called a "suspicious" withdrawal by Outlaw of \$600 from the partners' joint account. The city declared the residence complete in January 2014, but efforts to sell the property were unsuccessful. Eventually, a receiver sold the property, and the proceeds were placed in the registry of the court.

Gabriel and Brown sued Outlaw alleging fraud, deceptive trade practices, and breach of fiduciary duty. Their petition also sought an equal division of the proceeds among Gabriel, Brown, and Outlaw. Outlaw counterclaimed for wrongful withdrawal from the partnership, breach of fiduciary duty, intentional interference with the business relationship of Outlaw and Brown, and defamation. The trial court granted summary judgment in favor of Outlaw on the deceptive trade practices claim, and all of the remaining actions were tried to a jury. Outlaw prevailed on every claim.

On appeal, Gabriel and Brown challenged the evidentiary support for the jury's finding that Gabriel wrongfully withdrew from the partnership. The trial court instructed the jury on this issue by stating that "[a] partner wrongfully withdraws if the partnership is formed for the completion of a specific undertaking and the partner voluntarily withdraws from the partnership before the undertaking is complete." The trial court also defined "Partnership" in the charge as "the arrangement between Regina Brown, Gwendolyn Gabriel, and Merry Outlaw to purchase, repair and/or rehabilitate, and sell for profit the [Property.]" None of the parties objected to the instruction or the definition.

Gabriel and Brown argued that nothing in the parties' agreement required any partner to stay in the project until the actual sale of the house, in effect arguing that the partnership was not "formed for the completion of a specific undertaking" that included sale of the property. The court rejected the argument:

But the charge's very definition of the parties' undertaking, the "Partnership," included their arrangement to purchase, repair and/or rehabilitate, and sell the Property for profit. The jury was not free to disregard the court's instructions when making its finding.

The evidence does not support appellants' argument either. It is true that the parties testified to conflicting understandings of how the repairs and improvements to the Property were to be financed and how the proceeds of the sale were to be divided. But throughout trial, all three

parties testified that their agreement was to purchase, renovate, and sell the Property. And Gabriel's own testimony was specific: "I made an agreement that I would contribute to the project until we got it finished." Nevertheless, it is undisputed that Gabriel withdrew from the partnership effective July 2, 2010, less than two months after the purchase of the Property and some seven years before it was sold.

The jury's finding that Gabriel wrongfully withdrew from the partnership was supported by the parties' testimony concerning the purpose of their partnership. The finding is not clearly wrong or manifestly unjust.

The trial court instructed the jury that a fiduciary relationship existed between Gabriel and Outlaw "as partners in the real estate project." Gabriel and Brown challenged the factual sufficiency of the jury's finding that Gabriel breached that fiduciary duty to Outlaw. They argued that the only possible violation of Gabriel's duty was her wrongful withdrawal from the partnership, and they reasserted their position that there was insufficient evidence of such a wrongful withdrawal. The court reiterated its conclusion that "ample evidence supports the jury's finding on wrongful withdrawal." The court also noted that the trial court's charge (which mirrored the pattern jury charge on breach of fiduciary duty) gave the jury guidance on what conduct by Gabriel would amount to a breach:

The record supports the jury's finding that—employing one or more of these standards—Gabriel breached her fiduciary duty. For example, one standard required evidence that Gabriel did not make reasonable use of the confidence that Outlaw placed in her. Gabriel testified that "when we first started we thought I was going to be doing the most work and I was going to possibly be the one putting in the most money." She testified that she had built her own large home and that she had done "all the labor" on the homes that Outlaw had purchased as rental properties. Gabriel believed she would be performing most of the labor on this project as well. Outlaw testified that when the three women had decided to buy the Property, she was counting on Gabriel's expertise as well as her monetary contributions for repairs and improvements. Given Gabriel's early withdrawal, jurors could have found that she did not "make reasonable use of the confidence that Merry Outlaw put in her." Another standard listed in the charge required evidence that Gabriel had placed her own interest before Outlaw's. Gabriel acknowledged that the parties had "all committed to contribute as much as we possibly could, given our individual circumstances." Despite this commitment, Gabriel withdrew from the partnership and left Outlaw and Brown to complete the project on their own. Jurors could have found that Gabriel had "placed her own interest before Merry Outlaw's."

We conclude the jury's finding that Gabriel breached her fiduciary duty to Outlaw is supported by testimony from both Gabriel and Outlaw. It is neither clearly wrong nor manifestly unjust.

The court of appeals also concluded that sufficient evidence supported the jury's finding that Gabriel interfered with the modified partnership agreement between Brown and Outlaw. Brown had signed a deed that granted "all of her interest in the Property" to Outlaw, "save and except" eight percent. (The opinion notes that Gabriel, Brown, and Outlaw "agreed that each of them would own one third of the Property.") The court stated that the jury could have reasonably inferred that Gabriel persuaded Brown to stop cooperating with Outlaw on the project. There was also evidence that Gabriel and Brown attempted to have Outlaw "'change' the modification of Brown's agreement." As the court stated: "We conclude sufficient evidence supports the jury's finding that Gabriel interfered with the modified partnership agreement between Brown and Outlaw. The finding is neither clearly wrong nor manifestly unjust."

Finally, the court found that factually sufficient evidence supported the jury's defamation finding. According to the court, reasonable jurors could have believed that Outlaw had the right to withdraw \$600 from the partners' joint account, and that Gabriel's allegation that Outlaw stole the funds was therefore untrue.

See also Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.), summarized above under "Interpretation and Enforcement of Partnership Agreement—Removal of Partner."

I. Dissolution/Winding Up

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership, the court held that judicial dissolution on the ground that it was not reasonably practicable to carry on the partnership's business in conformity with its governing documents was unwarranted because there was no deadlock.

Shannon Medical Center ("Shannon") and Triad Holdings III, L.L.C. ("Triad") were general partners in a limited partnership that operated a regional cancer-treatment center ("RCTC") on premises leased from Shannon's subsidiary, Shannon Real Estate Services, Inc. ("SRES"). Except for the limited partnership, Shannon and Triad were competitors. Under the terms of the partnership agreement, the general partners managed and controlled the limited partnership through a partnership committee (consisting of one representative of each of the two general partners) and a managing general partner. Shannon served as the managing general partner, for which the limited partnership paid Shannon management fees under a separate agreement.

For some time before the lawsuit, Shannon had been attempting to dissolve the limited partnership and take over RCTC. The partnership agreement provided that the limited partnership would dissolve upon the earliest of (a) December 31, 2038; (b) approval of 75% of the partnership units; (c) the partnership's ceasing to operate a radiotherapy facility; or (d) the occurrence of any other circumstance that, under the Texas Revised Limited Partnership Act, would require dissolution. Shannon attempted to obtain the right to vote 75% of the partnership units in favor of dissolution. There originally were three general partners and a varying number of limited partners, but the third general partner left the limited partnership and sold its partnership units to Shannon and Triad. With the addition of those units, Shannon owned 72.32% of the partnership units, Triad owned 24.35%, and three doctors who were limited partners owned, respectively, 1.72%, 0.86%, and 0.75%. To reach the 75% threshold needed for it to dissolve the limited partnership, Shannon proposed voting agreements with the limited partners, but Triad blocked this move by entering into a voting agreement with one of the limited partners, thus giving Triad votes of more than 26% of the partnership and preventing Shannon from forcing the partnership to dissolve without Triad's consent. By the time of trial, Shannon and Triad had purchased all of the limited partners' partnership units so that Shannon and Triad were the only partners of the partnership. Due to the voting agreements, Shannon had the right to vote slightly less than 74% of the partnership units, and Triad had the right to vote slightly more than 26%.

Prior to expiration of the partnership's lease, SRES, the partnership's landlord, informed the partnership that it would not renew the five-year lease upon its expiration in 2012. Three days before the lease expired, Bryan Horner, Shannon's chief executive officer and SRES's president, sent the partnership and Triad a lease amendment he had executed on behalf of Shannon, as the Partnership's managing partner, and SRES, as its president. The amended lease almost doubled the partnership's annual rent. A significant portion of the increase was purportedly to reimburse SRES for vaults in the building that SRES represented were specialized tenant improvements it made to the building for the partnership's use. Contrary to these representations, however, Shannon knew that SRES had not modified the building and that the original owner had included the vaults as part of the building's original construction in 1988.

Shannon sued for judicial dissolution of the limited partnership so that Shannon could take over RCTC's operations. Triad, individually and derivatively on behalf of the limited partnership, sued Shannon for breach of common-law and statutory fiduciary duties in connection with the lease. Based on the jury verdict, the trial court denied Shannon's request for judicial dissolution and awarded the limited partnership actual damages in the amount of excess rent that Shannon obligated the limited partnership to pay to SRES. The trial court also ordered Shannon to pay the same amount to Triad as equitable disgorgement of profits. Shannon appealed.

After addressing the claims against Shannon for breach of its duty of care, the court turned to Shannon's claim for judicial dissolution.

The court began its discussion of Shannon's claim for judicial dissolution by stating that a district court may order the winding up and termination of a domestic partnership on application by a partner "if the court determines that it is not reasonably practicable to carry on the entity's business in conformity with its governing documents." The jury was asked whether it was reasonably practicable to carry on the partnership's business in conformity with the governing documents, and the jury answered "Yes." Shannon contended that it conclusively established that it was entitled to judicial dissolution based on a voting deadlock between the two partners. However, the court stated that the evidence, and Shannon's own admission, distinguished the facts here from case

law relied upon by Shannon. The partnership agreement here provided that a deadlock may be broken by the approval of general partners holding a majority of the partnership units, and Shannon admitted that it could “break the deadlock on its own because it holds the majority” of the partnership units. Shannon speculated that Triad would object to Shannon’s resolving the deadlock on its own and “would resort to a lawsuit,” but the court said that “speculation is not evidence.” Additionally, the court said that a partnership can carry on its business in accordance with its governing documents despite litigation between partners, as had been done here. Thus, Shannon did not establish that it was not “reasonably practicable to carry on the Partnership’s business in conformity with its governing documents.”

Tucker v. Bubak, Nos. 13-18-00427-CV, 13-18-00613-CV, 2019 WL 2529674 (Tex. App.—Corpus Christi—Edinburg June 20, 2019, pet. denied) (mem. op.).

In two appeals, appellant Troy Tucker challenged the trial court’s granting of summary judgment in favor of appellees, Raymond Bubak, Edde Management, Inc. (“EM”), Edde Ventures, L.P. (“EV”), Edde Drilling Services, LLC (“EDS”), and Titan Oilfield, LLC (“Titan”), in a suit seeking the winding up and termination of business entities under the Business Organizations Code. The court of appeals affirmed the trial court’s summary judgment order of winding up and termination as to EV, EDS, and Titan (the partnerships and LLCs), but reversed the order as to EM (the corporation).

Tucker and Bubak owned several business organizations together. Tucker claimed that Bubak was improperly seeking a larger share of the profits from their entities and was competing with their businesses. Bubak eventually filed suit against Tucker seeking involuntary dissolution of the entities. After Bubak moved for summary judgment, the trial court issued an order stating the following:

As to [Bubak’s] Motion For Partial Summary Judgement [sic] as to [EM], [EV], [EDS], and [Titan] (hereinafter referred to as “the entities”), the Court finds that there is no genuine issue as to any material fact that the “economic purposes of the entities is likely to be frustrated.” Therefore, in accordance with Section 11.314(1)(A) [sic], Tex. Bus. Org. Code, the Court orders the involuntary winding up and termination of “the entities,” having found that the Plaintiffs’ Motion For Partial Summary Judgement [sic] as to “the entities” should be granted.

The trial court ultimately ordered Bubak to manage and effectuate the winding up of the entities. Tucker appealed.

The court of appeals began by quoting § 11.314 of the Business Organizations Code, under which a partnership or an LLC can be dissolved if the court determines that (1) “the economic purpose of the entity is likely to be unreasonably frustrated”; (2) “another owner has engaged in conduct relating to the entity’s business that makes it not reasonably practicable to carry on the business with that owner”; or (3) “it is not reasonably practicable to carry on the entity’s business in conformity with its governing documents.” The court also cited § 11.054, under which a court may “(1) supervise the winding up of [a] domestic entity; (2) appoint a person to carry out the winding up of the domestic entity; and (3) make any other order, direction, or inquiry that the circumstances may require.” The court of appeals observed that the trial court’s appointment of Bubak to manage and effectuate the winding up was authorized by § 11.054.

Tucker argued that summary judgment was an inappropriate vehicle for awarding equitable relief such as the winding up of a business entity. He cited case law establishing that “dissolution proceedings are equitable in nature” and that, “[w]hen contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.” The court disagreed and noted that TRCP 166a(a) did not restrict the type of “claim” which may be disposed of by summary judgment. As a result, the court concluded that “summary judgment may be granted ordering the winding up and termination of a business entity.”

Tucker also argued that Bubak did not meet the statutory requirements for a court-ordered winding up. In response to Tucker’s assertion that § 11.054 and § 11.314 did not allow for the appointment of a receiver to wind up an entity, the court pointed out that Bubak abandoned his claim for a receiver and the trial court did not order one. Tucker then complained that the trial court cited a non-existent portion of the statute, § 11.314(1)(A), but the court of appeals found that it was clear that the trial court intended to refer to § 11.314(1) because it referenced the language of that subsection in its order. Finally, Tucker argued that the statute used by the trial court as the basis for its order, § 11.314, did not permit the involuntary winding up of a corporation such as EM. The court of appeals

agreed, stating that “[i]nvoluntary winding up and termination under § 11.314 is restricted to partnerships and limited liability companies.”

Bubak responded that the winding up of EM was authorized by § 11.054, which allows a court to “supervise the winding up” or “appoint a person to carry out the winding up” of any “domestic entity,” a term which includes corporations. The court disagreed that § 11.054 could be used in such a manner:

We cannot agree that the trial court’s order as to EM is authorized by § 11.054. That statute, entitled “Court Supervision of Winding Up Process,” explicitly states that the powers it grants are “[s]ubject to the other provisions of this code” Id. § 11.054. In those other provisions, “winding up” is defined as “the process of winding up the business and affairs of a domestic entity as a result of the occurrence of an event requiring winding up.” Id. § 11.001(8). “An event requiring winding up” of a domestic entity includes “a decree by a court requiring the winding up, dissolution, or termination of the domestic entity, rendered under this code or other law.” Id. § 11.051(5). But although § 11.054 allows a court to “supervise” the winding up of a corporation and to “appoint a person to carry out” that process, it does not explicitly allow a trial court to “requir[e] the winding up, dissolution, or termination” of a corporation. See id. §§ 11.051 (emphasis added), 11.054(a), (b).

Further, although § 11.054 allows a trial court to “make any other order, direction, or inquiry that the circumstances may require,” that authority is also “[s]ubject to the other provisions” of the business organizations code. See id. § 11.054(3). We do not believe § 11.054(3) was intended to serve as a judicial carte blanche that would allow a trial court unfettered authority to take actions—such as the rendition of an order requiring the involuntary termination of a corporation—that are not explicitly permitted elsewhere in the code. Instead, we construe § 11.054(3) as granting the trial court broad authority to make appropriate orders in cases where “[a]n event requiring winding up” has already occurred. See id. §§ 11.054(3); see also id. § 11.051.12.

We conclude that the trial court erred by ordering the involuntary termination and winding up of EM, a corporation. Tucker’s issues raising this argument are sustained. Moreover, because Bubak’s pleadings do not offer any legally cognizable basis for the trial court to order the involuntary termination and winding up of a corporation, we render judgment denying Bubak’s requests for the winding up and dissolution of EM.

Tucker’s remaining contentions involved his claim that Bubak did not produce any competent summary judgment evidence. He argued that summary judgment was improper because he produced extensive evidence of Bubak’s wrongful conduct. The court noted, however, that Tucker’s summary judgment response did not challenge Bubak’s assertion that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated” due to the ongoing disagreements between the parties. As the court observed:

Our inquiry here is limited to the question of whether the trial court erred in rendering summary judgment on grounds that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated.” The business organizations code plainly permits a trial court to order winding up and dissolution if it makes this finding. TEX. BUS. ORGS. CODE ANN. § 11.314(1). Here, Bubak alleged these grounds in his summary judgment motion but Tucker did not deny them in his response. We therefore cannot reverse the judgment on this basis as Tucker urges.

Further, in light of the fact that Tucker never disputed Bubak’s § 11.314(1) allegation, Bubak was arguably under no obligation to produce any evidence to support it. See TEX. R. CIV. P. 166a(a) (noting that a plaintiff may “move with or without supporting affidavits for a summary judgment in his favor”). And even if all of Bubak’s summary judgment evidence is considered incompetent, the evidence attached to Tucker’s summary judgment response constituted more than a scintilla to show that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated.” For example, Tucker attached deposition testimony by Bubak in which he stated that the Edde companies suffered from “[d]ysfunctional management”

Accordingly, the court of appeals concluded that the trial court did not err by granting summary judgment ordering the winding up and dissolution of EV, EDS, and Titan.

J. Merger, Conversion, Sale of Assets

Peterson, Goldman & Villani, Inc. v. Ancor Holdings, LP, 584 S.W.3d 556 (Tex. App.—Fort Worth 2019, pet. filed).

PGV won an arbitration award against Ancor LLC. Ancor LLC merged into Ancor LP. The court of appeals concluded that Ancor LP was liable for the award and the trial court should have granted summary judgment on the issue:

Under Texas law, a certificate of merger must be filed for a merger to become effective if any domestic limited liability company is a party to the merger. *See Trustmark Nat'l Bank v. Tegeler (In re Tegeler)*, 586 B.R. 598, 650 n.33 (Bankr. S.D. Tex. 2018) (quoting Tex. Bus. Orgs. Code Ann. § 10.151(a)(1)(A)); *see also* Tex. Bus. Orgs. Code Ann. § 1.002(22) (including domestic limited liability companies in the definition of “filing entity,” which must file under section 10.151). “A merger that requires such a filing takes effect on the acceptance of the filing of the certificate of merger by the secretary of state or county clerk, as appropriate.” When a merger takes effect, “all liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger.” *Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438, 449 n.13 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (quoting Tex. Bus. Orgs. Code Ann. § 10.008(a)(3)). The surviving organization to which a liability is allocated under the plan of merger is the primary obligor for the liability. *Id.* (quoting Tex. Bus. Orgs. Code Ann. § 10.008(a)(4)).

Attached to PGV’s motion for summary judgment were three exhibits showing the completed merger between Ancor LLC, a domestic limited liability company, and Ancor LP, a Delaware limited partnership. The first exhibit was titled “Agreement and Plan of Merger.” It specified that Ancor LLC would merge “with and into” Ancor LP, the surviving entity, and that Ancor LP would “assume all the liabilities of every kind and description of” Ancor LLC. Keene executed the merger agreement on behalf of both Ancor LLC and LP. The second exhibit was the “Articles of Merger,” which was filed with the Texas Secretary of State. The articles recited that Ancor LLC and LP were merging and that Ancor LP was the surviving entity. The third exhibit was a “Certificate of Merger” issued by the Texas Secretary of State, approving the merger as of September 22, 2000. This evidence conclusively established a completed merger.

By dint of the merger agreement and the completed merger itself, Ancor LP assumed all of Ancor LLC’s liabilities, including the confirmed arbitration judgment. ... Through its evidence, PGV conclusively established its entitlement to summary judgment on successor liability, and appellees failed to create a fact issue sufficient to show otherwise. We conclude that the trial court should have granted summary judgment holding Ancor LP liable on the judgment against Ancor LLC.

K. Creditor’s Remedies: Turnover Order

SGG, LLC v. Porche, No. 14-18-00473-CV, 2020 WL 1620535 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020) (mem. op.).

A turnover order against a partner’s interest in a limited partnership was entered in favor of the limited partnership and two other parties in partial satisfaction of a judgment against the partner obtained in a prior suit initiated by the partner. The court rejected the argument that the trial court lacked subject-matter jurisdiction over this lawsuit in which the partner asserted various claims in connection with the turnover order.

Appellants SGG, LLC, Storm Guardian Generators, LP, and Ronnie Boegler II obtained a judgment against Jared Porche for attorney’s fees incurred in a lawsuit initiated by Porche. Appellants obtained a turnover order requiring Porche to turn over to them his 33.9% partnership interest in Storm Guardian Generators in partial satisfaction of the appellants’ judgment against Porche. Porche filed this lawsuit seeking a valuation of his former

partnership interest in Storm Guardian Generators, reimbursement of any overpayment that may have occurred on the underlying judgment as a result of the turnover of his former partnership interest, and other claims (constructive trust, breach of fiduciary duty, etc.) relating to any overpayment of the underlying judgment. The case was tried to a jury, which determined that the fair market value of Porche's partnership interest was \$123,000. Because the amount of the underlying judgment plus attorney's fees incurred in the turnover proceeding totaled only \$77,500, the court awarded \$45,500 to Porche in this case.

The only issue raised by appellants on appeal was the trial court's subject-matter jurisdiction over Porche's claims in this suit. The court rejected the argument that this case was a collateral attack on the turnover order. The court characterized appellants' complaints on appeal as an attack on Porche's right to the relief he sought in his lawsuit, which was not a question of jurisdiction. Because appellants did not show that the trial court lacked subject-matter jurisdiction, the court overruled appellants' single issue on appeal and affirmed the trial court's judgment.

L. Attorney's Fees

GR Fabrication, LLC v. Swan, No. 02-19-00242-CV, 2020 WL 2202325 (Tex. App.—Fort Worth May 7, 2020, no pet. h.) (mem. op.).

The court held that the evidence was sufficient to support the existence of a partnership between two individuals, breach of the partnership agreement, and damages. The court remanded on the issue of attorney's fees because the prevailing partner failed to segregate his attorney's fees for his claim for breach of the partnership agreement from his other claims or show that segregation was impossible and that all the claims were intertwined.

Swan and Swartzwelder were involved in various aspects of oil and gas production. Swartzwelder formed an entity to sell equipment that the men acquired and refurbished, but the two men disagreed as to the terms of their business arrangement, with Swan claiming that they had a partnership and Swartzwelder claiming that there was no partnership and that Swan was paid salary and bonuses through another company of Swartzwelder's that employed Swan. The jury found that Swartzwelder breached his partnership agreement with Swan and awarded \$110,000 in damages. While Swan alleged a breach of partnership claim, for which attorney's fees are recoverable, he also pursued theories for which attorney's fees are not recoverable, including breach of fiduciary duty, shareholder oppression, and fraud. These other claims were resolved against Swan through dispositive motions and an appeal, and Swan thus bore the burden to demonstrate that his counsel's efforts in support of his unrecoverable claims were intertwined with and served the ends of his recoverable claim. Because Swan offered no evidence to show that these efforts were intertwined, he did not carry his burden to show that segregation was impossible. However, a failure to segregate attorney's fees does not necessarily preclude recovery of attorney's fees. A court may remand the issue for a new trial on attorney's fees, which the court in this case did.

Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP, 599 S.W.3d 618 (Tex. App.—Dallas 2020, no pet. h.).

On appeal of a take-nothing judgment in favor of the Residences at Riverdale L.P. and the Residences of Riverdale, GP, LLC, the appellant challenged the trial court's decision to vacate a judgment awarding it damages and attorney's fees. Although the appellate court reversed the take-nothing judgment against appellant on the breach of contract claim, it held that Chapter 38 of the Texas Civil Practice and Remedies Code denied appellant recovery of attorney's fees from either of the Riverdale entities because Section 38.001 does not permit the award of attorney's fees against limited liability partnerships, limited liability companies, or limited partnerships. The court also foreclosed appellant's argument that the Riverdale entities were required to deny their corporate status under Tex. R. Civ. P. 93 or claim an "exemption" from Chapter 38 as an affirmative defense under Tex. R. Civ. P. 94. The court not only rejected language to the contrary found in *County of El Paso v. Boy's Concessions, Inc.*, 772 S.W.2d 291, 293 (Tex. App.—El Paso 1989, no pet.), but noted that the Riverdale entities appropriately raised the Chapter 38 issue in a motion for directed verdict, motion to modify the judgment, and judgment notwithstanding the verdict.

Shannon Medical Center v. Triad Holdings, III, L.L.C., 2019 WL 6606406, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2019, no pet. h.).

In this suit for judicial dissolution brought by the managing general partner of a limited partnership, the court held that judicial dissolution on the ground that it was not reasonably practicable to carry on the partnership's

business in conformity with its governing documents was unwarranted because there was no deadlock. The court also held that the partnership agreement could not and did not disclaim the managing general partner's duty of care to the partnership, and there was evidence that the managing general partner breached its statutory duty of care and of actual damages. There was no evidence, however, to support a disgorgement award because there was no evidence of the extent to which the managing general partner profited from excess rent paid by the limited partnership to the subsidiary of the managing general partner.

The court remanded for further proceedings on attorney's fees in view of the reversal of the disgorgement award. The court first pointed out that, under the statute in effect at the time of trial, a trial court had discretion to award the plaintiff reasonable attorneys' fees and expenses if the plaintiff is wholly or partly successful in prosecuting a derivative action. Tex. Bus. Orgs. Code § 153.405. In addition, the partnership agreement provided that the prevailing partner in litigation between partners relating to the partnership "shall be entitled to recover, in addition to all damages allowed by law and other relief, all court costs and reasonable attorney's fees incurred in connection therewith from the Partner or Partners not prevailing." Based on these provisions, the trial court ordered the losing partner to pay the prevailing partner's fees, expenses, and court costs incurred in pursuing the individual and derivative claims. The trial court also conditionally awarded additional attorney's fees in the event of appeal. The court of appeals agreed with losing partner that reversal of the judgment required remand for a new trial solely on the issues of attorneys' fees, reasonable expenses, and costs, and the court instructed the trial court to condition any award of appellate attorneys' fees on a successful appeal.

M. Standing or Capacity to Sue

Malouf v. Sterquell PSF Settlement, L.C., No. 05-17-01343-CV, 2019 WL 5799988 (Tex. App.—Dallas Nov. 7, 2019, pet. filed) (mem. op.).

The court of appeals affirmed the trial court's judgment that Sterquell PSF was a limited partner and could therefore assert claims for breach of fiduciary duty and breach of contract against the general partner and its sole manager. The court also upheld the trial court's award of exemplary damages and attorney's fees.

In 1996, Hapsmith Texas Corporation entered into a Reimbursement Agreement which entitled it to receive future payments from the City of Irving. In 2002, 635 LP, a Texas limited partnership, acquired Hapsmith's interest in the Reimbursement Agreement. 635 LP's general partner was 635 LLC.

In 2008, Matt Malouf and Steve Sterquell formed Irving Reimbursement, LLC ("IRLLC") for the sole purpose of acquiring 635 LP's right to receive the payments under the Reimbursement Agreement. IRLLC had three members at its inception: Matt Malouf, IRA owned 45%; Sterquell Profit Sharing Trust (the "Trust") owned 45%; and American Housing Foundation, of which Sterquell was President, owned 10%. Malouf and Sterquell were IRLLC's managers, and IRLLC ultimately acquired sole ownership of both 635 LP and 635 LLC (IRLLC came to own a 99% limited partner interest in 635 LP, and 635 LLC owned a 1% general partner interest).

In 2009, Sterquell died. His creditors and others filed lawsuits against his estate and a bankruptcy proceeding ensued. A group of Sterquell's creditors formed Sterquell PSF to receive and manage assets obtained through settlement proceedings. Pursuant to those proceedings, the Trust assigned Sterquell PSF its 45% interest in IRLLC and "whatever interest" it held in 635 LP.

After Sterquell's death, Malouf became the sole manager of both IRLLC and 635 LLC. He signed tax returns for IRLLC which indicated that IRLLC had transferred all of its assets in 2011. He also signed tax returns for 635 LP in 2012, 2013, and 2014, all of which listed Sterquell PSF as a 635 LP partner.

Sterquell PSF filed a lawsuit against Malouf, 635 LP, 635 LLC, and Minerva Partners (collectively "Appellants") in March 2015. Among other allegations, it contended that it was a partner in 635 LP and that 635 LP, as the general partner, had made \$305,000 of improper payments to Minerva, an entity owned and managed by Malouf. It also alleged that Malouf had made an unauthorized transfer of \$2,290,449.65 from 635 LP to Malouf's IRA. Sterquell sought a declaration that it was entitled to a share of the Reimbursement Agreement payments that 635 LP had received in 2014 and 2015 and, among other claims, it asserted breach of fiduciary duty and breach of contract. The defendants contended that Sterquell PSF had no limited partner interest in 635 LP and therefore "lack[ed] standing" to bring its claims.

After a bench trial, Sterquell PSF was awarded actual and exemplary damages against Malouf individually, plus prejudgment interest and attorney's fees. The trial court also issued findings of fact and conclusions of law

supporting Sterquell PSF's recovery on the grounds of breach of fiduciary duty, breach of the 635 LP partnership agreement, theft, conversion, misappropriation of fiduciary property, and fraud.

On appeal, the court noted that, although the question of whether a party is entitled to sue on a contract is often referred to as a question of standing, it is not truly a standing issue because it does not affect the jurisdiction of the court. Instead, it is a challenge to capacity and, unlike standing, a challenge to a party's capacity to participate in a suit can be waived and tried by consent.

Appellants asserted that the trial court erred in concluding that Sterquell PSF was a partner in 635 LP and therefore could assert claims for breach of fiduciary duty and breach of contract regarding Malouf's management of 635 LP and 635 LLC. Sterquell PSF argued that Malouf's failure to deny partnership status under oath (pursuant to TRCP 93(5)) resulted in an admission of partnership with Sterquell PSF that could not be controverted at trial. The court of appeals disagreed:

To the extent Sterquell PSF contends appellants waived their right to challenge ... Sterquell PSF's status as a 635 LP partner, we disagree. Although appellants did not file a rule 93 verified "denial of partnership," the record shows Sterquell PSF did not assert their "admission" argument below. Rather, Sterquell PSF's claimed status as a 635 LP partner was a primary focus of both sides' arguments at trial. On this record, we conclude capacity was tried by consent.

The court of appeals went on to conclude that the evidence was "legally sufficient to support the trial court's findings that Sterquell PSF [was] a partner in 635 LP and therefore could properly assert claims for breach of contract and breach of fiduciary duty":

The record shows Malouf (1) fully controlled IRLLC and 635 LLC, the general partner of 635 LP; (2) signed IRLLC's 2011 federal income tax return, which stated it was a "final" return and described "distribution" and "transfer" of all of IRLLC's assets during 2011, resulting in total IRLLC assets of "0"; and (3) signed 635 LP's tax returns in 2012, 2013, and 2014, all of which listed Sterquell PSF as a 635 LP partner and owner. Additionally, at trial, (1) Malouf testified 635 LP's 2011 tax accountant was Mike Carter; (2) Sterquell PSF introduced into evidence a handwritten note on Carter's file copy of 635 LP's 2011 tax return that stated "Per T/C w/Matt, Irving Reimbursement transferred its 99% interest to Matt Malouf IRA (49%) and Sterquell PSF Settlement, LC (50%);" and (3) Malouf testified he does not "deny telling [Carter] that."

In light of that evidence, appellants' arguments that the record contains no "asset transfer agreement or assignment" and that "the contents of a tax return cannot change or affect the parties' legal relationships" are immaterial. The evidence described above allows for reasonable inferences that Malouf, acting within his authority as manager of both IRLLC and 635 LLC, (1) directed the transfer of a portion of IRLLC's interest in 635 LP to Sterquell PSF and (2) obtained unanimous consent of 635 LP's partners—which were fully controlled by him—to make Sterquell PSF a "substitute limited partner" in 635 LP.

Appellants claimed that there was no legal basis for the recovery of exemplary damages, but the court observed that a recovery for breach of fiduciary duty is not limited to an accounting of profits received by the fiduciary; it can also include exemplary damages. Given the breach-of-fiduciary-duty finding by the trial court, the court disagreed that there was no legal basis for the award. The court of appeals also noted the trial court's finding that Malouf had committed fraud.

With respect to the award of attorney's fees, Appellants only argued that the trial court's rulings on declaratory judgment, breach of contract, and civil theft were subject to reversal. Other than that argument, Appellants did not explain how the attorney's fee award was improper. The court stated that "based on our conclusion above that appellants' sole basis for challenging liability for breach of contract—lack of capacity—is without merit, we disagree with their contention that there is no basis for awarding attorney's fees. See CIV. PRAC. & REM. § 38.001 (allowing for attorney's fees recovery if claim is for 'an oral or written contract')."

Neutra, Ltd. v. Terry (In re Acis Capital Management, L.P.), 604 B.R. 484 (Bankr. N.D. Tex. 2019) ("Equally important to deciding whether Neutra has standing is the 'shareholder standing rule,' which is 'a

longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation' absent special circumstances. The doctrine derives from the third-party standing rule: 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' This court has recognized that '[u]nder federal common law [and] Texas law ... only a corporation and not its shareholders, not even sole shareholders, can complain of an injury sustained by, or a wrong done to, the corporation.' Although the rule is phrased in terms of corporations and shareholders, it applies with equal force to limited partnerships like Acis LP. It also applies to limited liability companies like Acis GP." (citations omitted)).

Stephens v. Three Finger Black Shale Partnership, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed).

The court of appeals rejected a claim that a partnership did not have standing to sue and concluded that two alleged partners had standing to pursue causes of action in the name of the partnership.

Richard Raughton, Lowry Hunt, Chester Carroll, and Kerwin Stephens each pledged to acquire oil and gas leases and options for such leases in Fisher County (the "Project"). They had no written agreement; instead, they operated on a "handshake." When they needed additional money to continue the Project, they recruited Tom Taylor, an oil and gas investor. The parties eventually entered into a letter agreement known as the "Alpine Letter Agreement." Those named in the Alpine Letter Agreement as members of the "Alpine Group" were (1) Alpine Petroleum (by Carroll); (2) Thunderbird Oil & Gas, LLC (by its sole member, Stephens); (3) Arapaho Energy, LLC (by its manager, Raughton); and (4) L.W. Hunt Resources, LLC (by its manager, Hunt). Paradigm Petroleum Corporation, acting through its president, Taylor, was also a party to the Alpine Letter Agreement, but was not a member of the Alpine Group.

The Alpine Letter Agreement contained a provision that Paradigm was to contribute \$4,500,000 to the project and that the Alpine Group was to contribute, collectively, \$500,000. The Alpine Group agreed to transfer to Paradigm all of the oil and gas leases and options "that it holds," and future leases and options were to be taken in Paradigm's name. Decisions as to future leases and options, the scope of the Project, and the terms of any future leases and options were at Paradigm's sole discretion and direction. The agreement also contained provisions for the division of the proceeds from sales. After payout, proceeds from sales of oil and gas leases were to be paid 82% to Paradigm and 18% to the Alpine Group. Although Thunderbird Land was not a named party to the Alpine Letter Agreement, the named parties specified that Thunderbird Land, Stephens's wholly owned landman entity, was to provide landman services for the project and that it would "charge its normal customary rates" for those services.

Taylor found investors who agreed to provide a portion of Paradigm's \$4,500,000 contribution. The investors signed a "Participation Agreement" that referred to the investors in some places as "Parties" and in other places as "Partners." Paradigm was not a partner, but Trek Resources, Inc. and Tiburon Land and Cattle were two of the eight named partners in the agreement. Ultimately, Trek and Tiburon pleaded that the Participation Agreement resulted in the creation of a partnership known as Three Finger Black Shale Partnership. By the terms of the agreement, Paradigm was to contribute \$1,000,000; each of the additional parties agreed to contribute \$500,000 each. The agreement contained other terms by which the signatories defined their relationship. Paradigm was to receive a 20% interest before payout and a 36% interest after payout; each of the other parties was entitled to a 10% interest before payout and an 8% interest after payout. Each of the parties was also entitled to its percentage interest in any overriding royalties that were reserved in sales of the leases. The Participation Agreement was later amended to (a) substitute Lazy T Royalty Management, Ltd. for Paradigm, (b) reduce Paradigm's status to "agent for the Parties," and (c) add the Alpine Group as a party.

In January 2012, Devon Energy Production Company, L.P. agreed to buy 25,000 net mineral acres of oil and gas leases for \$900 per acre. The Devon agreement included an "option" provision whereby Devon agreed that it would not take oil and gas leases from Fisher County mineral owners directly. In return, Devon was given the right to purchase additional Fisher County acreage that Paradigm and its associates might acquire in the future.

Although the Participation Agreement proposed that 25,000 net mineral acres were involved in the Project, Devon's initial purchase comprised leases on 30,000 net mineral acres. As a part of the Devon transaction, Devon was to make a down payment of \$2,500,000 and was to pay the balance of the \$22,500,000 purchase price upon delivery of an assignment of the leases from Paradigm and Carroll to Devon.

The evidence showed that Taylor, Stephens, and Carroll, knowing that Devon was interested in acquiring leases of more mineral acreage, continued to buy Fisher County oil and gas leases, but they did so on their own to

the exclusion of the “Partners” in the amended Participation Agreement and, to some extent, Raughton and Hunt Resources. The record contains evidence that Taylor, Stephens, and Carroll used money from the initial sale to Devon—money that belonged to Plaintiffs—to fund the acquisition of the additional acreage. At some point in time, it came to light that Taylor, Stephens, and Carroll had sold leases on more than the initial 30,000 acres but that the proceeds of those sales were not shared with those involved in the Participation Agreement. When it did not receive satisfactory responses to its inquiries about the additional acreage, Tiburon filed a lawsuit. Trek and Three Finger were eventually added as plaintiffs, and Raughton and Hunt Resources later intervened in the suit.

Three Finger basically claimed that Taylor, through Paradigm and Lazy T, breached fiduciary duties owed to Three Finger in connection with the calculation and distribution of the proceeds from the sale of leases on the initial 30,000 acres. Three Finger claimed that through creative (albeit dishonest) accounting, Taylor made it appear that he, through his entities, had funded his required contribution when he had not fully funded it. Three Finger also claimed that Stephens and his Thunderbird-related entities had knowingly participated in those breaches. As the court summarized: “There are other claims, but, at this point, suffice it to say that Three Finger basically takes the position that one or more of the appellants [Stephens, Stephens & Myers, LLP, the Thunderbird-related entities, and Carroll], individually or collectively, had lied, cheated, and stolen from them and overtly, covertly, silently, and via creative accounting procedures had attempted to execute a cover-up of their ill-intentioned activities. The result of those activities, as well as overcharges by Thunderbird Land, was that Three Finger did not receive its rightful share of the profits from the sale of either the initial deal for 30,000 acres or in connection with the sales of additional acreage.”

At trial, Three Finger was awarded actual damages of \$4,560,433 against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources, jointly and severally, specifically for, as stated by the trial court in its judgment, “injuries sustained because of [A] the contribution failures of entities affiliated with ... Taylor and [B] Thunderbird Land’s role in determining and charging expenses to the Project for the Initial 30,000 Acres.” (Taylor had died before trial and the plaintiffs settled their claims against Taylor’s estate and his entities before trial began.) Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources under its equitable powers to award “disgorgement and restitution.” The trial court also awarded Three Finger a judgment against Stephens, Thunderbird Land, and Carroll, jointly and severally, in the amount of \$6,584,440 for damages that related to Three Finger’s exclusion from transactions over and above the initial 30,000 acres. Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Land, and Carroll under its equitable powers to award “disgorgement and restitution.”

Stephens and the Stephens-related entities argued that Three Finger did not have standing to sue for any duties owed by Paradigm, nor did Three Finger have standing to recover any “distributions” awarded in connection with the sale of the initial 30,000 acres. The court of appeals discussed the issues of standing to sue and capacity to sue. According to the court, “[a] plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.” The court noted that Trek and Tiburon alleged that they were partners in Three Finger and concluded that they had standing to pursue the causes of action in the name of Three Finger. In the alternative, the court determined that if the issue is one of capacity, Stephens and the Stephens-related entities waived that issue when they failed to raise it in the trial court.

See also Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.—Corpus Christi Mar. 5, 2020, no pet. h.) (mem. op.); *Cooke v. Karlseng*, No. 05-18-00206-CV, 2019 WL 3812060 (Tex. App.—Dallas Aug. 14, 2019, pet. filed) (mem. op.) summarized below under “Direct and Derivative Claims.”

N. Direct and Derivative Claims

Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.—Corpus Christi Mar. 5, 2020, no pet. h.) (mem. op.).

The court held that a co-trustee of a trust that was a limited partner did not have the right to sue derivatively on behalf of the limited partnership where a majority of the co-trustees and the other limited partner opposed the derivative suit and determined it was not in the best interest of the partnership. The court held that the filing of a memorandum of lease in the real estate records did not constitute constructive notice to the co-trustee for purposes

of his claim for breach of fiduciary duty because deed records do not furnish constructive knowledge to a property owner of subsequent impairments to title.

Marvin and Laura Berry acquired a ranch in 1960 and created the Flying Bull Limited Partnership in 1996. They assigned a 2% general partner interest to FB Ranch, LLC (FB Ranch) and split between themselves the interests as limited partners. Marvin died in 1997. At some point, the Berry Dynasty Trust (“the Trust”) received a limited partner interest for which the Berrys’ four sons served as co-trustees. There were several other Berry-related entities, including an entity known as Berry Contracting that leased the ranch and made regular lease payments to the limited partnership from 2000 to 2005. In 2000, after a family dispute, Kenneth Berry (Marvin and Laura’s son) resigned from nearly all of his functions within the family enterprises, and the family entered into a global release in 2005 under which Kenneth released certain Berry companies and individual family members in all capacities and they similarly released him from all causes of action related to facts that existed at that time.

In 2005, Kenneth sought lease and partnership records in his capacity as co-trustee of the Trust. In 2007, the limited partnership and Berry Contracting signed and recorded a lease agreement through 2024, back-dated to 2000. Several years thereafter, Kenneth continued to pursue partnership records and tax filings related to the Trust, including a 2014 demand for an accounting pursuant to the Texas Trust Code. These requests continued until 2016 when Kenneth and his trust-beneficiary daughter filed suit derivatively and individually against Kenneth’s co-trustees and all of the Berry-related entities. The suit alleged, *inter alia*, breaches of fiduciary duty, breach of the partnership agreement, and breach of the 2005 release agreement between Kenneth and other family members and Berry entities. He also sought an accounting and a declaratory judgment declaring that contracts and agreements in violation of the partnership agreement and fiduciary duties were void.

In response, the defendants filed a plea to the jurisdiction and a motion for summary judgment on statute-of-limitations grounds. The defendants entered into a consent and release agreement among themselves pursuant to which they rectified Laura’s inadvertent mishandling of lease payments owed to the ranch and released Laura from any liability related to the payments, modified the lease agreement, and declared that none of them believed that the suit was in the best interest of the Trust or the limited partnership. The trial court granted the plea to the jurisdiction as to Kenneth’s standing in a derivative capacity on behalf of the partnership and granted defendants’ motion for summary judgment as to limitations. Certain disputes were severed, and after a bench trial on the issue of attorney’s fees, the court awarded attorney’s fees in various amounts to Kenneth and the various defendants.

On appeal, Kenneth challenged the trial court’s ruling that he did not have standing to sue derivatively on behalf of the partnership in his capacity as co-trustee of the limited partner and the trial court’s summary-judgment ruling as to limitations.

With respect to Kenneth’s standing to sue derivatively on behalf of the limited partnership, the appellate court examined the Texas Trust Code, the Texas Property Code, and the Texas Business Organizations Code. The court pointed out that under Tex. Bus. Orgs. Code §§ 153.402 and 153.403, a limited partner has no right to sue on behalf of the limited partnership if the limited partner does not fairly and adequately represent the interests of the partnership. Further, the court took note that under Tex. Prop. Code § 113.85(a) trustees act on behalf of a trust by majority decision. Additionally, Texas case law limits a beneficiary’s ability to bring suit on behalf of a trust absent a trustee’s wrongful refusal to bring suit. Accordingly, in light of Chapter 153 of the Texas Business Organizations Code, the release agreement entered into among the defendants demonstrating a majority decision pursuant to Tex. Prop. Code § 113.85(a), and Texas case law, neither the Trust, as a limited partner, nor a trust beneficiary could sue third parties on behalf of the limited partnership. Consequently, the court affirmed the trial court’s judgment with respect to the issue of standing.

VTX Communications, LLC v. AT&T Inc., Civil Action No. 7:19-CV-269, 2020 WL 918670 (S.D. Tex. Feb. 26, 2020).

Limited partners of several Delaware limited partnerships brought a derivative suit against the general partner and affiliated entities of the general partner, and the defendants removed the case based on federal question jurisdiction. Because the defendants removed the case without the consent of the partnerships, the plaintiffs sought remand. The court held that the partnerships were nominal defendants whose consent was not required for removal.

The limited partners of several limited partnerships that operated AT&T branded wireless networks sued the general partner and affiliated entities of the general partner, including Cricket Communications, LLC and Cricket Wireless LLC, following AT&T’s acquisition of Cricket, contending that AT&T used the partnerships’ networks to operate Cricket as a separate wireless network in competition with the partnerships, withheld from the

partnerships and overcharged the partnerships for spectrum licenses, and failed to allocate and share with the partnerships certain revenue streams. The plaintiffs brought their lawsuit individually and derivatively in state court alleging breach of fiduciary duty, breach of the partnership agreements, and other causes of action under state law. The plaintiffs joined the partnerships as well as the defendants described above. During the pendency of the litigation, the defendants other than the partnerships removed the case based on language in the plaintiffs' second amended petition that the defendants claimed provided a basis for federal question jurisdiction under the Foreign Intelligence Surveillance Act (FISA). The plaintiffs moved to remand on several grounds, including that the partnerships did not consent to removal.

The plaintiffs argued that the partnerships were properly aligned as defendants because they were dominated and controlled by the other defendants (the defendants other than the partnerships are hereinafter referred to as "the defendants") and were thus adverse to the plaintiffs. The defendants argued that the partnerships were not indispensable parties because the plaintiffs established no cause of action against the partnerships. The defendants further argued that the partnerships were nominal defendants whose consent for removal was unnecessary. The court agreed that the partnerships were nominal defendants whose consent to removal was unnecessary.

When a civil action is removed based on federal question jurisdiction under Section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action. The test for establishing a nominal party is the same for diversity and federal question jurisdiction and requires the removing parties to show that there is no possibility that the plaintiff would be able to establish a cause of action against the non-removing defendants in state court. The plaintiffs relied on *Bankston v. Burch* in which the limited partner's claims for dissolution, removal of the general partner, injunctive and declaratory relief, and punitive damages were almost entirely derivative, and the Fifth Circuit Court of Appeals held that the partnership was not only a real party in interest, but an indispensable party. The defendants argued that *Bankston* was distinguishable from this case because the plaintiffs here expressly requested that all relief go to the limited partners, and the controlling Delaware law does not require claims to be brought derivatively like the Hawaii and New York law involved in *Bankston*. The defendants relied on *Moss v. Princip*, in which two plaintiff partners sued two defendant partners and the partnership. The defendant partners removed to federal court, and after an adverse jury verdict, the defendant partners sought dismissal on the basis that the defendant partnership destroyed diversity. In *Moss*, the Fifth Circuit Court of Appeals held that the partnership was a dispensable party that could be dismissed because the partnership was fully represented by each of its partners, all of whom were before the court. Although the plaintiffs in *Moss* raised claims for damages derivative of the partnership's rights, the court held that the partnership's presence in the suit was not necessary to protect the partnership or any of the parties from prejudice. Throughout the litigation, the partnership had been purely passive, reflecting that its interests did not diverge from the interests represented by the four individual partners and that its presence played no distinct role in the outcome of the suit. Although the court in *Moss* held that the partnership was a dispensable party rather than a nominal party, the court found *Moss* persuasive in this case. The court stated:

In the instant case, as in *Moss*, the Partnerships are fully represented by their general and limited partners in this action. In fact, the Partnerships are represented as both Plaintiffs and Defendants. This action seeks to compensate the Partnerships' partners for alleged revenues due without disrupting or disturbing the Partnerships' assets or networks, the clear source of revenue. "[T]he key inquiry is whether the suit can be resolved without affecting the non-consenting nominal defendant in any reasonably foreseeable way." [footnote omitted] Plaintiffs fail to provide the Court with a substantive argument as to why *Moss* would not apply, and only put forth an attempt to circumvent the crux of *Moss* by highlighting the terms "dispensable" and "nominal." Plaintiffs, however, fail to distinguish the considerations set out in *Moss*. Furthermore, as already noted, the Partnerships are also represented by Plaintiffs in this case. Thus, the interest of the Partnerships is protected by Plaintiffs.

The Court also finds a Fourth Circuit opinion persuasive here: "All these tests—in discussing indispensable parties, necessary parties, or what removing parties must show about non-consenting parties—may provide useful insights but they have strayed from the fundamental inquiry. They over-massage what ought to be a straightforward examination of the meaning of the word "nominal" and the reasons for having the nominal party exception. Nominal means simply

a party having no immediately apparent stake in the litigation either prior or subsequent to the act of removal.”[footnoted omitted] Because the Partnerships have no apparent stake in this litigation, which concerns a compensation dispute among the partners of the Partnerships, the Court finds the Partnerships are nominal defendants and Defendants did not need the Partnerships’ consent for removal.

Thus, the court concluded that the defendants’ removal was procedurally proper.

Cooke v. Karlseng, No. 05-18-00206-CV, 2019 WL 3812060 (Tex. App.—Dallas Aug. 14, 2019, pet. filed) (mem. op.).

The court of appeals reversed the trial court’s order that denied a plea to the jurisdiction because the injuries alleged by the plaintiff were injuries to business entities and not to the plaintiff individually. For similar reasons, the court of appeals also reversed the trial court’s order that denied summary judgment on limitations for the plaintiff’s derivative claims.

Cooke and Robert Karlseng formed a partnership, Title Partners, L.L.P., to provide title closing services to lenders and real estate companies. The business expanded to several Texas cities and eventually involved other partnerships with Ashley Patten and Jacques LeBlanc. (The partnerships were mostly limited partnerships with corporate general partners; collectively the “Business Entities.”) In 2004 and 2005, the Texas Department of Insurance (“TDI”) conducted an investigation of the partnerships to determine whether a licensed attorney was supervising the work of certain employees who were closing real estate transactions. Although counsel for the partnerships advised that the business relationship was legal, he also suggested that switching to a law firm structure could expedite a resolution with TDI. Thereafter, Karlseng, Patten, and LeBlanc (all attorneys) created law firms and transferred partnership assets and business to the new firms without paying Cooke or observing the requirements of the partnership agreements when transferring the assets.

In March 2006, Cooke filed a lawsuit alleging that partnership assets were tortiously transferred to new professional corporations owned solely by Karlseng, Patten, and LeBlanc. The lawsuit included individual claims for breach of fiduciary duty and misrepresentation. An amended petition in 2014 added the Business Entities as plaintiffs and stated that the claims were being brought individually by Cooke and derivatively on behalf of the entities.

Cross-appellants (primarily Karlseng, Patten, and LeBlanc) first argued that Cooke lacked standing to bring his individual claims because they belonged to the Business Entities. The trial court denied this plea to the jurisdiction. On appeal, the court noted that Cooke was a limited partner of the partnerships in 2006, but it stated that “[a] limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner’s interest.” Cooke acknowledged that his original claim for breach of fiduciary duty, as well as his later-added claims for breach of contract, conversion, shareholder oppression, unjust enrichment, and money had and received, were all “premised on [cross-appellants’] decision to stop sharing partnership proceeds with Mr. Cooke, move all of the assets and business goodwill of the Title Businesses to law firms without paying fair market value to Cooke, and mislead him on their actions.” According to the court, Cooke conceded that those claims were rooted in “harm done to Mr. Cooke as a partner, [by] eliminating the value of his partnership interest.” The court concluded that “[i]t is readily apparent ... that Cooke lacked standing to bring these claims individually.”

