

**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

Smith v. Insurance Adjusters Group, LLC, No. 2:21-cv-00068-JRG-RSP, 2022 WL 1517026 (E.D. Tex. Apr. 29, 2022).

Applying the five factors from the Texas Business Organizations Code that indicate the creation of a partnership, the court concluded that there were multiple genuine issues of fact and that the plaintiffs' summary-judgment evidence, if credited, provided sufficient support for the satisfaction of most of the factors. The court thus denied the defendants' motion for summary judgment on the issue of the creation of a partnership between the parties.

A central issue in this case was the plaintiffs' claim that Duane Smith and William Cox orally agreed to form a partnership in 2017 to conduct a public adjusting business for insurance claims. Smith and Cox began working together on public adjusting in 2017. On January 16, 2020, Smith and Cox both signed a handwritten "Letter of Intent," which stated that "[o]ur intent is to establish an equal partnership between Bill Cox & Duane Smith for Insurance Adjusters Group, LLC." Defendants Insurance Adjusters Group, LLC and Cox argued that Smith and Cox had discussed forming a partnership, but at most possessed an "agreement to agree [to form a partnership]," which the parties never consummated. The defendants filed a motion for partial summary judgment regarding the existence of a partnership. The court ultimately denied the defendants' motion because multiple genuine issues of fact existed.

The court evaluated whether a partnership existed based on the five non-exclusive factors in § 152.052 of the Texas Business Organizations Code. The court acknowledged that Texas case law indicates that more than one of the factors must be found in order to establish a partnership, but the court stated that the plaintiffs offered summary-judgment evidence that, if credited, could satisfy most of the factors. The court briefly addressed the summary-judgment evidence as to each factor.

The first factor is "receipt or right to receive a share of profits of the business." Tex. Bus. Orgs. Code § 152.052(a)(1). The plaintiffs presented evidence that Smith and Cox each had a right to receive half of the gross revenues from the venture. The defendants argued that gross revenues are distinct from profits, but the court stated that the defendants' argument was not a "persuasive distinction" in the context of the statute.

The second factor is "expression of an intent to be partners in the business." Tex. Bus. Orgs. Code § 152.052(a)(2). The court found that the Letter of Intent and affidavits by Smith and another plaintiff satisfied this factor.

The third factor is "participation or right to participate in control of the business." Tex. Bus. Orgs. Code § 152.052(a)(3). The court found that while this factor was "heavily contested," the plaintiffs' deposition and affidavit evidence arguably met this factor if credited.

The fourth factor is "agreement to share or sharing" in either the losses of the business or "liability for claims by third parties against the business." Tex. Bus. Orgs. Code § 152.052(a)(4). The plaintiffs attempted to provide evidence of their contribution to a settlement with a "former IAG independent contractor." The court stated that this factor was "far from fully developed" and that the court's evaluation of the evidence on this factor was not necessary to rule on the motion.

The fifth factor is “agreement to contribute or contributing money or property to the business.” The plaintiffs presented evidence of a check that Cox signed in the amount of \$50,000 with the memo line entry “IAG Buy in.” The parties contested whether the check, itself, or only a copy, was actually delivered to the plaintiffs. Further, the parties did not negotiate the check. Smith also argued that he contributed property to the business in the form of business contacts leading to new assignments.

The court stated that it was clear that many genuine issues of fact existed. According to the court, “It is also not clear that, when this evidence is presented in its full development at trial, a reasonable trier of fact could not find that a partnership existed for all or part of the time period at issue.” Thus, the court denied the defendants’ motion for partial summary judgment.

Bodine v. First Co., Case No. 3:20-CV-3116-BT, 2021 WL 5505562 (N.D. Tex. Nov. 24, 2021).

The magistrate judge granted the defendants’ motion to dismiss the plaintiffs’ duty-of-loyalty claim. The magistrate concluded that plaintiffs failed to sufficiently allege that a relationship of trust and confidence existed or that a partnership had been formed.

Plaintiffs Matt and Jason Bodine, DBS Associates, Inc. (“DBS”), and DABCO brought various claims against defendants Jim Nation, Jeff Evans, Ryan Bricarell, and First Co., including a claim for breach of the duty of loyalty. First Co. was a Texas corporation that manufactured parts and products for heating, ventilation, and air conditioning systems; Nation, Evans, and Bricarell were employees of First Co.

First Co. sold parts and products to distributors, called “Manufacturer’s Representatives,” who then sold the parts and products to contractors. DBS was a California corporation, owned by the Bodines, that served as one of First Co.’s Manufacturer’s Representatives from 1994 until 2018. DABCO was a warehousing business that allegedly operated as an unregistered partnership between the Bodines, DBS, and the defendants for almost 20 years.

Plaintiffs alleged that, starting in 1998, defendants gradually increased lead times for First Co. inventory purchased by DBS in order to force plaintiffs to enter into DABCO. Plaintiffs further alleged that, beginning in 2017, defendants launched an effort to force plaintiffs to quit their relationship with defendants. This effort to “force [p]laintiffs to surrender” was allegedly waged with false statements, increased prices, and increased lead times. According to plaintiffs, this years-long conspiracy culminated when Evans sent Bricarell to be trained by plaintiffs on their marketing setup. After completing this training, plaintiffs alleged that “[d]efendants, and each of them, had decided that they had learned enough from [p]laintiffs to supply a confidence level of being able to run a renamed version of DBS on their own, without DBS’s founders.” According to plaintiffs, this allowed defendants to terminate their contract with DBS and to end the “DABCO relationship” six months later. Plaintiffs asserted that this termination, which they admitted was proper under DBS’s contract with First Co., revealed the ongoing scheme perpetrated by defendants.

Plaintiffs asserted that defendants breached a fiduciary duty of loyalty stemming from (a) an informal relationship of trust and confidence and (b) a de facto partnership. The magistrate judge granted the defendants’ motion to dismiss:

Plaintiffs next assert claims ... based on an alleged fiduciary relationship between Defendants and DBS. Here, Plaintiffs once again assert that Defendants owed them a fiduciary duty due to “Plaintiffs[‘] ... vulnerable position relative to Defendants.” They further argue that Defendants breached this duty by terminating DBS’s Manufacturer’s Rep contract and then pursuing DBS’s customer base. Plaintiffs assert a similar claim based on an alleged fiduciary relationship between Defendants and DABCO. This fiduciary relationship, according to Plaintiffs, was a result of the “de facto Partnership” between Plaintiffs and Defendants, wherein Plaintiffs were dependent on Defendants in order to operate a viable business. Plaintiffs allege that Defendants breached this particular fiduciary duty by allowing Plaintiffs to spend money “to ascertain whether the Plaintiffs’ warehousing and distribution model was successful,” while planning all along to end the partnership as soon as it became profitable.

Fiduciary duties attach in formal fiduciary relationships—such as partnerships—and in special relationships of trust and confidence. As discussed above, special relationships must be based on more than one party’s unilateral, subjective sense of trust and confidence in the opposing party. And in order for fiduciary duties to attach, a special relationship must exist before and apart

from the contract or agreement that forms the basis of the controversy. A partnership, meanwhile, is “an association of two or more persons [carrying] on a business for profit as owners....” Tex. Bus. Orgs. Code § 152.052(b). Texas courts employ a multi-factor, totality-of-the-circumstances balancing test in determining whether a partnership exists. Relevant factors include whether the alleged partners had a right to receive a share of profits of the business; whether there was an expression of an intent to form a partnership; whether the alleged partners had a right to control the business; whether the alleged partners agreed to share losses and liabilities of the business; and whether the alleged partners contributed money to the business.

... Plaintiffs have not pleaded any facts establishing that any relationship of trust and confidence existed outside of the commercial agreements that serve as the basis for this suit—DBS’s Manufacturer’s Rep contract and DABCO’s alleged oral contract. Additionally, with respect to DABCO, Plaintiffs have failed to plead that any single factor used to determine whether partnerships exist was present in this case. Plaintiffs’ have thus failed to plead any legal basis for the fiduciary duties that the Defendants allegedly breached. Therefore ... Plaintiffs have failed to plead facts necessary to show that any special relationship, or formal fiduciary relationship, existed between Plaintiffs and Defendants. Plaintiffs have thus failed to properly assert any cause of action based on breach of the duty of loyalty.

Veliz v. Veliz, Civ. A. No. 6:19-CV-94, 2021 WL 4538489 (S.D. Tex. Aug. 12, 2021).

The court denied a motion for summary judgment that sought a declaration that a partnership had been formed. The court determined that there was no conclusive evidence to declare that plaintiff and defendant were in a partnership.

Plaintiff Felipe Veliz and defendant Vincent Veliz were brothers. Felipe claimed sole ownership of VLZ Elite Concepts, which provided automotive services, including auto body, engine repair, and customizing services. Felipe asserted that he filed an assumed name certificate for VLZ Elite Concepts and that the company was labeled as a sole proprietorship.

Vincent, on the other hand, claimed that from at least 2007-2012, VLZ Elite Concepts was a partnership between the brothers. The court also noted the following: (1) during the alleged partnership period, the brothers did not have a joint bank account—instead, each brother maintained a separate account that the other could not access; (2) the brothers did not split profits and losses 50/50; (3) Vidala Trevino, the brothers’ tax preparer, stated that the partnership was a verbal agreement; and (4) the brothers were sued individually and as VLZ Detailing (another alleged partnership between the brothers) in the same civil action in 2010.

Vincent filed a motion for summary judgment on his declaratory judgment claim that sought a declaration that the brothers were in a partnership from at least 2007 to 2012. The court denied the motion:

Defendants [Vincent and an affiliated company] claim that Defendant Vincent and Plaintiff were in a partnership from at least 2007 to 2012. Under section 152.051(b) of the Texas Business Organizations Code, “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.” (2006). Section 152.052(a) gives a list of factors for determining whether a partnership has been created, including the individuals’:

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

TEX. BUS. ORGS. CODE ANN. § 152.052.

“Whether a partnership exists under Texas law is a question of fact.” *Derrick Petroleum Servs. v. PLS, Inc.*, 659 F. App’x 748, 750 (5th Cir. 2016). To determine whether a partnership exists, the court examines the “totality of the circumstances” in its analysis of the factors listed

above. *Ingram v. Deere*, 288 S.W.3d 886, 904 (Tex. 2009). Courts will generally determine that evidence of one factor is “insufficient to establish the existence of a partnership,” but “conclusive evidence of all five factors establishes a partnership as a matter of law.” *Id.* at 904.

Here, Defendants’ motion states that there was a partnership between Defendant Vincent and Plaintiff based on two factors: profit sharing and liability to third party claims. Defendant Vincent asserts that the parties shared profits based off the payment of taxes under a single employer identification number (“EIN”) in 2009, 2010, and 2012. Defendants then cite a judgment against Defendant Vincent and Plaintiff as evidence that the parties were liable to third parties as a partnership.

The evidence Defendants offer is insufficient to establish a partnership as a matter of law. First, Defendants only offer evidence that support two of the five factors—profit sharing and liability to third parties. *See, e.g. Derrick Petroleum Servs.*, 659 F. App’x at 750 (affirming the trial court’s ruling that there was no partnership when there was only limited support for two of the five factors). Second, the evidence Defendants do provide for these factors is limited. There is no conclusive evidence that Defendant Vincent and Plaintiff shared profits. Their taxpayer testified against that fact and stated that if the parties were in a partnership, they would have shared a joint bank account, which they did not. Additionally, Defendant Vincent himself stated in his deposition that he and Plaintiff only kept the proceeds from the work they performed individually. As the Texas Supreme Court noted in *Ingram*, receipt of profits as compensation for services is not evidence of a partnership. 288 S.W.3d at 898-99. Lastly, the sole fact that Defendant Vincent and Plaintiff were co-defendants in a lawsuit is not conclusive evidence that the parties had an agreement to share liability.

After consideration of the facts and relevant case law, the Court finds that there is no conclusive evidence to declare that Defendant Vincent and Plaintiff were in a partnership.

El Campo Ventures, LLC v. Stratton Securities Inc., No. 1:20-CV-00560-RP, 2021 WL 5194721 (W.D. Tex. June 24, 2021), report and recommendation adopted, 2021 WL 5195212 (W.D. Tex. July 9, 2021).

“...Defendant Stratton Securities Inc. (‘Stratton Securities’) constructed the Studios in 2012 to house oilfield workers. Within two years of opening, the Studios was almost entirely vacant due to a slowdown in oil and gas activity. ...

Around March of 2019, Stratton Securities was contacted by Rae Powell and Dan Gattis, principals of El Campo Ventures LLC (‘El Campo’). ...

On May 2, 2019 ... Stratton Securities and El Campo entered into a separate agreement (the ‘Letter Agreement’). The Letter Agreement notes that in light of an ‘opportunity’ ‘identified’ by El Campo, Stratton Securities and El Campo ‘desire to cooperate and work together to either (a) sell [the Studios] to be operated as a detention facility to a 3rd party purchaser ... or (b) reach an agreement for [the Studios] to be utilized in partnership with other parties in an entity to own and operate such facility as an immigration detention facility....’ ...

Despite various brokerage attempts on behalf of El Campo, it is undisputed that no agreement related to the sale or lease of the Studios was reached by May 17, 2021 [the deadline under the Letter Agreement]. Moreover, there is no evidence in the record that the May 17, 2021, deadline was formally extended. On June 6, 2019, Stratton Securities leased the Studios to the U.S. National Institute of Health (‘NIH’) as a shelter for unaccompanied minors for a sum over \$4 million. ...

In a lengthy and thorough analysis, Defendants argue that El Campo’s claims of breach of fiduciary duty, fraudulent inducement, fraud by nondisclosure, and statutory fraud fail as a matter of law. As it relates to El Campo’s breach of fiduciary duty claim, Defendants argue they were not El Campo’s fiduciary. Specifically, Defendants posit that (1) there is no evidence that Defendants and El Campo were agents; (2) there is no evidence that Defendants and El Campo were partners; and (3) there is no evidence supporting any other fiduciary relationship between the parties. ...

This leaves Shannon Stratton’s May 18, 2019, text message as the only evidence proffered by El Campo in support of its fiduciary duty, fraudulent inducement, fraud by nondisclosure, and statutory fraud claims. The relevant text messages include a conversation between Dan Gattis and Shannon Stratton whereby they talk about getting an individual named Pat Rice on a telephone call. In response to Gattis, a licensed attorney, asking Stratton whether she wanted Gattis on a phone call with Pat Rice, Shannon responded: ‘He said he can’t talk to an attorney

w/o legal representation of his own.’ Gattis responded, ‘[t]hat this is an outright lie. Only if I am acting as legal counsel for a client. Not if I am a partner in the deal.’ In response to Gattis’s assertion, Stratton stated: ‘I know I tried to explain.’

Upon review, even when viewing this lone text message exchange in the light most favorable to El Campo, it is insufficient to create a fact issue on the above-stated claims. First, El Campo fails to explain how the underlying text messages support its fraud claims. And second, this evidence does not sufficiently evidence a fiduciary relationship. The argument that Shannon Stratton’s ambiguous text message confirms that Defendants and El Campo had entered into a fiduciary relationship is, at best, questionable. Moreover, ‘merely referring to another person as ‘partner’ in a situation where the recipient of the message would not expect the declarant to make a statement of legal significance is not enough’ to evidence a fiduciary relationship. *Ingram v. Deere*, 288 S.W.3d 886, 900 (Tex. 2009); *see id.* (‘Referring to a friend, employee, spouse, teammate, or fishing companion as a ‘partner’ in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership.’). ‘The term ‘partner’ is regularly used in common vernacular and may be used in a variety of ways.’ *Id.* Accordingly, courts ‘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’ in determining whether the term ‘partner’ is evidence of a fiduciary relationship. *See id.*; *Murphy v. McDermott Inc.*, 807 S.W.2d 606, 613 (Tex. App.—Houston [14th Dist.] 1991, pet. denied) (explaining that although one party referred to the other party as his partner, this alone did not create a partnership).

Here, a reasonable jury could not conclude that a partnership or any other fiduciary relationship existed between Defendants and El Campo based solely on the above text messages. Because this is the only evidence, and argument, that El Campo asserts in defense of its fiduciary duty and fraud claims, the undersigned recommends that Defendant’s Motion for Summary Judgment be GRANTED to the extent it seeks the dismissal of El Campo’s fiduciary duty, fraudulent inducement, fraud by nondisclosure, and statutory fraud claims.”

Yanez v. WWGAF, Inc., No. 5:19-CV-1065-DAE, 2021 WL 5194731 (W.D. Tex. May 19, 2021).

The district court determined that two related corporations were neither a joint venture nor a partnership; consequently, the court granted summary judgment to the defendant corporations on those issues.

This wrongful death suit arose out of the drowning of Roberto Chavez Celis (“Celis”) in the Guadalupe River on July 11, 2019. Plaintiffs were family members of the deceased. Defendant WWGAF, Inc., doing business as Rockin R River Rides, was in the business of renting out water equipment such as rafts, kayaks, tubes, and paddleboards. Defendant UME, Inc., doing business as Camp Huaco Springs, operated camp and recreation sites. The companies were incorporated under separate articles of incorporation filed with the Texas Secretary of State. Richard Rivers was the President and William Rivers was the Vice President of WWGAF. William Rivers was also the President of UME. According to the defendants, William and Richard Rivers owned all of the shares in WWGAF and UME. The companies, however, did not share employees, finances, or lines of business.

Defendants moved for summary judgment on a number of grounds, including that they were not operating as a joint venture or a partnership. The district court agreed:

Plaintiffs seek to hold Defendants liable on a joint venture theory. A joint venture is contractual and “must be based upon an agreement, either express or implied.” *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). Plaintiffs must prove the following elements to establish that Defendants are in a joint venture: “(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.” *Id.* If any one of those four elements is missing, a joint venture does not exist.

Admittedly, the two companies are somewhat intertwined. Richard Rivers and William Rivers are the officers and shareholders of both companies. The directors of WWGAF are Richard Rivers, William Rivers, and H.E. Rivers. The directors of UME are Richard Rivers and William Rivers. WWGAF’s premises, which it leases from UME, is adjacent to UME’s premises. However, according to the affidavit of Richard Rivers, the companies do not share profits or losses, which are two required elements of a joint venture. Because Plaintiffs have not provided any evidence that contradicts the affidavit, the Court finds that Defendants are not engaged in a joint venture.

...

Plaintiffs also seek to hold each Defendant liable for any liability of the other on the basis that they are acting as a partnership. Under Texas law, courts consider five factors when determining the existence of a partnership:

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

Tex. Bus. Org. Code § 152.052(a)(1)–(5).

1. Receipt or Right to Receive a Share of the Profits

The Court has already explained above that, according to Richard Rivers’s uncontested affidavit, Defendants do not share the profits of their individual operations. Thus, this factor weighs against the existence of a partnership.

2. Expression of an Intent to be Partners in Business

When analyzing this second factor, “[c]ourts should only consider evidence not specifically probative of the other factors.” *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 741 (Tex. 2020) (quoting *Ingram v. Deere*, 288 S.W.3d 886, 900 (Tex. 2009)). On the one hand, Defendants do not share employees, uniforms, management personnel, parking lots, or inventory. WWGAF does not rent equipment at Camp Huaco Springs. Although they share a W.O.R.D. [Water Oriented Recreation District] permit, according to Richard Rivers’s affidavit, Defendants do not jointly pay fees to W.O.R.D.—UME “pays fees to W.O.R.D. based solely on Camp Huaco Springs revenues derived from their camp operations” and WWGAF “pays fees to W.O.R.D. solely based on Rockin R’s river outfitting revenues.” On the other hand, Camp Huaco Springs’s website at one point stated that it was “owned and operated by Rockin’ R and hosts Rockin R’s second largest equipment rental outfit for any of your water recreation needs.” Given this conflicting evidence, the Court finds that this factor is neutral.

3. Participation or Right to Participate in Control of the Business

“The right to control a business is the right to make executive decisions.” *Rojas v. Duarte*, 393 S.W.3d 837, 843 (Tex. App.—El Paso 2012, pet. denied). Several subfactors that are relevant in determining whether a party has the right to make executive decisions include: “(1) the exercise of authority over the business’s operation; (2) the right to write checks on the business’s checking account; (3) control over and access to the business’s books; and (4) the receipt of and management of all of the business’s assets and monies.” *Houle v. Casillas*, 594 S.W.3d 524, 549 (Tex. App.—El Paso 2019) (quoting *Rojas*, 393 S.W.3d at 843). William Rivers and Richard Rivers are the only shareholders for UME and WWGAF and they each serve as Presidents of UME and WWGAF. They are also directors for both companies. However, Defendants hold separate board meetings and employ separate general managers to oversee the supervision of their respective employees. They do not share bank accounts and they pay their W.O.R.D. fees separately. According to Richard Rivers’s affidavit, “Rockin R does not receive any income from the Camp Huaco Springs business and Camp Huaco Springs does not receive any income from the Rockin R business.” Upon considering these facts, the Court finds that this factor is neutral.

4. Agreement to Share or Sharing (1) Losses or (2) Liability for Claims by Third Parties

According to the affidavit from Richard Rivers, the two companies do not share losses and they had their own respective liability insurance policies with separate insurance carriers at the time of the accident. Given this evidence and the absence of any other evidence that would indicate an agreement to share or sharing of losses or liability for claims by third parties, the Court finds that this factor weighs against the existence of a partnership.

5. Agreement to Contribute or Contributing Money or Property to the Business

Although WWGAF leases land from UME, Defendants’ rental equipment and retail inventory remain under control of their respective companies. Further, as stated above, neither

company receives income from the other. In the absence of conflicting evidence, the Court finds that this factor weighs against the existence of a partnership.

After weighing the five factors, the Court finds that Defendants are not a partnership. Because Defendants are not engaged in a joint venture or a partnership, the Court dismisses Plaintiffs' allegations with respect to these issues.

Denicus v. Bosacker, Civil No. 6:19-CV-00655-ADA-JCM, 2021 WL 2715978 (W.D. Tex. Jan. 26, 2021).

The district court concluded that a counter-plaintiff had alleged facts plausibly establishing the existence of a partnership between the counter-defendants. As a consequence, the court denied a motion to dismiss on a partnership liability claim.

Travis Bosacker operated a dog training facility in Minnesota. Danny Denicus was Bosacker's employee at the facility for several years until Denicus moved to Texas. Once in Texas, Denicus met and worked for Roger Sikes. Denicus obtained Bosacker's help to start Denicus's own dog training business in Texas. Bosacker alleged that Sikes was Denicus's business partner in this enterprise and that Sikes provided the land and investment capital necessary to pursue the business.

Over the course of several years, Bosacker gave Denicus and Sikes possession of fourteen valuable hunting dogs, a box trailer, and equipment to help train the dogs. Bosacker alleged that he provided these items conditioned on eventual payment. The dogs, in particular, were the subject of ongoing price negotiations. Denicus was also allegedly responsible for training the dogs to increase their value in exchange for the right to possess them .

At some point, price negotiations over the dogs allegedly fell apart and Bosacker demanded return of his dogs and equipment. Twelve dogs were returned to Bosacker in August 2020. Bosacker alleged that one of his dogs died in Denicus's possession before the rest were returned. The trailer and other equipment were not returned.

In October 2019, Denicus sued Bosacker for breach of contract and other causes of action in Texas state court. In November 2019, Bosacker removed the case to federal court and later filed a counterclaim. On September 9, 2020, Denicus and Sikes each filed motions to dismiss several of Bosacker's claims raised in the Amended Counterclaim and Third-Party Complaint, including a claim of partnership liability. The district court denied the motion and found that Bosacker had successfully alleged the existence of a partnership:

Sikes argues that he is not liable for Denicus's conduct because Bosacker has not alleged facts which plausibly show that he and Denicus were business partners. In his Supporting Brief, Sikes refers to the statutory theory of a partnership while Bosacker refers to a theory of "joint venture" in his Response.

Regardless of the nomenclature, Bosacker pleads a statutory partnership theory of joint and several liability. "Joint ventures" in Texas are governed now by the same legal principles as partnerships. "The legal distinctions between partnerships and joint ventures have virtually disappeared." 1 Tex. Prac. Guide Bus. & Com. Litig. § 1:2. (citing *Sims v. W. Waste Indus.*, 918 S.W.2d 682 (Tex. App.—Beaumont 1996, writ denied)). The Texas Business Organization Code even includes the term "joint venture" in its definition of a partnership. See Tex. Bus. Org. Code Ann. § 152.051(b)(2) ("[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether ... the association is called a 'partnership,' 'joint venture,' or other name"). The Court therefore considers whether Bosacker alleges facts sufficient to establish a partnership for the purposes of Denicus and Sikes's Motions to Dismiss.

Factors indicating a partnership include (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. Tex. Bus. Org. Code Ann. § 152.052(a). Texas courts apply a totality-of-the-circumstances test under which no one factor is solely determinative. *Ingram v. Deere*, 288 S.W.3d 886, 898 (Tex. 2009) (applying identical factors from the predecessor statute). A showing of all the factors will establish a partnership as a matter of law, while showing only one factor will normally be insufficient. The facts alleged by Bosacker fall in the middle of this spectrum but are still sufficient to plausibly show the existence of a partnership at the Motion to Dismiss stage.

The facts alleged plausibly satisfy the second, third, and fifth factors. Bosacker alleges that Sikes was Denicus's "business investor" and that Denicus had authority to negotiate matters relating to the dog training business (the purchase of dogs and equipment) on Sikes's behalf. These facts plausibly suggest mutual participation in the business between them. Bosacker also alleges that Sikes "provided land, facilities, and financial investment while Denicus provided experience and labor with dogs." This alleged exchange plausibly suggests an agreement to contribute property to the business.

Bosacker also alleges facts which plausibly show sufficient "expression of intent to be partners" per § 152.052(a)(2). Intent to be partners can be inferred from "the putative partners' speech, writings, and conduct." *Ingram*, 288 S.W.3d at 889. The Court will only consider allegations not specifically probative of the other factors. Excluding the allegations already discussed, Denicus and Sikes's alleged conduct plausibly suggests an intent to be partners. Bosacker alleges that Denicus and Sikes acted together in negotiating for the purchase of the dogs. Bosacker also specifically alleges that, together, they sought to obtain additional dogs for breeding. Finally, Bosacker alleges that he negotiated prices for dogs directly with Sikes, not just Denicus.

Taken as true and read in the light most favorable to Bosacker, these allegations plausibly suggest that Denicus and Sikes held each other out as partners in a common business enterprise. It makes no difference that Bosacker did not allege that Denicus or Sikes called each other "business partners" because sufficient allegations will indicate a partnership no matter what the parties call the arrangement. See Tex. Bus. Org. Code. Ann. § 153.051(b)(2) ("... an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether ... the association is called a 'partnership,' 'joint venture,' or other name"). Thus, for the purposes of the Motions to Dismiss, Bosacker alleges facts which plausibly establish the existence of a partnership between Denicus and Sikes.

B. Nature of Partnership

152 Lakewest Community, LP v. Ameristar Apartment Services, L.P., No. 05-20-00483-CV, 2021 WL 5710553 (Tex. App.—Dallas Dec. 2, 2021, no pet. h.) (mem. op.).

A limited partnership argued that it was a public facility corporation under the Texas Local Government Code, and as such was a "governmental unit" that could file an interlocutory appeal under the Texas Civil Practice and Remedies Code. The court held that the limited partnership could not be considered a public facility corporation since it was not a corporation, and the limited partnership thus was not a governmental unit under the Texas Civil Practice and Remedies Code.

152 Lakewest Community, LP ("Lakewest") and its general partner, Supreme Development Corporation ("Supreme"), argued that they were "governmental units" as defined by Section 101.001(3)(D) of the Texas Civil Practice and Remedies Code as "any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(D). The two organizations sought to invoke appellate jurisdiction for an interlocutory appeal under Section 51.054 of the Texas Civil Practice and Remedies Code as governmental units. *See id.* § 51.054. A public facility corporation is a type of governmental unit (Tex. Loc. Gov't Code § 392.006), and Supreme fell within the scope of a public facility corporation because it was owned and operated by the Dallas Housing Authority. Thus, the court had jurisdiction over the interlocutory appeal as to Supreme.

Lakewest argued that it was also a public facility corporation, and thus a governmental unit, because it carried out the duties of a public facility corporation under Sections 303.002(a) and 303.041 of the Texas Local Government Code. *Id.* §§ 303.002(a), 303.041. However, as a limited partnership, Lakewest was not a corporation and could not be considered a public facility corporation. The court stated that Chapter 303 indicates that a public facility corporation must be a corporation. *See* Tex. Loc. Gov't Code §§ 303.002(b), 303.022, 303.024, 303.025. Absent statutory authority, Lakewest, an entity hired to manage such a facility, was not a governmental unit for purposes of appellate jurisdiction for an interlocutory appeal.

See also cases included below under “Pro Se Representation” holding that a partnership, as an artificial entity, is not permitted to appear *pro se*, and *cases summarized under “Attorney’s Fees”* holding that a partnership is not an “individual or corporation.”

C. Partner’s Personal Liability for Obligations of Partnership

Weitz Company, LLC v. Strong Structural Steel, Ltd, Civ. A. No. 7:21-CV-00061, 2021 WL 3486787 (S.D. Tex. Aug. 9, 2021) (“Plaintiff further alleges that Defendant Braden & Treyton Management is vicariously liable as a general partner of Defendant Structural Steel, a Texas limited partnership. ‘[I]n Texas as elsewhere, the general partner in a limited partnership is liable for the debts and obligations of the partnership.’ Thus, as a general partner of Defendant Structural Steel, Defendant Braden & Treyton Management is vicariously liable for Defendant Structural Steel’s debts and obligations under and resulting from its breach of the Agreement with Plaintiff.”).

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

WWLC Investment, L.P. v. Miraki, 624 S.W.3d 796 (Tex. 2021).

The Texas Supreme Court concluded that a limited partnership was not properly served and was thus entitled to bill of review relief from a default judgment. In the course of the decision, the court discussed the roles and status of the corporate general partner and an individual who served as president of the limited partnership and who claimed to be the “owner” of the corporate general partner.

As noted at the outset, service on a limited partnership may be made on its general partner or registered agent. TEX. BUS. ORGS. CODE §§ 5.201(b)(1), 5.255(2). The evidence establishes that Chen was neither and that HPZ was both. Chen testified that she was WWLC’s president, the title she used in executing the lease to Miraki, and later its CEO. The “president” of a limited partnership is defined by statute as the individual “designated” to hold that title under the “entity’s governing documents” or the “officer ... authorized to perform the functions of the principal executive officer.” *Id.* § 1.002(70). An “officer,” like a CEO, “means an individual elected, appointed, or designated as an officer of an entity by the entity’s governing authority or under the entity’s governing documents.” *Id.* § 1.002(61). An officer need not be a general partner and is not one by virtue of holding the office. Service on a limited partnership, unlike a corporation, is not authorized to be made through an officer. *See id.* § 5.255(1)–(2) (authorizing service on a “corporation[’s]” president but omitting a similar authorization for limited partnerships). Chen referred to herself as WWLC’s “owner.” An “owner” of a partnership is statutorily defined as “a partner.” *Id.* § 1.002(63)(B). “Partner” means a limited partner or general partner.” *Id.* § 1.002(66). One could not infer from the fact that Chen was WWLC’s owner whether she was a limited partner, not authorized by statute to accept service on the partnership, or a general partner.

While the trial court found that Chen’s testimony established that she was the sole person involved with WWLC, that finding, standing alone, does not qualify her as WWLC’s general partner. A limited partnership’s general partner is “a person who is admitted to a limited partnership as a general partner in accordance with the governing documents of the limited partnership.” *Id.* § 1.002(33). The record does not include WWLC’s governing documents. Moreover, Chen testified that she was not WWLC’s general partner and that HPZ was. A corporation, like HPZ, may serve as a limited partnership’s general partner. *Id.* § 1.002(69-b) (defining a “[p]erson” as including “a corporation”). The evidence further shows that HPZ acted as WWLC’s general partner. HPZ filed a certificate-of-formation amendment and an assumed-name certificate with the Secretary of State to complete a name change for WWLC. In executing both documents, Chen expressly invoked HPZ’s authority to file documents on WWLC’s behalf. By statute, only a limited partnership’s general partner is authorized to make those changes. *Id.* § 153.051(3) (requiring “[a] general partner” to “file a certificate of amendment” with the Secretary for any “change in the name of the limited partnership”).

Miraki additionally argues that service on Chen was proper because she served as president and registered agent of both HPZ and WWLC. But there is no evidence that Chen was HPZ's president, only that she was its "authorized person" to sign the documents filed for WWLC. And there is no evidence that Chen served as either HPZ's or WWLC's registered agent. Instead, the evidence shows that only HPZ, not Chen, was WWLC's registered agent.

Finally, Miraki argues, and the court of appeals reasoned, that service through Chen was proper because HPZ forfeited its corporate charter on January 29, 2016. But all five of Miraki's process server's attempts to serve Chen occurred on or before January 29, when he could have served HPZ. Moreover, a corporate general partner that loses its certificate of formation remains a limited partnership's general partner for at least 90 days unless the partnership agreement or the partners by written consent provide otherwise. TEX. BUS. ORGS. CODE § 153.155(a)(10)(B). The record contains no evidence of either. Miraki accomplished substituted service on Chen on April 6—only 68 days after HPZ forfeited its charter and well within the period in which he could have served HPZ as WWLC's general partner.

In sum, WWLC met its burden to prove lack of proper service and is therefore entitled to bill-of-review relief. Accordingly, without hearing oral argument, we grant WWLC's petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for proceedings consistent with this opinion.

E. Fiduciary Duties of Partners and Affiliates

Power v. Power, No. 05-19-01557-CV, 2022 WL 1314944 (Tex. App.—Dallas May 3, 2022, no pet. h.) (mem. op.).

The court held that the Texas Business Organizations Code allowed the plaintiff partner to maintain an action in his individual capacity against the defendant partner for relief from the defendant partner's breaches of duties and to enforce and protect the plaintiff partner's interest as a partner. The doctrine of fraudulent concealment applied to toll the statute of limitations on the plaintiff partner's claims based on the defendant partner's failure to disclose all material facts relating to the partnership's finances.

Craig Patrick Power ("Craig") and Braden Richard Power ("Braden") were brothers who worked together to acquire, develop, and manage apartment complexes. For each property that the brothers developed, they formed a Texas-based entity ("Jointly Owned Entities") in which the brothers each owned (individually or through their respective trusts) half of the ownership interests (with one exception). The brothers jointly owned Power Property Management, Inc. to provide property management services for the apartment complexes.

Testimony at trial showed Craig was primarily responsible for operating the business while Braden was primarily responsible for designing and overseeing the renovations of the older buildings that the brothers purchased. Braden testified that he began inquiring about the finances of the Jointly Owned Entities in 2011 and asked Craig for a reconciliation of the finances. Braden received the reconciliation in December 2013 and concluded that Craig had been diverting a larger share of income from the Jointly Owned Entities to himself and failing to disclose the actual amount of profits of the Jointly Owned Entities.

Braden, in his individual capacity, brought suit against Craig, in his individual capacity, for breach of fiduciary duty, fraud, fraud by nondisclosure, statutory fraud, breach of contract, and civil theft. At trial, the jury found, among other things, that the brothers had created a partnership to purchase, develop, and sell properties; a relationship of trust and confidence existed between the brothers; Craig managed the accounting, books, and records for their relationship upon which Braden justifiably relied; Craig did not comply with his fiduciary duty to Braden; and Craig committed fraud by nondisclosure and civil theft. The trial court entered judgment on the jury's verdict, and Craig appealed the trial court's judgment.

On appeal, Craig argued that Braden lacked the capacity to recover the damages he sought, Braden's claims were barred by the applicable statutes of limitations, and the trial court abused its discretion by admitting evidence of spoliation and instructing the jury on spoliation. The court affirmed the first two issues and reversed and remanded the trial court's judgment because of the third issue. Craig also presented other arguments that the court declined to consider due to the remand of the trial court's judgment.

First, Craig argued Braden lacked the capacity to recover the damages Braden sought because the alleged damages resulted from injuries incurred solely by the Jointly Owned Entities or the partnership found by the jury.

The court rejected Craig's argument because one partner may sue another partner for damages that the first partner personally suffers.

The jury found that Craig and Braden created a partnership to purchase, develop, and sell properties, and Craig did not challenge this finding. The court cited *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 779 (Tex. 2020) for the proposition that “[w]hether a claim brought by a partner actually belongs to the partnership is ... a matter of capacity because it is a challenge to the partner’s legal authority to bring the suit.” The court noted numerous provisions of the Texas Business Organizations Code bearing on the question of Braden’s capacity to assert his claims in this case. The Texas Business Organizations Code provides that a partner is liable to the other partners for violating a duty to the other partners that causes harm to the other partners. Tex. Bus. Orgs. Code § 152.210(2). Further, a partner owes other partners a duty of care, which is a duty “to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances.” *Id.* §§ 152.204(a)(2), 152.206(a). A partner is required to discharge the partner’s duties to the partnership and other partners in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. *Id.* § 152.204(a), (b). Section 152.211 delineates the authority of partners and partnerships to bring claims and seek various remedies and provides that one partner “may maintain an action against ... another partner for legal or equitable relief” to, among other things, enforce a partner’s rights under Sections 152.204 and 152.206 and to “enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.” *See* Tex. Bus. Orgs. Code § 152.211(b)(2)(A), (b)(3).

Braden, individually, sued Craig, individually, alleging breach of fiduciary duty and other causes of action. Braden alleged that he was injured by Craig’s actions and produced evidence showing that Craig failed to pay Braden his proportionate share of profits generated by the partnership and made false representations to Braden about the financial condition of their businesses. By these actions, Craig breached his duty of care to Braden and caused injury to Braden personally rather than the partnership. Thus, the court stated that Braden had capacity to assert the claims he asserted. The court noted that Braden did not claim that Craig’s actions reduced the value of the partnership or devalued Braden’s ownership interest, which would be an injury to the partnership. Rather, he contended Craig hid assets from him and failed to pay him his share of the partnership profits. Any recovery Braden sought was not a partnership asset, but was rather Braden’s individual share of the partnership assets that Craig allegedly took and to which Braden personally was entitled.

Second, Craig argued that Braden’s claims were barred by the applicable statute of limitations because the evidence conclusively proved that Braden knew or should have known about the facts giving rise to his claims more than two or four years before he filed suit on November 27, 2015. In response, Braden argued that the tolling doctrine of fraudulent concealment applied. Fraudulent concealment is a fact-specific equitable doctrine that tolls limitations until the fraud is discovered or could have been discovered with reasonable diligence. Under fraudulent concealment, when a defendant has a duty to make a disclosure but instead conceals the existence of the cause of action from the other party, the defendant is estopped from utilizing the defense of limitations until the other party learns of the right of action or should have reasonably discovered it. Further, a person to whom a fiduciary duty is owed may be unable to inquire into the fiduciary’s actions or may be unaware of the need to do so. Where a claim involves a fiduciary relationship, even if an inquiry is made, facts that might ordinarily require investigation likely may not excite suspicion. Once misconduct is evident, a diligent inquiry is required, even in the context of a fiduciary relationship.

The court rejected Craig’s limitations argument because the evidence supported the jury’s findings. As a fiduciary, Craig had a duty to disclose all material facts to Braden. Craig had been responsible for tracking how much money in a commingled account belonged to each brother. In 2008, Craig told Braden the business was having financial problems, but Braden claimed to rely on Craig’s representations that they could resolve the situation. In 2011, Braden began asking more questions about the Jointly Owned Entities’ finances, but Braden claimed that he did not receive full disclosure of the businesses’ finances until he received the reconciliation in December 2013. Further, an email from November 2013 indicated that Braden did not have an account to access the businesses’ financial information. Braden further testified that after he received the reconciliation, Craig would not provide further information, and Braden did not realize that the finances were a “Pandora’s Box” until early 2014. The court found that the evidence did not conclusively prove that Braden knew or should have known about the facts giving rise to his claims more than two or four years before he filed the lawsuit.

Third, Craig argued that the trial court abused its discretion by admitting evidence of spoliation and instructing the jury on spoliation. The jury had heard testimony that Craig ordered an employee to destroy

documents, and the trial court submitted a spoliation instruction to the jury. Before a trial court can determine that a party spoliated evidence, the trial court must conduct a two-step analysis: (1) whether the spoliating party had a duty to reasonably preserve evidence, and (2) whether the party intentionally or negligently breached that duty by failing to do so.

The court reversed the trial court's judgment because the trial court abused its discretion in admitting spoliation evidence and subsequently giving the spoliation instruction, and the errors probably caused the rendition of an improper judgment. The trial court never made a finding regarding either step of the required spoliation analysis. Further, the court found that the erroneous instruction created a substantial likelihood of harm in the closely contested case. Both liability and the extent of each party's damages were closely contested at trial. Craig and his expert argued that the Jointly Owned Entities owed Braden less than \$400,000, while Braden's expert placed the value at nearly \$14,000,000. Craig argued that Braden had access to all documents and shared the responsibility of operating the business. However, Braden argued that Craig operated the business and that Braden possessed a limited role in the business. Further, in opening and closing arguments, Braden's counsel told the jury that Craig destroyed documents and that destruction was a breach of fiduciary duty. In light of the erroneous instruction and closely contested nature of the case, the court reversed the trial court's judgment.

Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury's finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney's fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall ("Walker") and some of his cousins inherited land (the "Blaffer Tract") along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties ("Freeport Properties"), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker's wholly owned company, Briarwood Capital Corporation ("Briarwood Capital"), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership's entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership's existence. The court referred to the appellants collectively as the "Other Limited Partners."

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of

the limited partnership on two valuable tracts of land obtained by an entity of Walker's in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

In the course of the court's discussion, the court noted that it would be inappropriate to hold that there was insufficient evidence of fairness based on events that transpired after the transaction, rather than evaluating the transaction in light of the circumstances existing when it took place, citing *Est. of Townes*, 867 S.W.2d at 417 and *Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (court evaluates whether fiduciary significantly benefits at expense of one to whom he owes fiduciary duty based on circumstances existing when transaction takes place). The court also noted that the Other Limited Partners' suggestion that the transaction was unfair because it created a conflict of interest—by making Walker and Freeport Properties competitors in the marina development project—disregarded the partnership agreement, which allowed any partner to “engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business” of the limited partnership. The court stated that Texas law allows parties to limit the scope of fiduciary duties in this manner in the partnership agreement, citing *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), and the existence of a conflict of interest resulting from competition, standing alone, thus did not establish the transaction's unfairness. Consistent with the partnership agreement, the trial court's charge instructed the jury that possessing a competitive business interest was not a breach of the duty of loyalty, and the court was required to assess evidentiary sufficiency based on the charge given in the absence of an objection to the instruction. The Other Limited Partners further argued that Walker's conflict of interest resulting from his competition in the marina development project later ripened into self-dealing when Walker made a better deal for himself than the partnership in a marina operating agreement, but this argument again relied on events that transpired after the transaction, and the court reiterated that a transaction's fairness cannot be measured by events such as these that happened years later. The Other Limited Partners also argued that the unfairness of Walker's purchase of the Stanley Tract was manifest because Walker gave no consideration to the partnership for his purchase of the property. The court distinguished the Other Limited Partners' reliance on *Crenshaw v. Swenson*, 611 S.W.2d 886, 888–91 (Tex. App.—Austin 1980, writ ref'd n.r.e.), in which the court held that a general partner violated her fiduciary duty by selling and leasing partnership property and depositing the proceeds into her own company's bank account without the knowledge of the limited partners. In *Crenshaw*, which did not mention or turn on consideration, the dispositive facts were undisputed, and the issue was whether the undisputed facts constituted a breach of fiduciary duty entitling the limited partners to restitution of their partnership contributions. The court of appeals held the general partner had breached her fiduciary duty as a matter of law, which, in turn, entitled the limited partners to the restitution they sought. Here, the court stated that it was undisputed that Walker paid \$90,000 for the Stanley Tract, and although he did not pay the partnership anything for the opportunity to buy the land, the jury heard testimony from which it could have concluded the partnership benefitted because the marina deal at that point was mired in eminent-domain controversy and litigation, and the purchase of the land by Walker helped stave off actions by the City that threatened Freeport Properties' existing investment in the marina development area during a time of uncertainty. The court stated that a reasonable jury

could credit this testimony and find that the transaction also benefitted the limited partnership. The court also responded to a number of points made by a dissenting justice and ultimately concluded that there was some evidence supporting the jury's findings that neither Walker nor Briarwood Capital breached any fiduciary duty or obligation as to the Stanley Tract. Further, considering the record as a whole, the evidence supporting the jury's Stanley Tract findings was not so weak, or so contrary to the weight of all the evidence, as to make the findings clearly wrong and manifestly unjust. Thus, the court held that the evidence was legally and factually sufficient to support these findings.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. The Other Limited Partners argued that because the evidence showed he received this right as part of a settlement he negotiated with the City on behalf of himself, his companies, and Freeport Properties, Walker's conflict of interest alone was enough to invalidate this transaction. In addition, the Other Limited Partners argued that Walker gained significantly from the settlement with the City while the partnership received comparatively little of value. The court pointed out that Walker provided a considerable amount of evidence shedding a different light on the context and circumstances than the Other Limited Partners. The court acknowledged that the jury was not obligated to accept Walker's version of events, but the court emphasized that the evidence was not one-sided. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Bodine v. First Co., Case No. 3:20-CV-3116-BT, 2021 WL 5505562 (N.D. Tex. Nov. 24, 2021) (observing that “[f]iduciary duties attach in formal fiduciary relationships—such as partnerships”).

Wood v. Wiggins, __ S.W.3d __, 2021 WL 5312652 (Tex. App.—Houston [1st Dist.] 2021, pet. denied, pet. for rehearing filed).

The court of appeals affirmed the trial court's conclusion that George Wood's breach of fiduciary duty claim against Matthew Wiggins was barred by the doctrine of unclean hands.

Wood and Wiggins were real estate investors who jointly purchased properties with the intent of repairing and selling them. On some occasions, Wood would purchase the property to be co-owned by Wiggins (and sometimes other co-owners). On other occasions, Wiggins would purchase the property to be co-owned by Wood (and sometimes other co-owners). At some point and by some method (either repayment or offset from another property), the non-purchasing co-owner would reimburse the purchasing party for his portion of the property, which would be equally owned by all parties. Deeds would be issued to each owner to file with the respective county.

Wood and Wiggins had a falling out, and Wood sued Wiggins for (among other claims) breach of fiduciary duty. After a bench trial, the court concluded that the doctrine of unclean hands barred Wood's claim. On appeal, Wood argued that “because unclean hands is an affirmative defense, Wiggins had to prove that ‘he has been seriously harmed and the wrong complained of cannot be corrected without applying unclean hands.’” Wood asserted that Wiggins “utterly failed” to make this showing. The court of appeals disagreed:

To recover in equity, Wood had to have clean hands. Whether to apply the doctrine of unclean hands is committed to a trial court's discretion. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The doctrine will be applied only to “one whose own conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing.” *Id.* In addition, the complaining party must show an injury to himself arising from the conduct. “The clean hands maxim should not be applied when the defendants have not been seriously harmed and the wrong complained of can be corrected without applying the doctrine.” *In re Jim Walter Homes*, 207 S.W.3d at 899.

However, an appellate court “will not disturb a trial court's ruling on a claim seeking equitable relief unless it is arbitrary, unreasonable, and unsupported by guiding rules and principles.” *Sister Initiative, LLC v. Broughton Maint. Ass'n, Inc.*, No. 02-19-00102-CV, 2020 WL 726785, at *29 (Tex. App.—Fort Worth Feb. 13, 2020, pet. denied) (mem. op.) (quoting *Edwards*

v. Mid-Continent Office Distribs., L.P., 252 S.W.3d 833, 836 (Tex. App.—Dallas 2008, pet. denied)). The trial court “exercises broad discretion in balancing the equities involved in a case seeking equitable relief.” *Id.* (quoting *Edwards*, 252 S.W.3d at 836)....

The trial court found that because Wood breached his fiduciary duties to Wiggins, he did not have clean hands and, therefore, Wood’s “equitable claims against Wiggins, including breach of fiduciary duty, [were] barred by the doctrine of unclean hands[.]” The trial court also made the following specific findings that support this conclusion:

- Nothing in the record indicates that Wiggins or Wood consulted with the other ... on whether to rent or sell, what repairs or improvements to make, or how much to spend in making such repairs or improvements.
- One owner simply did what he chose to do and then expected the other(s) to pay an equal portion of the costs.
- The evidence indicates that Wood charged Wiggins and other co-owners various management fees and inflated actual expenses to provide additional profit for himself. There is nothing to indicate that any other owner did the same to Wood. There is also nothing to indicate that any co-owner agreed to this arrangement.
- Documentation, if it existed, rarely indicated who paid for what on which occasion. Further, there was no consistent documentation for any given property, nor was there a particular deadline or form for repayment.
- Wood had his own “system” of record keeping, but it was not a consistent, well organized, or reliable system.
- The evidence also indicates that there were inconsistencies, inaccurate entries, missing entries, duplicate or triplicate entries, and items being charged to the wrong properties.
- In many instances, Wood billed Wiggins for expenses but failed to provide any documentation to support those expenses.
- Wood charged management fees to the co-owners of shared properties without their agreement.
- Wood made a profit on the carpet, furniture, fixtures, and supplies he sold to his co-owners in order to repair and refurbish the properties. Yet, he charged these as pass-through costs without informing his co-owners that he was making a profit on these “expenses.”
- Both Wiggins and Wood collected rents on shared properties without accounting to their co-owners for those rents received and without segregating those monies, which was a breach of their fiduciary duties to each other and to the other owners.
- Wiggins and Wood incurred significant expenses on various properties without informing the other, which was a breach of fiduciary duty to the other.
- Wiggins and Wood also allowed properties to be maintained without making them rentable or otherwise attempting to rent them, thereby incurring costs without income, which was another breach of fiduciary duty to the other.
- Wood did not keep accurate accounts of expenses, passed on inflated expenses to the co-owners without their permission or knowledge so that he made additional profits and did not properly allocate expenses, improperly charged additional fees to the co-owners, and may have billed co-owners for expenses not actually incurred. These were breaches of his fiduciary duties.
- Holding money or rents owed to another co-owner for months or even years was very common between and among Wiggins, Wood, and the other people with whom they shared properties. Withholding money like this was a breach of fiduciary duty by each party.
- After September 2008, the parties ceased to treat each other as partners or joint venturers, as they regarded themselves, and each breached one or more fiduciary duties to the other so that neither has clean hands in their respective dealings with each other on the subject properties.

Wood does not challenge any of the above findings in connection with his unclean-hands argument. Instead, he contends that Wiggins failed to show how he was harmed by Wood’s alleged breaches of his fiduciary duties. But the findings set forth above demonstrate harm. For example, the trial court found that Wood passed on inflated expenses to Wiggins and the other co-owners; billed for expenses without documentation; improperly charged fees to the co-owners; and may have billed the co-owners for expenses not actually incurred. Though Wood argues that Wiggins

could not have been harmed because he has yet to pay for any expenses billed, it is those expenses that Wood seeks to recover as damages in this lawsuit. Based on the above-findings and evidence, we hold the trial [court] did not abuse its discretion in applying the doctrine of unclean hands to bar Wood's equitable claims, including his claims for breach of fiduciary duty.

Dipprey v. Double Diamond, Inc., 637 S.W.3d 784 (Tex. App.—Eastland 2021, no pet. h.) (“‘Certain formal relationships create fiduciary relationships as a matter of law.’ Examples of formal fiduciary relationships include attorney-client, partnership, and trust relationships.”).

EMET, LLC v. Johnson Controls, Inc., Case No. SA-21-CV-00753-JKP-RBF, 2021 WL 4712694 (W.D. Tex. Oct. 7, 2021) (“In general, a formal fiduciary duty arises ‘as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.’”).

WC 1st and Trinity, LP v. Roy F. & JoAnn Cole Mitte Foundation, No. 03-19-00799-CV, No. 03-19-00905-CV, 2021 WL 4465995 (Tex. App.—Austin Sept. 30, 2021, pet. denied) (mem. op.).

The court of appeals affirmed the district court's appointment of a receiver for two limited partnerships. As part of that analysis, the court suggested that the general partners had breached their fiduciary duties.

This dispute concerned two limited partnerships, WC 1st and Trinity, LP, and WC 3rd and Congress, LP (collectively, the “Limited Partnerships”). WC 1st owned property at 1st and Trinity streets in Austin, and WC 3rd owned property at 3rd and Congress (collectively, the “Properties”). The general partner of each entity was an LLC—WC 1st and Trinity GP, LLC, and WC 3rd and Congress GP, LLC (collectively, the “General Partners”). Each general partner owned a controlling interest in its limited partnership and had sole authority to manage the limited partnership's affairs. It was undisputed that Nate Paul, a real estate investor, controlled both partnerships.

In 2011, the Roy F. and JoAnn Cole Mitte Foundation (“Mitte”) invested a portion of its endowment with the Limited Partnerships, acquiring approximately 16% of WC 1st and 6% of WC 3rd. Paul initially represented to investors that he was either developing the Properties or marketing them for sale. In 2018, appellants (the Limited Partnerships and the General Partners) allegedly stopped providing Mitte with financial information regarding the Limited Partnerships. Mitte filed suit, and appellants invoked an arbitration provision in the partnership agreements. In July of 2019, the parties reached a settlement whereby appellants agreed to purchase Mitte's interests in the Limited Partnerships for \$10.5 million. Payment was due no later than August 20, 2019.