Cooke argued, however, that his 2006 claim for fraud and his later-added claim for negligent misrepresentation presented claims of individual harm distinct from the partnership. He asserted that cross-appellants falsely told him that the partnerships needed to be shut down, thereby “misleading [him] into thinking that he would be fully compensated for the value of the partnership business that they took to their law firms.” He contended that he was kept away from the TDI audit, not informed of the “real reasons” for moving operations to the law firms, and “strung along” to continue managing the companies. He argued that he relied on cross-appellants’ misrepresentations and omissions “on the understanding that he would receive fair compensation for the conversion of the business to the law firms.” The court of appeals noted that Cooke never pleaded separate or different injuries for his fraud or negligent misrepresentation claims. Instead, as for all of his claims, he complained that he was not compensated for the value of his partnership shares and for the partnerships’ assets and businesses. As the court observed: “We do not question that Cooke felt the economic impact of the losses he alleges. However, [t]hese damages, although cast as personal damages, belong to the partnership[s] alone.” We conclude that Cooke’s fraud and negligent misrepresentation claims did not allege an individual injury.

Accordingly, all claims that Cooke filed in 2006—and all claims that he added later as individual claims—alleged injuries that legally belonged to the Business Entities.”

Cooke then argued that he had standing in 2006 to individually assert any claims that belonged to the Business Entities. His argument was rooted in his interpretation of § 21.563(c)(1) of the Business Organizations Code: “If justice requires ... a derivative proceeding brought by a shareholder of a closely held corporation may be treated by a court as a direct action brought by the shareholder for the shareholder’s own benefit.” The court disagreed with Cooke’s argument:

Cooke argues that this statute creates an identity between his individual claims and any derivative claims, because the latter may be treated as “direct” actions. He states that “[a]lthough it is true that the claims are injuries to the organization and thus derivative, the statute itself makes a clear distinction between this direct procedure and a typical derivative proceeding.” And he goes on to posit that, pursuant to this statute, “the question is *not* whether the injuries are to Cooke or to the corporation. It is whether he can sue individually for those corporate injuries *as though they were personal*.” (Emphasis in original.) He concludes that section 21.563 permits such a procedure. But it does not.

Section 21.563 does not turn a derivative claim into an individual claim. This Court has concluded that although the statute permits a court to “treat a derivative action as a direct action by a shareholder, the claims remain vested in the corporation.” *2055 Inc. v. McTague*, No. 05-08-01057-CV, 2009 WL 2506342, at *8 (Tex. App.—Dallas Aug. 18, 2009, no pet.) (mem. op.). Rather than transforming the nature of the plaintiff’s claim, the statute permits the trial court to award damages in a derivative proceeding directly to the shareholder “if necessary to protect the interests of creditors or other shareholders of the corporation.” BUS. ORGS. § 21.563(c)(2). Accordingly, “[a] trial court’s decision to treat an action as a direct action under Section 21.563 (c) so as to allow recovery to be paid directly to a shareholder plaintiff, as opposed to the corporation, does not mean that the action is no longer a derivative proceeding.” *Swank v. Cunningham*, 258 S.W.3d 647, 665 (Tex. App.—Eastland 2008, pet. denied).

Although Cooke contends that he was able to bring a derivative action in 2006, the fact remains that he did not. And despite his assertion to the contrary, the question before us is whether the injuries pleaded were to Cooke or to the Business Entities. We have concluded that the injuries were to the Business Entities.

We conclude Cooke lacked standing to assert his individual claims. If a plaintiff lacks standing to assert a claim, the court lacks jurisdiction over that claim and must dismiss it. The trial court should have dismissed Cooke’s individual claims. It erred by denying cross-appellants’ plea to the jurisdiction.

The cross-appellants also contended that, with respect to the derivative claims, the trial court erred in denying their summary judgment motion on limitations. They argued that the derivative claims brought on behalf of the Business Entities were asserted in Cooke’s Third Amended Petition on February 24, 2014, but the allegations underlying all of Cooke’s claims took place in 2005 and 2006. In response, Cooke relied on the doctrine of “relation back,” arguing that all of his derivative claims related back to his original filing in 2006. After discussing § 16.068 of the Civil Practice and Remedies Code, the court of appeals concluded that because Cooke lacked standing when he filed his original claims, there was nothing to which he could relate back:

We have concluded that Cooke lacked standing to assert his original individual claims. For that reason, the trial court never obtained jurisdiction over his claims. The doctrine of relation back cannot create jurisdiction where none existed. ... [A]ny injuries [Cooke] identified were not his own; they were injuries to the Business Entities. Cooke could not simply “change hats” and create jurisdiction in the trial court long after limitations had run. We conclude his derivative claims cannot relate back. Thus, those claims are barred by their respective statutes of limitations, and the trial court should have granted cross-appellant’s motion for summary judgment.

O. Divorce of Partner

Etheridge v. Opitz, 580 S.W.3d 167 (Tex. App.—Tyler 2019, pet. dismiss'd).

In a post-divorce action for division of several tracts of property that the ex-wife claimed were purchased by the couple during marriage and were not divided in the divorce decree, the court of appeals held that certain tracts were owned by the couple and other tracts were owned by a partnership formed during the marriage (the couple's community interest in the partnership was awarded to the ex-husband in the divorce). Thus, the ex-wife was entitled to partition of the tracts that were owned as community property, but the ex-wife had no interest in the tracts that were partnership property.

Jaime Etheridge brought a post-divorce action for division of six tracts of land purchased during her marriage to Eric Opitz. Jaime asserted that these tracts of land were community property that had not been divided in the divorce decree. The divorce decree awarded the couple's residence and the community interest in a dairy business known as Summit Dairy to Eric and imposed the debt associated with both the residence and Summit Dairy on Eric. Jaime was awarded \$50,000 for "her community interest in the marital residence and in the business known as Summit Dairy." The tracts of land at issue, title to which was held in the names of Eric and Jaime (and in the case of three of the tracts, in the names of Eric, Jaime, and Eric's parents), were not specifically mentioned in the divorce decree.

Eric's theory at trial, which was not pleaded by Eric, was that the property at issue was partnership property belonging to Summit Dairy, and Jaime complained that this assertion required a verified plea. The court of appeals held that Eric's assertion that the property was owned by the partnership under partnership law was not an argument of lack of capacity or a defect in parties and thus did not require a verified plea under Texas Rule of Civil Procedure 93.

At trial, the jury found that Jaime had no interest in any of the tracts, and the trial court entered judgment that Jaime take nothing on her claims of ownership in the six tracts of land. Jaime argued on appeal that the trial court erred in submitting an instruction that included the text of Tex. Bus. Orgs. Code § 152.102 regarding the classification of partnership property. The charge also included an instruction based on the presumption under the Texas Family Code that property acquired during marriage is community property. The court of appeals concluded that the trial court did not err in submitting the instruction on partnership property.

With regard to the sufficiency of the evidence, the court of appeals concluded that there was no evidence to rebut the community presumption as to three of the six tracts of land at issue. The first three tracts were acquired in 2002 in the names of Eric, Jaime, and Eric's parents. At this time, Eric and Jaime were married, but the partnership was not yet in existence. Eric attempted to rebut the community presumption with evidence that the properties were purchased with partnership funds, but the court pointed out that the partnership was not yet in existence at the time of the deeds and stated that "[t]he community character of the property is determined by the date of the deed, not by the date the purchase price is paid." In the absence of evidence rebutting the community presumption, the court examined the record for any evidence of a conveyance of these tracts to the partnership. "To convey to the partnership title to property owned by one partner at the formation of the partnership, or to make such property a partnership asset, there must be a written agreement, the same as any other contract for the sale of land." There was no evidence of such a conveyance. The court of appeals concluded that all vital facts in support of Jaime's community property interest were established as a matter of law. Thus, with respect to the three tracts, the court of appeals found the trial court erred in divesting Jaime of her community interest.

The court of appeals then examined the evidence relating to the remaining three tracts of land. The court found that there was sufficient evidence to support the implied finding that these three tracts were partnership property. These tracts were acquired in the names of Eric and Jaime after Eric and his father formed Summit Dairy as a partnership. Although these properties were presumptively community based on their acquisition during marriage, "Eric's testimony that the existing partnership paid for these properties, from the purchase date, is sufficient to rebut the community property presumption." The court stated that this testimony "also launched the presumption that the property is partnership property" pursuant to Tex. Bus. Orgs. Code § 152.102. The burden then fell on Jaime to rebut that presumption, and she did not do so. "Unlike the scenario involving the first three properties, when land is acquired for purposes of an existing partnership but is held in a partner's name, the partnership's claim to the land is not barred by the absence of a written document of conveyance.... Whether property used in the partnership operation is owned by the partnership is a question of intention." Both Jaime and Eric testified as to the payment of the down payment and monthly payments out of partnership funds, and Eric

testified that neither he nor Jaime ever wrote a personal check to pay for “anything on that property.” The court stated that this evidence showed that the parties intended the property to be partnership property, and it was of no consequence that legal title was in the names of Jaime and Eric or that Jaime was not a partner. Thus, the evidence supported the jury’s finding that Jaime had no interest in these three tracts, and the appellate court affirmed the trial court’s judgment as to the ownership of the tracts.

P. Bankruptcy

Southern California Sunbelt Developers, Inc. v. Grammar, No. 03-19-00192-CV, 2019 WL 7342249 (Tex. App.—Austin Dec. 31, 2019, no pet. h.) (mem. op.).

In the course of reversing a Rule 91a motion in favor of the defendants, the court recited and discussed Nevada limited partnership law regarding personal liability of the general partners of two Nevada limited partnerships, enforcement of such liability, exceptions to such liability, and contribution obligations of general partners of limited partnerships. The court also discussed the impact of bankruptcy law on the assertion of claims against non-debtor parties in the case given that the limited partnerships had filed bankruptcy.

Judgment creditors brought this suit in Texas to enforce cost awards that were entered against Donald Grammar and two limited partnerships formed by Donald Grammar in out-of-state litigation. The plaintiffs alleged that Donald Grammar and other family members evaded payment of the cost awards through a conspiracy to fraudulently transfer and hide assets in multiple alter-ego entities. The plaintiffs also sought a declaration that two general partners, Donald Grammar and an LLC owned by Grammar, were liable for the debts of the two limited partnerships. The trial court granted a Rule 91a motion dismissing the suit, and the plaintiffs appealed.

In the course of the appellate court’s discussion, the court recited provisions of the Nevada Limited Partnership Act governing personal liability of a general partner of a Nevada limited partnership, enforcement of such liability, exceptions to such liability, and contribution obligations of a general partner of a limited partnership. The court also discussed arguments raised under bankruptcy law. In the course of holding that the trial court erred in granting the Rule 91a dismissal motion, the appellate court held, *inter alia*, that the plaintiffs’ cost awards and fraudulent transfer claims were not property of the bankruptcy estates of the limited partnerships, the trial court failed to address various fact-dependent determinations relating to the general partners’ liability under non-bankruptcy law, and the automatic stay in the bankruptcy of the limited partnerships did not apply to the non-debtor defendants.

Red Honor Ventures, Ltd. v. Edmonds (In re Edmonds), Case No. 14-40375-MXM-7, Adv. No. 14-4027, 2019 WL 4780921 (Bankr. N.D. Tex. Sept. 30, 2019).

The bankruptcy court concluded that Red Honor Ventures, Ltd. (the “Plaintiff”) proved that its liquidated state-law claims against Robert Edmonds (the “Debtor”) were nondischargeable on several bases, including § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity.

Plaintiff was a Texas limited partnership formed to produce a museum guide for the National Scouting Museum, to produce other original-content publications, and to publish and distribute books of third parties. Red Honor Management, Inc. (“Management”) was the general partner of Plaintiff. The Debtor, Greg White, and David Scott were the limited partners.

The Plaintiff asserted a number of claims against Debtor, including breach of fiduciary duty and conversion, based on allegations that Debtor (a) never made his \$10,000 capital contribution to Plaintiff, (b) misappropriated Plaintiff’s funds for personal expenses, and (c) misappropriated a business opportunity of the Plaintiff. Debtor filed for bankruptcy, and the bankruptcy court first determined that Plaintiff had established liquidated state-law claims against Debtor in the amount of \$101,378.75. The court then addressed whether the claims were dischargeable.

Section 523(a)(4) of the Bankruptcy Code does not allow the “discharge [of] an individual from any debt ... for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” To bar discharge, the debtor must have been acting in a fiduciary capacity at the time of the alleged defalcation. With respect to fiduciary capacity, the court made the following observations:

While the scope of fiduciary duties is determined by federal law, federal courts, including the Fifth Circuit, often look to state law to determine whether an obligation exists. For example, in *In re Harwood*, [637 F.3d 615 (5th Cir. 2011),] the Fifth Circuit relied on *Crenshaw v. Swenson*

[611 S.W.2d 886 (Tex. Civ. App.—Austin 1980)] to hold that a managing partner of a partnership’s general partner owed the underlying partners “the highest fiduciary duty recognized in the law.” In accordance with state law, the court observed that the amount of control the director had over the company, and the confidence and trust placed into the director’s hands in managing the company’s operations, determined the scope of the director’s fiduciary duties. Where the business relationship shows that the director has a requisite degree of control over the business, and the director holds a considerable degree of trust from other partners, that director “act[s] in a fiduciary capacity ... within the meaning of Section 523(a)(4).”

In this case, the Partnership Agreement provides that each partner (including limited partners) agrees to act as a fiduciary of the Plaintiff with respect to matters of noncompetition, confidentiality, and other business opportunities. The Partnership Agreement also provides that “[e]ach Partner shall conduct the affairs of the Partnership in good faith toward the best interests of the Partnership.”

In addition, the Debtor was President of Management, which was the Plaintiff’s general partner. The Debtor was sole signatory for the Plaintiff’s bank accounts. Scott and White trusted the Debtor to conduct the Plaintiff’s financial affairs. There can be no dispute that the Debtor owed fiduciary duties to the Plaintiff and that the Debtor was acting in a fiduciary capacity.

With respect to defalcation, the court noted that defalcation requires a culpable state of mind involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior. As the court observed:

Prior to the Supreme Court’s ruling in *Bulloc[k] v. BankChampaign*, [569 U.S. 267 (2013),] circuit courts, including the Fifth Circuit, held that defalcation required recklessness, or a “willful neglect of duty.” This willful neglect did not require actual intent, but was an objective, recklessness standard that asked “what a reasonable person in the debtor’s position knew or reasonably should have known.” Stated simply, this standard required a “known breach of fiduciary duty, such that the conduct can be characterized as objectively reckless.”

Then, in *Bulloch*, the Supreme Court adopted a more stringent standard that required defalcation to rise to a greater level than “objectively reckless.” The Supreme Court determined that defalcation requires an intentional wrong (improper conduct expressly known to the fiduciary) or gross recklessness (“conscious disregard” to “a substantial and unjustifiable risk” that such conduct would violate a fiduciary duty). Generally, such a disregard involves a “gross deviation from the standard of conduct that a law abiding person would observe in the actor’s situation.”

Although the court concluded that Plaintiff did not prove the required culpable state of mind for the Debtor’s failure to make his capital contribution, the court did find that “the Debtor knew his conduct was improper, or at the very least, he was grossly reckless by demonstrating a conscious disregard to a substantial and unjustifiable risk that taking the Plaintiff’s funds for his personal use would violate his fiduciary duty to the Plaintiff.” Thus, Plaintiff proved the required culpable state of mind for defalcation in a fiduciary capacity to except from discharge the \$101,378.75 claim against the Debtor. The court also determined that Plaintiff met its burden to prove the required culpable state of mind for the Debtor’s actions in usurping a partnership opportunity, but Plaintiff failed to prove any damages from the usurpation. As the final part of its § 523(a)(4) analysis, the court concluded that the \$101,378.75 claim could be excepted from discharge under the embezzlement and larceny grounds because the Debtor knew that his misappropriation of Plaintiff’s funds for his own personal expenses was not authorized.

Section 523(a)(6) of the Bankruptcy Code excepts from a debtor’s discharge any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” The court found that this standard was met with respect to the \$101,378.75 claim: “By misappropriating the Plaintiff’s funds for his own personal use, knowing it was not allowed, and knowing that the Plaintiff needed the funds to continue operations, the Debtor had a subjective motive to harm the Plaintiff, or at the very least, there was an objective substantial certainty of harm.” The Plaintiff did not prove, however, that the claim for the \$10,000 contribution could be excepted from discharge under § 523(a)(6). Moreover, because the Plaintiff failed to prove damages from the usurpation of the partnership opportunity, that claim for nondischargeability under § 523(a)(6) also failed.

Finally, § 523(a)(2)(A) of the Bankruptcy Code provides that a debt will not be discharged to the extent the debt was obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” Plaintiff alleged that the Debtor (a) never made his \$10,000 capital contribution, (b) told Scott and White that Plaintiff was either losing money or just breaking even while misappropriating Plaintiff’s funds for personal purposes, and (c) never told Scott or White about the financial affairs of Plaintiff or provided Plaintiff’s bank statements, knowing that such disclosures would reveal the Debtor’s illicit use of the company’s funds.

The court noted that the Debtor’s promise to contribute \$10,000 was a mere promise to be performed in the future and was not sufficient to make the debt nondischargeable under § 523(a)(2)(A). In addition, the court stated that Plaintiff did not show any falsity in the Debtor’s alleged statement that Plaintiff was losing money or just breaking even. According to the court, it could not answer the question of whether Plaintiff would have been profitable absent the misappropriation because there was insufficient evidence to demonstrate how far underwater (or not) Plaintiff was made by the misappropriated funds. The court also found it difficult to give much credence to Scott’s complaint that the Debtor never told him about Plaintiff’s financial affairs or provided Scott with copies of Plaintiff’s bank statements. The court stated that “Scott was a limited partner who also had fiduciary duties to the Plaintiff,” “[t]here is no evidence that Scott ever asked to see the Plaintiff’s financial records until the very end of the Debtor’s tenure there,” and “there is no evidence that the Debtor ever hid or refused to provide such records to Scott.” Under these circumstances, the court rejected Plaintiff’s nondischargeability claim under § 523(a)(2)(A).

In conclusion, the court determined that Plaintiff proved a nondischargeable claim against the Debtor of \$101,378.75 under § 523(a)(4) and (a)(6), but failed to prove a nondischargeable claim under § 523(a)(2).

Trinkets and Tea, LLC v. Hunt (In re Hunt), 605 B.R. 758 (Bankr. N.D. Tex. 2019).

The court concluded that the objections to discharge asserted by Trinkets and Tea, LLC were without merit because, in part, the representations made by the debtor (Jeffrey Hunt) were not shown to be materially false when made and did not rise to the level of fraud or defalcation in a fiduciary capacity.

Jeffrey Hunt owned and operated retail tea stores under the name Tea 2 Go. Brooks Heise invested \$90,000 in two Tea 2 Go stores—\$50,000 in the “Hub” store and \$40,000 in the “Glenna” store. He made the investments through an LLC (Trinkets and Tea, LLC) that he owned. In exchange for the investments, Trinkets and Tea received a 10% partnership interest in the Hub store and a 49% partnership interest in the Glenna store. The other partner for both stores, and the entity to which the \$90,000 payment was made, was Tea 2 Go, LLC, which was owned by Hunt. Hunt was the designated manager of both general partnerships.

Hunt ran the businesses, at least in part, through the bank account of Tea 2 Go, LLC, the controlling general partner of both partnerships. From this account, Hunt made numerous payments and distributions on items not related to either of the two stores. Separate bank accounts and accounting records were not kept for the two stores.

Hunt eventually filed for bankruptcy. Trinkets and Tea objected to Hunt receiving a general discharge; alternatively, it objected to Hunt receiving a discharge of the specific debt owed to Trinkets and Tea.

Initially, the court found that it would not give collateral estoppel effect to a state court judgment finding in favor of Hunt on Trinkets and Tea’s breach of fiduciary duty claim. The court then discussed Hunt’s personal liability in the “two-tier” general partnerships at issue in the dispute (Tea 2 Go, LLC was a partner in both partnerships, and Hunt was the sole member of Tea 2 Go, LLC). After citing a number of basic partnership law principles (partners are liable to the partnership and the other partners for breach of the partnership agreement or a violation of duty to the partnership or the other partners that causes harm; partners owe a duty of loyalty and care; partners must exercise good faith and act in the best interests of the partnership when conducting partnership business; a partner doesn’t violate a duty or obligation “merely because” the partner’s actions further the partner’s own interests; the duty of loyalty requires, among other things, that the partner account to and hold partnership property and that the partner refrain from taking actions adverse to the partnership; the duty of care is measured by consideration of what an ordinarily prudent person would do under similar circumstances; the duty of care requires a partner to act on an informed basis, in compliance with the partner’s duties to the partnership, in good faith, and in the partnership’s best interest; individual partners may maintain actions against other partners “for legal or equitable relief” to enforce their rights under the partnership agreement or for breach of the duties of loyalty and care), the court framed its task as needing to determine if Tea 2 Go, LLC breached its duties to the partnership, and, if so, whether the court could impose that liability against Hunt, the sole manager of Tea 2 Go.

After discussing the bankruptcy decision of *In re Harwood* and the Fifth Circuit’s decision of *In re Bennett*, the court recognized that “where an individual substantially controls the actions of the named partner in a two-tier partnership arrangement, that individual could have a fiduciary duty to the partnership.” The court observed that despite Hunt’s attempt to avoid individual liability by creating a two-tiered entity, Hunt exercised a substantial degree of control and direction over Tea 2 Go, LLC. For that reason, the court determined that Hunt personally owed fiduciary duties to the partnership and the partners.

The court also discussed the bankruptcy decision of *In re Clem* and its observations that “managers/members of LLCs are not individually liable for the contractual debts and obligations of the LLC, unless there is a finding that the contractual debt or obligation was incurred by actual fraud for the direct personal benefit of the manager/member.” If there is a finding of actual fraud, “then the veil may be pierced to hold the manager/member personally liable on the contractual debt or obligation.” The court noted that actual fraud in the veil-piercing context is not equivalent to the tort of fraud, as actual fraud is defined as involving dishonesty of purpose or intent to deceive.

The court then considered Trinkets and Tea’s argument that Hunt’s debt to it (the \$90,000 invested in the partnerships) was nondischargeable under § 523(a)(2) of the Bankruptcy Code, which generally covers debts obtained by fraud or false pretenses. The court rejected the argument, concluding that “the evidence fails to prove that the various representations made by Hunt prior to Heise’s investment—both oral and written ... —were materially false.”

The court then discussed whether Hunt’s debts were nondischargeable under § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny) or § 523(a)(6) (willful and malicious injury by the debtor). The court noted that “[a] mere negligent breach of fiduciary duty is not enough to constitute a defalcation under § 523(a)(4), rather the debtor must willfully abandon their duties as a fiduciary.” According to the court, Trinkets and Tea was unable to satisfy the elements of these provisions:

Heise’s (and Trinkets and Tea’s) claim is based, in effect, on his having been induced into making the investment by Hunt’s wrongful conduct and representations. For the § 523(a)(4) and (a)(6) causes, the evidence fails to establish the requisite “debt” that derives from the acts covered by (a)(4) and (a)(6). There is some evidence that Hunt wrongfully used partnership funds for non-partnership purposes. But the evidence fails to prove the debt that arose from such conduct. The evidence is unclear on this point. It does not address whether funds from sources other than the two partnerships were deposited into the Tea 2 Go account. Hunt failed to address this issue, as well, which can raise an inference that no other funds funded the account. He simply testified that it never occurred to him to open-up separate accounts for the partnerships. On balance, however, the Court cannot conclude that Hunt committed fraud while acting in a fiduciary capacity, embezzlement, or larceny. The evidence is insufficient to prove intentional deceit on Hunt’s part.

And even assuming that Hunt had a fiduciary obligation to Heise (and Trinkets and Tea), the debt arising from his alleged failure to honor such obligation is unproven. The debt here is based on Heise’s investment that turned out bad and is, at most, indirectly related to Hunt’s alleged wrongful conduct after the investment and formation of the partnerships.

The facts fail to establish the elements of embezzlement or larceny. Hunt’s handling of the funds was arguably contrary to the terms of the partnership agreements. But the evidence falls well short of proving that he embezzled funds from the partnership. Heise’s \$90,000 investment was made voluntarily and thus cannot satisfy an element of larceny. The evidence does not explain how the \$90,000 was used by Hunt or the two partnerships.

...

The evidence wholly fails to establish a claim under § 523(a)(6). Hunt did not intend to injure Heise or Trinkets and Tea. His conduct cannot be characterized as willful and malicious. There is no evidence of Hunt’s personal animus, dislike, or recklessness towards Heise (and Trinkets and Tea) that is sufficient to create an (a)(6) claim.

The court also rejected claims that a discharge for Hunt should be denied under § 727(a)(3) (destroying or falsifying financial records) and § 727(a)(4)(A) (knowingly and fraudulently making a false oath or account). As the court observed:

The evidence is insufficient to warrant denial of Hunt’s discharge. The cause under § 727(a)(3) requires proof that Hunt failed to keep or preserve adequate records of his financial condition or business transactions. The evidence here addresses Hunt’s failure to maintain records of the Glenna and Hub partnerships. And this contention stems from his failing to keep a separate checking account for each partnership. While Hunt’s failure to keep a separate account for each partnership muddies the analysis of each partnership’s financial condition, it does not necessarily impair a review of Hunt’s financial condition. Hunt disclosed his interest in the LLCs and thus his indirect interest in the partnerships. Trinkets and Tea does not allege that it cannot determine Hunt’s personal financial condition or the cause of his financial demise. Whether Hunt, as owner of the controlling general partner and manager of both partnerships, kept adequate records of each of the partnerships is a different question that is, at most, indirectly related to Hunt’s personal finances. And, frankly, it is too remote to warrant denial of discharge.

Trinkets and Tea’s discharge cause under § 727(a)(4)(A) suffers a similar fate. Its main charge is that Hunt made a false oath in his failing to disclose in his bankruptcy schedules his interest in the domain name “nobilitea.us” and that he did not correct this failure until after this suit was brought. Hunt is presently employed by tea company Nobiletea and testified that he hoped to someday gain an ownership interest in the company. But there is no evidence that the domain name has or ever will have any value. It is merely an intangible “asset.” Hunt’s failure to initially disclose an immaterial item cannot justify denial of the discharge.

Lopez v. Quiroz Hernandez (In re Quiroz Hernandez), Case No. 15-50173-rbk, Adv. No. 15-5028-rbk, Adv. No. 16-5004-rbk, 2019 WL 2402998 (Bankr. W.D. Tex. June 3, 2019).

In its original opinion, the bankruptcy court concluded that a portion of Jorge Quiroz Hernandez’s debt to Magdalena Lopez was not dischargeable under § 523(a)(4) of the Bankruptcy Code. The district court vacated the judgment and remanded the proceeding back to the bankruptcy court, which again concluded that \$271,270 of Quiroz’s debt to Lopez was nondischargeable under § 523(a)(4).

The bankruptcy court noted that a partner’s duties to other partners falls squarely within the definition of a fiduciary duty under § 523(a)(4). The court observed that a partnership was created under Texas law between Quiroz and Lopez when they signed a subscription agreement on July 3, 2012. According to the court, “[t]he parties intended to and did become partners, intended to share profits, had the right to participate in control of the partnership, and agreed to contribute to the partnership.” The creation of the partnership was sufficient to trigger liability under § 523(a)(4). Quiroz intended to breach his fiduciary duties to Lopez when he drew checks from the company to himself, paid his credit card balances with partnership funds, disbursed fees to himself in excess of his salary, and refused to disclose financial information to Lopez.

Even if Quiroz lacked the specific intent to breach his fiduciary duties, the U.S. Supreme Court in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), established that “where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary ‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.” The evidence presented at trial established that Lopez requested financial information from Quiroz on several occasions, but Quiroz repeatedly refused to produce it. Instead, he misappropriated the funds that Lopez provided for the partnership to purchase personal items and to pay personal debts. The court concluded that Quiroz consciously disregarded a substantial and unjustifiable risk that his conduct would violate his fiduciary duties to Lopez. As a result, the \$ 271,270 that Lopez loaned or contributed to the partnership was held to be a nondischargeable debt under § 523(a)(4).

Q. Diversity Jurisdiction

The Fifth Circuit Court of Appeals and district courts continue to hold that the citizenship of a partnership or LLC is determined by the citizenship of each of its partners or members. If the partners or members are themselves partnerships, LLCs, or corporations, their citizenship must be alleged in accordance with the rules of

that entity, and the citizenship must be traced through however many layers of members or partners there may be. The cases are too numerous to include in this paper, but cases presenting somewhat unusual circumstances and arguments are included below.

Surge Busy Bee Holdings, LLC v. Wiszniewski, Civil Action No. 3:19-CV-127-L, 2020 WL 1846781 (N.D. Tex. Apr. 13, 2020).

The defendant removed an action brought against him by an LLC, and the plaintiff sought to remand the case based on a lack of diversity of citizenship. Because LLCs and partnerships have the citizenship of each of their members, diversity of citizenship in this case turned on whether the defendant was a limited partner of the Delaware limited partnership that was the sole member of the LLC plaintiff. The court interpreted the provisions of a Delaware limited partnership agreement and related subscription agreement and convertible note to determine when the defendant was admitted as a limited partner in order to determine the citizenship of the limited partnership and the LLC of which the limited partnership was the sole member. The plaintiff claimed that the defendant was admitted as a limited partner when the defendant exercised his right under a convertible note to receive units in the partnership, but the defendant claimed that he did not become a partner at that time because the partner schedule attached to the partnership agreement was not amended at the time to reflect that he was a limited partner. Even if the schedule of partners attached to the partnership agreement was not amended at the time to include the defendant, the court concluded that an email exchange among the defendant, his lawyer, and the general partner effectuated the admission of the defendant as a limited partner based on terms of the partnership agreement and convertible note, the authority granted to the general partner under the partnership agreement to determine the procedure for admitting limited partners, and the authority granted to carry out that procedure by executing any documents, including side letters and amendments to subscription agreements, that the general partner deemed necessary. The court concluded that the circumstances of this case did not justify jurisdictional discovery, distinguishing *Murchison Capital Partners, L.P. v. Nuance Communications, Inc.*, 3:12-CV-4746-L, 2013 WL 3328694 (N.D. Tex. July 2, 2013).

Jing Gao v. Blue Ridge Landfill TX, L.P., 783 Fed. Appx. 409 (5th Cir. 2019) (“Blue Ridge is a limited partnership, which means that it is ‘a citizen of the State where it has its principal place of business and the State under whose laws it is organized.’ 28 U.S.C. § 1332(d)(10). The Supreme Court has held that a business’s principal place of business is its ‘nerve center,’ which is normally where its headquarters is located, ‘provided that the headquarters is the actual center of direction, control, and coordination’ of its activities. *Hertz Corp. v. Friend*, 559 U.S. 77, 93, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010). Blue Ridge is organized under the laws of Delaware. It operates a landfill in Texas, but that fact alone does not make Texas its principal place of business. Blue Ridge filed a motion for leave to amend its Answer to admit to Plaintiffs’ allegation that Phoenix is its principal place of business. That motion also contains tax filings to demonstrate that Blue Ridge’s ‘nerve center’ is in Phoenix. We are satisfied that Blue Ridge is a citizen of Delaware and Phoenix. And Plaintiffs are citizens of Texas. Therefore, complete diversity exists.”). [For diversity jurisdiction, the citizenship of a limited partnership is typically determined by the citizenship of all of its partners. In class actions under 28 U.S.C. §§ 1332(d), 1453, however, “an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.”]

R. Personal Jurisdiction

Hanschen, Trustee of David Hanschen Heritage Trust Two v. Hanschen, No. 05-19-01134-CV, 2020 WL 2764629 (Tex. App.—Dallas May 28, 2020, no pet. h.) (mem. op.).

The court held that an individual was subject to personal jurisdiction based on his having been served in person while he was in Texas, but the trial court did not err in granting the individual’s special appearance as to his representative capacities as trustee of a trust, former manager of two LLCs, and former general partner of a partnership.

Several Hanschen family members (“the family”) sued James Hanschen, individually and as trustee of a trust, former manager of two LLCs, and former general partner of a partnership. The family asserted claims for breach of fiduciary duty based on James’s alleged failure to provide an accounting and misapplication of funds as trustee and failure to maintain the good standing of the entities, failure to provide an accounting, and

misappropriation of assets. While James was in Texas to attend a meeting regarding the trust, the family personally served him with the petition and citation. The citation of service was addressed to “James Hanschen.” An interlocutory default judgment was entered against James in all capacities after his answer deadline passed. The judgment also granted the family’s request for an accounting and appointed an auditor with respect to the trust, LLCs, and partnership. James filed a special appearance and motion to set aside the default judgment. The trial court granted the special appearance, and the family appealed.

On appeal, the family conceded that they did not assert that Texas has general jurisdiction over James or that the traditional minimum contacts analysis would be met in the absence of his physical presence. The court agreed with the family, however, that a nonresident is not exempt from jurisdiction where the nonresident is served with process while within the territorial limits of such jurisdiction. James argued that he was not subject to personal jurisdiction in Texas because there were no causes of action brought against him personally. The court disagreed:

While we may agree with James that the default judgment granted relief against the entities for which it would be necessary for Texas courts to have jurisdiction over James in representative capacities, the family’s petition pleaded causes of action against James individually for breaches of fiduciary duties arising from his role as trustee of the Progeny Trust and his roles in NBR-C2[, LLC], NBR-C3[, LLC], and NBR-Needham [Partnership]. The family seeks exemplary damages against James for these alleged breaches of fiduciary duties. James does not make a specific argument why these claims are not pleaded against him personally. In Texas, generally an agent is personally liable for his own tortious conduct. *See Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (“Texas’ longstanding rule [is] that a corporate agent is personally liable for his own fraudulent or tortious acts.”).

Thus, because James was personally served with process in Texas, the trial court had personal jurisdiction over him in that capacity.

The court affirmed the trial court’s denial of James’s special appearance in his representative capacity. The family argued that James was also served in his representative capacity and that service was sufficient because the family was not seeking liability of an entity. The family stated that it merely sought to hold James personally liable in his multiple roles, which were all bases for his personal liability. The court pointed out, however, that the citation completely omitted any indication of representative capacity, and the return of citation stated that “JAMES HANSCHEN” was served without any mention of his roles as a trustee, a former manager, and a former general partner. Thus, the court concluded that the service was deficient as to James in any representative capacity. The court declined to extend the Texas Supreme Court’s holding in another case to find personal jurisdiction over James in all of his capacities merely because he was served in his individual capacity while present in Texas. The court stated that such an extension would conflict with the position consistently taken by Texas courts that actions of an individual in a representative capacity are separate and distinct from actions taken in an individual’s personal capacity.

Axford Consulting, L.P. v. Foster Jordan, LLC, Civ. A. No. H-09-1899, 2009 WL 10711347 (S.D. Tex. Sept. 24, 2009). (Although the court issued this opinion in 2009, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court granted Safwan’s motion to dismiss for lack of personal jurisdiction after determining that Safwan was not in a partnership with Foster Jordan. Because there was no partnership, Foster Jordan’s contacts with Texas were not relevant to Safwan’s personal jurisdiction analysis.

Axford was a Texas limited partnership based in Harris County, Texas that provided consulting and procurement services to the power generation industry. Defendant Foster Jordan, LLC was organized in the United Arab Emirates with its base of operations in Amman, Jordan. Foster Jordan’s primary business was project management of power generation contracts. Defendant Safwan was an oil and gas services company headquartered in Kuwait.

Axford and Foster Jordan entered into a contract where Axford agreed to source two electrical generation units in exchange for a commission of \$500,000 per unit. When Foster Jordan did not pay the full commission, Axford sued Foster Jordan and Safwan.

Safwan contended that Axford's claims against it should be dismissed for lack of personal jurisdiction. Based on the theory that Foster Jordan and Safwan operated as a partnership, Axford argued that the contacts of both Foster Jordan and Safwan with Texas should be considered on the question of whether Safwan was subject to personal jurisdiction. The court declined to consider Foster Jordan's contacts, as it found that a partnership between the defendants did not exist:

As a preliminary matter, the court must determine which of the contacts attributed by Axford to Safwan are relevant for personal jurisdiction analysis. Many of the contacts mentioned by Axford occurred between Foster Jordan and Axford directly, and may be attributed to Safwan only through Axford's theory that Safwan and Foster Jordan operated as a partnership. Axford argues that the nature of Safwan and Foster Jordan's business relationship makes the two companies a partnership under Texas law, and that therefore their cumulative contacts should be counted together as for a single entity. Axford does not, however, explain why Texas partnership law should apply to companies based in Jordan and Kuwait that are not incorporated in Texas and have no offices in Texas. The Texas statute cited by Axford states, "An association or entity created under a law other than [the Texas Revised Partnership Act, the Texas Uniform Partnership Act, the Texas Revised Limited Partnership Act, or a comparable statute in another jurisdiction] is not a partnership." Tex. Rev. Civ. Stat. art. 6132b-2.02(a)-(b). Axford has given the court no reason to believe that this association was created under the Texas Revised Partnership Act or one of the other listed statutes. In the absence of such evidence, the court concludes that under the terms of the Texas Revised Partnership Act the alleged association is not a partnership under Texas law.

Even assuming that Texas partnership law did apply to Safwan's and Foster Jordan's activities in Texas, the court is not persuaded that a partnership existed. The Texas Supreme Court has stated that "a partnership consists of an express or implied agreement containing four required elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176. In *Schlumberger* the Court found that there was no partnership between the parties because even though there was an entitlement to royalties and the payment of a consultation fee, there was no evidence of an agreement to share profits. Likewise, in this action Axford has presented no evidence of an agreement between Safwan and Foster Jordan to share profits or losses. The fact that Safwan made a partial payment to Axford for the electrical generators that Foster Jordan ordered does not establish an agreement to share profits. Such a payment is equally consistent with the relationship of a subcontractor to a general contractor that has ordered materials for the subcontractor's use. Nor does the mention of a "Consortium of Partners" in one of Foster Jordan's letters indicate that the individual parties had agreed to operate as a single legal entity. The letter also describes the group as a "consortium of subcontractors," and there is nothing in the letter that would lead a reasonable reader to conclude that the multinational companies described had all agreed to share profits and losses henceforth. Since there is no evidence that Safwan and Foster Jordan agreed to share profits and losses, the court concludes that under the standard articulated in *Schlumberger*, Axford has not shown that the two parties operated as a partnership.

Since Axford has not established that Safwan and Foster Jordan operated as a partnership, the court declines to consider Foster Jordan's independent contacts with Texas as part of the minimum contacts analysis for [Safwan].

The court went on to conclude that Axford failed to present a prima facie case of minimum contacts between Safwan and Texas. As a result, the court granted Safwan's motion to dismiss for lack of personal jurisdiction.

S. Statute of Limitations

Berry v. Berry, No. 13-18-00169-CV, 2020 WL 1060576 (Tex. App.—Corpus Christi Mar. 5, 2020, no pet. h.) (mem. op.).

The court held that a co-trustee of a trust that was a limited partner did not have the right to sue derivatively on behalf of the limited partnership where a majority of the co-trustees and the other limited partner opposed the derivative suit and determined it was not in the best interest of the partnership. The court held that the filing of a memorandum of lease in the real estate records did not constitute constructive notice to the co-trustee for purposes of his claim for breach of fiduciary duty because deed records do not furnish constructive knowledge to a property owner of subsequent impairments to title.

Marvin and Laura Berry acquired a ranch in 1960 and created the Flying Bull Limited Partnership in 1996. They assigned a 2% general partner interest to FB Ranch, LLC (FB Ranch) and split between themselves the interests as limited partners. Marvin died in 1997. At some point, the Berry Dynasty Trust (“the Trust”) received a limited partner interest for which the Berrys’ four sons served as co-trustees. There were several other Berry-related entities, including an entity known as Berry Contracting that leased the ranch and made regular lease payments to the limited partnership from 2000 to 2005. In 2000, after a family dispute, Kenneth Berry (Marvin and Laura’s son) resigned from nearly all of his functions within the family enterprises, and the family entered into a global release in 2005 under which Kenneth released certain Berry companies and individual family members in all capacities and they similarly released him from all causes of action related to facts that existed at that time.

In 2005, Kenneth sought lease and partnership records in his capacity as co-trustee of the Trust. In 2007, the limited partnership and Berry Contracting signed and recorded a lease agreement through 2024, back-dated to 2000. Several years thereafter, Kenneth continued to pursue partnership records and tax filings related to the Trust, including a 2014 demand for an accounting pursuant to the Texas Trust Code. These requests continued until 2016 when Kenneth and his trust-beneficiary daughter filed suit derivatively and individually against Kenneth’s co-trustees and all of the Berry-related entities. The suit alleged, *inter alia*, breaches of fiduciary duty, breach of the partnership agreement, and breach of the 2005 release agreement between Kenneth and other family members and Berry entities. He also sought an accounting and a declaratory judgment declaring that contracts and agreements in violation of the partnership agreement and fiduciary duties were void.

In response, the defendants filed a plea to the jurisdiction and a motion for summary judgment on statute-of-limitations grounds. The defendants entered into a consent and release agreement among themselves pursuant to which they rectified Laura’s inadvertent mishandling of lease payments owed to the ranch and released Laura from any liability related to the payments, modified the lease agreement, and declared that none of them believed that the suit was in the best interest of the Trust or the limited partnership. The trial court granted the plea to the jurisdiction as to Kenneth’s standing in a derivative capacity on behalf of the partnership and granted defendants’ motion for summary judgment as to limitations. Certain disputes were severed, and after a bench trial on the issue of attorney’s fees, the court awarded attorney’s fees in various amounts to Kenneth and the various defendants.

On appeal, Kenneth challenged the trial court’s ruling that he did not have standing to sue derivatively on behalf of the partnership in his capacity as co-trustee of the limited partner and the trial court’s summary-judgment ruling as to limitations.

With respect to Kenneth’s standing to sue derivatively on behalf of the limited partnership, the appellate court examined the Texas Trust Code, the Texas Property Code, and the Texas Business Organizations Code. The court pointed out that under Tex. Bus. Orgs. Code §§ 153.402 and 153.403, a limited partner has no right to sue on behalf of the limited partnership if the limited partner does not fairly and adequately represent the interests of the partnership. Further, the court took note that under Tex. Prop. Code § 113.85(a) trustees act on behalf of a trust by majority decision. Additionally, Texas case law limits a beneficiary’s ability to bring suit on behalf of a trust absent a trustee’s wrongful refusal to bring suit. Accordingly, in light of Chapter 153 of the Texas Business Organizations Code, the release agreement entered into among the defendants demonstrating a majority decision pursuant to Tex. Prop. Code § 113.85(a), and Texas case law, neither the Trust, as a limited partner, nor a trust beneficiary could sue third parties on behalf of the limited partnership. Consequently, the court affirmed the trial court’s judgment with respect to the issue of standing.

Next, the court addressed Kenneth’s challenge to the trial court’s summary judgment in favor of the defendants as to the statute of limitations. A claim for breach of fiduciary duty is subject to a four-year statute of

limitations. The court recited the elements of a claim for breach of fiduciary duty (a fiduciary relationship, breach, causation, and damages) and recited the following principles regarding the duties of a fiduciary:

“The fiduciary owes a duty of full disclosure of matters concerning the parties’ interests and a strict duty of candor and good faith. The fiduciary may be punished for breaching these duties.” *Bombardier Aerospace Corp. v. SPEG Aircraft Holdings, LLC*, 572 S.W.3d 213, 231 (Tex. 2019) (internal citations omitted). “A fiduciary relationship gives rise to a duty of full disclosure of all material facts.” *Valdez v. Hollenbeck*, 465 S.W.3d 217, 230 (Tex. 2015); *see also Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (failing to disclose existence of an oil and gas lease on estate property was a breach of fiduciary duty by trustee). Furthermore, full disclosure of information concerning a partnership is required upon demand by a partner or the partner’s representative. *See* TEX. BUS. ORG. CODE ANN. § 152.213. Additionally, a trustee is required to respond to a request for an accounting. *See* TEX. PROP. CODE ANN. § 113.151.

In his capacity as a co-trustee and beneficiary of the Trust, Kenneth sought copies of any lease agreements affecting the ranch from Laura, who operated the ranch as general partner beginning in 2006, and continuing intermittently through 2015. The court reviewed the history of various agreements and documents, including real estate records that were filed in the deed records. The defendants argued, and the trial court agreed, that the filing of a memorandum of lease in the deed records was sufficient to begin the statute of limitations on Kenneth’s claim for breach of fiduciary duty regarding the lease. Kenneth argued that the general partner’s and his co-trustees’ failure to provide him with copies of the lease or to inform him of its terms was a breach of fiduciary duty and that he had no responsibility to search the deed records when all of the parties to the lease remained silent. In *Archer v. Tregallas*, 566 S.W.3d 281, 288 (Tex. 2018), the Texas Supreme Court upheld the use of the discovery rule in a case involving a right of first refusal even though the deed was recorded. The trial court and the parties did not have the benefit of the *Archer* case at the time of the summary-judgment hearing. According to the court, under *Archer* and the authorities it relied upon, a trustee would have no duty to search the deed records for impairments to its title by subsequent events. The defendants moved for summary judgment based only on constructive knowledge of the lease resulting from the filing of the memorandum of lease. Because *Archer* holds that deed records do not furnish constructive knowledge to a property owner of subsequent impairments to title, the court reversed the grant of summary judgment on statute-of-limitations grounds.

T. Service of Process

Gardner v. Specialized Loan Servicing LLC, No. 3:19-cv-1391-S-BN, 2019 WL 5790516 (N.D. Tex. Oct. 7, 2019), report and recommendation adopted, 2019 WL 5790264 (N.D. Tex. Nov. 5, 2019) (“Defendant Shapiro Schwartz, LLP is a limited liability partnership. A ‘partnership’ may be served in the same manner prescribed by Federal Rule of Civil Procedure 4(e)(1), which instructs that a plaintiff may serve process by following state law for serving a summons. *See* FED. R. CIV. P. 4(h)(1)(A). In Texas, ‘[the] registered agent and each general partner of a limited partnership are its agents for service of process,’ subject to an exception permitting service on the Texas Secretary of State. *Atrium Medical Ctr., L.P. v. Lange Mechanical Services, L.P.*, 2013 WL 269037, at *2 (Tex. App.—Houston [14th Dist.] Jan. 24, 2013, no pet.).... Plaintiffs attempted to effect service on Defendant Shapiro Schwartz, LLP via U.S. certified mail in accordance with the federal rules. But the citation was issued for service on ‘Shapiro Schwartz LLP’ generally and the return of service shows an illegible signature. And the ‘address of recipient’ field on the signed service form is incomplete. Because it is impossible to discern the identity of the person who signed the citation, as the Defendants argue, there is no indication in the record that either a registered agent for Shapiro Schwartz, LLP or the Texas Secretary of State was ever served. In light of Plaintiffs’ failure to comply with the applicable rules, the undersigned concludes that Plaintiffs did not properly effect service on Shapiro Schwartz, LLP.”).

Thornton v. Columbia Medical Center of Plano Subsidiary, L.P., No. 05-18-01010-CV, 2019 WL 4316481 (Tex. App.—Dallas Sept. 12, 2019, pet. filed) (mem. op.).

The trial court granted Columbia’s motion for summary judgment on the ground that Gia Thornton’s lawsuit was filed after the statute of limitations expired. The court of appeals affirmed, concluding that limitations had not been tolled because Thornton failed to give written notice of the claim to Columbia.

Thornton filed a medical malpractice lawsuit two years and sixty-two days after the death of McQuester Solomon. The statute of limitations expired after two years, but § 74.051 of the Civil Practice and Remedies Code provides that limitations is tolled for seventy-five days if the plaintiff gives the health care provider notice of the claim. Thornton had sent notice of her claim to “Medical Center of Plano,” the facility where Solomon was treated. According to the court, “if Thornton’s November 7, 2017 letter to Plano Medical Center ‘gave written notice’ of her claim to Columbia, then the statute of limitations was tolled for seventy-five days and Thornton timely filed suit.” As the court observed:

Columbia is a Texas limited partnership. Appellees argue that a Texas limited partnership receives notice when the notice is served on its registered agent or a general partner. Section 5.201(b) of the Texas Business Organizations Code provides that a registered agent “is an agent of the entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity.” TEX. BUS. ORGS. CODE ANN. § 5.201(b). Also, “For the purpose of service of process, notice, or demand: ... (2) each general partner of a domestic or foreign limited partnership ... is an agent of that partnership” Id. § 5.255(2). Columbia’s registered agent was listed in the public records of the Secretary of State’s office as CT Corporation System, and the record provides the agent’s address in Dallas. Appellees assert that if Thornton did not give written notice of the health care liability claim to Columbia’s registered agent or a general partner, then Columbia was not given written notice of the claim.

Thornton argues she presented evidence raising a genuine issue of material fact whether she gave written notice to Columbia by mailing the notice to the physical address of the hospital where Solomon was treated. She asserts “the hospital” was the health care provider, and she properly gave notice to “the hospital” by mailing the notice to its physical address. She asserts section 74.002 of the Civil Practice and Remedies Code states that Chapter 74 controls to the extent of any conflict with another statute. CIV. PRAC. § 74.002. The requirements of the Business Organizations Code for providing notice to a limited partnership do not conflict with Chapter 74. Chapter 74 requires that the claimant give written notice to the health care provider. The Business Organizations Code provides the method for giving notice to a limited partnership. Chapter 74 does not state that notice may be given by sending it to the place where the treatment was provided. Chapter 74 requires the notice be given to “the health care provider against whom such claim is being made.” The hospital, Medical Center of Plano at 3901 W. 15th Street, Plano, Texas, 75075, was the physical place at which the treatment occurred, but it was not the health care provider Thornton sued. Therefore, Thornton’s notice to “Medical Center of Plano” at the hospital’s physical address did not provide notice to Columbia.

Thornton argued that service of the notice was complete when the document was deposited in the mail, citing Texas Rule of Civil Procedure 21a(b)(1). The court disagreed, stating that the rule required the document to be properly addressed. The notice addressed to “Medical Center of Plano” was not properly addressed to Columbia.

Thornton also argued that § 5.256 of the Business Organizations Code permitted alternative means of service on an entity and that § 17.021 of the Civil Practice and Remedies Code, which allowed for service on an entity by delivery to an employee or agent at the entity’s place of business in certain circumstances, was one such alternative means. To use § 17.021, however, it must be shown that the partnership is not a resident of the county or state, or is a resident of the county but has not been found for service of process. That showing was not made:

The record contains no evidence that Columbia is not a Collin County and Texas resident. Thornton asks us to take judicial notice of a document in the Secretary of State’s office stating that Columbia’s “Address” is in Nashville, Tennessee. That document is not part of the summary-judgment evidence. We decline to take judicial notice of the document. [Appellate courts

may take judicial notice of documents outside the appellate record to determine their jurisdiction or to resolve matters ancillary to decisions that are mandated by law, such as calculation of prejudgment interest when the appellate court renders judgment. This case does not involve those situations.] “The Court of Appeals is not a trier of fact. ‘For us to consider evidence for the first time, never presented to the trial court, would effectively convert this Court into a court of original, not appellate jurisdiction.’” We conclude Thornton has not raised a genuine issue of material fact regarding whether her mailing notice of the claim to the hospital’s physical address constituted written notice of the claim to Columbia.

Finally, Thornton argued that her sending notice to HSP of Texas, Inc., the former owner of the hospital, constituted notice to Columbia. (HSP had merged with Columbia and ceased to exist.) The court disagreed. It stated that the notice was sent to a registered agent in Austin, Prentice Hall Corporation System, Inc., and that nothing in the record showed that Prentice Hall was ever the registered agent for Columbia. The court also noted that no evidence in the record showed that the document had ever come to Columbia’s attention.

U. Pro Se Representation

DTX Energy Capital, L.P. v. Amegy Bank of Texas, Civ. A. No. 3:19-CV-1748-G-BH, 2019 WL 5865499 (N.D. Tex. Sept. 23, 2019), report and recommendation adopted, 2019 WL 5864497 (N.D. Tex. Nov. 7, 2019) (“It is well-established that although individuals have the right to represent themselves or proceed *pro se* under this statute, corporations are fictional legal persons who can only be represented by licensed counsel. The rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations. Even if the person seeking to represent the artificial entity is its president and major stockholder or has some other close association with it, the only proper representative is a licensed attorney. When this type of party declines to hire counsel to represent it, the court may dismiss its claims if it is a plaintiff, or strike its defenses if it is a defendant. Here, Plaintiff [a limited partnership] was specifically advised that it could only be represented by licensed counsel in this action, and that the lack of an entry of appearance by counsel on its behalf within twenty-one days would result in a recommendation that its claims be dismissed. Defendant subsequently moved to dismiss this action, in part, on this same basis. Because no attorney has entered an appearance on behalf of Plaintiff in this case, and its CEO may not represent it *pro se*, Defendant’s motion to dismiss the complaint on this ground should be granted.” (citations omitted)).

Teletrac, Inc. v. Logicorp Enterprises, LLC, Civ. A. No. 7:18-CV-240, 2019 WL 3891812 (S.D. Tex. Aug. 19, 2019) (“The Court notes that because Defendant is a limited liability company it may not represent itself in any court action and any filings made by Defendant not through counsel would be stricken. The Fifth Circuit allows district courts to strike the pleadings of corporations or partnership defendants attempting to proceed without an attorney.”).

Smith v. Sanders, Civ. A. No. 3:12-CV-4377-M, 2019 WL 5887342 (N.D. Tex. Aug. 5, 2019), report and recommendation adopted, 2019 WL 5887216 (N.D. Tex. Aug. 29, 2019) (“In the federal courts of the United States, ‘parties may plead and conduct their own cases personally or by counsel.’ It is well-established that although individuals have the right to represent themselves or proceed *pro se* under this statute, corporations are fictional legal persons who can only be represented by licensed counsel. ‘This is so even when the person seeking to represent the corporation is its president and major stockholder.’ The rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations. When a corporation declines to hire counsel to represent it, the court may dismiss its claims if it is a plaintiff, or strike its defenses if it is a defendant.” (citations omitted)).

V. Venue

In re Fox River Real Estate Holdings, Inc., 596 S.W.3d 759 (Tex. 2020).

The court held that Tex. Civ. Prac. & Rem. Code § 65.023(a), which provides for mandatory venue in actions for injunctive relief, did not control over the contractual venue provision included in a limited partnership agreement pursuant to Tex. Civ. Prac. & Rem. Code § 15.020, a conflicting mandatory venue provision, because injunctive relief was not the primary and principal relief requested in the action.

A group of limited partners of a limited partnership sued the general partner and related parties alleging that the defendants fraudulently misappropriated partnership assets, breached the limited partnership agreement, and violated fiduciary duties owed to the partnership. The plaintiffs sought actual and exemplary damages, attorney's fees and expenses, and declaratory, injunctive, and other equitable relief. The plaintiffs filed the lawsuit in Washington County, where the defendants are domiciled. The defendants moved to transfer venue to Harris County, Texas, based on a venue-selection clause in the limited partnership agreement. Section 15.020 of the Texas Civil Practice and Remedies Code requires enforcement of a contractual venue provision in a "major transaction" (defined as "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than \$1 million"), and the plaintiffs conceded that the limited partnership agreement was a major transaction, the underlying dispute arose from that agreement, and the agreement provides for venue in Harris County. Subsection (d)(3) of Section 15.020 states, however, that "[t]his section does not apply to an action if ... venue is established under a statute of this state other than this title." Section 65.023(a) is in a different title than Section 15.020 and requires injunction suits to be heard in the defendant's county of domicile. Because the court had previously held that Section 65.023(a) is operative only when a party's pleadings in the underlying suit establish that the relief sought is "purely or primarily injunctive," this case turned on whether the plaintiff was "primarily" seeking injunctive relief despite pleading for significant damages, attorney's fees, declaratory relief, and other equitable relief. The court discussed other cases addressing the question of whether injunctive relief was the primary relief sought, and the court concluded that injunctive relief was not the dominant purpose of the plaintiffs' lawsuit in this case. Although the plaintiffs sought injunctive relief preventing the defendants from further action on the partnership's behalf and disgorgement of wrongfully appropriated partnership assets, the court concluded that all the injunctive relief was ancillary to the plaintiffs' primary goal of removal of the general partner in accordance with Section 152.501(b) of the Business Organizations Code and recovery of monetary damages. Because the injunctive relief was not the primary and principal relief requested, Section 65.023(a) did not apply, and Section 15.020 required enforcement of the parties' venue-selection clause.

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

MA LEG Partners 1 v. City of Dallas, 2020 WL 1064860, ___ F. Supp. 3d ___ (N.D. Tex. 2020).

The court rejected an LLC property owner's argument that information required by the City of Dallas pursuant to the City's regulation of rental properties was constitutionally protected from disclosure.

MA LEG Partners 1 ("MA LEG"), a limited liability company, sued the City of Dallas challenging the constitutionality of an ordinance regulating rental properties on various grounds. The ordinance required an application and provided for inspections. With respect to the application, MA LEG argued that the disclosure of certain information was constitutionally protected from disclosure. The court agreed with the City that MA LEG lacked a reasonable expectation of privacy in the requested information.

Included among the items of information required to be disclosed in the application process were: "the name and mailing address for each principal officer, director, general partner, trustee, manager, member, or other person charged with the operation, control, or management of the entity." With respect to this item the court noted that MA LEG admitted that this information was largely publicly available. The court stated:

When forming an LLC, as MA LEG did here, Texas law requires on the registration forms the disclosure of the members of the LLC.[The court stated in a footnote that a person becomes a member at the time of formation of the LLC if the person is named as an initial member in the

certificate of formation, and the court commented that MA LEG did not allege that there were new members not disclosed in a public filing.] The Texas application for registering an LLC likewise contains information for the LLC members (referred to as “governing persons”).[The court cited Form 205, Certificate of Formation for a Limited Liability Company on the Secretary of State’s website.] MA LEG complied with that request when forming its LLC, and this member information is publicly available on websites of the Texas Secretary of State and Comptroller. As a result, there is no constitutionally protected privacy interest in information such as this that is in the public domain.[footnote omitted]

Another item of information required under the ordinance was “the location of business records pertaining to the rental property.” The court distinguished the out-of-district opinion relied upon by MA LEG because it held only that business records containing commercially sensitive information were protected by a property-based expectation of privacy, and the case went on to recognize that business records held pursuant to a governmental regulatory framework have no reasonable expectation of privacy. According to the court, “MA LEG makes no case that the location of where records are kept is commercially sensitive. For example, disclosing that the Coca Cola recipe [footnote omitted] is kept at 1 Coca Cola Plaza NW Atlanta, GA 30313 is not the same as disclosing the actual recipe.”

Mallory v. Lease Supervisors, LLC, Civil Action No. 3:17-CV-3063-D, 2020 WL 137040 (N.D. Tex. Jan. 13, 2020).

The court held that there were genuine issues of material fact precluding summary judgment on the question of whether two LLC members were employees for purposes of asserting claims for unpaid overtime pay under the Fair Labor Standards Act.

Two LLC members asserted claims for unpaid overtime pay under the Fair Labor Standards Act (FLSA). To determine whether a worker qualifies as an employee under the FLSA, a court focuses on “whether the alleged employee so economically depends upon the business to which he renders his services, such that the individual, as a matter of economic reality, is not in business for himself.” The inquiry involves consideration of five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. No single factor is determinative, and each factor is a tool used to gauge the economic dependence of the alleged employee.

The LLC relied heavily on the LLC regulations (i.e., company agreement) to argue that the plaintiff members did not fit the FLSA definition of an employee; however, the court stated that employee status was not determined by the parties’ agreements, including the regulations. The touchstone of the analysis is “economic dependence.” Citing case law in the partnership context, the court stated that the members’ rights under the regulations might be relevant to the determination of the members’ economic dependence on the LLC, but those rights did not alone determine whether the plaintiffs were employees of the LLC for purposes of the FLSA. The court discussed the application of each of the five factors to the summary judgment evidence and concluded that none of the factors conclusively favored one side or the other. Thus, the court denied the parties’ cross motions for summary judgment.

State Farm Mutual Automobile Insurance Company v. Punjwani, Civil Action No. H-19-1491, 2019 WL 7372215 (S.D. Tex. Dec. 31, 2019).

The court denied a motion to dismiss the plaintiff’s RICO claim, holding that the plaintiff sufficiently pled that a professional LLC, as an ongoing legal entity, was an “enterprise” and that the physician who performed examinations, evaluations, and medical services for the LLC satisfied the “participation and conduct” requirement because the physician was the sole individual making medically unnecessary treatment decisions at the heart of the allegedly fraudulent scheme to defraud the plaintiff insurer.

State Farm sued Pain Alleviation & Interventional Needs, PLLC (“PAIN”) a Texas limited liability company, the LLC’s three members (collectively, “the Roopanis”), and Dr. Punjwani, who performed evaluations and medical services for PAIN. State Farm alleged that it paid hundreds of fraudulent claims for medical services

performed at PAIN locations by Dr. Punjwani on accident victims who submitted claims for insurance benefits under State Farm policies. State Farm's claims included claims under RICO and for money had and received.

Dr. Punjwani argued that State Farm's RICO claim failed because PAIN was not an enterprise. To establish RICO liability, the plaintiff must establish the existence of a "person" and a separate and distinct "enterprise." An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The court stated that State Farm adequately alleged that PAIN was an enterprise, as defined under RICO, because PAIN was a legal entity initially organized and operated as a limited liability company and later reorganized to be operated on an ongoing basis as a professional limited liability company.

Dr. Punjwani also argued that State Farm did not allege facts showing that Dr. Punjwani had any managerial or supervisory role at PAIN in order to satisfy the participation and conduct requirement of RICO. The court stated that the RICO statute's requirement that the defendant have "some part in directing the enterprise's affairs" does not limit RICO liability "to those with primary responsibility for the enterprise's affairs." Because State Farm alleged that Dr. Punjwani was the sole individual making medically unnecessary treatment decisions central to the allegedly fraudulent scheme, the participation element was sufficiently pled, and the court denied Dr. Punjwani's motion to dismiss the RICO claim.

Spivey v. Absentia Pictures LLC, No. 3:19-CV-1256-N-BT, 2019 WL 7841928 (N.D. Tex. Oct. 2, 2019).

The court stated that it lacked authority to appoint counsel for an LLC and denied the motion to appoint counsel. Under 28 U.S.C. § 1915(e)(1), "[a] court may 'request an attorney to represent any person unable to afford counsel.'" However, "[t]he term 'person,' as used in [that] provision refers only to natural persons and thus does not cover artificial entities." The court noted that even if it had such authority, the motion would still be denied because "corporate litigants" are presumed to have sufficient resources to pay the costs of litigation.

Stephens v. Three Finger Black Shale Partnership, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed) ("Additionally, Stephens asserts that he could not conspire with his own corporations. However, limited liability companies, which the Thunderbird entities are, are legal entities that are separate from a sole member.").

Loco Brands, LLC v. Butler America, LLC, Case No. 6:18-CV-69-JDK-KNM, 2019 WL 3015046 (E.D. Tex. Jan. 28, 2019), report and recommendation adopted, 2019 WL 2281252 (E.D. Tex. May 29, 2019).

The court recommended denying a motion to dismiss a § 1981 claim. The court found that an LLC sufficiently alleged that it was a minority-owned business and that there was discriminatory intent.

Plaintiff Loco Brands, LLC d/b/a Direct TEK ("Direct TEK") and Defendants Frontier Communications Corporation and Butler America, LLC were engaged in operations related to the telecommunications industry. Direct TEK contracted with telecommunications technicians and placed its technicians across the country through contracts and business relationships with Defendants.

Direct TEK alleged a number of claims against Defendants, including discrimination under 42 U.S.C. § 1981 based primarily upon the termination of numerous African-American technicians by Defendants. The court noted that § 1981 protects the rights of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. Section 1981 offers relief from racial discrimination that "blocks the creation of a contractual relationship" or "impairs an existing contractual relationship," but only where "the plaintiff has or would have rights under the existing or proposed contractual relationship." To state a claim, a plaintiff must allege "(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute...."

Frontier argued that Direct TEK failed to sufficiently plead the first two elements of a § 1981 claim. It argued that Direct TEK, a Texas limited liability company, did not fit within the definition of a protected racial class and could not, therefore, bring a discrimination claim under § 1981. In response, Direct TEK noted that several other circuits have held that a corporation may maintain a § 1981 claim. In addition, Direct TEK argued that it is a member of a protected class because it is a minority-owned company. The court concluded that "Direct TEK sufficiently pled the first element of a § 1981 claim by alleging it is a minority owned business." In contrast to other precedents, Direct TEK alleged that its owner was a racial minority, and that allegation was sufficient to meet the first element of a discrimination claim under § 1981.

The parties then disputed whether Direct TEK adequately alleged discriminatory intent. Frontier argued that Direct TEK did not allege that Frontier discriminated against Direct TEK on the basis of race. Direct TEK responded by arguing that Frontier discriminated against it by directing the firing of African-American technicians and insisting that they be replaced with Caucasian technicians. Direct TEK also argued that there was “direct evidence” of discriminatory intent in an email that requested a “Caucasian” replacement technician. The court held that the allegations were sufficient:

Here, Plaintiff alleges two instances of racial prejudice by Frontier demonstrate discriminatory intent. First, Plaintiff alleges Frontier insisted Butler fire “numerous African-American technicians placed in Southeast Texas by Direct TEK....” Second, Plaintiff alleges Frontier fired an African-American technician and then pressured Butler to seek a replacement technician that was “Caucasian.” Plaintiff then alleges that it “refused to comply with Frontier/Butler/Nab’s acts of racial prejudice and insistence on only Caucasian technicians,” and, subsequently, Direct TEK was removed from all of Frontier’s projects. These allegations, taken as true and in combination with the email from Butler requesting a “preferably ‘Caucasian’” replacement technician, make plausible the inference that Frontier intended to discriminate against Plaintiff based on race. Accordingly, at this stage of the proceedings, Direct TEK’s allegations are sufficient to plead discriminatory intent.

The court recommended denying Frontier’s motion to dismiss the § 1981 claim. For similar reasons, the court also recommended denying Butler’s motion to dismiss the claim.

See also Zodiac Seats US, LLC v. Synergy Aerospace Corp., No. 4:17-cv-00410, 2020 WL 1703572 (E.D. Tex. Apr. 8, 2020); *C&F International, Inc. v. Interoil Services, LLC*, No. 14-18-00698-CV, 2020 WL 1617261 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet. h.) (mem. op.); *Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP*, 599 S.W.3d 618 (Tex. App.—Dallas 2020, no pet. h.); *James Construction Group, LLC v. Westlake Chemical Corporation*, 594 S.W.3d 722 (Tex. App.—Houston [14th Dist.] 2019, pet. filed); *ATD Combustors, LLC v. Ameritube, LLC*, No. 6-18-CV-00077-ADA, 2019 WL 7759098 (W.D. Tex. Sept. 30, 2019); *Branch Banking & Trust Co. v. Mansfield Barbecue, LLC*, Civ. A. No. 3:19-cv-158-L, 2019 WL 5684430 (N.D. Tex. Oct. 31, 2019); *Pelc v. Howard*, Civ. A. No. 3:18-CV-00205, 2019 WL 5196373 (S.D. Tex. Sept. 24, 2019), report and recommendation adopted, 2019 WL 5191201 (S.D. Tex. Oct. 15, 2019); *CExchange, LLC v. Top Wireless Wholesaler*, No. 05-17-01318-CV, 2019 WL 3986299 (Tex. App.—Dallas Aug. 23, 2019, no pet.) (mem. op.); *Bullet Trap, L.L.C. v. Waterproof Positive, LLC*, No. 05-18-00529-CV, 2019 WL 3543579 (Tex. App.—Dallas Aug. 5, 2019, pet. denied) (mem. op.), summarized under “Attorney’s Fees” and holding that Tex. Civ. Prac. & Rem. Code § 38.001 does not authorize recovery of attorney’s fees against a limited liability company because the statute only permits recovery against an “individual” or a “corporation.”

See also cases summarized under “Pro Se Representation” holding that an LLC, as an artificial entity, is not permitted to appear pro se.

B. Limited Liability of Member or Manager; Personal Liability of Member or Manager Under Agency or Other Law

Chandler v. Phoenix Services, Civil Action No. 7:19-cv-00014-O, 2020 WL 1848047 (N.D. Tex. Apr. 13, 2020).

The court dismissed antitrust claims against the parent and an officer of an LLC, concluding that the parent was not part of a single enterprise with the LLC subsidiary and that the plaintiffs did not adequately allege conscious wrongdoing or a direct role by the officer in the alleged violations.

The plaintiffs in this case brought antitrust claims against the defendants based on prior unsuccessful patent litigation by Heat On-The-Fly, LLC (“HOTF”). The plaintiffs alleged that HOTF unlawfully tried to exploit a patent and gain monopoly power, and the plaintiffs sued HOTF’s parent company—Phoenix Services, LLC (“Phoenix Services”)—and an individual officer in addition to HOTF. Phoenix Services and the officer (collectively, “the

Phoenix defendants”) sought dismissal on the basis that the plaintiffs could not establish their liability for the allegedly anticompetitive conduct of HOTF. HOTF was a member-managed LLC. The finances of HOTF, Phoenix Services, and the parent company of Phoenix Services were all encompassed in a single financial statement. Fisher, the officer who was sued in this case, was the head of all three companies and one of two remaining officers of HOTF. The court concluded that the Phoenix defendants did not have the requisite knowledge and intent to be liable under the applicable single-enterprise and corporate-officer standards of liability based on the date that they obtained actual notice of facts to support the conduct that gave rise to the claims in this case.

As a matter of first impression in the Fifth Circuit, the court analyzed the single-enterprise-liability standard applied in the First and Tenth Circuits. After discussing the single-enterprise theory and the allegations in this case, the court concluded:

To be liable for its subsidiary’s conduct, a parent must engage in “coordinated activity,” *Copperweld*, 467 U.S. at 771, to “purposely advance the very same scheme ... for an illegal, anticompetitive purpose,” *Arandell Corp.*, 900 F.3d at 631. Without knowledge that HOTF was engaging in inequitable conduct when it sent the seventeen cease-and-desist letters and filed several patent-infringement claims against non-licensed competitors, Phoenix could not have purposely “control[led], dictate[d] or encourage[d]” HOTF’s anticompetitive conduct by continuing to enforce the ‘993 Patent. *Nobody in Particular*, 311 F. Supp. 2d at 1071. *Contra id.* at 1069 (“To conclude that a parent can direct and require anticompetitive conduct of its subsidiaries, like any principal directing the conduct of an agent, and then escape antitrust liability by hiding behind the separate corporation is counterintuitive.”). And the Chandler Plaintiffs provide no evidence that Phoenix shared HOTF’s “intention of monopolizing the relevant market.” *Climax Molybdenum Co.*, 414 F. Supp. 2d at 1013. Thus, given Phoenix’s lack of knowledge, intent, and involvement in HOTF’s injurious acts, Phoenix may not be held liable as part of a single enterprise.

For similar reasons, the court concluded that Fisher could not be liable for HOTF’s anticompetitive conduct:

In *MVConnect*, this Court held that “a corporate officer or director can be held personally liable for damages arising out of an anti-trust violation where he participated in the unlawful acts, or where he acquiesced or ratified the actions of other officers or agents of the corporation which were in violation of the anti-trust law.” *Id.* at *10. The “essential principle” necessary to hold a director or officer individually liable for a company’s alleged violation is the director’s or officer’s “direct, personal participation.” *Id.* Accordingly, to survive a motion to dismiss a claim for individual liability based on an antitrust violation, a plaintiff must plead “factual allegations of some sort of conscious wrongdoing by [an] officer on the corporation’s behalf” and that the officer had “some direct role” in the alleged violation. *Id.* at *9 (citing *In re Morrison*, 555 F.3d 473, 481 (5th Cir. 2009); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir. 1985)).

Based on the plaintiffs’ admission of when Fisher obtained actual notice of the facts supporting their claim, Fisher did not have the requisite knowledge, intent, and direct involvement in HOTF’s alleged anticompetitive acts and could not be held liable for his role as an officer of HOTF. Thus, the court dismissed the claims against the Phoenix defendants. (The court also dismissed the claims against HOTF as well as the Phoenix defendants based on lack of standing and the statute of limitations.)

J&J Sports Productions, Inc v. Club Mandala, LLC, No. 7:18-CV-134, No. 7:19-CV-108, 2020 WL 1892956 (S.D. Tex. Jan. 13, 2020).

The court denied an LLC member’s motion for summary judgment because the Federal Communications Act imposes liability on those who have the right to supervise unauthorized activity and have an obvious and direct financial interest in the activity, and public records regarding the ownership and management of an LLC that allegedly streamed two fights in violation of the FCA showed that the individual defendant had ownership and management positions in the LLC.

J&J Sports Productions, Inc., the broadcast licensee for two championship fights, sued Carlos Hernandez, Jorge Guajardo, and Club Mandala, LLC, for violation of the Federal Communications Act (FCA) based on the defendants' streaming of the fights without the plaintiff's permission.

Hernandez filed a motion for summary judgment, arguing that he was not individually liable for the interceptions because Club Mandala, LLC owned the facility where the programs were intercepted and shown. He also filed a motion for partial summary judgment in the alternative on the plaintiff's request for the maximum amount of damages under the FCA, arguing that he was not liable for enhanced damages under the federal law.

Regarding Hernandez's individual liability, the court noted that the FCA imposes vicarious liability on a person who assists in prohibited interception or receipt when the person has "(1) the right and ability to supervise the unauthorized activities and (2) an obvious and direct financial interest in those activities." Hernandez presented evidence that his son, rather than he, managed and supervised the LLC's day-to-day operations. He also alleged that he was not present on the date of either of the interceptions. However, the certificate of formation filed with the Texas Secretary of State before the fights were broadcast identified Hernandez as the LLC's sole member and manager. Filings after the broadcast of the fights showed that Hernandez was the "owner," "director," and "managing member" of the LLC until the LLC filed a certificate of amendment in 2017 naming Guajardo as "manager" and Hernandez as "partner," with equal ownership of the LLC. The LLC subsequently filed a certificate of correction, naming Guajardo as "managing member" and Hernandez as "member" of the LLC. In addition, evidence from a 2018 Texas Franchise Tax Public Information Report identified Hernandez and Guajardo as the LLC's "directors" and members, with Guajardo named as the managing member.

According to the court, this evidence, along with Hernandez's pre-trial admissions "(1) that he was an owner and/or manager of the establishment that exhibited the 2015 Event; (2) that he had a right and ability to supervise the activities of the establishment; and (3) that he had an obvious and direct financial interest in those activities," was sufficient to demonstrate a genuine dispute as to whether Hernandez was vicariously liable under the FCA. The court noted that while Texas law generally "immunizes" LLC members from the liabilities of the LLC, such immunity does not extend to the express imposition of liability under the FCA.

Accordingly, the court denied Hernandez's motion for summary judgment. The court did, however, grant Hernandez's motion for partial summary judgment on the enhanced damages due to a failure of the plaintiff to argue that the defendant had acted willfully.

State Farm Mutual Automobile Insurance Company v. Punjwani, Civil Action No. H-19-1491, 2019 WL 7372215 (S.D. Tex. Dec. 31, 2019).

The court denied a motion to dismiss the plaintiff's RICO claim, holding that the plaintiff sufficiently pled that a professional LLC, as an ongoing legal entity, was an "enterprise" and that the physician who performed examinations, evaluations, and medical services for the LLC satisfied the "participation and conduct" requirement because the physician was the sole individual making medically unnecessary treatment decisions at the heart of the allegedly fraudulent scheme to defraud the plaintiff insurer.

State Farm sued Pain Alleviation & Interventional Needs, PLLC ("PAIN") a Texas limited liability company, the LLC's three members (collectively, "the Roopanis"), and Dr. Punjwani, who performed evaluations and medical services for PAIN. State Farm alleged that it paid hundreds of fraudulent claims for medical services performed at PAIN locations by Dr. Punjwani on accident victims who submitted claims for insurance benefits under State Farm policies. State Farm's claims included claims under RICO and for money had and received.

Dr. Punjwani argued that State Farm's RICO claim failed because PAIN was not an enterprise. To establish RICO liability, the plaintiff must establish the existence of a "person" and a separate and distinct "enterprise." An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The court stated that State Farm adequately alleged that PAIN was an enterprise, as defined under RICO, because PAIN was a legal entity initially organized and operated as a limited liability company and later reorganized to be operated on an ongoing basis as a professional limited liability company. Dr. Punjwani also argued that State Farm did not allege facts showing that Dr. Punjwani had any managerial or supervisory role at PAIN in order to satisfy the participation and conduct requirement of RICO. The court stated that the RICO statute's requirement that the defendant have "some part in directing the enterprise's affairs" does not limit RICO liability "to those with primary responsibility for the enterprise's affairs." Because State Farm alleged that Dr. Punjwani was the sole individual making medically

unnecessary treatment decisions central to the allegedly fraudulent scheme, the participation element was sufficiently pled, and the court denied Dr. Punjwani's motion to dismiss the RICO claim.

All defendants move to dismiss State Farm's claim for money had and received, arguing that State Farm failed to identify fraudulent behavior that led to money received by the defendants; that the defendants had no liability because State Farm did not make any direct payments to defendants; and that the chain of events alleged in the complaint was too attenuated to support a plausible inference that any settlement money paid by State Farm for the claims at issue belonged in equity and good conscience to State Farm. The court rejected these arguments for dismissal. In addition, the Roopanis argued that the Texas Business Organizations Code precluded State Farm's claim against them, relying on Tex. Bus. Orgs. Code § 21.223(a) (stating that "[a] holder ... an owner ... or a subscriber ... may not be held liable to the corporation or its obligees with respect to ... any contractual obligation of the corporation ... on the basis of actual or constructive fraud"); § 101.002 (applying § 21.223 to limited liability companies); § 101.114 (stating that "a member or manager is not liable for a debt, obligation, or liability of a limited liability company"). The court rejected this argument, concluding: "These statutory provisions are facially inapplicable because State Farm does not allege that the Roopanis are liable for PAIN's contractual obligation, debt, or liability. Instead, State Farm alleges that the Roopanis received State Farm's money as 'a portion of the funds obtained through Dr. Punjwani and P.A.I.N.'s fraudulent scheme.' The cases on which the Roopanis rely dismissed claims when the plaintiffs did not plead facts alleging that the LLC member defendants individually received plaintiffs' money through the LLC. [citations omitted] Here, in contrast, State Farm alleges that the Roopanis, as sole members of PAIN, actually received State Farm's funds channeled through PAIN from the allegedly fraudulent insurance claims. This is sufficient to state a claim for money had and received."

Rodriguez v. Tarland, LLC, Civil No. 3:18-CV-00088-E, 2019 WL 6684140 (N.D. Tex. Dec. 5, 2019).

The court held that a member's status as a member of an LLC without any evidence of operational control did not raise a fact issue as to any of the factors involved in the economic-reality test used to determine a person's status as an employer under the Fair Labor Standards Act.

The plaintiff brought an action under the Fair Labor Standards Act (FLSA) against the LLC that owned and operated the restaurant where the plaintiff worked. The plaintiff also sued the LLC's two members, McGill and Rubsamen. The plaintiff claimed that all three defendants were employers within the meaning of the FLSA, which defines an "employer" as "any person acting directly or indirectly in the interest of the employer in relation to the employee." McGill was the restaurant manager, but Rubsamen claimed that she was not involved in the day-to-day operations, and Rubsamen moved for summary judgment on the ground that she was not the plaintiff's employer under the FLSA. To determine whether there is an employer/employee relationship, the Fifth Circuit uses the "economic reality" test set forth in *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012). This test requires consideration of whether the alleged employer: (1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. Rubsamen visited the restaurant about once a quarter, and she and McGill were the only members of the LLC that owned the restaurant. She invested \$500,000 in the restaurant and was in a personal relationship and had a child with McGill, who was the restaurant manager. The court compared the summary-judgment evidence in this case to the evidence in *Gray v. Powers*, in which the Fifth Circuit affirmed the district court's conclusion that no reasonable jury could have found that the LLC member at issue was an employer. The court here concluded that the summary-judgment evidence in this case was even less compelling than that in *Gray v. Powers*. Rubsamen established that none of the economic-reality test factors weighed in favor of her being considered an employer of the plaintiff, and the plaintiff failed to raise a fact issue. Thus, the court granted Rubsamen's motion for summary judgment.

Phelps v. Hunt (In re Hunt), 608 B.R. 477 (Bankr. N.D. Tex. 2019).

The court concluded that Robert Phelps should be granted a nondischargeable claim of \$55,000 against Jeffrey Hunt under § 523(a)(4) and (a)(6) of the Bankruptcy Code.

Tea 2 Go, LLC offered Tea 2 Go franchises. Its owner and manager was Jeffrey Hunt. Robert Phelps purchased several franchises from Tea 2 Go, LLC. He also purchased, from Hunt personally, a 49% interest in EJ T Kickers, LLC.

Hunt eventually filed for bankruptcy. The court stated that Hunt's liability would be measured by (1) the amounts Phelps paid for acquiring and implementing the franchise rights from Tea 2 Go, LLC, and (2) the amount Phelps paid Hunt for the membership interest in EJ T Kickers, LLC.

With respect to Phelps' purchase of the franchise rights from Tea 2 Go, LLC, the court discussed how Hunt could be personally liable. The court noted that a manager/member of an LLC is not individually liable for contractual debts and obligations of the LLC, unless there is a finding that the debt or obligation was incurred through actual fraud for the direct personal benefit of the manager/member. Phelps alleged that he was defrauded by Hunt and that such fraud personally benefitted Hunt. The court observed that actual fraud in the veil-piercing context is not equivalent to the tort of fraud. Rather, actual fraud is defined as involving dishonesty of purpose or intent to deceive. The court stated that if it could not conclude that Hunt's conduct amounted to actual fraud under Texas law, then there can be no debt to discharge, rendering moot any dischargeability issue under § 523(a)(2)(A) of the Bankruptcy Code.

Without the need for veil piercing, Hunt could also be liable if he personally committed a fraudulent or intentionally tortious act. The court noted that agents of corporations are personally liable for their own tortious conduct under the common law. Tea 2 Go, LLC's company agreement did not appoint an agent, but it did vest the manager (Hunt) with authority to designate an agent at the manager's sole discretion. Moreover, § 101.254(a) of the TBOC provides that "each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business." The court concluded, therefore, that Hunt was an agent of Tea 2 Go, LLC and was carrying out the company's business when transacting with Phelps regarding the franchise sales. If Hunt obtained funds from Phelps by "false pretenses, a false representation, or actual fraud" with the requisite intent, Hunt may be held personally liable for such conduct as an agent of Tea 2 Go, LLC.

Garza v. CMM Enterprises, LLC (In re Garza), 605 B.R. 817 (Bankr. S.D. Tex. 2019).

The bankruptcy court concluded that an LLC willfully violated the automatic stay, but the LLC's manager was not personally liable.

CMM Enterprises, LLC, through its manager Jesus Sanchez, exercised self-help in repossessing Guadalupe Garza's vehicle after Garza had filed for bankruptcy. Garza instituted an adversary complaint against CMM for violation of the automatic stay, and she argued that Sanchez should be held personally liable for the actions of CMM. Sanchez filed a motion for judgment on partial findings, arguing that Garza failed to bring forth any evidence showing that Sanchez acted outside of his capacity as a representative of CMM. The court noted that to defeat Sanchez's motion, Garza would have to carry her burden of "establishing a prima facie case that Sanchez is not afforded the legal protections of the corporate structure."

The court observed that "[t]he bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's obligations." That limited liability protection is also afforded to LLCs. The court noted, however, that such limited liability could be disregarded under an alter ego theory of piercing the corporate veil—a theory which applies equally to LLCs. Alter ego applies "when there is such an identity between a corporation and an individual that all separateness between the parties has ceased and a failure to disregard the corporate form would be unfair or unjust." An alter ego allegation is shown from the total dealings of the corporation and the individual, including "the degree to which corporate formalities have been followed, the degree of which corporate and individual property has been kept separate, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes."

The court concluded that Garza was unable to establish that Sanchez was the alter ego of CMM:

Garza did not plead, nor did she submit any evidence or testimony that Sanchez kept his and CMM's property together, that Sanchez was acting individually instead of through CMM, that Sanchez was using CMM for personal purposes, or that Sanchez and CMM are considered a single entity. While Sanchez did testify that it was CMM's policy to flag a client's account and hold off on all contact when they receive notice of a bankruptcy—and this policy was neither written down nor memorialized—this alone does not constitute enough to disregard the corporate fiction. During trial, the evidence and witness testimony demonstrated that CMM sold the Malibu to Garza, that CMM repossessed the Malibu, and that Sanchez—acting as representative of CMM—sought legal

counsel on behalf of CMM before returning the Malibu to Garza. Because Garza did not plead, nor was there any evidence or testimony demonstrating that Sanchez and CMM disregarded the corporate form, this Court will not make such a finding here.

Garza also argued that members of an LLC are not protected from liability for their own tortious actions. In such a case, no finding of alter ego is necessary. The court agreed with the legal proposition, but found no evidence that Sanchez should be liable:

While Garza correctly cited the law, the problem arises in the fact that not only did Garza fail to state a claim involving allegedly tortious or fraudulent actions, but Garza failed to present any evidence that Sanchez committed any tortious or fraudulent act. Indeed, Garza only presented two statutory claims before this Court: violation of the automatic stay under section 362, and violation of the [Texas Debt Collection Act]. Because Garza failed to plead tortious or fraudulent conduct, and failed to present evidence of tortious or fraudulent conduct, Garza may not argue that personal liability attaches to Sanchez without piercing the corporate veil.

While Garza is correct in that section 362(a) applies to all entities, including limited liability companies, Garza failed to carry her burden in establishing a prima facie case that Sanchez's conduct constituted a disregard for the corporate fiction. Accordingly, this Court grants Sanchez's motion for judgment on partial findings under Rule 52(c).

The bankruptcy court did find, however, that CMM willfully violated the automatic stay. As a result of that violation, Garza was awarded actual and punitive damages.

Zhang v. Capital Plastic & Bags, Inc., 587 S.W.3d 82 (Tex. App.—Houston [14th Dist.] Aug. 15, 2019, pet. filed).

An individual argued that he signed a lease in his capacity as president of an LLC and thus was not liable on the lease, but the court held that the lease identified the individual as the landlord, and the individual was thus personally liable on the lease.

Capital Plastic & Bags, Inc. ("Capital") filed a landlord-tenant action against Frank Zhang and Daxwell Group, LLC, for bad faith retention of Capital's security deposit. Zhang asserted, among other things, that he was not personally liable for the obligation, arguing that he signed the lease documents on behalf of Daxwell Group, LLC as the LLC's president. The lease listed "Frank Zhang or Assigns" as the landlord. In addition, Zhang's individual signature and initials appeared numerous times throughout the lease. While finding evidence that Zhang had signed the lease on behalf of the LLC, the court determined that there was no evidence of contract assignment prior to contract signing and closing. Because the statute of frauds precludes enforcement of an unwritten property interest assignment of greater than one year, the lease unambiguously identified Zhang as a landlord. Accordingly, Zhang could be held jointly and severally liable for the obligation to Capital.

C. Authority of Member, Manager, Officer, or Other Agent

Domain Protection, LLC v. Sea Wasp, LLC, 426 F. Supp. 3d 355 (E.D. Tex. 2019).

In a dispute over domain names, a litigant argued that the declaration of an LLC's agent filed in support of a response to a motion for partial summary judgment should not be given weight because of the agent's alleged conflict of interest and breach of fiduciary duty in transferring certain domain names of a nonparty LLC. The court held that the litigant, as a third party, was not entitled to hold the agent to any fiduciary duty or to void the agent's assignment of the LLC's domain names. Only the LLC, as the principal, was entitled to avoid the agent's assignment. Stating that "entities are necessarily run by individuals serving as their agents," the court also rejected the argument that the agent merely held the domain names of the LLC in a nominal capacity and lacked authority to transfer them. The agent had been vested by a federal district court with authority to manage the LLC and its assets after a receiver was ordered to turn the assets over to the agent, and the litigant was not the proper party to challenge clear title to the domain names at issue.

Phelps v. Hunt (In re Hunt), 608 B.R. 477 (Bankr. N.D. Tex. 2019).

The court concluded that Robert Phelps should be granted a nondischargeable claim of \$55,000 against Jeffrey Hunt under § 523(a)(4) and (a)(6) of the Bankruptcy Code.

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Hunt eventually filed for bankruptcy. The court stated that Hunt's liability would be measured by (1) the amounts Phelps paid for acquiring and implementing the franchise rights from Tea 2 Go, LLC, and (2) the amount Phelps paid Hunt for the membership interest in EJ T Kickers, LLC.

With respect to Phelps' purchase of the franchise rights from Tea 2 Go, LLC, the court discussed how Hunt could be personally liable. The court noted that a manager/member of an LLC is not individually liable for contractual debts and obligations of the LLC, unless there is a finding that the debt or obligation was incurred through actual fraud for the direct personal benefit of the manager/member. Phelps alleged that he was defrauded by Hunt and that such fraud personally benefitted Hunt. The court observed that actual fraud in the veil-piercing context is not equivalent to the tort of fraud. Rather, actual fraud is defined as involving dishonesty of purpose or intent to deceive. The court stated that if it could not conclude that Hunt's conduct amounted to actual fraud under Texas law, then there can be no debt to discharge, rendering moot any dischargeability issue under § 523(a)(2)(A) of the Bankruptcy Code.

Without the need for veil piercing, Hunt could also be liable if he personally committed a fraudulent or intentionally tortious act. The court noted that agents of corporations are personally liable for their own tortious conduct under the common law. Tea 2 Go, LLC's company agreement did not appoint an agent, but it did vest the manager (Hunt) with authority to designate an agent at the manager's sole discretion. Moreover, § 101.254(a) of the TBOC provides that "each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business." The court concluded, therefore, that Hunt was an agent of Tea 2 Go, LLC and was carrying out the company's business when transacting with Phelps regarding the franchise sales. If Hunt obtained funds from Phelps by "false pretenses, a false representation, or actual fraud" with the requisite intent, Hunt may be held personally liable for such conduct as an agent of Tea 2 Go, LLC.

8-Plus Properties, LLC v. Invesco Commercial Enterprises, LLC, No. 01-17-00657-CV, 2019 WL 3819515 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, no pet.) (mem. op.).

The court of appeals reversed the judgment of the trial court on the ground that harm was caused by erroneous jury instructions regarding the authority of an agent in the LLC setting.

8-Plus was a member-managed LLC. Johnny Carroll was one of eight members. Invesco alleged that it negotiated with Johnny and entered into a binding contract to purchase a property owned by 8-Plus for \$62,500. When 8-Plus refused to sell the property, Invesco brought claims for specific performance, trespass to try title, breach of contract, and a declaratory judgment. 8-Plus filed a general denial and specific denial, asserting, among other things, that an oral agreement existed requiring all eight members to approve the sale, and that the required approvals had not been obtained. The parties disagreed about whether Invesco had been informed by Johnny that the consent of his fellow members was required to approve the sale.

The jury returned a verdict in favor of Invesco. On appeal, 8-Plus argued that the trial court committed harmful error by refusing 8-Plus's tendered jury instructions. The court of appeals began by quoting the pattern jury instruction on actual and apparent authority that was submitted to the jury:

Authority for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.

Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

8-Plus argued that the trial court committed reversible error by refusing to instruct the jury on the requirements for binding action by a member under § 101.254 of the Business Organizations Code (“BOC”). That section explains the authority of agents of an LLC as follows:

(a) Except as provided by this title and Title 1, each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company’s business.

(b) An act committed by an agent of a limited liability company described by Subsection (a) for the purpose of apparently carrying out the ordinary course of business of the company, including the execution of an instrument, document, mortgage, or conveyance in the name of the company, binds the company unless:

(1) the agent does not have actual authority to act for the company; and

(2) the person with whom the agent is dealing has knowledge of the agent’s lack of actual authority.

(c) An act committed by an agent of a limited liability company described by Subsection (a) that is not apparently for carrying out the ordinary course of business of the company binds the company only if the act is authorized in accordance with this title.

“Governing person” is defined under § 1.002(37) of the BOC as “a person serving as part of the governing authority of an entity.” “[G]overning authority” with respect to an LLC is defined under § 101.251 of the BOC as the managers in a manager-managed LLC and the members in a member-managed LLC.

The court noted that two instructions submitted by 8-Plus (and refused by the trial court) directly tracked the language of § 101.254(a)-(b). 8-Plus also submitted an additional instruction on an act “in the ordinary course of business” that was found by the court of appeals to be “grounded in well-established statutory construction principles.” The court concluded that the evidence pertaining to 8-Plus’s proposed jury instructions was hotly disputed. As a result, the instructions proposed by 8-Plus pursuant to § 101.254 would have aided the jury in answering whether 8-Plus agreed to sell the property to Invesco.

The court then addressed 8-Plus’s argument that the trial court committed reversible error because its instruction on apparent authority did not conform to *Gaines v. Kelly*, 235 S.W.3d 179 (Tex. 2007). 8-Plus requested the following instruction with the italicized language from the *Gaines* opinion:

Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person *acting with diligence and discretion to ascertain the agent’s authority* [to] rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

The court of appeals concluded that 8-Plus’s instruction, which tracked the language of the *Gaines* opinion, was proper and should not have been refused by the trial court.

Even though the court of appeals determined that the trial judge had committed jury-charge error, the court stated that it would only reverse if the error was harmful. The court found that it was:

In this case, the jury presumably found that Johnny had actual or apparent authority to bind 8-Plus in unanimously answering “yes” to Question No. 1 of the trial court’s charge asking if 8-Plus agreed to sell the Property to Invesco. And there is nothing that instructs the jury that if Johnny lacks actual authority and Invesco is aware that he lacks actual authority, that it could not find that 8-Plus was bound by Johnny’s actions under a theory of apparent authority. In other words, the instructions accompanying Question No. 1 of the jury charge allowed the jury to make a finding that 8-Plus agreed to sell the Property to Invesco without first determining whether Johnny lacked actual authority to bind 8-Plus and, if so, whether Invesco had knowledge that he lacked such authority. This omits a specific finding required by the statute governing agency in this

case, which provides that an LLC is not bound by the acts of its agents if the agent acts without actual authority and the person dealing with the agent is aware that the agent lacks actual authority. We cannot assume that the jury considered evidence about Invesco’s knowledge regarding Johnny’s authority without instructions advising the jury to do so.

Augustine v. Dallas Medical Center, LLC, Case No. 4:19-CV-00020-ALM-KPJ, 2019 WL 3806037 (E.D. Tex. June 25, 2019), report and recommendation adopted, 2019 WL 3940644 (E.D. Tex. Aug. 21, 2019).

An arbitration agreement was signed by the plaintiff, Mercy Augustine, and by the defendant, Dallas Medical Center, LLC. An unidentified individual signed on behalf of the LLC. In resisting arbitration, the plaintiff contended that the defendant’s signature was defective because the individual who signed on behalf of the defendant remained unidentified and might lack authority to sign. The court disagreed:

Plaintiff argues the individual who signed on behalf of Defendant may have lacked authority or agency to act on behalf of Defendant. Specifically, Plaintiff addresses agency law in the scope of limited liability companies, in which only a person authorized by the board of directors of a limited liability company in Texas may bind the company in contract for anything other than routine matters. Plaintiff cites no case in which the court refused to enforce an arbitration agreement because the individual who signed on behalf of the employer did not have the authority of the board of directors. Upon review, the case law relied on by Plaintiff is inapposite. The Court finds no case law holding that an arbitration agreement provided to all employees is not a routine matter appropriately delegated in the context of a limited liability company.

Additionally, the Motion to enforce the Arbitration Agreement was filed by Defendant and Defendant adopts the signature contained therein. See Dkt. 16 at 2 (“In fact, as is clearly evident by a cursory glance at the Agreement[], both parties signed the Agreement.”). In Texas, a signature is effective so long as it is rendered by or at the direction of the signor. While Plaintiff argues, “Defendant must sign the agreement,” Texas law does not require an entity to sign the agreement on its own behalf, but allows a signature executed on behalf of an entity to be effective where made at the direction of the signor. Accordingly, the Court finds that while the identity of the signor is at this time unknown, the signature is nevertheless effective.

D. Fiduciary Duties

Hui Ye v. Xiang Zhang, No. 4:18-CV-4729, 2020 WL 2521292 (S.D. Tex. May 18, 2020).

In a dispute between two businessmen who jointly owned six companies, the district court granted the defendant’s motion for judgment on the plaintiff’s individual and derivative claims for breach of fiduciary duty.

Hui Ye and Xiang Zhang were high school friends and decided to start a joint venture to bring in goods from China to sell in the United States. By 2015, Ye and Zhang were the joint owners and named directors of six companies in the logistics and water filter industries (the “U.S. Companies”). The U.S. Companies—three Texas LLCs and three Texas corporations—were each owned 60% by Ye and 40% by Zhang. Zhang was placed in charge of managing the U.S. Companies because he lived in the United States and Ye was unable to travel outside of China. The parties’ common practice was to require that both Ye and Zhang agree on all “major decisions” related to the U.S. Companies. Zhang’s wife helped with the U.S. Companies’ books in an unofficial capacity until she was hired to work full-time as the Director of Accounting in September 2016. Between 2014 and 2016, the U.S. Companies generated \$5.4 million in revenue. In January 2015, Ye and Zhang purchased a warehouse in Houston (the “Warehouse”) on behalf of one of the U.S. Companies.

The U.S. Companies began to decline in 2017, due in part to defective water filters. Beginning in December 2017, the U.S. Companies stopped paying invoices to their Chinese suppliers and owed approximately \$3.6 million. In June 2018, Zhang expressed concerns about the health of the U.S. Companies to Ye and two of their friends who were also involved with the water filter business. Later, in September 2018, Zhang proposed selling the Warehouse as a source of cash flow. Zhang, Ye, and their friends met in China in October 2018 (the “October Meeting”) to discuss the future of the U.S. Companies and the sale of the Warehouse. At the October Meeting, Ye and Zhang signed six documents (collectively, “the Resolutions”), one for each company that Zhang had drafted beforehand.

The Resolutions outlined a transfer of ownership such that Zhang would become the sole owner of two of the U.S. Companies while Ye would become the sole owner of the remaining companies. The October Resolutions were in English, and later Ye testified at trial that he did not understand them. Ye and Zhang also agreed to sell the Warehouse at the October Meeting and signed a Certificate of Resolutions and Incumbency that authorized Zhang's wife to execute the sale of the Warehouse. However, three weeks prior to the October Meeting, Zhang's wife had entered into a listing contract with a realtor for the Warehouse, but Zhang did not disclose this at the October Meeting. Ye and Zhang also made several oral agreements that were not reduced to writing, including that all of the water filter inventory would be transferred to Ye and that Zhang would send proceeds from water filter sales on a weekly basis beginning later that month. The parties disagreed on whether certain other oral agreements were reached at the October Meeting, including whether Zhang would abide by Ye's conditions that the Warehouse sale price be no less than \$2 million and the realtor fee not exceed 2 percent, or whether the Warehouse sales proceeds would be used first to pay back loans that Ye took out in China for inventory and then divided in the same percentage as their ownership of the U.S. Companies. At the end of the October Meeting, Ye stated that he would draft a Chinese translation of the Resolutions (the "Chinese-Language Resolution"), and Zhang agreed to sign it.

In November 2018, Ye sent Zhang the Chinese-Language Resolution, which provided for the same transfer of ownership of the U.S. Companies as outlined in the Resolutions and some of Ye's financial conditions regarding the sale of the Warehouse. However, Ye's Chinese-Language Resolution also added several new provisions not set out in the Resolutions, including that all of the stock and goods of the U.S. Companies would belong to Ye. On November 20, 2018, Ye convened a shareholder meeting at which he was the only individual present. At that meeting, Ye signed the Chinese-Language Resolution and a new resolution to terminate the Certificate of Resolutions and Incumbency that was signed by Ye and Zhang at the October Meeting. Ye then informed Zhang of the outcome of the November meeting and stated that the resolutions were valid because company rules permitted passing resolutions by majority vote and he was the majority owner of the company. After Zhang returned to the United States, he informed Ye that he did not approve of the Chinese-Language Resolution because it listed terms that were not found in the Resolutions and he would only recognize those terms as agreed in the Resolutions.

Ye sued Zhang, asserting various claims that included breach of fiduciary duty individually, as an investor and shareholder, and derivatively, on behalf of the U.S. Companies. The court appointed an auditor to conduct a forensic audit of the U.S. Companies' books and records, which found that the company record-keeping practices were not compliant with Generally Accepted Accounting Principles, numerous transactions could not be verified because the auditor could not locate many records, there was an unusual number of related-party transactions, the amount spent on shipping labels did not match the amount of online sales, and there was no evidence that funds or assets had been transferred from the U.S. Companies to the personal bank accounts of Zhang or his wife. During the seven-day bench trial, the court heard testimony from Ye, Zhang, their two friends, the auditor, and the realtor. After the close of Ye's case-in-chief, Zhang moved for judgment on partial findings.

The court began its analysis by stating that, under Texas law, to prevail on a claim for breach of fiduciary duty, a plaintiff must prove that (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached his fiduciary duty to the plaintiff, and (3) the defendant's breach caused injury to the plaintiff or benefit to the defendant. [Throughout the court's discussion and analysis, it referred to the U.S. Companies and the fiduciary-duty issues in corporate terms, i.e., the court relied on principles of corporate law and did not distinguish between the entities that were LLCs and corporations.] The first issue the court addressed was whether and to whom Zhang owed a fiduciary duty. Ye argued that Zhang owed fiduciary duties both to him as an individual shareholder and the U.S. Companies. Zhang, on the other hand, took the position that he did not owe any fiduciary duties to either because he was a mere shareholder. The court agreed with Zhang that, in Texas courts, minority shareholders do not owe a fiduciary duty to other shareholders as a matter of law. The court, however, noted that Zhang was a director of the U.S. Companies and cited Texas case law for the proposition that officers and directors owe fiduciary duties to the entity. Therefore, the court concluded that Zhang owed fiduciary duties to the U.S. Companies. The court stated that Zhang's fiduciary duties ran to the corporation, not to individual shareholders or even a majority of shareholders. Thus, Zhang would owe a fiduciary duty to Ye only if an informal fiduciary relationship existed or Zhang otherwise owed him a duty that was separate and apart from what Zhang owed the U.S. Companies. The court determined that Ye could not establish either. The court explained that an informal fiduciary relationship exists when one of the parties relies on the other "for moral, financial, or personal support or guidance" and "there exists a long association in a business relationship, as well as personal relationship[,]" all of which requires "extraordinary facts." Despite Ye's contentions that he considered Zhang to be like a brother and

they had an ongoing business relationship, the court determined that the record did not contain sufficient “extraordinary facts” and concluded that Zhang did not owe fiduciary duties to Ye through an informal fiduciary relationship. Likewise, the court concluded that Ye did not present a contract or otherwise establish that Zhang owed him a special duty. As a result, the court granted Zhang’s motion as to Ye’s individual fiduciary duty claims.