On August 16, 2019, the FBI raided appellants' office and Paul's residence in connection with pending federal criminal investigations. The day before the payment deadline, Mitte's counsel was informed that appellants would not be paying the settlement. The settlement agreement gave Mitte two options in the case of nonpayment: (1) end the arbitration and sue for breach of the settlement agreement, or (2) declare the settlement agreement void and continue with the arbitration. Mitte chose the latter option, and the arbitration continued.

In October 2019, Mitte filed a motion asking the arbitrator to appoint a receiver because the assets of the Limited Partnerships were “at imminent risk of being lost, removed, or materially injured.” The motion cited the raid, appellants' failure to pay the settlement, and other factors that indicated that the entities might be in financial distress. Following a day-long evidentiary hearing, the arbitrator announced that she would grant Mitte's application and appoint Greg Milligan as receiver. After more procedural wrangling and unsubstantiated claims by appellants that the Properties had been sold, the district court subsequently rendered an order appointing Milligan as receiver for the Limited Partnerships and the Properties (the “Appointment Order”). The Appointment Order granted the receiver all powers to manage the Limited Partnerships' assets that the General Partners possessed under the partnership agreements.

On appeal, the appellants argued that the district court abused its discretion by appointing a receiver. As part of the analysis, the court of appeals suggested that the General Partners had breached their fiduciary duties:

First, the record supports a determination that the General Partners owed Mitte a legal duty arising out of both law and contract. The limited partnership agreements each required the general partner to “conduct the affairs of the Partnership in the best interests of the Partnership” and not to the benefit the general partner's other businesses “if such conduct also produces a detriment to the Partnership.” In addition, the General Partners owed Mitte, as limited partner, a fiduciary duty. *See Ingram v. Deere*, 288 S.W.3d 886, 892 n.1 (Tex. 2009) (recognizing, “as a matter of common

law,” general rule “that ‘[t]he relationship between ... partners ... is fiduciary in character’ ” (quoting *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998)); *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.) (observing that “relationship between general partner and limited partners in a limited partnership is fiduciary in nature”). A fiduciary relationship includes the duties of “utmost good faith, fairness, and honesty[.]”

The district court could reasonably have concluded that the General Partners breached these duties. First, there is evidence that the General Partners represented that the Properties had been sold to harm Mitte’s interests. Specifically, there is evidence that the representation that the \$23 million sale price for the 1st and Trinity Property was “equal to the highest offer yet made on the property” was false. Milligan testified that he obtained a June 2018 letter of intent sent to WC 1st offering to purchase the First and Trinity property for \$60 million. The district court admitted the letter of intent into evidence, and appellants have never disputed that they received the letter or that it was a genuine offer.... The district court could reasonably conclude that the General Partners misrepresented that the Properties had been sold to avoid the receivership and so that Mitte would accept less than the true value of its interest in the Limited Partnerships.

The district court could also have reasonably concluded that the general partner of WC 1st mismanaged the funds entrusted to it. WC 1st refinanced the loan on the 1st and Trinity Property in December 2015, yielding \$3 million. Lee [Vice-President of Accounting for Paul’s entities] testified by deposition that the entire sum was expended on the partnership’s “operating expenses.” WC 1st’s bank records show that \$2.5 million was deposited on December 15, 2015, and that almost the entire sum was transferred to WCCG [another Paul-related entity] in a series of transactions ending the following month. Milligan testified that he found no documentation that the transfers were payment of a debt to WCCG, and he could never discover another business-related reason for the transfers. Under these circumstances, the transfers support a conclusion that the general partner breached its duties.

Donalson v. Harrington, No. 09-19-00286-CV, 2021 WL 3196970 (Tex. App.—Beaumont July 29, 2021, no pet. h.) (mem. op.) (stating that “[f]ormal fiduciary relationships arise as a matter of law, such as with attorney-clients, partnerships, and trustee relationships”).

Dandachli v. Active Motorwerks, Inc., No. 03-19-00494-CV, 2021 WL 3118437 (Tex. App.—Austin July 23, 2021, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court’s findings that (1) one partner (Mario Garcia) did not breach his fiduciary duty; (2) Garcia did not breach the Partnership Agreement by allegedly requiring a salary and more than half of the partnership profits; (3) another partner (Hassan Dandachli) did breach the Partnership Agreement and his fiduciary duty; and (4) Dandachli was only entitled to recover 50% of the lease payments that he made on behalf of the partnership and 50% of the loan that he made to the partnership as damages for Garcia’s breach of contract.

In early 2013, Dandachli and Garcia, who were both well-respected professionals in the Austin automotive industry, decided to join forces to own and operate “a high-end automotive repair shop” known as Active Motorwerks, Inc. To memorialize this decision, Dandachli drafted a Partnership Agreement requiring that each partner “provide their full-time services and best efforts on behalf of the partnership” and indicating that the partners would “each have a 50% share of Active Motorwerks and a 50% share of net profits.” The Partnership Agreement further stipulated that the partnership would “commence on February 5th, 2013[,] and [would] end only on mutual agreement between the parties involved or mutual dissolution.” Although not included in the Partnership Agreement, the partners had apparently reached an understanding that Garcia would oversee the work in the garage while Dandachli would oversee front-office operations, including handling administrative matters and bookkeeping.

Dandachli was the primary financial contributor to the partnership, lending Active Motorwerks money when necessary and obtaining reimbursement when possible. In early 2015, Active Motorwerks began operating out of a facility that Dandachli owned and had remodeled at his own expense for the partnership business. Later in 2015, Active Motorwerks and Dandachli executed a Lease Purchase Agreement providing that Active Motorwerks would lease certain equipment from Dandachli for a sum of \$2,895 per month. When Active Motorwerks failed to make its monthly payments, Dandachli sold approximately \$40,000 of the equipment in December of that year.

In March of 2017, Dandachli moved to Lebanon. Although Dandachli had assured Garcia that Dandachli could and would satisfy his obligations under the Partnership Agreement from abroad, his move strained the partnership. In May of 2017, Dandachli learned that Garcia had moved equipment owned by Active Motorwerks and Dandachli to an unknown location. On May 10, in an apparent attempt to prevent any further loss, Dandachli asked his agents in Austin to change the locks on the Dandachli-owned facility from which Active Motorwerks was operating. Dandachli then refused to allow Garcia access to the facility or to any equipment or vehicle within the facility. Later the same day, Dandachli attempted to redirect \$22,000 in Active Motorwerks funds to his personal bank account. Garcia received notice of the attempted transfer, stopped payment, and then removed all remaining funds to an account that only he could access.

By May 15, Garcia was still without access to the Active Motorwerks facility and had eliminated Dandachli's digital access to the accounting and administrative software used to manage Active Motorwerks. Garcia then used Active Motorwerks's email account to contact over 800 current and former Active Motorwerks customers, notifying them that "technical issues" necessitated a change in the business's phone number and email address. The notice provided Garcia's cell phone number and his personal email address as the only means of contacting Active Motorwerks. Garcia also revised Active Motorwerks's social media to reflect the change.

Unbeknownst to Dandachli, Garcia had made plans to operate a new automotive shop, which Garcia would ultimately register as Active Euroworks, LLC. When customers or potential customers would attempt to contact or locate Active Motorwerks, Garcia or Active Motorwerks's online materials would direct them to the Active Euroworks location. Garcia later designed a logo for Active Euroworks nearly identical to the one used by Active Motorwerks.

The parties eventually sued one another for, among other causes of action, breach of fiduciary duty and breach of the Partnership Agreement. At the end of a bench trial, the district court found, in part, the following: (1) that Dandachli breached Section 2.3 of the Agreement by "failing to keep and maintain accurate records, and for [the] actions taken in May 2017"; (2) that Dandachli breached Section 3.1 of the Agreement "in March 2017 when Dandachli moved to Lebanon"; (3) that Dandachli breached his fiduciary duty to Active Motorwerks by failing to "maintain accurate records"; (4) that Garcia breached Section 5.2 of the Agreement "when Garcia transferred funds in the Active Motorwerks' bank account to an account controlled solely by Garcia"; and (5) that Garcia breached the Agreement through his "actions taken in May 2017." Dandachli appealed.

Among other arguments, Dandachli contended that the district court erred in entering a take-nothing judgment on his claim that Garcia had breached his fiduciary duties to Dandachli and Active Motorwerks. The court of appeals disagreed:

"[T]he elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (citing *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010); *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied)). "Generally, fiduciaries owe the following duties ... the duty of loyalty and utmost good faith; duty of candor; duty to refrain from self-dealing; duty to act with integrity; duty of fair, honest dealing; and the duty of full disclosure." *Wolf v. Ramirez*, 622 S.W. 3d 126, 142 (Tex. App.—El Paso Aug. 31, 2020, no pet.) (footnotes and citations omitted). "Texas law undeniably recognizes that partners owe one another a fiduciary duty." *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App.—Houston [14th Dist.] 1995, writ granted), *aff'd*, 977 S.W.2d 543 (1998) (citing *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264–65 (1951); *Johnson v. Peckham*, 120 S.W.2d 786, 787–88 (1938); *Kunz v. Huddleston*, 546 S.W.2d 685, 688 (Tex. App.—El Paso 1977, writ *ref'd n.r.e.*)).

Given certain unchallenged findings of fact, Dandachli satisfied his burden to show that Garcia breached his fiduciary duties to Dandachli and to Active Motorwerks. The district court found that Dandachli and Garcia entered into a partnership in February of 2013. The court further found that, while the two were still partners, Garcia "took partnership property from the location where Active Motorwerks conducted business and took steps to delete Defendant Dandachli's access to the Active Motorwerks QuickBooks system." At trial, Garcia himself conceded that he used that property in conjunction with his new automotive shop in Pflugerville, and it is undisputed that Garcia took steps to redirect over 800 Active Motorwerks customers to Active Euroworks. In

addition, the district court found that Garcia, without Dandachli's knowledge or approval and while the two were still partners, "transferred the funds in the Active Motorwerks bank account on which both he and Defendant Dandachli were authorized signers into an account controlled solely by Plaintiff Garcia." These actions reflect a lack of candor and loyalty, a failure to act in good faith, and an attempt at self-dealing.

Yet while Dandachli may have satisfied his burden with respect to the elements of existence of and breach of the duty, it does not necessarily follow that he is entitled to relief from that grievance. Texas law affords an aggrieved individual several remedies for breach of fiduciary duty. These include, *inter alia*, actual damages, exemplary damages, disgorgement, and re[sc]ission of contract. In this case, as compensation for the breach of fiduciary duties, Dandachli sought an additional \$71,778.40 in damages. Dandachli derives this sum from evidence of monies Garcia obtained while operating Active Euroworks and from his theory that "all of the profits and payments would have been split between Garcia and Dandachli" had Garcia not breached his fiduciary duty by opening and operating the competing enterprise. However, the district court made no finding regarding Garcia's profits from the operation of Active Euroworks. Moreover, Dandachli presumes that all of Garcia's profits were made while the two men were still partners, but the district court made no finding regarding the date the partnership ended. Nor did either party specifically request any findings regarding the alleged breach of fiduciary duty or any profit Garcia might have made while operating Active Euroworks. As an appellate court, we must assume that any omitted, unrequested findings support the judgment. In other words, we must infer that the district court concluded: (1) that the fiduciary relationship had already ended when Garcia began earning profits from Active Euroworks, (2) that Dandachli was not harmed by Garcia's operation of Active Euroworks, or (3) that Dandachli simply failed to prove any damages incurred. We overrule Dandachli's third issue.

Dandachli separately argued that the district court erred by failing to find that Garcia had "breached the partnership agreement by requiring a salary and requiring that he be paid more than a 50% share of the net profits." The court of appeals rejected Dandachli's argument:

In support of his contention, Dandachli argues that "[i]t is undisputed that Garcia required that he be paid a salary" and that Garcia "was paid approximately \$40,000" more than Dandachli over the course of 40 months. Yet Garcia, while testifying, repeatedly disputed Dandachli's characterization of Garcia's salary expectations and any profit Garcia had made during his time at Active Motorwerks. Moreover, the district court found that Dandachli's failure "to maintain the books and records of the Partnership ma[de] it impossible to establish the amounts [sic] of distributions paid to each partner." And while Dandachli contests whether it was his obligation to handle the accounting for Active Motorwerks, there is no dispute that the partners failed to maintain accurate financial records. Indeed, Dandachli himself spent much of the five-day trial revising his own calculation of damages due to bookkeeping discrepancies and other accounting errors. Thus, on this record, Dandachli cannot establish this alleged breach as a matter of law. Nor can he show that the failure to find such a breach contradicts the great weight of the evidence. As a consequence, he cannot prevail on appeal, and we overrule the issue.

Dandachli also maintained that there was insufficient evidence for the trial court to conclude that Dandachli breached the Partnership Agreement and his fiduciary duties. Once again, the court of appeals disagreed:

On this record, Dandachli cannot show the evidence legally or factually insufficient to support the district court's finding that Dandachli breached the contract. The district court found that Dandachli had breached the contract by, *inter alia*, moving to Lebanon and thereby failing to "provide [his] full-time services and best efforts on behalf of the partnership," by "fail[ing] to maintain accurate records," and by locking Garcia out of the facility. Dandachli challenges the characterization of his actions as breach of contract—asserting that the contract does not address these matters—and argues that Garcia presented no evidence of damages arising from any alleged

breach. But to whatever extent there was any silence or ambiguity regarding Dandachli's obligations under the contract, it fell within the province of the district court, as factfinder, to resolve that silence or ambiguity. Moreover, Garcia testified that he lost access to "close to 70-80,000 [dollars] total" in equipment that he personally owned when Dandachli locked him out of the facility and that Dandachli prevented him from "us[ing] any of the other company equipment." Garcia further testified—and Dandachli conceded—that little or no automotive work could be undertaken without this equipment. The evidence is therefore both legally and factually sufficient to support the findings, and we overrule the subissue. ...

Similarly, Dandachli cannot show the evidence legally or factually insufficient to support the district court's finding that Dandachli breached his fiduciary duties to his partner. Undisputed aspects of the record reflect that Dandachli changed the locks on the facility without Garcia's knowledge or approval, deprived Garcia of the equipment necessary to carry out the business, and attempted to redirect nearly every dollar left in the partnership's bank account to his own personal account. On this record, we cannot say there is no evidence of breach of fiduciary duty. Nor can we say the finding is clearly wrong or manifestly unjust. We therefore overrule the issues.

With respect to the trial court's award of damages for Garcia's breaches of contract, Dandachli asserted that "Section 2.3 of the Partnership Agreement requires that Dandachli recover 100% of the payments he personally made on the Equipment Lease and 100% of Dandachli's loan to Active Motorwerks, rather than the 50% of those respective amounts awarded by the district court." The court of appeals rejected the assertion:

We begin with the district court's relevant findings of fact. With respect to the Equipment Lease, the district court found:

On July 21, 2015, Defendant Dandachli, as lessor, and the Partnership, as lessee, executed a Lease Purchase Agreement. The terms of the Lease Purchase Agreement required the Partnership to make monthly payments of \$2895 to Defendant Dandachli for the lease of certain equipment, beginning September 1, 2015.... The Partnership did not make all the required monthly \$2895 payments.

The district court further found that Dandachli had personally made the payments required by the Lease Purchase Agreement in a total amount of \$11,524 "between September and December 2015." With respect to the loan, the district court found that Dandachli had loaned \$43,464 to the partnership. Because these findings are supported by the record and not challenged on appeal, they are binding on this Court.

Dandachli contends he should recover 100% of these sums pursuant to Section 2.3 of the Partnership Agreement, which provides:

The Partnership shall maintain a capital account record for each partner. All initial capital contributions and subsequent capital contributions made by Hassan Dandachli and Mario Garcia into the Partnership shall remain the property of each and shall be reimbursed to them at any time as per their request and or/upon withdrawal/dissolution of the Partnership.

Characterizing the lease payments and the loan as "capital contributions" and arguing that "there was no question that Garcia withdrew from the partnership," he reasons that "those amounts were due in full." We disagree with his reasoning.

The lease is governed by the Lease Purchase Agreement in conjunction with the Partnership Agreement. The Lease Purchase Agreement provides that the partnership—not Garcia—would be responsible for any payments due on the lease. And the Partnership Agreement provides that Garcia and Dandachli each have a 50% share in the partnership. Thus, if the partnership had followed through with its obligations under the Lease Purchase Agreement, Dandachli would have been responsible for half of that sum. Accordingly, Dandachli has not

satisfied his burden to show how the district court erred by awarding Dandachli half of the amount he paid toward the sums due and owing under the Lease Purchase Agreement.

It is unclear from the record what terms governed Dandachli's \$43,464 loan to the partnership. Dandachli argues that the capital-contribution provision of the Partnership Agreement governs but provides no evidence or authority in support of that argument. The Partnership Agreement itself does not define "capital contribution," and the district court made no specific findings regarding the meaning of that term, the timing of the loan, or what the loan was used for. Ambiguous terms of a contract must be discerned by the factfinder. On this record, because the phrase is ambiguous and because neither party proposed findings regarding its meaning, we must defer to the district court's construction of the Partnership Agreement and its implicit rejection of Dandachli's arguments regarding reimbursement of the loan as a "capital contribution." We therefore overrule the issue.

Smith v. Insurance Adjusters Group, LLC, Case No. 2:21-cv-00068-JRG-RSP, 2021 WL 3477362 (E.D. Tex. July 13, 2021), report and recommendation adopted, 2021 WL 3471210 (E.D. Tex. Aug. 6, 2021).

The magistrate judge recommended that the defendants' motion to dismiss for failure to state a claim should be rejected with respect to the plaintiffs' breach of fiduciary duty claim because the elements of the claim were sufficiently alleged. The magistrate also determined that the plaintiffs' claim for "breach of loyalty" was simply a species of breach of fiduciary duty and would not be recognized as an independent cause of action.

According to the First Amended Complaint, Duane Smith ("D. Smith") and Rachel Smith ("R. Smith") were public adjusters licensed in Texas. In March of 2017, William Cox, owner of Insurance Adjusters Group, LLC ("IAG"), took on D. Smith as a partner in IAG's business in various states. The parties formed a partnership as co-owners of an operated business for profit.

Cox had a felony conviction from California that prevented him from being licensed as a public adjuster in Texas. As a consequence, the partners performed their Texas work through the Smiths' company Premier Adjustment Group, LLC ("PAG"). The proceeds for the partnership between Cox and D. Smith, either through IAG or PAG, were to be split on a 50/50 basis and R. Smith and PAG were to be compensated for all of the work that R. Smith performed on behalf of Cox and IAG.

On February 9, 2021, D. Smith confronted Cox about his failure to pay in accordance with their agreement. Cox allegedly repeatedly shorted the Smiths and PAG on the portion of the insurance proceeds that they were to receive. Cox then barred access to the company computer system and contacted the various attorneys handling IAG's claims. He advised them to send funds directly to IAG and to ignore any right that the Smiths or PAG may have to that money.

The Smiths and PAG sued Cox and IAG for breach of fiduciary duty and other claims. Cox and IAG filed a motion to dismiss for failure to state a claim. The court began by discussing the legal standards for breach of fiduciary duty:

The first step for determining breach of fiduciary duty under Texas law is determining whether a fiduciary duty exists. A fiduciary relationship between partners exists as a matter of law. *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938).

Fiduciary duties can vary depending on the instrument involved, special statutes, and common law. In a general partnership, partners owe each other at least the following duties: (1) duty of loyalty (Tex. Bus. Orgs. Code §§ 152.204(a)(1), 152.205); (2) duty of care (Tex. Bus. Orgs. Code §§ 152.204(a)(2), 152.206); (3) obligation of good faith (Tex. Bus. Orgs. Code § 152.204(b)); and (4) duty to provide or disclose information (Tex. Bus. Orgs. Code § 152.213(a)).

The duty of loyalty includes

(1) accounting to and holding for the partnership property, profit, or benefit derived by the partner:

(A) in the conduct and winding up of the partnership business; or

(B) from use by the partner of partnership property;

(2) refraining from dealing with the partnership on behalf of a person who has an interest adverse to the partnership; and

(3) refraining from competing or dealing with the partnership in a manner adverse to the partnership.

Tex. Bus. Orgs. Code § 152.205.

The court then analyzed the allegations of breach of fiduciary duty and concluded that they sufficiently asserted a claim that defeated the motion to dismiss:

“Generally, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages.” *First United Pentecostal Church of Beaumont*, [514 S.W.3d 217, 220 (Tex. 2017)].

Plaintiffs plead “Defendants IAG and Defendant Cox maintained a fiduciary relationship with and owed fiduciary duties to Plaintiff Duane Smith, as a member and participating business partner with Defendant IAG and Defendant Cox.” Further, Plaintiffs allege “Defendants IAG and Defendant Cox maintained a fiduciary relationship with and owed fiduciary duties to Plaintiff Duane Smith, Rachel Smith and Premier Adjustment Group, LLC, as members of a joint venture established for the purpose for providing public adjusting services.”

Supporting these claims, Plaintiffs have alleged that “Defendant Cox, owner of INSURANCE ADJUSTERS GROUP, LLC, took on Duane Smith as a partner in IAG’s business” and that “[t]he parties formed a partnership and began doing business as a partnership with the purpose of operating a business for profit, with partners as co-owners of the business.” Plaintiffs also plead “[t]he partners operated their Texas work through the Smith’s company called PREMIER ADJUSTMENT GROUP, LLC. Through this entity they handled a number of claims in Texas....” Plaintiffs also plead “Rachel Smith and/or Premier was to be compensated for all of the work Rachel Smith performed on behalf of Defendant Cox and Defendant IAG. Rachel Smith acted as claims manager.... Defendant Cox repeatedly promised to compensate her for her services.”

With respect to D. Smith, Plaintiffs have sufficiently pleaded the existence of a partnership with Cox. A fiduciary relationship between partners exists as a matter of law. With respect to R. Smith and PAG, Plaintiffs have sufficiently plead that IAG, Cox, D. Smith, R. Smith, and PAG were members of a joint venture. “Under Texas law, joint ventures are legal entities described as being ‘in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit.’” *Lawler v. Dallas Statler-Hilton Joint Venture*, 793 S.W.2d 27, 33 (Tex. App.—Dallas 1990, writ denied) (quoting *Brown v. Cole*, 291 S.W.2d 704, 709 (Tex. 1956)). Accordingly, Plaintiffs have sufficiently pleaded the first element of a breach of fiduciary duty claim.

Plaintiffs allege, “Defendant IAG and Defendant Cox breached their fiduciary duties to Plaintiffs by making material misrepresentations and failing to disclose all material facts relating to the business” and “breached the duty of good faith and fair dealing by knowingly and intentionally concealing monies due to Plaintiffs.” Supporting this, Plaintiffs plead:

On or around February 9, 2021, during a telephonic meeting, Duane Smith confronted Defendant Cox about his failure to pay in accordance with their agreement. Defendant Cox, individually and on behalf of Defendant IAG, has repeatedly shorted the Smiths and Premier on the portion of insurance proceeds they were to receive as a part of their work. Plaintiffs believe that in addition to withholding sums Defendant Cox and Defendant IAG were not entitled to withhold, Cox and IAG have not divided monies with Plaintiffs that Plaintiffs were entitle [sic] to receive.... On this occasion, Defendant Cox responded by barring Plaintiffs’ access to the company computer system. In addition, Defendant Cox has been contacting the various attorneys handling the claims Defendant IAG is involved in and advising those attorneys to send funds directly to IAG and ignore any right that the Smiths and/or Premier may have to those monies. Plaintiffs are currently entitled to hundreds of thousands of dollars in monies from

... cases that have already been settled and the settlement checks are either at the respective clients' attorney's office or whose funding is imminent.

The Court finds this sufficiently pleads breach of fiduciary duty, causation, and damages.

The Defendants' Motion seeks to dismiss the Plaintiffs' Count I: Breach of Fiduciary Duty because (1) there is no fiduciary duty relationship between the parties, (2) there is no breach of fiduciary duty, and (3) there is no injury or benefit to Defendants. Defendants' Motion argues that there is no fiduciary duty because D. Smith "has not plead that a written partnership agreement existed" and "does not plead that an implied partnership existed." The Plaintiffs have clearly plead a partnership between D. Smith and Cox, as well as a joint venture between all parties. Whether this partnership was written or implied is irrelevant for resolving a motion to dismiss. All that is necessary to survive a motion to dismiss is to give the defendant "fair notice of what the ... claim is and the grounds upon which it rests." [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)] (ellipsis in original) (citations omitted).

Defendants' Motion proceeds to argue D. Smith has not pleaded how proceeds were to be split, the sharing of losses, the sharing of liability, and contributions to the business, concluding "[t]hus there is no partnership; without a partnership, the alleged fiduciary relationship does not exist." Defendants' Motion is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), not a motion for summary judgment. It is not required that a Plaintiff plead every detail of their case prior to discovery. Defendants' Motion, throughout its section seeking to dismiss the Plaintiffs' Count I: Breach of Fiduciary Duty, asserts that Plaintiffs have not pleaded various details well beyond the scope necessary to survive a motion to dismiss, effectively arguing a motion for summary judgment prior to discovery. Accordingly, the Defendants' Motion should be denied with respect to Count I: Breach of Fiduciary Duty.

The plaintiffs also alleged a "breach of loyalty" claim as a separate and distinct action from their "breach of fiduciary duty" claim. The defendants argued that the loyalty claim was improper "as breach of loyalty is not a cause of action but rather encompassed by the fiduciary duty cause of action." The court noted that the plaintiffs, in their response, "argue breach of fiduciary duties and breach of loyalty together as fiduciary duties and do not address Defendants' argument that 'the Court should dismiss Plaintiffs' 'cause of action' for 'breach of loyalty' or require Plaintiffs to provide a basis for a stand-alone cause of action for breach of loyalty.'" Ultimately, the court concluded that "Defendants are correct that breach of the duty of loyalty is not an independent cause of action, but rather a species of breach of fiduciary duty, where the fiduciary duty is the duty of loyalty." As such, "the Complaint will be read by the Court in that light and no separate breach of loyalty claim, apart from breach of fiduciary duty, will be considered."

Luisa Fernanda Calle Monsalve v. CMG Financial, EP-21-CV-00058-FM, 2021 WL 2444168 (W.D. Tex. June 15, 2021) ("A fiduciary duty arises 'as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.'").

F. Partnership Property and Partnership Interest

Shalit v. Shalit, No. 04-19-00736-CV, 2022 WL 789347 (Tex. App.—San Antonio Mar. 16, 2022, pet. denied) (mem. op.).

In this appeal from a divorce decree, the court held that the trial court could divide the community property interest of the husband but not the property of the partnership and construed the decree to divide the community property interest in the partnership, not the partnership property itself.

Assuming without deciding that Michael properly briefed this point, we agree that the trial court could not divide any individual property owned by BGS Realty. *See* TEX. BUS. ORGS. CODE ANN. § 152.101 ("Partnership property is not property of the partners. A partner or a partner's spouse does not have an interest in partnership property."); *id.* § 154.001 ("A partner is

not a co-owner of partnership property.”); *Siller v. LPP Mortg., Ltd.*, 264 S.W.3d 324, 329 (Tex. App.—San Antonio 2008, no pet.).

Nevertheless, as Michael acknowledges, the trial court had authority to divide the 62.5% community property interest in the partnership. *See, e.g., Lifshutz*, 61 S.W.3d at 518.

To the degree that there was any ambiguity in this provision of the decree, we construe it to divide the 62.5% community property interest in the partnership, not the partnership property itself.

G. Interpretation and Enforcement of Partnership Agreement

1. Fiduciary Duties

Hrdy v. Second Street Properties, LLC, ___ S.W.3d ___, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury’s finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, relying in part on a provision of the partnership agreement that permitted any partner to “engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business” of the limited partnership, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney’s fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall (“Walker”) and some of his cousins inherited land (the “Blaffer Tract”) along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties (“Freeport Properties”), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker’s wholly owned company, Briarwood Capital Corporation (“Briarwood Capital”), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership’s entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership’s existence. The court referred to the appellants collectively as the “Other Limited Partners.”

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker’s consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of the limited partnership on two valuable tracts of land obtained by an entity of Walker’s in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because

the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

In the course of the court's discussion, the court noted that it would be inappropriate to hold that there was insufficient evidence of fairness based on events that transpired after the transaction, rather than evaluating the transaction in light of the circumstances existing when it took place, citing *Est. of Townes*, 867 S.W.2d at 417 and *Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (court evaluates whether fiduciary significantly benefits at expense of one to whom he owes fiduciary duty based on circumstances existing when transaction takes place). The court also noted that the Other Limited Partners' suggestion that the transaction was unfair because it created a conflict of interest—by making Walker and Freeport Properties competitors in the marina development project—disregarded the partnership agreement, which allowed any partner to “engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business” of the limited partnership. The court stated that Texas law allows parties to limit the scope of fiduciary duties in this manner in the partnership agreement, citing *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), and the existence of a conflict of interest resulting from competition, standing alone, thus did not establish the transaction's unfairness. Consistent with the partnership agreement, the trial court's charge instructed the jury that possessing a competitive business interest was not a breach of the duty of loyalty, and the court was required to assess evidentiary sufficiency based on the charge given in the absence of an objection to the instruction. The Other Limited Partners further argued that Walker's conflict of interest resulting from his competition in the marina development project later ripened into self-dealing when Walker made a better deal for himself than the partnership in a marina operating agreement, but this argument again relied on events that transpired after the transaction, and the court reiterated that a transaction's fairness cannot be measured by events such as these that happened years later. The Other Limited Partners also argued that the unfairness of Walker's purchase of the Stanley Tract was manifest because Walker gave no consideration to the partnership for his purchase of the property. The court distinguished the Other Limited Partners' reliance on *Crenshaw v. Swenson*, 611 S.W.2d 886, 888–91 (Tex. App.—Austin 1980, writ ref'd n.r.e.), in which the court held that a general partner violated her fiduciary duty by selling and leasing partnership property and depositing the proceeds into her own company's bank account without the knowledge of the limited partners. In *Crenshaw*, which did not mention or turn on consideration, the dispositive facts were undisputed, and the issue was whether the undisputed facts constituted a breach of fiduciary duty entitling the limited partners to restitution of their partnership contributions. The court of appeals held the general partner had breached her fiduciary duty as a matter of law, which, in turn, entitled the limited partners to the restitution they sought. Here, the court stated that it was undisputed that Walker paid \$90,000 for the Stanley Tract, and although he did not pay the partnership anything for the opportunity to buy the land, the jury heard testimony from which it could have concluded the partnership benefitted because the marina deal at that point was mired in eminent-domain controversy and litigation, and the purchase of the land by Walker helped stave off actions by the City that threatened Freeport Properties' existing investment in the marina development area during a time of uncertainty. The court stated that a reasonable jury could credit this testimony and find that the transaction also benefitted the limited partnership. The court also responded to a number of points made by a dissenting justice and ultimately concluded that there was some

evidence supporting the jury's findings that neither Walker nor Briarwood Capital breached any fiduciary duty or obligation as to the Stanley Tract. Further, considering the record as a whole, the evidence supporting the jury's Stanley Tract findings was not so weak, or so contrary to the weight of all the evidence, as to make the findings clearly wrong and manifestly unjust. Thus, the court held that the evidence was legally and factually sufficient to support these findings.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. The Other Limited Partners argued that because the evidence showed he received this right as part of a settlement he negotiated with the City on behalf of himself, his companies, and Freeport Properties, Walker's conflict of interest alone was enough to invalidate this transaction. In addition, the Other Limited Partners argued that Walker gained significantly from the settlement with the City while the partnership received comparatively little of value. The court pointed out that Walker provided a considerable amount of evidence shedding a different light on the context and circumstances than the Other Limited Partners. The court acknowledged that the jury was not obligated to accept Walker's version of events, but the court emphasized that the evidence was not one-sided. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

2. Financial Rights

Dandachli v. Active Motorwerks, Inc., No. 03-19-00494-CV, 2021 WL 3118437 (Tex. App.—Austin July 23, 2021, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court's finding that Hassan Dandachli was only entitled to recover 50% of the lease payments that he made on behalf of the partnership and 50% of the loan that he made to the partnership as damages for Mario Garcia's breach of contract. The court rejected Dandachli's assertion that the capital contributions provision of the Partnership Agreement was applicable to the damages claim.

In early 2013, Dandachli and Garcia, who were both well-respected professionals in the Austin automotive industry, decided to join forces to own and operate "a high-end automotive repair shop" known as Active Motorwerks, Inc. To memorialize this decision, Dandachli drafted a Partnership Agreement requiring that each partner "provide their full-time services and best efforts on behalf of the partnership" and indicating that the partners would "each have a 50% share of Active Motorwerks and a 50% share of net profits." The Partnership Agreement further stipulated that the partnership would "commence on February 5th, 2013[,] and [would] end only on mutual agreement between the parties involved or mutual dissolution." Although not included in the Partnership Agreement, the partners had apparently reached an understanding that Garcia would oversee the work in the garage while Dandachli would oversee front-office operations, including handling administrative matters and bookkeeping.

Dandachli was the primary financial contributor to the partnership, lending Active Motorwerks money when necessary and obtaining reimbursement when possible. In early 2015, Active Motorwerks began operating out of a facility that Dandachli owned and had remodeled at his own expense for the partnership business. Later in 2015, Active Motorwerks and Dandachli executed a Lease Purchase Agreement providing that Active Motorwerks would lease certain equipment from Dandachli for a sum of \$2,895 per month. When Active Motorwerks failed to make its monthly payments, Dandachli sold approximately \$40,000 of the equipment in December of that year.

In March of 2017, Dandachli moved to Lebanon. Although Dandachli had assured Garcia that Dandachli could and would satisfy his obligations under the Partnership Agreement from abroad, his move strained the partnership. In May of 2017, Dandachli learned that Garcia had moved equipment owned by Active Motorwerks and Dandachli to an unknown location. On May 10, in an apparent attempt to prevent any further loss, Dandachli asked his agents in Austin to change the locks on the Dandachli-owned facility from which Active Motorwerks was operating. Dandachli then refused to allow Garcia access to the facility or to any equipment or vehicle within the facility. Later the same day, Dandachli attempted to redirect \$22,000 in Active Motorwerks funds to his personal bank account. Garcia received notice of the attempted transfer, stopped payment, and then removed all remaining funds to an account that only he could access.

By May 15, Garcia was still without access to the Active Motorwerks facility and had eliminated Dandachli's digital access to the accounting and administrative software used to manage Active Motorwerks. Garcia

then used Active Motorwerks's email account to contact over 800 current and former Active Motorwerks customers, notifying them that "technical issues" necessitated a change in the business's phone number and email address. The notice provided Garcia's cell phone number and his personal email address as the only means of contacting Active Motorwerks. Garcia also revised Active Motorwerks's social media to reflect the change.

Unbeknownst to Dandachli, Garcia had made plans to operate a new automotive shop, which Garcia would ultimately register as Active Euroworks, LLC. When customers or potential customers would attempt to contact or locate Active Motorwerks, Garcia or Active Motorwerks's online materials would direct them to the Active Euroworks location. Garcia later designed a logo for Active Euroworks nearly identical to the one used by Active Motorwerks.

The parties eventually sued one another for, among other causes of action, breach of fiduciary duty and breach of the Partnership Agreement. At the end of a bench trial, the district court found, in part, the following: (1) that Dandachli breached Section 2.3 of the Agreement by "failing to keep and maintain accurate records, and for [the] actions taken in May 2017"; (2) that Dandachli breached Section 3.1 of the Agreement "in March 2017 when Dandachli moved to Lebanon"; (3) that Dandachli breached his fiduciary duty to Active Motorwerks by failing to "maintain accurate records"; (4) that Garcia breached Section 5.2 of the Agreement "when Garcia transferred funds in the Active Motorwerks' bank account to an account controlled solely by Garcia"; and (5) that Garcia breached the Agreement through his "actions taken in May 2017." Dandachli appealed.

With respect to the trial court's award of damages for Garcia's breaches of contract, Dandachli asserted that "Section 2.3 of the Partnership Agreement requires that Dandachli recover 100% of the payments he personally made on the Equipment Lease and 100% of Dandachli's loan to Active Motorwerks, rather than the 50% of those respective amounts awarded by the district court." The court of appeals rejected the assertion:

We begin with the district court's relevant findings of fact. With respect to the Equipment Lease, the district court found:

On July 21, 2015, Defendant Dandachli, as lessor, and the Partnership, as lessee, executed a Lease Purchase Agreement. The terms of the Lease Purchase Agreement required the Partnership to make monthly payments of \$2895 to Defendant Dandachli for the lease of certain equipment, beginning September 1, 2015.... The Partnership did not make all the required monthly \$2895 payments.

The district court further found that Dandachli had personally made the payments required by the Lease Purchase Agreement in a total amount of \$11,524 "between September and December 2015." With respect to the loan, the district court found that Dandachli had loaned \$43,464 to the partnership. Because these findings are supported by the record and not challenged on appeal, they are binding on this Court.

Dandachli contends he should recover 100% of these sums pursuant to Section 2.3 of the Partnership Agreement, which provides:

The Partnership shall maintain a capital account record for each partner. All initial capital contributions and subsequent capital contributions made by Hassan Dandachli and Mario Garcia into the Partnership shall remain the property of each and shall be reimbursed to them at any time as per their request and or/upon withdrawal/dissolution of the Partnership.

Characterizing the lease payments and the loan as "capital contributions" and arguing that "there was no question that Garcia withdrew from the partnership," he reasons that "those amounts were due in full." We disagree with his reasoning.

The lease is governed by the Lease Purchase Agreement in conjunction with the Partnership Agreement. The Lease Purchase Agreement provides that the partnership—not Garcia—would be responsible for any payments due on the lease. And the Partnership Agreement provides that Garcia and Dandachli each have a 50% share in the partnership. Thus, if the partnership had followed through with its obligations under the Lease Purchase Agreement,

Dandachli would have been responsible for half of that sum. Accordingly, Dandachli has not satisfied his burden to show how the district court erred by awarding Dandachli half of the amount he paid toward the sums due and owing under the Lease Purchase Agreement.

It is unclear from the record what terms governed Dandachli's \$43,464 loan to the partnership. Dandachli argues that the capital-contribution provision of the Partnership Agreement governs but provides no evidence or authority in support of that argument. The Partnership Agreement itself does not define "capital contribution," and the district court made no specific findings regarding the meaning of that term, the timing of the loan, or what the loan was used for. Ambiguous terms of a contract must be discerned by the factfinder. On this record, because the phrase is ambiguous and because neither party proposed findings regarding its meaning, we must defer to the district court's construction of the Partnership Agreement and its implicit rejection of Dandachli's arguments regarding reimbursement of the loan as a "capital contribution." We therefore overrule the issue.

3. Amendment of Partnership Agreement

Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury's finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney's fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall ("Walker") and some of his cousins inherited land (the "Blaffer Tract") along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties ("Freeport Properties"), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker's wholly owned company, Briarwood Capital Corporation ("Briarwood Capital"), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership's entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership's existence. The court referred to the appellants collectively as the "Other Limited Partners."

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of

the limited partnership on two valuable tracts of land obtained by an entity of Walker's in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Another contention of the Other Limited Partners on appeal was that the trial court erred in ordering dissolution of the limited partnership. The basis for the trial court's order of dissolution was a provision of the partnership triggering dissolution if a replacement general partner was not designated within 90 days after the removal of the general partner. After noting that partnership agreements are construed like contracts and reciting several maxims of contract construction, the court discussed the provisions of the partnership agreement as they related to the removal of a general partner, amendment of the partnership agreement, appointment of a new general partner, and dissolution and winding up of the partnership when there was no remaining general partner.

Under the partnership agreement, limited partners holding a simple majority of the percentage interests in the partnership could remove the general partner; however, upon removal of the general partner, the limited partners had to unanimously elect to continue the partnership's business and designate a new general partner within 90 days to avoid dissolution. In the event that the limited partners failed to unanimously elect to continue and designate a new general partner within 90 days, the agreement provided that the partnership "shall be terminated." The agreement further provided that the partnership "shall be dissolved" and that the partnership assets were to be liquidated under these circumstances.

It was undisputed that the Other Limited Partners removed Briarwood Capital as general partner and that they had the simple majority of percentage interests in the partnership required to do so, but it was also undisputed that the limited partners, which included Walker or a company he owned, did not unanimously elect to continue or designate a new general partner within 90 days. The Other Limited Partners tried to avoid dissolution by changing the terms of the partnership agreement. After they removed Briarwood Capital as general partner, they amended the partnership agreement to allow one or more limited partners holding a simple majority of the percentage interests in the partnership to elect to continue business and designate a general partner; i.e., they eliminated the unanimity requirement for continuation of the business and designation of a new general partner so that Walker's concurrence as a limited partner would no longer be required. The Other Limited Partners then designated a company owned by two of the Other Limited Partners as the new general partner. The new general partner then ratified the amended partnership agreement that allowed its designation as general partner.

The court held the Other Limited Partners' attempted amendment was not valid because it did not comply with the terms of the unamended partnership agreement. The partnership agreement provided that it could only be amended in a writing executed by both the general partner and one or more limited partners holding a simple

majority of the percentage interests in the partnership. Because there was no general partner at the time of the amendment, it was not approved by a general partner, and the court stated that the provision would be meaningless if the Other Limited Partners could simply violate this term of the unamended agreement and then ratify the violation afterward.

Furthermore, the court stated that the unamended partnership agreement did not purport to give the general partner such sweeping ratification authority. The court stated that, under ordinary principles of partnership law, the new general partner could only ratify acts of the Other Limited Partners that it could have authorized them to take in the first place, citing *Laird Hill Salt Water Disposal v. E. Tex. Salt Water Disposal*, 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) (directors may ratify acts that other corporate actors take if directors could have authorized them to take these acts in first instance). Under the terms of the unamended partnership agreement, the general partner could neither amend the partnership agreement unilaterally nor authorize a simple majority to elect a new general partner after the removal of another one. Thus, the removal of Briarwood Capital as general partner was effective, but the amendment of the partnership agreement, appointment of a successor partner, and agreement to continue the partnership were not effective, and the partnership was terminated and dissolved by the terms of the partnership agreement due to the failure to validly designate a new general partner and elect to continue within 90 days of the removal of the general partner.

Walker's failure to secure jury findings that amendment of the partnership agreement and designation of a new general partner were invalid did not preclude dissolution because the Other Limited Partners did not identify a question of fact material to the issue of dissolution that should have been submitted to the jury. Because the relevant facts were undisputed and the partnership agreement was unambiguous, compliance with the partnership agreement was a question of law.

The Other Limited Partners also argued that Walker was estopped from enforcing the partnership agreement's unanimity requirement for designating a new general partner after the removal of another based on a side letter agreement between Walker and two of the Other Limited Partners, an email chain between Walker and the same two individuals, and an email from Walker to several individuals at a bank. The court stated that the partnership agreement's boilerplate merger clause did not amount to a disclaimer of reliance that would bar the Other Limited Partners from alleging they relied on the representations made by Walker in the letter agreement or elsewhere in deciding to join the limited partnership or sign the partnership agreement, but the court found the letter agreement inapposite to the situation at hand because it solely addressed replacement of the general partner during the first four years of the partnership and made no commitments beyond that period. As for the email exchange, the record demonstrated that the Other Limited Partners did not rely on the inconsistent and ambiguous statements by Walker in those communications. As for the email by Walker in which Walker stated to several bank employees that a simple majority could replace Briarwood Capital as general partner at any time, there was no evidence that the Other Limited Partners contemporaneously saw or were aware of this email. Thus, the court stated that the evidence foreclosed the estoppel argument, and, even assuming it was sufficient to raise a fact issue on reliance, the Other Limited Partners did not request or secure a jury finding on the matter. In fact, the jury found that the Other Limited Partners agreed to a mediated settlement agreement in 2014, which provided that the partnership agreement would be amended to allow a simple majority to designate a new general partner solely in the event of the existing general partner's resignation, not its removal. Thus, even if Walker had at one time agreed that a simple majority could replace Briarwood Capital as general partner when desired, the mediated settlement agreement conclusively showed that the parties had agreed this was no longer the case before the Other Limited Partners replaced Briarwood Capital.

On appeal, each side argued that they were entitled to recover attorney's fees, which the trial court had declined to award either side. The court of appeals first noted that the trial court had discretion as to a claim for attorney's fees under the Declaratory Judgments Act, and its decision would not be an abuse of discretion, but the court additionally noted that neither side properly presented for review its fee claim under the Declaratory Judgments Act. The court thus proceeded to analyze the parties' claims to attorney's fees under the limited partnership agreement. The trial court had no discretion under the limited partnership agreement, because the agreement provided that the prevailing party "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 with the litigation." Under this mandatory provision, the trial court could not refuse to award costs and fees under the agreement on equitable grounds.

Each side argued that they prevailed at trial. Based on the judgment in this case, the court concluded that the Other Limited Partners prevailed. Most importantly, the judgment's first two provisions returned two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprised a majority of the disputed acreage. Most of the remainder of the judgment related to the trial court's declaration that the partnership must be terminated, which Walker sought, but declaratory relief must confer a meaningful victory to confer prevailing-party status. A meaningful victory is one that materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. The court did not view the business divorce here as satisfying this description of a meaningful victory. The court disagreed with the way Walker classified the claims into "main issues." According to the court, "[a] party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged." The court also disagreed with Walker's argument that the Other Limited Partners did not prevail with respect to the City and District Tracts. The Other Limited Partners obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the constructive trust imposed by the judgment required their return. Obtaining this type of equitable relief sufficed to make the Other Limited Partners prevailing parties. The court summed up its conclusion as to this issue by stating:

...Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right.

Although the court rejected Walker's contention that he prevailed, the court stated that the trial court should consider on remand the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal when assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners.

4. Removal of General Partner; Admission of Successor General Partner

Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury's finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney's fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall ("Walker") and some of his cousins inherited land (the "Blaffer Tract") along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties ("Freeport Properties"), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker's wholly owned company, Briarwood Capital Corporation ("Briarwood Capital"), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership's entire history. Walker, or a company wholly

owned by him, was also a limited partner throughout the partnership's existence. The court referred to the appellants collectively as the "Other Limited Partners."

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of the limited partnership on two valuable tracts of land obtained by an entity of Walker's in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Another contention of the Other Limited Partners on appeal was that the trial court erred in ordering dissolution of the limited partnership. The basis for the trial court's order of dissolution was a provision of the partnership triggering dissolution if a replacement general partner was not designated within 90 days after the removal of the general partner. After noting that partnership agreements are construed like contracts and reciting several maxims of contract construction, the court discussed the provisions of the partnership agreement as they related to the removal of a general partner, amendment of the partnership agreement, appointment of a new general partner, and dissolution and winding up of the partnership when there was no remaining general partner.

Under the partnership agreement, limited partners holding a simple majority of the percentage interests in the partnership could remove the general partner; however, upon removal of the general partner, the limited partners had to unanimously elect to continue the partnership's business and designate a new general partner within 90 days to avoid dissolution. In the event that the limited partners failed to unanimously elect to continue and designate a new general partner within 90 days, the agreement provided that the partnership "shall be terminated." The agreement further provided that the partnership "shall be dissolved" and that the partnership assets were to be liquidated under these circumstances.

It was undisputed that the Other Limited Partners removed Briarwood Capital as general partner and that they had the simple majority of percentage interests in the partnership required to do so, but it was also undisputed that the limited partners, which included Walker or a company he owned, did not unanimously elect to continue or designate a new general partner within 90 days. The Other Limited Partners tried to avoid dissolution by changing the terms of the partnership agreement. After they removed Briarwood Capital as general partner, they amended the partnership agreement to allow one or more limited partners holding a simple majority of the percentage interests in the partnership to elect to continue business and designate a general partner; i.e., they eliminated the unanimity requirement for continuation of the business and designation of a new general partner so that Walker's concurrence as a limited partner would no longer be required. The Other Limited Partners then designated a company owned by two of the Other Limited Partners as the new general partner. The new general partner then ratified the amended partnership agreement that allowed its designation as general partner.

The court held the Other Limited Partners' attempted amendment was not valid because it did not comply with the terms of the unamended partnership agreement. The partnership agreement provided that it could only be amended in a writing executed by both the general partner and one or more limited partners holding a simple majority of the percentage interests in the partnership. Because there was no general partner at the time of the amendment, it was not approved by a general partner, and the court stated that the provision would be meaningless if the Other Limited Partners could simply violate this term of the unamended agreement and then ratify the violation afterward.

Furthermore, the court stated that the unamended partnership agreement did not purport to give the general partner such sweeping ratification authority. The court stated that, under ordinary principles of partnership law, the new general partner could only ratify acts of the Other Limited Partners that it could have authorized them to take in the first place, citing *Laird Hill Salt Water Disposal v. E. Tex. Salt Water Disposal*, 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) (directors may ratify acts that other corporate actors take if directors could have authorized them to take these acts in first instance). Under the terms of the unamended partnership agreement, the general partner could neither amend the partnership agreement unilaterally nor authorize a simple majority to elect a new general partner after the removal of another one. Thus, the removal of Briarwood Capital as general partner was effective, but the amendment of the partnership agreement, appointment of a successor partner, and agreement to continue the partnership were not effective, and the partnership was terminated and dissolved by the terms of the partnership agreement due to the failure to validly designate a new general partner and elect to continue within 90 days of the removal of the general partner.

Walker's failure to secure jury findings that amendment of the partnership agreement and designation of a new general partner were invalid did not preclude dissolution because the Other Limited Partners did not identify a question of fact material to the issue of dissolution that should have been submitted to the jury. Because the relevant facts were undisputed and the partnership agreement was unambiguous, compliance with the partnership agreement was a question of law.

The Other Limited Partners also argued that Walker was estopped from enforcing the partnership agreement's unanimity requirement for designating a new general partner after the removal of another based on a side letter agreement between Walker and two of the Other Limited Partners, an email chain between Walker and the same two individuals, and an email from Walker to several individuals at a bank. The court stated that the partnership agreement's boilerplate merger clause did not amount to a disclaimer of reliance that would bar the Other Limited Partners from alleging they relied on the representations made by Walker in the letter agreement or elsewhere in deciding to join the limited partnership or sign the partnership agreement, but the court found the letter agreement inapposite to the situation at hand because it solely addressed replacement of the general partner during the first four years of the partnership and made no commitments beyond that period. As for the email exchange, the record demonstrated that the Other Limited Partners did not rely on the inconsistent and ambiguous statements by Walker in those communications. As for the email by Walker in which Walker stated to several bank employees that a simple majority could replace Briarwood Capital as general partner at any time, there was no evidence that the Other Limited Partners contemporaneously saw or were aware of this email. Thus, the court stated that the evidence foreclosed the estoppel argument, and, even assuming it was sufficient to raise a fact issue on reliance, the Other Limited Partners did not request or secure a jury finding on the matter. In fact, the jury found that the Other Limited Partners agreed to a mediated settlement agreement in 2014, which provided that the partnership agreement would be amended to allow a simple majority to designate a new general partner solely in the event of the existing general partner's resignation, not its removal. Thus, even if Walker had at one time agreed that a simple

majority could replace Briarwood Capital as general partner when desired, the mediated settlement agreement conclusively showed that the parties had agreed this was no longer the case before the Other Limited Partners replaced Briarwood Capital.

On appeal, each side argued that they were entitled to recover attorney's fees, which the trial court had declined to award either side. The court of appeals first noted that the trial court had discretion as to a claim for attorney's fees under the Declaratory Judgments Act, and its decision would not be an abuse of discretion, but the court additionally noted that neither side properly presented for review its fee claim under the Declaratory Judgments Act. The court thus proceeded to analyze the parties' claims to attorney's fees under the limited partnership agreement. The trial court had no discretion under the limited partnership agreement, because the agreement provided that the prevailing party "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 with the litigation." Under this mandatory provision, the trial court could not refuse to award costs and fees under the agreement on equitable grounds.

Each side argued that they prevailed at trial. Based on the judgment in this case, the court concluded that the Other Limited Partners prevailed. Most importantly, the judgment's first two provisions returned two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprised a majority of the disputed acreage. Most of the remainder of the judgment related to the trial court's declaration that the partnership must be terminated, which Walker sought, but declaratory relief must confer a meaningful victory to confer prevailing-party status. A meaningful victory is one that materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. The court did not view the business divorce here as satisfying this description of a meaningful victory. The court disagreed with the way Walker classified the claims into "main issues." According to the court, "[a] party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged." The court also disagreed with Walker's argument that the Other Limited Partners did not prevail with respect to the City and District Tracts. The Other Limited Partners obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the constructive trust imposed by the judgment required their return. Obtaining this type of equitable relief sufficed to make the Other Limited Partners prevailing parties. The court summed up its conclusion as to this issue by stating:

...Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right.

Although the court rejected Walker's contention that he prevailed, the court stated that the trial court should consider on remand the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal when assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners.

5. Indemnification and Advancement

Newstream Hotels & Resorts, LLC v. Abdou, No. 02-21-00343-CV, 2022 WL 1496537 (Tex. App.—Fort Worth May 12, 2022, no pet.) (mem. op.).

The court held that a limited partnership's general partner and its affiliate failed to establish that the Texas Citizen Participation Act was applicable to a claim by investors in the limited partnership that the general partner and its affiliate had wrongfully obtained indemnification from the partnership for fees and expenses incurred in this judicial proceeding. The general partner and its affiliate characterized communications relating to the indemnification as being made "in or pertaining to a judicial proceeding" and "in connection with a matter of public concern" because the indemnified attorney's fees and expenses were incurred in this judicial proceeding and the investors' underlying claims in the lawsuit alleged misrepresentations and mismanagement of a real estate development project that included public improvements financed by the Town of Flower Mound. The court held

that the central issue to the investors' claim was breach of the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. That claim was premised on conduct, not on communication, and the TCPA thus did not apply.