The court then proceeded to Ye’s derivative claims and addressed the issue of whether Zhang breached his fiduciary duties of loyalty and care. Ye argued that he presented sufficient evidence to establish that Zhang breached his fiduciary duties in eight ways: (1) inducing Ye to appoint Zhang’s wife as Director of Accounting; (2) selling the Warehouse despite Ye’s revocation of his authorization; (3) failing to pay more than \$3.6 million in invoices to the U.S. Companies’ Chinese suppliers; (4) failing to “keep competent books so as to obfuscate the authenticity of company transactions”; (5) inducing Ye to agree to the business divorce; (6) transferring the inventory of water filters of the U.S. Companies to another one of the U.S. Companies “without any recorded payment”; (7) inducing Ye to agree to sell the Warehouse when he had already listed the property for sale; and (8) misappropriating a “venture patent” for his own personal gain.

The court cited Texas case law to provide a legal framework for the fiduciary duties of loyalty and care before ultimately rejecting each of Ye’s eight derivative claims. As to Ye’s first derivative claim, the court determined that Ye did not establish that Zhang’s conduct with respect to appointing his wife was a breach of his duty of loyalty. The court observed that Zhang had the burden to show that this hiring decision was fair to the U.S. Companies, assuming that Zhang was an interested party in his wife’s appointment. Because there was no official accountant until Zhang’s wife was hired and she had prior experience in keeping the books in an unofficial capacity, the court found that Zhang’s suggestion to appoint his wife was made in good faith and was fair to the U.S. Companies.

Likewise, the court concluded that Ye did not establish that Zhang breached his fiduciary duties in connection with the sale of the Warehouse. The court determined that Ye had not demonstrated that Zhang put his personal interests over those of the U.S. Companies in violation of his duty of loyalty. Applying the framework for interested parties, the court concluded that Zhang neither intended to nor in fact personally profited from the sale. Furthermore, the court determined that Zhang sold the Warehouse in good faith based on his testimony that it was necessary due to the poor health of the U.S. Companies. The court acknowledged that, after Zhang was authorized to sell the Warehouse at the October Meeting, Ye then added conditions to the sale and attempted to revoke Zhang’s authorization. However, the court reasoned that Ye still did not show that Zhang’s decision to proceed with the sale violated their custom for making business decisions or lacked “an intent to confer benefit on the [U.S. Companies].” The court then determined that Ye did not establish that Zhang violated his duty of care because Ye did not demonstrate that Zhang negligently mismanaged the sale and did not produce sufficient proof of fraud or gross negligence to overcome the business judgment rule.

Next, the court concluded that the evidence did not support Ye’s third derivative claim. The court reasoned that Ye did not establish that Zhang’s failure to pay the invoices was self-interested because the testimony at trial demonstrated that the U.S. Companies were struggling financially and there was no evidence that Zhang impermissibly transferred assets out of the companies. The court further reasoned that Ye did not present sufficient evidence to overcome the business judgment rule, noting that the rule’s “latitude applies with particular force” in similar situations where a company is struggling and difficult decisions must be made.

As to Ye’s fourth derivative claim, the court concluded that the evidence was not sufficient to establish that Zhang engaged in self-interested conduct or an impermissible dereliction of care. Despite acknowledging that the U.S. Companies’ record-keeping practices were “far from exemplary” and noting that the auditor testified to an unusual number of related-party transactions, the court reasoned that this was not enough to show that Zhang violated his duty of loyalty by purposefully obscuring company records to hide fraudulent transactions or that he failed to act for the benefit of the U.S. Companies. The court cited case law for the proposition that a director may be responsible for the conduct of another when “their failure to intercede constitutes a ‘total abdication of duties[.]’” While Zhang was not the companies’ accountant, the court determined that the evidence did not support such a total abdication. As a result, the court reasoned that the evidence was insufficient to show that Zhang breached his duty of care because it previously determined that he did not act fraudulently and his management was not grossly negligent.

Next, the court concluded that the evidence did not support Ye’s fifth derivative claim. According to the court, the central question for this claim was whether the evidence sufficiently demonstrated that Zhang acted in a self-interested manner at the expense of the U.S. Companies. The court noted that the evidence, at best, showed

that the total assets of two of the companies that Zhang proposed to take over increased significantly in the two years prior to the October Meeting, while the total assets of the companies that Ye would acquire decreased. However, the court reasoned that the evidence did not provide a complete understanding of the corresponding liabilities or the companies' future performance. Thus, the court determined that the evidence did not establish that Zhang either intended to receive or did receive a personal benefit by reallocating assets among the companies ahead of the Resolutions at the expense of the U.S. Companies.

The court rejected Ye's sixth, seventh, and eighth derivative claims because he did not prove that any breach benefitted Zhang or harmed the U.S. Companies. As to Ye's sixth derivative claim, the court first disagreed with Ye's factual premise regarding the payment, noting that the auditor testified at trial that company records reflected a payment of \$1.2 million from the company that acquired the inventory. Given this testimony, and absent any showing that the transaction harmed the U.S. Companies, the court determined that Zhang did not breach his fiduciary duties. The court rejected Ye's seventh derivative claim because listing the Warehouse, even without authorization, created no obligation to any party and thus did not harm the U.S. Companies. The court reasoned that Ye's eighth derivative claim failed because Zhang could not personally benefit from misappropriating the "venture patent" in breach of his fiduciary duties owed to the U.S. Companies since none of those entities owned the patent. Therefore, the court granted Zhang's motion as to Ye's derivative fiduciary-duty claims.

Recruiting Force, LLC v. Mainthia Tech., Inc., No. A-19-CV-1045-RP, 2020 WL 1698826 (W.D. Tex. Apr. 8, 2020).

The court concluded that claims asserted by an LLC member against the other member were derivative, and the LLC thus was not merely a nominal party. Because the citizenship of an LLC is based on the citizenship of all of its members, diversity of citizenship was lacking, and the court remanded the case for lack of subject-matter jurisdiction. In the course of discussing whether the plaintiff's claims were direct or derivative, the court stated that any fiduciary duties owed by the LLC's manager were owed to the LLC.

Katchadurian v. NGP Energy Capital Management, LLC (In re Northstar Offshore Group, LLC), 2020 WL 1930148, ___ B.R. ___ (S.D. Tex. 2020).

The court spoke in corporate terms and relied on Delaware case law in the corporate context in addressing a bankruptcy trustee's claims that an LLC's directors breached their fiduciary duties to the LLC. The court discussed the duty of loyalty, business judgment rule, and duty of care. The court reserved ruling on dismissal of the trustee's claim for breach of the duty of loyalty pending the trustee's amendment of its allegations regarding control over and lack of independence of the directors. With regard to the trustee's allegations of breach of the duty of care, the court stated that the trustee focused on the outcome of the directors' decisions, rather than the process, and the business judgment rule protects the outcome absent an egregious process. The complaint did not allege any facts to support an inference that the directors' decision-making process was grossly negligent or uninformed. The court concluded that the core of the trustee's allegations was that the directors' decisions were self-interested and motivated by bad faith. As such, these claims invoked the duty of loyalty rather than the duty of care, and the court dismissed the claim for breach of the duty of care.

French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652 (W.D. Tex. Aug. 27, 2018) (Although the court issued this opinion in 2018, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The district court granted preliminary injunctive relief sought by an LLC member after determining that there was a substantial likelihood of success on the plaintiff's claim that the other two members had breached the operating agreement.

In 2013, Jordan French and Darius Fisher formed First Page, a Texas limited liability company that performed online reputation management and advertising services. French and Fisher were both members of First Page. In 2015, French and Fisher amended First Page's operating agreement to add Jesse Boskoff as a member and to name all three members as managers. Pursuant to the operating agreement, French, Fisher, and Boskoff each held a one-third membership interest in First Page.

French sued Fisher and Boskoff ("Defendants") for breach of contract, breach of fiduciary duty, and other claims. The claims were largely based on (1) a purported diversion of business opportunities and personnel from First Page to Blue Land (a business owned by Fisher and Boskoff), and (2) the use of First Page funds to pay the

personal legal fees of Fisher and Boskoff. French sought a preliminary injunction based on assertions that Defendants had breached various provisions of First Page's operating agreement, including the following:

2.07. Approval of Members. No manager has authority to do any of the following without the prior approval of the members: (a) ... To sell, lease, exchange, mortgage, pledge, or otherwise transfer or dispose of all or substantially all the assets of the Company; ... (d) ... To incur indebtedness by the Company other than in the ordinary course of business; (e) ... To authorize a transaction involving an actual or potential conflict of interest between a Member or Manager and the Company[.]

2.10. Fiduciary Duties of Managers. Each Manager owes the fiduciary duties of care and loyalty to the Company and the Members and must discharge these duties and exercise the Manager's rights in the Company consistently with the obligation of good faith and fair dealing. Managers must discharge their fiduciary duties of care and loyalty in accordance with the standards set forth in the section of this agreement relating to outside activities of managers as well as the following standards:

(a) Standard of Care. In conducting ... the company's business, a Manager must act in a manner that the Manager reasonably believes to be in the best interest of the Company and must use the care that a person in like position would reasonably believe appropriate under the circumstances;

(b) Accounting. A Manager must account to the Company and hold as trustee for the Company any profit or benefit derived by the Manager in the conduct ... of the Company's business or derived from use by the Manager of the Company's property, including the appropriation of a Company opportunity;

(c) Conflicts of Interest. Except as otherwise provided in the section of this agreement relating to self-interest of managers, a Manager must refrain from dealing with the Company in the conduct ... of its business either personally or on behalf of a party having an adverse interest to the Company; and

(d) Noncompetition. A Manager may not compete with the Company in the conduct of its business prior to the time the Company is dissolved....

French argued that Defendants breached their contractual duties of care and loyalty, which Defendants owed directly to French, by entering into a joint venture with Blue Land. French claimed that this constituted a breach because, when Defendants entered into the joint venture, there was an actual conflict of interest between French and Defendants since both First Page and Blue Land were in the business of providing advertising services. Given the conflict, French claimed that Defendants were required to obtain the unanimous consent of the members, including French, before authorizing the joint venture. Even if there were not a conflict of interest at the time Defendants entered into the joint venture, French argued that a clear conflict of interest arose when Defendants began diverting resources and personnel from First Page to Blue Land. French claimed that after forming Blue Land, Defendants purportedly transferred First Page's advertising work to Blue Land and, instead of hiring Blue Land employees to perform the work, paid First Page employees to complete the work using First Page funds. Nevertheless, First Page received only half of the revenues.

Defendants countered that the operating agreement permitted them to engage in business outside of the company and expressly provided that a "[m]anager does not violate any duty or obligation to the Company merely as a result of engaging in conduct that furthers the interests of the [m]anager." Defendants also noted that, under the terms of the operating agreement, "[n]either the company nor any member has any rights to the profits or benefits of such activities." Further, Defendants contended that French's consent was not required because there was no conflict of interest, as "Blue Land is not engaged in the same type of business as [First Page]." Defendants claimed that Blue Land was in the advertising business, whereas First Page was in the search engine optimization business.

Despite Defendants' arguments, the court concluded that the evidence showed that First Page and Blue Land were engaged in the same type of business. Moreover, the evidence suggested that Defendants formed Blue

Land to take over First Page’s advertising work and that Defendants breached their duties of care and loyalty by diverting resources and personnel from First Page to Blue Land. In his deposition, Boskoff testified that Blue Land used several First Page employees to assist with Blue Land’s advertising campaigns, but First Page paid all of their salaries. Despite this assistance, First Page received only 50% of the revenues. Based on this evidence and the undisputed fact that Defendants did not obtain French’s consent to form the joint venture or transact business with Blue Land, the court found that there was a substantial likelihood of success on Plaintiff’s claim that Defendants breached various sections of the operating agreement in their dealings with Blue Land.

French also argued that Defendants breached the operating agreement by using First Page funds to pay for their personal legal fees without French’s consent. In response, Defendants argued that under section 2.12 of the operating agreement, “[First Page] must indemnify each of the [m]anagers against all liability, loss, and costs (including attorney’s fees) incurred or suffered by the [m]anager in connection with the Company or in connection with the manager’s participation in any other entity, association, or enterprise at the request of the Company.” The court pointed out, however, that the same provision also stated that “[First Page] has no obligation to indemnify a [m]anager for any liability arising out of: (a) a breach of the [m]anager’s fiduciary duties to the Company or the [m]embers; (b) an act or omission not in good faith that involve[s] intentional misconduct or a knowing violation of law; or (c) an unlawful distribution under the Act.” Moreover, the court found that the decision to expend resources on “defending actions [at] law or equity” appeared to require approval of the managers. Under the terms of the operating agreement, the managers were vested with the exclusive authority “to do any and all things necessary, appropriate, convenient and permitted by law for the furtherance and accomplishment of its purposes, and for the protection and benefit of the Company and its properties, including ... bringing and defending actions at law or equity[.]” In addition, “[i]f there is more than one manager serving, all decisions ... relating to the business or affairs of the company [must] be decided by the affirmative vote or consent of the [m]anagers.” According to the court, it was undisputed that Defendants paid for their personal legal fees from First Page’s account without French’s consent. Further, French demonstrated that he was personally injured by the monetary benefits that Defendants received (and still were receiving) to his exclusion. Thus, the court found that French demonstrated a substantial likelihood of success on his claim that Fisher and Boskoff breached the operating agreement by using First Page’s account to pay for their personal legal fees without French’s consent.

The court also found that there was a substantial likelihood that Defendants would continue to remove and dissipate First Page’s assets. Because French sought equitable remedies, such as the imposition of a constructive trust and disgorgement of ill-gotten profits, the court worried that such remedies would be rendered moot if injunctive relief were denied and Defendants dissipated the sought-after funds. The court determined, therefore, that the threatened harm—dissipation of the assets that were the subject of the suit—impaired the court’s ability to grant an effective remedy. As a result, the court concluded that there was a substantial threat of irreparable injury if a preliminary injunction were not entered.

E. LLC Property and LLC Membership Interest

Doucette v. Ditech Fin. LLC, Civ. A. No. 1:19-CV-00366-MJT, 2019 WL 4934857 (E.D. Tex. Aug. 30, 2019) (“A member of a Texas limited liability company does not have an interest in any specific property of the company. Tex. Bus. Orgs. Code § 101.106(b). Membership interest in an LLC is personal property, Tex. Bus. Orgs. Code § 101.106(a), and comes with a right to share profits and receive distributions. Tex. Bus. Orgs. Code § 1.002(54). Doucette has failed to show how the wrongful foreclosure of the property in question will cause him irreparable harm. Tritex Investment Group LLC—the real owner of the property—will lose an asset, but Doucette as a member of the LLC would not be irreparably harmed.” (citation omitted)).

Chi Hua Lee v. Linh Hoang Lee, No. 02-18-00006-CV, 2019 WL 3024478 (Tex. App.—Fort Worth July 11, 2019, no pet.) (mem. op.) (“JoAnderson Capital [an LLC], Jim, and Jenny also contend that the evidence conclusively proved Jessey held only a 40% interest in JoAnderson Capital. As we set out above, Jessey testified at trial that his capital contribution to JoAnderson Capital was for a 40% interest in the company. Huang testified to the same. Further, in his report, the parties’ agreed expert opined that Jessey owned a 40% interest in JoAnderson Capital. The trial court also admitted copies of JoAnderson Capital’s state and federal tax returns for 2014 and 2015, which also showed that Jessey’s share of JoAnderson Capital was 40%. And all of this evidence was uncontradicted. No reasonable factfinder could disregard this uncontradicted, clear, positive, consistent evidence

and find that Jessey’s interest in JoAnderson Capital was anything other than 40%. Accordingly, JoAnderson Capital, Jim, and Jenny conclusively established Jessey’s interest in JoAnderson Capital is 40%.”).

F. Interpretation and Enforcement of Company Agreement or Certificate of Formation

1. Fiduciary Duties

French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652 (W.D. Tex. Aug. 27, 2018) (Although the court issued this opinion in 2018, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The district court granted an LLC member’s motion for a preliminary injunction after determining that there was a substantial likelihood of success on the plaintiff’s claim that the other two members had breached the operating agreement.

In 2013, Jordan French and Darius Fisher formed First Page, a Texas limited liability company that performed online reputation management and advertising services. French and Fisher were both members of First Page. In 2015, French and Fisher amended First Page’s operating agreement to add Jesse Boskoff as a member and to name all three members as managers. Pursuant to the operating agreement, French, Fisher, and Boskoff each held a one-third membership interest in First Page.

French sued Fisher and Boskoff (“Defendants”) for breach of contract, breach of fiduciary duty, and other claims. The claims were largely based on (1) a purported diversion of business opportunities and personnel from First Page to Blue Land (a business owned by Fisher and Boskoff), and (2) the use of First Page funds to pay the personal legal fees of Fisher and Boskoff. French sought a preliminary injunction based on assertions that Defendants had breached various provisions of First Page’s operating agreement, including the following:

2.07. Approval of Members. No manager has authority to do any of the following without the prior approval of the members: (a) ... To sell, lease, exchange, mortgage, pledge, or otherwise transfer or dispose of all or substantially all the assets of the Company; ... (d) ... To incur indebtedness by the Company other than in the ordinary course of business; (e) ... To authorize a transaction involving an actual or potential conflict of interest between a Member or Manager and the Company[.]

2.10. Fiduciary Duties of Managers. Each Manager owes the fiduciary duties of care and loyalty to the Company and the Members and must discharge these duties and exercise the Manager’s rights in the Company consistently with the obligation of good faith and fair dealing. Managers must discharge their fiduciary duties of care and loyalty in accordance with the standards set forth in the section of this agreement relating to outside activities of managers as well as the following standards:

(a) Standard of Care. In conducting ... the company’s business, a Manager must act in a manner that the Manager reasonably believes to be in the best interest of the Company and must use the care that a person in like position would reasonably believe appropriate under the circumstances;

(b) Accounting. A Manager must account to the Company and hold as trustee for the Company any profit or benefit derived by the Manager in the conduct ... of the Company’s business or derived from use by the Manager of the Company’s property, including the appropriation of a Company opportunity;

(c) Conflicts of Interest. Except as otherwise provided in the section of this agreement relating to self-interest of managers, a Manager must refrain from dealing with the Company in the conduct ... of its business either personally or on behalf of a party having an adverse interest to the Company; and

(d) Noncompetition. A Manager may not compete with the Company in the conduct of its business prior to the time the Company is dissolved....

French argued that Defendants breached their contractual duties of care and loyalty, which Defendants owed directly to French, by entering into a joint venture with Blue Land. French claimed that this constituted a breach because, when Defendants entered into the joint venture, there was an actual conflict of interest between French and Defendants since both First Page and Blue Land were in the business of providing advertising services. Given the conflict, French claimed that Defendants were required to obtain the unanimous consent of the members, including French, before authorizing the joint venture. Even if there were not a conflict of interest at the time Defendants entered into the joint venture, French argued that a clear conflict of interest arose when Defendants began diverting resources and personnel from First Page to Blue Land. French claimed that after forming Blue Land, Defendants purportedly transferred First Page's advertising work to Blue Land and, instead of hiring Blue Land employees to perform the work, paid First Page employees to complete the work using First Page funds. Nevertheless, First Page received only half of the revenues.

Defendants countered that the operating agreement permitted them to engage in business outside of the company and expressly provided that a "[m]anager does not violate any duty or obligation to the Company merely as a result of engaging in conduct that furthers the interests of the [m]anager." Defendants also noted that, under the terms of the operating agreement, "[n]either the company nor any member has any rights to the profits or benefits of such activities." Further, Defendants contended that French's consent was not required because there was no conflict of interest, as "Blue Land is not engaged in the same type of business as [First Page]." Defendants claimed that Blue Land was in the advertising business, whereas First Page was in the search engine optimization business.

Despite Defendants' arguments, the court concluded that the evidence showed that First Page and Blue Land were engaged in the same type of business. Moreover, the evidence suggested that Defendants formed Blue Land to take over First Page's advertising work and that Defendants breached their duties of care and loyalty by diverting resources and personnel from First Page to Blue Land. In his deposition, Boskoff testified that Blue Land used several First Page employees to assist with Blue Land's advertising campaigns, but First Page paid all of their salaries. Despite this assistance, First Page received only 50% of the revenues. Based on this evidence and the undisputed fact that Defendants did not obtain French's consent to form the joint venture or transact business with Blue Land, the court found that there was a substantial likelihood of success on Plaintiff's claim that Defendants breached various sections of the operating agreement in their dealings with Blue Land.

French also argued that Defendants breached the operating agreement by using First Page funds to pay for their personal legal fees without French's consent. In response, Defendants argued that under section 2.12 of the operating agreement, "[First Page] must indemnify each of the [m]anagers against all liability, loss, and costs (including attorney's fees) incurred or suffered by the [m]anager in connection with the Company or in connection with the manager's participation in any other entity, association, or enterprise at the request of the Company." The court pointed out, however, that the same provision also stated that "[First Page] has no obligation to indemnify a [m]anager for any liability arising out of: (a) a breach of the [m]anager's fiduciary duties to the Company or the [m]embers; (b) an act or omission not in good faith that involve[s] intentional misconduct or a knowing violation of law; or (c) an unlawful distribution under the Act." Moreover, the court found that the decision to expend resources on "defending actions [at] law or equity" appeared to require approval of the managers. Under the terms of the operating agreement, the managers were vested with the exclusive authority "to do any and all things necessary, appropriate, convenient and permitted by law for the furtherance and accomplishment of its purposes, and for the protection and benefit of the Company and its properties, including ... bringing and defending actions at law or equity[.]" In addition, "[i]f there is more than one manager serving, all decisions ... relating to the business or affairs of the company [must] be decided by the affirmative vote or consent of the [m]anagers." According to the court, it was undisputed that Defendants paid for their personal legal fees from First Page's account without French's consent. Further, French demonstrated that he was personally injured by the monetary benefits that Defendants received (and still were receiving) to his exclusion. Thus, the court found that French demonstrated a substantial likelihood of success on his claim that Fisher and Boskoff breached the operating agreement by using First Page's account to pay for their personal legal fees without French's consent.

The court also found that there was a substantial likelihood that Defendants would continue to remove and dissipate First Page's assets. Because French sought equitable remedies, such as the imposition of a constructive trust and disgorgement of ill-gotten profits, the court worried that such remedies would be rendered moot if injunctive relief were denied and Defendants dissipated the sought-after funds. The court determined, therefore, that the threatened harm—dissipation of the assets that were the subject of the suit—impaired the court's ability

to grant an effective remedy. As a result, the court concluded that there was a substantial threat of irreparable injury if a preliminary injunction were not entered.

2. Indemnification and Advancement

eQuine Holdings, LLC v. Jacoby, No. 05-19-00758-CV, 2020 WL 2079183 (Tex. App.—Dallas Apr. 30, 2020, no pet. h.) (mem. op.).

The court held that an LLC member’s claim for indemnification of attorney’s fees incurred in a lawsuit against the member was ripe even though the lawsuit was not concluded because the indemnification provision in the articles of organization required indemnification of expenses, including attorney’s fees, if the members determined that the indemnitee acted in good faith.

In 2016, Michael Jacoby agreed to personally lend \$100,000, evidenced by a promissory note, to Brent Atwood. In exchange for the loan proceeds, Atwood agreed to give Jacoby and his wife a 10% interest in eQuine Holdings, LLC (“eQuine”), of which Atwood was a member. The interests were received pursuant to the amended articles of organization of eQuine. The amended articles of organization contained the following provision:

The Company shall indemnify any person who was or is a party defendant or is threatened to be made a party defendant, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigation (other than an action by or in the right of the Company) by reason of the fact that he is or was a Member of the Company, Manager, employee or agent of the Company, or is or was serving at the request of the Company, for instant expenses (*including attorney’s fees*), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with such action, suit or proceeding if the Members representing 81% or more of the capital interest in the Company as described in Exhibit 2 determine that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the Company, and with respect to any criminal action proceeding, has no reasonable cause to believe his/her conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of “no lo contendere” or its equivalent, shall not in itself create a presumption that the person did or did not act in good faith and in a manner which he reasonably believed to be in the best interest of the Company, and with respect to any criminal action or proceeding, had reasonable cause to believe that his/her conduct was lawful.

[emphasis added by court]

In October 2017, eQuine, Jacoby, and Atwood were sued by Thomas Schmidt for defamation and misappropriation of trade secrets. Schmidt sought recourse from Jacoby as a co-investor of Schmidt’s in two businesses and as an employee, affiliate, or partner of eQuine. Pursuant to eQuine’s amended articles, the members of eQuine agreed that eQuine would pay for the joint defense of eQuine, Atwood, and Jacoby in the Schmidt suit. eQuine paid for the representation of Jacoby in the Schmidt suit until April 2018, at which point Atwood notified Jacoby that eQuine would no longer pay his legal fees and costs in the Schmidt suit. Jacoby then paid for his own legal representation. When eQuine and Atwood refused to reimburse Jacoby, Jacoby sued them for their failure to indemnify him and distributions owed to him and his wife.

eQuine filed a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA), along with evidentiary objections, before an associate judge. After the judge ruled against eQuine, eQuine perfected a de novo appeal before a district court. The district court affirmed the prior rulings.

eQuine then filed an interlocutory appeal to the court of appeals with respect to subject-matter jurisdiction, the denial of his motion to dismiss, and the denial of his evidentiary objections. eQuine argued that the court lacked subject-matter jurisdiction because Jacoby’s indemnity claims were “premature.” Because ripeness is jurisdictional, the court addressed eQuine’s argument even though it was not raised in the trial court. The court pointed out that the indemnity provision at issue “indemnifies for *instant* expenses (*including attorney’s fees*), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with certain actions, suits or proceedings, provided a certain membership interest determines the individual acted in good faith.” Further, the court stated that attorneys’ fees, which are certain to be incurred, are different from liabilities, which may never be incurred. Because

the indemnity provision upon which Jacoby relied does not condition payment of attorney's fees on the outcome of an action, suit, or proceeding, Jacoby was not precluded from seeking indemnification for his expenses before a final judgment. Because eQuine refused Jacoby's proper demand for indemnification pursuant to the amended articles, Jacoby's breach of contract claim against eQuine was ripe for adjudication.

With regard to the motion to dismiss, eQuine argued both that Jacoby's suit was in violation of eQuine's right to petition under the anti-SLAPP statute and that the improper admission of evidence led to the improper consideration of evidence related to the motion to dismiss. The court first noted that the court conducting a TCPA hearing under Tex. Civ. Prac. & Rem. Code Chapter 27 may consider pleadings, affidavits, and any evidence that a court could consider under Tex. R. Civ. P. 166a; however, the court held that Chapter 27, unlike Rule 166a, does not impose the same affidavit requirements. Rather, Jacoby's affidavit need only provide "clear and specific," non-conclusory statements. The court found that Jacoby's affidavit contained statements of fact or conclusions with a reasonable basis, all made pursuant to personal knowledge, and thus were sufficient TCPA evidence. These statements included his statements, based on personal knowledge, that the members of eQuine agreed eQuine would pay for the joint defense of the parties in the Schmidt suit, and that in doing so they found he acted in good faith, along with statements establishing who were the members of eQuine and the amount of their membership interests. The court stated that, as a member, Jacoby has personal knowledge of member agreements and his conclusion of a good faith finding was supported by the agreement to indemnify.

With regard to the ultimate ruling on the motion to dismiss, the court noted that eQuine, as the movant, was required by Chapter 27 to show by a preponderance of the evidence that Jacoby's legal action was "based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association." Only upon such a showing was Jacoby required to establish by clear and specific evidence a prima facie case for his legal action. The court, however, did not have to determine whether the TCPA applied because it found that Jacoby had established by clear and convincing evidence a prima facie case for formation, performance, breach, and damages. When viewing only the pleadings and evidence in a light most favorable to Jacoby, the court found a "minimum quantum" of "unambiguous," "explicit" evidence necessary to support a rational inference that Jacoby's allegations of fact were true. Because Jacoby established a prima facie breach-of-contract claim, the lower court's decision to deny eQuine's motion was proper.

Accordingly, all issues were decided in favor of Jacoby except for the lower court's decision to award Jacoby attorneys' fees and costs. The court held that under Chapter 27, such an award was only proper upon a finding that the motion was "frivolous or solely intended to delay."

3. Arbitration

WEH-SLMP Investments, LLC v. Wrangler, No. 05-19-00271-CV, 2020 WL 994697 (Tex. App.—Dallas Mar. 2, 2020, no pet. h.) (mem. op.).

The court reversed the trial court's vacatur of an arbitrator's award of attorney's fees in an arbitration conducted pursuant to an arbitration clause in a limited liability company agreement. The agreement was governed by Delaware law, and the appellees argued that the arbitrator exceeded his powers by awarding attorney's fees because the appellants did not prevail on their claims against one of the appellees and the other appellee never signed the amended operating agreement containing the arbitration clause. Among its conclusions of law, the arbitrator concluded that the parties' agreement permitted the award of reasonable attorney's fees at the arbitrator's discretion and that Delaware law permits an award of attorney's fees to the prevailing party even absent contractual authority where the losing party brought the action in bad faith. The court of appeals held that the complaint that the arbitrator exceeded his powers by failing to follow Delaware law was nothing more than a complaint that the arbitrator committed an error of law. The agreement explicitly provided that the arbitrator would render a final decision, "which may include the award of reasonable attorney's fees and costs." A complaint that the arbitrator decided the issue incorrectly or made a mistake of law is not a complaint that the arbitrator exceeded his powers. The record also did not show any manifest disregard of the law, which would require a showing that the arbitrator understood the law and deliberately ignored the law. The argument by one of the appellees that the arbitrator acted with manifest disregard of Delaware law based on the fact that the party never signed the agreement was rejected because the parties had entered into a Rule 11 agreement in which they agreed that all disputes between them would be arbitrated, and nothing in the agreement indicated that attorney's fees was a claim that could not be determined by the arbitrator.

Soaring Wind Energy, L.L.C. v. Catic USA Inc., 946 F.3d 742 (5th Cir. 2020).

The court of appeals affirmed the district court's confirmation of an arbitration panel's award of lost profits and order divesting a member of its interest in an LLC in a dispute among LLC members. The court held that the panel reasonably found that there was a breach of the LLC agreement by a US company that was a member of the LLC based on the US company's agreement to be responsible for the obligations of its foreign affiliates, and it was thus not necessary for the district court to have jurisdiction over the foreign affiliates in order to confirm the award. The court also held that the panel was properly constituted in accordance with the terms of the arbitration clause in the LLC agreement where the agreement allowed each party to name an arbitrator, i.e., each of the seven members was entitled to name an arbitrator, notwithstanding that there were only two sides to the dispute. The court held that the panel did not exceed its authority in awarding lost profits and ordering divestment of a member's interest. The court rejected the argument that the relief effectively doubled the expected damages and constituted impermissible punitive damages. The court said that the panel lacked authority to award punitive damages but possessed the power to grant court-enforceable injunctive relief, and that is what the panel did. The divestment of the member's interest was to prevent the member from receiving incidental benefit from its breach of duties and fell within the scope of equitable relief.

Center Rose Partners, Ltd. v. Bailey, 587 S.W.3d 514 (Tex. App.—Houston [14th Dist.] 2019, no. pet. h.).

The court interpreted arbitration clauses in the membership agreement and regulations of an LLC and concluded, *inter alia*, that the arbitration clauses did not waive the right to appeal the trial court judgment confirming the arbitration award, a member who accepted an award of attorney's fees by the trial court was not estopped to appeal the judgment, and arguments that the arbitrators exceeded their power failed because a complete record of the arbitration proceedings was not provided.

The parties in the case were all members of a Texas LLC, Rose Acquisition, LLC. The articles of organization named two of the members, Jerry Bailey and L.J. Black, as the managers. In 2007, several members became unhappy with Black's performance. Accordingly, one of the members, Center Rose Partners, Ltd. ("Center Rose"), borrowed \$2.65 million in order to acquire Black's membership units in the LLC. The loan was backed by LLC collateral and a promissory note. Another member, Nicole Felt, served as a guarantor.

When Center Rose defaulted on the loan, Bailey and David Sonnier, also a member, purchased the loan from the bank to avoid foreclosure on LLC assets. Center Rose later filed suit, individually and derivatively on behalf of the LLC, against Bailey, Sonnier, and an additional member, Lloyd Hall, challenging Bailey's management of the LLC and asserting claims for breach of contract, breach of fiduciary duty, and quantum meruit. Center Rose also sought declaratory relief, an accounting, and a constructive trust. Bailey filed his own lawsuit against Center Rose and Nicole Felt for the amount owed under the promissory note.

In the Center Rose lawsuit, the defendants filed a motion to compel arbitration pursuant to the terms of a membership agreement entered into in 1999 by all of the LLC's members at the time. The court granted the motion based on language in the membership agreement that required any "dispute or controversy arising out of the [Membership Agreement]" to be settled by arbitration. The language also provided that arbitration decisions were "final, binding[,] and non-appealable."

Bailey and Sonnier then filed a demand for arbitration with the American Arbitration Association, individually and derivatively on behalf of the LLC, against Center Rose, David Felt, and Nicole Felt for fraud, breach of fiduciary duty, conversion, and unjust enrichment. They similarly sought declaratory relief and a constructive trust. The demand was made pursuant to an arbitration clause in the LLC's regulations rather than the arbitration clause contained in the membership agreement. This provision provided that disputes or controversies arising out of the regulations were required to be settled by arbitration and were likewise "final, binding[,] and non-appealable." Center Rose and the Felts answered and asserted claims for affirmative relief, seeking the same relief as had been sought in the original lawsuit. Hall was notably absent from the arbitration.

The arbitration panel concluded, among other things, that Center Rose defaulted on the note and that Center Rose held the 330 membership units purchased from Black in a "special trust" for the LLC's members, 100 units of which Bailey was entitled to receive, and the remaining 230 units of which were held in "constructive trust" for the LLC. Further, Center Rose was ordered to reimburse Bailey a sum of \$1.24 million for the purchase of the note.

Center Rose filed a motion to vacate the award, whereas Bailey and Sonnier moved to confirm the arbitration award and to award judgment thereon. The court granted the motion to confirm and entered a final judgment on the award. The court declared that all counterclaims asserted or that could have been asserted were

denied; yet, the court awarded Center Rose \$26,500 in attorneys' fees. Hall and Center Rose both filed a motion for a new trial, the Felts filed a motion to modify the judgment, and Center Rose filed a motion to reconsider. All these motions were denied and were the subject of the appeal.

Bailey and Sonnier filed a motion to dismiss the appeals on three grounds: (1) the "final, binding[,] and non-appealable" language found in both arbitration provisions constituted an express waiver of the right to appeal the trial court judgment; (2) Center Rose was estopped from appealing the judgment because it "accepted" a \$26,500 payment from the LLC in attorneys' fees awarded; and (3) Hall lacked standing to appeal because of a failure to timely assert a ground for vacating the arbitration award.

With regard to the arbitration provisions, the court found that the language at issue clearly required arbitration to be "binding." However, the court noted that a waiver of the right to appeal, while not against public policy, was a valuable right. Accordingly, the court was required to distinguish between language that expressly denies appeal of an arbitrator's decision or award and language that expressly denies the right to appeal a trial court judgment on the arbitrator's award. The court found the express language rather clearly provided that only the arbitrator's award was non-appealable.

The court noted that, under *Perry Homes v. Cull*, 258 S.W.3d 580, 585-87, 601 (Tex. 2008), any party who appeals the judgment rendered on an arbitrator's award can challenge the denial of an application to vacate, modify, or correct the award and any interlocutory order that merged into the trial court's final judgment; however, such judicial review would not extend to the merits of the award. In addition, the court noted that the American Arbitration Association has long recognized the ability to appeal an arbitration award via further arbitration. Regardless of what the parties could have agreed, the court held that the arbitration language in the agreements controlling this case did not expressly waive the right to appeal the trial court judgment on the award; therefore, Center Rose was entitled to appeal the lower court ruling.

With regard to the estoppel challenge, the court looked to the fact-dependent inquiry established by *Kramer v. Kastleman*, 508 S.W.3d 211, 228 (Tex. 2017). In *Kramer*, the Supreme Court of Texas established a non-exclusive list of factors to determine whether a party is estopped from appealing a judgment. A noteworthy factor, according to the court, was whether Center Rose "affirmatively sought enforcement of rights or obligations that exist only because of the judgment" when it cashed the check from the LLC related to attorneys' fees awarded by the arbitrator. The court determined that this payment due Center Rose was a result of both the award and the judgment, and no party challenged the obligation or the amount on appeal. Thus, the court held that Center Rose was not estopped from appealing the judgment under the "acceptance-of-benefits doctrine."

Nor, the court held, did Hall lack standing to appeal the lower court judgment based on his alleged failure to timely file an application to vacate, modify, or correct the award. Accordingly, Bailey and Sonnier's motion to dismiss was denied on all three grounds.

With regard to Center Rose's denied motion to vacate, Center Rose argued that the arbitrators exceeded their authority and thereby prejudiced the rights of Center Rose and the Felts. The parties alleged that the narrow arbitration provision, which covered "any dispute or controversy arising out of these Regulations," could not encompass the suit on the note. At issue was whether Center Rose submitted to the jurisdiction of the arbitration proceeding with respect to the note. The court acknowledged that Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(A) requires a trial court to vacate an arbitrator's award if the arbitrator has exceeded its power but noted that an arbitration award deserves deference. Accordingly, Center Rose was obligated, as the non-prevailing challenger, "to produce a complete record of the arbitration proceedings establishing that the arbitrators exceeded their authority." Because Center Rose failed to provide a complete record, Center Rose did not establish and the court could not find that the arbitrators exceeded their authority under the arbitration agreement.

Similarly, Center Rose and the Felts alleged that the arbitrator was without power to impose a constructive trust, arguing that because Texas law governed the regulations, the arbitrator was limited by Texas law when fashioning an equitable remedy. However, the court was unpersuaded, noting that "an agreement that Texas law governs the contract containing the arbitration provision does not constitute an agreement limiting the powers of the arbitrators." Regardless, the court held that without a complete transcript of the arbitration proceeding, Center Rose did not establish and the court could not find that the arbitrators exceeded their authority.

Center Rose and the Felts also argued that the arbitrator failed to address the statute of limitations defense in violation of Tex. Civ. Prac. & Rem. Code § 171.047. While a "complete failure" to address this defense would be a violation, the court held that the parties failed to demonstrate that the arbitrator did not address the issue. Further, the court held that the following statement by the arbitrator was sufficient to demonstrate that the arbitrator

had ruled on the limitations defense: “This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.”

Finally, Center Rose and the Felts argued that the lower court judgment against the Felts was improper because they were not parties to the litigation. However, the court held that the Felts, as intervenors, were properly included in the judgment below regardless of whether the trial court expressly ruled on their motion to vacate the arbitration award.

With regard to Hall’s challenge on appeal, the court found that Hall failed to timely file a motion to vacate the arbitration award and thus waived his right to vacatur. Consequently, the lower court judgment was affirmed.

Rodriguez v. Texas Leaguer Brewing Company L.L.C., 586 S.W.3d 423 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

The court interpreted an arbitration clause in a company agreement to require arbitration at the election of either party, rejecting a member’s argument that the clause required consent of the other party when one party elected binding arbitration. The court also held that the disputed termination of one party’s membership did not preclude the other party from enforcing the arbitration provision, and the dispute over the validity of the purported termination of a member’s membership was within the scope of the arbitration clause. A member’s claim for securities fraud under the Texas Securities Act was within the scope of the arbitration clause, but the member’s claim for breach of a loan agreement under which the member made a loan to the LLC was not within the scope of the arbitration clause.

The Rodriguezes invested in Texas Leaguer Brewing Company, LLC (“Texas Leaguer”) and signed an Amended and Restated Company Agreement (the “First Agreement”) under which they received a 7% membership interest in the LLC. Later the Rodriguezes signed a Second Amended and Restated Company Agreement (the “Second Agreement”) under which they agreed to co-sign a loan to Texas Leaguer in exchange for an increase in their membership interest to 14.5%. Both company agreements contained an arbitration clause pursuant to which the parties agreed to arbitrate “disputes aris[ing] out of or relat[ing] to this Agreement, or the breach thereof.” Less than a year after the Rodriguezes signed the First Agreement, the manager of Texas Leaguer notified the Rodriguezes that Texas Leaguer was exercising its right to terminate the membership or ownership of the Rodriguezes based on the alleged breach of the Rodriguezes to co-sign the loan to the LLC as they had agreed to do in the second amended and restated company agreement. The Rodriguezes filed suit against Texas Leaguer and its manager (the “Leaguer parties”), alleging claims for securities fraud, breach of and specific performance of the First Agreement to recognize their membership in Texas Leaguer, conversion, and breach of a loan agreement under which the Rodriguezes lent \$20,000 to Texas Leaguer. The Leaguer parties filed an application to compel arbitration, which the trial court granted, and the Rodriguezes appealed.

Both the First Agreement and the Second Agreement contained the same arbitration provision as follows:

- a. If a dispute arises out of or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled through direct discussions within fourteen (14) days of first consideration, the Members and Manager agree to first endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association (the “AAA”) under its Commercial Mediation Rules, before resorting to arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (except otherwise provided herein) by written notice to the other Members and Managers, as applicable. The Member or Manager electing arbitration shall by such notice to other Members or Manager name an arbitrator. The second arbitrator shall be chosen by the noticed Members or Manager, as applicable, within fourteen (14) days after such notice. If the noticed Members or Managers do not appoint such second Arbitrator, then the AAA shall be requested to submit a list of five (5) persons to serve as the second arbitrator and the first arbitrator shall select a name from such list within five (5) days of its submission; a third arbitrator shall be selected by the first and second arbitrators within five (5) days of the selection of the first and second arbitrators, and if the arbitrators fail to so select a third arbitrator, then the third arbitrator shall be selected from the remaining members of the list of five (5) received from AAA through the process of each of the first two (2) arbitrators in turn striking names from the list until one (1) name remains.

b. The decision of any two (2) of the arbitrators shall be final and binding upon the Members and Manager. The arbitrators shall determine the rights and obligations of the Members and Manager according to this Agreement and the substantive laws of Texas.... The decision of the arbitrators shall be final and binding on the Members and Manager and judgment thereon may be entered by any court having jurisdiction....

The Rodriguezes first argued that the parties agreed to mediate before arbitrating but did not agree to arbitrate following mediation. The Rodriguezes based this argument on the fact that the provision refers to arbitration as an election. The court rejected this interpretation, saying that the provision “clearly states that, if one of the members elects arbitration by sending written notice, the parties are required to select three arbitrators through a specified process, and, in subsection b, states ‘[t]he decision of any two (2) of the arbitrators shall be final and binding upon the Members and Manager.’” The court said that the provision reflected a clear intent to submit a matter to binding arbitration at the election of either party if the matter could not be resolved through mediation. The provision does not require consent of the other party when one party elects binding arbitration.

The Rodriguezes next argued that mediation was a condition precedent to arbitration under the arbitration provision, but the court said that, assuming the agreement required the parties to mediate before arbitration, the Rodriguezes waived the condition by filing suit without first requesting mediation.

The Rodriguezes next argued that the purported termination of their membership in Texas Leaguer under the Second Agreement precluded the Leaguer parties from enforcing the arbitration provisions because the arbitration clause only provided for a Member or Manager to elect arbitration, and the provision under which their membership was purportedly terminated stated that a Non-Member Holder “shall not have the right to participate in Member Actions or any other rights of a Member.” Thus, the Rodriguezes argued, termination of their membership also terminated their rights and obligations to arbitrate. The court rejected the Rodriguezes’ argument for two reasons. First, the Rodriguezes disputed that they breached the Second Agreement and denied that their membership had been terminated. This dispute was a dispute within the scope of the arbitration clause and both the Rodriguezes and the Leaguer parties had a right to arbitrate the dispute under the provision. Second, the court stated that the Second Agreement did not clearly provide that, when a member has been terminated for breaching the Second Agreement (and that member denies both breach and termination under the Agreement), the member no longer has a right or obligation to arbitrate a dispute. The Agreement stated only that a Non-Member Holder “shall not have the right to participate in Member Actions or any other rights of a Member,” without making any mention of the arbitration clause; therefore, it did not express a clear intent to waive the right and obligation to arbitrate in the event of a disputed termination. The trial court was not required to find waiver because the record did not show that the Leaguer parties clearly repudiated their right to compel arbitration under the Agreement or engaged in conduct that was inconsistent with a claim to that right.

The Rodriguezes argued that the Second Agreement was unenforceable due to lack of mutual consideration, but the court held that the trial court’s judgment compelling arbitration could be upheld based on the arbitration clause in the First Agreement regardless of whether the Second Agreement lacked consideration.

In support of their fraud claim under the Texas Securities Act, the Rodriguezes alleged that, the Leaguer parties made material untrue representations and omitted to state material facts in connection with the sale of membership interests in Texas Leaguer to the Rodriguezes. The court said that claims of this kind, which allege fraudulent inducement, are within the scope of an agreement requiring the arbitration of claims arising out of or relating to the agreement.

The Rodriguezes alleged that they loaned Texas Leaguer \$20,000 and that Texas Leaguer breached the loan agreement by failing to repay the loan after demand for payment. The Leaguer parties argued that the Rodriguezes’ claim for loan repayment fell within the scope of the arbitration agreement because the loan allegedly related to the Rodriguezes’ interests in Texas Leaguer, but the Leaguer parties cited no evidence in support of this allegation. Neither the First Agreement nor the Second Agreement mentioned the alleged loan agreement or imposed an obligation on the Rodriguezes to lend money to Texas Leaguer. Because the record did not show that the loan agreement arose from or related to the First or Second Agreement, the court concluded that the trial court erred by compelling arbitration of this claim.

Augustine v. Dallas Medical Center, LLC, Case No. 4:19-CV-00020-ALM-KPJ, 2019 WL 3806037 (E.D. Tex. June 25, 2019), report and recommendation adopted, 2019 WL 3940644 (E.D. Tex. Aug. 21, 2019).

An arbitration agreement was signed by the plaintiff, Mercy Augustine, and by the defendant, Dallas Medical Center, LLC. An unidentified employee signed on behalf of the LLC. In resisting arbitration, the plaintiff contended that the defendant's signature was defective because the individual who signed on behalf of the defendant remained unidentified and might lack authority to sign. The court disagreed:

Plaintiff argues the individual who signed on behalf of Defendant may have lacked authority or agency to act on behalf of Defendant. Specifically, Plaintiff addresses agency law in the scope of limited liability companies, in which only a person authorized by the board of directors of a limited liability company in Texas may bind the company in contract for anything other than routine matters. Plaintiff cites no case in which the court refused to enforce an arbitration agreement because the individual who signed on behalf of the employer did not have the authority of the board of directors. Upon review, the case law relied on by Plaintiff is inapposite. The Court finds no case law holding that an arbitration agreement provided to all employees is not a routine matter appropriately delegated in the context of a limited liability company.

Additionally, the Motion to enforce the Arbitration Agreement was filed by Defendant and Defendant adopts the signature contained therein. See Dkt. 16 at 2 (“In fact, as is clearly evident by a cursory glance at the Agreement[], both parties signed the Agreement.”). In Texas, a signature is effective so long as it is rendered by or at the direction of the signor. While Plaintiff argues, “Defendant must sign the agreement,” Texas law does not require an entity to sign the agreement on its own behalf, but allows a signature executed on behalf of an entity to be effective where made at the direction of the signor. Accordingly, the Court finds that while the identity of the signor is at this time unknown, the signature is nevertheless effective.

Romero v. Herrera, No. 04-18-00845-CV, 2019 WL 2439107 (Tex. App.—San Antonio June 12, 2019, no pet.).

The court of appeals reversed the trial court's order denying a motion to compel arbitration. The court of appeals concluded that the parties, by incorporating American Arbitration Association rules, had agreed to delegate the question of arbitrability to an arbitrator and not to a court.

Frank Herrera, Jr. and Raymond Romero entered into four agreements for the purpose of forming a business entity that would provide wheel and tire manufacturing and assembly services to Toyota Motor Manufacturing Texas, Inc. Two of the four agreements, the Limited Partnership Agreement and the Company Agreement, contained arbitration provisions. The Joint Venture Agreement and the Non-Compete Agreement did not.

In February 2018, Romero filed claims in arbitration against Herrera for allegedly starting a competing company in Mexico. In the arbitration proceeding, Romero alleged that Herrera breached the Non-Compete Agreement and further alleged that Herrera breached the other three agreements as a result. Herrera filed a lawsuit against Romero in district court seeking a declaratory judgment that Romero's claims arising from or relating to the Joint Venture Agreement could not be arbitrated. Herrera filed a motion for summary judgment on the ground that the Joint Venture Agreement did not contain an arbitration provision, and Romero filed a motion to compel arbitration. The trial court signed orders denying Romero's motion to compel arbitration and granting Herrera's motion for partial summary judgment. The partial summary judgment order granted Herrera declaratory relief that Romero “cannot compel the arbitration of [his] claims against [Herrera] regarding the interpretation or enforcement of the [Joint Venture] agreement.” Romero appealed the trial court's denial of his motion to compel arbitration and the partial summary judgment order.

On appeal, Herrera emphasized that the Joint Venture Agreement did not contain an arbitration provision and suggested that the parties' arbitration clauses did not apply to disputes about the Joint Venture Agreement. The court disagreed: “But the scope of an arbitration agreement turns on its terms, not on the particular written instrument in which the arbitration agreement appears. Thus, for purposes of the first motion-to-compel inquiry—the existence of a valid arbitration agreement—it is immaterial that the parties' arbitration agreement is not contained within the four-corners of the Joint Venture Agreement.”

The court then considered whether the claims at issue fell within the scope of either of the two arbitration agreements. This inquiry, according to the court of appeals, is ordinarily committed to the trial court, but parties can agree to arbitrate arbitrability. “In other words, parties can agree to entrust an arbitrator, rather than a trial court, to fairly and correctly construe an arbitration agreement to determine what claims fall within the agreement’s scope, and to act as the gatekeeper to determine what claims are arbitrable.” That said, “[a] presumption favors adjudication of arbitrability by the courts absent clear and unmistakable evidence of the parties’ intent to submit that matter to arbitration.”

The court of appeals noted that Herrera’s claims in the trial court sought the trial court’s determination of the meaning and scope of the arbitration provisions in the Limited Partnership Agreement and the Company Agreement. Consequently, to prevail on his motion to compel, Romero had the burden to establish that the parties clearly and unmistakably intended to “agree to arbitrate arbitrability” and to submit disputes about the scope of the arbitration agreements to arbitration.

The arbitration provision in the Limited Partnership Agreement provided that “[a]ny dispute regarding interpretation or enforcement of any of the Partners’ rights or obligations hereunder shall first be referred to non-binding mediation for resolution, and only if the dispute is not resolved through non-binding mediation shall it be resolved by binding arbitration according to the rules of the American Arbitration Association in San Antonio, Texas.” Similarly, the arbitration provision in the Company Agreement stated that “[a]ny dispute regarding interpretation or enforcement of any of the Members’ rights or obligations hereunder shall first be referred to non-binding mediation for resolution, and only if the dispute is not resolved through non-binding mediation shall it be resolved by binding arbitration according to the rules of the American Arbitration Association in San Antonio, Texas.” According to the court, the American Arbitration Association rules state that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. The court also observed that “[a] number of our sister courts have adopted a general rule that when a broad arbitration agreement exists between the parties, and when that agreement incorporates arbitration rules that specifically empower the arbitrator to decide issues of arbitrability, then the incorporation of those rules constitutes clear and unmistakable evidence of the parties’ intent to delegate arbitrability to the arbitrator.” As the court concluded:

The arbitration provisions in the Company and Limited Partnership Agreements expressly incorporate the AAA rules. The AAA rules specifically empower the arbitrator to decide issues of arbitrability and establish Romero and Herrera “agree[d] to arbitrate arbitrability.” Romero and Herrera thereby expressed their clear and unmistakable “intent to delegate arbitrability to the arbitrator.” In doing so, both agreed to entrust an arbitrator, not a trial court, with making fair and correct determinations as to the meaning and scope of an arbitration agreement and whether certain claims were arbitrable. Consistent with our sister courts and the vast majority of federal courts, we hold the parties agreed to arbitrate arbitrability, and thus a dispute about the scope of the arbitration agreements must be decided in arbitration, not in the trial court. Romero has therefore satisfied his burden to establish the parties’ disputes about the meaning and scope of the arbitration provisions, themselves, fall within the scope of the arbitration provisions.

The court of appeals reversed the trial court’s order denying Romero’s motion to compel arbitration. The case was remanded to the trial court with instructions to render an order compelling the parties to arbitrate the claims that Herrera alleged in the underlying suit filed in the trial court, which pertained to whether the alleged breach of the Joint Venture Agreement was a dispute that fell within the scope of the arbitration provisions. (The court also dismissed Romero’s appeal of the partial summary judgment order for lack of jurisdiction.)

G. Assignment or Transfer of Membership Interest

Liserio v. Colt Oilfield Servs., LLC, Civ. A. No. SA-19-CV-1159-XR, 2019 WL 6168208 (W.D. Tex. Nov. 20, 2019) (“As to Plaintiff’s membership in—and citizenship of—Colt LLC, Plaintiff is not named in the Certification of Formation. Nor was Plaintiff later added as a member. ‘A person who, after the formation of a limited liability company, acquires directly or is assigned a membership interest in the company or is admitted as a member of the company without acquiring a membership interest, becomes a member of the company on approval

or consent of all of the company’s members.’ TEX. BUS. ORG. CODE § 101.103(c). The Code itself supports the inference that one may receive distributions from an LLC, even with a ‘membership interest,’ yet still not be a member of the LLC. It provides that one who is assigned a membership interest in an LLC, even one entitled to receive an allocation of income or any distribution, is still only ‘entitled to become a member of the company on the approval of all of the company’s members.’ Id. § 101.109. There is no indication that any Defendants or member of Colt ever approved or consented to Plaintiff becoming a member, nor does Plaintiff’s own Petition state that he is a member As such, the Court does not consider Plaintiff’s individual citizenship for determining the citizenship of Colt LLC” (citation omitted) (footnote omitted)).

Cheniere Energy, Inc. v. Parallax Enterprises LLC, 585 S.W.3d 70 (Tex. App.—Houston [14th Dist.] 2019, pet. dismissed).

In a dispute over whether a secured note was intended to be a capital contribution rather than a loan, the court affirmed the trial court’s temporary injunction which enjoined a noteholder (Cheniere) from non-judicially foreclosing its security interest in the membership interest of the wholly owned LLC (Live Oak) of the maker of the note (Parallax).

Cheniere argued that it had an express contractual right under the note to foreclose on Parallax’s equity interest in Live Oak. The court of appeals observed that a security agreement providing a description of collateral is needed for the security interest to attach. A description must “reasonably identify” the collateral, but “[a] description of collateral as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.”

The note described the collateral securing the loan as “All of Loan Party’s right, title and interest in and to the following, whether now owned or hereafter acquired by such Loan Party and whether now existing or in the future coming into existence: 1. All deposit, securities and other accounts and investment property; 2. All instruments, documents and chattel paper; 3. All inventory, equipment, fixtures and goods; 4. All contracts and permits; 5. All letter-of-credit rights; 6. All intellectual property; 7. All real property; and 8. All other tangible and intangible property and assets of such Loan Party.” According to the court, “[Parallax’s] equity interests are not encompassed by items 1–7, and item 8 is a ‘super generic’ catch-all that, as a matter of law, ‘does not reasonably identify the collateral.’” The court agreed that Parallax’s equity in Live Oak was a “general intangible” as defined in the UCC, but it pointed out that the note’s description referred to “intangible property” and not “general intangible.” The court noted that “intangible property” is broader than “general intangible,” and it concluded that the description used by Cheniere was a super-generic description that did not reasonably identify the collateral. Thus, according to the court, Parallax showed that (a) the note did not give Cheniere a contractual right to non-judicially foreclose on Parallax’s equity in Live Oak, and (b) Parallax had a probable right to the requested declaration that Cheniere did not have a security interest in Parallax’s equity interest in Live Oak.

The court then turned to Cheniere’s argument that Parallax failed to prove that it faced imminent, irreparable harm for which it lacked an adequate remedy in law. In the trial court, Parallax argued that even if Cheniere were to foreclose on Parallax’s equity interest in Live Oak, Cheniere would not be able to exercise management and control over the company. See DEL. CODE ANN. tit. 6, § 18-702(b)(1) (“An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member...”); id. § 18-704(a)(3) (a person to whom the company’s sole member voluntarily assigns all of its interests in the company can become a member, but not if the assignment is accomplished “by foreclosure or other similar legal process”). Based on this argument, Cheniere contended that allowing foreclosure would not cause imminent and irreparable harm. The court of appeals rejected Cheniere’s position:

But the Parallax Parties face harm from the threatened foreclosure even if the Cheniere Parties would not benefit from it. Under Delaware law, foreclosure might not make the Cheniere Parties members in the company or entitle them to exercise the powers of a member—but it would make Parallax cease to be a member. See id. § 18-702(b)(3) (“Unless otherwise provided in a limited liability company agreement ... [a] member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member’s limited liability company interest.”). Further, a Delaware limited liability company is automatically dissolved when there are no members, see id. § 18-801(a)(4), and Live Oak certainly would be harmed by its own dissolution.

We acknowledge that Delaware law provides at least two ways to “revoke the dissolution.” First, the limited liability company is not dissolved if, within ninety days after the company ceases to have any members, “the personal representative of the last remaining member agrees to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member.” DEL. CODE ANN. tit. 6, § 18-801(a)(4)(a). Moreover, a limited liability company agreement can require the personal representative to agree to continue the company and to be admitted as a member. But Live Oak’s limited liability company agreement does not require Parallax’s personal representative to agree to either of these conditions. Second, a limited liability company agreement may specifically provide for the admission of a member after there is no longer a remaining member. *Id.* § 18-801(a)(4)(b). But here, too, Live Oak’s limited liability company agreement does not contain such a provision.

Even if Live Oak were to continue in existence by the appointment of a new member after foreclosure, Parallax would be irreparably harmed by the loss of its right to manage and control the company. For example, Live Oak’s limited liability company agreement provides that the company’s management is “exclusively vested in the Sole Member,” and that only the Sole Member may amend the company agreement. But if the Cheniere Parties foreclose on Parallax’s equity interest in Live Oak, Parallax will no longer be a member, and would lose these rights. The loss of management rights over a company are unique, irreplaceable, and “cannot be measured by any certain pecuniary standard.”

For all of these reasons, we conclude on reconsideration en banc that the trial court did not abuse its discretion in concluding that the Parallax Parties made a sufficient showing that, absent injunctive relief, they face probable imminent, irreparable harm for which there is no adequate remedy at law.

A dissenting opinion argued that Parallax did not meet its burden of proving a probable right to relief and imminent, irreparable harm. With respect to the probable right to relief, the dissent argued that the description of collateral, although broad, was sufficiently specific—particularly because the term “general intangibles” was used in another part of the note and because Parallax did not own any property other than its equity interest in Live Oak and other subsidiaries. As the dissent observed: “In deciding the adequacy of the collateral description, the court should focus on the essentials: the maker of the Note pledged its only asset—intangibles—as security for the debt, identifying the collateral with both the UCC term ‘general intangibles’ and the plain-English equivalent ‘intangible property.’ From a functional perspective, these words reflect the parties’ intent that the maker’s equity interest in Live Oak secure the Note. Read fairly, interpreted reasonably, and construed liberally, these words identify the collateral sufficiently to serve that purpose. That is all the law requires.”

With respect to imminent and irreparable harm, the dissent concluded that even if Cheniere were to wrongfully foreclose on Parallax’s equity interest in Live Oak, any resulting harm or injury could be quantified and remedied through monetary damages. As part of its analysis, the dissent noted that Live Oak had no ongoing business and that Live Oak’s only assets were its claims in this case. The dissent further observed that the only evidence of management rights in Live Oak that would be lost concerned management of claims in litigation, and it stated that the value of litigation claims could be measured by a certain pecuniary standard regardless of who manages the claims. Thus, according to the dissent, “loss of management does not establish an irreparable injury.” In refuting the majority’s specific argument about irreparable harm, the dissent observed:

The en banc majority states that, even if the Cheniere Parties would not obtain control or management of Live Oak by foreclosing on the Live Oak equity interest, the Parallax Parties face irreparable harm from the foreclosure because, under title 6, section 18-702(b)(3) of the Delaware Code, foreclosure would cause Parallax to cease to be a member of Live Oak and thus to lose the ability to manage and control Live Oak. The en banc majority also concludes that if Parallax ceases to be the sole member of Live Oak, there would be no members of Live Oak after foreclosure, thus triggering irreparable harm by the automatic dissolution of Live Oak under title 6, section 18-801(a)(4) of the Delaware Code.

First, the Parallax Parties did not assert either of these points in the trial court, so this court should not base its decision on this ground. Second, the en banc majority does not mention the second sentence of section 18-702(b)(3). The entire subsection provides that, unless otherwise provided in the limited liability company agreement:

(3) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's limited liability company interest. Unless otherwise provided in a limited liability company agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the limited liability company interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

In its construction of the Delaware statutes, the en banc majority equates the assignment of a limited liability company interest with the foreclosure of a security interest in a limited liability company interest. But, the plain text of section 18-702(b)(3) shows that the Delaware General Assembly does not treat these terms as equivalent. The General Assembly determined that unless otherwise provided in the limited liability company agreement, a member's rights as a member cease when the member assigns the member's limited liability company interest to another party but that a member's rights as a member do not cease when the member grants a security interest in the member's limited liability company interest. The General Assembly did not provide that a member's rights as a member cease upon foreclosure of a security interest in the member's limited liability company interest. Thus, the Parallax Parties did not show that Parallax would cease to be a member in Live Oak upon foreclosure of the security interest in the Live Oak equity. Likewise, the Parallax Parties did not prove that upon foreclosure there would be no members in Live Oak, which might trigger the automatic dissolution of Live Oak under section 801(a)(4). The evidence before the trial court did not show that Parallax would cease to be a member upon foreclosure of the security interest in the Live Oak equity. So, the Parallax Parties did not show irreparable harm on the ground that Parallax would cease to be a member or on the ground that Live Oak would dissolve automatically.

AME & FE Investments, Ltd. v. NEC Networks, LLC, 582 S.W.3d 294 (Tex. App.—San Antonio Nov. 20, 2017, pet. denied). (Although the court issued this opinion in 2017, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court of appeals granted AME's motion that challenged the amount of security that NEC was required to post after prevailing in the trial court. The court determined that, when a judgment awards a party an interest in an entity, the amount of security sufficient to protect the party against loss or damage during the pendency of an appeal is the value of the property interest on the date the court rendered judgment.

In 2009, AME and NEC signed a Note Purchase Agreement ("NPA") pursuant to which AME loaned NEC \$1.5 million secured by liens in NEC's property. Under the NPA, NEC granted AME an option to convert the entire principal amount of the loan into 30% of NEC's Class A Units of membership interest at any time prior to the loan's maturity date.

A dispute arose between the parties. After a jury trial, the trial court ordered AME to pay NEC \$6,000 and further ordered that AME take nothing on its counterclaims against NEC. The final judgment also vacated AME's liens and security interests. AME timely filed a notice of appeal.

On May 1, 2017, AME made a cash deposit in lieu of supersedeas bond in the amount of \$8,498.65. On May 5, 2017, NEC filed a document entitled Alternative Motions to Set Security or Determine Bond, requesting the trial court to either: (1) increase the amount of AME's supersedeas bond to adequately protect NEC against any loss or damage the appeal might cause; or (2) allow NEC to enforce the judgment by requiring NEC to post security in accordance with Texas Rule of Appellate Procedure 24.2(a)(3). After a hearing, the trial court signed an Amended Order Setting Security declining to permit AME to supersede the judgment and requiring NEC to post security in the amount of \$1.5 million, thereby allowing NEC to enforce the judgment. On June 7, 2017, AME filed a motion challenging the trial court's order and an emergency motion to stay the trial court's order pending the court of appeals' resolution. On June 8, 2017, the court of appeals granted AME's emergency motion to stay. On November 7, 2017, NEC filed a motion to vacate the stay of the trial court's order.

Although a judgment debtor generally is entitled to supersede a judgment while pursuing an appeal, see TEX. R. APP. P. 24.2, the trial court declined to permit AME to supersede the judgment pursuant to Rule 24.2(a)(3). As a result, NEC was required to post “security ordered by the trial court in an amount and type that will secure [AME] against any loss or damage caused by the relief granted [NEC] if [this] court determines, on final disposition, that that relief was improper.” In AME’s motion challenging the trial court’s order, AME argued that the amount of security posted by NEC was insufficient to secure AME against its loss or damage if it prevailed on appeal. Specifically, AME argued that the amount of security posted by NEC did not secure the damage AME would be caused if the court of appeals determined that AME was entitled to convert the loan into 30% of NEC’s Class A Units. AME asserted that allowing NEC to enforce the judgment by vacating AME’s liens and security interests will enable NEC to take any number of actions that could affect the value of NEC’s Class A Units. The court of appeals agreed with AME:

In this case, the status quo the posted security must preserve is the value of NEC’s Class A Units “as it existed before the issuance of the [] judgment” while AME’s liens and security interests were in place to protect that value by preventing NEC from certain actions in relation to its assets and property. Consistent with our holding in *El Caballero Ranch, Inc.*, the trial court was required to consider the damage that would be caused to AME by actions NEC could take in enforcing its judgment. If AME prevails on appeal, it will be entitled to 30% of NEC’s Class A Units. Because AME’s liens and security interests will be vacated while the appeal is pending, AME could lose the value of its potential equity interest if NEC sold, transferred, or dissipated its assets.

The portion of Rule 24.2(a)(3) allowing the judgment creditor to post security and enforce its judgment while an appeal is pending is not frequently addressed by appellate courts. An issue that has been addressed, however, is the amount that a judgment debtor would be required to post if a judgment awarded a judgment creditor an interest in a limited liability company. In *Abdullatif v. Choudhri*, No. 14-16-00116-CV, 536 S.W.3d 48, 2017 WL 2484374 (Tex. App.—Houston [14th Dist.] June 8, 2017, order [leave denied]), the underlying litigation concerned ownership interests in a limited partnership and a limited liability company which was the general partner of the limited partnership. The judgment awarded Ali Choudhri damages and declared his respective ownership interests in the two entities and the dates on which Choudhri obtained the percentage ownership. The trial court signed a Supersedeas Order, permitting the appellants “to supersede the judgment with a cash deposit equal to the amount of damages plus applicable interest.” The order also “prohibited certain activities by the business entities as further security for Choudhri pending appeal.” Choudhri filed a motion in the Houston court arguing the trial court’s Supersedeas Order did not provide sufficient security for the declaratory portion of the judgment which the opinion defines as the “Declarations.”

The Houston Court first held the trial court abused its discretion by not setting the security appellants were required to post to supersede the Declarations. The Houston court then addressed “which part of Rule 24 governs superseding the Declarations.” Noting an interest in a partnership and a membership interest in a limited liability company are personal property, the Houston court concluded Rule 24.2(a)(2) governed how the appellants could supersede the Declarations. The Houston court also concluded the prohibitions in the trial court’s Supersedeas Order were not relevant to the supersedeas analysis, noting the amount of security required to supersede the trial court’s judgment was set by Rule 24.2(a)(2). Because Rule 24.2(a)(2) requires “the amount of security [to be] at least ‘the value of the property interest on the date when the court rendered judgment,’” the Houston court held “the trial court abused its discretion by not determining the value of the property interests it declared had been assigned to Choudhri and using that value to set the security appellants [were required] to post to supersede the Declarations.”

Although the security in this case is governed by Rule 24.2(a)(3), the Houston court’s opinion provides guidance regarding the amount of security that is sufficient to protect a party against loss or damage during the pendency of an appeal when a judgment awards the party an interest in an entity. In this case, if AME prevails on appeal, it will be entitled to 30% of NEC’s Class A Units. Therefore, we hold the trial court abused its discretion in not determining the value

of 30% of NEC’s Class A Units on the date the trial court rendered judgment and using that value in setting the amount of security NEC was required to post.

The court of appeals granted AME’s motion and remanded the Amended Order Setting Security to the trial court for the entry of an order consistent with its guidance. The court noted that, if the trial court declined to permit AME to supersede the judgment, the trial court must take evidence on the value of 30% of NEC’s Class A Units as of the date the trial court rendered judgment. That value must be used in setting the amount and type of security that NEC must post.

H. Access to Books and Records

Davis v. Highland Coryell Ranch, LLC, 578 S.W.3d 242 (Tex. App.—Amarillo 2019, pet. denied).

The court of appeals held that the definition of “member” in the context of statutory information rights included both a person who was an existing member and a person previously admitted but not presently a member. The court reversed the trial court’s summary judgment in favor of an LLC and remanded, concluding that a former member was not prohibited from accessing LLC information simply because the person was no longer a member at the time of the request.

In 2004, Mark Davis and another individual formed Highland Coryell Ranch, LLC (“Highland”). Davis relinquished his interest in Highland in 2005 and later requested various business records developed by the company while he was still a member. Highland provided some of the records but not others, and Davis sued to obtain those that were not provided. The trial court granted Highland’s motion for summary judgment in which the company argued that Davis had no right to the information because he was a former member. The court of appeals reversed and remanded because the trial court could not hold that Highland established, as a matter of law, that Davis was not entitled to the records since its governing documents were absent from the summary judgment record. On remand, the trial court granted Highland’s second motion for summary judgment to which it attached its company agreement. Davis again appealed.

The issue before the court of appeals involved the right of a former member of an LLC to access company information. The court began its analysis by citing the following three provisions of the Texas Business Organizations Code regarding access to LLC information:

- (a) A *member* of [an LLC] . . . on written request and for a proper purpose, may examine and copy at any reasonable time and at the member’s . . . expense:
- (1) records required under Sections 3.151 and 101.501; and
- (2) other information regarding the business, affairs, and financial condition of the company that is reasonable for the person to examine and copy.

Tex. Bus. Orgs. Code § 101.502(a)(1), (2) (emphasis added).

Each *owner or member* of a filing entity may examine the books and records of the filing entity maintained under Section 3.151 and other books and records of the filing entity to the extent provided by the governing documents of the entity and the title of this code governing the filing entity.

Tex. Bus. Orgs. Code § 3.153 (emphasis added).

“Member” means:

- (A) in the case of [an LLC], a person who *is a member or has been admitted as a member* in the [LLC] under its governing documents.

Tex. Bus. Orgs. Code § 1.002(53)(A) (emphasis added).

The court distilled these provisions with two observations: first, the right to access LLC records and information is generally dependent upon “member” status in the company; and second, there are two categories of

membership because the statutory definition uses “or” in the disjunctive. Interpreting the “is a member” passage to plainly mean that a person is a current member of the LLC, the court concluded that this category did not apply to Davis because he relinquished his interest in Highland prior to his information request.

Turning to the other category, the court acknowledged that the “has been admitted as a member” passage was susceptible to multiple readings: it could mean that the person was admitted in the past and remained a member, or that the person was admitted in the past but was no longer a member. Highland argued for the former, namely that the person was admitted as a member sometime in the past and remained a member when the information request was made. According to a canon of statutory construction, the court must give meaning to each passage within the statutory definition of “member.” Thus, the court was required to give individual effect to “is a member” and “has been admitted as a member.” Under Highland’s reading, however, the first passage engulfed and rendered redundant the second passage: a member would be “a person who is a member or has been admitted as a member [and is a member].” Instead, the court interpreted the “has been admitted as a member” passage to mean a person admitted as a member previously but who was no longer a member. Therefore, the court held that the definition of “member” included a person who is presently a member and a person who was previously admitted as a member but not presently a member. The court viewed this interpretation as unambiguous and, thus, determinative. As a result, the court concluded that Davis was not prohibited from accessing Highland’s records and information simply because he was not a member at the time of his request.

The court next reasoned that this interpretation was not absurd because the “proper purpose” language in Section 101.502(a) continued to safeguard against speculative information requests from past members. In addition, the court noted that a “company agreement may not unreasonably restrict a person’s [information rights] under Section 101.502.” Tex. Bus. Orgs. Code § 101.054(e). The court considered this prohibition indicative of a legislative intent to avoid excessive restriction on information rights. The court perceived Highland’s reading as an unreasonable restriction because it prevented a former member from obtaining LLC information even if the former member had a “proper purpose” for the request. The court also observed that Section 101.054(e) contains the word “person,” which the statute defines to include individuals, business organizations, and other entities. Tex. Bus. Orgs. Code § 1.002(69-b). The court pointed to the legislature’s use of this broad term, and not the narrower “member,” as intending to grant access to more than just the current members of the LLC.

The court then addressed the dissenting opinion. Casting the court’s holding as a “once a member, always a member” concept that was foreign to Texas LLC law, the dissent was largely concerned that the court’s interpretation would allow former members’ voting and decision-making authority to linger under various statutory default rules. Tex. Bus. Orgs. Code §§ 101.103(c), 101.105, 101.251, 101.252. The court’s response included a citation to Section 101.107 (providing, as a modifiable default rule, that “[a] member of [an LLC] may not withdraw or be expelled from the company”) for the proposition that a “once a member, always a member” concept was not as foreign as the dissent asserted. In a footnote, the court pointed to Section 101.111 (which states that the assignment of a membership interest does not itself terminate a member’s membership and that the assignor is not released from any liability the assignor may have to the LLC whether or not the assignee becomes a member) and signaled that such continuing liability could serve as a potential “proper purpose” for a member’s written request. Tex. Bus. Orgs. Code §§ 101.111(a), (b); 101.502(a). The court then observed, however, that a former member could not obtain information to verify that liability under the interpretation of Highland and the dissent. The court also disagreed with the dissent’s assertion that the majority’s reasoning would result in former members being treated as members for all purposes. The majority stated that its decision was limited to the specific issue on appeal, adding that Davis still had to satisfy the “proper purpose” requirement and other statutory criteria.

In sum, the court held that the definition of “member” in the context of statutory information rights included both a person who was an existing member and a person previously admitted as a member but not currently a member. The court concluded that Davis was not prohibited from accessing Highland’s information simply because he was not a member at the time of his request. Because the trial court erred in granting summary judgment in favor of Highland, the court of appeals reversed and remanded for further proceedings.

I. Dissolution/Winding Up

J&J Sports Productions, Inc. v. Los Taquitos Bar and Grill LLC, Civil Action No. 7:19-CV-160, 2019 WL 3892296 (S.D. Tex. Aug. 19, 2019).

The court denied a motion to dismiss the plaintiff's claim against an LLC that no longer existed because the plaintiff's claim accrued before the termination of the LLC and was thus an "existing claim" that could be brought against the terminated LLC within three years after the LLC's termination as provided by the Texas Business Organizations Code.

The plaintiff sued an LLC and two individuals alleging violation of the Federal Communications Act based on the defendants' alleged broadcast of a boxing match without paying sublicense fees to the plaintiff. The defendants argued that the claim against the LLC was barred by the Texas Business Organizations Code ("TBOC") because the LLC no longer existed. The court rejected the defendants' argument because Section 11.356 of the TBOC provides that a terminated filing entity's existence continues for a period of three years following the entity's termination for the purpose of a suit on an "existing claim." Because the plaintiff's claim accrued before the LLC's termination and was not otherwise barred by the statute of limitations, it was an "existing claim," and the plaintiff's claim was not subject to dismissal on these grounds.

Tucker v. Bubak, Nos. 13-18-00427-CV, 13-18-00613-CV, 2019 WL 2529674 (Tex. App.—Corpus Christi—Edinburg June 20, 2019, pet. denied) (mem. op.).

In two appeals, appellant Troy Tucker challenged the trial court's granting of summary judgment in favor of appellees, Raymond Bubak, Edde Management, Inc. ("EM"), Edde Ventures, L.P. ("EV"), Edde Drilling Services, LLC ("EDS"), and Titan Oilfield, LLC ("Titan"), in a suit seeking the winding up and termination of business entities under the Business Organizations Code. The court of appeals affirmed the trial court's summary judgment order of winding up and termination as to EV, EDS, and Titan (the partnerships and LLCs), but reversed the order as to EM (the corporation).

Tucker and Bubak owned several business organizations together. Tucker claimed that Bubak was improperly seeking a larger share of the profits from their entities and was competing with their businesses. Bubak eventually filed suit against Tucker seeking involuntary dissolution of the entities. After Bubak moved for summary judgment, the trial court issued an order stating the following:

As to [Bubak's] Motion For Partial Summary Judgement [sic] as to [EM], [EV], [EDS], and [Titan] (hereinafter referred to as "the entities"), the Court finds that there is no genuine issue as to any material fact that the "economic purposes of the entities is likely to be frustrated." Therefore, in accordance with Section 11.314(1)(A) [sic], Tex. Bus. Org. Code, the Court orders the involuntary winding up and termination of "the entities," having found that the Plaintiffs' Motion For Partial Summary Judgement [sic] as to "the entities" should be granted.

The trial court ultimately ordered Bubak to manage and effectuate the winding up of the entities. Tucker appealed.

The court of appeals began by quoting § 11.314 of the Business Organizations Code, under which a partnership or an LLC can be dissolved if the court determines that (1) "the economic purpose of the entity is likely to be unreasonably frustrated"; (2) "another owner has engaged in conduct relating to the entity's business that makes it not reasonably practicable to carry on the business with that owner"; or (3) "it is not reasonably practicable to carry on the entity's business in conformity with its governing documents." The court also cited § 11.054, under which a court may "(1) supervise the winding up of [a] domestic entity; (2) appoint a person to carry out the winding up of the domestic entity; and (3) make any other order, direction, or inquiry that the circumstances may require." The court of appeals observed that the trial court's appointment of Bubak to manage and effectuate the winding up was authorized by § 11.054.

Tucker argued that summary judgment was an inappropriate vehicle for awarding equitable relief such as the winding up of a business entity. He cited case law establishing that "dissolution proceedings are equitable in nature" and that, "[w]hen contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues." The court disagreed and noted that TRCP 166a(a) did not restrict the type of "claim" which may be disposed of by

summary judgment. As a result, the court concluded that “summary judgment may be granted ordering the winding up and termination of a business entity.”

Tucker also argued that Bubak did not meet the statutory requirements for a court-ordered winding up. In response to Tucker’s assertion that § 11.054 and § 11.314 did not allow for the appointment of a receiver to wind up an entity, the court pointed out that Bubak abandoned his claim for a receiver and the trial court did not order one. Tucker then complained that the trial court cited a non-existent portion of the statute, § 11.314(1)(A), but the court of appeals found that it was clear that the trial court intended to refer to § 11.314(1) because it referenced the language of that subsection in its order. Finally, Tucker argued that the statute used by the trial court as the basis for its order, § 11.314, did not permit the involuntary winding up of a corporation such as EM. The court of appeals agreed, stating that “[i]nvoluntary winding up and termination under § 11.314 is restricted to partnerships and limited liability companies.”

Bubak responded that the winding up of EM was authorized by § 11.054, which allows a court to “supervise the winding up” or “appoint a person to carry out the winding up” of any “domestic entity,” a term which includes corporations. The court disagreed that § 11.054 could be used in such a manner:

We cannot agree that the trial court’s order as to EM is authorized by § 11.054. That statute, entitled “Court Supervision of Winding Up Process,” explicitly states that the powers it grants are “[s]ubject to the other provisions of this code” *Id.* § 11.054. In those other provisions, “winding up” is defined as “the process of winding up the business and affairs of a domestic entity as a result of the occurrence of an event requiring winding up.” *Id.* § 11.001(8). “An event requiring winding up” of a domestic entity includes “a decree by a court requiring the winding up, dissolution, or termination of the domestic entity, rendered under this code or other law.” *Id.* § 11.051(5). But although § 11.054 allows a court to “supervise” the winding up of a corporation and to “appoint a person to carry out” that process, it does not explicitly allow a trial court to “requir[e] the winding up, dissolution, or termination” of a corporation. *See id.* §§ 11.051 (emphasis added), 11.054(a), (b).

Further, although § 11.054 allows a trial court to “make any other order, direction, or inquiry that the circumstances may require,” that authority is also “[s]ubject to the other provisions” of the business organizations code. *See id.* § 11.054(3). We do not believe § 11.054(3) was intended to serve as a judicial carte blanche that would allow a trial court unfettered authority to take actions—such as the rendition of an order requiring the involuntary termination of a corporation—that are not explicitly permitted elsewhere in the code. Instead, we construe § 11.054(3) as granting the trial court broad authority to make appropriate orders in cases where “[a]n event requiring winding up” has already occurred. *See id.* §§ 11.054(3); *see also id.* § 11.051.12.

We conclude that the trial court erred by ordering the involuntary termination and winding up of EM, a corporation. Tucker’s issues raising this argument are sustained. Moreover, because Bubak’s pleadings do not offer any legally cognizable basis for the trial court to order the involuntary termination and winding up of a corporation, we render judgment denying Bubak’s requests for the winding up and dissolution of EM.

Tucker’s remaining contentions involved his claim that Bubak did not produce any competent summary judgment evidence. He argued that summary judgment was improper because he produced extensive evidence of Bubak’s wrongful conduct. The court noted, however, that Tucker’s summary judgment response did not challenge Bubak’s assertion that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated” due to the ongoing disagreements between the parties. As the court observed:

Our inquiry here is limited to the question of whether the trial court erred in rendering summary judgment on grounds that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated.” The business organizations code plainly permits a trial court to order winding up and dissolution if it makes this finding. TEX. BUS. ORGS. CODE ANN. § 11.314(1). Here, Bubak alleged these grounds in his summary judgment motion but Tucker did not deny them in his response. We therefore cannot reverse the judgment on this basis as Tucker urges.

Further, in light of the fact that Tucker never disputed Bubak’s § 11.314(1) allegation, Bubak was arguably under no obligation to produce any evidence to support it. See TEX. R. CIV. P. 166a(a) (noting that a plaintiff may “move with or without supporting affidavits for a summary judgment in his favor”). And even if all of Bubak’s summary judgment evidence is considered incompetent, the evidence attached to Tucker’s summary judgment response constituted more than a scintilla to show that the “economic purpose” of EV, EDS, and Titan “is likely to be unreasonably frustrated.” For example, Tucker attached deposition testimony by Bubak in which he stated that the Edde companies suffered from “[d]ysfunctional management”

Accordingly, the court of appeals concluded that the trial court did not err by granting summary judgment ordering the winding up and dissolution of EV, EDS, and Titan.

French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652 (W.D. Tex. Aug. 27, 2018) (Although the court issued this opinion in 2018, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The district court denied Defendants’ motion to dismiss a member’s request for a court-ordered buyout. The court concluded that liquidation was not the only remedy at the court’s disposal if oppressive conduct were found under § 11.404 of the Business Organizations Code.

In 2013, Jordan French and Darius Fisher formed First Page, a Texas limited liability company that performed online reputation management and advertising services. French and Fisher were both members of First Page. In 2015, French and Fisher amended First Page’s operating agreement to add Jesse Boskoff as a member and to name all three members as managers. Pursuant to the operating agreement, French, Fisher, and Boskoff each held a one-third membership interest in First Page.

French sued Fisher and Boskoff (“Defendants”) for breach of contract, breach of fiduciary duty, and other claims. The claims were largely based on (1) a purported diversion of business opportunities and personnel from First Page to Blue Land (a business owned by Fisher and Boskoff), and (2) the use of First Page funds to pay the personal legal fees of Fisher and Boskoff.

Defendants sought to dismiss French’s request for a court-ordered buyout of French’s one-third interest in First Page. The court observed that if equity-holder dissension or deadlock becomes intolerable, the Texas Business Organizations Code provides a remedy in the form of receivership and liquidation. Section 11.402 of the Business Organizations Code provides that a district court in the county in which an entity has its registered office or principal place of business may appoint a receiver to rehabilitate the company and ultimately to liquidate it. Section 11.404 of the Code provides that, on the application of an owner or member, the court may appoint a receiver if it is established that, among other options, the acts of those in control of the entity are illegal, oppressive, or fraudulent. The court noted, however, that liquidation is not the only remedy at the court’s disposal if oppressive conduct is found. In addition to remedies for breach of fiduciary duty, the court has the power to require the majority to buy out the minority at a fair price “if the buyout would both ‘avoid damage to [an] interested part[y]’ and ‘conserve the property and business of the domestic entity.’” As the court concluded: “At this stage of the proceedings, the Court does not have enough facts to determine whether a buyout is an appropriate remedy in this case. For now, the Court finds that it is at least an available remedy under Texas law. Accordingly, the Court denies without prejudice Defendants’ Motion to Dismiss as to this ground.”

Cheniere Energy, Inc. v. Parallax Enterprises LLC, 585 S.W.3d 70 (Tex. App.—Houston [14th Dist.] 2019, pet. dism’d) (“Further, a Delaware limited liability company is automatically dissolved when there are no members, *see id.* § 18-801(a)(4) We acknowledge that Delaware law provides at least two ways to ‘revoke the dissolution.’ First, the limited liability company is not dissolved if, within ninety days after the company ceases to have any members, ‘the personal representative of the last remaining member agrees to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member.’ DEL. CODE ANN. tit. 6, § 18-801(a)(4)(a). Moreover, a limited liability company agreement can require the personal representative to agree to continue the company and to be admitted as a member. ... Second, a limited liability company agreement may specifically provide for the admission of a member after there is no longer a remaining member. *Id.* § 18-801(a)(4)(b). ...”).

J. Merger, Conversion, Sale of Assets

Barcelo v. Teva Pharmaceuticals U.S.A., Inc., Civil Action No. H-20-00017, 2020 WL 1666116 (S.D. Tex. Apr. 2, 2020).

The plaintiff brought a products liability action against the manufacturer of the ParaGard intrauterine device (Teva Women's Health, Inc. or "Teva"), the company that purchased the assets of the ParaGard business from Teva (CooperSurgical, Inc. or "CooperSurgical"), and the purchaser's parent company (The Cooper Companies, Inc. or "The Cooper Companies"). The Cooper defendants sought dismissal, and the plaintiff sought to amend her pleadings to add a successor-liability or fraudulent-transfer claim.

After pointing out that the asset purchase agreement showed that CooperSurgical did not assume liability for injuries caused before the asset sale and that the Texas Business Organizations Code recognizes the rule of nonliability of the purchaser in an asset sale absent an express assumption, the court addressed the plaintiff's fraudulent-transfer theory, which was based on Teva's conversion from a corporation into a limited liability company just before the sale of Teva's assets. The plaintiff argued that because the Cooper defendants knew of pending litigation against Teva for claims similar to the plaintiff's, the defendants must have been trying to conceal Teva's existence and defraud claimants like the plaintiff. The plaintiff argued that actual intent to defraud was shown by a statement of Teva's general counsel that Teva Women's Health, Inc. had "ceased to exist" coupled with the fact that Teva filed for conversion in Delaware, which does not provide corporate documents online. The Cooper defendants responded that Teva was incorporated in Delaware and thus was required to file for conversion in Delaware, and the certificate was publicly filed with Delaware's Secretary of State. The Cooper defendants cited cases confirming that the incorporated entity ceases to exist under Delaware law although the resulting LLC is deemed to be the same entity as the converted corporation. The plaintiff admitted that Teva's general counsel clarified during a deposition that "Teva Women's Health, Inc., was converted 'out of existence.'"

The court concluded that the plaintiff failed to identify facts that could state a plausible claim that the Cooper defendants and Teva fraudulently transferred the ParaGard assets to avoid liability. The only statutory factor indicating actual fraud that was present was the defendants' alleged knowledge of pending litigation against Teva before the asset sale. There was no indication that Teva sold the ParaGard assets for inadequate consideration, that the transfer was concealed, that Teva transferred substantially all its assets to CooperSurgical, or that Teva remained in control of the ParaGard assets after the sale. The court said that the fact that Delaware does not make corporate filings available online did not suggest a cover-up, and the court pointed out that Teva, as a Delaware corporation, was required to file its certificate of conversion in Delaware. The certificate of conversion was publicly available and was later acquired by the plaintiff by calling the Secretary of State's office. The statements of Teva's general counsel that the incorporated entity "ceased to exist" were accurate. According to the court, the fact "[t]hat Teva sold its ParaGard assets to CooperSurgical, when both companies allegedly knew of pending litigation, and that CooperSurgical purchased the assets without assuming liability for injuries caused before the sale, does not plausibly allege that CooperSurgical purchased the assets intending to defraud creditors such as [the plaintiff]."

Because the plaintiff conceded that the Cooper defendants did not manufacture or sell the ParaGard device that allegedly caused her injury, her pleadings did not mention successor liability or fraudulent transfer, and she was unable to show that amendment of her pleadings would be anything but futile, the court dismissed the plaintiff's claims against the Cooper defendants.

Peterson, Goldman & Villani, Inc. v. Ancor Holdings, LP, 584 S.W.3d 556 (Tex. App.—Fort Worth 2019, pet. filed).

PGV won an arbitration award against Ancor LLC. Ancor LLC merged into Ancor LP. The court of appeals concluded that Ancor LP was liable for the award and the trial court should have granted summary judgment on the issue:

Under Texas law, a certificate of merger must be filed for a merger to become effective if any domestic limited liability company is a party to the merger. *See Trustmark Nat'l Bank v. Tegeler (In re Tegeler)*, 586 B.R. 598, 650 n.33 (Bankr. S.D. Tex. 2018) (quoting Tex. Bus. Orgs. Code Ann. § 10.151(a)(1)(A)); *see also* Tex. Bus. Orgs. Code Ann. § 1.002(22) (including domestic limited liability companies in the definition of "filing entity," which must file under section 10.151). "A merger that requires such a filing takes effect on the acceptance of the filing

of the certificate of merger by the secretary of state or county clerk, as appropriate.” When a merger takes effect, “all liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger.” *Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438, 449 n.13 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (quoting Tex. Bus. Orgs. Code Ann. § 10.008(a)(3)). The surviving organization to which a liability is allocated under the plan of merger is the primary obligor for the liability. *Id.* (quoting Tex. Bus. Orgs. Code Ann. § 10.008(a)(4)).

Attached to PGV’s motion for summary judgment were three exhibits showing the completed merger between Ancor LLC, a domestic limited liability company, and Ancor LP, a Delaware limited partnership. The first exhibit was titled “Agreement and Plan of Merger.” It specified that Ancor LLC would merge “with and into” Ancor LP, the surviving entity, and that Ancor LP would “assume all the liabilities of every kind and description of” Ancor LLC. Keene executed the merger agreement on behalf of both Ancor LLC and LP. The second exhibit was the “Articles of Merger,” which was filed with the Texas Secretary of State. The articles recited that Ancor LLC and LP were merging and that Ancor LP was the surviving entity. The third exhibit was a “Certificate of Merger” issued by the Texas Secretary of State, approving the merger as of September 22, 2000. This evidence conclusively established a completed merger.

By dint of the merger agreement and the completed merger itself, Ancor LP assumed all of Ancor LLC’s liabilities, including the confirmed arbitration judgment. ... Through its evidence, PGV conclusively established its entitlement to summary judgment on successor liability, and appellees failed to create a fact issue sufficient to show otherwise. We conclude that the trial court should have granted summary judgment holding Ancor LP liable on the judgment against Ancor LLC.

Bullet Trap, L.L.C. v. Waterproof Positive, LLC, No. 05-18-00529-CV, 2019 WL 3543579 (Tex. App.—Dallas Aug. 5, 2019, pet. denied) (mem. op.).

The court of appeals affirmed the trial court’s award of attorney’s fees under § 38.001 of the Civil Practice and Remedies Code against a corporation that allegedly converted to an LLC during the pendency of litigation.

After a lawsuit, Waterproof Positive, LLC d/b/a Energy Roofing Solutions (“ERS”) was awarded a breach of contract judgment against Bullet Trap, L.L.C. The court also awarded ERS attorney’s fees under § 38.001.

During the jury trial from August 28-30, 2017, the trial court admitted evidence that Bullet Trap was a corporation, including Bullet Trap’s articles of incorporation and its franchise tax statement. The day after the trial concluded, ERS filed its first motion for an award of attorney’s fees, and Bullet Trap did not respond. At the hearing on the motion, held on October 4, 2017, Bullet Trap told the court and ERS that on August 30, 2017, the day the jury found that Bullet Trap breached its contract, it converted from a corporation to an LLC. Because it was no longer a corporation, Bullet Trap argued that ERS could not recover its attorney’s fees under § 38.001. Bullet Trap offered into evidence an exhibit that its attorney described as “a printoff from the Secretary of State website showing that Bullet Trap, in fact, during the pendency of litigation was converted over to a[n] LLC.” After an objection from ERS’ attorney, the trial court voiced concern about admitting evidence that contradicted the undisputed evidence at the jury trial that Bullet Trap was a corporation and the jury’s finding that “Bullet Trap, Inc.” breached the contract. The court sustained the objection to Bullet Trap’s exhibit.

In response to a later amended motion for an award of attorney’s fees, Bullet Trap again attached documents regarding its conversion from a corporation to an LLC. At the hearing on the amended motion, the court declined to allow further argument about Bullet Trap’s conversion. Bullet Trap did not re-offer the exhibit that the court excluded at the first hearing, nor did it offer into evidence the documents attached to its response to the amended motion. The trial court signed the final judgment the same day awarding ERS its requested attorney’s fees. The trial court also made findings of fact and conclusions of law about the award of attorney’s fees, including that “Bullet Trap, Inc. is a Texas Corporation.”

After the trial court signed the final judgment, Bullet Trap filed a joint motion for new trial, motion to modify the judgment, and motion for judgment notwithstanding the verdict. Bullet Trap again asserted that it was an LLC and could not be ordered to pay ERS’s attorney’s fees. At the hearing on the motion for new trial, Bullet Trap did not offer any evidence. The trial court did not expressly rule, and the motion for new trial and motion to modify the judgment were overruled by operation of law.

On appeal, Bullet Trap asserted in its brief that “the record confirms unequivocally that Bullet Trap was a limited liability company” when the trial court signed the final judgment ordering Bullet Trap to pay ERS’s attorney’s fees. Bullet Trap asserted that the trial court erred at the first hearing by sustaining ERS’ objection to Bullet Trap’s evidence that it was an LLC. After noting that “[w]e must uphold the trial court’s evidentiary ruling if there is any legitimate basis for it,” the court of appeals rejected Bullet Trap’s claim:

On appeal, ERS argues the trial court abused its discretion by allowing ERS to present evidence of its fees but not allowing Bullet Trap to present evidence of its conversion from a corporation to an LLC. Bullet Trap asserts that if it was prohibited from presenting evidence of the conversion because it did not present that evidence during the jury trial, then ERS should have been prohibited from presenting evidence of the amount of its attorney’s fees because it did not present that evidence in the jury trial. We disagree. Before trial, the parties told the court they stipulated to having the trial court determine attorney’s fees. The hearing on the first motion to award attorney’s fees was pursuant to that stipulation. The parties had made no agreement to allow Bullet Trap to present evidence of a change of form. Bullet Trap cites no authority that would require the trial court to admit this evidence. We conclude Bullet Trap has not shown the trial court abused its discretion by sustaining ERS’s objection to Bullet Trap’s evidence of its LLC conversion.

Bullet Trap argues that any error from the exclusion of its evidence at the hearing on the first motion to award attorney’s fees “was compounded at the second hearing, where, despite ERS making no objection to Bullet Trap’s proffered evidence, the trial court outright refused to consider the issue on the basis that she had ‘already ruled on that.’” Contrary to Bullet Trap’s assertion, it never proffered any evidence at the hearing on the amended motion for award of attorney’s fees. Instead, Bullet Trap’s counsel stated he “renew[ed] our objection on the fact that the defendant is no longer a corporation, it is an LLC.” Bullet Trap did not proffer any evidence at that hearing. Bullet Trap argues that the documents attached to its response to the amended motion for award of attorney’s fees constituted evidence before the court. At the hearing ... on the amended motion, Bullet Trap did not offer the documents attached to its motion into evidence, nor did it even mention them. Bullet Trap referred to its response as “supplemental briefing” and did not tell the court that its response contained evidence it wanted the court to consider. We conclude Bullet Trap has not shown it proffered or that the trial court admitted any evidence at the hearing on ERS’s amended motion that Bullet Trap was an LLC and not a corporation.

Bullet Trap also argues ERS offered no evidence that Bullet Trap was a corporation. At the hearing on ERS’s first motion for award of attorney’s fees, when Bullet Trap asserted it was an LLC, ERS’s counsel reminded the trial court of the evidence introduced at trial showing Bullet Trap was a corporation. That evidence was Bullet Trap’s articles of incorporation, its franchise tax report, and Putnam’s [the owner of Bullet Trap] testimony that Bullet Trap was a corporation. Bullet Trap did not object to the trial court’s consideration of that evidence.

We conclude Bullet Trap has not shown the trial court erred by ordering Bullet Trap to pay ERS’s attorney’s fees under section 38.001.

Bullet Trap also argued that the trial court erred by awarding ERS attorney’s fees related to Bullet Trap’s counterclaims for breach of contract, fraud, and violations of the DTPA. The court of appeals observed that “a plaintiff who is entitled to fees on a claim may recover fees for legal services opposing defenses that the plaintiff had to overcome to prevail on its claim,” and it similarly noted that “when a defendant asserts a counterclaim that the plaintiff must overcome in order to fully recover on its contract claim, the attorneys’ fees necessary to defeat that counterclaim are likewise recoverable.” According to the court, in order for ERS to fully recover on its breach-of-contract claim, it had to overcome Bullet Trap’s counterclaim allegations that ERS breached the contract first and that its breach excused Bullet Trap’s performance. ERS was therefore entitled to recover its attorney’s fees related to that counterclaim. Even if ERS was not entitled to recover its attorney’s fees for the fraud and DTPA counterclaims, the court determined that the attorney’s fees related to those counterclaims also applied to the breach-of-contract counterclaim for which ERS was allowed to recover its attorney’s fees.

K. Forfeiture and Involuntary Termination

Breakwater Advanced Manufacturing, LLC v. East Texas Machine Works, Inc., No. 12-19-00013-CV, 2020 WL 827139 (Tex. App.—Tyler Feb. 19, 2020, no pet. h.) (mem. op.).

The court stated that individual members of an LLC whose charter was forfeited under the Tax Code in 2017 could be held personally liable for debts incurred after the date on which the entity's tax, report, or penalty was due, but the summary judgment evidence in this case did not show whether the LLC was delinquent in December 2015 and January 2016 when the transactions at issue in this case occurred. Thus, the court remanded on the issue of personal liability of the members.

East Texas Machine Works, Inc. ("East Texas Machine") sold services to Breakwater Advanced Manufacturing, LLC ("Breakwater") in December 2015 and January 2016. After Breakwater's failure to pay, East Texas Machine filed suit for breach of contract and suit on an account. After attempts at a settlement offer under Tex. R. Civ. P. 167 and several motions for summary judgment, the trial court ultimately awarded interest and attorneys' fees to East Texas Machine against Breakwater and its three members, jointly and severally. The trial court's reasoning for holding the members liable was based in part on a finding that the State of Texas forfeited Breakwater's charter in 2017 after the two pertinent transactions.

Among the issues preserved for appellate review was whether East Texas Machine was entitled to recover individually against the members of Breakwater pursuant to Tex. Tax Code 171.255. A public information report for 2015 named the three individual defendants as members. Further, the Secretary of State's notice of forfeiture, issued January 27, 2017, referred to certification by the Comptroller of Public Accounts, under Tex. Tax Code § 171.302, that grounds existed for the entity's charter, certificate, or registration forfeiture and that the entity had failed to revive its privileges within 120 days of privilege forfeiture.

The court of appeals recognized a split in authority as to whether individual liability may be imposed for debts incurred "between the date the tax, report, or penalty was due, but not filed or paid, and the date of the actual forfeiture of the right to transact business." The court interpreted the plain language of Tex. Tax Code § 171.255 to authorize the imposition of individual liability on members for debts incurred after the date on which the entity's tax, report, or penalty was due and before the entity's privileges are revived.

Because East Texas Machine failed to present summary judgment evidence to prove that Breakwater was delinquent at the time it entered into the 2015 or 2016 transactions, a genuine issue of material fact remained as to whether the members could be held individually liable. Accordingly, the court reversed and remanded the case for further proceedings on the individual liability issue.

L. Veil Piercing

Yang Wu International, Inc. v. LS & CS, LLC, Civil Action No. 4:20-CV-312, 2020 WL 2395937 (E.D. Tex. May 12, 2020).

The court held that the plaintiffs established that certain LLCs were liable for the actions of other affiliated LLCs based on the alter-ego doctrine.

The plaintiffs were in the business of selling perishable agricultural commodities. The defendants LS & CX, LLC, d/b/a Jusgo Supermarket and also d/b/a Ztao Marketplace ("Jusgo Plano"); Jusgo Duluth, LLC, d/b/a Jusgo Supermarket and also d/b/a Ztao Marketplace ("Jusgo Duluth"); Ztao Group Holding, LLC ("Ztao Group"); and Ztao Marketplace Distribution Center, LLC ("Ztao Marketplace") (collectively, "Business Entity Defendants") were in the business of purchasing and reselling perishable agricultural commodities. The plaintiffs sold perishable agricultural commodities to the defendants and were not paid; therefore, the plaintiffs filed suit alleging breach of contract and violation of the Perishable Agricultural Commodities Act of 1930 ("PACA"). The plaintiffs sought to enjoin Business Entity Defendants from dissipating the plaintiffs' PACA trust assets and, further, to freeze PACA trust assets worth almost half a million dollars.

In analyzing whether the plaintiffs established that they had a substantial likelihood of success on the merits, the court initially considered whether the plaintiffs established that their PACA claims applied to all Business Entity Defendants. The court concluded that they did. PACA applied to Jusgo Plano and Jusgo Duluth because they were dealers of perishable agricultural commodities, and the court concluded that the plaintiffs established that their claims applied to Ztao Marketplace and Ztao Group (collectively, "Ztao") because they were jointly liable as alter egos of Jusgo Plano and Jusgo Duluth (collectively "Jusgo").