Lakeside Crossing Land Partners ("LCLP") was a limited partnership involved in the construction of mixed-use real estate development in Flower Mound, Texas. Newstream Hotels and Resorts, LLC was the general partner of the partnership. Investors ("Appellees") in LCLP brought suit against Newstream Hotels and Resorts, LLC and an affiliated company, Newstream Commercial, LLC, (collectively "Appellants") on various claims, including Appellants' alleged misrepresentations and mismanagement of the project. Appellants then notified Appellees via email that Appellants were obtaining indemnification from LCLP, allegedly pursuant to the partnership agreement, in connection to the lawsuit. Subsequently, Appellants exercised their claimed right to indemnification through a series of invoices, payments, and checks for the indemnification of the legal fees and litigation expenses.

Following Appellants' exercise of their claimed right of indemnification, Appellees amended their petition to add a paragraph alleging that Appellants' exercise of their claimed indemnification rights was invalid under the partnership agreement and Texas law. Appellants subsequently moved to dismiss the amended claims under the Texas Citizen Participation Act (TCPA). Appellants argued that the amended claims were based on, or were in response to, Appellants' communications informing the Appellees of the indemnification. Appellants also claimed that the invoices, payments, and checks were "communications" made "in or pertaining to a judicial proceeding" and were made "in connection with a matter of public concern" and therefore protected by the TCPA. Specifically, Appellants claimed that (1) their rights to petition and free speech were implicated because Appellants' communications stated that they were obtaining indemnity/reimbursement from LCLP and (2) the payment "communications" pertained to the present judicial proceeding and involved a matter of public concern (the Town of Flower Mound's involvement in the project's financing). The trial court denied Appellants' motion, and Appellants filed an interlocutory appeal.

In describing the underlying legal framework of a motion to dismiss under the TCPA, the court noted that the nonmovants' (in this case, Appellees') pleadings are the "best and all-sufficient" evidence of the nature of their claim. An appellate court must review the trial court's ruling *de novo* and view the pleadings in the light most favorable to the nonmovant. Importantly, merely alleging conduct that has a communication embedded within it does not create the relationship between the claim and the communication necessary to invoke the TCPA. Additionally, if a claim does not allege a communication but is based on conduct, the TCPA does not apply.

A review of a TCPA motion to dismiss involves a three-step analysis. The court noted, however, that the Texas Legislature's 2019 amendments to the TCPA narrowed the statute's applicability. First, a movant seeking the protection of the TCPA must initially demonstrate that the claim is based on or is in response to its exercise of the right of free speech, to petition, or of association. Second, if the moving party satisfies its burden to prove the applicability of the TCPA, then the nonmoving party must establish by clear and specific evidence a *prima facie* case for each essential element of the claim in question. Finally, if the nonmoving party satisfies the second step, then the burden shifts back to the moving party to establish an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

First, considering the Appellees' pleadings as the "best and all-sufficient" evidence, the court found that the trial court properly denied Appellants' motion. The central issue to the Appellees' claim was that the Appellants breached the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. The claim was premised on conduct, not on communication. Thus, the TCPA did not apply.

Second, the court rejected Appellants' assertion that a quote in Appellees' response to the motion to dismiss supported Appellants' argument. Appellees' response to the motions to dismiss contained sworn testimony that Newstream Hotels and Resorts, LLC had informed all limited partners that the partnership had to raise additional capital, in part due to the indemnification payments. The testimony also included the statement that "those payments have depleted Partnership funds and have made it less likely that I will receive any return of my capital contribution." Appellants claimed that this testimony showed that Appellees responded to the "communication" of LCLP's "need to raise additional capital, in part, because of the [indemnification] payments" by filing wrongful indemnity claims. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, the quoted testimony showed that conduct caused the Appellees' harm and served as the basis for the amended claims.

Third, the court rejected Appellants' argument that Appellants brought their amended claims in response to the communications contained within checks and instructions to withdraw partnership funds. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, any communications contained within the checks and instructions to withdraw partnership funds merely served as evidence of Appellants' conduct and did not change the conduct at issue in the case.

Hotze v. IN Management, LLC, __ S.W.3d __, 2021 WL 3087524 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

The court of appeals concluded, in the limited partnership context, that appellants failed to establish that appellees were not entitled to indemnification or to advancement of their legal expenses.

This case concerned a dispute among five brothers regarding control of a family owned business, Compressor Engineering Corporation ("CECO"). The brothers also co-owned several limited partnerships, referred to as the Inter Nos entities, which existed primarily to lease assets to CECO. In essence, two of the brothers, appellants David and Bruce Hotze, alleged that the other three brothers, appellees Richard, Mark, and Steven Hotze, manipulated CECO's financial status to gain control of the company. In response, Richard, Mark, and Steven maintained that they merely undertook actions required to save CECO from impending bankruptcy and dissolution.

Appellants contended, among other issues, that "the trial court erred in denying their derivative claims on behalf of the Inter Nos entities based on the allegedly improper indemnification and advance payment of legal costs from the entities to appellees Mark, Richard, and Steven." The trial court had rejected jury charge submissions on these claims and had denied appellants' post-trial motions.

On appeal, the court largely agreed with the trial court's determinations:

Both sides cite to sections of Texas Business Organizations Code chapter 8, "Indemnification and Insurance" as controlling. Tex. Bus. Orgs. Code § 8.001–.152. Appellants first argue that because appellees did not plead for or obtain jury findings as to mandatory indemnification under section 8.051, they were not entitled to any payment of their legal costs by the Inter Nos entities. That section, entitled "Mandatory Indemnification," states in full:

- (a) An enterprise shall indemnify a governing person, former governing person, or delegate against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person or delegate if the person is wholly successful, on the merits or otherwise, in the defense of the proceeding.
- (b) A court that determines, in a suit for indemnification, that a governing person, former governing person, or delegate is entitled to indemnification under this section shall order indemnification and award to the person the expenses incurred in securing the indemnification.

Nothing in this section requires pleadings or jury findings specifically on an entitlement to indemnification pursuant to the section. Instead, it mandates indemnification of the reasonable expenses of governing persons who are pulled into litigation because of their governing positions if they are "wholly successful" in their defense. Appellants do not cite any other authority or make any argument outside of citing section 8.051 for the proposition that a pleading and jury findings were required for appellees to be entitled to indemnification. Accordingly, we find no merit in their first argument.

Next, appellants assert that the Inter Nos entities' partnership agreements do not permit indemnification and advancement of litigation expenses under the circumstances of this case. They begin by noting that the governing documents for one of the entities does not mention indemnification or advancement of legal costs, and they conclude from this that indemnification or advancement from that entity was not permitted as a matter of law. But they do not cite any authority or make any argument supporting this conclusion.

As for the other entities' partnership agreements, appellants assert that they do not permit indemnification when the claims being defended against are for fraud, breach of fiduciary duty,

and breach of the partnership agreements themselves, which appellants identify as the types of claims they pursued in this litigation. The governing documents, however, provide for indemnification of members, officers, and others against any and all claims in which those persons may become involved based on the affairs of the partnership except when “the claim or liability arises from the gross negligence, willful misconduct, fraud or breach of this Agreement by such [person] or actions of such [person] outside the scope of [the] Agreement.” Contrary to appellants’ representation, this language does not bar indemnity simply because a claim is made of fraud, breach of fiduciary duty, or breach of the agreements; it bars indemnity for claims arising from certain types of conduct. Just because a claim has been made regarding certain conduct does not mean that the conduct actually occurred. For example, in this case, the jury found against appellants on all their claims. Accordingly, there is no merit in appellants’ argument that the partnership agreements barred indemnification in this case as a matter of law.

Additionally, appellants assert that even if indemnification was permissible, the allocation of the costs among the different Inter Nos entities was unreasonable. On this basis, appellants contend that Richard, who acknowledged directing the allocation, breached the fiduciary duties he allegedly owed to the entities. Appellants’ complaint regarding the allocation is that it was supposedly done “based solely on the ‘ability to pay’ (i.e., the amount of funds each entity had on hand)—not based on any fair, reasoned allocation basis or formula.” Appellants, however, cite no authority and make no cogent argument to support their supposition that allocating indemnification to the entities based on the entities’ ability to pay was unreasonable or a breach of fiduciary duties. Accordingly, this argument is inadequately briefed.

Lastly, appellants argue that even assuming permissive indemnification and advancement was allowed under the agreements, it was not properly approved in this case. Specifically, appellants assert that Business Organizations Code section 8.103 requires an approval by majority vote of disinterested governing persons before permissive indemnification or advancement can occur and that such vote did not occur. As appellants themselves point out, however, indemnification is mandatory—and thus does not require a vote—under section 8.051 if the appellees are “wholly successful” in the defense of the claims. Appellees were, of course, wholly successful in the first trial and may be again on remand. Appellants do not offer any argument as to why we need to address the propriety of a permissive indemnification when indemnification may be mandatory on remand, and we decline to make any argument for them. We need not and do not state a position on this issue at this time.

Based on the foregoing discussion of appellants’ arguments, appellants have not established as a matter of law that appellees were not entitled to indemnity or the advancement of legal costs in this case. However, because the ultimate determination of whether appellees are entitled to indemnity may turn on whether they are “wholly successful” in defending against appellants’ claims on remand, we reverse and remand the indemnity/advancement of fees issues to the trial court.

6. Dissolution/Winding Up

Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury’s finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims

against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney's fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall ("Walker") and some of his cousins inherited land (the "Blaffer Tract") along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties ("Freeport Properties"), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker's wholly owned company, Briarwood Capital Corporation ("Briarwood Capital"), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership's entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership's existence. The court referred to the appellants collectively as the "Other Limited Partners."

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of the limited partnership on two valuable tracts of land obtained by an entity of Walker's in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

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The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Another contention of the Other Limited Partners on appeal was that the trial court erred in ordering dissolution of the limited partnership. The basis for the trial court's order of dissolution was a provision of the partnership triggering dissolution if a replacement general partner was not designated within 90 days after the

removal of the general partner. After noting that partnership agreements are construed like contracts and reciting several maxims of contract construction, the court discussed the provisions of the partnership agreement as they related to the removal of a general partner, amendment of the partnership agreement, appointment of a new general partner, and dissolution and winding up of the partnership when there was no remaining general partner.

Under the partnership agreement, limited partners holding a simple majority of the percentage interests in the partnership could remove the general partner; however, upon removal of the general partner, the limited partners had to unanimously elect to continue the partnership's business and designate a new general partner within 90 days to avoid dissolution. In the event that the limited partners failed to unanimously elect to continue and designate a new general partner within 90 days, the agreement provided that the partnership "shall be terminated." The agreement further provided that the partnership "shall be dissolved" and that the partnership assets were to be liquidated under these circumstances.

It was undisputed that the Other Limited Partners removed Briarwood Capital as general partner and that they had the simple majority of percentage interests in the partnership required to do so, but it was also undisputed that the limited partners, which included Walker or a company he owned, did not unanimously elect to continue or designate a new general partner within 90 days. The Other Limited Partners tried to avoid dissolution by changing the terms of the partnership agreement. After they removed Briarwood Capital as general partner, they amended the partnership agreement to allow one or more limited partners holding a simple majority of the percentage interests in the partnership to elect to continue business and designate a general partner; i.e., they eliminated the unanimity requirement for continuation of the business and designation of a new general partner so that Walker's concurrence as a limited partner would no longer be required. The Other Limited Partners then designated a company owned by two of the Other Limited Partners as the new general partner. The new general partner then ratified the amended partnership agreement that allowed its designation as general partner.

The court held the Other Limited Partners' attempted amendment was not valid because it did not comply with the terms of the unamended partnership agreement. The partnership agreement provided that it could only be amended in a writing executed by both the general partner and one or more limited partners holding a simple majority of the percentage interests in the partnership. Because there was no general partner at the time of the amendment, it was not approved by a general partner, and the court stated that the provision would be meaningless if the Other Limited Partners could simply violate this term of the unamended agreement and then ratify the violation afterward.

Furthermore, the court stated that the unamended partnership agreement did not purport to give the general partner such sweeping ratification authority. The court stated that, under ordinary principles of partnership law, the new general partner could only ratify acts of the Other Limited Partners that it could have authorized them to take in the first place, citing *Laird Hill Salt Water Disposal v. E. Tex. Salt Water Disposal*, 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) (directors may ratify acts that other corporate actors take if directors could have authorized them to take these acts in first instance). Under the terms of the unamended partnership agreement, the general partner could neither amend the partnership agreement unilaterally nor authorize a simple majority to elect a new general partner after the removal of another one. Thus, the removal of Briarwood Capital as general partner was effective, but the amendment of the partnership agreement, appointment of a successor partner, and agreement to continue the partnership were not effective, and the partnership was terminated and dissolved by the terms of the partnership agreement due to the failure to validly designate a new general partner and elect to continue within 90 days of the removal of the general partner.

Walker's failure to secure jury findings that amendment of the partnership agreement and designation of a new general partner were invalid did not preclude dissolution because the Other Limited Partners did not identify a question of fact material to the issue of dissolution that should have been submitted to the jury. Because the relevant facts were undisputed and the partnership agreement was unambiguous, compliance with the partnership agreement was a question of law.

The Other Limited Partners also argued that Walker was estopped from enforcing the partnership agreement's unanimity requirement for designating a new general partner after the removal of another based on a side letter agreement between Walker and two of the Other Limited Partners, an email chain between Walker and the same two individuals, and an email from Walker to several individuals at a bank. The court stated that the partnership agreement's boilerplate merger clause did not amount to a disclaimer of reliance that would bar the Other Limited Partners from alleging they relied on the representations made by Walker in the letter agreement or elsewhere in deciding to join the limited partnership or sign the partnership agreement, but the court found the letter

agreement inapposite to the situation at hand because it solely addressed replacement of the general partner during the first four years of the partnership and made no commitments beyond that period. As for the email exchange, the record demonstrated that the Other Limited Partners did not rely on the inconsistent and ambiguous statements by Walker in those communications. As for the email by Walker in which Walker stated to several bank employees that a simple majority could replace Briarwood Capital as general partner at any time, there was no evidence that the Other Limited Partners contemporaneously saw or were aware of this email. Thus, the court stated that the evidence foreclosed the estoppel argument, and, even assuming it was sufficient to raise a fact issue on reliance, the Other Limited Partners did not request or secure a jury finding on the matter. In fact, the jury found that the Other Limited Partners agreed to a mediated settlement agreement in 2014, which provided that the partnership agreement would be amended to allow a simple majority to designate a new general partner solely in the event of the existing general partner's resignation, not its removal. Thus, even if Walker had at one time agreed that a simple majority could replace Briarwood Capital as general partner when desired, the mediated settlement agreement conclusively showed that the parties had agreed this was no longer the case before the Other Limited Partners replaced Briarwood Capital.

On appeal, each side argued that they were entitled to recover attorney's fees, which the trial court had declined to award either side. The court of appeals first noted that the trial court had discretion as to a claim for attorney's fees under the Declaratory Judgments Act, and its decision would not be an abuse of discretion, but the court additionally noted that neither side properly presented for review its fee claim under the Declaratory Judgments Act. The court thus proceeded to analyze the parties' claims to attorney's fees under the limited partnership agreement. The trial court had no discretion under the limited partnership agreement, because the agreement provided that the prevailing party "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 with the litigation." Under this mandatory provision, the trial court could not refuse to award costs and fees under the agreement on equitable grounds.

Each side argued that they prevailed at trial. Based on the judgment in this case, the court concluded that the Other Limited Partners prevailed. Most importantly, the judgment's first two provisions returned two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprised a majority of the disputed acreage. Most of the remainder of the judgment related to the trial court's declaration that the partnership must be terminated, which Walker sought, but declaratory relief must confer a meaningful victory to confer prevailing-party status. A meaningful victory is one that materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. The court did not view the business divorce here as satisfying this description of a meaningful victory. The court disagreed with the way Walker classified the claims into "main issues." According to the court, "[a] party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged." The court also disagreed with Walker's argument that the Other Limited Partners did not prevail with respect to the City and District Tracts. The Other Limited Partners obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the constructive trust imposed by the judgment required their return. Obtaining this type of equitable relief sufficed to make the Other Limited Partners prevailing parties. The court summed up its conclusion as to this issue by stating:

...Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right.

Although the court rejected Walker's contention that he prevailed, the court stated that the trial court should consider on remand the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal when assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners.

7. Statute of Frauds

Wood v. Wiggins, __ S.W.3d __, 2021 WL 5312652 (Tex. App.—Houston [1st Dist.] 2021, pet. denied, pet. for rehearing filed).

The court of appeals held that oral partnership agreements between George Wood and Matthew Wiggins required a transfer of an interest in real property and therefore fell within the statute of frauds. Because the statute was not satisfied, the court affirmed the lower court’s conclusion that the statute of frauds barred Wood’s claims.

Wood and Wiggins were real estate investors who jointly purchased properties with the intent of repairing and selling them. On some occasions, Wood would purchase the property to be co-owned by Wiggins (and sometimes other co-owners). On other occasions, Wiggins would purchase the property to be co-owned by Wood (and sometimes other co-owners). At some point and by some method (either repayment or offset from another property), the non-purchasing co-owner would reimburse the purchasing party for his portion of the property, which would be equally owned by all parties. Deeds would be issued to each owner to file with the respective county.

Wood and Wiggins had a falling out, and Wood sued Wiggins for (among other claims) breach of contract. After a bench trial, the court concluded that the statute of frauds barred Wood’s claim. Wood appealed, arguing in part that “because his oral partnership agreements with Wiggins did not involve the conveyance of real property ... the statute of frauds was inapplicable.”

The court of appeals began by noting that the statute of frauds concerns problems of proof and exists to prevent fraud and perjury in certain types of transactions by requiring agreements to be in writing and signed by the party to be charged. It is an affirmative defense and renders a contract that falls within its purview unenforceable. The court noted that Wiggins pleaded the statute of frauds as an affirmative defense and thus had the initial burden to establish that the alleged promise fell within the statute. The court also observed that whether a contract falls within the statute of frauds is a question of law which is reviewed de novo.

Ultimately, the court rejected Wood’s argument and concluded that the statute of frauds was applicable, largely because the court determined that the agreements between Wood and Wiggins required a transfer of an interest in real property:

Section 26.01 of the Texas Business and Commerce Code provides that “a contract for the sale of real estate” or “an agreement which is not to be performed within one year from the date of making the agreement” is not enforceable unless it “is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.” TEX. BUS. & COM. CODE § 26.01(a)(1), (2), (b)(4), (6)....

We first consider Wood’s argument that the agreements were not for the sale of real estate because they were oral partnership agreements “for joint investment and sharing of expenses, losses and profits.” We disagree. In support of his argument, Wood cites to *Sewing v. Bowman*, where this Court held that a partnership agreement contemplating dealings in real estate “simply does not involve” [a] transfer or interest in real estate within [the] meaning of the statute of frauds. 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet denied). This Court concluded that the plaintiff’s “claim for redemption of his partnership interest may include an interest in the proceeds from the sale of the two properties without resulting in a transfer of interest in the two properties.” *Id.* “Merely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, bringing it under the statute of frauds.” *Id.*...

The agreement in *Sewing* ... did not involve any transfer of interest in real property between the plaintiff and Sewing—the properties remained titled in the names of Sewing and his wife. And the plaintiff argued that the agreement did not involve any conveying of title to the property but merely established a venture to profit from its sale. Likewise, in [*Berne v. Keith*, 361 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1962, writ ref’d n.r.e.)], nothing in the parties’ agreement gave Keith an interest in the land, and he was “not seeking a transfer of any interest in” the defendant’s real estate. 361 S.W.2d at 597. Instead, he sought “an accounting of a share in the profits as compensation for services rendered in a project involving speculation in real property which he asserts became due him upon completion of the project.” *Id.* (emphasis added).

Unlike in *Sewing* and *Berne*, the agreements between Wiggins and Wood contemplated, and in fact required, a transfer of an interest in real property. The evidence shows the parties agreed to purchase the Waverly Canyon Properties and that each would receive a 50 percent interest in those properties. After Wiggins purchased the Waverly Canyon Properties at the tax sale, having received 50 percent of the purchase price from Wood, Wiggins deeded a fifty percent interest to Wood in each of the three properties. The same is true for the other properties—each involved an agreement to purchase the property in which the property was either deeded to one party, who then deeded the agreed-upon interest to the other party, or to both parties upon purchase. And although Wood claims he is not seeking to enforce an oral agreement to convey real property, he is seeking damages and reimbursement for expenses, purchase price, and profits from the sale of these properties based on his interest in those properties. We do not see a way around concluding that these agreements involved the transfer of an interest in land.

The distinguishing factor between property-related agreements that are barred by the statute of frauds and those that are not is whether the agreement provides for the transfer of an interest in land from one party to another. Those agreements that provide for, contemplate, or require a transfer of an interest in land from one party to another are barred by the statute of frauds.

Because Wood and Wiggins’s oral agreements regarding the Waverly Canyon Properties, as well as the Fairfield Court, John Silver Road, Loan Oak Drive, Sealy Avenue, Southern Hills Drive, and Warsaw Drive properties, contemplated the transfer of an interest of land, Wiggins met his burden to show that the oral agreements fell within the statute of frauds. The burden then shifted to Wood to establish an exception that would take the oral agreements out of the statute of frauds.

Wood argued that his partial performance of the oral agreements with Wiggins operated to exempt the oral agreements from the statute of frauds, even if they involved the sale of real property. The court noted, however, that “in order to rely on this exception to the applicability of the statute of frauds, Wood was required to plead, prove, and obtain a finding on this exception.” The court determined that “Wood did not plead the partial performance exception or try it by consent,” and “[n]either did he secure a finding of fact or conclusion of law from the trial court as to the exception.” Thus, the court concluded that Wood waived the partial performance exception.

8. Arbitration

Highland Capital Management, L.P. v. Dondero (In re Highland Capital Management, L.P.), Case No. 19-34054-sgj11, Adversary No. 21-03003-sgj, Adversary No. 21-03005-sgj, Adversary No. 21-03006-sgj, Adversary No. 21-03007-sgj, 2021 WL 5769320 (Bankr. N.D. Tex. Dec. 3, 2021).

The court found that the defendants in adversary proceedings brought by the debtor, a limited partnership, were not entitled to compel arbitration under the arbitration clause in the partnership agreement because the limited partnership agreement and the arbitration clause it contained were executory contracts that were rejected by the debtor, and the defendants had waived the right to invoke the arbitration clause by engaging extensively in the judicial proceedings before seeking to invoke arbitration.

Highland Capital Management, L.P. (“Highland”), a limited partnership and Chapter 11 debtor, sued to collect on promissory notes due to it (collectively, the “Note Adversary Proceedings”). Each maker of the promissory notes was closely related to James Dondero, Highland’s former president, and collectively borrowed tens of millions of dollars from Highland. The promissory note makers defended the Note Adversary Proceedings by alleging that under an oral agreement, Highland would forgive the notes as compensation to Mr. Dondero if certain conditions occurred. Following the note holders’ assertion of the oral agreement defense, Highland added Mr. Dondero, Dugaboy Investment Trust (a family trust of which Mr. Dondero was the trustee), and Mr. Dondero’s sister (Ms. Dondero) as defendants. Highland also amended its complaint to add new claims of fraudulent transfer, a declaratory judgment on portions of Highland’s limited partnership agreement, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.

Mr. Dondero, Dugaboy Investment Trust, and Ms. Dondero filed motions to compel arbitration of the claims for declaratory judgment and aiding and abetting breach of fiduciary duty and to stay the remaining claims pending arbitration of the remaining claims.

Section 6.14 of Highland's limited partnership agreement stated that "[i]n the event there is an unresolved legal dispute between the parties and or any of their respective officers, directors, partners, employees, agents, affiliates or other representative that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act." The arbitration clause also significantly limited discovery that could occur in arbitration.

Notably, the parties agreed that the limited partnership agreement, as an executory contract, was rejected under 11 U.S.C. § 365 in connection with the court's order confirming Highland's plan of reorganization in February 2011.

Highland countered that (a) the rejection of the limited partnership agreement excused Highland from being forced to submit to mandatory arbitration; (b) the defendants had waived the arbitration clause by not invoking it at any earlier point in the Note Adversary Proceedings; and (c) the defendants should be judicially estopped from invoking the arbitration clause.

The court first considered Highland's argument that the rejection of the limited partnership agreement excused Highland from being forced to submit to mandatory arbitration. Under the Federal Arbitration Act, generally, where a contract contains a provision in which parties agreed to submit future disputes to arbitration, those provisions should be enforced according to their terms. However, some courts have considered whether a bankruptcy court needs to treat an arbitration provision in a contract as "any less mandatory" than other courts. The court noted that the underlying purpose of the Bankruptcy Code is to (a) provide debtors and creditors with orderly and effective administration of bankruptcy estates; and (b) centralize disputes over debtors' assets and obligations in one forum. Further, in *In re Gandy*, 299 F.3d 489, 489 (5th Cir. 2002) and *In re Nat'l Gypsum*, 118 F.3d 1056, 1056 (5th Cir. 1997), the Fifth Circuit instructed that a bankruptcy court may refuse to enforce arbitration clauses and may itself adjudicate a dispute when it finds that (a) a matter is core or derives from rights under the Bankruptcy Code; and (b) enforcement of the arbitration provision would irreconcilably conflict with the purposes or goals of the Bankruptcy Code.

Highland argued that as the limited partnership agreement was an executory contract that it rejected under its confirmed Chapter 11 plan, Highland was no longer bound by the limited partnership agreement's provisions that impose specific performance obligations on it, including the arbitration clause. Highland's argument was supported by *Janvey v. Alguire*, 2014 U.S. Dist. LEXIS 193394 (N.D. Tex. Jul. 20, 2014), *aff'd on other grounds*, 847 F.3d 231 (5th Cir. 2017). The *Janvey* opinion arose in the context of a federal receivership commenced at the request of the Securities and Exchange Commission in response to a large Ponzi scheme. Although the *Janvey* opinion involved a federal receiver, the case looked almost entirely to bankruptcy law and 11 U.S.C. § 365 to support its ruling. The receiver brought suit against former employees, alleging that the former employees received fraudulent transfers in violation of the Texas Uniform Fraudulent Transfers Act. The former employees moved to compel arbitration based on mandatory arbitration clauses in various documents. The precise issue of the case was whether to deny or grant the motions to compel arbitration based on whether the arbitration clauses bound the receiver if he sued, as he must, on behalf of the subject entities. The *Janvey* court stated that arbitration of the receiver's claims would frustrate a central purpose of federal equity receiverships. The *Janvey* court further noted that the analysis of exceptions to the general requirement to arbitrate under the Federal Arbitration Act is only necessary after an initial determination that a party (in *Janvey*, the receiver) is bound—either as a signatory or through a principle of law or equity—to an arbitration agreement.

The *Janvey* court concluded that arbitration agreements must be analyzed as separate executory contracts based on the nature of the agreement and arbitration case law regarding severability. The *Janvey* court cited Professor Jay Westbrook, an expert on executory contracts in bankruptcy, that "viewed as an independent contractual obligation of the parties, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought." The *Janvey* court ultimately determined that the receiver had rejected the arbitration agreements, the rejection was proper, the receiver was not bound to arbitrate, and that if the court required the receiver to arbitrate, it would greatly burden and deplete the receivership estate.

The Fifth Circuit ultimately affirmed the case, but on other grounds. *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017). Additionally, the Fifth Circuit was wary of endorsing the lower court's "broad policy arguments in the absence of specific direction from the Supreme Court," but did not otherwise address the arguments.

The court found *Janvey* persuasive (and potentially binding due to the Fifth Circuit's affirmance). The court further noted that just as a federal receiver is analogous to a bankruptcy trustee, a debtor-in-possession is statutorily

the same as a bankruptcy trustee. The court thus determined that the defendants could not obtain specific performance by Highland because the limited partnership agreement was an executory contract.

Second, the court considered Highland's arguments regarding waiver and found that the defendants had waived any right to invoke the arbitration clause. The court noted that waiver would be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. The court found, however, that the defendants waived their right to demand arbitration by filing multiple answers, motions to withdraw reference to the bankruptcy court, extensive discovery that exceeded what was allowed under the arbitration agreement, and complete silence about the arbitration issue for more than eight months of litigation. Even though Highland amended its complaint to include the claims subject to the motion to compel arbitration more than seven months after the Note Adversary Proceedings were filed, the defendants had reason to know that the oral agreement defense might implicate the arbitration clause and did not raise the issue until after several months of litigation.

Third, the court declined to consider the issue of judicial estoppel because of its prior rulings in favor of Highland not to compel arbitration.

Finally, the court declined to stay the proceedings on Highland's other claims because the court denied the motion to compel arbitration. Further, even if the court erred in its ruling on the arbitration motions, the court found that no cause existed to stay the proceedings on the other claims because if Highland prevailed on the other claims, it would be likely to pursue the claims that would be subject to arbitration.

9. Attorney's Fees

Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury's finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney's fee provision in the partnership agreement where they prevailed on some claims for breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall ("Walker") and some of his cousins inherited land (the "Blaffer Tract") along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties ("Freeport Properties"), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker's wholly owned company, Briarwood Capital Corporation ("Briarwood Capital"), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership's entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership's existence. The court referred to the appellants collectively as the "Other Limited Partners."

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker's consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and

Briarwood Capital had breached the fiduciary duties they owed to the Other Limited Partners and the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of the limited partnership on two valuable tracts of land obtained by an entity of Walker's in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney's fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney's fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners' argument that the evidence was insufficient to support the jury's finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker's entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners' challenge to the jury's findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. Again, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Another contention of the Other Limited Partners on appeal was that the trial court erred in ordering dissolution of the limited partnership. The basis for the trial court's order of dissolution was that the replacement of Briarwood Capital with a new general partner was invalid under the terms of the partnership agreement. The court discussed the provisions of the partnership agreement as they related to the removal of a general partner, amendment of the partnership agreement, appointment of a new general partner, and dissolution and winding up of the partnership when there was no remaining general partner. Because the general partner was removed in compliance with the partnership agreement, but the amendment of the limited partnership agreement and designation of a new general partner were not accomplished in compliance with the partnership agreement, dissolution of the partnership was triggered by a provision stating that the partnership was dissolved if a new general partner was not unanimously designated within 90 days of the removal of the general partner.

On appeal, each side argued that they were entitled to recover attorney's fees, which the trial court had declined to award either side. The court of appeals first noted that the trial court had discretion as to a claim for attorney's fees under the Declaratory Judgments Act, and its decision would not be an abuse of discretion, but the court additionally noted that neither side properly presented for review its fee claim under the Declaratory Judgments Act. The court thus proceeded to analyze the parties' claims to attorney's fees under the limited partnership agreement. The trial court had no discretion under the limited partnership agreement because the agreement provided that the prevailing party "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 with the litigation." Under this mandatory provision, the trial court could not refuse to award costs and fees under the agreement on equitable grounds.

Each side argued that they prevailed at trial. The Other Limited Partners argued that they prevailed on the main issue, breach of fiduciary duty, as to the most significant of the disputed tracts, thus entitling them to costs and fees. Walker argued there were four main issues—Walker's declaratory judgment claim about the improper replacement of Briarwood Capital as general partner and three separate claims for breach of fiduciary duty relating

respectively to the City and District Tracts, Stanley Tract, and Henderson Tract. Because he prevailed on at least three of these issues, he asserted that he was entitled to costs and fees. Walker additionally argued that he should be understood as having prevailed even with respect to the City and District Tracts because the Other Limited Partners abandoned their claims for millions of dollars in damages during closing arguments and the constructive trust imposed on these two tracts meant that they would ultimately be liquidated as part of the partnership's dissolution, in which he would share. The court discussed the meaning of a "prevailing party" in a case with multiple claims, stating that "[i]n suits with multiples claims, the prevailing party is the one 'who successfully prosecutes the action or successfully defends against the action on the main issue.'" When there is more than one main issue and both sides prevail on one or more of them, both sides may be prevailing parties in part, but the court stated that the fee-recovery provision in the limited partnership agreement contemplated a single prevailing party.

Based on the judgment in this case, the court concluded that the Other Limited Partners prevailed. Most importantly, the judgment's first two provisions returned two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprised a majority of the disputed acreage. Most of the remainder of the judgment related to the trial court's declaration that the partnership must be terminated, which Walker sought, but declaratory relief must confer a meaningful victory to confer prevailing-party status. A meaningful victory is one that materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. The court did not view the business divorce here as satisfying this description of a meaningful victory. The court disagreed with the way Walker classified the claims into "main issues." According to the court, "[a] party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged." The court also disagreed with Walker's argument that the Other Limited Partners did not prevail with respect to the City and District Tracts. The Other Limited Partners obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the constructive trust imposed by the judgment required their return. Obtaining this type of equitable relief sufficed to make the Other Limited Partners prevailing parties. The court summed up its conclusion as to this issue by stating:

...Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right.

Although it rejected Walker's contention that he prevailed, the court stated that the trial court should consider on remand the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal, when assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners.

H. Assignment or Transfer of Interest

Walraven v. U.S., 542 F. Supp. 3d 533 (N.D. Tex. 2021).

The district court granted summary judgment to the government on the grounds that the Walravens' tax refund claim, which was based on a transfer of limited partnership interests, violated the economic substance and substance-over-form doctrines.

Marc Walraven was an attorney and businessman in North Texas. In October 2008, Walraven had his tax attorney, Richard Shanks, establish three entities: Walraven Family Investments, Ltd. ("WFI"), Walraven Management Trust ("WMT"), and Pribilof Holdings, Inc. WFI was created as a limited partnership composed of WMT and Pribilof. Pribilof was the limited partner and owned 99% of the capital, profits, and loss of the partnership at formation. Walraven and his father, Joe, each owned approximately 50% of Pribilof. WMT was the general partner and owned the remaining 1%. Walraven was the grantor, the trustee, and, initially, the sole beneficiary of WMT, and possessed total discretion and control of the trust. As trustee of WMT, Walraven was also managing partner of WFI and had "full, complete and exclusive power to manage and control" WFI.

At the time those entities were formed, Walraven and his father owned Eagle Construction, an environmental cleanup business. On November 5, 2008, they sold Eagle Construction to Progressive Environmental for a substantial sum of cash and stock in Progressive. The following day, Walraven contributed a combined \$19,605,235 in cash and stock proceeds from the sale of Eagle Construction to Pribilof. Walraven and his father formed Pribilof as an equipment dealing business, with the goal of buying and selling heavy equipment, such as bulldozers, forklifts, and tractors. Their stated intent was to hire Ron Jacobson to run the business. When that did not materialize, they liquidated the business on December 29, 2008, a little over two months after its formation. During its short existence, Pribilof bought and sold eight pieces of heavy equipment. At liquidation, Pribilof's 99% interest in the WFI partnership—the \$19,605,235 originally contributed by Walraven to fund Pribilof—was transferred back to Walraven individually. At that point, Walraven's trust, WMT, maintained its 1% interest in WFI, with Walraven owning the remaining 99% as a limited partner. Shortly thereafter, Walraven took that 99% limited partnership interest in WFI and transferred 1% of it to each of his four children.

On its corporate income tax return, Pribilof claimed an income loss of over \$16.5 million for discounts applied to Pribilof's limited partnership interests in WFI and the Joe L. Walraven Family Partnership, Ltd. This figure was calculated by applying discounts to the fair market value of Pribilof based on a lack of marketability and control as a limited partner in the two family partnerships. On their personal income tax return for 2008, Plaintiffs reported Walraven's portion of Pribilof's loss, which amounted to \$7,997,997. After an audit, the IRS rejected the claimed loss, determined that the Walravens owed additional taxes in the amount of \$990,993.00, and assessed an underpayment penalty of \$198,198.60. The penalty was approved by the auditing revenue agent's supervisor on October 18, 2012. The Walravens paid the additional taxes and penalty assessed and subsequently filed this suit to obtain a refund.

The Government moved for summary judgment on the ground that the Walraven's claimed loss from Pribilof's liquidation, while in conformity with the letter of the tax code, violated anti-abuse tax doctrines. The court began by applying the "economic substance" doctrine to the facts before it:

"[T]ransactions lack objective economic reality if they 'do not vary, control, or change the flow of economic benefits.'" *Southgate*, 659 F.3d at 481 (quoting *Klamath*, 568 F.3d at 543). "This is an objective inquiry into whether the transaction either caused real dollars to meaningfully change hands or created a realistic possibility that they would do so." *Id.* "[A] circular flow of funds among related entities does not indicate a substantive economic transaction for tax purposes." *Merryman v. Comm'r*, 873 F.2d 879, 882 (5th Cir. 1989). The transaction here lacks economic reality to justify the claimed discounts, as there was no change in economic benefit or actual diminution in the value of the limited partnership interests transferred to Walraven at the time of Pribilof's liquidation. The facts are that Walraven funded Pribilof with his proceeds from the sale of Eagle Construction. Two months later, he transferred those same funds back to himself individually in the form of Pribilof's 99% limited partnership interests while already holding the other 1% interest owned by his trust, WMT, as general partner of WFI. To the extent any dollars "changed hands," it was from Walraven's left hand to his right. As trustee of WMT and thus managing partner of WFI, at all times Walraven maintained 100% ownership and control of the partnership and, by extension, the assets of all of the partners. Simply put, Walraven was made no worse off in this exchange.

Plaintiffs do not dispute that Walraven maintained control of WFI as trustee of WMT, the general partner in the partnership. Instead, they indicate that Walraven had fiduciary obligations as trustee of WMT and focus in the abstract on the fact that ownership of a limited partnership interest is not the same as outright ownership of underlying assets. As a practical matter, any fiduciary obligations Walraven had as trustee were to himself as the sole beneficiary of the trust at the time of Pribilof's liquidation. And the Walravens' contention that "the assets were [] another step away from them" is precisely the type of economic fiction the economic substance doctrine exists to eliminate in consideration of tax liability.

It is also not enough for this prong that Walraven intended the business to be operational or that actual pieces of equipment were bought and sold. "[W]hen applying the economic substance doctrine, the proper focus is on the particular transaction that gives rise to the tax benefit, not collateral transactions that do not produce tax benefits." Here, that is the liquidation of Pribilof and

transfer of its interests to Walraven. If the “transaction lacks economic substance compelled by business or regulatory realities, the transaction must be disregarded even if the taxpayers profess a genuine business purpose without tax-avoidance motivations.” *Klamath*, 568 F.3d at 544. Viewed objectively, the transaction is the type of circular flow of funds that has no legitimate economic reality for purposes of the claimed tax benefit. It thus fails the first prong.

Because the absence of either prong renders the transaction void for tax purposes, the Pribilof transaction lacks economic substance. Nevertheless, the Court addresses the second prong below. ...

The second prong of the economic substance test is “a subjective inquiry into whether the taxpayer was motivated by profit to participate in the transaction. Tax-avoidance considerations are not wholly prohibited; taxpayers who act with mixed motives, seeking both tax benefits and profits for their businesses, can satisfy the business-purpose test.” *Southgate*, 659 F.3d at 481–82 (citation and quotation marks omitted). “[T]he absence of a nontax business purpose is fatal to the argument that the Commissioner should respect an entity for federal tax purposes.” *Saba P’ship v. Comm’r*, 273 F.3d 1135, 1141 (D.C. Cir. 2001). Put another way, the presence of any legitimate business purpose to a taxable event is enough to satisfy the tax-avoidance prong of the *Klamath* test.

In consideration of this prong, there is at least some evidence that Walraven had a legitimate business motivation in forming Pribilof with his father and subsequently dissolving it when the business prospects fizzled out. Evidence in the record indicates that two reasons for structuring the entities as they did were to shelter Pribilof from the claims of potential creditors and for estate planning purposes. During its time in operation, Pribilof bought and sold pieces of heavy equipment, the stated purpose in starting the company. Walraven also stated that he and his father attempted to hire a manager, Rob Jacobson, to run Pribilof. When Jacobson did not end up coming on, they no longer viewed their business model as viable. While other facts cited by the Government point to tax-avoidance motivations by Walraven and his tax attorney, viewing all of the evidence in the light most favorable to the Walravens, as the Court must, the presence of at least some evidence tending to show legitimate profit motive satisfies the business-purpose prong of the test.

The district court then concluded that a separate doctrine, the “substance-over-form” doctrine, had also been violated by the Walravens:

The Government also bases its summary judgment motion on the substance-over-form doctrine, urging the Court to reject the Walravens’ formal characterization of the transaction and, instead, look at its underlying substance. Given the use of intermediaries for the purpose of decreasing his tax burden, the Government insists the Court should disregard the form and disallow this end run around the provisions of the tax code. In this same vein, the Government argues that the claimed “loss” itself is not a bona fide loss under the Treasury Regulations. “If a loss is merely a ‘tax loss,’ but does not correspond to an actual economic loss, it is not deductible under the Internal Revenue Code.” Because the transaction here was not arms-length and Walraven maintained the benefit of the assets the entire time, the Government submits that this does not qualify as a bona fide loss under the code.

In response, the Walravens contend that the transaction here involved several closed and completed transactions fixed by identifiable events. The final event of liquidation produced a loss under section 336, and that section’s operation to this taxable event is mandatory. Because the fair market value of the partnership was in fact less than its tax basis, this is a bona fide loss under the code. According to the Walravens, the fact that the Government disapproves of this result does not allow it to ignore the plain language and meaning of the statutes.

The Court holds that the claimed loss by Pribilof also violates the substance-over-form doctrine. “A fundamental principle of our income tax structure is the basic rubric that economic substance prevails over form.” *Sandvall v. Comm’r*, 898 F.2d 455, 458 (5th Cir. 1990) (citations and internal quotations omitted). Closely related and often overlapping with the economic

substance doctrine, the substance-over-form doctrine is integral to tax law and has been called “the cornerstone of sound taxation.” *Estate of Weinert v. Comm’r*, 294 F.2d 750, 755 (5th Cir. 1961). “The substance over form doctrine permits a court to determine a transaction’s characterization according to its ‘underlying substance of the transaction rather than its legal form.’” *Estate of Streightoff v. Comm’r*, 954 F.3d 713, 719 (5th Cir. 2020) (quoting *Southgate*, 659 F.3d at 480). “[E]ven if a transaction falls within the literal requirements of the tax statute, the transaction will be disregarded ... if it has no business purpose or economic effect other than the creation of tax deductions, or if its only purpose is tax avoidance.” *Griffin v. United States*, 42 F. Supp. 2d 700, 703 (W.D. Tex. 1998). “To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.” *Comm’r v. Court Holding Co.*, 324 U.S. 331, 334, 65 S.Ct. 707, 89 L.Ed. 981 (1945), superseded by statute as stated in *Eckerd Corp. v. United States*, 37 Fed. Cl. 713, 720 (1997).

Here, looking beyond the formal nature of the liquidation and transfer, the transaction lacks economic substance beyond its effect on the Walravens’ tax liability. Unlike other cases conducted at arms-length, Marc Walraven’s presence on all sides of this transaction confirms that there was never any actual or potential lack of control or marketability of Pribilof’s limited partnership interests in WFI. As such, there was also no bona fide loss, which must be a loss “actually sustained” in the taxable year. 26 C.F.R. § 1.165-1(b); *see also ACM P’ship. v. Comm’r*, 157 F.3d 231, 252 (3d Cir. 1998) (“Tax losses such as these ... which do not correspond to any actual economic losses, do not constitute the type of ‘bona fide’ losses that are deductible under the Internal Revenue Code and regulations.”). Considering what actually occurred in the liquidation of the limited partnership interests here reveals the substance of the Walravens’ claimed loss to be illusory. Applying the substance-over-form doctrine to these facts, the Pribilof transaction and claimed discounts resulting in a loss need not be respected for tax purposes.

The district court concluded: “Because the Court holds that both the economic substance doctrine and the substance-over-form doctrine independently preclude the Walravens’ refund claim as a matter of law, no rational jury could find to the contrary. Accordingly, the Court GRANTS the Government’s Motion for Summary Judgment on the Walravens’ claim for refund of overpaid income taxes.” (The court also concluded that the Walravens’ objections to an underpayment penalty failed as a matter of law because, “considering all of the pertinent facts, it was not reasonable for Walraven, a legally educated and savvy businessman, to rely on the advice of Shanks [his tax attorney] in claiming that loss on his 2008 tax return.” As the court observed, “[w]hile reliance on the advice of a tax advisor might demonstrate reasonable cause [for an underpayment] in many instances, the Court holds that it was not reasonable under these facts.”).

I. Dissolution/Winding Up

Hrdy v. Second Street Properties, LLC, ___ S.W.3d ___, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.).

In this dispute between limited partners of a limited partnership and the former general partner and its owner, the court of appeals held, inter alia, that: (1) the evidence was sufficient to support the jury’s finding that the general partner and its owner complied with their fiduciary duties with respect to certain transactions, (2) the limited partners did not comply with the partnership agreement in purporting to amend the agreement without the requisite consent of the general partner where the limited partners had removed the general partner and the partnership lacked a general partner at the time of the vote to amend the agreement; (3) the trial court did not err in ordering a winding up and dissolution of the partnership based on the partnership agreement, which provided that the partnership shall be terminated and dissolved, and its assets liquidated, if the limited partners did not unanimously designate a new general partner within 90 days of removal of the general partner; (5) although the limited partners did not prevail on all claims, and the general partner and its owner prevailed on certain claims against them and obtained certain requested declaratory relief, the limited partners were the prevailing party for purposes of the attorney’s fee provision in the partnership agreement where they prevailed on some claims for

breach of fiduciary duty and obtained a constructive trust requiring the transfer of certain valuable properties to the limited partnership.

In 2002, Walker Royall (“Walker”) and some of his cousins inherited land (the “Blaffer Tract”) along the Brazos River from an uncle. The Blaffer Tract had little value, and Walker and his cousins formed a limited partnership, Freeport Waterfront Properties (“Freeport Properties”), to manage the land with the goal of increasing its value. Because Walker had experience in commercial real estate, the partnership designated Walker’s wholly owned company, Briarwood Capital Corporation (“Briarwood Capital”), the general partner. The limited partners of Freeport Properties and their percentage interests changed over time, but the six individuals who were the appellants in this case were limited partners over the partnership’s entire history. Walker, or a company wholly owned by him, was also a limited partner throughout the partnership’s existence. The court referred to the appellants collectively as the “Other Limited Partners.”

Freeport Properties pursued its goal of increasing the value of the Blaffer Tract and engaged in years of negotiation, and eventually litigation, with the City of Freeport over a development project in connection with a proposed marina. Eventually, a rift developed between Walker and the Other Limited Partners. After the Other Limited Partners removed Briarwood Capital as general partner and elected another company in its place without Walker’s consent, Walker sued. Walker sought a declaration that the partnership agreement required unanimity when designating a new general partner and that the election of the new company as general partner was invalid, thus requiring dissolution of the partnership. The Other Limited Partners countersued, alleging that Walker and Briarwood Capital had breached the fiduciary duties they owed to the limited partnership by acquiring additional tracts of land that had been bought or should have been bought by the partnership. The Other Limited Partners sought the return of these tracts and more than \$1 million in damages. The jury returned a mixed verdict finding for the Other Limited Partners with respect to two tracts and against the Other Limited Partners with respect to two others. The trial court entered judgment on the verdict in which it imposed a constructive trust for the benefit of the limited partnership on two valuable tracts of land obtained by an entity of Walker’s in breach of his fiduciary duties and ordered dissolution and winding up of the partnership (appointing a receiver for that purpose) because the partnership agreement required dissolution if, as here, the partnership did not properly elect a new general partner in a specified time frame. The trial court declined to award any party attorney’s fees under either the Declaratory Judgments Act or the partnership agreement. The Other Limited Partners appealed, raising numerous issues, and Walker and Briarwood raised a single issue relating to the recovery of attorney’s fees by cross appeal.

In a very lengthy opinion, in which the court of appeals described the factual background and evidence in detail, the court addressed each of the issues raised on appeal.

The court first addressed the Other Limited Partners’ argument that the evidence was insufficient to support the jury’s finding that Walker and Briar Capital complied with their fiduciary duties to the Other Limited Partners and the partnership, respectively. The jury found that a relationship of trust and confidence existed between Walker and the other limited partners but that he complied with his duty in connection with transactions involving two tracts of property. The jury likewise found that Briarwood Capital complied with its duty of loyalty to the partnership with respect to these transactions.

In a lengthy discussion of the first of these two transactions, the court examined the evidence relating to the acquisition by Walker’s entity of a piece of property referred to as the Stanley Tract. The court concluded that there was significant conflicting evidence relating to the Stanley Tract transaction, and the evidence did not compel the jury to conclude that Walker lied as argued by the Other Limited Partners or that a conflict of interest or other circumstances rendered the transaction unfair.

Similarly, the court engaged in a lengthy discussion of the Other Limited Partners’ challenge to the jury’s findings that Walker complied with his fiduciary duty in acquiring a tract of land referred to as the Henderson Tract. Both sides put on a significant amount of proof relevant to the fairness of the transaction, and the court said that the evidence as a whole did not compel a reasonable jury to find in favor of the Other Limited Partners. Again, the court concluded that the evidence was legally and factually sufficient to support the jury’s findings that neither Walker nor Briarwood breached a fiduciary duty in connection with the Henderson Tract.

Another contention of the Other Limited Partners on appeal was that the trial court erred in ordering dissolution of the limited partnership. The basis for the trial court’s order of dissolution was a provision of the partnership triggering dissolution if a replacement general partner was not designated within 90 days after the removal of the general partner. After noting that partnership agreements are construed like contracts and reciting several maxims of contract construction, the court discussed the provisions of the partnership agreement as they

related to the removal of a general partner, amendment of the partnership agreement, appointment of a new general partner, and dissolution and winding up of the partnership when there was no remaining general partner.

Under the partnership agreement, limited partners holding a simple majority of the percentage interests in the partnership could remove the general partner; however, upon removal of the general partner, the limited partners had to unanimously elect to continue the partnership's business and designate a new general partner within 90 days to avoid dissolution. In the event that the limited partners failed to unanimously elect to continue and designate a new general partner within 90 days, the agreement provided that the partnership "shall be terminated." The agreement further provided that the partnership "shall be dissolved" and that the partnership assets were to be liquidated under these circumstances.

It was undisputed that the Other Limited Partners removed Briarwood Capital as general partner and that they had the simple majority of percentage interests in the partnership required to do so, but it was also undisputed that the limited partners, which included Walker or a company he owned, did not unanimously elect to continue or designate a new general partner within 90 days. The Other Limited Partners tried to avoid dissolution by changing the terms of the partnership agreement. After they removed Briarwood Capital as general partner, they amended the partnership agreement to allow one or more limited partners holding a simple majority of the percentage interests in the partnership to elect to continue business and designate a general partner; i.e., they eliminated the unanimity requirement for continuation of the business and designation of a new general partner so that Walker's concurrence as a limited partner would no longer be required. The Other Limited Partners then designated a company owned by two of the Other Limited Partners as the new general partner. The new general partner then ratified the amended partnership agreement that allowed its designation as general partner.

The court held the Other Limited Partners' attempted amendment was not valid because it did not comply with the terms of the unamended partnership agreement. The partnership agreement provided that it could only be amended in a writing executed by both the general partner and one or more limited partners holding a simple majority of the percentage interests in the partnership. Because there was no general partner at the time of the amendment, it was not approved by a general partner, and the court stated that the provision would be meaningless if the Other Limited Partners could simply violate this term of the unamended agreement and then ratify the violation afterward.

Furthermore, the court stated that the unamended partnership agreement did not purport to give the general partner such sweeping ratification authority. The court stated that, under ordinary principles of partnership law, the new general partner could only ratify acts of the Other Limited Partners that it could have authorized them to take in the first place, citing *Laird Hill Salt Water Disposal v. E. Tex. Salt Water Disposal*, 351 S.W.3d 81, 90 (Tex. App.—Tyler 2011, pet. denied) (directors may ratify acts that other corporate actors take if directors could have authorized them to take these acts in first instance). Under the terms of the unamended partnership agreement, the general partner could neither amend the partnership agreement unilaterally nor authorize a simple majority to elect a new general partner after the removal of another one. Thus, the removal of Briarwood Capital as general partner was effective, but the amendment of the partnership agreement, appointment of a successor partner, and agreement to continue the partnership were not effective, and the partnership was terminated and dissolved by the terms of the partnership agreement due to the failure to validly designate a new general partner and elect to continue within 90 days of the removal of the general partner.

Walker's failure to secure jury findings that amendment of the partnership agreement and designation of a new general partner were invalid did not preclude dissolution because the Other Limited Partners did not identify a question of fact material to the issue of dissolution that should have been submitted to the jury. Because the relevant facts were undisputed and the partnership agreement was unambiguous, compliance with the partnership agreement was a question of law.