The court relied upon the alter-ego doctrine as applied to corporations without mentioning or discussing that Business Entity Defendants were LLCs. The court described the relevant legal principles as follows:

“[T]he alter ego doctrine allows the imposition of liability of a corporation for the acts of another corporation when the subject corporation is organized or operated as a mere tool or business conduit,” *Nichols v. Pabtex, Inc.*, 151 F. Supp. 2d 772, 780 (E.D. Tex. 2001) (citations omitted) (noting that the alter ego doctrinal considerations are the same regardless of whether the companies have a parent-subsidary or sister-sister relationship). The doctrine applies when there is such unity between corporations that the “separateness of the ... corporations has ceased” and holding just one corporation liable “would result in injustice.” *Id.* (citation omitted). “Alter ego is demonstrated ‘by evidence showing a blending of identities, or a blurring of lines of distinction, both formal and substantive between [the] corporations.’” *Id.* at 781 (citation omitted). Keeping in mind that “no one factor is determinative,” the Fifth Circuit enumerated a laundry list of factors to be used in determining whether a company is an alter ego of another. *Id.* (citing *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985)). These factors include, among others: (1) one company pays the salaries and expenses of the other; (2) one company uses the other company’s property as its own; and (3) the daily operations of the corporations are not kept separate. *Jon-T Chems., Inc.*, 768 F.2d at 691–692.

Applying the Fifth Circuit’s list of factors above, the court found that the separateness of Jusgo and Ztao had ceased and that Jusgo and Ztao were operating as alter egos of each other. The court relied on the following: (1) Ztao routinely paid Jusgo’s expenses when Ztao paid Jusgo’s debts that were owed to the plaintiffs; (2) Ztao used Jusgo’s property (i.e., the companies used the same property as shown by Ztao’s continuous use of the same physical addresses as Jusgo); (3) the daily operations of Ztao were not kept separate from those of Jusgo as shown by the following: both Jusgo Plano and Jusgo Duluth generically called themselves “Jusgo Supermarkets”; Business Entity Defendants used the names “Jusgo Supermarket” and “Ztao Marketplace” interchangeably; (c) a single buyer was used to purchase the plaintiffs’ goods on behalf of Jusgo and Ztao Marketplace and this buyer instructed the plaintiffs to send the invoices for produce to the addresses shared by Ztao and Jusgo, issue the invoices to either “Jusgo Supermarket” or “Ztao Marketplace,” and email all billing statements and open invoices for Jusgo to email addresses with the domain names of “ztaomarketplace.com” and “ztaogroup.com.” Based on the above, the court found that there was a unity between Ztao and Jusgo such that Ztao was operating as the alter ego of Jusgo, and Ztao Marketplace and Ztao Group were liable for the actions of Jusgo Plano and Jusgo Duluth. Thus, the plaintiffs established that their PACA claims applied to Business Entity Defendants.

White v. Cyr, No. SA-18-cv-01287-JKP, 2020 WL 1644047 (W.D. Tex. Apr. 2, 2020).

The court affirmed the bankruptcy court’s denial of an exception to discharge of an LLC member’s debt to the plaintiff, concluding that the plaintiff’s fraud claims under Section 523 failed to state a claim, the plaintiff failed to sufficiently allege that the CEO of the LLC was acting as the agent of the member for purposes of imputing allegedly fraudulent statements of the CEO to the member, and the plaintiff failed to sufficiently plead an alter-ego claim.

After demanding payment for professional services rendered to an LLC, Dr. Johnny White filed suit against the LLC, the LLC’s CEO, and Steven Cyr, the alleged alter-ego of the LLC. The suit alleged breach of contract, quantum meruit, fraud, and theft of services. Cyr initiated a bankruptcy suit over three years later, staying White’s state court action. White then requested that the bankruptcy court deem the debt owed to him “nondischargeable” under 11 U.S.C. § 523(a)(2)(A), (4), and (6) and the alter-ego theory. White’s amended complaint against Cyr was ultimately dismissed by the bankruptcy court. White appealed the dismissal of his claims against Cyr to federal district court. With regard to the fraud claims, White claimed that Cyr fraudulently induced him to provide medical services despite Cyr knowing or negligently failing to know that the LLC would not be able to pay the fifty-percent share agreed to by the parties. Furthermore, White claimed that Cyr was liable for the omission of information regarding the LLC’s difficulties.

Section 523(a)(2)(A) requires a creditor to allege “a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury.” Sections 523(4) and (6) require a demonstration

of “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” and “willful and malicious injury by the debtor to another entity or to the property of another entity,” respectively. The district court found that White’s allegation failed to demonstrate: (1) Cyr’s intent and purpose to deceive; (2) that Cyr made intentional or material omissions; (3) that Cyr had a duty to disclose or knowledge that White was ignorant of the alleged omissions; or (4) White’s reliance and harm stemming from such omissions. Accordingly, White’s fraud claims under § 523 failed to state a claim for which relief could be granted, rendering the bankruptcy court’s dismissal proper.

With regard to the alter ego claim, the court noted the liability protection provided by an LLC, quoting Tex. Bus. Orgs. Code § 101.114 (“Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court.”) Due to the liability protection that corporations and LLCs offer to their owners, the court said that a plaintiff seeking to impose individual liability on an owner must “pierce the corporate veil.” To impose liability under an alter-ego theory, “a court must find (1) that the entity ‘is the alter ego of the debtor, and (2) that the corporate fiction was used for an illegitimate purpose, that is, to perpetrate an actual fraud on the plaintiff for the defendant’s direct personal benefit.’” A plaintiff adequately alleges an LLC is the alter ego of an individual by demonstrating “such unity” between the LLC and the individual “that the separateness of the [LLC] has ceased and holding only the [LLC] liable would result in an injustice.” The court stated that unity may be demonstrated by showing “the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.” The court listed the following as facts that might be included in a plausibly alleged alter-ego claim:

- (1) the payment of alleged corporate debts with personal checks or other commingling of funds;
- (2) representations that the individual will financially back the corporation;
- (3) the diversion of company profits to the individual for his or her personal use;
- (4) inadequate capitalization;
- (5) whether the corporation has been used for personal purposes; and
- (6) other failure to keep corporate and personal assets separate.

White alleged that he did not receive the fifty-percent share of billings as promised and later learned that “Cyr utilized the profits from his practice in [the LLC] for his personal gain and lavish and extravagant lifestyle.” The court concluded that White’s allegation that LLC funds were used for Cyr’s personal purposes was conclusory. “Absent factual allegations in support of the conclusion that Cyr used [the LLC’s] profits to support his lifestyle or factual allegations that show corporate formalities were not followed, that corporate and private property, funds, or assets were commingled, or that Cyr otherwise abused the corporate form, White’s amended complaint fails to demonstrate ‘such unity’ between [the LLC] and Cyr ‘that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice.’”

Lastly, White argued that the bankruptcy court failed to consider his claims of agency or vicarious liability against the LLC and Cyr for the actions of the LLC’s CEO. Under Fifth Circuit precedent, “an agent’s fraud may be imputed to the debtor under § 523(a)(2)(A).” Furthermore, under agency law, apparent authority is sufficient to bind a debtor for the apparent acts of his agent when a reasonable belief of agent authority is traceable to the manifestations of the debtor. However, the court agreed with the bankruptcy court’s finding that White did not plausibly allege facts demonstrating a reasonable belief that the CEO was Cyr’s agent. Rather, facts indicated that the CEO was acting on behalf of the LLC as its CEO.

Domain Protection, LLC v. Sea Wasp, LLC, Civ. A. No. 4:18-cv-792, 2019 WL 5189200 (E.D. Tex. Oct. 15, 2019).

The court concluded that Sea Wasp LLC’s contacts could be imputed to the individual defendants on a piercing the veil theory. As a result, the court denied the individual defendants’ motion to dismiss for lack of personal jurisdiction.

Domain Protection was the registered name holder for over 50,000 domain names. Sea Wasp was the registrar over those names. The lawsuit concerned whether Sea Wasp was encroaching on Domain Protection’s proprietary interest in the domain names by turning the executive lock on them, which prevented Domain Protection

from selling the domain names or updating their registration information. Sea Wasp insisted that Domain Protection lacked any proprietary interest in the domain names in light of a dispute over their ownership.

Pending before the court were several motions, including a motion to dismiss for lack of personal jurisdiction by individual defendants Gregory Faia and Vernan Decossas. Faia and Decossas “[were] the owners and officers and directors of Sea Wasp,” and they claimed that they had no contacts with the state of Texas. Faia was domiciled in Louisiana and Decossas was domiciled in Florida. Sea Wasp was “created in 2017 as a Nevada limited liability company, [and] is a citizen of Louisiana whose members reside in Louisiana.” According to Domain Protection, Sea Wasp was nothing more than a shell entity which Faia and Decossas used to evade existing legal obligations and to avoid wrongs. Domain Protection argued that Faia and Decossas were amenable to the court’s jurisdiction because the “corporate fiction” encapsulating Sea Wasp should be disregarded and Sea Wasp’s contacts should be imputed to them.

The court cited *Castleberry* and Fifth Circuit precedent in explaining that there were three broad categories of piercing: “(1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud.” These theories apply to both corporations and limited liability companies. “Should a court find that one of these theories applies, and that the corporate fiction should thus be disregarded, the corporations contacts will be imputed to its shareholders, successors, or other relevant actors.”

The court first addressed the claim that Sea Wasp was used to evade an existing legal obligation, which the court stated fell within the “illegal purposes” and “sham to perpetrate a fraud” categories. Under the policy of the Internet Corporation for Assigned Names and Numbers (“ICANN”), Sea Wasp had become the registrar of all domain names held by its predecessor, Fabulous.com, Australia. This transfer occurred after the two entities consummated an allegedly arms-length transaction whereby Sea Wasp purchased all of Fabulous.com, Australia’s assets, including the ICANN Registrar Accreditation Agreement. Fabulous.com, Australia’s assets also included the domain names registered in Domain Protection’s name. Domain Protection alleged that Sea Wasp was created, and these transactions took place, so that Sea Wasp could “seize control over the registrar functions without the consent of the domain name registrants who contracted with Fabulous.com to handle the registrar functions for their domain names.” Consequently, Domain Protection argued that Sea Wasp was used to avoid the obligations that Fabulous.com, Australia had under a court order and ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”).

The court disagreed. The order did not require Fabulous.com, Australia to follow certain instructions, and even if it did, that mandate did not apply to Sea Wasp. As to the UDRP, the court noted that any existing legal obligations belonged to Fabulous.com, Australia. “Thus, if any party was avoiding existing legal obligations, it was Fabulous.com, Australia.” In addition, the court observed that it was insufficient for Domain Protection to simply rehash factual allegations without any mention of which specific legal obligations Sea Wasp violated. Even if Domain Protection had alleged an existing legal obligation between Sea Wasp and itself, “it is doubtful that ... *Castleberry* contemplated a private, contractual legal obligation when discussing legal obligations.” As the court concluded: “Domain Protection failed to establish what existing legal obligation—that actually belonged to the Individual Defendants or Sea Wasp—that Sea Wasp was used to evade. And even if Domain Protection had alleged an existing legal obligation, a contractual obligation is not contemplated by *Castleberry*. Further, the Court Order Domain Protection cites does not stand for the proposition that Domain Protection claims it stands for. Consequently, the Court finds that Sea Wasp was not used to evade an existing legal obligation.”

The court then addressed the claim that the individual defendants “relied upon Sea Wasp as a protection of crime or to justify a tort or wrong,” which the court stated fell within the “sham to perpetrate a fraud” category. Under this claim, Domain Protection successfully persuaded the court:

In Domain Protection’s allegations, Domain Protection claims that Sea Wasp is a “shell entity” which was used to further a civil conspiracy, interfere with Domain Protection’s contract, and commit theft, conversion, and a violation of the Stored Communications Act (Dkt. #93). Specifically, Domain Protection maintains that Faia and Decossas used Sea Wasp to register themselves as Registrar over the Domain Names so that they could lock the Domain Names, change the DNS records, and thus prevent Domain Protection from controlling, selling, or receiving advertising revenue from the Domain Names (Dkt. #93). Put simply, Domain Protection alleges that the Individual Defendants created Sea Wasp so that Sea Wasp could “seize control

over the registrar functions without the consent of the domain name registrants who contracted with Fabulous.com to handle the registrar functions for their domain names” (Dkt. #181). The Individual Defendants effectively remain silent on this front.

In its Motion, the Individual Defendants do not persuasively rebut any of these claims. Rather, the Individual Defendants hurl accusations at Domain Protection and claim that, if any party engaged in any inequitable conduct, it was Domain Protection (Dkt. #173). Additionally, the Individual Defendants include three brief sentences whereby they claim that any actions taken by themselves and Sea Wasp were done in “good faith” to prevent Domain Protection’s potentially criminal conduct (Dkt. #188). Such arguments do not defeat any allegations made by Domain Protection. Taking Domain Protection’s allegations as true at this stage, and noting that the Individual Defendants have not provided any contradictory affidavits, it is evident that Domain Protection has pleaded sufficient facts to demonstrate that honoring the “legal independence” of the Individual Defendants would result in “inequity” or “injustice.” Domain Protection alleges that Sea Wasp was nothing more than a shell entity which was used to accomplish the ostensibly unlawful and/or tortious conduct that the Individual Defendants purportedly wanted to engage in. It would be inequitable to allow Sea Wasp to “cloak” or shield the Individual Defendants from the consequences of such alleged actions. Further, the Individual Defendants do not assert that it would be unfair or unreasonable for the Court to exercise jurisdiction over them.

Under Rule 12(b)(2), the court concluded that it was in the interest of equity to pierce the veil for personal jurisdiction purposes. The contacts of Sea Wasp were imputed to the individual defendants, and because Sea Wasp had submitted to the personal jurisdiction of the court, Faia and Decossas were held to be within the personal jurisdiction of the court.

Phelps v. Hunt (In re Hunt), 608 B.R. 477 (Bankr. N.D. Tex. 2019).

The court concluded that Robert Phelps should be granted a nondischargeable claim of \$55,000 against Jeffrey Hunt under § 523(a)(4) and (a)(6) of the Bankruptcy Code.

Tea 2 Go, LLC offered Tea 2 Go franchises. Its owner and manager was Jeffrey Hunt. Robert Phelps purchased several franchises from Tea 2 Go, LLC. He also purchased, from Hunt personally, a 49% interest in EJ T Kickers, LLC.

Hunt eventually filed for bankruptcy. The court stated that Hunt’s liability would be measured by (1) the amounts Phelps paid for acquiring and implementing the franchise rights from Tea 2 Go, LLC, and (2) the amount Phelps paid Hunt for the membership interest in EJ T Kickers, LLC.

With respect to Phelps’ purchase of the franchise rights from Tea 2 Go, LLC, the court discussed how Hunt could be personally liable. The court noted that a manager/member of an LLC is not individually liable for contractual debts and obligations of the LLC, unless there is a finding that the debt or obligation was incurred through actual fraud for the direct personal benefit of the manager/member. Phelps alleged that he was defrauded by Hunt and that such fraud personally benefitted Hunt. The court observed that actual fraud in the veil-piercing context is not equivalent to the tort of fraud. Rather, actual fraud is defined as involving dishonesty of purpose or intent to deceive. The court stated that if it could not conclude that Hunt’s conduct amounted to actual fraud under Texas law, then there can be no debt to discharge, rendering moot any dischargeability issue under § 523(a)(2)(A) of the Bankruptcy Code.

Without the need for veil piercing, Hunt could also be liable if he personally committed a fraudulent or intentionally tortious act. The court noted that agents of corporations are personally liable for their own tortious conduct under the common law. Tea 2 Go, LLC’s company agreement did not appoint an agent, but it did vest the manager (Hunt) with authority to designate an agent at the manager’s sole discretion. Moreover, § 101.254(a) of the TBOC provides that “each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company’s business.” The court concluded, therefore, that Hunt was an agent of Tea 2 Go, LLC and was carrying out the company’s business when transacting with Phelps regarding the franchise sales. If Hunt obtained funds from Phelps by “false pretenses, a false representation, or actual fraud” with the requisite intent, Hunt may be held personally liable for such conduct as an agent of Tea 2 Go, LLC.

Di Piazza v. Weather Group Television, LLC, Civil Action No. 5:19-CV-060-C, 2019 WL 8107917 (N.D. Tex. Sep. 9, 2019).

The court dismissed numerous entities because the plaintiff’s complaint failed to sufficiently allege facts that would support exercise of specific jurisdiction over the entities as the alter ego of an LLC defendant.

Various out-of-state entity defendants who were alleged parent companies of and investors in the Georgia LLC that operates the Weather Channel sought dismissal for lack of personal jurisdiction in a wrongful death lawsuit arising out of a fatal car accident involving storm chasers and TV personalities employed by the Weather Channel. The plaintiff argued that her complaint sufficiently alleged that the out-of-state defendants were engaged in a joint enterprise or joint venture or were each other’s agent, principal, employee, or alter ego so as to support the exercise of specific personal jurisdiction. The court relied on the following rules:

“In Texas, a subsidiary corporation’s contacts can be imputed to its parent corporation when the subsidiary ‘is organized and operated as a mere tool or business conduit’ of the parent.’ [citations omitted] To succeed under an alter ego theory, “the plaintiff seeking to establish personal jurisdiction must show that the ‘parent controls the internal business operations and affairs of the subsidiary.’” [citations omitted] Specifically, “[t]he evidence must show that ‘the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.’” [citation and footnote omitted] Accordingly, there must be a “plus factor, something beyond the subsidiary’s mere presence within the bosom of the corporate family.” [citation omitted]

The court concluded that the plaintiff failed to plead factual allegations to support the exercise of specific jurisdiction over the out-of-state defendants. “Other than alleging that the Out-of-State Defendants allegedly hold a financial interest in the Weather Channel and provide certain managerial services to said Defendant, Plaintiff has failed to allege the existence of a plus factor, or something beyond the subsidiaries mere presence within the corporate infrastructure.” Thus, the court granted the out-of-state defendants’ motion to dismiss.

Trinkets and Tea, LLC v. Hunt (In re Hunt), 605 B.R. 758 (Bankr. N.D. Tex. 2019) (“[M]anagers/members of LLCs are not individually liable for the contractual debts and obligations of the LLC, unless there is a finding that the contractual debt or obligation was incurred by actual fraud for the direct personal benefit of the manager/member. If there is a finding of actual fraud, then the veil may be pierced to hold the manager/member personally liable on the contractual debt or obligation. ... [T]he veil-piercing exercise is not necessary if the manager/member is otherwise personally liable under an ‘other applicable statute.’ ... The evolution of defining actual fraud in the context of piercing the corporate veil is well documented by the Fifth Circuit in *Spring Street Partners–IV, L.P. v. Lam*, 730 F.3d 427 (5th Cir. 2013). Notably, actual fraud in this veil-piercing context is not equivalent to the tort of fraud. Rather, ‘actual fraud is defined as involving dishonesty of purpose or intent to deceive.’” (citations omitted)).

Garza v. CMM Enterprises, LLC (In re Garza), 605 B.R. 817 (Bankr. S.D. Tex. 2019).

The bankruptcy court concluded that an LLC willfully violated the automatic stay, but the LLC’s manager was not personally liable.

CMM Enterprises, LLC, through its manager Jesus Sanchez, exercised self-help in repossessing Guadalupe Garza’s vehicle after Garza had filed for bankruptcy. Garza instituted an adversary complaint against CMM for violation of the automatic stay, and she argued that Sanchez should be held personally liable for the actions of CMM. Sanchez filed a motion for judgment on partial findings, arguing that Garza failed to bring forth any evidence showing that Sanchez acted outside of his capacity as a representative of CMM. The court noted that to defeat Sanchez’s motion, Garza would have to carry her burden of “establishing a prima facie case that Sanchez is not afforded the legal protections of the corporate structure.”

The court observed that “[t]he bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation’s obligations.” That limited liability protection is also afforded to LLCs. The court noted, however, that such limited liability could be disregarded under an alter ego theory of piercing the corporate veil—a theory which applies equally to LLCs. Alter ego applies “when there is such an identity between a corporation and an individual that all separateness between the parties has ceased and a failure to disregard the corporate form would be unfair or unjust.” An alter ego

allegation is shown from the total dealings of the corporation and the individual, including “the degree to which corporate formalities have been followed, the degree of which corporate and individual property has been kept separate, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.”

The court concluded that Garza was unable to establish that Sanchez was the alter ego of CMM:

Garza did not plead, nor did she submit any evidence or testimony that Sanchez kept his and CMM’s property together, that Sanchez was acting individually instead of through CMM, that Sanchez was using CMM for personal purposes, or that Sanchez and CMM are considered a single entity. While Sanchez did testify that it was CMM’s policy to flag a client’s account and hold off on all contact when they receive notice of a bankruptcy—and this policy was neither written down nor memorialized—this alone does not constitute enough to disregard the corporate fiction. During trial, the evidence and witness testimony demonstrated that CMM sold the Malibu to Garza, that CMM repossessed the Malibu, and that Sanchez—acting as representative of CMM—sought legal counsel on behalf of CMM before returning the Malibu to Garza. Because Garza did not plead, nor was there any evidence or testimony demonstrating that Sanchez and CMM disregarded the corporate form, this Court will not make such a finding here.

Garza also argued that members of an LLC are not protected from liability for their own tortious actions. In such a case, no finding of alter ego is necessary. The court agreed with the legal proposition, but found no evidence that Sanchez should be liable:

While Garza correctly cited the law, the problem arises in the fact that not only did Garza fail to state a claim involving allegedly tortious or fraudulent actions, but Garza failed to present any evidence that Sanchez committed any tortious or fraudulent act. Indeed, Garza only presented two statutory claims before this Court: violation of the automatic stay under section 362, and violation of the [Texas Debt Collection Act]. Because Garza failed to plead tortious or fraudulent conduct, and failed to present evidence of tortious or fraudulent conduct, Garza may not argue that personal liability attaches to Sanchez without piercing the corporate veil.

While Garza is correct in that section 362(a) applies to all entities, including limited liability companies, Garza failed to carry her burden in establishing a prima facie case that Sanchez’s conduct constituted a disregard for the corporate fiction. Accordingly, this Court grants Sanchez’s motion for judgment on partial findings under Rule 52(c).

The bankruptcy court did find, however, that CMM willfully violated the automatic stay. As a result of that violation, Garza was awarded actual and punitive damages.

R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218 (Tex. App.—El Paso 2019, no pet.) (“This subsection [§ 21.223(b) of the Business Organizations Code] has been interpreted to apply to LLC’s ... and [courts have] held that in order to pierce the corporate veil of an LLC, the plaintiff must prove that the defendant used the LLC to perpetrate an actual fraud for the defendant’s direct personal benefit. The principles applicable to piercing the corporate veil apply equally to limited liability companies.” (citations omitted)).

M. Creditor’s Remedies: Foreclosure of Security Interest

Cheniere Energy, Inc. v. Parallax Enterprises LLC, 585 S.W.3d 70 (Tex. App.—Houston [14th Dist.] 2019, pet. dism’d).

In a dispute over whether a secured note was intended to be a capital contribution rather than a loan, the court affirmed the trial court’s temporary injunction which enjoined a noteholder (Cheniere) from non-judicially foreclosing its security interest in the membership interest of the wholly owned LLC (Live Oak) of the maker of the note (Parallax).

Cheniere argued that it had an express contractual right under the note to foreclose on Parallax's equity interest in Live Oak. The court of appeals observed that a security agreement providing a description of collateral is needed for the security interest to attach. A description must "reasonably identify" the collateral, but "[a] description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral."

The note described the collateral securing the loan as "All of Loan Party's right, title and interest in and to the following, whether now owned or hereafter acquired by such Loan Party and whether now existing or in the future coming into existence: 1. All deposit, securities and other accounts and investment property; 2. All instruments, documents and chattel paper; 3. All inventory, equipment, fixtures and goods; 4. All contracts and permits; 5. All letter-of-credit rights; 6. All intellectual property; 7. All real property; and 8. All other tangible and intangible property and assets of such Loan Party." According to the court, "[Parallax's] equity interests are not encompassed by items 1–7, and item 8 is a 'super generic' catch-all that, as a matter of law, 'does not reasonably identify the collateral.'" The court agreed that Parallax's equity in Live Oak was a "general intangible" as defined in the UCC, but it pointed out that the note's description referred to "intangible property" and not "general intangible." The court noted that "intangible property" is broader than "general intangible," and it concluded that the description used by Cheniere was a super-generic description that did not reasonably identify the collateral. Thus, according to the court, Parallax showed that (a) the note did not give Cheniere a contractual right to non-judicially foreclose on Parallax's equity in Live Oak, and (b) Parallax had a probable right to the requested declaration that Cheniere did not have a security interest in Parallax's equity interest in Live Oak.

The court then turned to Cheniere's argument that Parallax failed to prove that it faced imminent, irreparable harm for which it lacked an adequate remedy in law. In the trial court, Parallax argued that even if Cheniere were to foreclose on Parallax's equity interest in Live Oak, Cheniere would not be able to exercise management and control over the company. See DEL. CODE ANN. tit. 6, § 18-702(b)(1) ("An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member..."); *id.* § 18-704(a)(3) (a person to whom the company's sole member voluntarily assigns all of its interests in the company can become a member, but not if the assignment is accomplished "by foreclosure or other similar legal process"). Based on this argument, Cheniere contended that allowing foreclosure would not cause imminent and irreparable harm. The court of appeals rejected Cheniere's position:

But the Parallax Parties face harm from the threatened foreclosure even if the Cheniere Parties would not benefit from it. Under Delaware law, foreclosure might not make the Cheniere Parties members in the company or entitle them to exercise the powers of a member—but it would make Parallax cease to be a member. See *id.* § 18-702(b)(3) ("Unless otherwise provided in a limited liability company agreement ... [a] member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's limited liability company interest."). Further, a Delaware limited liability company is automatically dissolved when there are no members, see *id.* § 18-801(a)(4), and Live Oak certainly would be harmed by its own dissolution.

We acknowledge that Delaware law provides at least two ways to "revoke the dissolution." First, the limited liability company is not dissolved if, within ninety days after the company ceases to have any members, "the personal representative of the last remaining member agrees to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member." DEL. CODE ANN. tit. 6, § 18-801(a)(4)(a). Moreover, a limited liability company agreement can require the personal representative to agree to continue the company and to be admitted as a member. But Live Oak's limited liability company agreement does not require Parallax's personal representative to agree to either of these conditions. Second, a limited liability company agreement may specifically provide for the admission of a member after there is no longer a remaining member. *Id.* § 18-801(a)(4)(b). But here, too, Live Oak's limited liability company agreement does not contain such a provision.

Even if Live Oak were to continue in existence by the appointment of a new member after foreclosure, Parallax would be irreparably harmed by the loss of its right to manage and control the company. For example, Live Oak's limited liability company agreement provides that the

company's management is "exclusively vested in the Sole Member," and that only the Sole Member may amend the company agreement. But if the Cheniere Parties foreclose on Parallax's equity interest in Live Oak, Parallax will no longer be a member, and would lose these rights. The loss of management rights over a company are unique, irreplaceable, and "cannot be measured by any certain pecuniary standard."

For all of these reasons, we conclude on reconsideration en banc that the trial court did not abuse its discretion in concluding that the Parallax Parties made a sufficient showing that, absent injunctive relief, they face probable imminent, irreparable harm for which there is no adequate remedy at law.

A dissenting opinion argued that Parallax did not meet its burden of proving a probable right to relief and imminent, irreparable harm. With respect to the probable right to relief, the dissent argued that the description of collateral, although broad, was sufficiently specific—particularly because the term "general intangibles" was used in another part of the note and because Parallax did not own any property other than its equity interest in Live Oak and other subsidiaries. As the dissent observed: "In deciding the adequacy of the collateral description, the court should focus on the essentials: the maker of the Note pledged its only asset—intangibles—as security for the debt, identifying the collateral with both the UCC term 'general intangibles' and the plain-English equivalent 'intangible property.' From a functional perspective, these words reflect the parties' intent that the maker's equity interest in Live Oak secure the Note. Read fairly, interpreted reasonably, and construed liberally, these words identify the collateral sufficiently to serve that purpose. That is all the law requires."

With respect to imminent and irreparable harm, the dissent concluded that even if Cheniere were to wrongfully foreclose on Parallax's equity interest in Live Oak, any resulting harm or injury could be quantified and remedied through monetary damages. As part of its analysis, the dissent noted that Live Oak had no ongoing business and that Live Oak's only assets were its claims in this case. The dissent further observed that the only evidence of management rights in Live Oak that would be lost concerned management of claims in litigation, and it stated that the value of litigation claims could be measured by a certain pecuniary standard regardless of who manages the claims. Thus, according to the dissent, "loss of management does not establish an irreparable injury." In refuting the majority's specific argument about irreparable harm, the dissent observed:

The en banc majority states that, even if the Cheniere Parties would not obtain control or management of Live Oak by foreclosing on the Live Oak equity interest, the Parallax Parties face irreparable harm from the foreclosure because, under title 6, section 18-702(b)(3) of the Delaware Code, foreclosure would cause Parallax to cease to be a member of Live Oak and thus to lose the ability to manage and control Live Oak. The en banc majority also concludes that if Parallax ceases to be the sole member of Live Oak, there would be no members of Live Oak after foreclosure, thus triggering irreparable harm by the automatic dissolution of Live Oak under title 6, section 18-801(a)(4) of the Delaware Code.

First, the Parallax Parties did not assert either of these points in the trial court, so this court should not base its decision on this ground. Second, the en banc majority does not mention the second sentence of section 18-702(b)(3). The entire subsection provides that, unless otherwise provided in the limited liability company agreement:

(3) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's limited liability company interest. Unless otherwise provided in a limited liability company agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the limited liability company interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

In its construction of the Delaware statutes, the en banc majority equates the assignment of a limited liability company interest with the foreclosure of a security interest in a limited liability company interest. But, the plain text of section 18-702(b)(3) shows that the Delaware General Assembly does not treat these terms as equivalent. The General Assembly determined that unless otherwise provided in the limited liability company agreement, a member's rights as a

member cease when the member assigns the member's limited liability company interest to another party but that a member's rights as a member do not cease when the member grants a security interest in the member's limited liability company interest. The General Assembly did not provide that a member's rights as a member cease upon foreclosure of a security interest in the member's limited liability company interest. Thus, the Parallax Parties did not show that Parallax would cease to be a member in Live Oak upon foreclosure of the security interest in the Live Oak equity. Likewise, the Parallax Parties did not prove that upon foreclosure there would be no members in Live Oak, which might trigger the automatic dissolution of Live Oak under section 801(a)(4). The evidence before the trial court did not show that Parallax would cease to be a member upon foreclosure of the security interest in the Live Oak equity. So, the Parallax Parties did not show irreparable harm on the ground that Parallax would cease to be a member or on the ground that Live Oak would dissolve automatically.

N. Attorney's Fees

Zodiac Seats US, LLC v. Synergy Aerospace Corp., No. 4:17-cv-00410, 2020 WL 1703572 (E.D. Tex. Apr. 8, 2020).

Zodiac, a limited liability company, filed suit against Synergy, a foreign corporation, for breach of contract, quantum meruit/unjust enrichment, and attorney's fees. Synergy filed counterclaims for breach of contract, breach of express warranty, breach of the implied warranty of merchantability, and attorney's fees. A magistrate judge determined that the United Nations Convention on Contracts for the International Sale of Goods did not bar the prevailing party from recovering attorney's fees under Tex. Civ. Prac. & Rem. Code Chapter 38. A district court later held that Synergy breached the CISG-governed contract, but under Chapter 38 attorney's fees were only recoverable against an individual or corporation. However, since neither party briefed the subject, the court did not rule on any entitlement to or an amount of attorney's fees owed.

C&F International, Inc. v. Interoil Services, LLC, No. 14-18-00698-CV, 2020 WL 1617261 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet. h.) (mem. op.).

Interoil Services, LLC ("Interoil") sued C&F International, Inc. ("C&F") for breach of contract and quantum meruit. C&F counterclaimed for breach of contract and indemnity. A jury found that a contract existed and awarded damages to both parties. The final judgment awarded Interoil damages, offset by the award to C&F, attorney's fees, pre-and post-judgment interest, and costs. On appeal, C&F argued that the trial court erroneously denied it attorney's fees, but the court held that C&F was precluded from recovering its attorney's fees because Interoil was an LLC and Tex. Civ. Prac. & Rem. Code § 38.001 does not permit recovery of attorney's fees from an LLC.

Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP, 599 S.W.3d 618 (Tex. App.—Dallas 2020, no pet. h.).

On appeal of a take-nothing judgment in favor of the Residences at Riverdale L.P. and the Residences of Riverdale, GP, LLC, the appellant challenged the trial court's decision to vacate a judgment awarding it damages and attorney's fees. Although the appellate court reversed the take-nothing judgment against appellant on the breach-of-contract claim, it held that Chapter 38 of the Texas Civil Practice and Remedies Code denied appellant recovery of attorney's fees from either of the Riverdale entities because Section 38.001 does not permit the award of attorney's fees against limited liability partnerships, limited liability companies, or limited partnerships. The court also foreclosed appellant's argument that the Riverdale entities were required to deny their corporate status under Tex. R. Civ. P. 93 or claim an "exemption" from Chapter 38 as an affirmative defense under Tex. R. Civ. P. 94. The court not only rejected language to the contrary found in *County of El Paso v. Boy's Concessions, Inc.*, 772 S.W.2d 291, 293 (Tex. App.—El Paso 1989, no pet.), but noted that the Riverdale entities appropriately raised the Chapter 38 issue in a motion for directed verdict, motion to modify the judgment, and judgment notwithstanding the verdict.

Breakwater Advanced Manufacturing, LLC v. East Texas Machine Works, Inc., No. 12-19-00013-CV, 2020 WL 827139 (Tex. App.—Tyler Feb. 19, 2020, no pet. h.) (mem. op.).

East Texas Machine Works, Inc. (“East Texas Machine”) entered into a service contract with Breakwater Advanced Manufacturing, LLC (“Breakwater”). After summary judgment was entered in favor of East Texas Machine for its suit on an account and breach of contract claims, Breakwater and three of its members filed an appeal challenging *inter alia* an award of attorney’s fees to East Texas Machine on its sworn account claim. The issue before the court was whether payments by Breakwater to East Texas Machine between the filing of the suit and prior to judgment could negate the award of attorney’s fees under Tex. Civ. Prac. & Rem. Code § 38.001. The court determined that Breakwater’s payment of the principal did not extinguish East Texas Machine’s claim for interest. Because interest was awarded to East Texas Machine, the court held that East Texas Machine was a prevailing party under Section 38.001 and thus was entitled to recover attorney’s fees from Breakwater. [The court made no mention of the fact that Section 38.001 only authorizes recovery of attorney’s fees from an individual or a corporation.]

Great Southwest Regional Center, LLC v. ACSWD, LP, No. 14-18-00679-CV, 2020 WL 205993 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet. h.) (mem. op.).

The original sole limited partner of ACSWD, LP (“ACSWD”) asserted claims against ACSWD and its general partner, Great Southwest Regional Center, LLC (“Great Southwest”), as well as Great Southwest’s parent company, Frost Rains Holdings, LLC (“Frost Rains”). After the limited partner nonsuited her claims, the court realigned the parties, and the case proceeded to trial on claims by ACSWD against Great Southwest and Frost Rains. Following a bench trial, the trial court signed a final judgment in favor of ACSWD that included a declaratory judgment stating: (1) Great Southwest was removed as ACSWD’s general partner and became a limited partner without the right to vote owning a .99% interest; (2) another entity became the general partner of ACSWD with a 1% interest; and (3) the original limited partner’s limited partnership interest was reduced from 99% to 98.01%.

Great Southwest asserted six challenges on appeal, including a challenge to the award of attorney’s fees to ACSWD. The appellate court held that ACSWD’s declaratory judgment and breach of contract claims entitled the limited partnership to attorney’s fees under Tex. Civ. Prac. & Rem. Code §§ 37.009 and 38.001(8). The court noted that, contrary to Great Southwest’s assertion, ACSWD sufficiently segregated those fees it was entitled to, excluding those for which it was not, and that ACSWD’s evidence was uncontroverted.

[The court did not mention its previous holdings in *Vast Constr., LLC v. CTC Contractors, LLC*, 526 S.W.3d 709, 728 (Tex. App.—Houston [14th Dist.] 2017, no pet.), *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452-55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), and *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 594 S.W.3d 722 (Tex. App.—Houston [14th Dist.] 2019, pet. filed) precluding the recovery of attorney’s fees under Section 38.001 from a limited liability company.]

James Construction Group, LLC v. Westlake Chemical Corporation, 594 S.W.3d 722 (Tex. App.—Houston [14th Dist.] 2019, pet. filed).

Westlake Chemical Corporation (“Westlake”) and James Construction Group, LLC (“James”), entered a construction contract. Westlake filed suit against both James and James’s parent company, Primoris Services Corporation (“Primoris”), in its role as guarantor of the contract, for breach of contract. The trial court entered judgment awarding damages against James and Primoris, jointly and severally, on Westlake’s breach of contract claim and awarded damages against Westlake on James’s breach of contract counterclaim. Westlake was also awarded attorney’s fees against Primoris.

On appeal, Primoris challenged the award of attorney’s fees, arguing that there was no evidence to support the award, that Westlake failed to sufficiently segregate its attorney’s fees, and that the award was excessive. By cross-issue, Westlake challenged the court’s decision to hold only Primoris liable for attorney’s fees, arguing that it should be entitled to recover attorney’s fees from James as well.

The court of appeals affirmed the judgment of attorney’s fees against Primoris, under Tex. Civ. Prac. & Rem. Code § 38.001, for the corporation’s breach of guaranty, and held that the fees awarded were properly segregated.

With regard to Westlake's argument that attorney's fees should have been awarded against James, the appellate court declined to overrule its Chapter 38 precedent holding that attorney's fees cannot be recovered from a limited liability company under Section 38.001.

ATD Combustors, LLC v. Ameritube, LLC, No. 6-18-CV-00077-ADA, 2019 WL 7759098 (W.D. Tex. Sept. 30, 2019).

After prevailing on its contract claim, ATD Combustors, LLC ("ATD") filed a motion for attorney's fees against Ameritube, LLC. ATD argued it was entitled to attorney's fees under both Chapter 38 of the Tex. Civ. Prac. & Rem. Code and, alternatively, as sanctions for Ameritube's discovery abuse. The court acknowledged that a Texas federal court sitting in diversity jurisdiction must look to Texas law for the award of attorney's fees. Looking to the plain language of Section 38.001, the court determined that attorney's fees could only be recovered from an individual or a corporation. Despite ATD's argument that the purposes of Section 38.001 would be frustrated by excluding limited liability companies from the statute because Section 38.005 says the statute shall be applied liberally, the federal court held that the unambiguous language of the statute precluded recovery from the defendant in this case.

Branch Banking & Trust Co. v. Mansfield Barbecue, LLC, Civ. A. No. 3:19-cv-158-L, 2019 WL 5684430 (N.D. Tex. Oct. 31, 2019) ("The court notes, however, that Section 38.001 does not allow BB&T to recover attorney's fees and costs against Defendant Mansfield Barbecue, LLC, as it is not a corporation.").

Pelc v. Howard, Civ. A. No. 3:18-CV-00205, 2019 WL 5196373 (S.D. Tex. Sept. 24, 2019), report and recommendation adopted, 2019 WL 5191201 (S.D. Tex. Oct. 15, 2019) ("The problem here is that the party against whom attorney's fees are sought ... is neither an individual [nor] a corporation. It is a limited liability company, and Texas law prohibits the award of attorneys' fees against a limited liability company under Chapter 38.").

CExchange, LLC v. Top Wireless Wholesaler, No. 05-17-01318-CV, 2019 WL 3986299 (Tex. App.—Dallas Aug. 23, 2019, no pet.) (mem. op.) ("While Top sought fees with respect to its breach of contract claim, the applicable statute, Civil Practice and Remedies Code section 38.001(8), does not apply here because CExchange is a limited liability company.").

Bullet Trap, L.L.C. v. Waterproof Positive, LLC, No. 05-18-00529-CV, 2019 WL 3543579 (Tex. App.—Dallas Aug. 5, 2019, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's award of attorney's fees under § 38.001 of the Civil Practice and Remedies Code against a corporation that allegedly converted to an LLC during the pendency of litigation.

After a lawsuit, Waterproof Positive, LLC d/b/a Energy Roofing Solutions ("ERS") was awarded a breach of contract judgment against Bullet Trap, L.L.C. The court also awarded ERS attorney's fees under § 38.001.

During the jury trial from August 28-30, 2017, the trial court admitted evidence that Bullet Trap was a corporation, including Bullet Trap's articles of incorporation and its franchise tax statement. The day after the trial concluded, ERS filed its first motion for an award of attorney's fees, and Bullet Trap did not respond. At the hearing on the motion, held on October 4, 2017, Bullet Trap told the court and ERS that on August 30, 2017, the day the jury found that Bullet Trap breached its contract, it converted from a corporation to an LLC. Because it was no longer a corporation, Bullet Trap argued that ERS could not recover its attorney's fees under § 38.001. Bullet Trap offered into evidence an exhibit that its attorney described as "a printoff from the Secretary of State website showing that Bullet Trap, in fact, during the pendency of litigation was converted over to a[n] LLC." After an objection from ERS' attorney, the trial court voiced concern about admitting evidence that contradicted the undisputed evidence at the jury trial that Bullet Trap was a corporation and the jury's finding that "Bullet Trap, Inc." breached the contract. The court sustained the objection to Bullet Trap's exhibit.

In response to a later amended motion for an award of attorney's fees, Bullet Trap again attached documents regarding its conversion from a corporation to an LLC. At the hearing on the amended motion, the court declined to allow further argument about Bullet Trap's conversion. Bullet Trap did not re-offer the exhibit that the court excluded at the first hearing, nor did it offer into evidence the documents attached to its response to the amended motion. The trial court signed the final judgment the same day awarding ERS its requested attorney's fees.

The trial court also made findings of fact and conclusions of law about the award of attorney's fees, including that "Bullet Trap, Inc. is a Texas Corporation."

After the trial court signed the final judgment, Bullet Trap filed a joint motion for new trial, motion to modify the judgment, and motion for judgment notwithstanding the verdict. Bullet Trap again asserted that it was an LLC and could not be ordered to pay ERS's attorney's fees. At the hearing on the motion for new trial, Bullet Trap did not offer any evidence. The trial court did not expressly rule, and the motion for new trial and motion to modify the judgment were overruled by operation of law.

On appeal, Bullet Trap asserted in its brief that "the record confirms unequivocally that Bullet Trap was a limited liability company" when the trial court signed the final judgment ordering Bullet Trap to pay ERS's attorney's fees. Bullet Trap asserted that the trial court erred at the first hearing by sustaining ERS' objection to Bullet Trap's evidence that it was an LLC. After noting that "[w]e must uphold the trial court's evidentiary ruling if there is any legitimate basis for it," the court of appeals rejected Bullet Trap's claim:

On appeal, ERS argues the trial court abused its discretion by allowing ERS to present evidence of its fees but not allowing Bullet Trap to present evidence of its conversion from a corporation to an LLC. Bullet Trap asserts that if it was prohibited from presenting evidence of the conversion because it did not present that evidence during the jury trial, then ERS should have been prohibited from presenting evidence of the amount of its attorney's fees because it did not present that evidence in the jury trial. We disagree. Before trial, the parties told the court they stipulated to having the trial court determine attorney's fees. The hearing on the first motion to award attorney's fees was pursuant to that stipulation. The parties had made no agreement to allow Bullet Trap to present evidence of a change of form. Bullet Trap cites no authority that would require the trial court to admit this evidence. We conclude Bullet Trap has not shown the trial court abused its discretion by sustaining ERS's objection to Bullet Trap's evidence of its LLC conversion.

Bullet Trap argues that any error from the exclusion of its evidence at the hearing on the first motion to award attorney's fees "was compounded at the second hearing, where, despite ERS making no objection to Bullet Trap's proffered evidence, the trial court outright refused to consider the issue on the basis that she had 'already ruled on that.'" Contrary to Bullet Trap's assertion, it never proffered any evidence at the hearing on the amended motion for award of attorney's fees. Instead, Bullet Trap's counsel stated he "renew[ed] our objection on the fact that the defendant is no longer a corporation, it is an LLC." Bullet Trap did not proffer any evidence at that hearing. Bullet Trap argues that the documents attached to its response to the amended motion for award of attorney's fees constituted evidence before the court. At the hearing ... on the amended motion, Bullet Trap did not offer the documents attached to its motion into evidence, nor did it even mention them. Bullet Trap referred to its response as "supplemental briefing" and did not tell the court that its response contained evidence it wanted the court to consider. We conclude Bullet Trap has not shown it proffered or that the trial court admitted any evidence at the hearing on ERS's amended motion that Bullet Trap was an LLC and not a corporation.

Bullet Trap also argues ERS offered no evidence that Bullet Trap was a corporation. At the hearing on ERS's first motion for award of attorney's fees, when Bullet Trap asserted it was an LLC, ERS's counsel reminded the trial court of the evidence introduced at trial showing Bullet Trap was a corporation. That evidence was Bullet Trap's articles of incorporation, its franchise tax report, and Putnam's [the owner of Bullet Trap] testimony that Bullet Trap was a corporation. Bullet Trap did not object to the trial court's consideration of that evidence.

We conclude Bullet Trap has not shown the trial court erred by ordering Bullet Trap to pay ERS's attorney's fees under section 38.001.

Bullet Trap also argued that the trial court erred by awarding ERS attorney's fees related to Bullet Trap's counterclaims for breach of contract, fraud, and violations of the DTPA. The court of appeals observed that "a plaintiff who is entitled to fees on a claim may recover fees for legal services opposing defenses that the plaintiff had to overcome to prevail on its claim," and it similarly noted that "when a defendant asserts a counterclaim that the plaintiff must overcome in order to fully recover on its contract claim, the attorneys' fees necessary to defeat

that counterclaim are likewise recoverable.” According to the court, in order for ERS to fully recover on its breach-of-contract claim, it had to overcome Bullet Trap’s counterclaim allegations that ERS breached the contract first and that its breach excused Bullet Trap’s performance. ERS was therefore entitled to recover its attorney’s fees related to that counterclaim. Even if ERS was not entitled to recover its attorney’s fees for the fraud and DTPA counterclaims, the court determined that the attorney’s fees related to those counterclaims also applied to the breach-of-contract counterclaim for which ERS was allowed to recover its attorney’s fees.

Panaron Sdn. Bhd. v. Senior Flexonics Pathway, No. SA-18-CV-71-XR, 2018 WL 10419237 (W.D. Tex. July 19, 2018). (Although the court issued this opinion in 2018, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The plaintiff filed suit against an LLC for breach of contract, violation of the DTPA, and fraud. Before the district court was the LLC’s Rule 12(b)(6) motion to dismiss the DTPA and fraud claims and argument to deny the plaintiff attorney’s fees on the breach of contract claim. The court held that Texas law precludes the recovery of attorney’s fees from an LLC under Chapter 38 of the Texas Civil Practice & Remedies Code. Despite the plaintiff’s assertion that the legislature “took up the statute” in 2015 to amend it, the court noted that the statute had not been revised.

O. Standing or Capacity to Sue

Infracon USA, LLC v. Funding Circle Partners, LP, No. 02-19-00423-CV, 2020 WL 719431 (Tex. App.—Fort Worth Feb. 13, 2020, no pet. h.) (mem. op.).

The court dismissed the appeal of an LLC member who had no standing to appeal because he had been nonsuited from the case and was not a party to the default judgment. The court explained that standing is jurisdictional and a party must generally be a party to the judgment to have standing to appeal. The court further explained: “Although the record reflects that Montes is a member of Infracon, a limited liability company is considered a separate legal entity from its members. *See Spates v. Office of Att’y Gen., Child Support Div.*, 485 S.W.3d 546, 550–51 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Accordingly, we dismiss Montes’s appeal for want of jurisdiction. *See Tex. R. App. P. 42.3(a), 43.2(f)*; *see also J.G.*, 2018 WL 4925332, at *1 (dismissing appeal for want of jurisdiction because appellant was not a party to the trial court proceeding); *In re J.D.G.*, No. 2-02-194-CV, 2003 WL 21028373, at *2 (Tex. App.—Fort Worth May 8, 2003, no pet.) (mem. op.) (per curiam) (same); *Spates*, 485 S.W.3d at 550–51 (dismissing member’s appeal from charging order entered against limited liability company for want of jurisdiction because he lacked standing to appeal).”

Neutra, Ltd. v. Terry (In re Acis Capital Management, L.P.), 604 B.R. 484 (Bankr. N.D. Tex. 2019) (“Equally important to deciding whether Neutra has standing is the ‘shareholder standing rule,’ which is ‘a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation’ absent special circumstances. The doctrine derives from the third-party standing rule: ‘the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’ This court has recognized that ‘[u]nder federal common law [and] Texas law ... only a corporation and not its shareholders, not even sole shareholders, can complain of an injury sustained by, or a wrong done to, the corporation.’ Although the rule is phrased in terms of corporations and shareholders, it applies with equal force to limited partnerships like Acis LP. It also applies to limited liability companies like Acis GP.” (citations omitted)).

Stephens v. Three Finger Black Shale Partnership, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed).

The court of appeals affirmed a summary judgment that a member could not recover individually for injuries suffered by an LLC.

Richard Raughton, Lowry Hunt, Chester Carroll, and Kerwin Stephens each pledged to acquire oil and gas leases and options for such leases in Fisher County (the “Project”). They had no written agreement; instead, they operated on a “handshake.” When they needed additional money to continue the Project, they recruited Tom Taylor, an oil and gas investor. The parties eventually entered into a letter agreement known as the “Alpine Letter

Agreement.” Those named in the Alpine Letter Agreement as members of the “Alpine Group” were (1) Alpine Petroleum (by Carroll); (2) Thunderbird Oil & Gas, LLC (by its sole member, Stephens); (3) Arapaho Energy, LLC (by its manager, Raughton); and (4) L.W. Hunt Resources, LLC (by its manager, Hunt). Paradigm Petroleum Corporation, acting through its president, Taylor, was also a party to the Alpine Letter Agreement, but was not a member of the Alpine Group.

The Alpine Letter Agreement contained a provision that Paradigm was to contribute \$4,500,000 to the project and that the Alpine Group was to contribute, collectively, \$500,000. The Alpine Group agreed to transfer to Paradigm all of the oil and gas leases and options “that it holds,” and future leases and options were to be taken in Paradigm’s name. Decisions as to future leases and options, the scope of the Project, and the terms of any future leases and options were at Paradigm’s sole discretion and direction. The agreement also contained provisions for the division of the proceeds from sales. After payout, proceeds from sales of oil and gas leases were to be paid 82% to Paradigm and 18% to the Alpine Group. Although Thunderbird Land was not a named party to the Alpine Letter Agreement, the named parties specified that Thunderbird Land, Stephens’s wholly owned landman entity, was to provide landman services for the project and that it would “charge its normal customary rates” for those services.

Taylor found investors who agreed to provide a portion of Paradigm’s \$4,500,000 contribution. The investors signed a “Participation Agreement” that referred to the investors in some places as “Parties” and in other places as “Partners.” Paradigm was not a partner, but Trek Resources, Inc. and Tiburon Land and Cattle were two of the eight named partners in the agreement. Ultimately, Trek and Tiburon pleaded that the Participation Agreement resulted in the creation of a partnership known as Three Finger Black Shale Partnership. By the terms of the agreement, Paradigm was to contribute \$1,000,000; each of the additional parties agreed to contribute \$500,000 each. The agreement contained other terms by which the signatories defined their relationship. Paradigm was to receive a 20% interest before payout and a 36% interest after payout; each of the other parties was entitled to a 10% interest before payout and an 8% interest after payout. Each of the parties was also entitled to its percentage interest in any overriding royalties that were reserved in sales of the leases. The Participation Agreement was later amended to (a) substitute Lazy T Royalty Management, Ltd. for Paradigm, (b) reduce Paradigm’s status to “agent for the Parties,” and (c) add the Alpine Group as a party.

In January 2012, Devon Energy Production Company, L.P. agreed to buy 25,000 net mineral acres of oil and gas leases for \$900 per acre. The Devon agreement included an “option” provision whereby Devon agreed that it would not take oil and gas leases from Fisher County mineral owners directly. In return, Devon was given the right to purchase additional Fisher County acreage that Paradigm and its associates might acquire in the future.

Although the Participation Agreement proposed that 25,000 net mineral acres were involved in the Project, Devon’s initial purchase comprised leases on 30,000 net mineral acres. As a part of the Devon transaction, Devon was to make a down payment of \$2,500,000 and was to pay the balance of the \$22,500,000 purchase price upon delivery of an assignment of the leases from Paradigm and Carroll to Devon.

The evidence showed that Taylor, Stephens, and Carroll, knowing that Devon was interested in acquiring leases of more mineral acreage, continued to buy Fisher County oil and gas leases, but they did so on their own to the exclusion of the “Partners” in the amended Participation Agreement and, to some extent, Raughton and Hunt Resources. The record contains evidence that Taylor, Stephens, and Carroll used money from the initial sale to Devon—money that belonged to Plaintiffs—to fund the acquisition of the additional acreage. At some point in time, it came to light that Taylor, Stephens, and Carroll had sold leases on more than the initial 30,000 acres but that the proceeds of those sales were not shared with those involved in the Participation Agreement. When it did not receive satisfactory responses to its inquiries about the additional acreage, Tiburon filed a lawsuit. Trek and Three Finger were eventually added as plaintiffs, and Raughton and Hunt Resources later intervened in the suit.

Three Finger basically claimed that Taylor, through Paradigm and Lazy T, breached fiduciary duties owed to Three Finger in connection with the calculation and distribution of the proceeds from the sale of leases on the initial 30,000 acres. Three Finger claimed that through creative (albeit dishonest) accounting, Taylor made it appear that he, through his entities, had funded his required contribution when he had not fully funded it. Three Finger also claimed that Stephens and his Thunderbird-related entities had knowingly participated in those breaches. As the court summarized: “There are other claims, but, at this point, suffice it to say that Three Finger basically takes the position that one or more of the appellants [Stephens, Stephens & Myers, LLP, the Thunderbird-related entities, and Carroll], individually or collectively, had lied, cheated, and stolen from them and overtly, covertly, silently, and via creative accounting procedures had attempted to execute a cover-up of their ill-intentioned activities. The result of those activities, as well as overcharges by Thunderbird Land, was that Three Finger did not receive its

rightful share of the profits from the sale of either the initial deal for 30,000 acres or in connection with the sales of additional acreage.”

At trial, Three Finger was awarded actual damages of \$4,560,433 against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources, jointly and severally, specifically for, as stated by the trial court in its judgment, “injuries sustained because of [A] the contribution failures of entities affiliated with ... Taylor and [B] Thunderbird Land’s role in determining and charging expenses to the Project for the Initial 30,000 Acres.” (Taylor had died before trial and the plaintiffs settled their claims against Taylor’s estate and his entities before trial began.) Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Oil, Thunderbird Land, and Thunderbird Resources under its equitable powers to award “disgorgement and restitution.” The trial court also awarded Three Finger a judgment against Stephens, Thunderbird Land, and Carroll, jointly and severally, in the amount of \$6,584,440 for damages that related to Three Finger’s exclusion from transactions over and above the initial 30,000 acres. Alternatively, the trial court awarded that identical sum of money in favor of Three Finger against Stephens, Thunderbird Land, and Carroll under its equitable powers to award “disgorgement and restitution.”

Raughton, as an intervenor and cross-appellant, complained about the trial court’s summary judgment in which it ruled that he did not have standing to recover damages to Arapaho Energy, LLC, the entity through which he participated in the Project. The court noted that in Raughton’s divorce, the divorce court awarded Raughton “the parties” interests in any royalty or mineral interests, but the parties owned no interest in the Fisher County Project—only Arapaho did. “The interests with which we are concerned in this appeal that were purportedly awarded to Raughton in the divorce were not property of the community; the property belonged to Arapaho Energy, a limited liability corporation. Assets belonging to a third party are not part of the marital estate.” Despite the fact that Arapaho was an LLC, the court stated that “[a] cause of action for injury to a corporation’s business lies with the corporation, not a shareholder,” and it noted that “corporate stockholders cannot recover personally for a wrong done only to the corporation.” Arapaho’s charter, however, had been forfeited, and the court observed that when a “corporate” charter is forfeited, a shareholder may sue derivatively upon a cause of action belonging to the “corporation.” In his pleading, Raughton stated that he was “an individual ... [and] the successor in interest to Arapaho Energy, LLC with respect to the claims being asserted herein.” The court concluded: “Arapaho is not a party to this lawsuit, and Raughton does not bring the suit as a derivative one on Arapaho’s behalf. Under the authorities cited, Raughton did not have standing to assert Arapaho’s claims individually, and the trial court did not err in so holding.”

P. Direct and Derivative Claims

Recruiting Force, LLC v. Mainthia Tech., Inc., No. A-19-CV-1045-RP, 2020 WL 1698826 (W.D. Tex. Apr. 8, 2020).

The court concluded that claims asserted by an LLC member against the other member were derivative, and the LLC thus was not merely a nominal party. Because the citizenship of an LLC is based on the citizenship of all of its members, diversity of citizenship was lacking, and the court remanded the case for lack of subject-matter jurisdiction.

Recruiting Force, LLC (“Recruiting Force”) and Mainthia Tech., Inc. and its principal (collectively “Mainthia”), entered into a “joint venture agreement” forming an LLC to perform engineering services under a contract with Boeing. Under the joint venture agreement, Mainthia was responsible for certain administrative services. Subsequently, the LLC and Mainthia entered into a separate one-year contract for Mainthia to provide consulting services to the LLC. The parties entered into a second one-year consulting contract after the expiration of the first contract. At the expiration of the second contract, Mainthia proposed that the LLC pay an additional fee to Mainthia for its services. Despite no agreement to do so, Mainthia began invoicing the LLC for the additional fees.

After a series of billings by Mainthia for unauthorized administrative fees, all of which the parties’ joint venture agreement expressly excluded, Recruiting Force, individually and derivatively, sued Mainthia asserting that Mainthia breached its fiduciary duty as manager of the LLC and breached the joint venture agreement, and seeking a declaration that the LLC was not obligated to pay the outstanding fees and expenses charged by Mainthia. Recruiting Force alleged that Mainthia usurped control of the joint venture, preventing routine business and jeopardizing its engineering services contract.

At issue before the court was Mainthia's attempt to remove the case to federal district court and Recruiting Force's subsequent remand for lack of subject-matter jurisdiction. For purposes of diversity jurisdiction, a corporation is a citizen of its state of incorporation and the state where it has its principal place of business, whereas an LLC's citizenship is based on its members. Citing a leading treatise on federal procedure, the court stated the following principle: "In a derivative action brought on behalf of a limited liability company by one member against another member, regardless of whether the company is aligned as a plaintiff or a defendant, diversity is destroyed as the company has the citizenship of its members." Thus, the controversy before the federal court turned on whether the suit could be characterized as "derivative."

Recruiting Force argued that the LLC was a plaintiff in the case because Recruiting Force was suing Mainthia both individually and derivatively; therefore, Mainthia's citizenship was represented on both sides of the case. Mainthia argued instead that the claims were actually "direct claims" brought on behalf of Recruiting Force, rendering the LLC a nominal party whose citizenship could be ignored for purposes of subject-matter jurisdiction. The court noted Mainthia's argument that Recruiting Force's prayer for damages included only relief for itself, which Mainthia argued was alone enough to render the LLC a nominal party.

The court held that the appropriate characterization of the suit turned not on Recruiting Force's labeling of the claims, but rather on the nature of the wrongs and the relief requested. The court pointed out that Recruiting Force sued to enforce the LLC's rights under the joint venture agreement and general fiduciary duties owed to the LLC. The court stated that any fiduciary duties owed by Mainthia were owed to the LLC. The claims based on authorized charges for services and conduct jeopardizing the LLC's contract with Boeing alleged injury to the LLC. Therefore, the court concluded that at least some of Recruiting Force's claims were derivative claims that destroyed diversity jurisdiction.

The court distinguished another decision in the Western District in which one member of a three-member LLC filed suit against the other members both individually and derivatively. There the court determined that the LLC was improperly joined as a plaintiff because the plaintiff member's claims were direct rather than derivative. Of importance to the court was the plaintiff's argument that the other members' alleged breach of the company agreement was merely a "thinly veiled attempt to extricate profits from [the company] without paying [plaintiff] his fair 1/3 share of the distribution." The nature of this argument, the court held, although founded on the company agreement, sought relief that "fundamentally" accrued to the plaintiff alone. Accordingly, the court in that case deemed the company a nominal party only, disregarding its citizenship for diversity purposes.

The court also rejected Mainthia's argument that Recruiting Force's reliance on Tex. Bus. Orgs. Code § 101.463(c) transformed Recruiting Force's claims into direct claims. Section 101.463(c) allows a court, if justice requires, to treat a derivative suit brought on behalf of a closely held LLC as a direct action and permits a plaintiff in a derivative action to recover directly. Mainthia pointed to no case where a party's request for a court to apply Section 101.463 transformed an otherwise derivative claim into a direct one, and Recruiting Force pointed out that every court that has considered the issue has rejected the argument.

Accordingly, because Recruiting Force's claims were derivative in nature, the case lacked complete diversity and the court lacked subject-matter jurisdiction. Although Recruiting Force's suit was remanded, the court refused the request for attorneys' fees, costs, and expenses incurred by the removal action because it could not find that Mainthia lacked an "objectively reasonable" basis for the removal action.

In re Murrin Bros. 1885, Ltd., 2019 WL 6971663, __ S.W.3d __ (Tex. 2019).

The Texas Supreme Court held that the trial court did not abuse its discretion in refusing to disqualify counsel from continuing its representation of both the defendant ownership faction and the LLC in a derivative suit brought by another ownership faction. The court also held that the relator did not establish that it lacked adequate remedies to redress the denial of the relator's Rule 12 motion requiring counsel for the LLC to show its authority to represent the LLC.

In 2011, the three original owners of Billy Bob's, a historic entertainment venue in the Fort Worth Stockyards, brought in additional owners and collectively formed Bill Bob's Texas Investments (BBT), a closely held LLC, to own and manage Billy Bob's. BBT's owners adopted a company agreement providing for BBT's structure and containing rules for its management. One provision of the company agreement required unanimous consent of the owners for any "matter within the scope of any major decision." The "major decisions" requiring unanimous consent included "settling, prosecuting, defending or initiating any lawsuit, administrative or similar actions concerning or affecting the business of BBT LLC and/or the BBT LLC Property." After the owners adopted

the company agreement, a certificate of formation was filed with the Secretary of State. The certificate of formation lists six “Governing Persons” of BBT, all of whom are either owners of BBT or closely related to an owner or ownership entity. Concho Minick, an owner and governing person, was unanimously elected president and managing member with “full power and authority to make and carry out all decisions in connection” with “the ordinary, daily and routine business affairs of BBT.”

In 2017, several owners and governing persons (nine of twelve owners and four of six governing persons, the “Hickman Group”) became dissatisfied with Minick and attempted to dismiss him by a majority vote of the governing persons. Three owners, Minick, Murrin Brothers 1885, Ltd., and ERI-BBTX, LLC (the “Murrin Group”) opposed Minick’s removal, arguing that Minick’s dismissal was a “major decision” for which the company agreement required a unanimous vote of the owners. Murrin Brothers 1885, Ltd. then filed a lawsuit, asserting both individual and derivative claims against the Hickman Group. The Murrin Group also sought injunctive relief to deny the Hickman Group the ability to unilaterally remove Minick, a declaration that the Hickman Group was without authority to oust Minick, and appointment of a receiver. The Hickman Group hired counsel to represent both BBT and the Hickman Group, and the Hickman Group filed counterclaims asserting both individual and derivative counterclaims and requesting appointment of a receiver.

About three months before trial, the Murrin Group filed a motion to disqualify the Hickman Group’s attorneys, alleging that their representation of both the Hickman Group and BBT amounted to the impermissible representation of both sides in the same case (because BBT was the “plaintiff” in Murrin Group’s derivative claims against the Hickman Group). The Murrin Group later filed a Rule 12 Motion, requiring the Hickman Group’s attorneys to show its authority to represent the LLC. The Rule 12 motion argued that the decision to hire counsel on behalf of BBT was a “major decision” requiring unanimous consent of the owners. The Hickman Group responded that the certificate of formation granted them authority to hire counsel for BBT with a simple majority of the governing persons. The trial court denied both motions. After the court of appeals denied mandamus relief to the Murrin Group, the Murrin Group sought mandamus relief from the Texas Supreme Court on both motions.

With respect to the motion to disqualify, the Murrin Group argued that BBT and the Hickman Group were directly adverse, i.e. opposing parties, because BBT is the plaintiff in this derivative action and the Hickman Group are defendants. The court stated that the classification of the company in a derivative action is not that simple:

The battle lines are not so clear, however. Shareholder derivative actions provide a procedural pathway for a minority shareholder to sue on behalf of the company for wrongs committed against the company. *Sneed v. Webre*, 465 S.W.3d 169, 182–83 (Tex. 2015); *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162 (Tex. 1990); *see also* TEX. BUS. ORGS. CODE §§ 21.552, 101.452 (outlining requirements for derivative suits). Because the suit is to vindicate the company’s rights, it is often said that the company is a “plaintiff” in a derivative action. *See, e.g., Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 658, 659 (N.D. Tex. 1978); *Nat’l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 36 (Tex. Civ. App.—San Antonio 1959, no writ); *cf. In re Schmitz*, 285 S.W.3d 451, 452 (Tex. 2009) (orig. proceeding). Labeling the company a “plaintiff” does not tell the whole story, however. Most companies begin derivative litigation resistant to the minority shareholder’s derivative claims. The resistance of the company’s usual decisionmakers to the minority shareholder’s claims is what causes derivative litigation in the first place. For this reason, in addition to sometimes being called plaintiffs, companies embroiled in derivative litigation are also commonly called “nominal defendants.” *See, e.g., Meyer v. Fleming*, 327 U.S. 161, 167, 66 S.Ct. 382, 90 L.Ed. 595 (1946); *Bankston v. Burch*, 27 F.3d 164, 167 n.10 (5th Cir. 1994); *Neff ex rel. Weatherford Int’l, Ltd. v. Brady*, 527 S.W.3d 511, 518 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Thus, companies in derivative litigation are simultaneously “plaintiffs” and “defendants,” depending on how you look at it. Of course, if the company is literally both plaintiff and defendant, then no lawyer could ever represent it in derivative litigation because to do so would automatically place the lawyer on both sides of the case. Obviously, that is not the rule.

The court said that rather than focusing on which party label applies to a company in derivative litigation, “the proper inquiry is to look to whether the substance of the challenged representation requires the lawyer to take conflicting positions or to take a position that risks harming one of his clients.” The court noted a division of

authority around the country as to whether such a risk is always present in derivative litigation, with some courts concluding that representation of both the company and the insider defendants is categorically impermissible, while other courts, including courts in Delaware, have taken a more practical approach and have reasoned that the interests of the company and its controlling officers or directors are often aligned such that separate counsel is not necessary unless a divergence of interests arises.

The court declined to announce a categorical rule governing dual representation in derivative litigation:

Whether a company and the individual defendants are “opposing parties” for purposes of Rule 1.06(a) in derivative litigation requires consideration of the true extent of their adversity under the circumstances. The definition of “directly adverse” representation provided in the comments to the disciplinary rules provides useful guidance in derivative litigation, as elsewhere:

Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.

TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.06 cmt. 6.

The court stated that, not surprisingly, each faction claimed to be aligned with BBT and acting on its behalf while arguing that the other faction’s positions are incorrect and harmful to BBT. According to the court, “[s]tripped of the conceptual and procedural baggage of its ‘derivative’ claims, this case is about who controls the management of BBT—the Hickman Group by virtue of its majority interest, or the Murrin Group by virtue of the Company Agreement’s unanimity provision. Either the Hickman Group is right, in which case its interests and BBT’s are truly aligned, or the Murrin Group is right, in which case BBT is aligned with it instead.”

The court also pointed to the provisions of the Business Organizations Code governing derivative suits on behalf of closely held LLCs:

Perhaps anticipating suits like this one—control-fights between LLC members couched as derivative actions—the legislature has provided that “if justice requires: a derivative proceeding brought by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member’s own benefit.” TEX. BUS. ORGS. CODE § 101.463(c). For purposes of the disqualification motion, the trial court could have treated the derivative claims as claims “brought by the member for the member’s own benefit,” rather than disqualifying KHH based on the procedural complexities introduced by the derivative claims. Indeed, if the derivative claims are treated as direct claims, as the statute permits, the Murrin Group’s case for disqualification essentially vanishes.

Additionally, the court stated that none of the other “facts and circumstances” presented to the trial court supported disqualification. The case was nearly ready for trial at the time the trial court considered the disqualification motion, and the court said the motion could have been brought much earlier in the litigation. The Hickman Group and the Murrin Group were fully adverse, and both sought to control BBT. The question of which ownership group was entitled to control BBT could be fully and fairly litigated by the parties and counsel currently before the court, and the resolution of it would resolve the troublesome and complex question of BBT’s alignment. No showing was made that the Hickman Group’s lawyers possessed confidential information belonging to BBT that prejudiced the Murrin Group and could not otherwise have been obtained from the Hickman Group. The court stated that all these facts and circumstances supported the trial court’s decision not to disrupt the current alignment of parties and counsel on the eve of trial.

Finally, the court addressed the Murrin Group’s contention that allowing the Hickman Groups lawyers to represent both BBT and the Hickman Group would confuse the jury by creating the false impression that the Hickman Group speaks for BBT or that the two are one and the same. Even assuming the validity of this concern,

the court said there were less severe remedies than disqualification, such as jury instructions or other parameters for the conduct of trial that would ensure an even playing field. Characterizing the dispute as “a fairly straightforward case about which ownership group controls the company’s decisions,” the court said that it was unlikely the jury would have any problem identifying the two ownership groups and their counsel, and it was unclear to the court why a jury would need to be told anything about the question of which lawyers have authority to represent the company itself. The court also found it unclear how the answer to that question would have any practical impact on the case.

In sum, the court concluded that the trial court did not abuse its discretion by denying the motion to disqualify.

The court next turned to the Murrin Group’s Rule 12 motion. Rule 12 of the Texas Rules of Civil Procedure provides that a party, upon a sworn motion stating the moving party’s belief that the suit is being prosecuted or defended without authority, may cause an attorney to show authority to act. The burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the suit. In support of its Rule 12 motion, the Murrin Group argued that the Hickman Group’s lawyers lacked authority to represent BBT because the unanimity requirement of the company agreement prevented the Hickman Group from hiring counsel for BBT. The Hickman Group’s principal response was that the powers afforded governing persons by the certificate of formation constituted “sufficient authority” for a majority of governing persons to hire counsel under these circumstances.

The court first stated that it disagreed with the Murrin Group’s suggestion that the trial court effectively decided the merits of its claims by denying the Rule 12 motion. The trial court’s ruling that the Hickman Group’s lawyers showed “sufficient authority” to represent BBT was not a merits decision on ultimate issues involving the meaning of the company documents and control of the company in the future. Those questions remained for resolution at trial.

Assuming without deciding that the company agreement requires unanimous consent of the owners of BBT to hire counsel as argued by the Murrin Group, the trial court’s abuse of discretion by misinterpreting BBT’s governing documents did not warrant mandamus relief unless the Murrin Group also established its lack of an adequate remedy absent mandamus relief. The Murrin Group alleged that denial of the Rule 12 motion caused three harms that cannot be adequately remedied absent mandamus relief: (1) denial of the Murrin Group’s contractual right to veto BBT’s litigation counsel; (2) jury confusion and prejudice against the Murrin Group if the jury is told that the Hickman Group’s lawyers represent both BBT and the Hickman Group; and (3) payment of the Hickman Group’s legal bills by BBT, thus burdening the Murrin Group’s interest in BBT with payment of their opponent’s legal fees. The court concluded that none of these alleged harms satisfies the lack-of-adequate-remedy requirement. The court said that “[t]he only concrete, non-monetary harms the Murrin Group alleges are the possibility of jury confusion and the unfairness of being made to contribute towards its opponent’s legal bills.” The court pointed out that it had already described how the jury-confusion concern can be remedied, and the court said that adequate remedies exist for breach of contract and recovery of any legal fees that may turn out to have been improperly paid from the Murrin Group’s interest in BBT. Because the Murrin Group did not establish the lack of an adequate remedy if mandamus relief is not granted, the court denied mandamus relief as to the Rule 12 motion.

French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652 (W.D. Tex. Aug. 27, 2018) (Although the court issued this opinion in 2018, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

Defendants moved to dismiss the plaintiff’s claims on the grounds that he was suing as an individual member for harms suffered by the LLC. The court denied the motion, as it found that the plaintiff brought individual claims to vindicate individual harms.

In 2013, Jordan French and Darius Fisher formed First Page, a Texas limited liability company that performed online reputation management and advertising services. French and Fisher were both members of First Page. In 2015, French and Fisher amended First Page’s operating agreement to add Jesse Boskoff as a member and to name all three members as managers. Pursuant to the operating agreement, French, Fisher, and Boskoff each held a one-third membership interest in First Page.

French sued Fisher and Boskoff (“Defendants”) for breach of contract, breach of fiduciary duty, and other claims. The claims were largely based on (1) a purported diversion of business opportunities and personnel from First Page to Blue Land (a business owned by Fisher and Boskoff), and (2) the use of First Page funds to pay the personal legal fees of Fisher and Boskoff. Defendants argued that French’s claims should be dismissed because

French sought damages to redress alleged harms suffered by First Page. The court disagreed, as it found that French brought personal causes of action for his individual harm:

The facts in this case are similar to those in *Saden v. Smith*, 415 S.W.3d 450, 461 (Tex. App.—Houston [1st Dist.] 2013). In *Saden*, the plaintiff and defendant were the sole shareholders of a closely held corporation that they formed under an agreement to “share equally in the revenues” of the company. The plaintiff, in his individual capacity and in his derivative capacity as a member of the company, sued the defendant for breach of contract and breach of fiduciary duty, alleging that the defendant had diverted company revenues to his personal account and withheld information regarding the financial status of the company. The court explained that the plaintiff had alleged “a claim for a personal breach of contract based on ‘contractual obligations,’ and [the plaintiff’s] contractual rights under the several agreements signed by the parties” in forming the company. The court concluded, in part, that the plaintiff could assert his claims in his individual capacity.

Here, similar to *Saden*, Plaintiff and Defendants are the sole members of a closely held limited liability company that they formed under an agreement to share in its revenues. Further, French brings his breach of contract and breach of fiduciary claims in his individual capacity and, to the extent necessary in his derivative capacity as a member of First Page, based on the Operating Agreement that he and Defendants executed in their individual capacities. French claims that Defendants breached the Operating Agreement by: (1) using First Page revenues to pay for their personal legal bills; (2) diverting company resources to Blue Land; and (3) withholding complete information about First Page’s financial status. Moreover, French alleges that he was individually injured by the monetary benefits that Defendants received (and still receive) to his exclusion. Based on these allegations, the Court finds that French’s claims are direct—not derivative—claims.

Defendants’ arguments to the contrary do not compel a different conclusion. Fisher and Boskoff contend that the harm alleged by French is harm to First Page and the fact that French’s one-third interest in First Page might be reduced if First Page is harmed does not transform his derivative claim into a direct claim. In support, Fisher and Boskoff cite *Lenz v. Associated Inns & Rests. Co. of Am.*, wherein the United States District Court for the Southern District of New York found that the plaintiff’s alleged injury—reduced income to the Limited Partnership as a result of the defendants’ alleged misconduct—was an indirect injury that could be pursued only through a derivative action. 833 F. Supp. 362, 380 (S.D.N.Y. 1993). Unlike in *Lenz*, the Operating Agreement here specifically states Fisher and Boskoff owe duties of care and loyalty to both the company and French. French’s damages therefore stem from the contractual duties that Fisher and Boskoff owed directly to French. As such, French may bring a direct action for the injuries done to him in his individual capacity.

French’s damages are also separate and distinct from those of other members and managers. The crux of French’s claims is that Fisher and Boskoff are using Blue Land to dissipate or conceal the proceeds or profits of First Page for their benefit and to French’s detriment. This represents a unique and independent injury suffered by French.

For these reasons, the court concluded that French’s claims against Defendants were direct and not derivative, and the court denied Defendants’ motion to dismiss.

See also *Stephens v. Three Finger Black Shale Partnership*, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed); *Neutra, Ltd. v. Terry (In re Acis Capital Management, L.P.)*, 604 B.R. 484 (Bankr. N.D. Tex. 2019) summarized above under “Standing or Capacity to Sue.”

Q. Bankruptcy

White v. Cyr, No. SA-18-cv-01287-JKP, 2020 WL 1644047 (W.D. Tex. Apr. 2, 2020).

The court affirmed the bankruptcy court’s denial of an exception to discharge of an LLC member’s debt to the plaintiff, concluding that the plaintiff’s fraud claims under Section 523 failed to state a claim, the plaintiff

failed to sufficiently allege that the CEO of the LLC was acting as the agent of the member for purposes of imputing allegedly fraudulent statements of the CEO to the member, and the plaintiff failed to sufficiently plead an alter-ego claim.

After demanding payment for professional services rendered to an LLC, Dr. Johnny White filed suit against the LLC, the LLC's CEO, and Steven Cyr, the alleged alter-ego of the LLC. The suit alleged breach of contract, quantum meruit, fraud, and theft of services. Cyr initiated a bankruptcy suit over three years later, staying White's state court action. White then requested that the bankruptcy court deem the debt owed to him "nondischargeable" under 11 U.S.C. § 523(a)(2)(A), (4), and (6) and the alter-ego theory. White's amended complaint against Cyr was ultimately dismissed by the bankruptcy court. White appealed the dismissal of his claims against Cyr to federal district court. With regard to the fraud claims, White claimed that Cyr fraudulently induced him to provide medical services despite Cyr knowing or negligently failing to know that the LLC would not be able to pay the fifty-percent share agreed to by the parties. Furthermore, White claimed that Cyr was liable for the omission of information regarding the LLC's difficulties.

Section 523(a)(2)(A) requires a creditor to allege "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury." Sections 523(4) and (6) require a demonstration of "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" and "willful and malicious injury by the debtor to another entity or to the property of another entity," respectively. The district court found that White's allegation failed to demonstrate: (1) Cyr's intent and purpose to deceive; (2) that Cyr made intentional or material omissions; (3) that Cyr had a duty to disclose or knowledge that White was ignorant of the alleged omissions; or (4) White's reliance and harm stemming from such omissions. Accordingly, White's fraud claims under § 523 failed to state a claim for which relief could be granted, rendering the bankruptcy court's dismissal proper.

With regard to the alter ego claim, the court noted the liability protection provided by an LLC, quoting Tex. Bus. Orgs. Code § 101.114 ("Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court.") Due to the liability protection that corporations and LLCs offer to their owners, the court said that a plaintiff seeking to impose individual liability on an owner must "pierce the corporate veil." To impose liability under an alter-ego theory, "a court must find (1) that the entity 'is the alter ego of the debtor, and (2) that the corporate fiction was used for an illegitimate purpose, that is, to perpetrate an actual fraud on the plaintiff for the defendant's direct personal benefit.'" A plaintiff adequately alleges an LLC is the alter ego of an individual by demonstrating "such unity" between the LLC and the individual "that the separateness of the [LLC] has ceased and holding only the [LLC] liable would result in an injustice." The court stated that unity may be demonstrated by showing "the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes." The court listed the following as facts that might be included in a plausibly alleged alter-ego claim:

- (1) the payment of alleged corporate debts with personal checks or other commingling of funds;
- (2) representations that the individual will financially back the corporation;
- (3) the diversion of company profits to the individual for his or her personal use;
- (4) inadequate capitalization;
- (5) whether the corporation has been used for personal purposes; and
- (6) other failure to keep corporate and personal assets separate.

White alleged that he did not receive the fifty-percent share of billings as promised and later learned that "Cyr utilized the profits from his practice in [the LLC] for his personal gain and lavish and extravagant lifestyle." The court concluded that White's allegation that LLC funds were used for Cyr's personal purposes was conclusory. "Absent factual allegations in support of the conclusion that Cyr used [the LLC's] profits to support his lifestyle or factual allegations that show corporate formalities were not followed, that corporate and private property, funds, or assets were commingle, or that Cyr otherwise abused the corporate form, White's amended complaint fails to demonstrate 'such unity' between [the LLC] and Cyr 'that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice.'"

Lastly, White argued that the bankruptcy court failed to consider his claims of agency or vicarious liability against the LLC and Cyr for the actions of the LLC's CEO. Under Fifth Circuit precedent, "an agent's fraud may be imputed to the debtor under § 523(a)(2)(A)." Furthermore, under agency law, apparent authority is sufficient to bind a debtor for the apparent acts of his agent when a reasonable belief of agent authority is traceable to the manifestations of the debtor. However, the court agreed with the bankruptcy court's finding that White did not plausibly allege facts demonstrating a reasonable belief that the CEO was Cyr's agent. Rather, facts indicated that the CEO was acting on behalf of the LLC as its CEO.

Phelps v. Hunt (In re Hunt), 608 B.R. 477 (Bankr. N.D. Tex. 2019).

The court concluded that Robert Phelps should be granted a nondischargeable claim of \$55,000 against Jeffrey Hunt, an LLC manager, under § 523(a)(4) and (a)(6) of the Bankruptcy Code.

Tea 2 Go, LLC offered Tea 2 Go franchises. Its owner and manager was Jeffrey Hunt. Robert Phelps purchased several franchises from Tea 2 Go, LLC. He also purchased, from Hunt personally, a 49% interest in EJ T Kickers, LLC.

Hunt eventually filed for bankruptcy. The court stated that Hunt's liability would be measured by (1) the amounts Phelps paid for acquiring and implementing the franchise rights from Tea 2 Go, LLC, and (2) the amount Phelps paid Hunt for the membership interest in EJ T Kickers, LLC.

With respect to Phelps' purchase of the franchise rights from Tea 2 Go, LLC, the court discussed how Hunt could be personally liable. The court noted that a manager/member of an LLC is not individually liable for contractual debts and obligations of the LLC, unless there is a finding that the debt or obligation was incurred through actual fraud for the direct personal benefit of the manager/member. Phelps alleged that he was defrauded by Hunt and that such fraud personally benefitted Hunt. The court observed that actual fraud in the veil-piercing context is not equivalent to the tort of fraud. Rather, actual fraud is defined as involving dishonesty of purpose or intent to deceive. The court stated that if it could not conclude that Hunt's conduct amounted to actual fraud under Texas law, then there can be no debt to discharge, rendering moot any dischargeability issue under § 523(a)(2)(A) of the Bankruptcy Code.

Without the need for veil piercing, Hunt could also be liable if he personally committed a fraudulent or intentionally tortious act. The court noted that agents of corporations are personally liable for their own tortious conduct under the common law. Tea 2 Go, LLC's company agreement did not appoint an agent, but it did vest the manager (Hunt) with authority to designate an agent at the manager's sole discretion. Moreover, § 101.254(a) of the TBOC provides that "each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business." The court concluded, therefore, that Hunt was an agent of Tea 2 Go, LLC and was carrying out the company's business when transacting with Phelps regarding the franchise sales. If Hunt obtained funds from Phelps by "false pretenses, a false representation, or actual fraud" with the requisite intent, Hunt may be held personally liable for such conduct as an agent of Tea 2 Go, LLC.

The court first rejected Phelps' contention that Hunt's debts to him were nondischargeable under § 523(a)(2) of the Bankruptcy Code, which generally covers debts obtained by fraud or false pretenses. The court found that Phelps "failed to satisfy his burden under § 523(a)(2)(A) to establish that Hunt made materially false statements with the intent to deceive him that, in turn, induced his investment, payment of franchise fees, or purchase of an interest in the LLC." In addition, under § 523(a)(2)(B), Phelps did not prove that the profit and loss statements provided by Hunt painted a substantially untruthful picture of Hunt's financial condition.

The court then discussed whether Hunt's debts were nondischargeable under § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny) or § 523(a)(6) (willful and malicious injury by the debtor). According to the court, Phelps was able to satisfy the elements of these provisions:

Hunt's sale of 49% of his 100% interest in the Austin store (EJ T Kickers)—with the \$50,000 that was wired by Phelps and the additional \$5,000 payment made by his company, Mr. JP Ventures, LLC—raises a dischargeability question. Phelps, according to his un rebutted testimony, was assigned the claims of his LLC and thus asserts such claims. Hunt was in deep financial trouble at the time he solicited the \$55,000 from Phelps. The stated purpose was for a 49% interest in the Austin store that was owned by EJ T Kickers, LLC. Hunt sold the store out from under Phelps within a month. Given Hunt's conduct and circumstance at the time—his dire

financial condition, the solicitation of the funds, and the sale and failure to account back to Phelps—the Court infers that Hunt, in effect, intended to procure the funds for his (Hunt’s) personal benefit. Such conduct was intentional, it violated Hunt’s obligation to Phelps, and, at the time, was substantially certain to cause injury to Phelps. The conduct was malicious and willful. Hunt cheated Phelps out of the \$55,000. His conduct satisfies the elements for a nondischargeable claim under both § 523(a)(4) and (a)(6) of the Code.

The court also rejected claims that a discharge for Hunt should be denied under § 727(a)(3) (destroying or falsifying financial records) and § 727(a)(4)(A) (knowingly and fraudulently making a false oath or account). The court observed that “Phelps failed to present evidence sufficient to establish that Hunt attempted to conceal financial information by failing to provide such information to the trustee, to the Court in his Statement of Financial Affairs or Schedules, or to Phelps.”

Garza v. CMM Enterprises, LLC (In re Garza), 605 B.R. 817 (Bankr. S.D. Tex. 2019).

The bankruptcy court concluded that an LLC willfully violated the automatic stay, but the LLC’s manager was not personally liable.

CMM Enterprises, LLC, through its manager Jesus Sanchez, exercised self-help in repossessing Guadalupe Garza’s vehicle after Garza had filed for bankruptcy. Garza instituted an adversary complaint against CMM for violation of the automatic stay, and she argued that Sanchez should be held personally liable for the actions of CMM. Sanchez filed a motion for judgment on partial findings, arguing that Garza failed to bring forth any evidence showing that Sanchez acted outside of his capacity as a representative of CMM. The court noted that to defeat Sanchez’s motion, Garza would have to carry her burden of “establishing a prima facie case that Sanchez is not afforded the legal protections of the corporate structure.”

The court observed that “[t]he bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation’s obligations.” That limited liability protection is also afforded to LLCs. The court noted, however, that such limited liability could be disregarded under an alter ego theory of piercing the corporate veil—a theory which applies equally to LLCs. Alter ego applies “when there is such an identity between a corporation and an individual that all separateness between the parties has ceased and a failure to disregard the corporate form would be unfair or unjust.” An alter ego allegation is shown from the total dealings of the corporation and the individual, including “the degree to which corporate formalities have been followed, the degree of which corporate and individual property has been kept separate, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.”

The court concluded that Garza was unable to establish that Sanchez was the alter ego of CMM:

Garza did not plead, nor did she submit any evidence or testimony that Sanchez kept his and CMM’s property together, that Sanchez was acting individually instead of through CMM, that Sanchez was using CMM for personal purposes, or that Sanchez and CMM are considered a single entity. While Sanchez did testify that it was CMM’s policy to flag a client’s account and hold off on all contact when they receive notice of a bankruptcy—and this policy was neither written down nor memorialized—this alone does not constitute enough to disregard the corporate fiction. During trial, the evidence and witness testimony demonstrated that CMM sold the Malibu to Garza, that CMM repossessed the Malibu, and that Sanchez—acting as representative of CMM—sought legal counsel on behalf of CMM before returning the Malibu to Garza. Because Garza did not plead, nor was there any evidence or testimony demonstrating that Sanchez and CMM disregarded the corporate form, this Court will not make such a finding here.

Garza also argued that members of an LLC are not protected from liability for their own tortious actions. In such a case, no finding of alter ego is necessary. The court agreed with the legal proposition, but found no evidence that Sanchez should be liable:

While Garza correctly cited the law, the problem arises in the fact that not only did Garza fail to state a claim involving allegedly tortious or fraudulent actions, but Garza failed to present

any evidence that Sanchez committed any tortious or fraudulent act. Indeed, Garza only presented two statutory claims before this Court: violation of the automatic stay under section 362, and violation of the [Texas Debt Collection Act]. Because Garza failed to plead tortious or fraudulent conduct, and failed to present evidence of tortious or fraudulent conduct, Garza may not argue that personal liability attaches to Sanchez without piercing the corporate veil.

While Garza is correct in that section 362(a) applies to all entities, including limited liability companies, Garza failed to carry her burden in establishing a prima facie case that Sanchez's conduct constituted a disregard for the corporate fiction. Accordingly, this Court grants Sanchez's motion for judgment on partial findings under Rule 52(c).

The bankruptcy court did find, however, that CMM willfully violated the automatic stay. As a result of that violation, Garza was awarded actual and punitive damages.

R. Diversity Jurisdiction

The Fifth Circuit Court of Appeals and district courts continue to hold that the citizenship of a partnership or LLC is determined by the citizenship of each of its partners or members. If the partners or members are themselves partnerships, LLCs, or corporations, their citizenship must be alleged in accordance with the rules of that entity, and the citizenship must be traced through however many layers of members or partners there may be. The district court cases are too numerous to include in this paper, but representative recent Fifth Circuit cases and cases presenting somewhat unusual circumstances and arguments are included below.

Surge Busy Bee Holdings, LLC v. Wiszniewski, Civil Action No. 3:19-CV-127-L, 2020 WL 1846781 (N.D. Tex. Apr. 13, 2020).

The defendant removed an action brought against him by an LLC, and the plaintiff sought to remand the case based on a lack of diversity of citizenship. Because LLCs and partnerships have the citizenship of each of their members, diversity of citizenship in this case turned on whether the defendant was a limited partner of the Delaware limited partnership that was the sole member of the LLC plaintiff. The court interpreted the provisions of a Delaware limited partnership agreement and related subscription agreement and convertible note to determine when the defendant was admitted as a limited partner in order to determine the citizenship of the limited partnership and the LLC of which the limited partnership was the sole member. The plaintiff claimed that the defendant was admitted as a limited partner when the defendant exercised his right under a convertible note to receive units in the partnership, but the defendant claimed that he did not become a partner at that time because the partner schedule attached to the partnership agreement was not amended at the time to reflect that he was a limited partner. Even if the schedule of partners attached to the partnership agreement was not amended at the time to include the defendant, the court concluded that an email exchange among the defendant, his lawyer, and the general partner effectuated the admission of the defendant as a limited partner based on terms of the partnership agreement and convertible note, the authority granted to the general partner under the partnership agreement to determine the procedure for admitting limited partners, and the authority granted to carry out that procedure by executing any documents, including side letters and amendments to subscription agreements, that the general partner deemed necessary. The court concluded that the circumstances of this case did not justify jurisdictional discovery, distinguishing *Murchison Capital Partners, L.P. v. Nuance Communications, Inc.*, 3:12-CV-4746-L, 2013 WL 3328694 (N.D. Tex. July 2, 2013).

Recruiting Force, LLC v. Mainthia Tech., Inc., No. A-19-CV-1045-RP, 2020 WL 1698826 (W.D. Tex. Apr. 8, 2020).

The court concluded that claims asserted by an LLC member against the other member were derivative, and the LLC thus was not merely a nominal party. Because the citizenship of an LLC is based on the citizenship of all of its members, diversity of citizenship was lacking, and the court remanded the case for lack of subject-matter jurisdiction.

Recruiting Force, LLC ("Recruiting Force") and Mainthia Tech., Inc. and its principal (collectively "Mainthia"), entered into a "joint venture agreement" forming an LLC to perform engineering services under a contract with Boeing. Under the joint venture agreement, Mainthia was responsible for certain administrative

services. Subsequently, the LLC and Mainthia entered into a separate one-year contract for Mainthia to provide consulting services to the LLC. The parties entered into a second one-year consulting contract after the expiration of the first contract. At the expiration of the second contract, Mainthia proposed that the LLC pay an additional fee to Mainthia for its services. Despite no agreement to do so, Mainthia began invoicing the LLC for the additional fees.

After a series of billings by Mainthia for unauthorized administrative fees, all of which the parties' joint venture agreement expressly excluded, Recruiting Force, individually and derivatively, sued Mainthia asserting that Mainthia breached its fiduciary duty as manager of the LLC and breached the joint venture agreement, and seeking a declaration that the LLC was not obligated to pay the outstanding fees and expenses charged by Mainthia. Recruiting Force alleged that Mainthia usurped control of the joint venture, preventing routine business and jeopardizing its engineering services contract.

At issue before the court was Mainthia's attempt to remove the case to federal district court and Recruiting Force's subsequent remand for lack of subject-matter jurisdiction. For purposes of diversity jurisdiction, a corporation is a citizen of its state of incorporation and the state where it has its principal place of business, whereas an LLC's citizenship is based on its members. Citing a leading treatise on federal procedure, the court stated the following principle: "In a derivative action brought on behalf of a limited liability company by one member against another member, regardless of whether the company is aligned as a plaintiff or a defendant, diversity is destroyed as the company has the citizenship of its members." Thus, the controversy before the federal court turned on whether the suit could be characterized as "derivative."

Recruiting Force argued that the LLC was a plaintiff in the case because Recruiting Force was suing Mainthia both individually and derivatively; therefore, Mainthia's citizenship was represented on both sides of the case. Mainthia argued instead that the claims were actually "direct claims" brought on behalf of Recruiting Force, rendering the LLC a nominal party whose citizenship could be ignored for purposes of subject-matter jurisdiction. The court noted Mainthia's argument that Recruiting Force's prayer for damages included only relief for itself, which Mainthia argued was alone enough to render the LLC a nominal party.

The court held that the appropriate characterization of the suit turned not on Recruiting Force's labeling of the claims, but rather on the nature of the wrongs and the relief requested. The court pointed out that Recruiting Forces sued to enforce the LLC's rights under the joint venture agreement and general fiduciary duties owed to the LLC. The court stated that any fiduciary duties owed by Mainthia were owed to the LLC. The claims based on authorized charges for services and conduct jeopardizing the LLC's contract with Boeing alleged injury to the LLC. Therefore, the court concluded that at least some of Recruiting Force's claims were derivative claims that destroyed diversity jurisdiction.

The court distinguished another decision in the Western District in which one member of a three-member LLC filed suit against the other members both individually and derivatively. There the court determined that the LLC was improperly joined as a plaintiff because the plaintiff member's claims were direct rather than derivative. Of importance to the court was the plaintiff's argument that the other members' alleged breach of the company agreement was merely a "thinly veiled attempt to extricate profits from [the company] without paying [plaintiff] his fair 1/3 share of the distribution." The nature of this argument, the court held, although founded on the company agreement, sought relief that "fundamentally" accrued to the plaintiff alone. Accordingly, the court in that case deemed the company a nominal party only, disregarding its citizenship for diversity purposes.

The court also rejected Mainthia's argument that Recruiting Force's reliance on Tex. Bus. Orgs. Code § 101.463(c) transformed Recruiting Force's claims into direct claims. Section 101.463(c) allows a court, if justice requires, to treat a derivative suit brought on behalf of a closely held LLC as a direct action and permits a plaintiff in a derivative action to recover directly. Mainthia pointed to no case where a party's request for a court to apply Section 101.463 transformed an otherwise derivative claim into a direct one, and Recruiting Force pointed out that every court that has considered the issue has rejected the argument.

Accordingly, because Recruiting Force's claims were derivative in nature, the case lacked complete diversity and the court lacked subject-matter jurisdiction. Although Recruiting Force's suit was remanded, the court refused the request for attorneys' fees, costs, and expenses incurred by the removal action because it could not find that Mainthia lacked an "objectively reasonable" basis for the removal action.

Preston Hollow Capital, LLC v. Bouldin, Civil Action No. 3:19–CV–00185, 2020 WL 486783 (S.D. Tex. Jan. 30, 2020).

The court rejected the LLC plaintiff’s argument that it was merely suing in a representative capacity for another entity and that its own citizenship, which for purposes of diversity jurisdiction was based on the citizenship of its 66 members (consisting of individuals, partnerships, LLCs, trusts, and other organizations), was irrelevant. Because the court concluded that the plaintiff was a real party in interest in addition to suing in a representative capacity, the court ordered the plaintiff to provide details regarding its 66 members sufficient to determine the citizenship of the plaintiff.

Preston Hollow Capital, LLC (“Preston Hollow”), an independent municipal finance company, filed suit to recover on a guaranty agreement under which the guarantor guaranteed the bond and loan obligations of a senior care facility. The court raised *sua sponte* the issue of whether the court had diversity jurisdiction, explaining: “I noticed that several of the parties in this case are limited liability companies, and I am well-aware that the process for unraveling the citizenship status of a limited liability company is somewhat unique and complex. The citizenship of limited liability entities is determined by the citizenship of their members. See *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008). When members of a limited liability entity are themselves entities or associations, citizenship must be traced through however many layers of members there are until arriving at the entity that is not a limited liability entity and identifying its citizenship status. See *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397–98 (5th Cir. 2009).” The court requested a letter from Preston Hollow explaining the citizenship of all parties. In response, Preston Hollow represented to the court that it was unable to determine the citizenship of an LLC defendant and that Preston Hollow’s 66 members (consisting of a combination of individuals, partnerships or limited partnerships, LLCs, trusts, employee retirement or pension plans, and other business organizations) preferred not to disclose the details of their involvement in Preston Hollow. Preston Hollow argued that the citizenship of its members was not relevant because Preston Hollow was suing exclusively as an agent of Branch Banking and Trust Company, the original indenture trustee and real party in interest. Based on the terms of the financing documents and Preston Hollow’s status as a significant bondholder as well as representative of the bondholders, the court concluded that Preston Hollow was a real party in interest and not merely an agent for the trustee. Thus, the court ordered Preston Hollow and an LLC defendant to file letters with the court explaining their citizenship in detail. With respect to Preston Hollow, the court commented: “Preston Hollow has indicated that its 66 members prefer not to disclose details of their involvement in Preston Hollow. While I appreciate this, I believe such information is essential for me to determine whether diversity jurisdiction exists.”

Liserio v. Colt Oilfield Servs., LLC, Civ. A. No. SA-19-CV-1159-XR, 2019 WL 6168208 (W.D. Tex. Nov. 20, 2019) (“As to Plaintiff’s membership in—and citizenship of—Colt LLC, Plaintiff is not named in the Certification of Formation. Nor was Plaintiff later added as a member. ‘A person who, after the formation of a limited liability company, acquires directly or is assigned a membership interest in the company or is admitted as a member of the company without acquiring a membership interest, becomes a member of the company on approval or consent of all of the company’s members.’ TEX. BUS. ORG. CODE § 101.103(c). The Code itself supports the inference that one may receive distributions from an LLC, even with a ‘membership interest,’ yet still not be a member of the LLC. It provides that one who is assigned a membership interest in an LLC, even one entitled to receive an allocation of income or any distribution, is still only ‘entitled to become a member of the company on the approval of all of the company’s members.’ *Id.* § 101.109. There is no indication that any Defendants or member of Colt ever approved or consented to Plaintiff becoming a member, nor does Plaintiff’s own Petition state that he is a member As such, the Court does not consider Plaintiff’s individual citizenship for determining the citizenship of Colt LLC” (citation omitted) (footnote omitted)).

Greenwich Ins. Co. v. Capsco Indus., Inc., 934 F.3d 419 (5th Cir. 2019) (“The citizenship of an LLC is determined by the citizenship of each of its members. Further, it is the citizenship of the parties when suit is filed that controls.” (citation omitted)).

MidCap Media Finance, L.L.C. v. Pathway Data, Inc., 929 F.3d 310 (5th Cir. 2019) (“In contrast, ‘the citizenship of a[n] LLC is determined by the citizenship of all of its members.’ So, to establish diversity jurisdiction, a party ‘must specifically allege the citizenship of every member of every LLC.’ ... [B]ecause MidCap is an LLC, the pleadings needed to identify MidCap’s members and allege their citizenship. The parties, however, alleged only

that MidCap was ‘organized and existing under the laws of the State of Texas and had its principal place of business’ in Texas.” (citations omitted)).

S. Personal Jurisdiction

Hanschen, Trustee of David Hanschen Heritage Trust Two v. Hanschen, No. 05-19-01134-CV, 2020 WL 2764629 (Tex. App.—Dallas May 28, 2020, no pet. h.) (mem. op.).

The court held that an individual was subject to personal jurisdiction based on his having been served in person while he was in Texas, but the trial court did not err in granting the individual’s special appearance as to his representative capacities as trustee of a trust, former manager of two LLCs, and former general partner of a partnership.

Several Hanschen family members (“the family”) sued James Hanschen, individually and as trustee of a trust, former manager of two LLCs, and former general partner of a partnership. The family asserted claims for breach of fiduciary duty based on James’s alleged failure to provide an accounting and misapplication funds as trustee and failure to maintain the good standing of the entities, failure to provide an accounting, and misappropriation of assets. While James was in Texas to attend a meeting regarding the trust, the family personally served him with the petition and citation. The citation of service was addressed to “James Hanschen.” An interlocutory default judgment was entered against James in all capacities after his answer deadline passed. The judgment also granted the family’s request for an accounting and appointed an auditor with respect to the trust, LLCs, and partnership. James filed a special appearance and motion to set aside the default judgment. The trial court granted the special appearance, and the family appealed.

On appeal, the family conceded that they did not assert that Texas has general jurisdiction over James or that the traditional minimum contacts analysis would be met in the absence of his physical presence. The court agreed with the family, however, that a nonresident is not exempt from jurisdiction where the nonresident is served with process while within the territorial limits of such jurisdiction. James argued that he was not subject to personal jurisdiction in Texas because there were no causes of action brought against him personally. The court disagreed:

While we may agree with James that the default judgment granted relief against the entities for which it would be necessary for Texas courts to have jurisdiction over James in representative capacities, the family’s petition pleaded causes of action against James individually for breaches of fiduciary duties arising from his role as trustee of the Progeny Trust and his roles in NBR-C2[, LLC], NBR-C3[, LLC], and NBR-Needham [Partnership]. The family seeks exemplary damages against James for these alleged breaches of fiduciary duties. James does not make a specific argument why these claims are not pleaded against him personally. In Texas, generally an agent is personally liable for his own tortious conduct. *See Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (“Texas’ longstanding rule [is] that a corporate agent is personally liable for his own fraudulent or tortious acts.”).

Thus, because James was personally served with process in Texas, the trial court had personal jurisdiction over him in that capacity.