The Other Limited Partners also argued that Walker was estopped from enforcing the partnership agreement's unanimity requirement for designating a new general partner after the removal of another based on a side letter agreement between Walker and two of the Other Limited Partners, an email chain between Walker and the same two individuals, and an email from Walker to several individuals at a bank. The court stated that the partnership agreement's boilerplate merger clause did not amount to a disclaimer of reliance that would bar the Other Limited Partners from alleging they relied on the representations made by Walker in the letter agreement or elsewhere in deciding to join the limited partnership or sign the partnership agreement, but the court found the letter agreement inapposite to the situation at hand because it solely addressed replacement of the general partner during the first four years of the partnership and made no commitments beyond that period. As for the email exchange, the

record demonstrated that the Other Limited Partners did not rely on the inconsistent and ambiguous statements by Walker in those communications. As for the email by Walker in which Walker stated to several bank employees that a simple majority could replace Briarwood Capital as general partner at any time, there was no evidence that the Other Limited Partners contemporaneously saw or were aware of this email. Thus, the court stated that the evidence foreclosed the estoppel argument, and, even assuming it was sufficient to raise a fact issue on reliance, the Other Limited Partners did not request or secure a jury finding on the matter. In fact, the jury found that the Other Limited Partners agreed to a mediated settlement agreement in 2014, which provided that the partnership agreement would be amended to allow a simple majority to designate a new general partner solely in the event of the existing general partner's resignation, not its removal. Thus, even if Walker had at one time agreed that a simple majority could replace Briarwood Capital as general partner when desired, the mediated settlement agreement conclusively showed that the parties had agreed this was no longer the case before the Other Limited Partners replaced Briarwood Capital.

On appeal, each side argued that they were entitled to recover attorney's fees, which the trial court had declined to award either side. The court of appeals first noted that the trial court had discretion as to a claim for attorney's fees under the Declaratory Judgments Act, and its decision would not be an abuse of discretion, but the court additionally noted that neither side properly presented for review its fee claim under the Declaratory Judgments Act. The court thus proceeded to analyze the parties' claims to attorney's fees under the limited partnership agreement. The trial court had no discretion under the limited partnership agreement, because the agreement provided that the prevailing party "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 with the litigation." Under this mandatory provision, the trial court could not refuse to award costs and fees under the agreement on equitable grounds.

Each side argued that they prevailed at trial. Based on the judgment in this case, the court concluded that the Other Limited Partners prevailed. Most importantly, the judgment's first two provisions returned two valuable tracts to the limited partnership based on Walker's and Briarwood Capital's wrongful acquisition. These two tracts comprised a majority of the disputed acreage. Most of the remainder of the judgment related to the trial court's declaration that the partnership must be terminated, which Walker sought, but declaratory relief must confer a meaningful victory to confer prevailing-party status. A meaningful victory is one that materially alters the relationship between the parties in a way that directly benefits the party seeking relief to the other's detriment. The court did not view the business divorce here as satisfying this description of a meaningful victory. The court disagreed with the way Walker classified the claims into "main issues." According to the court, "[a] party who alleges multiple breaches of fiduciary duty, as the Other Limited Partners did in this suit, but secures relief on just one is still a prevailing party because there is but one main issue, which is breach of fiduciary duty, not the individual breaches alleged." The court also disagreed with Walker's argument that the Other Limited Partners did not prevail with respect to the City and District Tracts. The Other Limited Partners obtained a jury finding that Walker breached his fiduciary duty when he acquired these tracts, and the constructive trust imposed by the judgment required their return. Obtaining this type of equitable relief sufficed to make the Other Limited Partners prevailing parties. The court summed up its conclusion as to this issue by stating:

...Walker asks us to declare him the prevailing party in a dispute triggered by his breach of fiduciary duty to the limited partnership, notwithstanding a jury finding that he did breach his fiduciary duty and the trial court's corresponding judgment ordering him to return wrongfully acquired property, based on his successful invocation of a self-destruct clause in the limited partnership agreement after the Other Limited Partners became aware of his fiduciary lapse and took action to protect the limited partnership. That cannot be right.

Although the court rejected Walker's contention that he prevailed, the court stated that the trial court should consider on remand the mixed results and limited extent of relief that the Other Limited Partners secured at trial and on appeal when assessing the amount of attorney's fees reasonably recoverable by the Other Limited Partners.

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"[T]ransactions lack objective economic reality if they 'do not vary, control, or change the flow of economic benefits.'" *Southgate*, 659 F.3d at 481 (quoting *Klamath*, 568 F.3d at 543). "This is an objective inquiry into whether the transaction either caused real dollars to meaningfully change hands or created a realistic possibility that they would do so." *Id.* "[A] circular flow of funds among related entities does not indicate a substantive economic transaction for tax purposes." *Merryman v. Comm'r*, 873 F.2d 879, 882 (5th Cir. 1989). The transaction here lacks economic reality to justify the claimed discounts, as there was no change in economic benefit or actual diminution in the value of the limited partnership interests transferred to Walraven at the time of Pribilof's liquidation. The facts are that Walraven funded Pribilof with his proceeds from the sale of Eagle Construction. Two months later, he transferred those same funds back to himself individually in the form of Pribilof's 99% limited partnership interests while already holding the other 1% interest owned by his trust, WMT, as general partner of WFI. To the extent any dollars "changed hands," it was from Walraven's left hand to his right. As trustee of WMT and thus managing partner of WFI, at all times Walraven maintained 100% ownership and control of the partnership and, by extension, the assets of all of the partners. Simply put, Walraven was made no worse off in this exchange.

Plaintiffs do not dispute that Walraven maintained control of WFI as trustee of WMT, the general partner in the partnership. Instead, they indicate that Walraven had fiduciary obligations as trustee of WMT and focus in the abstract on the fact that ownership of a limited partnership interest is not the same as outright ownership of underlying assets. As a practical matter, any fiduciary obligations Walraven had as trustee were to himself as the sole beneficiary of the trust at the time of Pribilof's liquidation. And the Walravens' contention that "the assets were [] another step away from them" is precisely the type of economic fiction the economic substance doctrine exists to eliminate in consideration of tax liability.

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Because the absence of either prong renders the transaction void for tax purposes, the Pribilof transaction lacks economic substance. Nevertheless, the Court addresses the second prong below. ...

The second prong of the economic substance test is "a subjective inquiry into whether the taxpayer was motivated by profit to participate in the transaction. Tax-avoidance considerations are not wholly prohibited; taxpayers who act with mixed motives, seeking both tax benefits and profits for their businesses, can satisfy the business-purpose test." *Southgate*, 659 F.3d at 481–82 (citation and quotation marks omitted). "[T]he absence of a nontax business purpose is fatal to the argument that the Commissioner should respect an entity for federal tax purposes." *Saba P'ship v. Comm'r*, 273 F.3d 1135, 1141 (D.C. Cir. 2001). Put another way, the presence of any legitimate business purpose to a taxable event is enough to satisfy the tax-avoidance prong of the *Klamath* test.

In consideration of this prong, there is at least some evidence that Walraven had a legitimate business motivation in forming Pribilof with his father and subsequently dissolving it when the business prospects fizzled out. Evidence in the record indicates that two reasons for structuring the entities as they did were to shelter Pribilof from the claims of potential creditors and for estate planning purposes. During its time in operation, Pribilof bought and sold pieces of heavy equipment, the stated purpose in starting the company. Walraven also stated that he and his father attempted to hire a manager, Rob Jacobson, to run Pribilof. When Jacobson did not end up coming on, they no longer viewed their business model as viable. While other facts cited by the Government point to tax-avoidance motivations by Walraven and his tax attorney, viewing all of the evidence in the light most favorable to the Walravens, as the Court must, the presence of at least some evidence tending to show legitimate profit motive satisfies the business-purpose prong of the test.

The district court then concluded that a separate doctrine, the "substance-over-form" doctrine, had also been violated by the Walravens:

The Government also bases its summary judgment motion on the substance-over-form doctrine, urging the Court to reject the Walravens' formal characterization of the transaction and, instead, look at its underlying substance. Given the use of intermediaries for the purpose of decreasing his tax burden, the Government insists the Court should disregard the form and disallow this end run around the provisions of the tax code. In this same vein, the Government argues that the claimed "loss" itself is not a bona fide loss under the Treasury Regulations. "If a loss is merely a 'tax loss,' but does not correspond to an actual economic loss, it is not deductible under the Internal Revenue Code." Because the transaction here was not arms-length and Walraven

maintained the benefit of the assets the entire time, the Government submits that this does not qualify as a bona fide loss under the code.

In response, the Walravens contend that the transaction here involved several closed and completed transactions fixed by identifiable events. The final event of liquidation produced a loss under section 336, and that section's operation to this taxable event is mandatory. Because the fair market value of the partnership was in fact less than its tax basis, this is a bona fide loss under the code. According to the Walravens, the fact that the Government disapproves of this result does not allow it to ignore the plain language and meaning of the statutes.

The Court holds that the claimed loss by Pribilof also violates the substance-over-form doctrine. "A fundamental principle of our income tax structure is the basic rubric that economic substance prevails over form." *Sandvall v. Comm'r*, 898 F.2d 455, 458 (5th Cir. 1990) (citations and internal quotations omitted). Closely related and often overlapping with the economic substance doctrine, the substance-over-form doctrine is integral to tax law and has been called "the cornerstone of sound taxation." *Estate of Weinert v. Comm'r*, 294 F.2d 750, 755 (5th Cir. 1961). "The substance over form doctrine permits a court to determine a transaction's characterization according to its 'underlying substance of the transaction rather than its legal form.'" *Estate of Streightoff v. Comm'r*, 954 F.3d 713, 719 (5th Cir. 2020) (quoting *Southgate*, 659 F.3d at 480). "[E]ven if a transaction falls within the literal requirements of the tax statute, the transaction will be disregarded ... if it has no business purpose or economic effect other than the creation of tax deductions, or if its only purpose is tax avoidance." *Griffin v. United States*, 42 F. Supp. 2d 700, 703 (W.D. Tex. 1998). "To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress." *Comm'r v. Court Holding Co.*, 324 U.S. 331, 334, 65 S.Ct. 707, 89 L.Ed. 981 (1945), superseded by statute as stated in *Eckerd Corp. v. United States*, 37 Fed. Cl. 713, 720 (1997).

Here, looking beyond the formal nature of the liquidation and transfer, the transaction lacks economic substance beyond its effect on the Walravens' tax liability. Unlike other cases conducted at arms-length, Marc Walraven's presence on all sides of this transaction confirms that there was never any actual or potential lack of control or marketability of Pribilof's limited partnership interests in WFI. As such, there was also no bona fide loss, which must be a loss "actually sustained" in the taxable year. 26 C.F.R. § 1.165-1(b); *see also ACM P'ship. v. Comm'r*, 157 F.3d 231, 252 (3d Cir. 1998) ("Tax losses such as these ... which do not correspond to any actual economic losses, do not constitute the type of 'bona fide' losses that are deductible under the Internal Revenue Code and regulations."). Considering what actually occurred in the liquidation of the limited partnership interests here reveals the substance of the Walravens' claimed loss to be illusory. Applying the substance-over-form doctrine to these facts, the Pribilof transaction and claimed discounts resulting in a loss need not be respected for tax purposes.

The district court concluded: "Because the Court holds that both the economic substance doctrine and the substance-over-form doctrine independently preclude the Walravens' refund claim as a matter of law, no rational jury could find to the contrary. Accordingly, the Court GRANTS the Government's Motion for Summary Judgment on the Walravens' claim for refund of overpaid income taxes." (The court also concluded that the Walravens' objections to an underpayment penalty failed as a matter of law because, "considering all of the pertinent facts, it was not reasonable for Walraven, a legally educated and savvy businessman, to rely on the advice of Shanks [his tax attorney] in claiming that loss on his 2008 tax return." As the court observed, "[w]hile reliance on the advice of a tax advisor might demonstrate reasonable cause [for an underpayment] in many instances, the Court holds that it was not reasonable under these facts.").

Veliz v. Veliz, Civ. A. No. 6:19-CV-94, 2021 WL 4538489 (S.D. Tex. Aug. 12, 2021).

"Finally, Defendants ask the Court to declare that Defendant Vincent has trademark ownership of the 'VLZ,' VLZ Collision, and VLZ Elite Concept's stallion logos. Ownership of a trademark requires bona fide use. When a partnership dissolves, the trademark rights are not automatically divided between the partners. *Okla. Bev. Co. v. Pepper Love Bottling Co.*, 565 F.2d 629, 631 (10th Cir. 1977). Even where partners explicitly agree to divide

trademark ownership, the trademark rights must still be perfected by use after the dissolution of the partnership. *Id.*

Additionally, ‘the first one to use a mark is generally held to be the ‘senior’ user and is entitled to enjoin other ‘junior’ users from using the mark, or one that is deceptively similar to it, subject to limits imposed by the senior user’s market and natural area of expansion.’ *Union Nat’l Bank of Tex., Laredo v. Union Nat’l Bank of Tex., Austin*, 909 F.2d 839, 842–43 (5th Cir. 1990). Under the Lanham Act, junior users may still claim usage rights if ‘the use predates the senior user’s registration’ and ‘the mark ‘was adopted without knowledge of the registrant’s prior use and has been continuously used.’ ‘ *Peaches Ent. Corp. v. Ent. Repertoire Assocs.*, 62 F.3d 690, 692 (5th Cir. 1995) (quoting 15 U.S.C. § 1115(b)(5)).

Defendant Vincent claims that the partnership between him and Plaintiff owned the VLZ trademarks from 2007 to 2012. Defendant Vincent also asserts that after the dissolution, he acquired common law trademark rights to use the ‘VLZ’ mark, stallion logo, and the VLZ Collision marks through the agreement of the parties and his continued use of the marks. However, as previously stated, this Court finds that there is a significant factual dispute over whether an enforceable agreement existed between the parties.

In addition, the factual disputes about the alleged partnership create confusion around the determination of senior and junior users. Plaintiff asserts that he has used and owned the VLZ trademarks since 1997. Plaintiff also registered the trademarks in his own name in 2016 and 2018, after the alleged partnership dissolved. Defendant began using the name and mark ‘VLZ Collision’ after the dissolution in 2012 but testified that he never used ‘VLZ’ as a standalone word mark. This Court need not address who was a senior or junior user at this time because there is no proof of continual usage of the trademarks by Defendant Vincent nor evidence of an agreement for co-ownership of the marks between Plaintiff and Defendants.

Therefore, given the significant factual disputes around the alleged partnership and the existence of an agreement to the trademarks, this Court cannot definitively declare that Defendant Vincent has ownership of the VLZ trademarks.”

J. Attorney’s Fees

[Prior to September 1, 2021, Tex. Civ. Prac. & Rem. Code § 38.001(b) authorized recovery of attorney’s fees for services, labor, sworn account, and contracts against any “individual or corporation.” In suits filed on or after September 1, 2021, Tex. Civ. Prac. & Rem. Code § 38.001(b) allows for the recovery of attorney’s fees from “an individual or organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust.” *Id.* (amended by Acts 2021, 87th Leg., ch. 665 (H.B. 1578), § 1, eff. Sept. 1, 2021). An “organization” is defined with reference to Tex. Bus. Orgs. Code § 1.002, under which an “organization” means “a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.” *Id.*; Tex. Bus. Orgs. Code Ann. § 1.002(62).]

Benge General Contracting, LLC v. Hertz Electric, LLC, No. 05-19-01506-CV, 2021 WL 5317840 (Tex. App.—Dallas Nov. 16, 2021, no pet. h.) (mem. op.) (“Section 38.001 authorizes an award of attorney’s fees for certain types of claims brought by a ‘person’ against ‘an individual or corporation.’ See TEX. CIV. PRAC. & REM. CODE § 38.001. Under the plain language of section 38.001, a trial court cannot order limited liability partnerships (LLP), limited liability companies (LLC), or limited partnerships (LP) to pay attorney’s fees.”).

In re Houston Bluebonnet, L.L.C., Case No. 16-34850, 2021 WL 4562255 (Bankr. S.D. Tex. Oct. 5, 2021).

“Still, the Hammans’ ability to recover attorneys’ fees from Defendants is limited. Section 38.001 of the Civil Practice[] and Remedies Code authorizes plaintiffs to recover attorneys’ fees from ‘an individual or organization.’ However, prior to September 2021, section 38.001 only provided for the recovery of attorneys’ fees from ‘an individual or corporation.’ Under the former provision, the term ‘corporation’ did not encompass limited liability companies or limited partnerships.

In enacting the new version of section 38.001, the Texas Legislature noted:

The change in law made by this Act applies only to an award of attorney’s fees in an action commenced on or after the effective date of this Act. An award of attorney’s fees in an action commenced before the effective date of this Act is governed by the law applicable to the award immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Act of June 15, 2021, 87th Leg., R.S., ch. 665, § 2, sec. 31.008, 2021 Tex. Sess. Law Serv. (West) (emphasis added). Based on this provision, the Legislature did not intend for plaintiffs like the Hammans to reap the benefits of section 38.001’s amendment. The Hammans are bound by the old version of section 38.001. Under the prior version of section 38.001, the Hammans cannot recover attorneys’ fees from Houston Bluebonnet, a Texas limited liability company, or from E&H, a non-resident limited partnership.”

See also Hrdy v. Second Street Properties, LLC, __ S.W.3d __, 2022 WL 903952 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.), **summarized above under “Interpretation and Enforcement of Partnership Agreement—Attorney Fees.”**

K. Indemnification and Advancement

Newstream Hotels & Resorts, LLC v. Abdou, No. 02-21-00343-CV, 2022 WL 1496537 (Tex. App.—Fort Worth May 12, 2022, no pet.) (mem. op.).

The court held that a limited partnership’s general partner and its affiliate failed to establish that the Texas Citizen Participation Act was applicable to a claim by investors in the limited partnership that the general partner and its affiliate had wrongfully obtained indemnification from the partnership for fees and expenses incurred in this judicial proceeding. The general partner and its affiliate characterized communications relating to the indemnification as being made “in or pertaining to a judicial proceeding” and “in connection with a matter of public concern” because the indemnified attorney’s fees and expenses were incurred in this judicial proceeding and the investors’ underlying claims in the lawsuit alleged misrepresentations and mismanagement of a real estate development project that included public improvements financed by the Town of Flower Mound. The court held that the central issue to the investors’ claim was breach of the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. That claim was premised on conduct, not on communication, and the TCPA thus did not apply.

Lakeside Crossing Land Partners (“LCLP”) was a limited partnership involved in the construction of mixed-use real estate development in Flower Mound, Texas. Newstream Hotels and Resorts, LLC was the general partner of the partnership. Investors (“Appellees”) in LCLP brought suit against Newstream Hotels and Resorts, LLC and an affiliated company, Newstream Commercial, LLC, (collectively “Appellants”) on various claims, including Appellants’ alleged misrepresentations and mismanagement of the project. Appellants then notified Appellees via email that Appellants were obtaining indemnification from LCLP, allegedly pursuant to the partnership agreement, in connection to the lawsuit. Subsequently, Appellants exercised their claimed right to indemnification through a series of invoices, payments, and checks for the indemnification of the legal fees and litigation expenses.

Following Appellants’ exercise of their claimed right of indemnification, Appellees amended their petition to add a paragraph alleging that Appellants’ exercise of their claimed indemnification rights was invalid under the partnership agreement and Texas law. Appellants subsequently moved to dismiss the amended claims under the Texas Citizen Participation Act (TCPA). Appellants argued that the amended claims were based on, or were in response to, Appellants’ communications informing the Appellees of the indemnification. Appellants also claimed that the invoices, payments, and checks were “communications” made “in or pertaining to a judicial proceeding” and were made “in connection with a matter of public concern” and therefore protected by the TCPA. Specifically, Appellants claimed that (1) their rights to petition and free speech were implicated because Appellants’ communications stated that they were obtaining indemnity/reimbursement from LCLP and (2) the payment “communications” pertained to the present judicial proceeding and involved a matter of public concern (the Town of Flower Mound’s involvement in the project’s financing). The trial court denied Appellants’ motion, and Appellants filed an interlocutory appeal.

In describing the underlying legal framework of a motion to dismiss under the TCPA, the court noted that the nonmovants' (in this case, Appellees') pleadings are the "best and all-sufficient" evidence of the nature of their claim. An appellate court must review the trial court's ruling de novo and view the pleadings in the light most favorable to the nonmovant. Importantly, merely alleging conduct that has a communication embedded within it does not create the relationship between the claim and the communication necessary to invoke the TCPA. Additionally, if a claim does not allege a communication but is based on conduct, the TCPA does not apply.

A review of a TCPA motion to dismiss involves a three-step analysis. The court noted, however, that the Texas Legislature's 2019 amendments to the TCPA narrowed the statute's applicability. First, a movant seeking the protection of the TCPA must initially demonstrate that the claim is based on or is in response to its exercise of the right of free speech, to petition, or of association. Second, if the moving party satisfies its burden to prove the applicability of the TCPA, then the nonmoving party must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Finally, if the nonmoving party satisfies the second step, then the burden shifts back to the moving party to establish an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

First, considering the Appellees' pleadings as the "best and all-sufficient" evidence, the court found that the trial court properly denied Appellants' motion. The central issue to the Appellees' claim was that the Appellants breached the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. The claim was premised on conduct, not on communication. Thus, the TCPA did not apply.

Second, the court rejected Appellants' assertion that a quote in Appellees' response to the motion to dismiss supported Appellants' argument. Appellees' response to the motions to dismiss contained sworn testimony that Newstream Hotels and Resorts, LLC had informed all limited partners that the partnership had to raise additional capital, in part due to the indemnification payments. The testimony also included the statement that "those payments have depleted Partnership funds and have made it less likely that I will receive any return of my capital contribution." Appellants claimed that this testimony showed that Appellees responded to the "communication" of LCLP's "need to raise additional capital, in part, because of the [indemnification] payments" by filing wrongful indemnity claims. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, the quoted testimony showed that conduct caused the Appellees' harm and served as the basis for the amended claims.

Third, the court rejected Appellants' argument that Appellants brought their amended claims in response to the communications contained within checks and instructions to withdraw partnership funds. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, any communications contained within the checks and instructions to withdraw partnership funds merely served as evidence of Appellants' conduct and did not change the conduct at issue in the case.

Hotze v. IN Mganagement, LLC, __ S.W.3d __, 2021 WL 3087524 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

The court of appeals concluded, in the limited partnership context, that appellants failed to establish that appellees were not entitled to indemnification or to advancement of their legal expenses.

This case concerned a dispute among five brothers regarding control of a family owned business, Compressor Engineering Corporation ("CECO"). The brothers also co-owned several limited partnerships, referred to as the Inter Nos entities, which existed primarily to lease assets to CECO. In essence, two of the brothers, appellants David and Bruce Hotze, alleged that the other three brothers, appellees Richard, Mark, and Steven Hotze, manipulated CECO's financial status to gain control of the company. In response, Richard, Mark, and Steven maintained that they merely undertook actions required to save CECO from impending bankruptcy and dissolution.

Appellants contended, among other issues, that "the trial court erred in denying their derivative claims on behalf of the Inter Nos entities based on the allegedly improper indemnification and advance payment of legal costs from the entities to appellees Mark, Richard, and Steven." The trial court had rejected jury charge submissions on these claims and had denied appellants' post-trial motions.

On appeal, the court largely agreed with the trial court's determinations:

Both sides cite to sections of Texas Business Organizations Code chapter 8, "Indemnification and Insurance" as controlling. Tex. Bus. Orgs. Code § 8.001–.152. Appellants first argue that because appellees did not plead for or obtain jury findings as to mandatory

indemnification under section 8.051, they were not entitled to any payment of their legal costs by the Inter Nos entities. That section, entitled “Mandatory Indemnification,” states in full:

- (a) An enterprise shall indemnify a governing person, former governing person, or delegate against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person or delegate if the person is wholly successful, on the merits or otherwise, in the defense of the proceeding.
- (b) A court that determines, in a suit for indemnification, that a governing person, former governing person, or delegate is entitled to indemnification under this section shall order indemnification and award to the person the expenses incurred in securing the indemnification.

Nothing in this section requires pleadings or jury findings specifically on an entitlement to indemnification pursuant to the section. Instead, it mandates indemnification of the reasonable expenses of governing persons who are pulled into litigation because of their governing positions if they are “wholly successful” in their defense. Appellants do not cite any other authority or make any argument outside of citing section 8.051 for the proposition that a pleading and jury findings were required for appellees to be entitled to indemnification. Accordingly, we find no merit in their first argument.

Next, appellants assert that the Inter Nos entities’ partnership agreements do not permit indemnification and advancement of litigation expenses under the circumstances of this case. They begin by noting that the governing documents for one of the entities does not mention indemnification or advancement of legal costs, and they conclude from this that indemnification or advancement from that entity was not permitted as a matter of law. But they do not cite any authority or make any argument supporting this conclusion.

As for the other entities’ partnership agreements, appellants assert that they do not permit indemnification when the claims being defended against are for fraud, breach of fiduciary duty, and breach of the partnership agreements themselves, which appellants identify as the types of claims they pursued in this litigation. The governing documents, however, provide for indemnification of members, officers, and others against any and all claims in which those persons may become involved based on the affairs of the partnership except when “the claim or liability arises from the gross negligence, willful misconduct, fraud or breach of this Agreement by such [person] or actions of such [person] outside the scope of [the] Agreement.” Contrary to appellants’ representation, this language does not bar indemnity simply because a claim is made of fraud, breach of fiduciary duty, or breach of the agreements; it bars indemnity for claims arising from certain types of conduct. Just because a claim has been made regarding certain conduct does not mean that the conduct actually occurred. For example, in this case, the jury found against appellants on all their claims. Accordingly, there is no merit in appellants’ argument that the partnership agreements barred indemnification in this case as a matter of law.

Additionally, appellants assert that even if indemnification was permissible, the allocation of the costs among the different Inter Nos entities was unreasonable. On this basis, appellants contend that Richard, who acknowledged directing the allocation, breached the fiduciary duties he allegedly owed to the entities. Appellants’ complaint regarding the allocation is that it was supposedly done “based solely on the ‘ability to pay’ (i.e., the amount of funds each entity had on hand)—not based on any fair, reasoned allocation basis or formula.” Appellants, however, cite no authority and make no cogent argument to support their supposition that allocating indemnification to the entities based on the entities’ ability to pay was unreasonable or a breach of fiduciary duties. Accordingly, this argument is inadequately briefed.

Lastly, appellants argue that even assuming permissive indemnification and advancement was allowed under the agreements, it was not properly approved in this case. Specifically, appellants assert that Business Organizations Code section 8.103 requires an approval by majority vote of disinterested governing persons before permissive indemnification or advancement can

occur and that such vote did not occur. As appellants themselves point out, however, indemnification is mandatory—and thus does not require a vote—under section 8.051 if the appellees are “wholly successful” in the defense of the claims. Appellees were, of course, wholly successful in the first trial and may be again on remand. Appellants do not offer any argument as to why we need to address the propriety of a permissive indemnification when indemnification may be mandatory on remand, and we decline to make any argument for them. We need not and do not state a position on this issue at this time.

Based on the foregoing discussion of appellants’ arguments, appellants have not established as a matter of law that appellees were not entitled to indemnity or the advancement of legal costs in this case. However, because the ultimate determination of whether appellees are entitled to indemnity may turn on whether they are “wholly successful” in defending against appellants’ claims on remand, we reverse and remand the indemnity/advancement of fees issues to the trial court.

L. Standing or Capacity to Sue

In re Porter Development Partners, LLC, Case No. 15-31305, Case No. 15-31307, Case No. 15-31770, Case No. 15-31772, 2022 WL 1535183 (Bankr. S.D. Tex. May 13, 2022).

The court disallowed numerous claims of investors against a limited partnership and related entities because the investors failed to meet their summary judgment burden to establish standing by failing to allege specific facts supporting an alleged injury fairly traceable to the defendant’s conduct or because the harm alleged was indirect rather than direct (i.e., the harm was suffered by the entities and only indirectly by the investors).

The debtors in these bankruptcy proceedings were Porter Development Partners LLC (“Porter”), WB Murphy Road Development LLC (“Murphy Road”), WB Real Estate Holdings LLC (“WB Holdings”), and Wallace Bajjali Investment Fund II LP (“Fund II”) (collectively the “Debtors”). In the early 2000s, Wallace Bajjali (“Bajjali”) and David Wallace (“Wallace”) formed several entities to acquire and develop real estate. Following the 2008 recession, Wallace and Bajjali proposed to consolidate various entities (including Fund II) into a single holding company, WB Holdings (the “Merger”). The parties in the suit disagreed on whether the requisite approval of the parties was obtained for the Merger and whether it was effective.

In 2012, Wallace and Bajjali planned to launch an initial public offering to raise capital for public-private partnership projects. However, Wallace and Bajjali could not raise the requisite funds to support the initial public offering, and the Debtors filed for bankruptcy. Various individuals, who invested in one or more of Debtors, entities related to Debtors, and non-debtor entities (collectively the “Claimants”) filed separate proofs of claim against each of the Debtors.

Claimants alleged seven causes of action against Debtors: (1) negligence, (2) negligent misrepresentation, (3) breach of fiduciary duty, (4) knowing participation in breach of fiduciary duty, (5) common law fraud, (6) violations of the Texas Securities Act, and (7) civil conspiracy. Additionally, Claimants described three acts that were most relevant to the proceeding. First, Claimants identified “[t]he repayment of a loan from IIRC to BusinessRadio Network LP (an entity that Fund II invested in) by the Wallace Bajjali partnerships to avoid personal liability for Wallace in breach of his fiduciary duty.” Second, Claimants identified “[t]he transfer of ownership of numerous single-purpose entities from three real estate funds to a single holding company called WB Holdings—the Merger—without making full disclosure to interested parties and without corporate approval” Finally, Claimants identified “[t]he diversion of funds from real estate partnerships to Wallace and Bajjali’s personal benefit.”

In the matters at issue in the court’s opinion, the Trustee filed a motion for summary judgment. The court additionally ordered the parties to submit briefing on the issue of standing. The court ultimately found that Claimants failed to establish their summary judgment burden as to standing and disallowed all of Claimants’ claims, except for Claimant Donald Taylor’s claims based on unpaid promissory notes to Porter and Murphy.

As an initial matter, the court stated that Texas law applied because “state law governs ‘[i]n deciding questions of law involving partnerships, including standing.’”

There are three elements for standing under Texas and federal law. First, the plaintiff must be personally injured and plead facts demonstrating that the plaintiff itself suffered the injury. The injury must be concrete and particularized, actual or imminent, not hypothetical. Second, the plaintiff’s alleged injury must be fairly traceable

to the defendant's conduct. Third, the requested relief must be likely to redress the plaintiff's alleged injury, and the plaintiff must demonstrate standing separately for each form of relief sought.

First, the court found that Claimants failed to meet their burden for standing on Claimants' negligence claims because Claimants' pleadings did not contain any allegations specific to negligence. Because Claimants did not cite particular parts of materials in the record to support their assertion that they had standing to bring a cause of action directly for negligence, they failed to satisfy their burden on the negligence cause of action.

Second, the court disallowed Claimants' negligent misrepresentation claims, except those by Donald Taylor with respect to loans that he made to Porter and Murphy Road. The court considered four distinct categories of negligent misrepresentation claims by Claimants.

Claimant Randall DePue asserted a claim of negligent misrepresentation against WB Holdings for misrepresentation in connection with his investment in the entity. However, the court concluded that Randall DePue's conclusory allegation that WB Holdings made a negligent misrepresentation "in connection with" Randall DePue's investment in the entity did not adequately allege an injury fairly traceable to the defendant without more specific facts or allegations.

Various Claimants asserted claims of negligent misrepresentation against Fund II to recover money that each of those Claimants invested (and subsequently lost) in Fund II. Each of those Claimants alleged that Fund II "raised money from investors to further Wallace's, Frishberg's, and Laffer's personal agendas, which included operating a radio station to attract capital and developing real estate for their own benefit" 106 and that "[t]he WBL Partnerships conspired with Wallace to attract Claimants' capital" However, these allegations failed to mention any misrepresentation "in connection" with Claimants' investments in Fund II, and the court disallowed the claims due to the absence of specific facts supporting the allegation.

Claimant Donald Taylor asserted claims of negligent misrepresentation against Porter and Murphy Road for misrepresentations made by the entities in connection with loans that Donald Taylor made to the entities. Trustee did not object to these claims. Therefore, the court allowed these claims to the extent that the claims were based on unpaid promissory notes and not a cause for negligent misrepresentation.

Third, the court disallowed Claimants' breach-of-fiduciary-duty claims because Claimants asserted that the Trustee controlled any claim for breach of fiduciary duty.

Fourth, the court disallowed Claimants' claims for knowing participation in breach of fiduciary duty because Claimants failed to cite to any affidavits or other evidence to support the elements of standing. As the nonmovants at the summary judgment stage, Claimants could not rest on mere allegations and were required to set forth specific facts by affidavit or other evidence.

Fifth, the court disallowed Claimants' common-law fraud claims. The court considered three distinct categories of common-law fraud claims.

Claimants alleged that Debtors committed common-law fraud by failing to inform Claimants of various matters in the Merger. However, the court noted that "[i]f a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under applicable law, then the cause of action belongs to the [bankruptcy] estate." The court further noted that "[i]nvestors may own claims resulting from fraud or misrepresentation that occurred at the time they made their investment." Claimants alleged that they had standing because the Merger caused harm to Debtors (caused Debtors to collapse), which harmed the Claimants through the loss of their investments. The court disallowed these claims because Claimants failed to demonstrate that they suffered a direct injury rather than indirect harm to a creditor.

Donald Taylor asserted common-law fraud claims against Porter and Murphy Road for the sale of his promissory notes. The Trustee did not object to these claims. Therefore, the court allowed these claims to the extent that the claims were based on unpaid promissory notes and not a cause of action for fraud.

Various Claimants argued that they had standing for their common-law fraud claims against Fund II and WB Holdings because "[t]he fraud claims asserted by the Taylor Claimants are personal to them for the losses they sustained individually investing in each of the Debtors." However, those Claimants had previously stated (in their response to the Trustee's motion for summary judgment) that their investments in Fund II and WB Holdings were "going strong" until 2015. Because the damages arose from post-investment mismanagement of Debtors, an indirect injury to Claimants, the court disallowed these claims.

Sixth, the court disallowed Claimants' conspiracy claims against Debtors based on fraud. A conspiracy claim depends on a defendant's participation in some underlying tort for which the plaintiff seeks to hold another

defendant liable; however, no underlying claim of fraud existed because the court disallowed all of Claimants' fraud claims.

Seventh, the court disallowed Claimants' aiding and abetting securities-fraud claims against Debtors because Claimants failed to provide any affidavits or evidence to support these claims.

The court found that the Trustee's evidentiary objection to Claimants' summary-judgment evidence was moot because Claimants failed to carry their summary-judgment burden as to standing.

Power v. Power, No. 05-19-01557-CV, 2022 WL 1314944 (Tex. App.—Dallas May 3, 2022, no pet. h.) (mem. op.).

The court held that the Texas Business Organizations Code allowed the plaintiff partner to maintain an action in his individual capacity against the defendant partner for relief from the defendant partner's breaches of duties and to enforce and protect the plaintiff partner's interest as a partner. The doctrine of fraudulent concealment applied to toll the statute of limitations on the plaintiff partner's claims based on the defendant partner's failure to disclose all material facts relating to the partnership's finances.

Craig Patrick Power ("Craig") and Braden Richard Power ("Braden") were brothers who worked together to acquire, develop, and manage apartment complexes. For each property that the brothers developed, they formed a Texas-based entity ("Jointly Owned Entities") in which the brothers each owned (individually or through their respective trusts) half of the ownership interests (with one exception). The brothers jointly owned Power Property Management, Inc. to provide property management services for the apartment complexes.

Testimony at trial showed Craig was primarily responsible for operating the business while Braden was primarily responsible for designing and overseeing the renovations of the older buildings that the brothers purchased. Braden testified that he began inquiring about the finances of the Jointly Owned Entities in 2011 and asked Craig for a reconciliation of the finances. Braden received the reconciliation in December 2013 and concluded that Craig had been diverting a larger share of income from the Jointly Owned Entities to himself and failing to disclose the actual amount of profits of the Jointly Owned Entities.

Braden, in his individual capacity, brought suit against Craig, in his individual capacity, for breach of fiduciary duty, fraud, fraud by nondisclosure, statutory fraud, breach of contract, and civil theft. At trial, the jury found, among other things, that the brothers had created a partnership to purchase, develop, and sell properties; a relationship of trust and confidence existed between the brothers; Craig managed the accounting, books, and records for their relationship upon which Braden justifiably relied; Craig did not comply with his fiduciary duty to Braden; and Craig committed fraud by nondisclosure and civil theft. The trial court entered judgment on the jury's verdict, and Craig appealed the trial court's judgment.

On appeal, Craig argued that Braden lacked the capacity to recover the damages he sought, Braden's claims were barred by the applicable statutes of limitations, and the trial court abused its discretion by admitting evidence of spoliation and instructing the jury on spoliation. The court affirmed the first two issues and reversed and remanded the trial court's judgment because of the third issue. Craig also presented other arguments that the court declined to consider due to the remand of the trial court's judgment.

First, Craig argued Braden lacked the capacity to recover the damages Braden sought because the alleged damages resulted from injuries incurred solely by the Jointly Owned Entities or the partnership found by the jury. The court rejected Craig's argument because one partner may sue another partner for damages that the first partner personally suffers.

The jury found that Craig and Braden created a partnership to purchase, develop, and sell properties, and Craig did not challenge this finding. The court cited *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 779 (Tex. 2020) for the proposition that "[w]hether a claim brought by a partner actually belongs to the partnership is ... a matter of capacity because it is a challenge to the partner's legal authority to bring the suit." The court noted numerous provisions of the Texas Business Organizations Code bearing on the question of Braden's capacity to assert his claims in this case. The Texas Business Organizations Code provides that a partner is liable to the other partners for violating a duty to the other partners that causes harm to the other partners. Tex. Bus. Orgs. Code § 152.210(2). Further, a partner owes other partners a duty of care, which is a duty "to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances." *Id.* §§ 152.204(a)(2), 152.206(a). A partner is required to discharge the partner's duties to the partnership and other partners in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. *Id.* § 152.204(a), (b). Section 152.211 delineates the authority of partners and partnerships to bring claims and seek

various remedies and provides that one partner “may maintain an action against ... another partner for legal or equitable relief” to, among other things, enforce a partner’s rights under Sections 152.204 and 152.206 and to “enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.” *See* Tex. Bus. Orgs. Code § 152.211(b)(2)(A), (b)(3).

Braden, individually, sued Craig, individually, alleging breach of fiduciary duty and other causes of action. Braden alleged that he was injured by Craig’s actions and produced evidence showing that Craig failed to pay Braden his proportionate share of profits generated by the partnership and made false representations to Braden about the financial condition of their businesses. By these actions, Craig breached his duty of care to Braden and caused injury to Braden personally rather than the partnership. Thus, the court stated that Braden had capacity to assert the claims he asserted. The court noted that Braden did not claim that Craig’s actions reduced the value of the partnership or devalued Braden’s ownership interest, which would be an injury to the partnership. Rather, he contended Craig hid assets from him and failed to pay him his share of the partnership profits. Any recovery Braden sought was not a partnership asset, but was rather Braden’s individual share of the partnership assets that Craig allegedly took and to which Braden personally was entitled.

In re Breitburn Operating LP, No. 14-21-00337-CV, 2022 WL 1151187 (Tex. App.—Houston [14th Dist.] Apr. 18, 2022, no pet. h.) (mem. op.).

The court held that a partner did not have the capacity to sue individually to require a party with whom the partnership had contracted to deposit funds in the registry of the court.

The LL&E Royalty Partnership (the “Partnership”) was formed for the purpose of receiving and holding overriding royalty interests, receiving proceeds from the overriding royalty interests, paying the liabilities and expenses of the Partnership, and disbursing remaining revenues to the 99% partner, the LL&E Trust (the “Trust”), and the 1% managing general partner, the Louisiana Land and Exploration Company (“LLEC”). LLEC entered into substantially identical agreements known as “Conveyance Overriding Royalty Interests” (collectively, the “Conveyance”), which varied only in the interests covered, with the Partnership. Through a series of acquisitions, ConocoPhillips Company became LLEC’s successor as managing general partner of the Partnership. The Trust alleged that certain owners of working interests (whose successor was Breitburn, the relator in this action) breached the Conveyance by failing to pay the Trust tens of millions of dollars in royalties. Breitburn’s predecessor brought a declaratory judgment action against Roger D. Parsons, in his capacity as Trustee of the Trust, and Parsons counterclaimed. In amended pleadings, Parsons added ConocoPhillips as a party and alleged that ConocoPhillips, as general partner of the Partnership, had not taken any steps to protect the royalty interests or ensure compliance with the contractual terms of the Conveyance. Breitburn filed a second verified amended answer, asserting that “The Trust is not entitled to recover in the capacity in which it sues.” Breitburn notified the Partnership that it intended to withdraw the funds in a Wells Fargo account (“Special Cost Escrow Funds” or “Funds”). Parsons filed an application for an order compelling Breitburn to deposit the Funds in the registry of the court, and the trial court granted the request. In this mandamus proceeding, Breitburn asked the court of appeals to compel the trial court to vacate its order for deposit of the Funds into the registry of the court. One of the arguments relied on by Breitburn, which the court found to be dispositive, was that the Trust did not have the capacity to recover the Funds in the court’s registry.

The court boiled down what was a relatively complicated factual history as follows: “When all the dust settles from all the various acquisitions, transfers, assignments, and mergers, we are left with a relatively simple business structure. The LL&E Royalty Partnership has two partners: (1) the LL&E Royalty Trust, a non-managing general partner; and (2) ConocoPhillips, the managing general partner. Parsons is the trustee of the LL&E Royalty Trust.” Breitburn contended that Parsons lacked capacity to pursue the Special Account Escrow Funds. Without conceding that any party other than Breitburn was entitled to the funds, Breitburn asserted that only the Partnership, which was the assignee under the Conveyance, had capacity to sue for the funds. The court noted that the Partnership was not a party to the case and that Parsons’ pleadings and application for deposit into the court’s registry made clear that Parsons was asserting claims on behalf of the Trust and was suing solely in his capacity as trustee for the Trust.

Although Parsons challenged whether Breitburn properly verified its capacity defense, the court concluded that the issue had been tried by consent, and Breitburn had established the affirmative defense of capacity.

The court noted the nature of a partnership as an entity distinct from its partners and the partnership’s ability to enter into contracts and sue and be sued in its own name. *See* Tex. Bus. Orgs. Code §§ 152.056, 152.101;

Tex. R. Civ. Pro. 28. The court also recited principles of partnership property and the distinction between a partnership interest and partnership property. *See id.* § 152.101; *Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.). The court stated that “[n]either a general partner nor a limited partner has a cause of action or right to recover for losses suffered by a partnership,” citing *R2 Enters., Inc. v. Whipple*, No. 2-07-257-CV, 2008 WL 2553444, at *4 (Tex. App.—Fort Worth June 26, 2008, pet. denied) (mem. op.). Parsons acknowledged that a general partnership in Texas may sue on its own behalf under the Texas Business Organizations Code but argued that there is no statute or common-law rule that only the partnership, and not the partners, may pursue the rights of the partnership. According to Parsons, the common law rule in Texas is that general partners are proper parties to pursue the rights of a general partnership. Parsons relied on *Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257 (Tex. App.—Houston [14th Dist.] 1992, no writ) for the proposition that as long as all of the general partners are parties to a lawsuit, then any of the partners may pursue a claim for the general partnership. The court did not find it necessary to reach the question of whether the Texas Business Organizations Code limits or restricts case law in Texas holding that a general partner may pursue claims of a general partnership if all partners are parties to the suit because Parsons never pleaded that he, as trustee of the Trust, a partner in the Partnership, was bringing any claims on behalf of the Partnership. (In a footnote, the court stated: “*Allied* was decided in 1992; in 1993, the Legislature enacted the Texas Revised Uniform Partnership Act (“TRPA”). The Texas Supreme Court in *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455 (Tex. 2011) (orig. proceeding), noted that the TRPA ‘unequivocally embrace[d] the entity theory of partnership by specifically stating ... that a partnership is an entity distinct from its partners.’ *Id.* at 464. Although there is a question of whether *Allied* is still good law, it is not necessary to reach that decision.”) Because Breitburn established its defense of capacity, the court held that the trial court abused its discretion by ordering Breitburn to deposit the disputed funds into the court’s registry.

Cooke v. Karlseng, No. 05-18-00206-CV, 2022 WL 1089911 (Tex. App.—Dallas Apr. 12, 2022, no pet. h.) (mem. op.).

The court of appeals held that the trial court erred in granting a plea to the jurisdiction with respect to a partner’s assertion of claims individually that pleaded only an injury to partnerships in which he was a partner because the Texas Supreme Court has held that a partner or other stakeholder in an entity has constitutional standing to sue for an alleged loss to the entity. *See Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763 (Tex. 2020). Although the supreme court acknowledged the existence of “statutory provisions that define and limit a stakeholder’s ability to recover certain measures of damages, which protect the organization’s status as a separate and independent entity,” the court clarified that those statutory provisions relate to the merits of the partner’s claim, not to the subject-matter jurisdiction of the court. Thus, a court possesses jurisdiction to render a take-nothing judgment—rather than to dismiss the claim—if the partner fails to meet statutory requirements.

Whether a claim brought by a partner actually belongs to the partner or the partnership is a matter of capacity because it is a matter of legal authority to bring the suit. For that reason, the relation-back rule saved the partner’s derivative claims in this case from being barred by limitations. The partner’s individually asserted claims were timely filed. Because the amended pleadings in which the partner asserted the same claims derivatively added no new facts or grounds of liability, they were not “wholly based on a new, distinct, or different transaction or occurrence” and the added claims related back to the timely filed individual claims. *See Tex. Civ. Prac. & Rem. Code* § 16.068. The change in pleading was solely a matter of capacity, and case law instructs that errors in capacity may be corrected and relate back to timely filed petitions.

(Ultimately, the court of appeals held that the partner’s claims (that he and the partnerships, which provided title closing services, were deprived of their rights and property when the other partners transferred all the partnerships’ assets and business to new law firms without complying with the partnership agreements) were properly disposed of by summary judgment on the basis of illegality because the partner was not a licensed attorney or licensed escrow agent, and Texas law does not permit the sharing of profits from title closing services with a person who is not a licensed attorney or licensed escrow agent. The court characterized the partnership agreements as illegal and affirmed the trial court’s judgment against the partner based on the other partners’ illegality defense to enforcement of the agreements.)

Lin v. Veritex Community Bank, N.A., No. H-20-1904, 2022 WL 510483 (S.D. Tex. Feb. 21, 2022).

A limited partner sued an escrow agent for breach of contract and breach of fiduciary duty, alleging that the escrow agent prematurely released money to the partnership that the partner had invested. The escrow agent

argued that the money belonged to the partnership and that the partner accordingly lacked standing to bring his claims against the escrow agent. The court held that the partner lacked Article III standing.

Richard Lin, a Chinese national, invested with RGO Opportunities I, LP (“RGO”), a company set up to provide Chinese nationals with a means of qualifying for an EB-5 visa. RGO was in the business of opening and running a chain of Brazilian barbecue restaurants. RGO entered into an Escrow Agreement to hold Lin’s and other investors’ funds until certain conditions were met, including that the USCIS approved the investors’ I-526 petitions. If and when the specific conditions were met, the funds would be released to RGO, in increments, to allow it to develop the business and create the required jobs. Veritex Community Bank (“Veritex”) was the escrow agent.

Lin sued Veritex for breach of fiduciary duty and breach of contract based on its premature release of \$375,000 invested by Lin in RGO. Under the Escrow Agreement, investor funds held by Veritex corresponded to specific investors. When an investor first filed an I-526 petition, Veritex was authorized to release \$125,000 of that investor’s contribution. When two investors’ I-526 petitions were approved, Veritex was authorized to release an additional \$325,000 from each of the approved investors’ contributions to the RGO account. If an investor’s I-526 petition was not approved, Veritex was required to refund the amount of money the investor paid directly to the investor, not to RGO. Lin and Veritex’s corporate representative both testified that the \$375,000 funds at issue were associated with Lin’s investment. Lin alleged that the \$375,000 came from his individual \$500,000 investment in RGO and that Veritex breached the Escrow Agreement by releasing these funds when Lin’s I-526 application was approved but before a second I-526 petition was approved. Lin explained that the condition in the Escrow Agreement requiring two investors’ applications to be approved before Veritex released additional money to RGO made it likely that the remaining investors’ petitions would be approved and the project would be fully-funded and successful.

Veritex argued that Lin lacked Article III standing because he had not suffered an injury in fact fairly traceable to Veritex’s actions inasmuch as the money at issue belonged to the partnership. Lin responded that he was “personally aggrieved” by Veritex’s breach because he lost the \$375,000 that he committed to RGO as an investment. Lin additionally argued that his injury was redressable because RGO still existed and he could receive a permanent resident visa if he recovers the \$375,000 and reinvests it in RGO before 2023.

The court acknowledged that, under Texas law, “a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization,” citing *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020), but stated that Lin had not argued that he lost the value in his partnership interest. The court distinguished cases relied upon by Lin for the proposition that partner or shareholder standing does not implicate constitutional standing. The court stated that Lin’s case was different because he was not bringing his lawsuit “for the benefit of the partnership and other partners”; his injury was based only on money he invested in the partnership, and he alleged that he lost “his specific investment—that is separate and apart from any other injury that could have been suffered by the partnership or other RGO investors.” The court responded as follows:

[U]nder Texas law, “[a] partnership is an entity distinct from its partners,” and “[p]artnership property is not property of the partners.” Tex. Bus. Orgs. Code Ann. §§ 152.056; 152.101. “[R]egardless of which partner had legal title, no partner owns specific partnership property but each owns a specific interest ... of such property.” *Biggs v. First Nat. Bank of Lubbock*, 808 S.W.2d 232, 237 (Tex. App. 1991), writ denied (Oct. 23, 1991). See also *Keller v. United States*, 697 F.3d 238, 243 (5th Cir. 2012) (under Texas law, the intent of the parties, rather than legal title, controls whether property belongs to a partner or the partnership). Lin’s partnership interest is “his proportionate share of the surplus of the whole after payment of the partnership debts,” *Humphrey v. Bullock*, 666 S.W.2d 586, 590 (Tex. App.—Austin 1984, writ ref’d n.r.e.), not the precise amount of money he initially invested.

Lin relied on *In re Fisher*, 433 S.W.3d 523, 527 (Tex. 2014), in which the Texas Supreme Court recognized that “a partner who is “personally aggrieved” may bring claims for those injuries suffered directly.” In *Fisher*, the court concluded that at the motion-to-dismiss stage, it was sufficient that a partner alleged personal damages unique to him, such as “loss of earning capacity, lost profits, loss of income, damage to credit reputation, lost investments,” injury to his character, and mental anguish.

The court stated that Lin pointed to no evidence that he, rather than the partnership, owned the funds at issue. The purpose of the arrangement was for the partnership to use the funds to create jobs, not for the individual investors to make a profit. Lin would have been entitled to a refund if his petition was denied, but that cannot be the basis for his injury since his I-526 petition was approved. Lin argued that he “lost” his investment, but the court stated that he continued to own the partnership interest that he paid for. Although it may not be worth anything, the court stated that was a different issue. Unlike the partner’s alleged injuries in *Fisher*, Lin did not point to any evidence showing that he suffered a personal monetary loss that was different from the partnership’s loss. The record showed that Lin’s investment was intended to be the partnership’s property, and the partnership would have received the funds even if they had not been prematurely disbursed. The court stated that any suggestion that Lin suffered a personal loss from this disbursement was speculation, and he did not show that he suffered an injury based on the early disbursement of his investment to RGO. He thus lacked Article III standing to sue on this basis.

M. Direct and Derivative Claims

Berry v. Berry, 2022 WL 1510330, __ S.W.3d __ (Tex. 2022).

An individual co-trustee of a trust that was the limited partner of a limited partnership lacked the ability to bring a derivative suit on behalf of the limited partnership because the individual was not himself a limited partner and the other three co-trustees opposed the individual’s actions. (The trust agreement did not alter the rule that co-trustees may act by decision of a majority of the trustees.)

Flying Bull Ranch, Ltd. (“Flying Bull Ranch”) was a Texas limited partnership that managed the Flying Bull Ranch in Real County, Texas. FB Ranch, LLC owned 2% of Flying Bull Ranch as the general partner. The Berry Family Trust owned the remaining 98% of the Berry Family Trust (the “Trust”) as the limited partner. The Trust had four co-trustees, Dennis W. Berry, Kenneth L. Berry (“Kenneth”), Marvin G. Berry, and Allen L. Berry. All of the co-trustees were brothers. Berry Contracting, Inc. had leased land within the Flying Bull Ranch pursuant to oral and written lease agreements. Between 2000 and 2007, Berry Contracting, Inc. did not make the required lease payments to Flying Bull Ranch. Kenneth claimed this failure was part of a plot by his brothers, who controlled Berry Contracting, Inc., to enrich themselves. Kenneth and his daughter sued the other three co-trustees alleging breach of fiduciary duty, among other claims. Kenneth alleged his claims as a beneficiary of the Trust, as a trustee of the Trust, and in a derivative capacity on behalf of the partnership. Kenneth’s daughter alleged her claims in her capacity as a beneficiary of the Trust.

After the suit was filed, the defendants and other members of the Berry family (beneficiaries of the Trust) entered into a Consent Agreement; however, Kenneth and his daughter did not sign the Consent Agreement. The Consent Agreement stated that the signing parties did not believe it was in the Trust’s interests to pursue the claims that Kenneth and his daughter alleged on the Trust’s behalf.

The defendants then filed a combined plea consisting of a motion to dismiss and a motion for summary judgment. The motion argued that (1) Kenneth’s daughter lacked standing as a beneficiary, and (2) Kenneth lacked standing to assert claims on the Trust’s behalf and lacked standing to bring a derivative suit on behalf of the partnership. The defendants separately sought summary judgment based on the statute of limitations against all claims premised on the written lease executed in 2007. The trial court granted the standing motion as to both plaintiffs and granted the limitations motion as to Kenneth.