The court affirmed the trial court’s denial of James’s special appearance in his representative capacity. The family argued that James was also served in his representative capacity and that service was sufficient because the family was not seeking liability of an entity. The family stated that it merely sought to hold James personally liable in his multiple roles, which were all bases for his personal liability. The court pointed out, however, that the citation completely omitted any indication of representative capacity, and the return of citation stated that “JAMES HANSCHEN” was served without any mention of his roles as a trustee, a former manager, and a former general partner. Thus, the court concluded that the service was deficient as to James in any representative capacity. The court declined to extend the Texas Supreme Court’s holding in another case to find personal jurisdiction over James in all of his capacities merely because he was served in his individual capacity while present in Texas. The court stated that such an extension would conflict with the position consistently taken by Texas courts that actions of an individual in a representative capacity are separate and distinct from actions taken in an individual’s personal capacity.

Frank v. P N K (Lake Charles) L.L.C., 947 F.3d 331 (5th Cir. 2020).

The court applied case law from the corporate context to its analysis of whether an LLC domiciled in Louisiana was “at home” in Texas based on advertising targeted at Texas patrons. In the course of its discussion, the court made the following comment in a footnote:

Of note, neither the Supreme Court nor a sister circuit has directly addressed whether the type of artificial entity, *e.g.*, partnership or limited liability company, affects the “at home” analysis. Our circuit and several in-circuit district courts have applied the “at home” test to entities other than corporations, albeit without analyzing whether the entity type changes the outcome. *See, e.g., Cunningham v. CBC Conglomerate, LLC*, 359 F.Supp.3d 471, 478–79 (E.D. Tex. 2019) (finding that a limited liability corporation was not considered “at home” based on insufficient contacts); *Stewart v. Marathon Petroleum Co. LP*, 326 F.Supp.3d 284, 292–95 (E.D. La. 2018) (same in the context of a limited partnership); *Head v. Las Vegas Sands, LLC*, 298 F.Supp.3d 963, 976–80 (S.D. Tex. 2018), *aff’d* 760 F. App’x 281 (5th Cir. 2019) (same).

Here, we are examining the corporate structure of a limited liability company whose physical corporate operations are domiciled in Louisiana. The rationale behind this test is to rely on a business’s domicile or place of principal business as a guidepost in ascertaining where the business is “at home.” Considering this premise, the entity type is not germane to this jurisdictional analysis; instead it is the company’s domicile that merits attention.

The court concluded that the targeted advertising conducted by the LLC did not render the LLC “at home” in Texas. The allegations did not demonstrate a physical presence in Texas, and it was uncontroverted that the LLC did not have any employees or registered agents in Texas; any Texas license or permit; any offices, gaming facilities, or real estate in Texas; nor did the LLC have any bank account or pay taxes in Texas. Its Texas contacts were limited to its marketing activities, and the court concluded that the advertising activities alone were insufficient to infer that the LLC was literally present in Texas.

Fisher v. Eagle Rock Custom Homes Inc., No. 14-18-00483-CV, 2020 WL 205975 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet. h.) (mem. op.).

The court of appeals reversed the trial court’s denial of the defendant’s special appearance and dismissed for lack of personal jurisdiction because the plaintiff failed to establish that the defendant was the alter ego of entities doing business in Texas, that lawsuits in Texas in which the defendant or his entities allegedly participated were connected to the present suit, or that alleged in-person meetings between the defendant in a representative capacity involved tortious acts on the part of the defendant in Texas.

The plaintiff sued Fisher alleging that he was a Texas resident who conducted business in Texas. Specifically, the plaintiff alleged that it was doing business with a Fisher-related entity when Fisher approached it with a proposal for creating a joint venture with other entities Fisher controlled for the purpose of developing properties. Fisher filed a special appearance and stated that he was a Hong Kong resident without significant contacts with Texas. He stated that he was formerly a manager or investor in companies that were doing business in Texas but that he personally did not own any property, have any bank accounts, or conduct any business in the state. The plaintiff responded to the special appearance by citing other Texas cases in which Fisher allegedly made certain statements, including that he had bought properties in the state for himself through limited liability companies and had requested the court to treat a particular matter as a direct action for his personal benefit. The plaintiff also stated that Fisher had numerous in-person meetings with its representatives. Fisher was required to negate these jurisdictional allegations to be successful in his special appearance.

The court stated that the plaintiff did not specify whether it was attempting to establish that Texas has specific or general jurisdiction over Fisher or both, but some of the allegations could be relevant to both types of jurisdiction, so the court analyzed both options. The allegations that appeared aimed at or relevant to establishing whether Fisher had continuous and systematic contacts with Texas (*i.e.*, supporting the exercise of general jurisdiction) were: (1) Fisher controlled several entities that did business in Texas as his alter egos, (2) Fisher or the entities participated in lawsuits in Texas, (3) Fisher had in-person meetings in Texas with representatives of the plaintiff, and (4) Fisher visited his parents in Texas and had a Texas driver’s license.

Regarding the alter-ego claims, the burden of piercing the corporate veil and demonstrating a corporation was used as an alter ego is always on the plaintiff. The plaintiff did not present any evidence to pierce the corporate veil between Fisher and any entities that were doing business in Texas.

The assertion that Fisher or entities he controlled participated in litigation in Texas was also unsupported by evidence. The plaintiff referenced lawsuits allegedly involving Fisher or entities controlled by Fisher in Texas courts but did not provide any evidence to support these allegations. The plaintiff did not state that these prior lawsuits were in any way related to the present lawsuit.

The plaintiff asserted that Fisher had meetings in Texas with representatives of the plaintiff but Fisher stated that he did so only as a company representative. “While a corporate officer may not escape liability where he had direct, personal participation in wrongdoing, ... for general jurisdiction purposes, simply stating that the defendant attended meetings in state is not sufficient.” There were no details provided regarding the number, length, or subject matter of the alleged meetings. The additional fact that Fisher visited his parents in Texas a couple times per year and had a Texas driver’s license did not suffice to establish general jurisdiction.

The allegations that appeared to be aimed at establishing specific jurisdiction were: (1) Fisher controlled several entities that did business in Texas as his alter egos, (2) Fisher participated in lawsuits in Texas, and (3) Fisher had in-person meetings in Texas with representatives of the plaintiffs.

As the court had previously noted, the burden to pierce the corporate veil of Fisher’s companies allegedly conducting business in Texas was on the plaintiff, and there was no evidence to support those allegations. The court stated that an officer or employee of a corporation can be held liable for wrongdoing in which he participated without the need for piercing the corporate veil, but the plaintiff did not allege or offer any evidence to show that Fisher committed any tortious conduct in Texas. The plaintiff only made general allegations that Fisher committed torts (without stating where) or engaged in certain activities (without alleging that they were tortious conduct). Thus, the allegations that Fisher conducted business in Texas on behalf of corporations connected to him did not support an implied finding on specific jurisdiction.

Regarding the alleged participation of Fisher or Fisher-related entities in lawsuits in Texas, the plaintiff failed to present any evidence to support the existence or details of the alleged lawsuits, and the plaintiff did not allege or show that the prior lawsuits were connected to the torts alleged in this case.

Finally, the plaintiff asserted that Fisher participated in “numerous” in-person meetings in Texas but the allegations that stated Fisher committed torts did not say where, and the allegations regarding meetings in Texas did not assert that fraudulent representations or other tortious conduct occurred in the state.

In sum, Fisher negated all pleaded bases for personal jurisdiction, and the plaintiff failed to establish Fisher had sufficient contacts with Texas to support jurisdiction.

Domain Protection, LLC v. Sea Wasp, LLC, Civ. A. No. 4:18-cv-792, 2019 WL 5189200 (E.D. Tex. Oct. 15, 2019).

The court concluded that Sea Wasp LLC’s contacts could be imputed to the individual defendants on a piercing the veil theory. As a result, the court denied the individual defendants’ motion to dismiss for lack of personal jurisdiction.

Domain Protection was the registered name holder for over 50,000 domain names. Sea Wasp was the registrar over those names. The lawsuit concerned whether Sea Wasp was encroaching on Domain Protection’s proprietary interest in the domain names by turning the executive lock on them, which prevented Domain Protection from selling the domain names or updating their registration information. Sea Wasp insisted that Domain Protection lacked any proprietary interest in the domain names in light of a dispute over their ownership.

Pending before the court were several motions, including a motion to dismiss for lack of personal jurisdiction by individual defendants Gregory Faia and Vernan Decossas. Faia and Decossas “[were] the owners and officers and directors of Sea Wasp,” and they claimed that they had no contacts with the state of Texas. Faia was domiciled in Louisiana and Decossas was domiciled in Florida. Sea Wasp was “created in 2017 as a Nevada limited liability company, [and] is a citizen of Louisiana whose members reside in Louisiana.” According to Domain Protection, Sea Wasp was nothing more than a shell entity which Faia and Decossas used to evade existing legal obligations and to avoid wrongs. Domain Protection argued that Faia and Decossas were amenable to the court’s jurisdiction because the “corporate fiction” encapsulating Sea Wasp should be disregarded and Sea Wasp’s contacts should be imputed to them.

The court cited *Castleberry* and Fifth Circuit precedent in explaining that there were three broad categories of piercing: “(1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud.” These theories apply to both corporations and limited liability companies. “Should a court find that one of these theories applies, and that the corporate fiction should thus be disregarded, the corporations contacts will be imputed to its shareholders, successors, or other relevant actors.”

The court first addressed the claim that Sea Wasp was used to evade an existing legal obligation, which the court stated fell within the “illegal purposes” and “sham to perpetrate a fraud” categories. Under the policy of the Internet Corporation for Assigned Names and Numbers (“ICANN”), Sea Wasp had become the registrar of all domain names held by its predecessor, Fabulous.com, Australia. This transfer occurred after the two entities consummated an allegedly arms-length transaction whereby Sea Wasp purchased all of Fabulous.com, Australia’s assets, including the ICANN Registrar Accreditation Agreement. Fabulous.com, Australia’s assets also included the domain names registered in Domain Protection’s name. Domain Protection alleged that Sea Wasp was created, and these transactions took place, so that Sea Wasp could “seize control over the registrar functions without the consent of the domain name registrants who contracted with Fabulous.com to handle the registrar functions for their domain names.” Consequently, Domain Protection argued that Sea Wasp was used to avoid the obligations that Fabulous.com, Australia had under a court order and ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”).

The court disagreed. The order did not require Fabulous.com, Australia to follow certain instructions, and even if it did, that mandate did not apply to Sea Wasp. As to the UDRP, the court noted that any existing legal obligations belonged to Fabulous.com, Australia. “Thus, if any party was avoiding existing legal obligations, it was Fabulous.com, Australia.” In addition, the court observed that it was insufficient for Domain Protection to simply rehash factual allegations without any mention of which specific legal obligations Sea Wasp violated. Even if Domain Protection had alleged an existing legal obligation between Sea Wasp and itself, “it is doubtful that ... *Castleberry* contemplated a private, contractual legal obligation when discussing legal obligations.” As the court concluded: “Domain Protection failed to establish what existing legal obligation—that actually belonged to the Individual Defendants or Sea Wasp—that Sea Wasp was used to evade. And even if Domain Protection had alleged an existing legal obligation, a contractual obligation is not contemplated by *Castleberry*. Further, the Court Order Domain Protection cites does not stand for the proposition that Domain Protection claims it stands for. Consequently, the Court finds that Sea Wasp was not used to evade an existing legal obligation.”

The court then addressed the claim that the individual defendants “relied upon Sea Wasp as a protection of crime or to justify a tort or wrong,” which the court stated fell within the “sham to perpetrate a fraud” category. Under this claim, Domain Protection successfully persuaded the court:

In Domain Protection’s allegations, Domain Protection claims that Sea Wasp is a “shell entity” which was used to further a civil conspiracy, interfere with Domain Protection’s contract, and commit theft, conversion, and a violation of the Stored Communications Act (Dkt. #93). Specifically, Domain Protection maintains that Faia and Decossas used Sea Wasp to register themselves as Registrar over the Domain Names so that they could lock the Domain Names, change the DNS records, and thus prevent Domain Protection from controlling, selling, or receiving advertising revenue from the Domain Names (Dkt. #93). Put simply, Domain Protection alleges that the Individual Defendants created Sea Wasp so that Sea Wasp could “seize control over the registrar functions without the consent of the domain name registrants who contracted with Fabulous.com to handle the registrar functions for their domain names” (Dkt. #181). The Individual Defendants effectively remain silent on this front.

In its Motion, the Individual Defendants do not persuasively rebut any of these claims. Rather, the Individual Defendants hurl accusations at Domain Protection and claim that, if any party engaged in any inequitable conduct, it was Domain Protection (Dkt. #173). Additionally, the Individual Defendants include three brief sentences whereby they claim that any actions taken by themselves and Sea Wasp were done in “good faith” to prevent Domain Protection’s potentially criminal conduct (Dkt. #188). Such arguments do not defeat any allegations made by Domain Protection. Taking Domain Protection’s allegations as true at this stage, and noting that the Individual

Defendants have not provided any contradictory affidavits, it is evident that Domain Protection has pleaded sufficient facts to demonstrate that honoring the “legal independence” of the Individual Defendants would result in “inequity” or “injustice.” Domain Protection alleges that Sea Wasp was nothing more than a shell entity which was used to accomplish the ostensibly unlawful and/or tortious conduct that the Individual Defendants purportedly wanted to engage in. It would be inequitable to allow Sea Wasp to “cloak” or shield the Individual Defendants from the consequences of such alleged actions. Further, the Individual Defendants do not assert that it would be unfair or unreasonable for the Court to exercise jurisdiction over them.

Under Rule 12(b)(2), the court concluded that it was in the interest of equity to pierce the veil for personal jurisdiction purposes. The contacts of Sea Wasp were imputed to the individual defendants, and because Sea Wasp had submitted to the personal jurisdiction of the court, Faia and Decossas were held to be within the personal jurisdiction of the court.

Di Piazza v. Weather Group Television, LLC, Civil Action No. 5:19-CV-060-C, 2019 WL 8107917 (N.D. Tex. Sep. 9, 2019).

The court dismissed numerous entities because the plaintiff’s complaint failed to sufficiently allege facts that would support exercise of specific jurisdiction over the entities as the alter ego of an LLC defendant.

Various out-of-state entity defendants who were alleged parent companies of and investors in the Georgia LLC that operates the Weather Channel sought dismissal for lack of personal jurisdiction in a wrongful death lawsuit arising out of a fatal car accident involving storm chasers and TV personalities employed by the Weather Channel. The plaintiff argued that her complaint sufficiently alleged that the out-of-state defendants were engaged in a joint enterprise or joint venture or were each other’s agent, principal, employee, or alter ego so as to support the exercise of specific personal jurisdiction. The court relied on the following rules:

“In Texas, a subsidiary corporation’s contacts can be imputed to its parent corporation when the subsidiary ‘is organized and operated as a mere tool or business conduit’ of the parent.’ [citations omitted] To succeed under an alter ego theory, “the plaintiff seeking to establish personal jurisdiction must show that the ‘parent controls the internal business operations and affairs of the subsidiary.’ “ [citations omitted] Specifically, “[t]he evidence must show that ‘the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.’ “ [citation and footnote omitted] Accordingly, there must be a “plus factor, something beyond the subsidiary’s mere presence within the bosom of the corporate family.” [citation omitted]

The court concluded that the plaintiff failed to plead factual allegations to support the exercise of specific jurisdiction over the out-of-state defendants. “Other than alleging that the Out-of-State Defendants allegedly hold a financial interest in the Weather Channel and provide certain managerial services to said Defendant, Plaintiff has failed to allege the existence of a plus factor, or something beyond the subsidiaries mere presence within the corporate infrastructure.” Thus, the court granted the out-of-state defendants’ motion to dismiss.

U.S. Reif Northpointe Centre Texas Limited Partnership v. Connett, No. 05-18-01274-CV, 2019 WL 3315447 (Tex. App.—Dallas July 24, 2019, no pet.) (mem. op.).

The trial court granted the special appearance of Jordan Connett d/b/a Reconn Texas LLC and d/b/a Redefy Real Estate and dismissed U.S. Reif’s lawsuit against him. The court of appeals affirmed, concluding that the undisputed allegations and the factual findings supported by the evidence were insufficient to confer personal jurisdiction over Connett in his individual capacity.

In 2015, U.S. Reif (landlord) and Reconn Texas, LLC, a Colorado LLC (tenant) entered into a commercial lease agreement for office space in Austin, Texas. The lease was negotiated between brokers. Connett stated that U.S. Reif’s broker was given the tenant’s correct name and place of origin, but the final lease mistakenly listed “Reconn Texas LLC, a Texas limited liability company, doing business as Redefy Real Estate as tenant” instead of “Reconn TX, LLC, a Colorado limited liability company, doing business as Redefy Real Estate as tenant.” Connett stated that he did not personally contact or speak to U.S. Reif and that all negotiations were handled by the

brokers. Connett further stated that he was an individual living in Colorado since February 2011 who did not personally do business in Texas or maintain an agent for service of process in Texas. He also represented that he did not own or lease property in Texas and had not committed any torts in Texas.

U.S. Reif responded to Connett's special appearance and argued that because Connett signed the lease as an agent of a company that did not exist, and no other entity was disclosed to U.S. Reif at the time the lease was executed, Connett was personally liable on the lease as an agent of an undisclosed principal. U.S. Reif argued that because Connett was personally liable on a lease for Texas property, there were sufficient contacts in Texas for the trial court to exercise personal jurisdiction over him.

The court stated that "[a] non-resident corporate officer is generally protected from the exercise of jurisdiction when all of that individual's contacts with the forum were made in a representative capacity." According to the court, it is well-settled that ordinarily a corporate agent is not personally liable in an action on a contract made by him for the benefit of his corporate principal. When an agent negotiates a contract for its principal in Texas, it is the principal who does business in the state and not the agent. The court observed that the evidence indicated that Connett did not enter into the lease agreement in his personal capacity and that any action he took with regard to the lease was solely in his corporate capacity as an officer or manager of Recon Texas. Connett's signature on both the lease agreement and an amendment demonstrated that he was executing the documents in a representative capacity and not in an individual capacity.

U.S. Reif cited cases for the general proposition that an agent must disclose the identity of its principal to the other contracting party in order to avoid individual liability for a signature on a contract. Because Connett may be individually liable for the unpaid rent on the lease by failing to disclose the true principal, U.S. Reif argued that Texas may exercise specific jurisdiction over Connett. The court disagreed:

But U.S. Reif cites no authority for its proposition that this general principal of agency law creates personal jurisdiction. Rather, the appropriate focus in a minimum contacts analysis for purposes of personal jurisdiction is defendant's purposeful availment of the privilege of conducting activities within the forum state. We therefore reject U.S. Reif's invitation to conflate the jurisdictional inquiry with the underlying merits of the case.

Here, U.S. Reif did not specifically allege Connett entered into a contract with it in his personal capacity and Connett's affidavit testimony constitutes evidence that any actions he took with regard to U.S. Reif were solely in his corporate capacity as an agent of Recon TX. Based on the record before us, we conclude that Connett had insufficient contacts with Texas to support the exercise of specific jurisdiction over U.S. Reif's claims against him.

Nivisys, LLC v. Walsh, EP-18-CV-369-KC, 2019 WL 5417153 (W.D. Tex. July 9, 2019).

The district court concluded that the "fiduciary shield" doctrine did not prevent the court from considering the Texas contacts that Joseph Walsh developed while serving as the President and CEO of Nivisys, LLC. Walsh's motion to dismiss for lack of personal jurisdiction was denied.

Plaintiff Nivisys was an LLC that manufactured thermal imaging products. Defendant Joseph Walsh served as Plaintiff's president and CEO. Plaintiff asserted claims for breach of fiduciary duty and waste against Walsh, alleging losses from Walsh's ineptitude and abuses of power. Walsh moved to dismiss and argued that the court lacked personal jurisdiction over him, in part because the fiduciary shield doctrine prevented the court from relying on Walsh's Texas contacts to establish personal jurisdiction. The court disagreed:

The fiduciary shield doctrine is grounded in Texas law that holds a corporate agent generally is not personally liable "in an action on a contract made by him for the benefit of his corporate principal," because in that case, "only the principal is doing business in Texas." *Stull v. LaPlant*, 411 S.W.3d 129, 134, 138 (Tex. Ct. App. 2013). On the other hand, a corporate agent can "be held liable for committing a tort or wrong while engaged in the business of the corporate principal based on the agent's personal acts." *Id.* at 135.

The fiduciary shield doctrine has not been explicitly adopted by the Texas Supreme Court, and the Texas courts of appeals have taken two differing approaches to the doctrine. *Brown v. Gen. Brick Sales Co.*, 39 S.W.3d 291, 300 (Tex. Ct. App. 2001). While some courts apply the doctrine only in cases alleging general personal jurisdiction, see, e.g., *id.*, other courts apply the doctrine

where the defendant “can be held personally liable under applicable law,” regardless of whether the plaintiff asserts general or specific jurisdiction, *Stull*, 411 S.W.3d at 138. In *Stull*, the Texas court of appeals clarified that the doctrine does not shield a defendant from liability “for torts the individual is alleged to have committed while conducting the business of his employer[,] because individuals are liable for the torts they commit.” *Id.* at 135. This approach is consistent with the Fifth’s Circuit’s holding that the doctrine does not prevent a defendant “from being held personally liable for his own tortious conduct simply because he is an officer of a corporation.” *Gen. Retail Servs. v. Wireless Toyz Franchise, LLC*, 255 F. App’x 775, 795 (5th Cir. 2007).

Regardless of which of these rules the Court applies, the fiduciary shield doctrine does not prevent the Court from exercising personal jurisdiction over Defendants. First, Plaintiff asserts a theory of specific personal jurisdiction, not general jurisdiction. The doctrine, therefore, does not protect Mr. Walsh under the rule articulated in *Brown*. Second, Plaintiff alleges Mr. Walsh engaged in tortious conduct while managing Plaintiff’s business. Because individuals are generally liable for the torts they commit, the doctrine does not protect Mr. Walsh despite that his alleged wrongdoing occurred while he served as Plaintiff’s president and CEO. As a result, Mr. Walsh’s Texas contacts can be considered to determine whether the Court has specific personal jurisdiction over him.

The court ultimately determined that Walsh had numerous purposeful contacts with Texas and that the exercise of personal jurisdiction over him was fair and reasonable. Walsh’s motion to dismiss for lack of personal jurisdiction was denied.

T. Service of Process

Coleman v. Carrington Mortgage Services, LLC, Civil Action No. 4:19-CV-0231-ALM-CAN, 2019 WL 7195392 (E.D. Tex. Dec. 3, 2019).

The court gave a pro se plaintiff further opportunity to properly serve the LLC defendant after determining that the plaintiff failed to properly serve the LLC.

Rule 4 of the Federal Rules of Civil Procedure permits service of process upon a corporation, partnership or unincorporated association acting under a common name by delivering copies of the summons and complaint to “an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process....” Fed. R. Civ. P. 4(h)(1)(B). Texas law provides for service of process on an LLC by serving its registered agent, manager, or any member. Tex. Bus. Orgs. Code §§ 5.201, 5.255(3). Neither the individuals identified by the plaintiff to accept service on behalf of the LLC defendant nor the individuals who actually signed for the certified mail were qualified to accept service. Because the pro se plaintiff apparently misunderstood the requirements of Rule 4, the court explained the service requirements and gave the plaintiff an opportunity to properly effectuate service.

U. Pro Se Representation

Rocha v. Hosto, No. 4:19-CV-00572-O-BP, 2020 WL 592381 (N.D. Tex. Jan. 21, 2020), report and recommendation adopted, No. 4:19-CV-00572-O-BP, 2020 WL 584589 (N.D. Tex. Feb. 6, 2020) (“It is well-established that ... corporations are fictional legal persons who can only be represented by licensed counsel. The same rule applies with equal force to limited liability companies.”).

Stark v. Kohrs, No. 1:19-CV-041-LY, 2020 WL 734480 (W.D. Tex. Feb. 12, 2020).

The court reiterated, as directed in two previous orders in the same cause, that an individual plaintiff could not appear on behalf of an LLC. Attempting to proceed pro se, the plaintiff re-characterized claims initially brought on behalf of an LLC as individual claims by asserting assignment of those claims to him. The court was not persuaded and found that the plaintiff could not pursue the LLC’s claims pro se through assignment.

Infracon USA, LLC v. Funding Circle Partners, LP, No. 02-19-00423-CV, 2020 WL 719431 (Tex. App.—Fort Worth Feb. 13, 2020, pet. denied).

The court dismissed an LLC’s appeal of a default judgment for the following reasons: (1) ‘an entity such as [this LLC] may not appear through its members who are not attorneys’ and the notice of appeal was filed by a non-attorney member of the company; and (2) the LLC did not obtain counsel by the court-ordered deadline.

Strauss v. Lake City Credit, No. 4:19-CV-00620-SDJ-CAN, 2020 WL 2174461 (E.D. Tex. Apr. 6, 2020), report and recommendation adopted, No. 4:19-CV-00620-SDJ-CAN, 2020 WL 2126412 (E.D. Tex. May 4, 2020) (referring to the LLC defendant as a “corporate entity” and stating that “a corporation or other artificial entity may not appear pro se or be represented by a non-attorney”).

Opp v. Rainbow Int’l, LLC, No. 10-19-00022-CV, 2019 WL 5800449 (Tex. App.—Waco Nov. 6, 2019, no pet.) (mem. op.) (“In their pro se notice of appeal, the Opps purport to represent themselves and Spartan Construction, LLC. However, the Opps signed their notice of appeal and appellants’ brief in their individual capacities. Additionally, Texas law does not allow for nonlawyers to represent corporate entities. *See Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (stating that corporations may appear only through licensed attorneys); *Amron Props., LLC v. McGown Oil Co.*, No. 14-03-01432, 2004 WL 438783, at **1, 2004 Tex. App. LEXIS 2268 at **1-2 (Tex. App.—Houston [14th Dist.] Mar. 11, 2004, no pet.) (mem. op.) (stating that limited liability companies must appear through licensed attorneys); *see also* TEX. R. CIV. P. 7 (allowing a person to represent himself pro se). As such, we cannot construe the Opps’s pro se notice of appeal to encompass Spartan Construction, LLC. Without a proper notice of appeal, there is nothing preserved for appellate review on Spartan Construction, LLC’s behalf. Because Spartan Construction, LLC did not file a proper notice of appeal in this proceeding, we modify the style of this case to delete Spartan Construction, LLC.” (citations omitted)).

Jyue Hwa Fu v. Yeh Chin Chin, No. 3:18-cv-2066-N-BN, 2019 WL 3996876 (N.D. Tex. Aug. 23, 2019) (“Insofar as Ling’s Holdings, LLC is neither an individual nor a sole proprietorship, this defendant is not permitted to proceed *pro se* or through a non-attorney but rather must be represented by an attorney in litigation in federal court. The ‘clear’ rule is ‘that a corporation as a fictional legal person can only be represented by licensed counsel.’ *Donovan v. Road Rangers Country Junction, Inc.*, 736 F.2d 1004, 1005 (5th Cir. 1984) (per curiam) (quoting *K.M.A., Inc. v. General Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir. 1982)). This applies to limited liability companies. And Ling’s Holdings, LLC is CAUTIONED that a failure to hire counsel to represent it may result in appropriate measures, including possibly entering a default judgment against it.” (citation omitted)).

Teletrac, Inc. v. Logicorp Enterprises, LLC, Civ. A. No. 7:18-CV-240, 2019 WL 3891812 (S.D. Tex. Aug. 19, 2019) (“The Court notes that because Defendant is a limited liability company it may not represent itself in any court action and any filings made by Defendant not through counsel would be stricken. The Fifth Circuit allows district courts to strike the pleadings of corporations or partnership defendants attempting to proceed without an attorney.”).

Altech Controls Corp. v. Malone, No. 14-17-00737-CV, 2019 WL 3562633 (Tex. App.—Houston [14th Dist.] Aug. 6, 2019, no pet.) (mem. op.) (“Legal entities, such as corporations or limited liability companies, generally may appear in a district or county court only through a licensed attorney. A legal entity that attempts to thwart this rule does so at its peril. Although a non-attorney may perform certain ministerial tasks for a limited liability company, the presentation of a claim at trial is not a mere ministerial act. A non-attorney’s attempt to appear for a corporation or present a case on its behalf has no legal effect.” (citations omitted)).

Dorsha Motors of Texas, LLC v. Nichols, No. 05-19-00388-CV, 2019 WL 2647789 (Tex. App.—Dallas June 27, 2019, no pet.) (mem. op.) (“Legal entities such as a corporation or a limited liability company must be represented by a licensed attorney. Because appellant is not represented by counsel, we instructed appellant to notify this Court, by May 15, 2019, of the name, State Bar number, address, and telephone number of new counsel. We cautioned appellant that failure to comply may result in dismissal of the appeal without further notice. As of today’s date, appellant has not filed a response. Accordingly, we dismiss the appeal.”).

V. Attorney Disqualification

In re Murrin Bros. 1885, Ltd., 2019 WL 6971663, __ S.W.3d __ (Tex. 2019).

The Texas Supreme Court held that the trial court did not abuse its discretion in refusing to disqualify counsel from continuing its representation of both the defendant ownership faction and the LLC in a derivative suit brought by another ownership faction. The court also held that the relator did not establish that it lacked adequate remedies to redress the denial of the relator's Rule 12 motion requiring counsel for the LLC to show its authority to represent the LLC.

In 2011, the three original owners of Billy Bob's, a historic entertainment venue in the Fort Worth Stockyards, brought in additional owners and collectively formed Bill Bob's Texas Investments (BBT), a closely held LLC, to own and manage Billy Bob's. BBT's owners adopted a company agreement providing for BBT's structure and containing rules for its management. One provision of the company agreement required unanimous consent of the owners for any "matter within the scope of any major decision." The "major decisions" requiring unanimous consent included "settling, prosecuting, defending or initiating any lawsuit, administrative or similar actions concerning or affecting the business of BBT LLC and/or the BBT LLC Property." After the owners adopted the company agreement, a certificate of formation was filed with the Secretary of State. The certificate of formation listed six "Governing Persons" of BBT, all of whom are either owners of BBT or closely related to an owner or ownership entity. Concho Minick, an owner and governing person, was unanimously elected president and managing member with "full power and authority to make and carry out all decisions in connection" with "the ordinary, daily and routine business affairs of BBT."

In 2017, several owners and governing persons (nine of twelve owners and four of six governing persons, the "Hickman Group") became dissatisfied with Minick and attempted to dismiss him by a majority vote of the governing persons. Three owners, Minick, Murrin Brothers 1885, Ltd., and ERI-BBTX, LLC (the "Murrin Group") opposed Minick's removal, arguing that Minick's dismissal was a "major decision" for which the company agreement required a unanimous vote of the owners. Murrin Brothers 1885, Ltd. then filed a lawsuit, asserting both individual and derivative claims against the Hickman Group. The Murrin Group also sought injunctive relief to deny the Hickman Group the ability to unilaterally remove Minick, a declaration that the Hickman Group was without authority to oust Minick, and appointment of a receiver. The Hickman Group hired counsel to represent both BBT and the Hickman Group, and the Hickman Group filed counterclaims asserting both individual and derivative counterclaims and requesting appointment of a receiver.

About three months before trial, the Murrin Group filed a motion to disqualify the Hickman Group's attorneys, alleging that their representation of both the Hickman Group and BBT amounted to the impermissible representation of both sides in the same case (because BBT was the "plaintiff" in Murrin Group's derivative claims against the Hickman Group). The Murrin Group later filed a Rule 12 Motion, requiring the Hickman Group's attorneys to show its authority to represent the LLC. The Rule 12 motion argued that the decision to hire counsel on behalf of BBT was a "major decision" requiring unanimous consent of the owners. The Hickman Group responded that the certificate of formation granted them authority to hire counsel for BBT with a simple majority of the governing persons. The trial court denied both motions. After the court of appeals denied mandamus relief to the Murrin Group, the Murrin Group sought mandamus relief from the Texas Supreme Court on both motions.

With respect to the motion to disqualify, the Murrin Group argued that BBT and the Hickman Group were directly adverse, i.e., opposing parties, because BBT is the plaintiff in this derivative action and the Hickman Group are defendants. The court stated that the classification of the company in a derivative action is not that simple:

The battle lines are not so clear, however. Shareholder derivative actions provide a procedural pathway for a minority shareholder to sue on behalf of the company for wrongs committed against the company. *Sneed v. Webre*, 465 S.W.3d 169, 182–83 (Tex. 2015); *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162 (Tex. 1990); see also TEX. BUS. ORGS. CODE §§ 21.552, 101.452 (outlining requirements for derivative suits). Because the suit is to vindicate the company's rights, it is often said that the company is a "plaintiff" in a derivative action. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 658, 659 (N.D. Tex. 1978); *Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 36 (Tex. Civ. App.—San Antonio 1959, no writ); cf. *In re Schmitz*, 285 S.W.3d 451, 452 (Tex. 2009) (orig. proceeding). Labeling the company a "plaintiff" does not tell the whole story, however. Most

companies begin derivative litigation resistant to the minority shareholder's derivative claims. The resistance of the company's usual decisionmakers to the minority shareholder's claims is what causes derivative litigation in the first place. For this reason, in addition to sometimes being called plaintiffs, companies embroiled in derivative litigation are also commonly called "nominal defendants." See, e.g., *Meyer v. Fleming*, 327 U.S. 161, 167, 66 S.Ct. 382, 90 L.Ed. 595 (1946); *Bankston v. Burch*, 27 F.3d 164, 167 n.10 (5th Cir. 1994); *Neff ex rel. Weatherford Int'l, Ltd. v. Brady*, 527 S.W.3d 511, 518 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Thus, companies in derivative litigation are simultaneously "plaintiffs" and "defendants," depending on how you look at it. Of course, if the company is literally both plaintiff and defendant, then no lawyer could ever represent it in derivative litigation because to do so would automatically place the lawyer on both sides of the case. Obviously, that is not the rule.

The court said that rather than focusing on which party label applies to a company in derivative litigation, "the proper inquiry is to look to whether the substance of the challenged representation requires the lawyer to take conflicting positions or to take a position that risks harming one of his clients." The court noted a division of authority around the country as to whether such a risk is always present in derivative litigation, with some courts concluding that representation of both the company and the insider defendants is categorically impermissible, while other courts, including courts in Delaware, have taken a more practical approach and have reasoned that the interests of the company and its controlling officers or directors are often aligned such that separate counsel is not necessary unless a divergence of interests arises.

The court declined to announce a categorical rule governing dual representation in derivative litigation:

Whether a company and the individual defendants are "opposing parties" for purposes of Rule 1.06(a) in derivative litigation requires consideration of the true extent of their adversity under the circumstances. The definition of "directly adverse" representation provided in the comments to the disciplinary rules provides useful guidance in derivative litigation, as elsewhere:

Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 6.

The court stated that, not surprisingly, each faction claimed to be aligned with BBT and acting on its behalf while arguing that the other faction's positions are incorrect and harmful to BBT. According to the court, "[s]tripped of the conceptual and procedural baggage of its 'derivative' claims, this case is about who controls the management of BBT—the Hickman Group by virtue of its majority interest, or the Murrin Group by virtue of the Company Agreement's unanimity provision. Either the Hickman Group is right, in which case its interests and BBT's are truly aligned, or the Murrin Group is right, in which case BBT is aligned with it instead."

The court also pointed to the provisions of the Business Organizations Code governing derivative suits on behalf of closely held LLCs:

Perhaps anticipating suits like this one—control-fights between LLC members couched as derivative actions—the legislature has provided that "if justice requires: a derivative proceeding brought by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member's own benefit." TEX. BUS. ORGS. CODE § 101.463(c). For purposes of the disqualification motion, the trial court could have treated the derivative claims as claims "brought by the member for the member's own benefit," rather than disqualifying KHH based on the procedural complexities introduced by the derivative claims.

Indeed, if the derivative claims are treated as direct claims, as the statute permits, the Murrin Group's case for disqualification essentially vanishes.

Additionally, the court stated that none of the other "facts and circumstances" presented to the trial court supported disqualification. The case was nearly ready for trial at the time the trial court considered the disqualification motion, and the court said the motion could have been brought much earlier in the litigation. The Hickman Group and the Murrin Group were fully adverse, and both sought to control BBT. The question of which ownership group was entitled to control BBT could be fully and fairly litigated by the parties and counsel currently before the court, and the resolution of it would resolve the troublesome and complex question of BBT's alignment. No showing was made that the Hickman Group's lawyers possessed confidential information belonging to BBT that prejudiced the Murrin Group and could not otherwise have been obtained from the Hickman Group. The court stated that all these facts and circumstances supported the trial court's decision not to disrupt the current alignment of parties and counsel on the eve of trial.

Finally, the court addressed the Murrin Group's contention that allowing the Hickman Groups lawyers to represent both BBT and the Hickman Group would confuse the jury by creating the false impression that the Hickman Group speaks for BBT or that the two are one and the same. Even assuming the validity of this concern, the court said there were less severe remedies than disqualification, such as jury instructions or other parameters for the conduct of trial that would ensure an even playing field. Characterizing the dispute as "a fairly straightforward case about which ownership group controls the company's decisions," the court said that it was unlikely the jury would have any problem identifying the two ownership groups and their counsel, and it was unclear to the court why a jury would need to be told anything about the question of which lawyers have authority to represent the company itself. The court also found it unclear how the answer to that question would have any practical impact on the case.

In sum, the court concluded that the trial court did not abuse its discretion by denying the motion to disqualify.

The court next turned to the Murrin Group's Rule 12 motion. Rule 12 of the Texas Rules of Civil Procedure provides that a party, upon a sworn motion stating the moving party's belief that the suit is being prosecuted or defended without authority, may cause an attorney to show authority to act. The burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the suit. In support of its Rule 12 motion, the Murrin Group argued that the Hickman Group's lawyers lacked authority to represent BBT because the unanimity requirement of the company agreement prevented the Hickman Group from hiring counsel for BBT. The Hickman Group's principal response was that the powers afforded governing persons by the certificate of formation constituted "sufficient authority" for a majority of governing persons to hire counsel under these circumstances.

The court first stated that it disagreed with the Murrin Group's suggestion that the trial court effectively decided the merits of its claims by denying the Rule 12 motion. The trial court's ruling that the Hickman Group's lawyers showed "sufficient authority" to represent BBT was not a merits decision on ultimate issues involving the meaning of the company documents and control of the company in the future. Those questions remained for resolution at trial.

Assuming without deciding that the company agreement requires unanimous consent of the owners of BBT to hire counsel as argued by the Murrin Group, the trial court's abuse of discretion by misinterpreting BBT's governing documents did not warrant mandamus relief unless the Murrin Group also established its lack of an adequate remedy absent mandamus relief. The Murrin Group alleged that denial of the Rule 12 motion caused three harms that cannot be adequately remedied absent mandamus relief: (1) denial of the Murrin Group's contractual right to veto BBT's litigation counsel; (2) jury confusion and prejudice against the Murrin Group if the jury is told that the Hickman Group's lawyers represent both BBT and the Hickman Group; and (3) payment of the Hickman Group's legal bills by BBT, thus burdening the Murrin Group's interest in BBT with payment of their opponent's legal fees. The court concluded that none of these alleged harms satisfies the lack-of-adequate-remedy requirement. The court said that "[t]he only concrete, non-monetary harms the Murrin Group alleges are the possibility of jury confusion and the unfairness of being made to contribute towards its opponent's legal bills." The court pointed out that it had already described how the jury-confusion concern can be remedied, and the court said that adequate remedies exist for breach of contract and recovery of any legal fees that may turn out to have been improperly paid from the Murrin Group's interest in BBT. Because the Murrin Group did not establish the lack of an adequate remedy if mandamus relief is not granted, the court denied mandamus relief as to the Rule 12 motion.

W. Appeals

AME & FE Investments, Ltd. v. NEC Networks, LLC, 582 S.W.3d 294 (Tex. App.—San Antonio Nov. 20, 2017, pet. denied). (Although the court issued this opinion in 2017, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court of appeals granted AME’s motion that challenged the amount of security that NEC was required to post after prevailing in the trial court. The court determined that, when a judgment awards a party an interest in an entity, the amount of security sufficient to protect the party against loss or damage during the pendency of an appeal is the value of the property interest on the date the court rendered judgment.

In 2009, AME and NEC signed a Note Purchase Agreement (“NPA”) pursuant to which AME loaned NEC \$1.5 million secured by liens in NEC’s property. Under the NPA, NEC granted AME an option to convert the entire principal amount of the loan into 30% of NEC’s Class A Units of membership interest at any time prior to the loan’s maturity date.

A dispute arose between the parties. After a jury trial, the trial court ordered AME to pay NEC \$6,000 and further ordered that AME take nothing on its counterclaims against NEC. The final judgment also vacated AME’s liens and security interests. AME timely filed a notice of appeal.

On May 1, 2017, AME made a cash deposit in lieu of supersedeas bond in the amount of \$8,498.65. On May 5, 2017, NEC filed a document entitled Alternative Motions to Set Security or Determine Bond, requesting the trial court to either: (1) increase the amount of AME’s supersedeas bond to adequately protect NEC against any loss or damage the appeal might cause; or (2) allow NEC to enforce the judgment by requiring NEC to post security in accordance with Texas Rule of Appellate Procedure 24.2(a)(3). After a hearing, the trial court signed an Amended Order Setting Security declining to permit AME to supersede the judgment and requiring NEC to post security in the amount of \$1.5 million, thereby allowing NEC to enforce the judgment. On June 7, 2017, AME filed a motion challenging the trial court’s order and an emergency motion to stay the trial court’s order pending the court of appeals’ resolution. On June 8, 2017, the court of appeals granted AME’s emergency motion to stay. On November 7, 2017, NEC filed a motion to vacate the stay of the trial court’s order.

Although a judgment debtor generally is entitled to supersede a judgment while pursuing an appeal, see TEX. R. APP. P. 24.2, the trial court declined to permit AME to supersede the judgment pursuant to Rule 24.2(a)(3). As a result, NEC was required to post “security ordered by the trial court in an amount and type that will secure [AME] against any loss or damage caused by the relief granted [NEC] if [this] court determines, on final disposition, that that relief was improper.” In AME’s motion challenging the trial court’s order, AME argued that the amount of security posted by NEC was insufficient to secure AME against its loss or damage if it prevailed on appeal. Specifically, AME argued that the amount of security posted by NEC did not secure the damage AME would be caused if the court of appeals determined that AME was entitled to convert the loan into 30% of NEC’s Class A Units. AME asserted that allowing NEC to enforce the judgment by vacating AME’s liens and security interests will enable NEC to take any number of actions that could affect the value of NEC’s Class A Units. The court of appeals agreed with AME:

In this case, the status quo the posted security must preserve is the value of NEC’s Class A Units “as it existed before the issuance of the [] judgment” while AME’s liens and security interests were in place to protect that value by preventing NEC from certain actions in relation to its assets and property. Consistent with our holding in *El Caballero Ranch, Inc.*, the trial court was required to consider the damage that would be caused to AME by actions NEC could take in enforcing its judgment. If AME prevails on appeal, it will be entitled to 30% of NEC’s Class A Units. Because AME’s liens and security interests will be vacated while the appeal is pending, AME could lose the value of its potential equity interest if NEC sold, transferred, or dissipated its assets.

The portion of Rule 24.2(a)(3) allowing the judgment creditor to post security and enforce its judgment while an appeal is pending is not frequently addressed by appellate courts. An issue that has been addressed, however, is the amount that a judgment debtor would be required to post if a judgment awarded a judgment creditor an interest in a limited liability company. In *Abdullatif v. Choudhri*, No. 14-16-00116-CV, 536 S.W.3d 48, 2017 WL 2484374 (Tex. App.—Houston [14th Dist.] June 8, 2017, order [leave denied]), the underlying litigation concerned ownership interests

in a limited partnership and a limited liability company which was the general partner of the limited partnership. The judgment awarded Ali Choudhri damages and declared his respective ownership interests in the two entities and the dates on which Choudhri obtained the percentage ownership. The trial court signed a Supersedeas Order, permitting the appellants “to supersede the judgment with a cash deposit equal to the amount of damages plus applicable interest.” The order also “prohibited certain activities by the business entities as further security for Choudhri pending appeal.” Choudhri filed a motion in the Houston court arguing the trial court’s Supersedeas Order did not provide sufficient security for the declaratory portion of the judgment which the opinion defines as the “Declarations.”

The Houston Court first held the trial court abused its discretion by not setting the security appellants were required to post to supersede the Declarations. The Houston court then addressed “which part of Rule 24 governs superseding the Declarations.” Noting an interest in a partnership and a membership interest in a limited liability company are personal property, the Houston court concluded Rule 24.2(a)(2) governed how the appellants could supersede the Declarations. The Houston court also concluded the prohibitions in the trial court’s Supersedeas Order were not relevant to the supersedeas analysis, noting the amount of security required to supersede the trial court’s judgment was set by Rule 24.2(a)(2). Because Rule 24.2(a)(2) requires “the amount of security [to be] at least ‘the value of the property interest on the date when the court rendered judgment,’” the Houston court held “the trial court abused its discretion by not determining the value of the property interests it declared had been assigned to Choudhri and using that value to set the security appellants [were required] to post to supersede the Declarations.”

Although the security in this case is governed by Rule 24.2(a)(3), the Houston court’s opinion provides guidance regarding the amount of security that is sufficient to protect a party against loss or damage during the pendency of an appeal when a judgment awards the party an interest in an entity. In this case, if AME prevails on appeal, it will be entitled to 30% of NEC’s Class A Units. Therefore, we hold the trial court abused its discretion in not determining the value of 30% of NEC’s Class A Units on the date the trial court rendered judgment and using that value in setting the amount of security NEC was required to post.

The court of appeals granted AME’s motion and remanded the Amended Order Setting Security to the trial court for the entry of an order consistent with its guidance. The court noted that, if the trial court declined to permit AME to supersede the judgment, the trial court must take evidence on the value of 30% of NEC’s Class A Units as of the date the trial court rendered judgment. That value must be used in setting the amount and type of security that NEC must post.

X. Section 1981 Claims

Loco Brands, LLC v. Butler America, LLC, Case No. 6:18-CV-69-JDK-KNM, 2019 WL 3015046 (E.D. Tex. Jan. 28, 2019), report and recommendation adopted, 2019 WL 2281252 (E.D. Tex. May 29, 2019).

The court recommended denying a motion to dismiss a § 1981 claim. The court found that an LLC sufficiently alleged that it was a minority-owned business and that there was discriminatory intent.

Plaintiff Loco Brands, LLC d/b/a Direct TEK (“Direct TEK”) and Defendants Frontier Communications Corporation and Butler America, LLC were engaged in operations related to the telecommunications industry. Direct TEK contracted with telecommunications technicians and placed its technicians across the country through contracts and business relationships with Defendants.

Direct TEK alleged a number of claims against Defendants, including discrimination under 42 U.S.C. § 1981 based primarily upon the termination of numerous African-American technicians by Defendants. The court noted that § 1981 protects the rights of “[a]ll persons within the jurisdiction of the United States” to “make and enforce contracts” without respect to race. Section 1981 offers relief from racial discrimination that “blocks the creation of a contractual relationship” or “impairs an existing contractual relationship,” but only where “the plaintiff has or would have rights under the existing or proposed contractual relationship.” To state a claim, a plaintiff must allege “(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute....”

Frontier argued that Direct TEK failed to sufficiently plead the first two elements of a § 1981 claim. It argued that Direct TEK, a Texas limited liability company, did not fit within the definition of a protected racial class and could not, therefore, bring a discrimination claim under § 1981. In response, Direct TEK noted that several other circuits have held that a corporation may maintain a § 1981 claim. In addition, Direct TEK argued that it is a member of a protected class because it is a minority-owned company. The court concluded that “Direct TEK sufficiently pled the first element of a § 1981 claim by alleging it is a minority owned business.” In contrast to other precedents, Direct TEK alleged that its owner was a racial minority, and that allegation was sufficient to meet the first element of a discrimination claim under § 1981.

The parties then disputed whether Direct TEK adequately alleged discriminatory intent. Frontier argued that Direct TEK did not allege that Frontier discriminated against Direct TEK on the basis of race. Direct TEK responded by arguing that Frontier discriminated against it by directing the firing of African-American technicians and insisting that they be replaced with Caucasian technicians. Direct TEK also argued that there was “direct evidence” of discriminatory intent in an email that requested a “Caucasian” replacement technician. The court held that the allegations were sufficient:

Here, Plaintiff alleges two instances of racial prejudice by Frontier demonstrate discriminatory intent. First, Plaintiff alleges Frontier insisted Butler fire “numerous African-American technicians placed in Southeast Texas by Direct TEK....” Second, Plaintiff alleges Frontier fired an African-American technician and then pressured Butler to seek a replacement technician that was “Caucasian.” Plaintiff then alleges that it “refused to comply with Frontier/Butler/Nab’s acts of racial prejudice and insistence on only Caucasian technicians,” and, subsequently, Direct TEK was removed from all of Frontier’s projects. These allegations, taken as true and in combination with the email from Butler requesting a “preferably ‘Caucasian’” replacement technician, make plausible the inference that Frontier intended to discriminate against Plaintiff based on race. Accordingly, at this stage of the proceedings, Direct TEK’s allegations are sufficient to plead discriminatory intent.

The court recommended denying Frontier’s motion to dismiss the § 1981 claim. For similar reasons, the court also recommended denying Butler’s motion to dismiss the claim.

Y. RICO

State Farm Mutual Automobile Insurance Company v. Punjwani, Civil Action No. H-19-1491, 2019 WL 7372215 (S.D. Tex. Dec. 31, 2019).

The court denied a motion to dismiss the plaintiff’s RICO claim, holding that the plaintiff sufficiently pled that a professional LLC, as an ongoing legal entity, was an “enterprise” and that the physician who performed examinations, evaluations, and medical services for the LLC satisfied the “participation and conduct” requirement because the physician was the sole individual making medically unnecessary treatment decisions at the heart of the allegedly fraudulent scheme to defraud the plaintiff insurer.

State Farm sued Pain Alleviation & Interventional Needs, PLLC (“PAIN”) a Texas limited liability company, the LLC’s three members (collectively, “the Roopanis”), and Dr. Punjwani, who performed evaluations and medical services for PAIN. State Farm alleged that it paid hundreds of fraudulent claims for medical services performed at PAIN locations by Dr. Punjwani on accident victims who submitted claims for insurance benefits under State Farm policies. State Farm’s claims included claims under RICO and for money had and received.

Dr. Punjwani argued that State Farm’s RICO claim failed because PAIN was not an enterprise. To establish RICO liability, the plaintiff must establish the existence of a “person” and a separate and distinct “enterprise.” An enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” The court stated that State Farm adequately alleged that PAIN was an enterprise, as defined under RICO, because PAIN was a legal entity initially organized and operated as a limited liability company and later reorganized to be operated on an ongoing basis as a professional limited liability company.

Dr. Punjwani also argued that State Farm did not allege facts showing that Dr. Punjwani had any managerial or supervisory role at PAIN in order to satisfy the participation and conduct requirement of RICO. The court stated

that the RICO statute's requirement that the defendant have "some part in directing the enterprise's affairs," does not limit RICO liability "to those with primary responsibility for the enterprise's affairs." Because State Farm alleged that Dr. Punjwani was the sole individual making medically unnecessary treatment decisions central to the allegedly fraudulent scheme, the participation element was sufficiently pled, and the court denied Dr. Punjwani's motion to dismiss the RICO claim.