Both plaintiffs appealed, and the appellate court affirmed most of the trial court’s rulings except Kenneth’s statute-of-limitations issue. Both sides petitioned the Texas Supreme Court of Texas for review, and the supreme court granted both petitions. The supreme court found that the trial court properly granted the motions regarding Kenneth, but that his daughter had standing for her claims.

The court noted that the default rule governing co-trustees in Texas is that co-trustees may exercise their powers by majority decision. Tex. Prop. Code § 113.085(a). Although the Trust Agreement could have altered this default rule, the Trust Agreement stated that the Property Code applied, thus embracing the default rule. As the co-trustees other than Kenneth opposed Kenneth’s actions on behalf of the Trust, Kenneth had no unilateral power to oppose the wishes of the majority of the co-trustees.

Kenneth lacked the ability to bring a derivative suit on behalf of the limited partnership because he was not a limited partner of Flying Bull Ranch. *See* Tex. Bus. Orgs. Code § 153.401 *et seq.* The Trust, as a limited partner, may have been able to sue derivatively against Flying Bull Ranch; however, Kenneth was merely one of four

co-trustees that lacked the power to act unilaterally on behalf of the Trust, including its potential right as a limited partner to bring derivative actions.

Cooke v. Karlseng, No. 05-18-00206-CV, 2022 WL 1089911 (Tex. App.—Dallas Apr. 12, 2022, no pet. h.) (mem. op.).

The court of appeals held that the trial court erred in granting a plea to the jurisdiction with respect to a partner’s assertion of claims individually that pleaded only an injury to partnerships in which he was a partner because the Texas Supreme Court has held that a partner or other stakeholder in an entity has constitutional standing to sue for an alleged loss to the entity. *See Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763 (Tex. 2020). Although the supreme court acknowledged the existence of “statutory provisions that define and limit a stakeholder’s ability to recover certain measures of damages, which protect the organization’s status as a separate and independent entity,” the court clarified that those statutory provisions relate to the merits of the partner’s claim, not to the subject-matter jurisdiction of the court. Thus, a court possesses jurisdiction to render a take-nothing judgment—rather than to dismiss the claim—if the partner fails to meet statutory requirements.

Whether a claim brought by a partner actually belongs to the partner or the partnership is a matter of capacity because it is a matter of legal authority to bring the suit. For that reason, the relation-back rule saved the partner’s derivative claims in this case from being barred by limitations. The partner’s individually asserted claims were timely filed. Because the amended pleadings in which the partner asserted the same claims derivatively added no new facts or grounds of liability, they were not “wholly based on a new, distinct, or different transaction or occurrence” and the added claims related back to the timely filed individual claims. *See Tex. Civ. Prac. & Rem. Code* § 16.068. The change in pleading was solely a matter of capacity, and case law instructs that errors in capacity may be corrected and relate back to timely filed petitions.

(Ultimately, the court of appeals held that the partner’s claims (that he and the partnerships, which provided title closing services, were deprived of their rights and property when the other partners transferred all the partnerships’ assets and business to new law firms without complying with the partnership agreements) were properly disposed of by summary judgment on the basis of illegality because the partner was not a licensed attorney or licensed escrow agent, and Texas law does not permit the sharing of profits from title closing services with a person who is not a licensed attorney or licensed escrow agent. The court characterized the partnership agreements as illegal and affirmed the trial court’s judgment against the partner based on the other partners’ illegality defense to enforcement of the agreements.)

See also In re Porter Development Partners, LLC, Case No. 15-31305, Case No. 15-31307, Case No. 15-31770, Case No. 15-31772, 2022 WL 1535183 (Bankr. S.D. Tex. May 13, 2022); ***Power v. Power***, No. 05-19-01557-CV, 2022 WL 1314944 (Tex. App.—Dallas May 3, 2022, no pet. h.) (mem. op.); ***In re Breitburn Operating LP***, No. 14-21-00337-CV, 2022 WL 1151187 (Tex. App.—Houston [14th Dist.] Apr. 18, 2022, no pet. h.) (mem. op.). ***Lin v. Veritex Community Bank, N.A.***, No. H-20-1904, 2022 WL 510483 (S.D. Tex. Feb. 21, 2022) **summarized above under “Standing or Capacity to Sue.”**

N. Divorce of Partner

Shalit v. Shalit, No. 04-19-00736-CV, 2022 WL 789347 (Tex. App.—San Antonio Mar. 16, 2022, pet. denied) (mem. op.).

In this appeal from a divorce decree, the court held that the trial court could divide the community property interest of the husband but not the property of the partnership and construed the decree to divide the community property interest in the partnership, not the partnership property itself.

Assuming without deciding that Michael properly briefed this point, we agree that the trial court could not divide any individual property owned by BGS Realty. *See TEX. BUS. ORGS. CODE ANN.* § 152.101 (“Partnership property is not property of the partners. A partner or a partner’s spouse does not have an interest in partnership property.”); *id.* § 154.001 (“A partner is not a co-owner of partnership property.”); *Siller v. LPP Mortg., Ltd.*, 264 S.W.3d 324, 329 (Tex. App.—San Antonio 2008, no pet.).

Nevertheless, as Michael acknowledges, the trial court had authority to divide the 62.5% community property interest in the partnership. *See, e.g., Lifshutz*, 61 S.W.3d at 518.

To the degree that there was any ambiguity in this provision of the decree, we construe it to divide the 62.5% community property interest in the partnership, not the partnership property itself.

O. Bankruptcy

Highland Capital Management, L.P. v. Dondero (In re Highland Capital Management, L.P.), Case No. 19-34054-sgj11, Adversary No. 21-03003-sgj, Adversary No. 21-03005-sgj, Adversary No. 21-03006-sgj, Adversary No. 21-03007-sgj, 2021 WL 5769320 (Bankr. N.D. Tex. Dec. 3, 2021).

The court found that the defendants in adversary proceedings brought by the debtor, a limited partnership, were not entitled to compel arbitration under the arbitration clause in the partnership agreement because the limited partnership agreement and the arbitration clause it contained were executory contracts that were rejected by the debtor, and the defendants had waived the right to invoke the arbitration clause by engaging extensively in the judicial proceedings before seeking to invoke arbitration.

Highland Capital Management, L.P. (“Highland”), a limited partnership and Chapter 11 debtor, sued to collect on promissory notes due to it (collectively, the “Note Adversary Proceedings”). Each maker of the promissory notes was closely related to James Dondero, Highland’s former president, and collectively borrowed tens of millions of dollars from Highland. The promissory note makers defended the Note Adversary Proceedings by alleging that under an oral agreement, Highland would forgive the notes as compensation to Mr. Dondero if certain conditions occurred. Following the note holders’ assertion of the oral agreement defense, Highland added Mr. Dondero, Dugaboy Investment Trust (a family trust of which Mr. Dondero was the trustee), and Mr. Dondero’s sister (Ms. Dondero) as defendants. Highland also amended its complaint to add new claims of fraudulent transfer, a declaratory judgment on portions of Highland’s limited partnership agreement, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.

Mr. Dondero, Dugaboy Investment Trust, and Ms. Dondero filed motions to compel arbitration of the claims for declaratory judgment and aiding and abetting breach of fiduciary duty and to stay the remaining claims pending arbitration of the remaining claims.

Section 6.14 of Highland’s limited partnership agreement stated that “[i]n the event there is an unresolved legal dispute between the parties and or any of their respective officers, directors, partners, employees, agents, affiliates or other representative that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act.” The arbitration clause also significantly limited discovery that could occur in arbitration.

Notably, the parties agreed that the limited partnership agreement, as an executory contract, was rejected under 11 U.S.C. § 365 in connection with the court’s order confirming Highland’s plan of reorganization in February 2011.

Highland countered that (a) the rejection of the limited partnership agreement excused Highland from being forced to submit to mandatory arbitration; (b) the defendants had waived the arbitration clause by not invoking it at any earlier point in the Note Adversary Proceedings; and (c) the defendants should be judicially estopped from invoking the arbitration clause.

The court first considered Highland’s argument that the rejection of the limited partnership agreement excused Highland from being forced to submit to mandatory arbitration. Under the Federal Arbitration Act, generally, where a contract contains a provision in which parties agreed to submit future disputes to arbitration, those provisions should be enforced according to their terms. However, some courts have considered whether a bankruptcy court needs to treat an arbitration provision in a contract as “any less mandatory” than other courts. The court noted that the underlying purpose of the Bankruptcy Code is to (a) provide debtors and creditors with orderly and effective administration of bankruptcy estates; and (b) centralize disputes over debtors’ assets and obligations in one forum. Further, in *In re Gandy*, 299 F.3d 489, 489 (5th Cir. 2002) and *In re Nat’l Gypsum*, 118 F.3d 1056, 1056 (5th Cir. 1997), the Fifth Circuit instructed that a bankruptcy court may refuse to enforce arbitration clauses and may itself adjudicate a dispute when it finds that (a) a matter is core or derives from rights under the Bankruptcy Code; and (b) enforcement of the arbitration provision would irreconcilably conflict with the purposes or goals of the Bankruptcy Code.

Highland argued that as the limited partnership agreement was an executory contract that it rejected under its confirmed Chapter 11 plan, Highland was no longer bound by the limited partnership agreement's provisions that impose specific performance obligations on it, including the arbitration clause. Highland's argument was supported by *Janvey v. Alguire*, 2014 U.S. Dist. LEXIS 193394 (N.D. Tex. Jul. 20, 2014), *aff'd on other grounds*, 847 F.3d 231 (5th Cir. 2017). The *Janvey* opinion arose in the context of a federal receivership commenced at the request of the Securities and Exchange Commission in response to a large Ponzi scheme. Although the *Janvey* opinion involved a federal receiver, the case looked almost entirely to bankruptcy law and 11 U.S.C. § 365 to support its ruling. The receiver brought suit against former employees, alleging that the former employees received fraudulent transfers in violation of the Texas Uniform Fraudulent Transfers Act. The former employees moved to compel arbitration based on mandatory arbitration clauses in various documents. The precise issue of the case was whether to deny or grant the motions to compel arbitration based on whether the arbitration clauses bound the receiver if he sued, as he must, on behalf of the subject entities. The *Janvey* court stated that arbitration of the receiver's claims would frustrate a central purpose of federal equity receiverships. The *Janvey* court further noted that the analysis of exceptions to the general requirement to arbitrate under the Federal Arbitration Act is only necessary after an initial determination that a party (in *Janvey*, the receiver) is bound—either as a signatory or through a principle of law or equity—to an arbitration agreement.

The *Janvey* court concluded that arbitration agreements must be analyzed as separate executory contracts based on the nature of the agreement and arbitration case law regarding severability. The *Janvey* court cited Professor Jay Westbrook, an expert on executory contracts in bankruptcy, that “viewed as an independent contractual obligation of the parties, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought.” The *Janvey* court ultimately determined that the receiver had rejected the arbitration agreements, the rejection was proper, the receiver was not bound to arbitrate, and that if the court required the receiver to arbitrate, it would greatly burden and deplete the receivership estate.

The Fifth Circuit ultimately affirmed the case, but on other grounds. *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017). Additionally, the Fifth Circuit was wary of endorsing the lower court's “broad policy arguments in the absence of specific direction from the Supreme Court,” but did not otherwise address the arguments.

The court found *Janvey* persuasive (and potentially binding due to the Fifth Circuit's affirmance). The court further noted that just as a federal receiver is analogous to a bankruptcy trustee, a debtor-in-possession is statutorily the same as a bankruptcy trustee. The court thus determined that the defendants could not obtain specific performance by Highland because the limited partnership agreement was an executory contract.

Second, the court considered Highland's arguments regarding waiver and found that the defendants had waived any right to invoke the arbitration clause. The court noted that waiver would be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. The court found, however, that the defendants waived their right to demand arbitration by filing multiple answers, motions to withdraw reference to the bankruptcy court, extensive discovery that exceeded what was allowed under the arbitration agreement, and complete silence about the arbitration issue for more than eight months of litigation. Even though Highland amended its complaint to include the claims subject to the motion to compel arbitration more than seven months after the Note Adversary Proceedings were filed, the defendants had reason to know that the oral agreement defense might implicate the arbitration clause and did not raise the issue until after several months of litigation.

Third, the court declined to consider the issue of judicial estoppel because of its prior rulings in favor of Highland not to compel arbitration.

Finally, the court declined to stay the proceedings on Highland's other claims because the court denied the motion to compel arbitration. Further, even if the court erred in its ruling on the arbitration motions, the court found that no cause existed to stay the proceedings on the other claims because if Highland prevailed on the other claims, it would be likely to pursue the claims that would be subject to arbitration.

In re WC 1st and Trinity GP, LLC v. Milligan, No. 1-20-CV-995-LY, Bankr. No. 20-10886-TMD (W.D. Tex. Mar. 18, 2021).

The court held that dismissal of bankruptcy petitions filed on behalf of limited partnerships by their general partners was appropriate because there was a state-court-appointed receiver for the partnerships (appointed after the partnership defaulted on a settlement in favor of a nonprofit foundation that owned a minority of the partnership

interests), and the receivership order granted the receiver the power to manage the partnerships, including the authority to file bankruptcy petitions for the partnerships. The receivership order also divested the general partners of all authority. The court thus granted the receiver's motion to dismiss the bankruptcy petitions.

P. Securities Law

Carr v. Barnett, No. 3:18-CV-03109-N, 2022 WL 1570739 (N.D. Tex. May 18, 2022).

The court granted summary judgment in favor of the plaintiff on his claim for rescission of the purchase of his interest in an oil-and-gas general partnership, finding that the partnership interest was a security under the Securities Act of 1933 and the Texas Securities Act, that the plaintiff was entitled to rescission of the purchase of the unregistered security, and that the partnership and its managing general partner were jointly and severally liable as a dealer and an agent, respectively.

Gregory Carr brought claims for sale of an unregistered security under both the Securities Act of 1933 and the Texas Securities Act against Barnett Energy Development LLC ("BED") and Barnett Energy #21 (the "Partnership"), a general partnership formed to own a working interest in a particular oil and gas well.

Carr was introduced by an individual he met at a networking event to Phil Barnett, the president and principal of BED. BED was the managing general partner of the Partnership, and Carr ultimately executed an agreement to purchase a general partnership interest in the Partnership and delivered to Barnett a check for \$99,378.

Not long after Carr purchased his interest, he began having second thoughts due to a lack of communication from Barnett about the status of the oil well. Carr asked for rescission of the purchase agreement and the return of the money he paid in consideration for the partnership interest. Carr's money was not returned, and he filed this lawsuit against Barnett, BED, the Partnership, and the individual who introduced him to Barnett. Carr asserted claims for violations of the Securities Act of 1933 (the "Securities Act") and the Texas Securities Act ("TSA") along with various common-law claims. Barnett filed a Chapter 7 bankruptcy petition, and Carr obtained an agreed judgment against Barnett in the bankruptcy. Carr and the individual who introduced him to Barnett stipulated to dismissal of all claims against that individual with prejudice. Here, the court addressed Carr's motion for summary judgment on its claims against BED and the Partnership.

The Securities Act imposes strict liability on offerors and sellers of unregistered securities. To make a prima facie case on such a claim, a plaintiff must show (1) the sale of or offer to sell securities; (2) the absence of a registration statement covering the securities; and (3) the use of the mails or facilities of interstate commerce in connection with the sale or offer. It was undisputed that the sale of Carr's interest involved the use of a means of interstate commerce, and there was un rebutted evidence sufficient to show that there was no registration statement covering the sale of the interest in the Partnership. The undisputed facts also showed that the partnership interest was a security as an "investment contract" under the Securities Act. The court explained:

A partnership interest may be a security as an "investment contract," one of the more variable categories of instruments falling within the scope of federal securities laws. *Youmans v. Simon*, 791 F.2d 341, 345 (5th Cir. 1986); 15 U.S.C. § 77b(a)(1) (defining "security"). Under the test set out by the Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), "an investment contract qualifies as a security if it meets three requirements: '(1) an investment of money; (2) in a common enterprise; and (3) on an expectation of profits to be derived solely from the efforts of [others].'" *SEC v. Arcturus Corp.*, 928 F.3d 400, 409 (5th Cir. 2019) (quoting *Williamson v. Tucker*, 645 F.2d 404, 417–18 (5th Cir. 1981)). There is no serious dispute here that Carr's purchase of the partnership interest described above satisfied the first two requirements (investment of money in a common enterprise). The Court must now decide whether Carr has shown the partnership interest met the third requirement.

When determining whether investors expect to rely "solely on the efforts of others," courts apply the term "solely" flexibly so that a party cannot evade liability merely by "parceling [out] minor duties to investors." *Id.* (quoting *Youmans*, 791 F.2d at 345–46). Instead, the test is a practical one focusing on "whether investors, in fact, can and do utilize their powers" rather than "theoretical control." *Id.* (citing *Affco Invs. 2001, LLC v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 190 (5th Cir. 2010)).

Due to the power typically retained and exercised by partners in a general partnership, there is a strong presumption that a general partnership interest does not qualify as a security. *Id.*; *Youmans*, 791 F.2d at 346. But sometimes general partners lack managerial powers, and a general partnership interest qualifies as a security where the investor can show that “in spite of the partnership form which the investment took, he was so dependent on the promotor or on a third party that he was in fact unable to exercise meaningful partnership powers.” *Williamson*, 645 F.2d at 424. To meet this burden, the investor can show any one of the following factors:

(1) an agreement among the parties leaves so little power in the hands of the partner ... that the arrangement in fact distributes power as would a limited partnership; or (2) the partner ... is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner ... is so dependent on some unique entrepreneurial or managerial ability of the promotor or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership ... powers.

Id. These factors are not exhaustive, and “other factors could also give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded.” *Arcturus Corp.*, 928 F.3d at 411 (internal quotation marks omitted).

The court agreed with Carr that he met his burden with respect to the first *Williamson* factor, as to which courts look to (1) the legal documents setting up the arrangement to see if investors were given formal powers; and (2) how the arrangement functioned in practice. Carr pointed to express terms in the legal documents indicating that he did not retain or exercise significant control over the enterprise, and the evidence of the arrangement in practice supported that conclusion. The Private Placement Memorandum (“PPM”) stated that BED, as the managing general partner of the Partnership, “will exclusively manage and control all aspects of the business of the partnership and will make all decisions concerning the business of the partnership.” The PPM also expressly disclaimed any ability of the investor to make business decisions. Similarly, the Form of General Partnership Agreement attached to the PPM stated that BED “shall conduct, direct, and exercise full and exclusive control over all activities of the Partnership” and that “Investor Partners shall have no power over the conduct of the affairs of the Partnership.” There was little evidence in the record regarding the practices of the parties during the short time between Carr’s investment and his request for rescission, but Carr’s sworn declaration reflected his inability to obtain basic updates regarding the operations of the Partnership during the two months leading up to his request for rescission. Based on Carr’s declaration and the plain language of the governing documents, the Court held that Carr met his burden to establish the first *Williamson* factor. Because the partnership interest met all three requirements for an investment contract, the Court held that Carr’s investment in the partnership interest was a security.

The court also agreed with Carr that BED and the Partnership were both “statutory sellers” for purposes of the Securities Act. Case law has established that a “seller” is not limited to the owner who passed title or other interest in the security to the buyer. A person who solicits an investor is also a seller, but a seller must be more than a collateral participant in the transaction. The PPM stated that BED, the managing general partner, offered and sold the partnership interest on behalf of the Partnership in exchange for a check payable to the Partnership. Barnett, the president of BED, met directly with Carr and actively solicited his investment and induced action on behalf of BED and the Partnership. Thus, these defendants were more than collateral participants; they were statutory sellers.

The Securities Act provides for a rescission measure of recovery and the defendants, each of whom was liable independently as a seller, were jointly and severally liable to Carr for the consideration paid for his security (without reduction for any income received on the interest since he had received no distributions or benefits). Carr did not receive a certificate or title document, and he thus effectively tendered the security by demanding rescission and repayment of the purchase price. Carr was thus entitled to judgment against BED and the Partnership in the amount of \$99,378 plus pre-judgment interest.

The court also concluded that Carr was entitled to rescission under the TSA. Under the TSA, a “dealer or agent may not sell or offer for sale any securities ... unless the commissioner has issued a permit qualifying securities for sale for those securities to the issuer of the securities or a registered dealer.” Tex. Gov’t Code § 4003.001. A plaintiff may sue a person who offers or sells a security in violation of the registration requirements for rescission of the sale. *Id.* § 4008.051. A plaintiff entitled to rescission may “recover the consideration ... paid

for the security plus interest on the consideration at the legal rate from the date the buyer made the payment, less the amount of any income the buyer received on the security.” *Id.* § 4008.056(a).

Having already determined that Carr’s partnership interest was a security under federal securities law applying the *Howey* test, the court held that the partnership interest was a security under the TSA as well. The definition of “security” under the TSA also includes investment contracts, and the Texas Supreme Court has adopted a version of the *Howey* test to determine when investment contracts are securities under TSA.

Carr offered sufficient un rebutted evidence that the Texas Securities Commissioner did not issue a permit qualifying the security for sale in Texas, and the court concluded that Barnett, BED, and the Partnership were subject to the TSA’s restrictions on the sale of unregistered securities. The TSA extends liability to any “dealer or agent” that sells unregistered securities. The TSA broadly defines a “dealer” and further specifies that an issuer of a security who offers for sale, sells, or makes sales of its own securities is deemed a dealer unless the issuer sells to or through a registered dealer acting as fiscal agent for the issuer. Tex. Gov’t Code § 4001.056(a)–(c). An agent means “a person or company employed, appointed, or authorized by a dealer to sell, offer for sale or delivery, solicit subscriptions to or orders for, or deal in any other manner in, securities in [Texas]”; however, an officer of a corporation or partner of a partnership is not deemed an agent solely because of their status as an officer or partner of an entity if that entity is registered as a dealer. *Id.* § 4001.052(a)–(b). BED, through Barnett, directly offered the security for sale on behalf of the Partnership (the issuer), but BED and Barnett were not registered dealers acting as the Partnership’s fiscal agent. Thus, the Partnership was a dealer, and BED was an agent. As such, they were subject to the statute’s restrictions on sales of unregistered securities. The court further explained that Barnett, BED, and the Partnership were all sellers under the TSA because the meaning of the phrase “person who offers or sells” under the TSA has been interpreted as having the same meaning as the phrase in the Securities Act. Thus, the court concluded that Carr was entitled to summary judgment against BED and the Partnership, jointly and severally, on his claim under the TSA for the consideration he paid for his partnership interest plus pre-judgment interest.

Q. Diversity Jurisdiction

The Fifth Circuit Court of Appeals and federal 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 applying this principle are too numerous to include in this paper, but recent Fifth Circuit opinions or opinions addressing somewhat novel situations or unsettled issues in this context are included below.

George v. SI Group, Incorporated, No. 20-40427, 2021 WL 5095981 (5th Cir. Nov. 2, 2021).

“Citizenship for an individual is synonymous with the person’s domicile; for a corporation, it is that of the state in which it is incorporated and the state where it has its principal place of business; for an L.L.C., it is that of any state where its members are citizens....

We first consider jurisdiction as it relates to Walker [Group Holdings, L.L.C.]. According to a Certificate of Amendment Walker filed with the Texas Secretary of State in 2015, Walker’s sole member is Wabash National, LP (“Wabash”). Thus, Walker’s citizenship is tied to Wabash’s citizenship, and Wabash is a citizen of every state in which one of its partners is a citizen. Evergreen asserts that Wabash has two partners: Wabash National Trailer Centers, Inc. and Wabash National Corporation....Walker’s single bare assertion of its own citizenship at the pleadings stage is not enough to clearly establish jurisdiction following summary judgment proceedings. Because appellees have failed to establish Wabash’s citizenship, they have failed to establish Walker’s citizenship.

Now, Brenner Tank [Services, L.L.C.]. According to Brenner’s 2016 Texas Franchise Tax Public Information Report, it has one member, Brenner Tank L.L.C. Thus, like Walker, Brenner Tank’s citizenship is tied to Brenner Tank L.L.C.’s citizenship, and Brenner Tank L.L.C. is a citizen of every state in which one of its members is a citizen. Evergreen claims that Brenner Tank L.L.C.’s sole member is Walker.... Because appellees have failed to establish Brenner Tank L.L.C.’s citizenship, they have failed to establish Brenner Tank’s citizenship.

Appellees have failed to show clearly that jurisdiction exists with respect to Walker Group Holdings, L.L.C. and Brenner Tank Services, L.L.C. But, as we have noted earlier in this opinion, appellees have proffered some evidence to suggest that jurisdiction does exist. Under these circumstances—‘[w]here ... jurisdiction is not clear from the record, but there is some reason to believe that jurisdiction exists, the Court may remand the case to the

district court for amendment of the allegations and for the record to be supplemented.’ *Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1228 (5th Cir. 1989) (per curiam). We will do so here.”

R. Statute of Limitations

Power v. Power, No. 05-19-01557-CV, 2022 WL 1314944 (Tex. App.—Dallas May 3, 2022, no pet. h.) (mem. op.).

The court held that the Texas Business Organizations Code allowed the plaintiff partner to maintain an action in his individual capacity against the defendant partner for relief from the defendant partner’s breaches of duties and to enforce and protect the plaintiff partner’s interest as a partner. The doctrine of fraudulent concealment applied to toll the statute of limitations on the plaintiff partner’s claims based on the defendant partner’s failure to disclose all material facts relating to the partnership’s finances.

Craig Patrick Power (“Craig”) and Braden Richard Power (“Braden”) were brothers who worked together to acquire, develop, and manage apartment complexes. For each property that the brothers developed, they formed a Texas-based entity (“Jointly Owned Entities”) in which the brothers each owned (individually or through their respective trusts) half of the ownership interests (with one exception). The brothers jointly owned Power Property Management, Inc. to provide property management services for the apartment complexes.

Testimony at trial showed Craig was primarily responsible for operating the business while Braden was primarily responsible for designing and overseeing the renovations of the older buildings that the brothers purchased. Braden testified that he began inquiring about the finances of the Jointly Owned Entities in 2011 and asked Craig for a reconciliation of the finances. Braden received the reconciliation in December 2013 and concluded that Craig had been diverting a larger share of income from the Jointly Owned Entities to himself and failing to disclose the actual amount of profits of the Jointly Owned Entities.

Braden, in his individual capacity, brought suit against Craig, in his individual capacity, for breach of fiduciary duty, fraud, fraud by nondisclosure, statutory fraud, breach of contract, and civil theft. At trial, the jury found, among other things, that the brothers had created a partnership to purchase, develop, and sell properties; a relationship of trust and confidence existed between the brothers; Craig managed the accounting, books, and records for their relationship upon which Braden justifiably relied; Craig did not comply with his fiduciary duty to Braden; and Craig committed fraud by nondisclosure and civil theft. The trial court entered judgment on the jury’s verdict, and Craig appealed the trial court’s judgment.

On appeal, Craig argued that Braden lacked the capacity to recover the damages he sought, Braden’s claims were barred by the applicable statutes of limitations, and the trial court abused its discretion by admitting evidence of spoliation and instructing the jury on spoliation. The court affirmed the first two issues and reversed and remanded the trial court’s judgment because of the third issue. Craig also presented other arguments that the court declined to consider due to the remand of the trial court’s judgment.

First, Craig argued Braden lacked the capacity to recover the damages Braden sought because the alleged damages resulted from injuries incurred solely by the Jointly Owned Entities or the partnership found by the jury. The court rejected Craig’s argument because one partner may sue another partner for damages that the first partner personally suffers.

The jury found that Craig and Braden created a partnership to purchase, develop, and sell properties, and Craig did not challenge this finding. The court cited *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 779 (Tex. 2020) for the proposition that “[w]hether a claim brought by a partner actually belongs to the partnership is ... a matter of capacity because it is a challenge to the partner’s legal authority to bring the suit.” The court noted numerous provisions of the Texas Business Organizations Code bearing on the question of Braden’s capacity to assert his claims in this case. The Texas Business Organizations Code provides that a partner is liable to the other partners for violating a duty to the other partners that causes harm to the other partners. Tex. Bus. Orgs. Code § 152.210(2). Further, a partner owes other partners a duty of care, which is a duty “to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances.” *Id.* §§ 152.204(a)(2), 152.206(a). A partner is required to discharge the partner’s duties to the partnership and other partners in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. *Id.* § 152.204(a), (b). Section 152.211 delineates the authority of partners and partnerships to bring claims and seek various remedies and provides that one partner “may maintain an action against ... another partner for legal or equitable relief” to, among other things, enforce a partner’s rights under Sections 152.204 and 152.206 and to

“enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.” *See* Tex. Bus. Orgs. Code § 152.211(b)(2)(A), (b)(3).

Braden, individually, sued Craig, individually, alleging breach of fiduciary duty and other causes of action. Braden alleged that he was injured by Craig’s actions and produced evidence showing that Craig failed to pay Braden his proportionate share of profits generated by the partnership and made false representations to Braden about the financial condition of their businesses. By these actions, Craig breached his duty of care to Braden and caused injury to Braden personally rather than the partnership. Thus, the court stated that Braden had capacity to assert the claims he asserted. The court noted that Braden did not claim that Craig’s actions reduced the value of the partnership or devalued Braden’s ownership interest, which would be an injury to the partnership. Rather, he contended Craig hid assets from him and failed to pay him his share of the partnership profits. Any recovery Braden sought was not a partnership asset, but was rather Braden’s individual share of the partnership assets that Craig allegedly took and to which Braden personally was entitled.

Second, Craig argued that Braden’s claims were barred by the applicable statute of limitations because the evidence conclusively proved that Braden knew or should have known about the facts giving rise to his claims more than two or four years before he filed suit on November 27, 2015. In response, Braden argued that the tolling doctrine of fraudulent concealment applied. Fraudulent concealment is a fact-specific equitable doctrine that tolls limitations until the fraud is discovered or could have been discovered with reasonable diligence. Under fraudulent concealment, when a defendant has a duty to make a disclosure but instead conceals the existence of the cause of action from the other party, the defendant is estopped from utilizing the defense of limitations until the other party learns of the right of action or should have reasonably discovered it. Further, a person to whom a fiduciary duty is owed may be unable to inquire into the fiduciary’s actions or may be unaware of the need to do so. Where a claim involves a fiduciary relationship, even if an inquiry is made, facts that might ordinarily require investigation likely may not excite suspicion. Once misconduct is evident, a diligent inquiry is required, even in the context of a fiduciary relationship.

The court rejected Craig’s limitations argument because the evidence supported the jury’s findings. As a fiduciary, Craig had a duty to disclose all material facts to Braden. Craig had been responsible for tracking how much money in a commingled account belonged to each brother. In 2008, Craig told Braden the business was having financial problems, but Braden claimed to rely on Craig’s representations that they could resolve the situation. In 2011, Braden began asking more questions about the Jointly Owned Entities’ finances, but Braden claimed that he did not receive full disclosure of the businesses’ finances until he received the reconciliation in December 2013. Further, an email from November 2013 indicated that Braden did not have an account to access the businesses’ financial information. Braden further testified that after he received the reconciliation, Craig would not provide further information, and Braden did not realize that the finances were a “Pandora’s Box” until early 2014. The court found that the evidence did not conclusively prove that Braden knew or should have known about the facts giving rise to his claims more than two or four years before he filed the lawsuit.

S. Service of Process

Oyler v. Auspero Enterprises, LP, SA-21-CV-1057-XR, 2022 WL 1004642 (W.D. Tex. Apr. 1, 2022).

The court granted the plaintiff’s request to effectuate service of process on a limited partnership by certified mail, return receipt requested, since the Federal Rules of Civil Procedure authorize service of process by any means permitted under Texas law.

After the plaintiff’s two unsuccessful attempts on one afternoon to serve the registered agent of a Texas limited partnership, the plaintiff asked the court to permit service by certified mail, return receipt requested, or by posting on the defendant’s gate or door. The court pointed out that Federal Rule of Civil Procedure 4(h), provides that a “partnership” may be served “in the manner prescribed by Rule 4(e)(1) for serving an individual[.]” and Federal Rule of Civil Procedure 4(e)(1) provides, in relevant part, that a plaintiff may effectuate service by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located[.]” The court relied on Tex. R. Civ. Pro. 106(a)(2) for the proposition that Texas law authorized the plaintiff to effectuate service on the defendant “by mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition.” Thus, the court granted the portion of the motion requesting permission to effectuate service on the defendant by certified mail, return receipt requested. The court pointed out that the registered agent and each general partner of a limited partnership are its agents for service

of process (subject to certain exceptions for service on the Secretary of State), citing case law and Tex. Bus. Orgs. Code §§ 5.201(b)(1), 5.251, 5.255(2). The court further pointed out certain requirements under Tex. R. Civ. Pro. 107(b)–(c) for effectuating service of process, such as information required in the return of service and a requirement that the return receipt be signed by the addressee.

Craig v. American Honda Motor Co., Civ. A. No. 9:21-CV-043, 2021 WL 5501794 (E.D. Tex. Oct. 26, 2021), report and recommendation adopted, 2021 WL 5493362 (E.D. Tex. Nov. 22, 2021) (concluding that plaintiff’s service of process was insufficient: “Plaintiff did not serve a proper party as CT Corporation in Florida is not the authorized registered agent to accept service in Texas. Under the federal rules, service of process upon a corporation, partnership, or unincorporated association is accomplished by delivering a copy of the summons and of the 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 authorizes service on a corporation through the corporation’s registered agent, president or vice-president. TEX. BUS. ORGS. CODE §§ 5.201, 5.255(3). Based on the evidence of record and the affidavit filed by Defendant [a corporation], Plaintiff has not served or attempted to serve the Summons and Complaint on an individual qualified to accept service on behalf of Defendant, because CT Corporation in Florida was not an officer, managing or general agent, or any other agent authorized or registered to accept service on behalf of Defendant in Texas.”).

WWLC Investment, L.P. v. Miraki, 624 S.W.3d 796 (Tex. 2021).

The Texas Supreme Court concluded that a limited partnership was not properly served and was therefore entitled to bill of review relief from a default judgment.

WWLC Investment, L.P., a Texas limited partnership, leased commercial property to Sorab Miraki for use as a specialty food market and restaurant. Wendy Chen, then WWLC’s owner and president and later its CEO, executed the lease for WWLC. Two years into the lease, Miraki stopped paying rent, complaining that WWLC had not made promised repairs. WWLC had Miraki evicted, and he sued WWLC in November 2015 for breach of the lease, fraud, and violations of the Texas Deceptive Trade Practices Act.

Miraki’s process server tried five times over the course of about a week in January 2016 to personally serve Chen at a house that she owned, but the attempted service was unsuccessful. Miraki then obtained an order for substituted service under Rule 106 of the Texas Rules of Civil Procedure by attaching a copy of the petition and citation to the front door of Chen’s house. Miraki accomplished that substituted service on April 6, 2016. When WWLC did not answer, Miraki took a default judgment against WWLC in November 2016 for \$382,543.26 in actual damages, \$738,771.60 in punitive damages, and \$30,000 in attorney fees.

Miraki made no attempt to serve WWLC through its registered agent, HPZ International, Inc. WWLC identified HPZ International, Inc. as its registered agent in name-change and assumed-name documents filed with the Secretary of State in 2011. By those filings, WLC Investment, L.P. changed its name to WWLC, and WWLC adopted WLC Investment, L.P. as an assumed name. The Business Organizations Code required both documents to be filed by WWLC’s general partner, Tex. Bus. Orgs. Code § 153.051(3), and both were filed by HPZ. Chen signed on HPZ’s behalf as a person “authorized” to do so. The record does not reflect what Chen’s position was at HPZ.

On June 1, 2017, a month after it first learned of the judgment from receipt of a demand for payment from the constable, WWLC sued to enjoin Miraki from executing on the formerly leased property and for a bill of review. The trial court denied all relief. Although the court did not make findings of fact, it stated at the hearing on WWLC’s motion for new trial that Chen had to be its general partner because “she was the only person” involved in WWLC.

The court of appeals affirmed. Noting that HPZ’s charter had been forfeited while Miraki was trying to serve Chen and that Chen was WWLC’s president and owner, the court concluded that the trial court did not abuse its discretion in finding that service on WWLC was not defective.

The Supreme Court began by discussing the standards for a bill of review :

“A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. Bill of review plaintiffs must ordinarily plead and prove (1) a meritorious defense to the underlying cause of

action, (2) which the plaintiffs were prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on their own part.” *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam) (citations omitted). But plaintiffs alleging that they were not properly served are excused from proving the first two elements. They need only prove the third, *id.* at 96–97, which “[p]roof of non-service ... will conclusively establish,” *id.* at 97.

“For well over a century, this court has required that strict compliance with the rules for service of citation affirmatively appear on the record in order for a default judgment to withstand direct attack. There are no presumptions in favor of valid issuance, service, and return of citation in the face of a [direct] attack on a default judgment.” *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (citations omitted). A bill of review is a direct attack on a judgment. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271 (Tex. 2012) (“A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment....”).

The Supreme Court then concluded that WWLC had met its burden to establish improper service and, therefore, was entitled to bill of review relief:

As noted at the outset, service on a limited partnership may be made on its general partner or registered agent. TEX. BUS. ORGS. CODE §§ 5.201(b)(1), 5.255(2). The evidence establishes that Chen was neither and that HPZ was both. Chen testified that she was WWLC’s president, the title she used in executing the lease to Miraki, and later its CEO. The “president” of a limited partnership is defined by statute as the individual “designated” to hold that title under the “entity’s governing documents” or the “officer ... authorized to perform the functions of the principal executive officer.” *Id.* § 1.002(70). An “officer,” like a CEO, “means an individual elected, appointed, or designated as an officer of an entity by the entity’s governing authority or under the entity’s governing documents.” *Id.* § 1.002(61). An officer need not be a general partner and is not one by virtue of holding the office. Service on a limited partnership, unlike a corporation, is not authorized to be made through an officer. *See id.* § 5.255(1)–(2) (authorizing service on a “corporation[’s]” president but omitting a similar authorization for limited partnerships). Chen referred to herself as WWLC’s “owner.” An “owner” of a partnership is statutorily defined as “a partner.” *Id.* § 1.002(63)(B). “Partner” means a limited partner or general partner.” *Id.* § 1.002(66). One could not infer from the fact that Chen was WWLC’s owner whether she was a limited partner, not authorized by statute to accept service on the partnership, or a general partner.

While the trial court found that Chen’s testimony established that she was the sole person involved with WWLC, that finding, standing alone, does not qualify her as WWLC’s general partner. A limited partnership’s general partner is “a person who is admitted to a limited partnership as a general partner in accordance with the governing documents of the limited partnership.” *Id.* § 1.002(33). The record does not include WWLC’s governing documents. Moreover, Chen testified that she was not WWLC’s general partner and that HPZ was. A corporation, like HPZ, may serve as a limited partnership’s general partner. *Id.* § 1.002(69-b) (defining a “[p]erson” as including “a corporation”). The evidence further shows that HPZ acted as WWLC’s general partner. HPZ filed a certificate-of-formation amendment and an assumed-name certificate with the Secretary of State to complete a name change for WWLC. In executing both documents, Chen expressly invoked HPZ’s authority to file documents on WWLC’s behalf. By statute, only a limited partnership’s general partner is authorized to make those changes. *Id.* § 153.051(3) (requiring “[a] general partner” to “file a certificate of amendment” with the Secretary for any “change in the name of the limited partnership”).

Miraki additionally argues that service on Chen was proper because she served as president and registered agent of both HPZ and WWLC. But there is no evidence that Chen was HPZ’s president, only that she was its “authorized person” to sign the documents filed for WWLC. And there is no evidence that Chen served as either HPZ’s or WWLC’s registered agent. Instead, the evidence shows that only HPZ, not Chen, was WWLC’s registered agent.

Finally, Miraki argues, and the court of appeals reasoned, that service through Chen was proper because HPZ forfeited its corporate charter on January 29, 2016. But all five of Miraki's process server's attempts to serve Chen occurred on or before January 29, when he could have served HPZ. Moreover, a corporate general partner that loses its certificate of formation remains a limited partnership's general partner for at least 90 days unless the partnership agreement or the partners by written consent provide otherwise. TEX. BUS. ORGS. CODE § 153.155(a)(10)(B). The record contains no evidence of either. Miraki accomplished substituted service on Chen on April 6—only 68 days after HPZ forfeited its charter and well within the period in which he could have served HPZ as WWLC's general partner.

In sum, WWLC met its burden to prove lack of proper service and is therefore entitled to bill-of-review relief. Accordingly, without hearing oral argument, we grant WWLC's petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for proceedings consistent with this opinion.

T. Pro Se Representation

D'Arcy Petroleum, LLC v. Mink, No. 3:19-CV-02770-M-BT, 2021 WL 5218223 (N.D. Tex. Oct. 6, 2021), report and recommendation adopted, 2021 WL 5213035 (N.D. Tex. Nov. 9, 2021) (“In federal court, a corporation is not permitted to proceed pro se. The rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations.”).

JKD Holdings v. Prajapati, No. 3:21-CV-0276-D (BH), 2021 WL 2583067 (N.D. Tex. May 6, 2021), report and recommendation adopted, 2021 WL 2580549 (N.D. Tex. June 23, 2021) (“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. As a cross between a corporation and a partnership, a limited liability company is also an artificial entity that may only appear in federal court through licensed counsel.”).

ProjectRose Sports Science Research Center, LLC v. Pro Player Health Alliance, Civ. A. No. 6:18-CV-00578-RWS, 2021 WL 3423073 (E.D. Tex. Feb. 8, 2021) (“In federal court, ‘parties are guaranteed by statute the right to proceed *pro se*.’ ‘This right, however, is limited to appearing on behalf of one’s self; one cannot represent another separate legal entity, such as another person, a corporation, or a partnership, *pro se*.’ ‘As fictional legal entities, corporations and partnerships cannot appear for themselves personally. Their only proper representative is a licensed attorney.’”); accord *ProjectRose Sports Sci. Research Ctr., LLC v. Am. Sleep and Breathing Acad., LLC*, Civ. A. No. 6:19-CV-00161-RWS, 2021 WL 3423031 (E.D. Tex. Feb. 8, 2021).

U. Statute of Frauds

Wood v. Wiggins, __ S.W.3d __, 2021 WL 5312652 (Tex. App.—Houston [1st Dist.] 2021, pet. denied, pet. for rehearing filed).

The court of appeals held that oral partnership agreements between George Wood and Matthew Wiggins required a transfer of an interest in real property and therefore fell within the statute of frauds. Because the statute was not satisfied, the court affirmed the lower court's conclusion that the statute of frauds barred Wood's claims.

Wood and Wiggins were real estate investors who jointly purchased properties with the intent of repairing and selling them. On some occasions, Wood would purchase the property to be co-owned by Wiggins (and sometimes other co-owners). On other occasions, Wiggins would purchase the property to be co-owned by Wood (and sometimes other co-owners). At some point and by some method (either repayment or offset from another property), the non-purchasing co-owner would reimburse the purchasing party for his portion of the property, which would be equally owned by all parties. Deeds would be issued to each owner to file with the respective county.

Wood and Wiggins had a falling out, and Wood sued Wiggins for (among other claims) breach of contract. After a bench trial, the court concluded that the statute of frauds barred Wood's claim. Wood appealed, arguing in part that "because his oral partnership agreements with Wiggins did not involve the conveyance of real property ... the statute of frauds was inapplicable."

The court of appeals began by noting that the statute of frauds concerns problems of proof and exists to prevent fraud and perjury in certain types of transactions by requiring agreements to be in writing and signed by the party to be charged. It is an affirmative defense and renders a contract that falls within its purview unenforceable. The court noted that Wiggins pleaded the statute of frauds as an affirmative defense and thus had the initial burden to establish that the alleged promise fell within the statute. The court also observed that whether a contract falls within the statute of frauds is a question of law which is reviewed de novo.

Ultimately, the court rejected Wood's argument and concluded that the statute of frauds was applicable, largely because the court determined that the agreements between Wood and Wiggins required a transfer of an interest in real property:

Section 26.01 of the Texas Business and Commerce Code provides that "a contract for the sale of real estate" or "an agreement which is not to be performed within one year from the date of making the agreement" is not enforceable unless it "is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him." TEX. BUS. & COM. CODE § 26.01(a)(1), (2), (b)(4), (6)....

We first consider Wood's argument that the agreements were not for the sale of real estate because they were oral partnership agreements "for joint investment and sharing of expenses, losses and profits." We disagree. In support of his argument, Wood cites to *Sewing v. Bowman*, where this Court held that a partnership agreement contemplating dealings in real estate "simply does not involve" [a] transfer or interest in real estate within [the] meaning of the statute of frauds. 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet denied). This Court concluded that the plaintiff's "claim for redemption of his partnership interest may include an interest in the proceeds from the sale of the two properties without resulting in a transfer of interest in the two properties." *Id.* "Merely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, bringing it under the statute of frauds." *Id.*...

The agreement in *Sewing* ... did not involve any transfer of interest in real property between the plaintiff and Sewing—the properties remained titled in the names of Sewing and his wife. And the plaintiff argued that the agreement did not involve any conveying of title to the property but merely established a venture to profit from its sale. Likewise, in [*Berne v. Keith*, 361 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.)], nothing in the parties' agreement gave Keith an interest in the land, and he was "not seeking a transfer of any interest in" the defendant's real estate. 361 S.W.2d at 597. Instead, he sought "an accounting of a share in the profits as compensation for services rendered in a project involving speculation in real property which he asserts became due him upon completion of the project." *Id.* (emphasis added).

Unlike in *Sewing* and *Berne*, the agreements between Wiggins and Wood contemplated, and in fact required, a transfer of an interest in real property. The evidence shows the parties agreed to purchase the Waverly Canyon Properties and that each would receive a 50 percent interest in those properties. After Wiggins purchased the Waverly Canyon Properties at the tax sale, having received 50 percent of the purchase price from Wood, Wiggins deeded a fifty percent interest to Wood in each of the three properties. The same is true for the other properties—each involved an agreement to purchase the property in which the property was either deeded to one party, who then deeded the agreed-upon interest to the other party, or to both parties upon purchase. And although Wood claims he is not seeking to enforce an oral agreement to convey real property, he is seeking damages and reimbursement for expenses, purchase price, and profits from the sale of these properties based on his interest in those properties. We do not see a way around concluding that these agreements involved the transfer of an interest in land.

The distinguishing factor between property-related agreements that are barred by the statute of frauds and those that are not is whether the agreement provides for the transfer of an

interest in land from one party to another. Those agreements that provide for, contemplate, or require a transfer of an interest in land from one party to another are barred by the statute of frauds.

Because Wood and Wiggins’s oral agreements regarding the Waverly Canyon Properties, as well as the Fairfield Court, John Silver Road, Loan Oak Drive, Sealy Avenue, Southern Hills Drive, and Warsaw Drive properties, contemplated the transfer of an interest of land, Wiggins met his burden to show that the oral agreements fell within the statute of frauds. The burden then shifted to Wood to establish an exception that would take the oral agreements out of the statute of frauds.

Wood argued that his partial performance of the oral agreements with Wiggins operated to exempt the oral agreements from the statute of frauds, even if they involved the sale of real property. The court noted, however, that “in order to rely on this exception to the applicability of the statute of frauds, Wood was required to plead, prove, and obtain a finding on this exception.” The court determined that “Wood did not plead the partial performance exception or try it by consent,” and “[n]either did he secure a finding of fact or conclusion of law from the trial court as to the exception.” Thus, the court concluded that Wood waived the partial performance exception.

V. Receivership

In re WC 1st and Trinity GP, LLC v. Milligan, No. 1-20-CV-995-LY, Bankr. No. 20-10886-TMD (W.D. Tex. Mar. 18, 2021).

The court held that dismissal of bankruptcy petitions filed on behalf of limited partnerships by their general partners was appropriate because there was a state-court-appointed receiver for the partnerships (appointed after the partnership defaulted on a settlement in favor of a nonprofit foundation that owned a minority of the partnership interests), and the receivership order granted the receiver the power to manage the partnerships, including the authority to file bankruptcy petitions for the partnerships. The receivership order also divested the general partners of all authority. The court thus granted the receiver’s motion to dismiss the bankruptcy petitions.

WC 1st and Trinity, LP v. Roy F. & JoAnn Cole Mitte Foundation, No. 03-19-00799-CV, No. 03-19-00905-CV, 2021 WL 4465995 (Tex. App.—Austin Sept. 30, 2021, pet. denied) (mem. op.)

The court of appeals affirmed the district court’s appointment of a receiver for two limited partnerships based upon the insolvency and illegal/fraudulent grounds of § 11.404 of the Texas Business Organizations Code.

This dispute concerned two limited partnerships, WC 1st and Trinity, LP, and WC 3rd and Congress, LP (collectively, the “Limited Partnerships”). WC 1st owned property at 1st and Trinity streets in Austin, and WC 3rd owned property at 3rd and Congress (collectively, the “Properties”). The general partner of each entity was an LLC—WC 1st and Trinity GP, LLC, and WC 3rd and Congress GP, LLC (collectively, the “General Partners”). Each general partner owned a controlling interest in its limited partnership and had sole authority to manage the limited partnership’s affairs. It was undisputed that Nate Paul, a real estate investor, controlled both partnerships.

In 2011, the Roy F. and JoAnn Cole Mitte Foundation (“Mitte”) invested a portion of its endowment with the Limited Partnerships, acquiring approximately 16% of WC 1st and 6% of WC 3rd. Paul initially represented to investors that he was either developing the Properties or marketing them for sale. In 2018, appellants (the Limited Partnerships and the General Partners) allegedly stopped providing Mitte with financial information regarding the Limited Partnerships. Mitte filed suit, and appellants invoked an arbitration provision in the partnership agreements. In July of 2019, the parties reached a settlement whereby appellants agreed to purchase Mitte’s interests in the Limited Partnerships for \$10.5 million. Payment was due no later than August 20, 2019.

On August 16, 2019, the FBI raided appellants’ office and Paul’s residence in connection with pending federal criminal investigations. The day before the payment deadline, Mitte’s counsel was informed that appellants would not be paying the settlement. The settlement agreement gave Mitte two options in the case of nonpayment: (1) end the arbitration and sue for breach of the settlement agreement, or (2) declare the settlement agreement void and continue with the arbitration. Mitte chose the latter option, and the arbitration continued.

In October 2019, Mitte filed a motion asking the arbitrator to appoint a receiver because the assets of the Limited Partnerships were “at imminent risk of being lost, removed, or materially injured.” The motion cited the raid, appellants’ failure to pay the settlement, and other factors that indicated that the entities might be in financial distress. Following a day-long evidentiary hearing, the arbitrator announced that she would grant Mitte’s application

and appoint Greg Milligan as receiver. After more procedural wrangling and unsubstantiated claims by appellants that the Properties had been sold, the district court subsequently rendered an order appointing Milligan as receiver for the Limited Partnerships and the Properties (the “Appointment Order”). The Appointment Order granted the receiver all powers to manage the Limited Partnerships’ assets that the General Partners possessed under the partnership agreements.

On appeal, the appellants argued that the district court abused its discretion by appointing a receiver. They first argued that the Appointment Order was unsupported by the pleadings. Mitte had requested a receivership under § 64.001 of the Civil Practice and Remedies Code, but the court appeared to grant the receivership under § 11.404 of the Business Organizations Code. The court of appeals rejected the argument and concluded that the issue of a § 11.404 receiver had been tried by consent:

Trial by consent occurs “[w]hen both parties present evidence on an issue and the issue is developed during trial without objection[.]” An issue “is not tried by consent merely because evidence regarding it is admitted.” The reviewing court “must examine the record not for evidence of the issue, but rather for evidence of trial of the issue.”

Section 64.001 allows a court having jurisdiction to appoint a receiver in certain actions concerning a “property or fund” if the property or fund is “in danger of being lost, removed, or materially injured.” *See* Tex. Civ. Prac. & Rem. Code § 64.001(a)–(b). Section 11.404 authorizes a court having jurisdiction over a domestic entity to “appoint a receiver for the entity’s property and business” if “it is established” that:

- (A) the entity is insolvent or in imminent danger of insolvency;
- (B) the governing persons of the entity are deadlocked in the management of the entity’s affairs, the owners or members of the entity are unable to break the deadlock, and irreparable injury to the entity is being suffered or is threatened because of the deadlock;
- (C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent; [or]
- (D) the property of the entity is being misapplied or wasted[.]

Tex. Bus. Orgs. Code § 11.404(a)(1).

Appellants assert that Mitte’s arguments and evidence “focused exclusively” on the requirements for a receiver under Section 64.001 rather than Section 11.404. While acknowledging that Mitte’s evidence concerning the financial status of the Limited Partnerships and the actions of the governing persons is relevant to matters an applicant must prove to obtain a receivership under Section 11.404, appellants insist that it is equally relevant to Section 64.001’s requirement that an applicant show that the property is “in danger of being lost, removed, or materially injured.” *See* Tex. Civ. Prac. & Rem. Code § 64.001(b). Assuming that is true, Mitte also presented evidence and argued that alternative remedies were not adequate to protect its interest. Section 11.404 requires that an applicant prove that “all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402(a), are inadequate,” Tex. Bus. Orgs. Code § 11.404(b)(3), but Section 64.001 does not have the same requirement, *see In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.) (explaining that applicant seeking receivership “pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists”). The record shows that the parties joined issue over whether an injunction prohibiting alienation of the Properties or a receivership over the Properties alone would be sufficient to protect Mitte’s interests. Mitte presented evidence that appellants had refused to comply with every part of the arbitrator’s order appointing a receiver and argued that a receivership was the only possible remedy. Milligan testified that he could not adequately preserve the values of the Properties without control over the Limited Partnerships and described the resistance he had already faced from appellants. Considering the whole record, we conclude that the record clearly shows “evidence of trial of the issue” of whether a receiver should be appointed over the Limited Partnerships under Section 11.404.

The appellants then argued that the district court's failure to specify whether it had appointed Milligan under § 11.404 ("Appointment of Receiver to Rehabilitate Domestic Entity") or § 11.405 ("Appointment of Receiver to Liquidate Domestic Entity; Liquidation") was an abuse of discretion. The court of appeals noted that the failure to specify the controlling statute was not fatal, and it further observed that "[t]he findings and conclusions included in the order closely track the language of Section 11.404 but not of Section 11.405." The court concluded that, "[c]onstrued as whole, the Appointment Order appoints Milligan under Section 11.404."

The appellants next contended that Mitte had failed to establish the requirements for a receiver under § 11.404. With respect to the ground under § 11.404(1)(A) ("the entity is insolvent or in imminent danger of insolvency"), the court of appeals concluded that the trial court did not abuse its discretion in determining that the ground was met:

Turning to the district court's findings and conclusions, we begin with its conclusion that the Limited Partnerships are "insolvent or in imminent danger of insolvency." *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A). The Business Organizations Code defines "insolvency" as "the inability of a person to pay the person's debts as they become due in the usual course of business or affairs." *Id.* § 1.002(40). The record reflects that both Limited Partnerships had recently failed to pay their debts as they became due. Lee [Vice-President of Accounting for Paul's entities] testified that the lender who holds a mortgage on the First and Trinity Property posted it for foreclosure after WC 1st did not make payments on the loan. Milligan testified that the lender on the Third and Congress Property had accelerated the loan after several quarters of nonpayment by the partnership. Richey [a representative of the lender] confirmed that the loan had been accelerated after "three or four" quarters of nonpayment. Appellants respond that neither entity is insolvent: WC 1st reached an agreement with its lender to avoid foreclosure by placing certain cash in escrow for the lender, and WC 3rd and its lender executed a loan forbearance agreement in which the lender agreed not to exercise any foreclosure remedies until December 31, 2021.

Even if these agreements would preclude a conclusion that the Limited Partnerships are insolvent, there is significant evidence that both entities are in imminent danger of reaching that state. WC 1st made capital calls in 2013 and 2017 and refinanced its loan in 2015 to make its loan payments, and WC 3rd made two capital calls in 2016 for the same reason. WC 1st's only source of income is leasing a parking lot and leasing other parts of the property for events connected with the South by Southwest festival, but the revenue has never been enough to cover expenses. Lee testified that the precise amount of the annual loss varies, and that WC 1st lost half a million dollars in 2018. WC 3rd pays approximately 1.2 million dollars a year on its loan but receives no regular revenue from the lease of the property. Lee testified that there "needs to be" additional capital calls for both Limited Partnerships to continue operating but that she was not aware of any plans for ones or for raising money from other sources. Additionally, Lee testified that she could not say whether either partnership was ever in possession of sufficient funds to pay the settlement agreement.

Appellants do not address this evidence but rather argue that Mitte failed to demonstrate an "imminent risk" of foreclosure of both properties. They contend this showing was necessary because the total value of the Properties is substantially greater than the Limited Partnerships' debts. In support of this argument, appellants rely on authorities applying a statutory requirement that property must be at imminent risk of loss before a court may appoint a receiver to take charge of it. Section 11.404 similarly provides that a court may appoint a receiver only if circumstances exist that "necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties." Tex. Bus. Orgs. Code § 11.404(b)(1). But Section 11.404 makes the question of whether circumstances exist that necessitate appointment of a receiver distinct from whether an entity is insolvent. *See generally id.* § 11.404(a)(1)(A), (b)(1). Appellants' authorities do not persuade us that the test for insolvency is whether the value of the Properties exceed the value of the Limited Partnerships' debts rather than the statutory definition of the inability to pay debts as they become due in the usual course of business. Deferring to the district court's factual determinations, we conclude the district court did not abuse its discretion

by concluding that the Limited Partnerships are either insolvent or in imminent danger of insolvency. *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A).

The court of appeals continued by concluding that § 11.404(a)(1)(C) (“the actions of the governing persons of the entity are illegal, oppressive, or fraudulent”) was met as well:

Even if the district court had abused its discretion by concluding that the Limited Partnerships are insolvent, its finding that the actions of the “governing persons of the [Limited] Partnerships are illegal, oppressive, or fraudulent,” *see id.* § 11.404(a)(1)(C), is supported by the record. The legislature did not define what constitutes fraud for these purposes, so we “apply the definition most consistent with the context of the statutory scheme.” Fraud has many dictionary definitions, the most relevant of which is “unconscionable dealing.” At common law, fraud “means an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage.”

First, the record supports a determination that the General Partners owed Mitte a legal duty arising out of both law and contract. The limited partnership agreements each required the general partner to “conduct the affairs of the Partnership in the best interests of the Partnership” and not to the benefit the general partner’s other businesses “if such conduct also produces a detriment to the Partnership.” In addition, the General Partners owed Mitte, as limited partner, a fiduciary duty. *See Ingram v. Deere*, 288 S.W.3d 886, 892 n.1 (Tex. 2009) (recognizing, “as a matter of common law,” general rule “that [t]he relationship between ... partners ... is fiduciary in character” (quoting *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998))); *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.) (observing that “relationship between general partner and limited partners in a limited partnership is fiduciary in nature”). A fiduciary relationship includes the duties of “utmost good faith, fairness, and honesty[.]”

The district court could reasonably have concluded that the General Partners breached these duties. First, there is evidence that the General Partners represented that the Properties had been sold to harm Mitte’s interests. Specifically, there is evidence that the representation that the \$23 million sale price for the 1st and Trinity Property was “equal to the highest offer yet made on the property” was false. Milligan testified that he obtained a June 2018 letter of intent sent to WC 1st offering to purchase the First and Trinity property for \$60 million. The district court admitted the letter of intent into evidence, and appellants have never disputed that they received the letter or that it was a genuine offer.... The district court could reasonably conclude that the General Partners misrepresented that the Properties had been sold to avoid the receivership and so that Mitte would accept less than the true value of its interest in the Limited Partnerships.

The district court could also have reasonably concluded that the general partner of WC 1st mismanaged the funds entrusted to it. WC 1st refinanced the loan on the 1st and Trinity Property in December 2015, yielding \$3 million. Lee testified by deposition that the entire sum was expended on the partnership’s “operating expenses.” WC 1st’s bank records show that \$2.5 million was deposited on December 15, 2015, and that almost the entire sum was transferred to WCCG [another Paul-related entity] in a series of transactions ending the following month. Milligan testified that he found no documentation that the transfers were payment of a debt to WCCG, and he could never discover another business-related reason for the transfers. Under these circumstances, the transfers support a conclusion that the general partner breached its duties.

The evidence of unexplained transfers also supports a conclusion that the General Partners may have engaged in illegal conduct. In this context, fraudulent and illegal conduct are related:

Illegal and fraudulent actions in corporate management share considerable similarities and in some circumstances overlap—fraud generally is itself “illegal,” and may subject the actor to criminal liability. *See, e.g.*, Tex. Penal Code, ch. 32 (fraud), ch. 35 (insurance fraud), ch. 37 (perjury and other falsification).

Fraudulent and illegal actions in this context pose a danger to the corporation itself.

Ritchie v. Rupe, 443 S.W.3d 856, 869 (Tex. 2014). It is an offense under Chapter 32 of the Penal Code for a person to “misappl[y] property he holds as a fiduciary ... in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.” Tex. Penal Code § 32.45(b). Each general partner acted in a fiduciary capacity by virtue of their obligations under the limited partnership agreement. And the district court could reasonably conclude that transferring money to WCCG rather than using it to pay the partnership’s operating expenses violated the limited partnership agreement and so constituted a misapplication of that property.

Based on the record before us, we conclude that the district court did not abuse its discretion by concluding that the Limited Partnerships were insolvent or in imminent danger of insolvency and that the actions of the governing persons of the Limited Partnerships were oppressive, illegal, or fraudulent. *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A), (C).

Finally, the court of appeals concluded that a receivership was appropriate because no other remedy would adequately protect Mitte’s interest:

.... First, appellants argue that no legal or equitable remedies were necessary at all because the value of the Properties so far exceed the Limited Partnerships’ debts that a sale—even a foreclosure sale—would yield Mitte a profit exceeding the value of its interests in the Properties. But this assumes that the Properties would sell for or near fair market value at a foreclosure sale. It is well settled that “evidence of the price paid in a foreclosure sale is no evidence of fair market value because there is not a willing seller who ... is under no necessity of selling.” Appellants do not explain why a foreclosure sale of the Properties would be different.

As an alternative, appellants argue that an injunction prohibiting alienation of the Properties—essentially the same relief afforded by this Court’s stay order—would have been adequate protection. They argue such relief would have sufficed because there was no attempt to alienate the Properties when this Court’s stay order was in place. They also point out that they offered several times in the district court to stipulate to such an injunction. Although appellants are correct that the record shows no further attempts to alienate the Properties after this Court’s stay order, that does not necessarily mean that an injunction would have sufficed to protect Mitte’s interest. The evidence supports a finding that appellants misrepresented that the Properties had been sold to evade the arbitrator’s appointment of a receiver and to deprive Mitte of the true value of its interests. Moreover, Milligan testified that appellants had consistently refused his requests for information that the [court’s order] expressly required them to turn over, including bank records. It was only Milligan’s status as receiver that enabled him to obtain WC 1st’s bank records directly from the financial institution and discover the unexplained transfers to WCCG. All this evidence reasonably supports a finding that an injunction prohibiting alienation of the Properties would not have been an adequate remedy.

The same conduct could also reasonably support a finding that a receivership over the Properties alone would be inadequate. Additionally, Milligan testified that he would be unable to discharge his duties to conserve the value of the Properties without control of the Limited Partnerships because he must be able to access the entities’ books and records, negotiate with tenants, and conduct the entities’ day-to-day affairs. And given the evidence of the financial status of the Limited Partnerships and their previous record of nonpayment, the district court could have reasonably concluded that lesser remedies would have been insufficient to protect against the possibility of foreclosure.

Appellants respond that the risk of foreclosure stems from the receivership itself because the loan documents state that creation of a receivership over the Limited Partnerships or their property constitutes a default. Additionally, the loan forbearance agreement between WC 1st and its lender is expressly contingent on Paul retaining control of the general partner. While the

receivership may constitute a default, the Appointment Order also prohibits lenders from foreclosing on the Properties without court approval. The district court could also have considered that appellants failed to post a supersedeas bond in an amount that is a small fraction of appellants' valuation of the Properties. Given the financial status of the Limited Partnerships and the conduct of the General Partners, the district court could have reasonably concluded that a receivership would not greatly contribute to the risk of loss.

While a receivership over the Limited Partnerships might not be a perfect remedy, the record reasonably supports the district court's conclusion that "all other available legal and equitable remedies, including the appointment of a receiver for specific property" of the Limited Partnerships were inadequate to protect Mitte's interest. *See* Tex. Bus. Orgs. Code § 11.404(b)(3).

We overrule appellant's challenges to the Appointment Order.

W. Illegality (Title Closing Services)

Cooke v. Karlseng, No. 05-18-00206-CV, 2022 WL 1089911 (Tex. App.—Dallas Apr. 12, 2022, no pet. h.) (mem. op.).

A partner in numerous partnerships that provided title closing services claimed that he and the partnerships were deprived of their rights and property when the other partners transferred all the partnerships' assets and business to new law firms without complying with the partnership agreements. The court of appeals held that the partner's claims were properly disposed of by summary judgment on the basis of illegality because the partner was not a licensed attorney or licensed escrow agent, and Texas law does not permit the sharing of profits from title closing services with a person who is not a licensed attorney or licensed escrow agent. The court characterized the partnership agreements as illegal and affirmed the trial court's judgment against the partner based on the other partners' illegality defense to enforcement of the agreements.

X. Texas Citizens Participation Act

Newstream Hotels & Resorts, LLC v. Abdou, No. 02-21-00343-CV, 2022 WL 1496537 (Tex. App.—Fort Worth May 12, 2022, no pet.) (mem. op.).

The court held that a limited partnership's general partner and its affiliate failed to establish that the Texas Citizen Participation Act was applicable to a claim by investors in the limited partnership that the general partner and its affiliate had wrongfully obtained indemnification from the partnership for fees and expenses incurred in this judicial proceeding. The general partner and its affiliate characterized communications relating to the indemnification as being made "in or pertaining to a judicial proceeding" and "in connection with a matter of public concern" because the indemnified attorney's fees and expenses were incurred in this judicial proceeding and the investors' underlying claims in the lawsuit alleged misrepresentations and mismanagement of a real estate development project that included public improvements financed by the Town of Flower Mound. The court held that the central issue to the investors' claim was breach of the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. That claim was premised on conduct, not on communication, and the TCPA thus did not apply.

Lakeside Crossing Land Partners ("LCLP") was a limited partnership involved in the construction of mixed-use real estate development in Flower Mound, Texas. Newstream Hotels and Resorts, LLC was the general partner of the partnership. Investors ("Appellees") in LCLP brought suit against Newstream Hotels and Resorts, LLC and an affiliated company, Newstream Commercial, LLC, (collectively "Appellants") on various claims, including Appellants' alleged misrepresentations and mismanagement of the project. Appellants then notified Appellees via email that Appellants were obtaining indemnification from LCLP, allegedly pursuant to the partnership agreement, in connection to the lawsuit. Subsequently, Appellants exercised their claimed right to indemnification through a series of invoices, payments, and checks for the indemnification of the legal fees and litigation expenses.

Following Appellants' exercise of their claimed right of indemnification, Appellees amended their petition to add a paragraph alleging that Appellants' exercise of their claimed indemnification rights was invalid under the partnership agreement and Texas law. Appellants subsequently moved to dismiss the amended claims under the Texas Citizen Participation Act (TCPA). Appellants argued that the amended claims were based on, or were in

response to, Appellants' communications informing the Appellees of the indemnification. Appellants also claimed that the invoices, payments, and checks were "communications" made "in or pertaining to a judicial proceeding" and were made "in connection with a matter of public concern" and therefore protected by the TCPA. Specifically, Appellants claimed that (1) their rights to petition and free speech were implicated because Appellants' communications stated that they were obtaining indemnity/reimbursement from LCLP and (2) the payment "communications" pertained to the present judicial proceeding and involved a matter of public concern (the Town of Flower Mound's involvement in the project's financing). The trial court denied Appellants' motion, and Appellants filed an interlocutory appeal.

In describing the underlying legal framework of a motion to dismiss under the TCPA, the court noted that the nonmovants' (in this case, Appellees') pleadings are the "best and all-sufficient" evidence of the nature of their claim. An appellate court must review the trial court's ruling de novo and view the pleadings in the light most favorable to the nonmovant. Importantly, merely alleging conduct that has a communication embedded within it does not create the relationship between the claim and the communication necessary to invoke the TCPA. Additionally, if a claim does not allege a communication but is based on conduct, the TCPA does not apply.

A review of a TCPA motion to dismiss involves a three-step analysis. The court noted, however, that the Texas Legislature's 2019 amendments to the TCPA narrowed the statute's applicability. First, a movant seeking the protection of the TCPA must initially demonstrate that the claim is based on or is in response to its exercise of the right of free speech, to petition, or of association. Second, if the moving party satisfies its burden to prove the applicability of the TCPA, then the nonmoving party must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Finally, if the nonmoving party satisfies the second step, then the burden shifts back to the moving party to establish an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

First, considering the Appellees' pleadings as the "best and all-sufficient" evidence, the court found that the trial court properly denied Appellants' motion. The central issue to the Appellees' claim was that the Appellants breached the partnership agreement and Texas law by unilaterally collecting funds under a claimed right to contractual indemnity. The claim was premised on conduct, not on communication. Thus, the TCPA did not apply.

Second, the court rejected Appellants' assertion that a quote in Appellees' response to the motion to dismiss supported Appellants' argument. Appellees' response to the motions to dismiss contained sworn testimony that Newstream Hotels and Resorts, LLC had informed all limited partners that the partnership had to raise additional capital, in part due to the indemnification payments. The testimony also included the statement that "those payments have depleted Partnership funds and have made it less likely that I will receive any return of my capital contribution." Appellants claimed that this testimony showed that Appellees responded to the "communication" of LCLP's "need to raise additional capital, in part, because of the [indemnification] payments" by filing wrongful indemnity claims. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, the quoted testimony showed that conduct caused the Appellees' harm and served as the basis for the amended claims.

Third, the court rejected Appellants' argument that Appellants brought their amended claims in response to the communications contained within checks and instructions to withdraw partnership funds. The court noted that this argument ignored that the Appellees' pleadings were the "best and all-sufficient" evidence of the nature of the claim. Further, any communications contained within the checks and instructions to withdraw partnership funds merely served as evidence of Appellants' conduct and did not change the conduct at issue in the case.

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

Lopez v. Guiding Light, LLC, No. 04-20-00561-CV, 2021 WL 5605403 (Tex. App.—San Antonio Dec. 1, 2021, no pet. h.) (mem. op.).

The court concluded that a limited liability company was a health care provider under the Texas Medical Liability Act.

Guiding Light, LLC ("Guiding Light") was a limited liability company that operated as a residential child-care facility pursuant to a contract with the Texas Department of Family Health and Protective Services. Appellant-plaintiff Enrique Lopez (individually and as representative of the estate of Tristen Lopez) argued that

he was not required to submit an expert report within the 120-day deadline set forth in Section 74.351(a) of the Texas Civil Practice and Remedies Code because he was not asserting a health care liability claim and Guiding Light was not a health care provider.

The Texas Medical Liability Act defines “health care” to mean “any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.” Tex. Civ. Prac. & Rem. Code § 74.001(10). A “health care provider” means “any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care” *Id.* § 74.001(a)(12)(A). Guiding Light contended that it was a healthcare provider because it is a “corporation duly licensed ... by the State of Texas to provide health care” The court focused its analysis on whether Guiding Light was “licensed ... to provide health care” and concluded that it was and that Lopez’s claim was based on facts implicating Guiding Light’s conduct during the care and treatment of Tristen Lopez and, as such, was a health care liability claim.

[The court and the parties apparently assumed that Guiding Light was a “corporation.” Although that conclusion is questionable, the definition of a health care provider also includes “any person” as well as a “facility” and an “institution.” Under the Code Construction Act of the Texas Government Code, a person “includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity” Tex. Gov. Code § 311.005(2).

See also cases included below under “Pro Se Representation” holding that an LLC, as an artificial entity, is not permitted to appear *pro se*, and ***cases summarized under “Attorney’s Fees”*** holding that an LLC is not an “individual or corporation.”

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

Jiao v. Xu, 28 F.4th 591 (5th Cir. 2022).

The court held that either the assignors or assignees, or both, of membership interests in a Texas LLC had standing to bring a derivative action against the LLC’s majority member, the trial court did not err in declaring part of the majority member’s interest invalid due to the member’s failure to pay all of his required capital contribution, and a turnover order in favor of the LLC against the member requiring the member to turn over his remaining membership interest in partial satisfaction of the judgment against the member for unauthorized withdrawals from the LLC’s account did not violate the exclusivity provision of the charging order statute.

In 2016, Ningbo Xu, Xiongen Jiao, Zhonghua Yu, and Pengfei Zhou formed Dongtai Investment Group, LLC for the purpose of acquiring the Crowne Plaza Hotel in Houston. Jiao, Yu, and Zhou each made a capital contribution of \$1,000,000 for a 16.66% membership interest in the LLC. Xu was contractually obligated to pay \$3,000,000 for a 50.02% membership interest. Jiao, Yu, and Zhou later assigned their membership interests to their children. Upon discovering financial wrongdoing by Xu, the assignors and assignees brought various claims against Xu and LCL Company, LLC (collectively, “Xu”), including claims for breach of contract, fraud, derivative and non-derivative breach of fiduciary duty, and violations of § 10(b) of the Securities Exchange Act.

The district court granted the plaintiffs’ motion for preliminary injunction and declaratory judgment against Xu. The district court found that Xu did not make his agreed \$3,000,000 capital contribution for his membership interest in the LLC but instead only paid \$867,889. Based on that finding, the court declared Xu’s unit certificates invalid and ordered the LLC to provide Xu with new certificates reflecting the ownership interest derived from the amount Xu had actually paid. The district court also declared that Xu owed the LLC \$1,304,400 based on numerous unauthorized withdrawals from the LLC’s accounts. The district court then entered a turnover order that required Xu to return his membership interest to the LLC in partial satisfaction of the declaratory judgment award.

Xu asserted that the declaratory relief violated the plain language of the LLC’s operating agreement, which limited the liability of a member “for the losses, debts, liabilities and obligations” of the company and provides that “[n]o member shall have the right to demand and receive any distribution from [Dongtai] in any form other than cash.” The court stated that these provisions had no bearing on the district court’s declaration that Xu failed to pay for his full membership interest and was thus only entitled to the membership units for which he paid.

Porter Teleo, LLC v. Print4One, LLC, Civ. A. No. 4:19-CV-3334, 2021 WL 5155665 (S.D. Tex. Sept. 10, 2021).

In a claim of copyright infringement against an LLC, its president, and its creative director, the court granted summary judgment for the president and the creative director on the ground that plaintiff did not introduce evidence to suggest that those defendants had an equity interest in the LLC, received a salary from the LLC, or controlled the company's day-to-day activities.

Porter Teleo, LLC asserted a cause of action for copyright infringement against Print4One, LLC, doing business as Olivia and Poppy, its president Jamie Garza Graney, and its creative director Tina Silvestri. Defendants moved for summary judgment to dismiss Graney and Silvestri from the case, arguing that the plaintiff had failed to plead any theory of personal liability against them.

The court noted that “[a] controlling corporate officer or shareholder may be vicariously liable for infringement along with his or her corporation, despite any immunity provided by state corporation law.” According to the court, “[t]he test of whether a corporate officer is jointly and severally liable with the corporation for copyright infringement is whether the officer has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” Further, “[c]ourts have found that an individual defendant had the requisite right and ability to control infringing activities when the individual defendant actually had the control over the day-to-day activities, or had sufficient equity interest in the infringing entity to infer the existence of such control.” Courts have also found that an officer of a company has a “direct financial interest” in the infringing activity when, “in addition to being an officer and receiving a salary from the infringing corporation, [the officer] had some equity interest in the corporation itself.”

The court concluded that the plaintiff failed to present sufficient evidence to hold Graney and Silvestri liable for the alleged infringement, and the summary judgment was granted:

Here, Graney and Silvestri each submitted a sworn declaration stating, “[t]he only conceivable indirect benefit I derive from the design or sale of [the allegedly infringing wallpaper] is through my financial interest in [Olivia and Poppy] ... because [Olivia and Poppy] benefits and is able to continue business and provide my continued employment.” Graney and Silvestri also provided supplemental declarations stating that they “have not received any commissions for ... or any percentage of the sales of the Torn design.” Plaintiff claims that Defendants have identified only one other member of the company besides Graney and Silvestri. But Plaintiff has not adduced any evidence to suggest that Graney or Silvestri had an equity interest in, or received a salary from, Olivia and Poppy. The record is also devoid of evidence showing that Graney and Silvestri controlled Olivia and Poppy's day-to-day activities. Thus, the Court finds that Plaintiff has failed to present sufficient evidence to hold Graney and Silvestri jointly and severally liable for the alleged copyright infringement. *See also [Broad. Music, Inc. v. Tex Border Mgmt., Inc., 11 F. Supp. 3d 689, 696 (N.D. Tex. 2014)]* (concluding that plaintiffs had not established joint and several liability for president of company because plaintiffs failed to meet burden of showing that he had direct financial interest in company or right and ability to control infringing activities).

In re GTG Solutions, Inc., 642 S.W.3d 41 (Tex. App.—El Paso, 2021, no pet. h.) (“Use of the limited liability company form ordinarily functions to insulate members and managers from personal liability for the LLC's obligations.” (quoting *Hawxhurst v. Austin's Boat Tours*, No. 08-19-00257-CV, 2020 WL 5094673, at *7 (Tex.App.—El Paso Aug. 28, 2020, no pet.))).

K. Griff Investigations, Inc. v. Cronin, 633 S.W.3d 81 (Tex. App.—Houston [14th Dist.] 2021, no pet. h.).

The court of appeals affirmed the grant of summary judgment in favor of a principal of an LLC, apparently on limited liability grounds, even though the plaintiffs had asserted tort claims against the principal.

Kathy Griffin owned K. Griff Investigations, Inc. (“K. Griff”), an investigative agency that performed services such as background checks, surveillance, and service of civil process. Griffin advertised her desire to sell K. Griff and received a response from Cronin, Riordan & Whitman Security Consultants, LLC (“CRW”). The principals in CRW were John Cronin, Mark Riordan, and Hank Whitman.

The parties engaged in negotiations regarding a possible asset sale, but the deal ultimately fell apart. Griffin and K. Griff sued CRW, Cronin, Riordan, Whitman, and others asserting claims for breach of contract, promissory

estoppel, fraud, negligent misrepresentation, conspiracy, and negligence. After the defendants filed summary judgments, the trial court (among other rulings) granted summary judgment for CRW, Cronin, Riordin, and Whitman on the breach of contract, negligence, and fraud claims.

Whitman later moved for summary judgment on the remaining promissory estoppel, negligent misrepresentation, and conspiracy claims against him. He argued that he was a member of CRW, a limited liability company, during the relevant time period and that he could not be individually liable for plaintiffs' alleged claims. Whitman relied on the language of § 101.114 of the Texas Business Organizations Code providing that "[e]xcept 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." The trial court granted Whitman's motion and dismissed the remaining claims against him.

On appeal, the court first upheld the summary judgment granted for CRW, Cronin, Riordin, and Whitman on the breach of contract, negligence, and fraud claims. The court of appeals then upheld the grant of summary judgment in favor of Whitman on the remainder of the claims:

Appellants [i.e., plaintiffs Griffin and K. Griff] concede that section 101.114 means that a member may be individually liable only upon proof that the member "use[d] the LLC for the purpose of perpetrating an actual fraud for the member['s] ... personal benefit," citing *Metroplex Mailing Service, LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.), *abrogated on other grounds by Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Appellants argue, however, that they raised a fact question whether Whitman perpetuated a fraud for his own benefit.

In their brief, appellants refer to their argument regarding the trial court's ruling on their fraud claim against the CRW defendants to support their assertion that Whitman can be held individually liable for perpetuating a fraud for his own benefit. We have already concluded that the trial court did not err in granting summary judgment on appellants' fraud claim in favor of the CRW defendants, including Whitman. Because appellants rely solely on their briefed argument regarding the CRW defendants' alleged fraud to contend that a fact question remains whether Whitman should be shielded by section 101.114, we conclude that appellants' argument as briefed presents no basis for us to conclude that Whitman can be held individually liable for CRW's actions or omissions.

Appellants also argue that section 101.114 "does not apply to an employee," that Whitman was an employee of CRW, and thus the statute does not shield him from liability for appellants' promissory estoppel, negligent misrepresentation, and conspiracy claims. Appellants do not cite to any evidence in the record that establishes that Whitman was an employee of CRW. Accordingly, to the extent their asserted legal proposition is correct, a question we need not reach, appellants did not present evidence creating a fact issue that would preclude summary judgment.

Benbow v. Al-Barnawi, No. 13-20-00131-CV, 2021 WL 3556214 (Tex. App.—Corpus Christi Aug. 12, 2021, no pet. h.) (mem. op.).

The court of appeals reversed the trial court's determination that a member-manager of an LLC could not be held personally liable under § 171.255 of the Texas Tax Code. The court of appeals concluded that the trial court had misapplied § 171.255 by wrongfully determining that the plaintiff's claim sounded in negligence.

Appellant Aaron Benbow sued appellee Mohammad Al-Barnawi, alleging that he "[p]aid for auto repairs that were never performed" by Al-Barnawi's business, Auto Mechanic Service Plus, LLC. Auto Mechanic had its right to transact business in Texas forfeited on September 29, 2017 for failure to pay franchise taxes. Its charter was forfeited on February 2, 2018. Benbow alleged that he took his vehicle to Auto Mechanic in February of 2019 for the specific purpose of having the air conditioning evaporator core replaced. He paid Auto Mechanic \$1,075 to replace the part and \$760 to perform additional repairs that Auto Mechanic recommended. After problems persisted with his vehicle, Benbow took it to a dealership. A mechanic at the dealership told Benbow that the evaporator core had not been replaced and that the other work performed by the LLC was unnecessary.

Benbow claimed that Al-Barnawi was the sole member-manager of Auto Mechanic and was actively engaged in the day-to-day operations of the business. He filed a small claims suit against Al-Barnawi, alleging that

he “[p]aid for auto repairs that were never performed” by the LLC. On September 17, 2019, after a trial on the merits, the justice of the peace court rendered a judgment in favor of Benbow and awarded him \$3,500 in damages. Auto Mechanic had its charter reinstated on September 29, 2019, and thereafter Al-Barnawi appealed the judgment to a county court at law for a trial de novo.

The county court held a trial on the merits and rendered a take nothing judgment in favor of Al-Barnawi. The court found that Benbow engaged the LLC to perform the repair work; an employee of the LLC, not Al-Barnawi, performed the repair work; the LLC invoiced Benbow; and Benbow paid the LLC. Based on these findings, the court concluded that “the entity that is subject to any liability for the negligent repair work that is being alleged by [Benbow] is [the LLC].” The trial court further concluded that Benbow could not hold Al-Barnawi personally liable for the wrongful conduct of the LLC under § 171.255 of the Texas Tax Code because the statute does not apply to unintentional torts, and Benbow’s claim was “for negligent repair work.” Benbow appealed the decision.

The court of appeals began by explaining the relationship between the limited liability offered by an LLC and the potential for personal liability provided by § 171.255 of the Texas Tax Code:

“Generally, members are not personally liable for the debts of a limited liability company.” *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.) (citing *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)). This shield from personal liability is based on a presumption of legal separateness that exists between an LLC and its members.

Section 171.255(a) of the [T]ax [C]ode provides an exception to that rule:

If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived.

TEX. TAX. CODE ANN. § 171.255(a). The statute is penal in nature and is intended to hold those directors and officers liable who “have abused the corporate privilege by continuing to create and incur debts after the franchise tax is delinquent.” *Rossmann v. Bishop Colorado Retail Plaza, L.P.*, 455 S.W.3d 797, 802 (Tex. App.—Dallas 2015 pet. denied) (quoting *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879, 883 (Tex. App.—Dallas 2007, no pet.)).

However, § 171.255(c) contains a safe harbor provision for unwitting directors and officers:

A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred:

- (1) over the director’s objection; or
- (2) without the director’s knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.

TEX. TAX. CODE ANN. § 171.255(c). Because the safe harbor provision turns on the director or officer’s knowledge or consent, we have previously concluded that corporate “debt” does not include liability for unintentional torts. [*Williams v. Adams*, 74 S.W.3d 437 (Tex. App.—Corpus Christi 2002, pet. denied).] Therefore, § 171.255(a) does not create personal liability for “tort judgments predicated on negligence liability.” *Id.* at [442].

The court of appeals then agreed with Benbow and concluded that the trial court had misapplied § 171.255 to Benbow’s claim:

.... First, the trial court mischaracterized his claim as one for “negligent repair work.” Benbow did not allege that the repairs were negligently performed; instead, he alleged that he “[p]aid for auto repairs that were never performed.” Construing his pleading liberally in his favor and looking to his intent, Benbow clearly alleged that he was defrauded—based on the LLC’s knowing misrepresentations, he paid the company for repairs that it never performed in the first instance.

Fraud is an intentional tort. *See LTTS Charter Sch., Inc. v. Palasota*, 362 S.W.3d 202, 209 (Tex. App.—Dallas 2012, no pet.) (holding appellant’s claim for fraud was excepted from Texas Tort Claims Act because fraud is an intentional tort); *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 219 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (same); *Sanders v. City of Grapevine*, 218 S.W.3d 772, 779 (Tex. App.—Fort Worth 2007, pet. denied) (same); *Gen. Elec. Co. v. City of Abilene*, 795 S.W.2d 311, 313 (Tex. App.—Eastland 1990, no writ) (same). Therefore, the trial court’s reliance on our opinion in *Adams* was misguided.

To the contrary, our analysis in *Adams* leads us to the conclusion that a corporate “debt” under § 171.255 includes liability for fraud claims because, unlike a negligence claim, fraudulent conduct is intentional. At least one of our sister courts has reached the same conclusion, *see Skrepnek v. Shearson Lehman Bros., Inc.*, 889 S.W.2d 578, 581–82 (Tex. App.—Houston [14th Dist.] 1994, no writ.), and § 171.255 has also been used to impose personal liability on a corporate officer for a breach of contract claim against the corporation. *See Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 134–35 (Tex. App.—Fort Worth 2016, no pet.). So, although a corporate director or officer may invoke and ultimately prevail under the safe harbor provision, a plaintiff is not categorically excluded as a matter of law from pursuing personal liability against a director or officer for fraudulent conduct by the corporation or its employees under § 171.255(a). Because the trial court concluded otherwise, we sustain Benbow’s sole issue. ... We reverse and remand for a new trial.

Mungas v. Odyssey Space Research, LLC, No. 14-19-00378-CV, 2021 WL 3416500 (Tex. App.—Houston [14th Dist.] Aug. 5, 2021, no pet. h.) (mem. op.) (“Firestar is a limited-liability company. A member or manager of a limited-liability company is not liable for the company’s debts, obligations, or liabilities under a judgment, decree, or order of a court except to the extent the company agreement specifically provides otherwise. *See* Tex. Bus. Orgs. Code Ann. § 101.114. However, the principles and law applicable to disregarding the corporate fiction apply to limited-liability companies. Tex. Bus. Orgs. Code Ann. § 101.002(a) (providing that section 21.223 applies to limited-liability companies and their members).”).

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

JSAA Realty, LLC v. Hak Man Lee Trust (In re JSAA Realty, LLC), Case No. 20-32504, 2022 WL 89155 (Bankr. N.D. Tex. Jan. 7, 2022).

A promissory note signed by a member of a member-managed LLC was binding on the LLC notwithstanding that the signature of the other member was forged on the promissory note. The member who signed the note was an agent of the LLC whose actual authority was not disputed, and the forged signature of the other member was superfluous and irrelevant to the enforceability of the note.

JSAA Realty, LLC (“JSAA Realty”) sought a determination of the Hak Man Lee Trust’s (the “Trust”) claim against JSAA Realty. Sunshine Metro Investments, LLC (“Sunshine”) had filed a proof of claim against JSAA Realty secured by a mortgage on JSAA Realty’s real property, and Sunshine transferred the claim to the Trust on December 1, 2020. JSAA Realty filed an objection to the proof of claim, to which the Trust timely answered.

JSAA Realty was a Texas limited liability company with two members, Mr. Sinkular and Mr. Joshi, who each owned a 50% membership interest. In 2016, Sunshine lent \$300,000 to JSAA Realty, and JSAA Realty executed a promissory note payable to Sunshine in that amount. Following a series of missed payments and failed negotiations, JSAA Realty and Sunshine amended the terms of the promissory note to an amount of \$465,000. The amended note contained three signature blocks—one for Joshi, one for Sinkular, and one for an agent of Sunshine. The signatures of Joshi and Sinkular (whose signature Joshi admitted he forged) on the note were undated, and the signature of Sunshine’s agent was dated July 13, 2020. On July 2, 2019, Joshi emailed a “First Amendment to

Assignment of Rent,” a “First Amendment to Deed of Trust,” and a “First Amendment to Guaranty” to Sunshine and JSAA Realty’s accountant. Each document contained a notarized signature for Joshi and an additional signature for Sinkular (which was not notarized). Joshi admitted to forging Sinkular’s signature on each of the documents. The July 2, 2019 email did not contain the amended note, and the parties disagreed over whether the amended note was executed in July of 2019 or July of 2020. The court determined that resolving the enforceability of the amended note turned less on *when* the amended note was executed and more on the fact that it *was* executed. In any event, the court found that the evidence most supported a finding that the amended note was executed in July of 2020 based on the date of the signature of Sunshine’s agent and statements in a demand letter sent by the law firm representing Sunshine.

The court determined that Joshi executed the amended note as an agent of JSAA Realty acting with actual authority. “An act committed by an agent of a limited liability company ... 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.” Tex. Bus. Orgs. Code § 101.254(b).

Joshi was an agent of JSAA Realty as a “governing person ... and ... officer ... vested with actual authority by the governing authority by the company.” Tex. Bus. Orgs. Code § 101.254(a). Joshi was a governing person of JSAA Realty because the limited liability company was member-managed (the certificate of formation provided that the company would not have managers and that the members would manage the company), and Joshi’s title of “President” of JSAA Realty further supported the conclusion that Joshi was an agent.

The court concluded that Joshi had actual authority to bind JSAA Realty because neither party disputed that Joshi had actual authority to execute the amended note. JSAA Realty’s certificate of formation was silent on its members’ authority, other than authority to indemnify and to purchase indemnification insurance. Evidence in the record showed that Joshi had been entrusted to negotiate lending arrangements and make loan payments on behalf of JSAA Realty. Thus, the court concluded that Joshi had actual authority to execute the amended note on behalf of JSAA Realty in the absence of evidence to the contrary.

JSAA Realty argued that Joshi’s forgery of Sinkular’s signature rendered the amended note unenforceable, but JSAA Realty provided no authority supporting the proposition that the number of signature blocks on an instrument is determinative of which signatures are necessary to bind the entity. Rather, the court found that Sinkular’s signature was superfluous and unnecessary to the enforceability of the note because Joshi had actual authority to bind JSAA Realty. Based on Joshi’s signature on the amended note, JSAA Realty was obligated to Sunshine for \$465,000 under the amended note.

Vision Up, LLC v. Longabaugh, No. 14-19-00942-CV, 2021 WL 5934697 (Tex. App.-Houston [14th Dist.] Dec. 16, 2021, no pet. h.) (mem. op.).

The court concluded that settlement and release agreements signed by the two initial members/governing persons of an LLC as individuals and members of the LLC were sufficient to make the LLC a party to the releases and to release the claims of the LLC.

Randy Hughes and Broc Spedale decided to operate a restaurant in the Navasota area. Hughes hired Marvin Longabaugh, an attorney, to prepare and file a certificate of formation for Vision Up, LLC, an entity to operate the restaurant. The certificate of formation listed Hughes and Spedale as the LLC’s only members and governing persons. A disagreement arose between Hughes and Spedale, and Hughes informed Longabaugh that Spedale no longer wished to be a part of the business. Subsequently, Longabaugh filed an amended certificate of formation no longer listing Spedale as a member and governing person. Spedale then brought suit against Hughes, claiming that Spedale had been wrongfully removed as a governing person of Vision Up or remained a member despite the filing of the amended certificate. Spedale later amended his petition to add Vision Up and Longabaugh as defendants and to assert a claim against Longabaugh purportedly on behalf of Vision Up. After Longabaugh died in 2017, his wife appeared on behalf of his estate.

Following severance of the case based on Spedale’s claims against Hughes and Vision Up, the trial court entered a declaratory judgment that Spedale remained a member of Vision Up. During the pendency of an appeal, the parties reached a settlement, under which Hughes signed a settlement agreement and release, relinquishing claims against Longabaugh for both himself and Vision Up. Spedale also signed a settlement agreement and release, relinquishing claims against Longabaugh for both himself and Vision Up. However, Vision Up intervened in the lawsuit against Longabaugh, asserting malpractice, before Spedale dismissed his claims under the settlement.

Subsequently, the trial court granted Longabaugh's motion for summary judgment disposing of all claims against Longabaugh.

The settlement agreement and release signed by Hughes (the "Hughes release") identified and described the parties to the agreement as the "Hughes Parties," consisting of "Randy Hughes, Individually and as a member of Vision Up LLC." The release stated that the Hughes Parties "made a presuit demand against Longabaugh" for attorney's fees. The parties then stated a desire "to settle and resolve ... all issues and disputes between them." With regard to consideration for the settlement, the release stated that Longabaugh or his insurance carrier agreed to pay a certain sum and that the Hughes Parties acknowledged receiving the certain sum. Further, the release stated that the Hughes Parties "agree not to file a lawsuit against Longabaugh ... for claims related to the Underlying Suit ..." and "any and all claims based upon any of [Longabaugh's] acts or omissions prior to the date of this Agreement and arising from any conduct of any kind or character whatsoever, from the beginning of time to the present" and "none of the releasing Parties shall assert against [Longabaugh] any future claims based on any conduct, act, or omission encompassed by the releases"

The Hughes release also contained a section labeled "Authority and Approvals" in which it stated that each of the signatories to the release was "duly authorized to ... resolve all disputes ... between the parties" and "to bind ... those entities on whose behalf he or she purports to act in the capacity identified" and that each signatory "warrants that all corporate or other approvals necessary ... to enter into this Agreement have been obtained." Hughes's notarized signature appeared twice at the end of the document, once for himself and once "as a member of Vision Up, LLC."

The settlement agreement and release signed by Spedale (the "Spedale release") stated that Spedale entered the agreement "Individually and in the right of Vision Up, LLC." The release further stated that Spedale, individually and in the right of Vision Up, "releases, acquits, and forever discharges ... Longabaugh ... from any and all actions, causes of action, claims and demands ... in any way growing out of any and all claims for negligence, breach of fiduciary duty, [etc.] that were or which could have been asserted in" the lawsuit against Longabaugh in exchange for a sum provided by Longabaugh or his insurance carrier (which Spedale acknowledged receiving). The release further stated that it "resolves all issues arising from facts made the basis of the Lawsuit." Additionally, the release contained an indemnity provision in favor of Longabaugh by Spedale, and Spedale warranted that he was the sole owner of the claims. At the end of the release, Spedale signed it both for himself and "as a member of Vision Up, LLC."

Vision Up argued that: (1) it was not a named party in either release, (2) neither of the releases mentioned its claims as being released, (3) no consideration was paid to it for either release, (4) neither Hughes nor Spedale had the authority to release the claims, and (5) neither a legal malpractice case nor its proceeds may be assigned.

First, the court found that Vision Up was a named party to both releases because the only members and governing persons signed releases purporting to represent Vision Up. A release is only effective against a party that is named in the release or described with such particularity that its identity is not in doubt. The Hughes release identified Hughes individually and as a member of Vision Up as a party. Further, the "releasing Parties" referenced in the Hughes release referred to Hughes individually and as a member of Vision Up. Additionally, Hughes signed the release both for himself individually and as a member of Vision Up. Finally, Spedale entered into the Spedale release for himself individually and as a member of Vision Up and signed both individually and as a member of Vision Up.

Second, the court concluded that both releases mentioned the claims belonging to Vision Up as released. To effectively release a claim in Texas, the releasing instrument must "mention" the claim to be released, and any claims not clearly within the subject matter of the release are not discharged. The Hughes release stated that the Hughes Parties, which included Hughes as a member of Vision Up, agreed not to file a lawsuit against Longabaugh for any claims relating to the underlying suit. Further, the Spedale release stated that Spedale, in the right of Vision Up, released Longabaugh from all claims related to the underlying suit. Third, the court concluded that both releases were supported by valid consideration. Vision Up argued that insufficient consideration was given because "no money was paid" in consideration for a release, but the court stated that consideration does not have to be paid to the releasing party. Rather, consideration consists of a benefit to the promisor or a detriment to the promisee. In this case, the releases recited payment by Longabaugh or his insurance carrier for each release. Although the payment may not have been to Vision Up, it may still constitute a detriment to Longabaugh.

Fourth, the court stated that the evidence demonstrated that both Spedale and Hughes had authority to release Vision Up's claims. Vision Up cited *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W.3d 230, 239 (Tex. App.—Dallas 2005, pet. denied) to support its argument. In *Edwards*, a release signed by a company's shareholder and officer did not release the company's claims because the company was not a party to the release, the release did not indicate that the company was releasing any claims, and the release did not contain any language describing anyone granting a release for or on behalf of the company. In this case, however, the court stated that Vision Up was a party to the release, and the release clearly and unambiguously expressed an intent to release Vision Up's claims. According to the court, Vision Up's reliance on Hughes's affidavit, which stated that no one had been authorized to release any claims on behalf of Vision Up, was insufficient to raise a fact issue. Thus, the court concluded that both Spedale and Hughes had the authority to release Vision Up's claims.

Fifth, the court stated that no evidence suggested that Vision Up assigned its malpractice claims or any proceeds to Hughes or Spedale. Rather, Hughes and Spedale acted as the members and governing persons of Vision Up in releasing its claims.

Finally, the court rejected Vision Up's argument that Spedale had no standing to bring suit against Longabaugh because Vision Up presented no explanation of how Spedale's standing (or the lack thereof) was relevant to the appeal.

D. Fiduciary Duties

McLeod v. McLeod, 644 S.W.3d 792 (Tex. App.—Eastland 2022, no pet. h.).

The surviving member of an LLC sued the deceased member's estate asserting individual and derivative claims for breach of fiduciary duty. In the absence of a ruling on special exceptions to the pleadings filed by the deceased member's estate, the court of appeals held that the trial court did not err in submitting a jury question inquiring as to the existence of an informal fiduciary duty owed by the deceased member to the surviving member. The court of appeals also held that there was sufficient evidence to support the damages findings with respect to breaches of fiduciary duty found by the jury to the surviving member as well as to the LLC.

In 2012, Barry McLeod proposed to his mother, Wanda McLeod, that they develop a portion of her 112-acre farm into a residential property development. Barry and Wanda formed McLeod Property Development, LLC ("MPD") for the purpose of developing the property. Barry and Wanda were the only members of MPD at the time that it was formed. Although Wanda was listed as a managing member of MPD, she did not have any role in its management for the first four years. Barry was the controlling member of MPD until he died unexpectedly in 2016. Upon Barry's death, his wife, Julie McLeod, began operating MPD. Disputes, most of which focused on the manner in which Barry had operated MPD, arose between Wanda and Julie, and Wanda subsequently took control of MPD from Julie in early 2017. Eventually, litigation ensued between the parties.

While Barry was alive and managed MPD, Barry made many withdrawals and paid expenditures of which Wanda was unaware, including using MPD funds to pay for cars for Julie and his daughter, two rental houses, personal income taxes and ad valorem taxes, his son's personal income taxes, his daughter's college tuition, and interest on loans for other properties owned by Barry. At the time of Barry's death, Wanda's capital account far exceeded Barry's capital account, and Barry's accountant had been urging Barry to take measures to discuss the situation with Wanda and rectify the imbalance in the capital accounts. After Barry's death, Julie initially took over the operations of MPD and discovered that MPD had a large outstanding bill for street work and minimal cash in its bank account. Julie was able to sell enough lots from MPD's inventory to pay the bill and increase the balance in MPD's bank account, but Wanda and Julie disagreed on how to account for Wanda's contribution of the property to MPD and deal with the imbalance in the capital accounts resulting from Barry's withdrawals and failure to pay any distributions to Wanda. Wanda took control of MPD in early 2017 and sued Julie in her capacity as executor of Barry's estate in early 2018.

Wanda alleged causes of action against Barry's estate for breach of fiduciary duty, breach of contract, and unjust enrichment. Julie later intervened in both her individual capacity and derivatively on behalf of MPD. Julie alleged claims against Wanda and her daughter, whom Wanda had enlisted to help her run MPD after she took over. Wanda subsequently filed an amended petition wherein she sued Julie in her individual capacity, alleging that Julie knowingly participated in Barry's breaches of fiduciary duty.

The trial court submitted a charge to the jury that contained thirty-seven questions. The jury's findings included the following: Barry owed Wanda a fiduciary duty that he breached, and Barry also breached the fiduciary

duty that he owed to MPD, but Julie was not a knowing participant in these breaches; Barry was unjustly enriched, and five items of property were traceable to his acts of unjust enrichment; and Wanda did not comply with all of the fiduciary duties that she owed to MPD, but MPD did not suffer any damages because of Wanda's breach of fiduciary duty. On appeal, the court addressed several challenges by Julie to the recoveries awarded to Wanda and MPD against Barry's estate.

With respect to Wanda's individual claim against Barry for breach of fiduciary duty, Julie claimed that Wanda did not sufficiently plead an individual cause of action for breach of fiduciary duty as contemplated by the court's charge. The first question in the trial court's charge asked if a relationship of trust and confidence existed between Barry and Wanda. Wanda's pleading alleged that Barry was her son, that Wanda's participation was at Barry's instruction, that Barry was the managing and controlling member who handled all of the financials for MPD, and that Barry withdrew funds without her knowledge or approval. Wanda also alleged that Barry, as the controlling member, owed a fiduciary duty to MPD and its members, which he breached by wrongfully suppressing and withholding funds to Wanda in order to use the corporate profits for his own personal gain, wrongfully using the company account as his own personal piggy-bank without notifying or seeking Wanda's consent, misappropriating company funds for his own personal use and to pay off his loans in full while not paying Wanda's loan in full, and self-dealing. Julie filed a special exception to Wanda's claims for breach of fiduciary duty, asserting that Wanda alleged "a very general and generic claim for breach of fiduciary duty" and that Wanda failed "to articulate what fiduciary duty [Barry] owed to" Wanda; however, the record did not indicate that the trial court held a hearing on Julie's special exceptions, nor did the record contain an order ruling on her special exceptions. The court addressed formal and informal fiduciary relationships (noting case law in Texas that has declined to recognize a broad formal fiduciary duty between LLC members) as follows:

To succeed on a claim for breach of fiduciary duty, a plaintiff must establish (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach. *Dipprey v. Double Diamond, Inc.*, 637 S.W.3d 784, 802 (Tex. App.—Eastland 2021, no pet.). "Certain formal relationships create fiduciary relationships as a matter of law." *Id.* (quoting *Severs v. Mira Vista Homeowners Ass'n, Inc.*, 559 S.W.3d 684, 703 (Tex. App.—Fort Worth 2018, pet. denied)); see *Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as noted in Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225–26 (Tex. 2002). Julie contends that Wanda only pleaded an individual cause of action for breach of fiduciary duty based on a formal relationship by virtue of Barry's position as the controlling member of MPD. However, Texas courts have not recognized that a broad formal fiduciary duty exists between members of an LLC. See *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349, 366 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 391 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.).

Sometimes informal relationships, whether moral, social, domestic, or purely personal, may also give rise to fiduciary duties where one person trusts in and relies on another. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997); *Dipprey*, 637 S.W.3d at 802; *Severs*, 559 S.W.3d at 703. "But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Swanson*, 959 S.W.2d at 176–77. In order to give full force to contracts, courts do not create fiduciary relationships lightly. *Id.* at 177. Thus, "to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit." *Id.* "[M]ere subjective trust does not ... transform arm's-length dealing into a fiduciary relationship." *Id.*

The court concluded that the trial court did not abuse its discretion by determining that Wanda's pleadings constituted fair notice that she was relying on a special relationship of trust and confidence apart from the formation of MPD with Barry in view of the liberal fair-notice standard governing pleadings. According to the court, "[t]o the extent there was a defect in Wanda's pleading of this cause of action, Julie waived that complaint by failing to obtain a ruling on her special exception."

Next, the court addressed Julie's challenge to the sufficiency of the evidence supporting the jury's damage award of \$150,000 to Wanda for Barry's breach of fiduciary duty to Wanda. The parties called two accountants as witnesses and offered thousands of pages of banking records and accounting documents. Although the jury's award of \$150,000 to Wanda for Barry's breach of fiduciary duty did not correlate to a specific damage element of that same amount, the court stated that it fell within the range of damages detailed in the testimony of the parties and the accountants. Because there was some evidence supporting the jury's damage finding, the court overruled Julie's issue challenging the legal sufficiency of the evidence supporting the jury's damage finding. The court also concluded that the jury's damage finding was supported by factually sufficient evidence because it was not against the great weight and preponderance of the evidence.

The court then proceeded to address Julie's contention that there was legally and factually insufficient evidence to support the jury's damage award of \$36,000 to MPD for Barry's breach of fiduciary duty to MPD. Here the court was able to tie the \$36,000 damage finding to a specific item of evidence relating to Barry's failure to deposit \$36,000 of rebates on an electric service contract into MPD's account. Thus, the court overruled Julie's challenges to the legal and factual insufficiency of the evidence in this regard.

With respect to Julie's challenges to the unjust enrichment and constructive trust issues, the court found that the evidence supported the jury's finding of unjust enrichment, but the court sustained Julie's challenge to the constructive trust imposed on two automobiles and three pieces of real property that were acquired with funds traceable to MPD because Wanda failed to establish that these items continued to be owned by Barry's estate at the time of trial. Additionally, the trial court's final judgment placed a constructive trust on the proceeds from the five items of property, but there was no evidence that identified any proceeds from the disposition of these property items, and the court thus concluded that a constructive trust on unidentified proceeds was improper as well.

Villareal v. Saenz, No. 5-20-CV-00571-OLG-RBF, 2022 WL 1553009 (W.D. Tex. Mar. 4, 2022).

The magistrate court recommended dismissal of the plaintiff's individually asserted claims for breach of fiduciary duty and violations of the Computer Fraud and Abuse Act and the Anti-Cybersquatting Consumer Protection Act on the basis that all of these claims could only be asserted by the LLC that was allegedly damaged by the breaches and violations. With respect to the claim for breach of fiduciary duty, the court stated that members of an LLC do not owe one another a formal fiduciary duty under Texas law.

Jonathan Villarreal, on behalf of himself and his company, ZroBlack, LLC, brought suit against his former business partner, Jonathan Saenz, among others. The district court adopted a report and recommendation resulting in all of Villarreal's claims being dismissed except his claims against Saenz for breach of fiduciary duty, violations of the Computer Fraud and Abuse Act, and the Anti-Cybersquatting Consumer Protection Act. While the report and recommendation was pending before the district court, the court granted a motion to withdraw by Villarreal's counsel. As ZroBlack, LLC failed to timely obtain new counsel, despite the court's multiple warnings and extensions, the district court dismissed all claims by ZroBlack, LLC against Saenz. Saenz then filed a motion to dismiss all of Villarreal's individually held claims asserted against Saenz, and the magistrate court in this opinion issued a report and recommendation to grant Saenz's motion to dismiss all remaining claims that Villarreal asserted individually against Saenz because Villarreal's remaining claims constituted claims that could only be asserted by, and belonged to, ZroBlack, LLC as a matter of law.

In support of its recommendation that Villarreal's remaining individual breach-of-fiduciary-duty claims be dismissed, the court pointed out that Villarreal pleaded that Saenz breached his duty to, and damaged, ZroBlack, LLC, not Villarreal. The court stated that, "under Texas law, members in a limited liability company don't owe a formal fiduciary duty to one another," citing *Chase v. Hodge*, No. 1:20-cv-0175-RP, 2021 WL 1948470, at *8 (W.D. Tex. May 14, 2021). Acknowledging that "an informal fiduciary relationship may under certain circumstances exist between members," the court stated that Villarreal failed to plead any facts to suggest that an informal fiduciary relationship existed between himself and Saenz.

The court further determined that ZroBlack, LLC solely held the claims relating to the Computer Fraud and Abuse Act and the Anti-Cybersquatting Consumer Protection Act. These claims hinged on the allegation that Saenz's actions (Saenz's alleged intentional access of ZroBlack LLC's domain (or mark) on GoDaddy, deletion of ZroBlack LLC's webpage and email server, and refusal to release ZroBlack LLC's GoDaddy account) caused ZroBlack, LLC to suffer injury by losing major contracts, data, and new clients.

Arya Risk Management Systems, Pvt. Ltd. v. Dufossat Capital Puerto Rico, LLC, No. H-16-3595, 2021 WL 6197360 (S.D. Tex. Dec. 30, 2021), amended on reconsideration in part, 2022 WL 358251 (S.D. Tex. Feb. 2022).

The court held that multiple common-law claims (including claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty), which were asserted by an LLC against a member, his spouse, and other parties, were preempted by the Texas Uniform Trade Secrets Act because the claims were based on converting, using, and misappropriating the LLC's confidential information. The court held that there was no evidence of a preexisting relationship between a member's spouse and the LLC so as to give rise to an informal duty in the business relationship between the LLC and the member's spouse, and the spousal consent to the LLC operating agreement signed by the spouse did not impose on the spouse the contractual duties and obligations imposed by the operating agreement.

Manoj Ghayalod ("Manoj") was hired as the Managing Director of Quantitative Research and Analytics of an energy and commodities trading company named West Oaks Energy, L.P. ("West Oaks") formed by Ashton Soniat and Mark Schwausch. Manoj recommended that West Oaks hire his wife, Pallavi Ghayalod ("Pallavi") to identify and recruit programmers in India. With West Oaks' agreement, Pallavi formed Arya Risk Management Systems, Pvt. Ltd. ("Arya") to recruit computer programmers. When Soniat and Schwausch parted ways, Soniat formed defendant Dufossat Capital Puerto Rico, LLC, ("Dufossat"), in which Manoj received a one percent membership interest. Manoj signed the operating agreement of Dufossat, and Pallavi signed a spousal assent. This case was a combination of three actions, and this opinion addressed various motions and requests to file motions for summary judgment by the parties.

The preemption provision of the Texas Uniform Trade Secrets Act (TUTSA) was the basis for the court's rulings as to numerous claims in this opinion. TUTSA's preemption provision states:

- (a) Except as provided by Subsection (b), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.
- (b) This chapter does not affect:
 - (1) contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (2) other civil remedies that are not based upon misappropriation of a trade secret; or
 - (3) criminal remedies, whether or not based upon misappropriation of a trade secret.

Tex. Civ. Prac. & Rem. Code § 134A.007.

Among the claims addressed in this opinion were counterclaims asserted by defendant Dufossat against Manoj and Pallavi for breach of fiduciary duty, constructive fraud, aiding and abetting, assisting and participating, conspiracy, joint enterprise, and spousal agency liability. The court examined the factual allegations supporting each of these claims and concluded that almost all of them were preempted by TUTSA because they were based on misappropriating, converting, or using trade secrets. For example, in support of the counterclaim for aiding and abetting asserted against Manoj and Pallavi, Dufossat alleged:

Manoj was both an employee and an owner of Dufossat. Accordingly, he owed a fiduciary duty to act in the best interests of Dufossat. In a supposed attempt to save money, Manoj recommended to Soniat that Dufossat hire India Programmers. In addition, Manoj encouraged Soniat to engage his wife, Pallavi, to recruit the India Programmers. Manoj assured Soniat that he would train and supervise the India Programmers and that he would protect Dufossat's confidential information, including its Trader App software.

As opposed to protecting Dufossat's confidential information, especially the Trader App software, Manoj aided and abetted Pallavi, his wife, in converting and misappropriating Dufossat's confidential information. To be specific, Manoj actively assisted Pallavi in copying Dufossat's Trader App software on a server in India for the purpose of misappropriating the software. In addition, Manoj actively assisted his wife in converting Dufossat's confidential information, including Dufossat's e-mail system. Finally, Manoj (while still employed by Dufossat) actively assisted his wife in obtaining Dufossat's confidential information to use in her competing business.

With the exception of one allegation against Manoj for breach of fiduciary duty based on his alleged neglect of his duties related to the “Follow Book,” the court concluded that all of the claims for breach of fiduciary duty, constructive fraud, aiding and abetting, assisting and participating, conspiracy, joint enterprise, and spousal agency liability were preempted by TUTSA.

Among the other claims and issues addressed by the court were breach-of-contract claims against Pallavi based on alleged breaches of non-disclosure, confidentiality, and noncompete provisions of Dufossat’s operating agreement. Dufossat relied on the following spousal assent signed by Pavalli as a basis to hold her liable for breach of the operating agreement:

[t]he undersigned Spouse (“Spouse”) of MANOJ GHAYALOD (“Member,” ...), hereby signs this ASSENT AND AFFIRMATION (“Assent”) and joins in the execution of that certain Operating Agreement dated August 28, 2013, as may be amended from time-to-time (“Agreement”) for the purposes of evidencing his or her knowledge of the Agreement’s existence and substance after thorough inspection thereof; evidencing his or her acknowledgment that he or she agrees to the provisions contained in the Agreement; and affirming and/or re-affirming, as the case may be, the corporate documentation contained Company’s corporate Records (“Records”), including but not limited to any restrictions on transfer of an interest or rights of repurchase surrounding spouses.

...

... This Assent is intended solely as an assent, affirmation and/or reaffirmation of the Agreement and the Records. It is not intended to, and shall not be construed as, conferring, confirming or creating any separate or community property interest in any ownership interest of the Company in favor of the Member’s Spouse. Moreover, as is consistent with the Records, no further consent or signature of Member’s Spouse shall be required with respect to any future action taken by such Member or the Company under or in connection with this Agreement, the Records or the Company.

Relying on *Wilshire Villa Association v. Strauss*, No. 94-40111, 1994 WL 612411, at *5 (5th Cir. October 24, 1994), which involved a spousal assent to a partnership agreement, the court concluded that Pallavi’s signature on the spousal assent was intended to relieve Dufossat or its members from having to obtain her consent for Manoj’s or Dufossat’s acts. According to the court, the spousal assent did not make her “anything other than a third-party to the Operating Agreement,” and she was entitled to summary judgment on this claim by Dufossat.

The court also addressed a breach-of-fiduciary-duty claim by Dufossat against Pallavi “by virtue of her business relationship with the Dufossat Defendants where she was provided with confidential information and provided with access to the Dufossat Defendants’ e-mail account.” Dufossat alleged that she breached this fiduciary duty by locking the Dufossat Defendants out of their email systems. The court stated that Dufossat “fail[ed] to cite any authority for the proposition that parties to commercial transactions such as those in which Dufossat engaged with Pallavi owe fiduciary duties to one another.” The court acknowledged that Texas law recognizes a fiduciary duty as a matter of law in certain formal relationships and also recognizes an informal fiduciary duty may arise from “a moral, social, domestic or purely personal relationship of trust and confidence.” However, “[o] impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.” Here, there was no evidence of a preexisting relationship between Dufossat and Pallavi, and the fact that Dufossat trusted Pallavi did not transform their business arrangement into a fiduciary relationship. Furthermore, the court stated that agreements requiring confidentiality generally do not create fiduciary relationships. Thus, the commercial dealings described in Dufossat’s counterclaims against Pallavi did not transform their arm’s length business transactions into a fiduciary relationship.

Campbell v. Texas Tea Reclamation, LLC, No. 3:20-CV-00090, 2021 WL 2211690 (S.D. Tex. May 6, 2021), report and recommendation adopted, 2021 WL 2211807 (S.D. Tex. June 1, 2021).

The court denied the motion to dismiss of an LLC member’s claim for breach of fiduciary duty against a fellow member because the lack of a formal fiduciary relationship between members of an LLC in Texas does not preclude the existence of an informal fiduciary relationship, and the allegations of close familial ties and a longstanding relationship between the members were sufficient at the early stage of this litigation to allow the fiduciary-duty claim to proceed.

H. Stuart Campbell, Sr. (“Campbell Sr.”) contributed \$2 million to an LLC formed by Campbell’s nephew and his nephew’s wife, John and Debra Williams, and received a membership interest in the LLC. Over a period of time, Campbell Sr. also lent \$2.375 million to the LLC for a total of 28 demand promissory notes. After Campbell Sr. died, his estate demanded payment of the notes. When the LLC failed to pay, Campbell Sr.’s son (“Campbell Jr.”), as executor of his estate, sued for breach of contract and later amended the complaint to add a number of additional causes of action, including breach of fiduciary duty against the Williamses. In this opinion, the court addressed a motion to dismiss filed by the LLC and the Williamses seeking dismissal of numerous counts asserted in the Second Amended Complaint, including a claim for breach of fiduciary duty against the Williamses.

The court explained that there are two types of fiduciary relationships: (1) a “formal” relationship that arises as a matter of law based on a relationship such as attorney-client, principal-agent, trustee-beneficiary, or partners in a partnership; and (2) an “informal” relationship that arises from a moral, social, domestic, or personal relationship referred to as a “confidential” relationship. The Second Amended Complaint alleged that the Williamses breached both formal and informal fiduciary duties.

As a basis for the alleged formal fiduciary duties, Campbell Jr. claimed that the Williamses (as managing members of the LLC) owed his father (another member of the LLC) fiduciary duties as a matter of law. The court explained that Texas law does not appear to impose formal fiduciary duties on members to other members:

... The Texas statute governing LLCs does not directly address whether members of an LLC owe duties to one another. Rather, the Texas Business Organizations Code simply provides that “[t]he company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” TEX. BUS. ORG. CODE § 101.401. Based on my research, I have been unable to identify a single case at either the state or federal level that holds that an LLC’s managing member owes fiduciary duties to other members as a matter of Texas law. *See Ent. Merch. Tech., L.L.C. v. Houchin*, 720 F. Supp. 2d 792, 797 (N.D. Tex. 2010) (“No Texas court has held that fiduciary duties exist between members of a limited liability company as a matter of law.”); *In re Hardee*, No. 11-60242, 2013 WL 1084494, at *10 (Bankr. E.D. Tex. Mar. 14, 2013) (“It is widely recognized that there is no formal fiduciary relationship created as a matter of Texas law between members of a limited liability company.” (quotation omitted)). For what it’s worth, Texas appears to have charted a different path in this area of the law, with most states imposing fiduciary duties on members of an LLC under both statutes and common law. *See Debra Hatter & Rikiya Thomas, Swimming in Unsettled Waters: Fiduciary Duties and Limited Liability Companies*, 49 HOUS. LAW. 22, 24 (2011) (“It is well-settled within most jurisdictions that fiduciary duties are owed by managers in a manager-managed LLC and members in a member-managed LLC.”).

However, the court stated that the lack of a formal fiduciary relationship between members of an LLC did not end the inquiry because an informal fiduciary duty may be formed based on “a moral, social, domestic or purely personal relationship of trust and confidence.” The Second Amended Complaint contained allegations that the Williamses owed Campbell Sr. fiduciary duties because of their close familial ties and longstanding relationship. According to the Complaint, Campbell Sr. vested “his trust and confidence in the Williamses to properly and lawfully manage his investments and [the LLC’s] business operations.” The court stated that whether an informal fiduciary relationship exists usually turns on the unique circumstances of a particular case, and its existence is “usually a fact intensive inquiry” that cannot be resolved on a Rule 12(b)(6) motion to dismiss. The court concluded that the allegations of an informal fiduciary relationship were more than sufficient, at this early stage of the proceedings, to allow the claim for breach of fiduciary duty to proceed, and the court thus denied the motion to dismiss the claim.

CyberX Group, LLC v. Pearson, No. 3:20-CV-2501-B, 2021 WL 1966813 (N.D. Tex. May 17, 2021).

The court held that a provision of an LLC’s company agreement that provided that “each [m]anager, [m]ember and officer of [the LLC] ... may engage in and possess interests in other business ventures ..., save and except for ones in competition with [the LLC]” imposed a contractual fiduciary duty to refrain from competing with

the LLC and was not an unenforceable covenant not to compete because members and officers of the company owed fiduciary duties as agents of the LLC.

In 2018, Plaintiff David Lindsey, Defendant Christopher Pearson, and Defendant Troy Van Zile executed a company agreement and formed CyberX Group LLC (“CXG”). The parties disputed whether CXG was involved in the development of customer-relationship management (“CRM”) software, but the parties agreed that CXG’s business included marketing CRM software to the healthcare-insurance industry. Lindsey, Pearson, and Van Zile were the only members of CXG. Lindsey held a seventy-percent interest, Pearson held a twenty-percent interest, and Van Zile held a ten-percent interest in CXG. Additionally, Pearson served as CXG’s President, and Van Zile served as its Chief Operating Officer. Lindsey provided funding for CXG, investing over \$1,000,000 into the company.

Section 4.12 of the company agreement of CXG provided in relevant part:

Conflicts of Interest ... [E]ach Manager, Member and officer of [CXG] at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, save and except for ones in competition with [CXG], with no obligation to offer to [CXG] or any other Member, Manager, or officer the right to participate therein.

After an initial healthcare-insurance CRM software was developed, CXG successfully marketed it and entered into two contracts to provide the software to American Workers Insurance Services, Inc. (“AWIS”) and Coterie Advisory Group, Inc. (“Coterie”). Based on these successful contracts, Lindsey, Pearson, and Van Zile planned for development of a second version of the software, which would be called SmartE, which was initially scheduled to launch on January 1, 2020. CXG began an advertising and promotion plan that included promotion through a website, Lindsey’s network, and CXG’s existing customers, but Pearson and Van Zile repeatedly missed deadlines and delayed delivery of SmartE.

SmartE was never delivered, and on August 10, 2020, Pearson and Van Zile, through their attorney, delivered to Lindsey a letter (“the August Letter”) claiming sole ownership of any software developed during the existence of CXG. The August Letter urged CXG to release AWIS and Coterie from their contracts with CXG, stating that “AWIS and Coterie will eventually decide to transition to a contract with” Pearson and Van Zile. The letter stated that CXG “isn’t worth anything” and sought “a complete formal separation between” Pearson, Van Zile, and Lindsey. The letter also stated that Pearson and Van Zile would “resign from all positions” and purported to “transfer ... their ownership interests in” CXG.

Lindsey and CXG sued Pearson and CyberX, LLC, seeking a temporary restraining order and preliminary injunction prohibiting them from soliciting CXG’s clients and competing with CXG. The plaintiffs based their request for injunctive relief on their claims for: (1) declaratory judgment that CXG owned all intellectual property in the software developed during its existence; (2) breach of the company agreement—specifically, § 4.12 (conflicts-of-interests provision) and § 3.6(B) (confidentiality provision); and (3) Pearson’s breach of fiduciary duty to CXG.

In a previous opinion, the court denied the plaintiffs’ request for a TRO or preliminary injunction, finding that the evidence was insufficient to show a likelihood of success on CXG’s claims that CXG owned the intellectual property or that Pearson had competed with CXG. The plaintiffs filed a second motion for a preliminary injunction based on their discovery of “shocking new facts and circumstances that were previously unknown, and indeed, obscured by Defendants.”

The newly discovered facts relied on by the plaintiffs included messages dated as early as August 12, 2019, showing that Pearson, Van Zile, and Landon Jordan—the owner and president of AWIS—planned to create a business with a “similar set-up” to CXG, but “with different funding support[.]” That plan came to fruition, and Operation 29, LLC (“Op29”), whose sole members were allegedly “shell companies” owned by Pearson, Jordan, and Van Zile, was formed on February 5, 2020. According to the plaintiffs, the shell companies were used as a means of concealing Pearson, Van Zile, and Jordan’s involvement in Op29 from Lindsey so that they could “extend time without any ... major changes” at CXG while they worked to establish Op29 as a competitor in the healthcare-insurance software industry.

Forensic analyses of CXG’s servers revealed that Op29 was providing CRM services to clients within the healthcare-insurance industry as early as March 2020. The plaintiffs discovered a website built using CXG’s servers

and stating on its homepage that the site is “powered by Op29[.]” The plaintiffs pointed to evidence in the bankruptcy proceeding of a sister company of AWIS indicating that Op29 built this website for AWIS’s sister company.

Additionally, Brian Duly, the owner of Premier Health Solutions, LLC (“Premier”)—a company that “provides customers with insurance management services”—provided statements about communications he received from Jordan and Van Zile regarding webinar demonstrations of a platform project of Op29. Although Mr. Duly believed that Jordan was involved in “a project that also involved Mr. David Lindsey,” the plaintiffs denied that Lindsey was aware of the webinar or of Op29’s existence at that time.

Finally, the plaintiffs provided screenshots of Op29’s website, which the plaintiffs claimed advertised “a comprehensive solution for insurance organizations[.]” The CRM platform advertised on Op29’s website was strikingly similar, if not “nearly identical,” to the design for SmartE. The website also advertised the same features, at times in identical language to SmartE’s website. SmartE was never delivered in operable condition to CXG, but Op29 apparently had a fully operational platform.

Based on this new information, the plaintiffs filed an amended complaint and added Op29, Van Zile, Jordan, and the entities that were members of Op29 as defendants. The amended complaint sought declaratory judgment and asserted claims including breach of contract, breach of fiduciary duty, violation of the Defend Trade Secrets Act, violation of the Texas Uniform Trade Secrets Act, tortious interference, breach of Idaho Limited Liability Company Act, common law fraud, and civil conspiracy. Additionally, in January 2021, the plaintiffs filed a second motion seeking a preliminary injunction, which was granted as described by the court in this opinion and order.

The plaintiffs premised their request for a preliminary injunction on their claims for breach of contract, breach of fiduciary duty, tortious interference, and conspiracy to breach fiduciary duties. To obtain a preliminary injunction, a plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest. After hearing the parties’ arguments and reviewing their briefing, the court found that the plaintiffs had demonstrated all of the elements required to obtain a preliminary injunction based on their breach-of-contract and breach-of-fiduciary duty claims.

The court explained that the plaintiffs met their burden of presenting a prima facie case of breach of contract for purposes of showing a likelihood of success on the merits of that claim based on Section 4.12 of the company agreement. The defendants did not dispute that Lindsey performed under the company agreement (by making his initial capital contribution) or that Lindsey was damaged by the alleged breach; therefore, the inquiry turned on whether Section 4.12 was a valid contract provision and whether Pearson and Van Zile breached it.

The defendants argued that Section 4.12 was an unenforceable covenant not to compete “because it is not reasonable in time, scope, or geography and imposes greater restraint than is necessary to protect a business interest of CXG,” but the court agreed with the plaintiffs that the provision was not an unenforceable covenant not to compete, but rather was “a limited, and more specific, contractual duty of loyalty imposed among members of the company, which [is] enforceable, and indeed presumed in some business relationships.” The court pointed out that, under Tex. Bus. Orgs. Code § 101.401, “[t]he company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” The court then addressed the fiduciary duties of Pearson and Van Zile in this case as follows:

Under Texas law, “corporate officers ... owe fiduciary duties to the corporations they serve and must not allow their personal interests to prevail over the interests of the corporation.” *In re Harwood*, 637 F.3d, 615, 620 (5th Cir. 2011) (citations omitted). And while “[t]he Texas Business Organization[s] Code is silent as to an LLC member’s fiduciary duties, ... [t]he cases support finding that [members] owe[] [the LLC] fiduciary duties based on agency-law principles.” *Katz v. Intel Pharma, LLC*, 2020 WL 3871493, at *2 (S.D. Tex. July 9, 2020) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002); *In re Hardee*, 2013 WL 1084494, at *3–4 (Bankr. E.D. Tex. Mar. 14, 2013)). In other words, members are agents of their LLCs, and fiduciary duties arise where an agency relationships exist. *See Johnson*, 73 S.W.3d at 200. And though the August Letter purported to transfer Pearson and Van Zile’s ownership interests, *see*

Doc. 49-28, Pls.' Mot. App., 223–24, this does not relieve them of the fiduciary duties owed as members of CXG. Indeed, Texas law does not permit “[a] member of a limited liability company [to] withdraw” unless he “is permitted to do so by contract[.]” *Kennebrew v. Harris*, 425 S.W.3d 588, 598 n.2 (Tex. App.—Houston [14th Dist.], pet. denied) (citing Tex. Bus. Orgs. Code Ann. §§ 101.107, 101.205). And the Company Agreement explicitly prohibits withdrawal, as § 3.8 provides that “[n]o [m]ember has the right to withdraw from [CXG] as a member.” Doc. 49-2, Pls.' Mot. App., 17. Therefore, Pearson and Van Zile owed fiduciary duties to CXG in their roles as both officers and members of the LLC.

Among their fiduciary duties are the obligations “not to act as, or on account of, an adverse party without the [LLC’s] consent, ... not to compete with the [LLC] on his own account or for another[,] and ... to deal fairly with the [LLC.]” *Johnson*, 73 S.W.3d at 200. Section 101.401 of the Texas Business Organizations Code permits a company agreement to “expand or restrict” these duties. Section 4.12 of the Company Agreement provides that “each [m]anager, [m]ember and officer of [CXG] ... may engage in and possess interests in other business ventures ..., save and except for ones in competition with [CXG.]” Doc. 49-2, Pls.' Mot. App., 19. In other words, § 4.12 imposes the fiduciary duty to refrain from competing with CXG. *See Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.—San Antonio 2006, pet. denied) (citation omitted). Under Texas law, such a provision is not an unenforceable covenant not to compete but is rather an imposition of a fiduciary duty to the members, managers, and officers of CXG. *See, e.g., Strebel v. Wimberly*, 371 S.W.3d 267, 278 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (provision of a company agreement valid where it imposed the “duties of due care, good faith, and loyalty” on the company’s managers).

Even assuming Section 4.12 could be construed as a non-compete agreement, the court stated that the proper remedy would be to reform the provision to the extent necessary to make it reasonable as to time, geographic area, and scope of activity. *See* Tex. Bus. & Com. Code § 15.51(c). Because Section 4.12 was not an impermissible non-compete agreement, reformation by the court was not necessary; however, the court noted that Pearson and Van Zile operated Op29 during the time they acted as members and officers of CXG, in the same area and scope of activity as CXG. If the court were to reform Section 4.12 to impose reasonable limits as to time, area, and scope of activity, the court stated that it was likely that Pearson and Van Zile’s activities would fall within such limits. Thus, the court concluded that Section 4.12 of the company agreement was valid and enforceable.

The court next addressed the defendants’ argument that Pearson and Van Zile did not breach Section 4.12 because Op29 was not “in competition” with CXG while Pearson and Van Zile were officers at CXG. The defendants argued that Op29 was not in competition with CXG because CXG was “not ... able to offer services to customers until it releases new software in 2022.” The court, however, attributed any current inability to offer services on CXG’s part to Pearson’s and Van Zile’s breaches. The court agreed with the plaintiffs’ characterization of the defendants’ argument as essentially “that Pearson and Van Zile have been so successful in breaching Section 4.12, that CXG does not have the wherewithal to compete with Op29.” The court viewed the evidence as showing that Pearson and Van Zile, on behalf of Op29, were competing with CXG while they were officers and members of CXG, in violation of Section 4.12 of the company agreement. The court acknowledged that Pearson and Van Zile resigned from their respective positions as officers on August 10, 2020, but the court stated that they remained subject to fiduciary duties to CXG as members. In any event, the court stated that the evidence showed that Op29 was competing as early as March 2020, while Pearson and Van Zile were both officers and members. The court thus found that Pearson and Van Zile breached Section 4.12.

The plaintiffs also based their request for a preliminary injunction on their claims against Pearson and Van Zile for breaching their fiduciary duties to CXG. The court concluded that the plaintiffs were likewise likely to succeed on the merits of this claim, which requires: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in injury to the plaintiff or benefit to the defendant.”

Based on its prior analysis, the court reiterated that Pearson and Van Zile owed fiduciary duties to CXG in their capacities as officers and members. The court continued as follows:

... Among these fiduciary duties are the obligations “not to act as, or on account of, an adverse party without the [LLC’s] consent, ... not to compete with the [LLC] on his own account or for another[,] and ... to deal fairly with the [LLC.]” *Johnson*, 73 S.W.3d at 200.

The Court rejects Defendants’ argument that “[t]here is no evidence that Van Zyle [sic] was actually employed by [CXG].” Doc. 54, Defs.’ Resp., 16. The evidence shows that even if Van Zile was not a CXG “employee” by Defendants’ standards, he served as CXG’s COO and thus owed fiduciary duties to the company as an officer. See Doc. 49-3, Pls.’ Mot. App., 42. Moreover, as discussed, Pearson and Van Zile owed fiduciary duties to CXG as members. See *Katz*, 2020 WL 3871493, at *2. Thus, the first element is satisfied.

The court next concluded that Pearson and Van Zile breached their fiduciary duties to CXG by competing with it and by failing to deal fairly with CXG. The defendants argued that (1) “an agent’s mere preparation to compete is not a breach of fiduciary duty under the law,” and (2) “the other allegations of breaches alleged by the Plaintiffs are not supported by the evidence and do not establish a breach of fiduciary duty.” The court rejected both arguments.

First, Defendants argue that Pearson and Van Zile did not breach their fiduciary duties to CXG because “[i]t is not a breach of fiduciary duty for agents of a company to plan to compete with it while still working for the company.” *Id.* at 15 (emphasis omitted). Defendants cite *Abetter Trucking Company v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.), and *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 651 (S.D. Tex. 2010), in support of this contention. *Abetter* involved a breach-of-fiduciary-duty claim by a trucking company against a former at-will employee who left to start his own trucking company. 113 S.W.3d at 507. The court found that the defendant–employee did not breach his fiduciary duty to his employer where he informed the employer that “he planned to form his own company and would be taking seven trucks belonging to him and his brothers[,]” but failed to disclose “that he had incorporated his company ..., obtained permits, ... obtained insurance ... [and] ... that a number of the [employer]’s drivers had expressed their intent to drive for [the defendant’s] company.” *Id.* at 511. Similarly, in *Rimkus*, the defendant–employees did not breach their fiduciary duties to their employer when they “had vague discussions about going into business with one another and ... there was no agreement to form” the competing company until after the defendants had left the company. 688 F. Supp. 2d at 652, 669. However, the actions taken by the defendants in *Abetter* and *Rimkus* are wholly distinguishable from those of Pearson and Van Zile.

As the court in *Abetter* stated, “there are recognized limitations on the conduct of an employee who plans to compete with his former employer.” *Abetter*, 113 S.W.3d at 512. Conduct that goes beyond mere preparation includes “solicit[ing] [the company’s] customers[.]” *Id.* (citations omitted). And as discussed, the evidence shows that Op29 solicited potential CXG customers as early as March 2020, while Pearson and Van Zile served as both officers and directors of CXG, and continued to do so through the date of the hearing on the Second Motion. See *supra* Section III.A.1.ii. Indeed, Op29 was engaged in building a website for a potential CXG client in March 2020, and was owed “[s]ystems fees” from a potential CXG client—AWIS. Doc. 49-31, Pls.’ Mot. App., 234; Doc. 57-4, Pls.’ Reply App., 301–02; Doc. 57-5, Pls.’ Reply App., 305–06. This is ample evidence of competition beyond mere planning. Accordingly, Plaintiffs have shown that Pearson and Van Zile breached their fiduciary duties not to compete with CXG.

Second, Defendants argue that there is no evidence of any other breach of fiduciary duty. Doc. 54, Defs.’ Resp., 16. The Court, however, finds ample evidence that Pearson and Van Zile breached their fiduciary duties beyond competing with CXG. Indeed, Pearson and Van Zile “owe[d] [CXG] loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence [their] actions to [CXG]’s prejudice.” *Hartford Cas. Ins. Co. v. Walker Cnty. Agency, Inc.*, 808 S.W.2d 681, 688 (Tex. App.—Corpus Christi 1991, no writ) (citing *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 319 (Tex. App.—Tyler 1985, no writ)). Accordingly, they were obligated “to deal openly [with CXG] and to make full disclosure ... about matters affecting [CXG]’s business.” *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex.

App.—Houston [1st Dist.] 1985, no writ). Here, the evidence supports a finding that Pearson and Van Zile intentionally delayed the delivery of SmartE, misled CXG and Lindsey, and utilized CXG’s resources in support of their plan to establish Op29.

CXG tasked Pearson and Van Zile with overseeing the development of SmartE as “an innovative enrollment web application designed to accommodate all types of agencies in the American healthcare market.” Doc. 49-14, Pls.’ Mot. App., 155; *see also* Doc. 49-10, Pls.’ Mot. App., 93 (Defendants’ response to interrogatory listing Pearson and Van Zile as “[i]ndividuals contributing content” to SmartE). Instead of working to deliver SmartE for CXG, however, Pearson and Van Zile sought to “[e]xtend time without any ... changes” while they planned “to open up insurance with different funding support[.]” Doc. 49-19, Pls.’ Mot. App., 182 (messages between Pearson and Van Zile). While promoting the image that they were “still pushing hard on the development of” SmartE, Doc. 49-17, Pls.’ Mot. App., 169, Pearson and Van Zile were, in reality, evolving Op29 from an idea to a functional, competing entity. ...

When Pearson and Van Zile ultimately made their deception known through the August Letter, CXG was left without a marketable platform and without its President and COO, who oversaw development of such a marketable platform. Additionally, CXG was left in a position where it had to immediately compete against Op29. And while the Court will not go so far as to definitively agree with Plaintiffs’ allegations of “data theft,” Doc. 48, Pls.’ Mot., 15, it is notable that Op29 marketed a platform that “appear[ed] nearly identical to” the design for SmartE. *See id.* at 6–7. Ownership issues aside, this evidence demonstrates that Pearson and Van Zile gave to Op29 what they had promised to deliver to CXG, and that CXG faced a significant disadvantage as a consequence.

Incredibly, Defendants argue that Pearson and Van Zile were “not breaching fiduciary duties” through their deceptive conduct because “[s]alaried employees across the country routinely take personal time during work hours, whether to go to the doctor or interview for a different job.” Doc. 54, Defs.’ Resp., 16. The Court rejects this argument. By all accounts, Pearson and Van Zile were not merely taking “personal time.” Rather, they were actively engaged in both a plan to compete with CXG and a scheme to conceal that plan from CXG and Lindsey. By continuously promising to deliver SmartE—while knowing they would not deliver it—Pearson and Van Zile knowingly hindered CXG’s ability to compete in the market. And by abruptly leaving without delivering SmartE, Pearson and Van Zile left CXG without any ability to react to its lack of a marketable platform. Upon Pearson and Van Zile’s exodus, CXG employees “were left with an unfinished product that [they then had] to go back, understand the code, recode, and finish it.” Doc. 66, Tr., 57:9–11. To do so, CXG had to find and hire a “technical project manager.” *Id.* at 66:7–16. At the time of the hearing, CXG estimated it needed “9 to 15 additional months” to develop a competitive platform. *See id.* at 58:11–12.

The Court recognizes that certain unforeseen circumstances may require an abrupt departure from one’s employment, leaving the employer at a disadvantage. Here, the evidence demonstrates that Pearson and Van Zile’s departure was not the result of unforeseen circumstances, but was rather a step in their plan to form a competing business, which they at least knew, if not intended, would leave CXG at a competitive disadvantage. Such actions are clear examples of conduct that constitute breaches of Pearson and Van Zile’s fiduciary duties of “loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence [their] actions to [CXG]’s prejudice.” *Hartford Cas.*, 808 S.W.2d at 688 (citation omitted).

In sum, Plaintiffs have successfully shown a substantial likelihood that Pearson and Van Zile breached their fiduciary duties to CXG.

The court found that the plaintiffs had shown a substantial likelihood of damages as a result of the breaches of contract and fiduciary duties, thus satisfying all elements of required to establish a likelihood of success on their claims for breach of contract and breach of fiduciary duties.

With respect to the remaining requirements for a preliminary injunction, the court found that the plaintiffs had demonstrated a substantial threat of irreparable harm and that the threatened injury outweighed any harm the injunction might cause the defendants. The court explained its rationale for the scope of the injunction as follows:

As discussed, Pearson and Van Zile likely breached the Company Agreement and their fiduciary duties by competing with CXG through their involvement with Op29. They also breached their fiduciary duties in the execution of their deceptive scheme. Moreover, because Op29, Jordan, PHI, VZL, GBM, and CyberX all acted “in active concert or participation with” Pearson and Van Zile, the Court need not address the remaining claims to enjoin all Defendants. *See* Fed. R. Civ. P. 65(d)(2); *see also Waffenschmidt*, 763 F.2d at 717.

It is thus proper to preliminarily enjoin all named Defendants from utilizing any CRM software that Pearson and Van Zile developed, or helped develop, while they wrongfully competed with CXG. *See Brink’s Inc. v. Patrick*, 2014 WL 2931824, at *6 (N.D. Tex. June 27, 2014). Additionally, while the Court does not definitively find at this juncture that CXG owns SmartE, Pearson and Van Zile breached their fiduciary duties by delaying its development while at the same time providing Op29 with a platform that is “nearly identical” to SmartE. Doc. 48, Pls.’ Mot., 6–7. Pearson and Van Zile thus gave the advantage to Op29 that they promised to give to CXG, and the Court finds it proper to preliminarily enjoin Defendants’ ability to profit from any software that was derived from the development of the SmartE software. Therefore, the preliminary injunction is proper, as it is directly related to the violations established. *See Califano*, 442 U.S. at 702.

E. LLC Property and LLC Membership Interest

Pelletier v. Victoria Air Conditioning, Ltd., No. 13-20-00011-CV, 2022 WL 52810 (Tex. App.—Corpus Christi Jan. 6, 2022, no pet. h.) (mem. op.).

The court of appeals held that the trial court properly dismissed claims asserted individually by the sole member of several LLCs involved in a construction project on which the plaintiff was hired to provide work. Because the property that was the subject of the member’s claims was owned by one of his LLCs, he was attempting to bring claims belonging to his LLC and the trial court did not err by dismissing the claims.

Victoria Air Conditioning, Ltd. (“VAC”) sued Gaetan Pelletier (“Pelletier”) an individual, and Pelletier Management and Consulting, LLC (“PMC”) seeking to hold them liable on the basis of alter ego for the judgment debt of QI Wholesale Lumber, LLC (“QI”) and TexInn, LLC (“TexInn”). Pelletier was a member and owner of PMC, QI, and TexInn. Each of these LLCs was involved in the construction of the TexInn Hotel in Cuero, Texas. VAC was hired to provide plumbing work for the project. Litigation ensued, and VAC obtained a default judgment against QI and TexInn in state court. Shortly before the state court entered its default judgment, Pelletier filed suit in federal court alleging claims against VAC. In the federal case, the Fifth Circuit Court of Appeals affirmed the district court’s dismissal of that case on the basis that Pelletier lacked standing because “Pelletier did not establish that he personally owned the hotel and he offered no other valid cause of action for his personal claim against [VAC]”

While the federal suit was pending, VAC conducted post-judgment discovery, including deposing Pelletier. VAC filed a third-party alter-ego claim against Pelletier and PMC, alleging that Pelletier used QI and TexInn to further his individual objectives without regard to the LLCs’ business concerns. VAC also alleged that Pelletier engaged in actual fraud by representing that QI and TexInn were the parties contracting with VAC and were the actual owners of the hotel. Pelletier asserted counterclaims similar to those initially asserted by QI and TexInn in the prior suit in state court. These claims were dismissed by the trial court, and PMC then filed similar counterclaims against VAC, alleging that a contract had been formed with PMC pursuant to a bid letter or that PMC was a third-party beneficiary. The trial court granted summary judgment in favor of VAC on PMC’s claims, and the case went to trial on VAC’s alter-ego claim against Pelletier. The jury answered “yes” on the sole question submitted, which inquired whether Pelletier was responsible for the conduct of QI or TexInn.

The first issue addressed by the court of appeals was whether the trial court erred in dismissing Pelletier’s counterclaims for lack of standing. The court explained that “[a] member of an LLC does not have an interest in any property of the company. *See* Tex. Bus. Orgs. Code. § 101.106(b). Furthermore, a member of an LLC does not have standing to assert claims that belong to the company. Recognizing this limitation, Pelletier based his standing

to bring his counterclaims on his purported ownership of the hotel improvements. Pelletier argued that he had an ownership interest in the improvements by virtue of a land lease agreement between PMC and Pelletier. VAC responded that the land lease agreement did not convey ownership of the improvements to Pelletier and further argued that the federal court's determination that PMC owned the premises and improvements on the premises had preclusive effect on this issue. The court of appeals agreed with VAC that Pelletier was collaterally estopped from relitigating the issue of ownership. Absent an ownership interest in the premises or property, Pelletier failed to show a concrete injury and a real controversy between the parties. Pelletier was attempting to bring claims belonging to one of his LLCs, and the trial court did not err by dismissing the claims.

Next, the court addressed PMC's counterclaims and concluded that PMC failed to raise a fact issue regarding the existence of a contract between it and VAC and failed to raise a fact issue as to whether it was a third-party beneficiary to a contract. PMC also failed to raise a fact issue on its tort claims. The court of appeals thus concluded that the trial court did not err in granting summary judgment in favor of VAC on PMC's counterclaims.

The court also addressed Pelletier's argument that the evidence was legally and factually insufficient to support the jury's alter-ego finding. The court held that the evidence was sufficient to support the jury's finding.

Ruff v. Ruff (In re JMV Holdings LLC), Case No. 18-42552, Adversary No. 21-4003, 2022 WL 996372 (Bankr. E.D Tex. Mar. 31, 2022).

The court recognized that a limited liability company is considered a separate legal entity from its members and that a member does not have an interest in any specific property of the company (Tex. Bus. Orgs. Code § 101.106(b)), but the court concluded that a constructive trust over property held by a single member LLC was appropriate where the property of the LLC was purchased for the LLC by the member's husband with money misappropriated from the husband's mother, and the member's husband exercised all rights of ownership, including managing the LLC and paying its bills.

Lexington v. Treece, No. 01-17-00228-CV, 2021 WL 2931354 (Tex. App.—Houston [1st Dist.] July 13, 2021, pet. filed) (mem. op.) (“A limited liability company is a legal entity distinct from its members. *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). As such, its members have no interest in the company's property. *Id.*; TEX. BUS. ORGS. CODE § 101.106(b).”).

Touponse v. Touponse, No. 02-20-00285-CV, 2021 WL 2753504 (Tex. App.—Fort Worth July 1, 2021, no pet. h.) (mem. op.) (“A limited-liability company is a separate legal entity, and property owned by such a company is neither the community property nor the separate property of its members. Tex. Bus. Org. Code Ann. § 101.106(a)–(a-1). The business property that is subject to division is the interest in the limited-liability company itself, not the company's specific assets. Tex. Bus. Org. Code Ann. § 101.106(b). And a trial court is authorized to divide only the parties' community estate. Thus, the trial court clearly abused its discretion by characterizing the real properties owned by T4 Holdings and Ashford Woods as part of the community estate and, thereafter, awarding them to George as his separate property.”).

Herrera v. Lowe's Home Centers, LLC, Civ. A. No. 5:20-CV-2, 2020 WL 10893178 (S.D. Tex. Aug. 26, 2020) (Although the court issued this opinion in 2020, it is included in this year's update because it did not appear in the Westlaw database until recently.) (“Defendants argue that ‘Lowe's of Laredo, TX Store No. 1563’ is not an independent legal entity,’ but rather a store owned and operated by Defendant Lowe's Home Centers, LLC. Defendants are correct. A search of the Texas Secretary of State's ‘Corporation and Business Entity Registry’ reveals no domestic business entity named ‘Lowe's of Laredo, TX, Store No. 1563,’ ‘Lowe's of Laredo, Texas, Store No. 1563,’ ‘Lowe's of Laredo’ or anything reasonably similar. The Court's search did reveal that an entity called ‘Lowe's of Texas, Inc.’ existed at some point in the past, but it was merged into the foreign ‘Lowe's Investment Corporation’ in January of 1989. Moreover, it appears that a number of local Lowe's stores operated as independent legal entities at some point in the past, but (1) all of these entities became ‘inactive’ in the late 1980s and mid-1990s, and (2) no such independent entity existed in Webb County, Texas. Accordingly, the Court finds that ‘Lowe's of Laredo, Texas, Store No. 1563’ is not an independent legal entity, but rather a store owned and operated by Defendant Lowe's Home Centers, LLC, a foreign business entity.”).

F. Interpretation and Enforcement of Company Agreement or Certificate of Formation

1. Fiduciary Duties

CyberX Group, LLC v. Pearson, No. 3:20-CV-2501-B, 2021 WL 1966813 (N.D. Tex. May 17, 2021).

The court held that a provision of an LLC’s company agreement that provided that “each [m]anager, [m]ember and officer of [the LLC] ... may engage in and possess interests in other business ventures ..., save and except for ones in competition with [the LLC]” imposed a contractual fiduciary duty to refrain from competing with the LLC and was not an unenforceable covenant not to compete because members and officers of the company owed fiduciary duties as agents of the LLC.

In 2018, Plaintiff David Lindsey, Defendant Christopher Pearson, and Defendant Troy Van Zile executed a company agreement and formed CyberX Group LLC (“CXG”). The parties disputed whether CXG was involved in the development of customer-relationship management (“CRM”) software, but the parties agreed that CXG’s business included marketing CRM software to the healthcare-insurance industry. Lindsey, Pearson, and Van Zile were the only members of CXG. Lindsey held a seventy-percent interest, Pearson held a twenty-percent interest, and Van Zile held a ten-percent interest in CXG. Additionally, Pearson served as CXG’s President, and Van Zile served as its Chief Operating Officer. Lindsey provided funding for CXG, investing over \$1,000,000 into the company.

Section 4.12 of the company agreement of CXG provided in relevant part:

Conflicts of Interest ... [E]ach Manager, Member and officer of [CXG] at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, save and except for ones in competition with [CXG], with no obligation to offer to [CXG] or any other Member, Manager, or officer the right to participate therein.

After an initial healthcare-insurance CRM software was developed, CXG successfully marketed it and entered into two contracts to provide the software to American Workers Insurance Services, Inc. (“AWIS”) and Coterie Advisory Group, Inc. (“Coterie”). Based on these successful contracts, Lindsey, Pearson, and Van Zile planned for development of a second version of the software, which would be called SmartE, which was initially scheduled to launch on January 1, 2020. CXG began an advertising and promotion plan that included promotion through a website, Lindsey’s network, and CXG’s existing customers, but Pearson and Van Zile repeatedly missed deadlines and delayed delivery of SmartE.

SmartE was never delivered, and on August 10, 2020, Pearson and Van Zile, through their attorney, delivered to Lindsey a letter (“the August Letter”) claiming sole ownership of any software developed during the existence of CXG. The August Letter urged CXG to release AWIS and Coterie from their contracts with CXG, stating that “AWIS and Coterie will eventually decide to transition to a contract with” Pearson and Van Zile. The letter stated that CXG “isn’t worth anything” and sought “a complete formal separation between” Pearson, Van Zile, and Lindsey. The letter also stated that Pearson and Van Zile would “resign from all positions” and purported to “transfer ... their ownership interests in” CXG.

Lindsey and CXG sued Pearson and CyberX, LLC, seeking a temporary restraining order and preliminary injunction prohibiting them from soliciting CXG’s clients and competing with CXG. The plaintiffs based their request for injunctive relief on their claims for: (1) declaratory judgment that CXG owned all intellectual property in the software developed during its existence; (2) breach of the company agreement—specifically, § 4.12 (conflicts-of-interests provision) and § 3.6(B) (confidentiality provision); and (3) Pearson’s breach of fiduciary duty to CXG.

In a previous opinion, the court denied the plaintiffs’ request for a TRO or preliminary injunction, finding that the evidence was insufficient to show a likelihood of success on CXG’s claims that CXG owned the intellectual property or that Pearson had competed with CXG. The plaintiffs filed a second motion for a preliminary injunction based on their discovery of “shocking new facts and circumstances that were previously unknown, and indeed, obscured by Defendants.”

The newly discovered facts relied on by the plaintiffs included messages dated as early as August 12, 2019, showing that Pearson, Van Zile, and Landon Jordan—the owner and president of AWIS—planned to create a

business with a “similar set-up” to CXG, but “with different funding support[.]” That plan came to fruition, and Operation 29, LLC (“Op29”), whose sole members were allegedly “shell companies” owned by Pearson, Jordan, and Van Zile, was formed on February 5, 2020. According to the plaintiffs, the shell companies were used as a means of concealing Pearson, Van Zile, and Jordan’s involvement in Op29 from Lindsey so that they could “extend time without any ... major changes” at CXG while they worked to establish Op29 as a competitor in the healthcare-insurance software industry.

Forensic analyses of CXG’s servers revealed that Op29 was providing CRM services to clients within the healthcare-insurance industry as early as March 2020. The plaintiffs discovered a website built using CXG’s servers and stating on its homepage that the site is “powered by Op29[.]” The plaintiffs pointed to evidence in the bankruptcy proceeding of a sister company of AWIS indicating that Op29 built this website for AWIS’s sister company.

Additionally, Brian Duly, the owner of Premier Health Solutions, LLC (“Premier”)—a company that “provides customers with insurance management services”—provided statements about communications he received from Jordan and Van Zile regarding webinar demonstrations of a platform project of Op29. Although Mr. Duly believed that Jordan was involved in “a project that also involved Mr. David Lindsey,” the plaintiffs denied that Lindsey was aware of the webinar or of Op29’s existence at that time.

Finally, the plaintiffs provided screenshots of Op29’s website, which the plaintiffs claimed advertised “a comprehensive solution for insurance organizations[.]” The CRM platform advertised on Op29’s website was strikingly similar, if not “nearly identical,” to the design for SmartE. The website also advertised the same features, at times in identical language to SmartE’s website. SmartE was never delivered in operable condition to CXG, but Op29 apparently had a fully operational platform.

Based on this new information, the plaintiffs filed an amended complaint and added Op29, Van Zile, Jordan, and the entities that were members of Op29 as defendants. The amended complaint sought declaratory judgment and asserted claims including breach of contract, breach of fiduciary duty, violation of the Defend Trade Secrets Act, violation of the Texas Uniform Trade Secrets Act, tortious interference, breach of Idaho Limited Liability Company Act, common law fraud, and civil conspiracy. Additionally, in January 2021, the plaintiffs filed a second motion seeking a preliminary injunction, which was granted as described by the court in this opinion and order.

The plaintiffs premised their request for a preliminary injunction on their claims for breach of contract, breach of fiduciary duty, tortious interference, and conspiracy to breach fiduciary duties. To obtain a preliminary injunction, a plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest. After hearing the parties’ arguments and reviewing their briefing, the court found that the plaintiffs had demonstrated all of the elements required to obtain a preliminary injunction based on their breach-of-contract and breach-of-fiduciary duty claims.

The court explained that the plaintiffs met their burden of presenting a prima facie case of breach of contract for purposes of showing a likelihood of success on the merits of that claim based on Section 4.12 of the company agreement. The defendants did not dispute that Lindsey performed under the company agreement (by making his initial capital contribution) or that Lindsey was damaged by the alleged breach; therefore, the inquiry turned on whether Section 4.12 was a valid contract provision and whether Pearson and Van Zile breached it.

The defendants argued that Section 4.12 was an unenforceable covenant not to compete “because it is not reasonable in time, scope, or geography and imposes greater restraint than is necessary to protect a business interest of CXG,” but the court agreed with the plaintiffs that the provision was not an unenforceable covenant not to compete, but rather was “a limited, and more specific, contractual duty of loyalty imposed among members of the company, which [is] enforceable, and indeed presumed in some business relationships.” The court pointed out that, under Tex. Bus. Orgs. Code § 101.401, “[t]he company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” The court then addressed the fiduciary duties of Pearson and Van Zile in this case as follows:

Under Texas law, “corporate officers ... owe fiduciary duties to the corporations they serve and must not allow their personal interests to prevail over the interests of the corporation.” *In re*

Harwood, 637 F.3d, 615, 620 (5th Cir. 2011) (citations omitted). And while “[t]he Texas Business Organization[s] Code is silent as to an LLC member’s fiduciary duties, ... [t]he cases support finding that [members] owe[] [the LLC] fiduciary duties based on agency-law principles.” *Katz v. Intel Pharma, LLC*, 2020 WL 3871493, at *2 (S.D. Tex. July 9, 2020) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002); *In re Hardee*, 2013 WL 1084494, at *3–4 (Bankr. E.D. Tex. Mar. 14, 2013)). In other words, members are agents of their LLCs, and fiduciary duties arise where an agency relationships exist. *See Johnson*, 73 S.W.3d at 200. And though the August Letter purported to transfer Pearson and Van Zile’s ownership interests, *see* Doc. 49-28, Pls.’ Mot. App., 223–24, this does not relieve them of the fiduciary duties owed as members of CXG. Indeed, Texas law does not permit “[a] member of a limited liability company [to] withdraw” unless he “is permitted to do so by contract[.]” *Kennebrew v. Harris*, 425 S.W.3d 588, 598 n.2 (Tex. App.—Houston [14th Dist.], pet. denied) (citing Tex. Bus. Orgs. Code Ann. §§ 101.107, 101.205). And the Company Agreement explicitly prohibits withdrawal, as § 3.8 provides that “[n]o [m]ember has the right to withdraw from [CXG] as a member.” Doc. 49-2, Pls.’ Mot. App., 17. Therefore, Pearson and Van Zile owed fiduciary duties to CXG in their roles as both officers and members of the LLC.

Among their fiduciary duties are the obligations “not to act as, or on account of, an adverse party without the [LLC’s] consent, ... not to compete with the [LLC] on his own account or for another[,] and ... to deal fairly with the [LLC.]” *Johnson*, 73 S.W.3d at 200. Section 101.401 of the Texas Business Organizations Code permits a company agreement to “expand or restrict” these duties. Section 4.12 of the Company Agreement provides that “each [m]anager, [m]ember and officer of [CXG] ... may engage in and possess interests in other business ventures ..., save and except for ones in competition with [CXG.]” Doc. 49-2, Pls.’ Mot. App., 19. In other words, § 4.12 imposes the fiduciary duty to refrain from competing with CXG. *See Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.—San Antonio 2006, pet. denied) (citation omitted). Under Texas law, such a provision is not an unenforceable covenant not to compete but is rather an imposition of a fiduciary duty to the members, managers, and officers of CXG. *See, e.g., Strebel v. Wimberly*, 371 S.W.3d 267, 278 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (provision of a company agreement valid where it imposed the “duties of due care, good faith, and loyalty” on the company’s managers).

Even assuming Section 4.12 could be construed as a non-compete agreement, the court stated that the proper remedy would be to reform the provision to the extent necessary to make it reasonable as to time, geographic area, and scope of activity. *See* Tex. Bus. & Com. Code § 15.51(c). Because Section 4.12 was not an impermissible non-compete agreement, reformation by the court was not necessary; however, the court noted that Pearson and Van Zile operated Op29 during the time they acted as members and officers of CXG, in the same area and scope of activity as CXG. If the court were to reform Section 4.12 to impose reasonable limits as to time, area, and scope of activity, the court stated that it was likely that Pearson and Van Zile’s activities would fall within such limits. Thus, the court concluded that Section 4.12 of the company agreement was valid and enforceable.

The court next addressed the defendants’ argument that Pearson and Van Zile did not breach Section 4.12 because Op29 was not “in competition” with CXG while Pearson and Van Zile were officers at CXG. The defendants argued that Op29 was not in competition with CXG because CXG was “not ... able to offer services to customers until it releases new software in 2022.” The court, however, attributed any current inability to offer services on CXG’s part to Pearson’s and Van Zile’s breaches. The court agreed with the plaintiffs’ characterization of the defendants’ argument as essentially “that Pearson and Van Zile have been so successful in breaching Section 4.12, that CXG does not have the wherewithal to compete with Op29.” The court viewed the evidence as showing that Pearson and Van Zile, on behalf of Op29, were competing with CXG while they were officers and members of CXG, in violation of Section 4.12 of the company agreement. The court acknowledged that Pearson and Van Zile resigned from their respective positions as officers on August 10, 2020, but the court stated that they remained subject to fiduciary duties to CXG as members. In any event, the court stated that the evidence showed that Op29 was competing as early as March 2020, while Pearson and Van Zile were both officers and members. The court thus found that Pearson and Van Zile breached Section 4.12.

The plaintiffs also based their request for a preliminary injunction on their claims against Pearson and Van Zile for breaching their fiduciary duties to CXG. The court concluded that the plaintiffs were likewise likely to succeed on the merits of this claim, which requires: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in injury to the plaintiff or benefit to the defendant.”

Based on its prior analysis, the court reiterated that Pearson and Van Zile owed fiduciary duties to CXG in their capacities as officers and members. The court continued as follows:

... Among these fiduciary duties are the obligations “not to act as, or on account of, an adverse party without the [LLC’s] consent, ... not to compete with the [LLC] on his own account or for another[,] and ... to deal fairly with the [LLC.]” *Johnson*, 73 S.W.3d at 200.

The Court rejects Defendants’ argument that “[t]here is no evidence that Van Zyle [sic] was actually employed by [CXG].” Doc. 54, Defs.’ Resp., 16. The evidence shows that even if Van Zile was not a CXG “employee” by Defendants’ standards, he served as CXG’s COO and thus owed fiduciary duties to the company as an officer. See Doc. 49-3, Pls.’ Mot. App., 42. Moreover, as discussed, Pearson and Van Zile owed fiduciary duties to CXG as members. See *Katz*, 2020 WL 3871493, at *2. Thus, the first element is satisfied.

The court next concluded that Pearson and Van Zile breached their fiduciary duties to CXG by competing with it and by failing to deal fairly with CXG. The defendants argued that (1) “an agent’s mere preparation to compete is not a breach of fiduciary duty under the law,” and (2) “the other allegations of breaches alleged by the Plaintiffs are not supported by the evidence and do not establish a breach of fiduciary duty.” The court rejected both arguments.

First, Defendants argue that Pearson and Van Zile did not breach their fiduciary duties to CXG because “[i]t is not a breach of fiduciary duty for agents of a company to plan to compete with it while still working for the company.” *Id.* at 15 (emphasis omitted). Defendants cite *Abetter Trucking Company v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.), and *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 651 (S.D. Tex. 2010), in support of this contention. *Abetter* involved a breach-of-fiduciary-duty claim by a trucking company against a former at-will employee who left to start his own trucking company. 113 S.W.3d at 507. The court found that the defendant–employee did not breach his fiduciary duty to his employer where he informed the employer that “he planned to form his own company and would be taking seven trucks belonging to him and his brothers[,]” but failed to disclose “that he had incorporated his company ..., obtained permits, ... obtained insurance ... [and] ... that a number of the [employer]’s drivers had expressed their intent to drive for [the defendant’s] company.” *Id.* at 511. Similarly, in *Rimkus*, the defendant–employees did not breach their fiduciary duties to their employer when they “had vague discussions about going into business with one another and ... there was no agreement to form” the competing company until after the defendants had left the company. 688 F. Supp. 2d at 652, 669. However, the actions taken by the defendants in *Abetter* and *Rimkus* are wholly distinguishable from those of Pearson and Van Zile.

As the court in *Abetter* stated, “there are recognized limitations on the conduct of an employee who plans to compete with his former employer.” *Abetter*, 113 S.W.3d at 512. Conduct that goes beyond mere preparation includes “solicit[ing] [the company’s] customers[.]” *Id.* (citations omitted). And as discussed, the evidence shows that Op29 solicited potential CXG customers as early as March 2020, while Pearson and Van Zile served as both officers and directors of CXG, and continued to do so through the date of the hearing on the Second Motion. See *supra* Section III.A.1.ii. Indeed, Op29 was engaged in building a website for a potential CXG client in March 2020, and was owed “[s]ystems fees” from a potential CXG client—AWIS. Doc. 49-31, Pls.’ Mot. App., 234; Doc. 57-4, Pls.’ Reply App., 301–02; Doc. 57-5, Pls.’ Reply App., 305–06. This is ample evidence of competition beyond mere planning. Accordingly, Plaintiffs have shown that Pearson and Van Zile breached their fiduciary duties not to compete with CXG.

Second, Defendants argue that there is no evidence of any other breach of fiduciary duty. Doc. 54, Defs.’ Resp., 16. The Court, however, finds ample evidence that Pearson and Van Zile breached their fiduciary duties beyond competing with CXG. Indeed, Pearson and Van Zile “owe[d] [CXG] loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence [their] actions to [CXG]’s prejudice.” *Hartford Cas. Ins. Co. v. Walker Cnty. Agency, Inc.*, 808 S.W.2d 681, 688 (Tex. App.—Corpus Christi 1991, no writ) (citing *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 319 (Tex. App.—Tyler 1985, no writ)). Accordingly, they were obligated “to deal openly [with CXG] and to make full disclosure ... about matters affecting [CXG]’s business.” *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ). Here, the evidence supports a finding that Pearson and Van Zile intentionally delayed the delivery of SmartE, misled CXG and Lindsey, and utilized CXG’s resources in support of their plan to establish Op29.

CXG tasked Pearson and Van Zile with overseeing the development of SmartE as “an innovative enrollment web application designed to accommodate all types of agencies in the American healthcare market.” Doc. 49-14, Pls.’ Mot. App., 155; *see also* Doc. 49-10, Pls.’ Mot. App., 93 (Defendants’ response to interrogatory listing Pearson and Van Zile as “[i]ndividuals contributing content” to SmartE). Instead of working to deliver SmartE for CXG, however, Pearson and Van Zile sought to “[e]xtend time without any ... changes” while they planned “to open up insurance with different funding support[.]” Doc. 49-19, Pls.’ Mot. App., 182 (messages between Pearson and Van Zile). While promoting the image that they were “still pushing hard on the development of” SmartE, Doc. 49-17, Pls.’ Mot. App., 169, Pearson and Van Zile were, in reality, evolving Op29 from an idea to a functional, competing entity. ...

When Pearson and Van Zile ultimately made their deception known through the August Letter, CXG was left without a marketable platform and without its President and COO, who oversaw development of such a marketable platform. Additionally, CXG was left in a position where it had to immediately compete against Op29. And while the Court will not go so far as to definitively agree with Plaintiffs’ allegations of “data theft,” Doc. 48, Pls.’ Mot., 15, it is notable that Op29 marketed a platform that “appear[ed] nearly identical to” the design for SmartE. *See id.* at 6–7. Ownership issues aside, this evidence demonstrates that Pearson and Van Zile gave to Op29 what they had promised to deliver to CXG, and that CXG faced a significant disadvantage as a consequence.

Incredibly, Defendants argue that Pearson and Van Zile were “not breaching fiduciary duties” through their deceptive conduct because “[s]alaried employees across the country routinely take personal time during work hours, whether to go to the doctor or interview for a different job.” Doc. 54, Defs.’ Resp., 16. The Court rejects this argument. By all accounts, Pearson and Van Zile were not merely taking “personal time.” Rather, they were actively engaged in both a plan to compete with CXG and a scheme to conceal that plan from CXG and Lindsey. By continuously promising to deliver SmartE—while knowing they would not deliver it—Pearson and Van Zile knowingly hindered CXG’s ability to compete in the market. And by abruptly leaving without delivering SmartE, Pearson and Van Zile left CXG without any ability to react to its lack of a marketable platform. Upon Pearson and Van Zile’s exodus, CXG employees “were left with an unfinished product that [they then had] to go back, understand the code, recode, and finish it.” Doc. 66, Tr., 57:9–11. To do so, CXG had to find and hire a “technical project manager.” *Id.* at 66:7–16. At the time of the hearing, CXG estimated it needed “9 to 15 additional months” to develop a competitive platform. *See id.* at 58:11–12.

The Court recognizes that certain unforeseen circumstances may require an abrupt departure from one’s employment, leaving the employer at a disadvantage. Here, the evidence demonstrates that Pearson and Van Zile’s departure was not the result of unforeseen circumstances, but was rather a step in their plan to form a competing business, which they at least knew, if not intended, would leave CXG at a competitive disadvantage. Such actions are clear examples of conduct that constitute breaches of Pearson and Van Zile’s fiduciary duties of “loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which

might influence [their] actions to [CXG]’s prejudice.” *Hartford Cas.*, 808 S.W.2d at 688 (citation omitted).

In sum, Plaintiffs have successfully shown a substantial likelihood that Pearson and Van Zile breached their fiduciary duties to CXG.

The court found that the plaintiffs had shown a substantial likelihood of damages as a result of the breaches of contract and fiduciary duties, thus satisfying all elements of required to establish a likelihood of success on their claims for breach of contract and breach of fiduciary duties.

With respect to the remaining requirements for a preliminary injunction, the court found that the plaintiffs had demonstrated a substantial threat of irreparable harm and that the threatened injury outweighed any harm the injunction might cause the defendants. The court explained its rationale for the scope of the injunction as follows:

As discussed, Pearson and Van Zile likely breached the Company Agreement and their fiduciary duties by competing with CXG through their involvement with Op29. They also breached their fiduciary duties in the execution of their deceptive scheme. Moreover, because Op29, Jordan, PHI, VZL, GBM, and CyberX all acted “in active concert or participation with” Pearson and Van Zile, the Court need not address the remaining claims to enjoin all Defendants. *See Fed. R. Civ. P. 65(d)(2); see also Waffenschmidt*, 763 F.2d at 717.

It is thus proper to preliminarily enjoin all named Defendants from utilizing any CRM software that Pearson and Van Zile developed, or helped develop, while they wrongfully competed with CXG. *See Brink’s Inc. v. Patrick*, 2014 WL 2931824, at *6 (N.D. Tex. June 27, 2014). Additionally, while the Court does not definitively find at this juncture that CXG owns SmartE, Pearson and Van Zile breached their fiduciary duties by delaying its development while at the same time providing Op29 with a platform that is “nearly identical” to SmartE. Doc. 48, Pls.’ Mot., 6–7. Pearson and Van Zile thus gave the advantage to Op29 that they promised to give to CXG, and the Court finds it proper to preliminarily enjoin Defendants’ ability to profit from any software that was derived from the development of the SmartE software. Therefore, the preliminary injunction is proper, as it is directly related to the violations established. *See Califano*, 442 U.S. at 702.

2. Financial Rights

Lion Copolymer Holdings, Inc. v. Lion Polymers, LLC, No. 01-17-00671-CV, 2021 WL 6014665 (Tex. App.—Houston [1st Dist.] Dec. 21, 2021, no pet. h.) (mem. op.).

The court held that the evidence was sufficient to support the jury’s verdict on an LLC member’s claim that the LLC breached its operating agreement by deducting from the member’s distribution more than it should have deducted to recoup advance distributions made to the member under the tax distributions provision of the operating agreement.

Lion Copolymer Holdings, LLC (the “Company”) manufactured synthetic rubber for the automotive and construction industries. Lion Polymers, LP (“LP”) owned 1,237,500 Class 1 Preferred Units and 1,964,492 Class 3 Common Units in the Company. The Company was treated as a partnership for federal tax purposes, and thus each member was required to pay taxes on the losses or profits allocated to the member.

Section 6.1(d) of the Company’s operating agreement stated in relevant part: “On each Tax Distribution Date, the Company shall, to the extent the Board determines such amounts to be available for distribution, make distributions to the Members in such amounts as the Board determines are sufficient to satisfy the Members’ projected estimated income tax liability with respect to the Company’s income allocable to their Units for such period.... Any distribution made to a member pursuant to this Section 6.01(d) shall be treated as an advanced distribution of, and shall reduce, the amounts next distributable to such Member pursuant to Section ... 6.02.” Thus, the Company would advance sufficient cash to LP to satisfy LP’s estimated income tax liability and then recoup these tax advances from LP in a subsequent non-tax distribution of proceeds by reducing the amount it paid to LP.

On September 9, 2011, LP received its first distribution of proceeds from the Company. However, Rich Furlin, the Company’s Tax Matters Member, had improperly calculated these amounts because he did not consider tax advances that LP had received in 2010 and prior to the 2011 distribution. An owner and manager of LP, Stephen Lyttleton, notified Furlin of these errors.

Lyttleton testified that in February 2012, Furlin sent a spreadsheet (the “February 2012 Spreadsheet”) to correct the errors in the 2011 distribution. While the February 2012 Spreadsheet correctly included \$1,603,197 of tax advances to LP attributable to its Class 3 units, the February 2012 Spreadsheet also showed \$361,295 attributable to LP’s tax advances in the third and fourth quarters of 2011, which had not yet been paid at the time of the 2011 distribution. Thus, the total amount withheld constituted \$1,964,492. Furlin later admitted that including the 2011 third and fourth quarter tax advances in this amount was wrong. Furlin additionally testified that he was the only person to perform calculations on the Company’s distributions and tax advances.

Lyttleton further testified that on March 7, 2013, he received a letter from the Company’s accountant that the tax advances from the third and fourth quarters would be deducted from the Company’s 2013 distribution to LP (the distribution also occurred on March 7, 2013). However, Furlin testified that \$1,964,492 “was not the ultimate amount distributed” and that the discrepancy in the 2013 distribution arose from the Company’s withholding funds from LP to account for overpayment to LP. Furlin claimed that the Company had utilized a later spreadsheet (the “August 2012 Spreadsheet”), which showed that the Company had overpaid LP \$1.3 million in the 2011 distribution as the basis for its further deductions from the 2013 distributions. Furlin testified that the August 2012 Spreadsheet was based on a spreadsheet that the Company’s attorney had created. The Company’s accountant, who prepared the Company’s tax allocations and tax returns, stated that the August 2012 Spreadsheet represented the final correction to LP’s share of the distributions. However, the accountant also stated that Furlin performed the calculations to create the spreadsheet. Additionally, the manager of the entity that managed the Company also testified that the discrepancy arose from the August 2012 Spreadsheet. Following the 2013 distribution, LP brought a breach-of-contract claim against the Company, partly for withholding the tax advances twice. The trial court severed the double-deduction claim into a separate suit. Following a jury trial, a jury answered in favor of LP that the Company had breached the operating agreement and awarded \$361,295 to LP. The trial court entered a judgment on the verdict and awarded \$361,295 to LP.

On appeal, the court of appeals held that the evidence was legally sufficient to support the jury’s findings. The court noted that LP’s burden at trial was limited to presenting evidence supporting its claim for damages of \$361,295. The court also found that the Company failed to adequately brief its factual sufficiency issue because it did not explain why the jury’s findings were so contrary to the great weight and preponderance of the evidence as to make them clearly wrong and unjust.

The Company filed a petition for review in the Supreme Court of Texas. The supreme court found that the Company adequately briefed its factual sufficiency issue and reversed and remanded the case to the court of appeals for consideration of the factual sufficiency issue.

On remand, the court of appeals noted that the jury faced numerous contradictions in the testimony. The appellate court found that the jury could have reasonably chosen to credit Lyttleton’s testimony that the difference between the tax advances paid before the 2011 distribution and the \$1,964,492 deduction to the 2011 distribution was attributable to LP’s tax advances in the third and fourth quarters of 2011 because the 2011 third and fourth quarter tax advances were undisputedly not paid until after the 2011 distribution. The appellate court further found that the jury could have credited Furlin’s testimony that he was the only person behind the calculations in the February 2012 Spreadsheet due to supporting testimony from other persons. Additionally, the appellate court found that the jury could have reasonably discredited the testimony regarding the August 2012 Spreadsheet due to conflicting testimony by Furlin and the Company’s accountant. Additionally, the jury could have found that the manager of the managing entity of the Company provided self-serving and noncredible testimony.

The Company additionally argued that continued discussions between LP and the Company and the existence of subsequent spreadsheets conclusively proved that the Company used the August 2012 Spreadsheet. However, evidence of continued discussions and additional spreadsheets did not prove that the Company utilized the August 2012 Spreadsheet.

In sum, the appellate court held that the evidence was factually sufficient to support the jury’s finding that the Company breached the operating agreement and the jury’s award of \$361,295.

TPG (Post Oak) Acquisition, LLC v. Greystone Multi-Family Builders, Inc., No. 01-18-00396-CV, 2021 WL 3870130 (Tex. App.—Houston [1st Dist.] Aug. 31, 2021, pet. granted, judgm’t vacated w.r.m.) (mem. op.).

The court of appeals reversed the trial court’s judgment in favor of TPG 2011-4 (Post Oak), LLC (“TPG 2011-4”) on a claim for breach of an LLC Agreement. The court concluded that any construction cost overruns were not recoverable because of the presence of a contingency amount that the trial court should have applied.

In August 2012, TPG (Post Oak) Acquisition, LLC (“TPG Owner”), an entity affiliated with Kenneth Picerne, and Greystone ily Builders, Inc. (“GMFB”), an entity affiliated with Walter Eeds, executed a construction contract for the planned construction of an apartment complex. The contract designated TPG Owner as the owner and GMFB as the builder.

In connection with the planned construction, TPG 2011-4, an entity affiliated with Picerne, and Greystone (Post Oak), LLC (“GPO”), an entity affiliated with Eeds, jointly formed TPG (Post Oak) Mezzanine LLC (“TPG Mezzanine”) and entered into the Amended and Restated Limited Liability Company Agreement of TPG (Post Oak) Mezzanine, LLC (the “LLC Agreement”). The stated purposes of TPG Mezzanine were to: (1) serve as the sole member of TPG Owner (and thus the indirect owner of the project), (2) acquire the project land, and (3) develop the project land. The LLC Agreement provided that TPG 2011-4 held an eighty percent ownership interest in TPG Mezzanine and was the managing member “responsible for the day-to-day management” of the project’s “business and affairs.” GPO, designated as the developer in the LLC Agreement, held a twenty percent interest in TPG Mezzanine and, subject to TPG 2011-4’s “approval of all aspects of the design and permitting,” was responsible for preparing the budget and planning the project.

Problems arose with the project, and TPG Owner eventually terminated GMFB for cause. The termination prompted litigation asserting breach of the construction contract and the LLC Agreement. With respect to the construction contract, the trial court rendered judgment in favor of GMFB and against TPG Owner. With respect to the LLC Agreement, the trial court rendered judgment in favor of TPG 2011-4 and against GPO.

On appeal, the court of appeals addressed the construction contract and reversed the trial court’s judgment in favor of GMFB. The court remanded the claim for breach of the construction contract for a new trial. With respect to the LLC Agreement, the court of appeals also reversed the trial court’s judgment in favor of TPG 2011-4 and held that both TPG 2011-4 and GPO “shall take nothing under the LLC Agreement.”

In addressing the LLC Agreement, the court of appeals first determined that the agreement did not require GPO to pay “Construction Cost Overruns” incurred after GMFB was terminated:

In its sixth and seventh issues, TPG 2011-4 argues that the trial court erred in misconstruing the LLC Agreement to limit the Construction Cost Overruns to those incurred before TPG Owner terminated GMFB under the Construction Contract because it should have included all cost overruns for the entire Project. Thus, the trial court awarded it an insufficient amount as Construction Cost Overruns against GPO under the LLC Agreement and against Eeds based on his guaranty of GPO’s obligation to pay Construction Cost Overruns.

After examining the LLC Agreement and analyzing the arguments presented, we disagree with TPG 2011-4 that the LLC Agreement holds GPO liable for Construction Cost Overruns incurred after GMFB’s termination under the Construction Contract. We first note the trial court’s conclusion that the LLC Agreement is governed by Delaware Law—a conclusion neither party challenges on appeal. Thus, we apply Delaware law to interpret the LLC Agreement. We will still apply Texas standards of appellate review, however, including the de novo standard for questions [of] law.

“[Delaware] courts interpreting a contract will give priority to the parties intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions.” *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016); *see also Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) (“We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.”); *Eugene A. Delle Donne & Son, L.P. v. Applied Card Sys., Inc.*, 821 A.2d 885, 887 (Del. 2003) (“In construing a contract, the document must be considered as a whole[.]”). Courts will afford a contract’s clear and unambiguous terms their ordinary and usual meaning. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

In asserting that GPO had to pay all Construction Cost Overruns for the entire Project, including those incurred after GMFB was terminated under the Construction Contract, TPG 2011-4 looks to section 6.3 of the LLC Agreement. That section provides that “[a]ll Construction Cost Overruns, after the application of available contingencies ..., will be paid by [GPO].” Emphasizing the presence of the adjective “all” before Construction Cost Overruns that “will be paid” by GPO as well as the LLC Agreement’s commercial purpose related to the development of the entire

Project, TPG 2011-4 asserts that section 6.3's scope cannot be restricted “only to Construction Cost Overruns incurred before GMFB was terminated as contractor under the Construction Contract.”

As TPG 2011-4 asserts, the “definition of ‘all’ is well known, and means ‘the whole amount, quantity, or extent of.’” But the question is “the whole amount, quantity, or extent of” what? The answer must be of the Construction Cost Overruns, as specifically defined in the LLC Agreement to mean the “amount by which the actual cost of the Land acquisition and the Construction Work exceeds the Construction Budget, if any.” Construction Work is also contractually defined. It means “all construction work and site work required to be performed by [GMFB] in connection with the Construction of the Proposed Development, as set forth in the Construction Contract.”

As GPO and Eeds point out, the definition of Construction Work includes only the work “required to be performed by [GMFB] ... as set forth in the Construction Contract,” and any work the Construction Contract did not require GMFB to perform was not part of the Construction Work and thus did not contribute to Construction Cost Overruns. The Construction Contract—which the parties and we agree should be read together with the LLC Agreement—does not require or even permit GMFB to perform work after termination, no matter if GMFB is terminated for cause based on a default or for convenience. We agree with GPO and Eeds that “the general definition of the adjective ‘all’ cannot change the specific definition of ‘Construction Cost Overruns’ to which the parties agreed.” Because GMFB had to perform no work under the Construction Contract after termination, section 6.3 cannot be read as requiring GPO to pay Construction Cost Overruns after GMFB’s termination.

We are not persuaded that a more expansive interpretation of GPO’s liability for Construction Cost Overruns is required by other provisions of the LLC Agreement. For instance, we do not find that reading section 6.3 of the LLC Agreement together with section 9.17 requires a different interpretation. Section 9.17 provides:

Guaranties. [GPO] shall guaranty completion of construction and shall provide any completion and/or recourse carveout guaranties and environmental indemnities required in connection with the Construction Loan and/or the Mezzanine Loan. If [TPG 2011-4] or an Affiliate of [TPG 2011-4] is required to provide any such guaranty or indemnity, the economic detriment of each Guaranty shall be borne by [GPO]; In furtherance of, but subject to, the foregoing, (a) if [TPG 2011-4] makes a payment under a Member Guaranty, then [GPO] [sic] promptly pay [TPG 2011-4] the amount of such payment, and (b) if an Affiliate of [TPG 2011-4] makes a payment under an Affiliate Guaranty, then [GPO] shall promptly pay the Affiliate guarantor the amount of such payment. Amounts paid under or with respect to a Member Guaranty or an Affiliate Guaranty shall not be deemed a Capital Contribution.

TPG 2011-4 urges that GPO’s promises in section 9.17—to (1) “guaranty completion of construction” and (2) “promptly pay [] the amount of [any] payment” that TPG 2011-4 or any affiliate of TPG 2011-4 makes to project lenders—rendered GPO financially responsible for project completion, meaning “the only reasonable reading of [section] 6.3 is that ... GPO promised to pay *all* Construction Cost Overruns on the *entire* Project.” (First and second alterations in original.) (Internal quotations omitted.) But section 9.17 does not answer who would pay to complete construction, and it cannot be read so broadly as to include a promise by GPO to guarantee completion after termination of GMFB. The specific clauses in the Construction Contract suggesting that GMFB may not complete construction after termination must prevail over the general clause guaranteeing completion.

The recitals in the LLC Agreement also do not compel a different interpretation. According to TPG 2011-4, the LLC Agreement recitals stating that TPG 2011-4 and GPO’s joint-venture entity, TPG Mezzanine, will develop the acquired land as well as “develop, construct, own, lease, manage, and operate” the Project support a conclusion that the purpose of the LLC Agreement was

to develop the entire Project, and thus the trial court adopted an unreasonable interpretation by limiting the recoverable Construction Cost Overruns to only part of the Project. But recitals do not establish a substantive obligation.

We conclude that the LLC Agreement does not require GPO to pay Construction Cost Overruns incurred after GMFB's termination. Thus, we hold that the trial court did not err by limiting the Construction Cost Overruns to those incurred before GMFB was terminated under the Construction Contract.

The court of appeals then proceeded to conclude that the Construction Cost Overruns were not recoverable against GPO or Eeds because of the presence of a contingency amount:

In their first issue on cross-appeal, GPO and Eeds argue that the trial court erred in awarding any Construction Cost Overruns to TPG 2011-4 because the \$647,717.13 for Construction Cost Overruns found by the trial court is not recoverable. They assert the estimated budget for the construction of the Project included a contingency amount, the unused portion of which exceeded the Construction Cost Overruns at the time of GMFB's termination and, by the clear and unambiguous terms of the LLC Agreement, should have been applied to reduce any liability of GPO to zero. They also assert that because GPO was not liable under the LLC Agreement for Construction Cost Overruns, neither was Eeds under the Guaranty. We agree.

More than one of the findings and conclusions pertinent to this issue are unchallenged on appeal. These include (1) the trial court's finding that the estimated budget for the construction of the Project—the Control Estimate defined to “include the estimated Cost of the Work plus the Contractor's Fee”—included \$1,460,173 in Hard Cost Contingency and (2) the trial court's conclusion that, at the time of GMFB's termination, the unexpended Hard Cost Contingency was \$1,026,161.01. Given these unchallenged findings and conclusions, there is no dispute that the amount of the unexpended Hard Cost Contingency exceeded the amount of the Construction Cost Overruns found by the trial court.

Section 5.2.6 of the Construction Contract provided that the contingency line item in the Controlled Estimate “shall be used to pay for additional costs incurred by [GMFB] for its performance of the Work for which additional costs may not have been included in the Control Estimate.” The LLC Agreement, as described above, defined “Construction Cost Overruns” as the “amount by which the actual cost of the Land acquisition and the Construction Work exceed[ed] the Construction Budget,” and instructed that any unused contingency should be applied in determining the Construction Cost Overruns payable by GPO. Reading these provisions together, we conclude that the LLC Agreement clearly and unambiguously required GPO to pay only the Construction Cost Overruns that remained after application of the unexpended contingency, which in this case was none given that the unexpended contingency exceeded the amount of the cost overruns.

The trial court declined to apply the unused contingency per the LLC Agreement's requirement, concluding that it would be “inequitable to allow either party the benefit of any unused portions of the Hard Cost Contingency” because the LLC Agreement did not “contemplate a termination of the Construction Contract for convenience.” But equity was not a valid basis for disregarding the LLC Agreement's requirement. *See Heartland Del. Inc. v. Rehoboth Mall Ltd. P'ship*, 57 A.3d 917, 925 (Del. Ch. 2012) (observing “[e]quity respects the freedom to contract” and “if contract rights were only to be enforced upon a balancing of the equities, mischief would result far greater than is imposed, on occasion, by letting parties order their own affairs”); *see also Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983) (courts cannot make new contract for parties). Moreover, the LLC Agreement's requirement to reduce Construction Cost Overruns by unexpended contingency was not conditional on the nature of GMFB's termination. As we have already concluded, it clearly and unambiguously stated that GPO would pay Construction Cost Overruns “after the application of available contingencies.”

Although it agrees that the trial court erroneously applied equity to rewrite the LLC Agreement, TPG 2011-4 asserts that “the trial court's resort to equity was driven by the ...

contract-interpretation error” limiting the cost overruns only to those accrued when GMFB was terminated as a contractor under the Construction Contract, rather than determining cost overruns on the entire Project. We have already rejected this argument in interpreting section 6.3 of the LLC Agreement to not require GPO to pay Construction Cost Overruns incurred after GMFB’s termination.

In sum, having found that the Construction Cost Overruns without applying the contingency were \$647,717.13 and that the unexpended contingency was \$1,026,161.01, the plain meaning of the LLC Agreement requires a conclusion that no cost overruns were recoverable from GPO when the latter is subtracted from the former.

3. Termination of Member; Redemption/Buyout of Member’s Interest

Veterinary Specialists of North Texas, PLLC v. King, No. 05-21-00325-CV, 2022 WL 406095 (Tex. App.—Dallas Feb. 9, 2022, no pet. h.) (mem. op.).

In this interlocutory appeal from a temporary injunction, the court of appeals concluded that the trial court did not abuse its discretion in determining that a disabled member was still a member even though he refused to accept the consideration tendered for his membership interest and refused to sign a document conveying his interest after the company exercised its right (triggered by the member’s disability) under the company agreement to buy out the interest. Because the company agreement did not say that the disabled member immediately or automatically ceased to be a member once the company tendered consideration for the interest, the disabled member’s refusal to accept the consideration and sign the document conveying his interest was evidence that he was still a member, and the court of appeals thus concluded that the trial court did not abuse its discretion by implicitly concluding that the company and other member breached the company agreement by locking out the disabled member and depriving him of the rights and benefits of membership.

This lawsuit was a dispute over ownership and control of Veterinary Specialists of North Texas, PLLC (“VSNT”), which operated a specialty veterinary practice. Dr. Glenn King and Dr. Derek Burney became the sole owners of VSNT in 2014 and were the managers and 50% owners under an Amended Company Agreement (the “Agreement”) that became effective in 2015. Eventually, King was no longer able to competently treat VSNT’s patients, and he stopped treating patients in March 2020 and stopped coming to VSNT’s animal treatment facility in April 2020. In July 2020, Burney invoked a “disability” provision in the Agreement and informed King that VSNT would buy him out as prescribed in the Agreement. King refused to cooperate with the buyout, and VSNT and Burney sued King for breach of contract and declaratory judgment. King counterclaimed and obtained a temporary injunction that generally required VSNT and Burney to recognize King as a managing member of VSNT. VSNT and Burney appeal the temporary injunction.

The court of appeals first addressed whether the trial court abused its discretion by ruling that King showed a probability of success on the merits. In the trial court, King argued that he was a VSNT manager and member under the Agreement and that VSNT and Burney breached the Agreement by locking him out of his contractual rights and benefits. On appeal, VSNT and Burney did not dispute that they locked King out, but they argued that they did not breach the Agreement because the evidence established that King was no longer a VSNT manager or member when they locked him out. Thus, they argued that King failed to show a probable right to continue as a VSNT member or manager as ordered by the temporary injunction.

Assuming without deciding that the evidence established that King became “disabled” under the Agreement no later than the end of June 2020, and that King’s disability automatically terminated his position as a VSNT manager and entitled VSNT to buy him out under the Agreement, the court of appeals concluded that there was nevertheless evidence that King was still a member. Burney invoked the disability and buyout clauses on or around July 31, 2020, and VSNT tendered consideration to King for his membership interest. Thus, Burney and VSNT argued that King ceased to be a VSNT member on August 31, 2020. King testified, however, that he refused to sign a document that would have conveyed his membership interest and had not cashed any of the checks VSNT sent him as periodic installment payments for his membership interest. VSNT and Burney argued that these facts established that King ceased to be a VSNT member pursuant to § 8.4 of the Agreement, which provided that upon a member’s disability “the Company shall have the right, at the sole discretion and election of the other Member, to purchase the Impaired Member’s Member Interest.” Other provisions described how the purchase price would

be determined in that event. Based on these provisions, the court of appeals concluded that the evidence allowed the court to conclude that King was still a member.

... [T]hese provisions do not say that King immediately or automatically ceased to be a member once VSNT tendered consideration for his membership interest. Indeed, § 8.4(e) contains detailed provisions governing the closing of the purchase of a disabled member's interest. But King testified that he refused to sign a document conveying his membership interest, and we see no evidence that the conveyance ever took place.

Thus, appellants have not shown that the trial court abused its discretion by implicitly concluding that there was some evidence that (1) King remained a VSNT member and thus (2) appellants were breaching the Agreement by not affording him the rights and benefits of membership.

The court next addressed the argument of VSNT and Burney that the trial court abused its discretion by ordering them to make monetary payments to King for compensation, salary, insurance and benefits; pay King's health, life, key-man, disability, and long-term care insurance premiums and reimburse him for premiums paid by him; and make "equalization payments" in an amount equal to the attorney's fees and costs paid by VSNT on behalf of Burney, individually, in connection with the lawsuit. The court of appeals concluded that this relief was not required to prevent irreparable injury or extreme hardship because King's injuries in the form of his unpaid manager benefits, his unpaid member distributions, and his insurance premiums were injuries compensable by money damages, and King cited no evidence that he would experience extreme hardship if VSNT and Burney were not compelled to make these payments now.

Finally, the court addressed the argument of VSNT and Burney that the temporary injunction improperly altered the status quo by ordering that King have "clinical access to clients." VSNT and Burney construed "clients" to mean "veterinary patients," and they argued that the injunction changed the status quo because King voluntarily stopped treating veterinary patients in March 2020, before Burney invoked the disability clause. King argued that "clients" referred to the pets' owners and not the pets themselves. Because the evidence showed that Burney and King agreed in early 2020 that King would engage in administrative and marketing duties, King argued that the orders giving King access to VSNT's clients were consistent with the status quo. Although King testified that he did not provide veterinary services for VSNT's paying clients after March 2020, he also testified that, in March 2020, Burney represented to King that his duties should shift from clinical duties to managing and marketing. Although the court of appeals saw no evidence that King actually interacted with VSNT's clients after he stopped providing veterinary services, VSNT and Burney did not point to anything that forbade him from doing so. The court said the trial court could reasonably conclude that managing and marketing activities, by their very nature, might involve interaction with VSNT's clients, and the trial court did not abuse its discretion by ordering VSNT and Burney to give King "clinical access to clients."

Houston Metro Ortho and Spine Surgery, LLC v. Juansrich, Ltd., No. 14-19-00732-CV, 2021 WL 2799643 (Tex. App.—Houston [14th Dist.] July 6, 2021, pet. denied) (mem. op.).

The court of appeals determined that the owner of an interest in an LLC ambulatory surgical center, should take nothing on its conversion, aiding and abetting, and unjust enrichment causes of action due to the economic loss rule doctrine and the presence of the LLC Agreement. The court of appeals also concluded that the owner could not simply elect to recover under its breach-of-contract claim seeking payment for its ownership interest because there were fact questions related to the owner's termination under the LLC Agreement. With respect to a post-termination covenant not to compete contained in the LLC Agreement, the court held that the covenant did not violate Texas law because the Texas Business and Commerce Code provides that its requirements do not apply to a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center. The court remanded the breach-of-contract cause of action for further proceedings.

Appellee Richard Francis, M.D. through his business entity Juansrich, Ltd. (collectively "Juansrich") owned an interest in appellant Houston Metro Ortho and Spine Surgery, LLC ("Metro"), an ambulatory surgical center. Juansrich shared ownership in Metro with several other surgeons who were appellants in the dispute. As Class A members of Metro, the surgeons agreed, among other things, that each would conduct a certain percentage of their

eligible procedures at Metro. A dispute began when appellants believed that Dr. Francis had stopped performing procedures at Metro.

Metro terminated Juansrich's ownership interest and then filed suit against Dr. Francis seeking to enforce a noncompetition agreement contained in the "Company Agreement of Houston Metro Ortho and Spine Surgery Center LLC" (the "LLC Agreement"). Believing that it was owed significant sums as payment for its ownership interest in Metro, as well as for missed distributions of earnings made while it was still a member of Metro, Juansrich filed counterclaims alleging numerous causes of action, including breach of contract, conversion, aiding and abetting, and unjust enrichment.

The trial court granted Dr. Francis's motion for partial summary judgment on the grounds that the noncompetition agreement was unenforceable. It then realigned the parties making Juansrich the plaintiff. The trial court subsequently granted two Rule 166 motions filed by Juansrich and conducted a bench trial on the remaining issues. At the conclusion of the bench trial, the trial court found in favor of Juansrich and signed findings of fact and conclusions of law supporting recovery on theories of conversion, aiding and abetting, unjust enrichment, and breach of contract. Juansrich elected to recover on its conversion cause of action, and the trial court signed a final judgment awarding Juansrich \$9,855,596.85 in damages.

The court of appeals began by citing Texas Business Organizations Code § 101.052 and observing that "[a]s with all limited liability companies, Metro is governed by a contract, the LLC Agreement." The court then presented some of the "key provisions" in the LLC Agreement:

Section 2.3

Section 2.3(b)(iv) provides that each Class A member "shall perform at least one-third of such Class A Member's procedures that require or can be performed at an ambulatory surgery center at the [Metro] Center."

Section 4.3

Section 4.3 addresses redemption of members' ownership interests. Section 4.3 divides terminating events with respect to a member's ownership interest as either "Adverse Terminating Events" or "Non-Adverse Terminating Events." It further provides that the redemption price for a Class A member's units "shall be based on whether the Terminating Event is an Adverse Terminating Event or a Non-Adverse Terminating Event." An Adverse Terminating Event occurs when, among other events not at issue here, a Class A Member materially breaches the LLC Agreement. A Non-Adverse Terminating Event occurs with respect to a Class A Member if, among other things, the Class A Member is removed "for any reason or no reason," by "Supermajority Approval." The redemption price is also affected by whether Metro has become "Operational" as defined in the LLC Agreement. Metro becomes "Operational" once it "is Medicare certified as an ambulatory surgical center." If Metro is not "Operational," or the termination is "Adverse," then the redemption price for a departing Class A Member's Units is limited to the departing Member's capital contribution. If Metro is "Operational," and the termination is "Non-Adverse," the redemption price is determined by a formula found in section 4.3(g)(ii) of the LLC Agreement.

Section 10.7

Section 10.7 of the LLC Agreement contains a non-competition clause. It provides that

[d]uring the term of a Class A Member's membership in [Metro], and for a period of one year thereafter, no Class A Member nor any of such Class A Member's Affiliates, except as provided below or through [Metro], shall, without prior written Consent of the Class B Member, directly or indirectly own, manage, operate, control, or participate in any manner in the ownership, management, operation, or control of, or serve as a partner, employee, principal, agent, consultant, or otherwise contract with, or have any financial interest in, or aid or assist any other person or entity that operates a facility (including an ambulatory surgical center or office-based or practice-based facility or operating site or room that provides any of the services offered by [Metro]) to provide outpatient surgical services, including a state-licensed, Medicare-certified or accredited surgery center or office-based surgical facility, within 10 miles of the location of [Metro's

ambulatory surgical center] (the “Restricted Territory”) nor may a Class A Member provide Facility Fee Procedures in such Class A Member’s office. The preceding sentence shall not be construed to prevent a Class A Member or any of a Class A Member’s Affiliate’s from (i) maintaining staff privileges at any facility, (ii) providing professional surgical services and earning a professional fee thereon (but not acting as an owner or having a compensation or financial relationship) in any other ambulatory surgical center or hospital, (iii) performing any in-office procedures under local anesthesia that does not require the presence of an anesthesiologist or a certified registered nurse anesthetist, or (iv) having any financial relationship or owning an interest in any hospital within the Restricted Territory. For purposes of this Section 10.7, it shall be presumed that a person or entity competes with [Metro] and violates this provision if such person or entity has any interest in any facility or center of any type whatsoever for the conduct of, or compensation relationship with, any outpatient surgery center within the Restricted Territory.

On appeal, Metro argued that because the dispute was governed by a contract (the LLC Agreement), the trial court erred in allowing Juansrich to recover on its conversion cause of action. The court of appeals agreed that the economic loss rule precluded Juansrich’s recovery in tort:

In *Exxon Mobil [Corporation v. Kinder Morgan Operating, L.P.]*, 192 S.W.3d 120, 126–27 (Tex. App.—Houston [14th Dist.] 2006, no pet.), we explained that the independent injury rule provides that “when the only loss or damage is to the subject matter of the contract, the plaintiff’s action is ordinarily on the contract.” We further explained that “when the contract spells out the parties’ respective rights about a subject matter, the contract—not common law tort theories—governs any dispute about the subject matter.” We then rejected Exxon Mobil’s conversion claim because “(1) the only loss Exxon Mobil complains of is the propane, which is the subject of the contract, and (2) the contract spells out the parties’ respective rights regarding the processing of the propane.” This rule was recognized by the Supreme Court of Texas in *Chapman Custom Homes, Inc. v. Dallas Plumbing Company*, 445 S.W.3d 716, 718 (Tex. 2014). There, the Court stated that “the economic loss rule generally precludes recovery in tort for economic losses resulting from a party’s failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy.” It went on to explain that the economic loss rule does not bar all tort claims arising out of a contractual setting. The court observed that “a party states a tort claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit.”

Here, we are presented with the former situation rather than the latter. The LLC Agreement covers the field of this dispute. It created Juansrich’s ownership interest, defined the parties’ rights and duties under the agreement, and established the remedies available when a party failed to perform those duties. In addition, Juansrich’s alleged loss is the receipt of a contractual benefit, reimbursement for the loss of its ownership interest in Metro. As a result, Juansrich’s conversion claim fails as a matter of law. *See Exxon Mobil*, 192 S.W.3d at 128 (“The very nature of the dispute between the parties was whether appellees legally performed their contractual obligations under the GPA. Appellees have conclusively demonstrated that Exxon Mobil’s conversion claims were barred by application of the independent injury rule.”).

Because Juansrich cannot recover on a conversion theory, its aiding and abetting theory of imposing joint and several liability also fails. In addition, to the extent Juansrich asserts aiding and abetting as an independent tort supporting recovery against certain appellants, we have previously rejected aiding and abetting as a valid legal theory. We once again do so here.

The court of appeals also determined that the trial court’s findings supporting a recovery by Juansrich for unjust enrichment were improper because a contract covered all aspects of the claim:

.... Here, as pointed out above, the LLC Agreement covers all aspects of Juansrich's unjust enrichment claim. In addition, there was a legitimate dispute regarding the amount owed under the LLC Agreement, which forecloses an unjust enrichment recovery. *See Industrial III, Inc. v. Burns*, No. 14-13-00386-CV, 2014 WL 4202495, at *6 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied) (mem. op.) (“Generally speaking, a party may not recover under quantum meruit or unjust enrichment if an express contract covers the services or materials furnished.”). As a result, we hold that Juansrich cannot recover under an unjust enrichment cause of action.

The court of appeals then concluded that the trial court had erred by granting Juansrich's Rule 166 motions. With respect to the first motion, the court of appeals initially determined that the trial court erred by ruling as a matter of law that Juansrich's termination was non-adverse. According to the court of appeals, there was a fact question on whether Juansrich had complied with § 2.3 of the LLC Agreement that required each Class A member to perform at least one-third of the member's procedures at Metro:

To be entitled to a return of anything more than its initial capital contribution, Juansrich initially had to establish that Juansrich's termination by Metro was non-adverse as defined in the LLC Agreement. An adverse termination occurs if the member materially breached the LLC Agreement. If the termination was “adverse,” then Juansrich would only be entitled to a return of its initial capital contribution of \$195,000. If the termination was non-adverse, then the redemption price for Juansrich's ownership interest would be determined by whether the termination occurred before or after Metro became “Operational” as defined in the LLC Agreement. If the termination occurs before Metro becomes “Operational,” Juansrich would only be entitled to a return of its initial capital contribution, \$195,000. If after, then the payment would be determined by performing a calculation laid out in article 4.3(g)(ii)(B) of the LLC Agreement.

Metro had alleged that Juansrich's termination was adverse because it had materially breached the LLC Agreement by violating (1) the non-compete, and (2) the one-third procedures rule. Juansrich argued that the trial court should grant its first Rule 166 motion because (1) the undisputed facts showed that it had complied with the one-third procedures rule, and (2) its prior summary judgment order had determined that the non-compete agreement was unenforceable. Juansrich argued compliance with the one-third procedures requirement was measured by the prior fiscal year and Metro had admitted that Juansrich had complied with that requirement for 2013. Juansrich based this argument on the fact that the LLC Agreement required that compliance with the one-third of medical-income rule be measured “for the previous fiscal year or previous 12-month period.” The trial court agreed and granted Juansrich's first Rule 166 motion.

On appeal, Metro argues, in part, that the trial court erred when it granted Juansrich's first Rule 166 motion because the LLC Agreement did not specify that, unlike the one-third of medical-income rule, compliance with the one-third procedures rule was measured by the prior fiscal year. Metro asserts this omission was intentional and the trial court erred when it added the annual compliance language into the number of procedures rule. We agree.

Courts are not authorized to rewrite agreements to insert provisions that the parties could have included or to imply terms for which they have not bargained. Here, because the parties chose to include an annual measurement period for determining compliance with the one-third of medical-income rule, we must accept that the parties' omission of that language from the one-third of procedures rule was intentional. Therefore, because the parties did not include an annual time-period for measuring compliance with the one-third procedures rule, we construe the contract to require the measurement to occur over a reasonable time period. “The question of reasonableness is usually one for the trier of fact.” We therefore hold that there was a fact question on whether Juansrich complied with the one-third procedures rule to be resolved by the trier of fact. Accordingly, the trial court erred when it ruled as a matter of law that Juansrich's termination was non-adverse and it granted Juansrich's first Rule 166 motion.

The court of appeals then determined that, due to a statutory change, the trial court had erred in concluding that the covenant not to compete in the LLC Agreement was unenforceable:

Metro also argues that the trial court erred when it partially based its first Rule 166 order on its previous summary judgment order declaring the covenant not to compete found in the LLC Agreement unenforceable. The trial court had previously determined that the covenant not to compete in the LLC Agreement was unenforceable because it failed to comply with the requirements set forth in subsection 15.50(b) of the Business and Commerce Code. *See* Tex. Bus. & Com. Code Ann. § 15.50(b) (establishing requirements that a covenant not to compete relating to the practice of medicine must comply with to be enforceable). Metro did not deny that the covenant not to compete found in the LLC Agreement did not include those restrictions. Metro instead argued that the LLC Agreement did not need to comply with the subsection 15.50(b) requirements because the legislature had amended the statute by adding subsection (c), which provides that “subsection (b) does not apply to a physician’s business ownership interest in a licensed hospital or licensed ambulatory surgical center.” *Id.* at § 15.50(c). As a result of this addition to the statute, Metro argued the covenant not to compete did not need to comply with subsection 15.50(b) and was otherwise enforceable against Dr. Francis. We agree with Metro. ...

Here, it is undisputed that the covenant not to compete at issue here was contained in the LLC Agreement forming Metro, the entity owning and operating an ambulatory surgical center. As a result, pursuant to the plain language of the statute, the covenant not to compete in the LLC Agreement was not required to comply with the limitations found in subsection (b) of the statute. *See* Tex. Bus. & Com. Code Ann. § 15.50(c) (providing that subsection 15.50(b) of the Business and Commerce Code “does not apply to a physician’s business ownership interest in a licensed hospital or licensed ambulatory surgical center”); *Novamed Surgery Ctr. of Tyler, L.P. v. Bochow*, No. 12-12-00159-CV, 2013 WL 2725544, at *4 (Tex. App.—Tyler June 12, 2013, no pet.) (mem. op.) (“Before the [2009] amendment, a noncompetition covenant involving a physician’s ownership interest in an [ambulatory surgical center] required a buyout provision. Following the amendment, it did not. It is more than a ‘clarification.’ It is a change in the law.”) (internal citations omitted). We therefore hold that the trial court erred when it ruled that the covenant not to compete in the LLC Agreement was unenforceable because it did not contain the limitations found in subsection 15.50(b) of the Business and Commerce Code and then relied on that ruling in part to determine that Metro’s termination of Dr. Francis and Juansrich was non-adverse.

With respect to the second Rule 166 motion, the court of appeals concluded that Metro had not judicially admitted that Metro was “Operational” at the time Juansrich was terminated:

Juansrich argued that Metro’s judicial admission occurred three separate times, all related to Metro’s motion for summary judgment asserting that Juansrich’s termination was adverse because Juansrich had materially breached the LLC Agreement. According to Juansrich, the first instance occurred in a supplemental motion for summary judgment which provided that “Here, Metro became operational on May 22, 2011.” The second occurred when a Metro lawyer stated during the summary judgment hearing that Juansrich “withdrew within five years after Metro became operational.” The third occurred in a Power Point slide stating that “Metro became operational on May 22, 2011.” As explained above, “Operational” (emphasis added) was a defined term in the LLC Agreement. Operational however, also has a generic meaning when applied to a business, meaning the state of being functional. Here, none of Metro’s alleged judicial admissions used “operational” with a capitalized “O.” Based on these dual meanings, and the fact Metro used the uncapitalized version of operational, we hold that it is not clear in what sense Metro used the term. Therefore, the three alleged admissions do not meet the requirement of being deliberate, clear, and unequivocal. We conclude that none of the statements rise to the level of a judicial admission as to the contractually defined term and therefore the trial court erred when it granted Juansrich’s second Rule 166 motion.

In summary, the court of appeals reversed the trial court’s final judgment based on Juansrich’s conversion cause of action and rendered judgment that Juansrich take nothing on its conversion, aiding and abetting, and unjust enrichment claims. Because the trial court erred by granting both of Juansrich’s Rule 166 motions, the court of

appeals also concluded that Juansrich could not simply elect to recover under its breach of contract action seeking payment on the value of its membership units. Instead, the breach of contract claim had to be remanded to the trial court for further proceedings.

4. Restrictions on Transfer of Interest

Longhorn Integrity Inspection Services, LLC v. McCurdy, No. H-16-1649, 2017 WL 11675395 (S.D. Tex. Nov. 20, 2017) (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 concluded that three equal members of an LLC entered into an enforceable agreement (evidenced by a writing that was subsequently orally modified) pursuant to which one of the members agreed to sell a 28 1/3% membership interest to the other two members, notwithstanding transfer restrictions contained in the LLC's regulations previously adopted by the members, and that the purchasing members were entitled to specific performance by the selling member because there was no evidence that the membership interest had an ascertainable market value.

In 2014, Garrett Pletcher, Bryan Harper, and Berwin McCurdy Jr. formed Longhorn Integrity Inspection Services, LLC ("LIIS"), a Texas limited liability company. At its inception, each of the three members owned an equal 33 1/3% membership interest. In connection with the formation of LIIS, the members adopted company regulations entitled "Limited Liability Company Documents of Longhorn Integrity Inspection Services LLC" (the "LIIS Regulations"). Section 3.17 of the LIIS Regulations, entitled "Restrictions on Sale and Transfer of Membership Interests," provided that "[n]o membership interest of [LIIS] ... shall be sold or transferred, nor shall any purported sale or transfer of membership interests be valid: 1. Without a current resolution of the Managers approving the transfer; or ... 5. Without following the detailed issue and transfer procedures set out in the Company Record Book Section Five: Membership." Section 3.15 of the LIIS Regulations, entitled "Mandatory Prerequisites before Sale or Transfer of Membership Interests," stated that LIIS "shall sell no membership interests ... except ... [if] there is on file in the Company record a written attorney's opinion, satisfactory to the Company."

On April 15, 2015, Pletcher, Harper, and McCurdy entered into an agreement for McCurdy to sell McCurdy's one-third (33 1/3%) membership interest in LIIS to Pletcher and Harper, in exchange for \$15,000 (the "Agreement"). Pletcher and Harper signed one copy, and Pletcher and McCurdy signed another copy. Subsequently, McCurdy, Pletcher, and Harper orally discussed and agreed that McCurdy would sell a 28 1/3% membership interest in LIIS to Pletcher and Harper in exchange for \$10,000 (the "Modified Agreement"). Pursuant to wire transfer instructions provided by McCurdy, Pletcher and Harper sent a wire transfer of \$10,000 to McCurdy's bank account, but the funds were returned because the account had been closed. Pletcher and Harper offered McCurdy \$10,000 through their lawyer at the time, but McCurdy did not transfer his 28 1/3% membership interest. Pletcher, Harper, and LIIS brought this suit alleging breach of contract by McCurdy and specific performance of his agreement to transfer a 28 1/3% membership interest in exchange for \$10,000.

McCurdy contended the Agreement was not enforceable because (1) Pletcher, Harper, and McCurdy did not all three sign the Agreement; (2) the Agreement was later modified; and (3) the parties did not properly follow the LIIS Regulations. The court rejected these arguments and concluded that Pletcher and Harper were entitled to specific performance of the Modified Agreement.

The court rejected McCurdy's first argument because the Agreement stated that it was to be signed by Pletcher, Harper, and McCurdy, and Pletcher and Harper signed one copy of the Agreement, and Pletcher and McCurdy signed an identical copy of the Agreement. Although Harper's and McCurdy's signatures appeared on separate documents, the two copies were kept together, and Pletcher testified he filed both copies of the Agreement in LIIS's company files. Further, the Agreement did not explicitly state and there was no evidence presented that the parties intended signatures as a condition of the parties' mutual assent. Construing both copies together and in light of the parties' intent, the court concluded that the Agreement was a valid and enforceable contract.

The court next concluded that Pletcher, Harper, and McCurdy orally and validly modified the Agreement based on their testimony that they orally agreed to modify the Agreement, and an email message that indicated they discussed and agreed to the terms of the Modified Agreement.

Next, the court rejected McCurdy's contention that the Modified Agreement was not valid because the Modified Agreement and LIIS Regulations should be construed together. Because the Regulations and the Modified Agreement were not entered into at the same time, and based on Pletcher's testimony that he was unaware of

Section 3.15 and Section 3.17 and that the parties did not contemplate the LIIS Regulations at the time the parties entered into the Agreement and the Modified Agreement, the court concluded that the parties did not intend the LIIS Regulations and the Modified Agreement to be read together. Based on that conclusion, the court found the Modified Agreement was an enforceable contract for McCurdy to sell 28 1/3% of McCurdy's membership interest in LIIS in exchange for \$10,000.

The court concluded that time was not of the essence with respect to the transfer of the funds, and McCurdy was not excused from his obligation to transfer a 28 1/3% membership interest. Because McCurdy did not transfer the interest, he breached his obligation under the Modified Agreement.

The court found that the plaintiffs showed that they were ready, willing, and able to timely perform their obligations under the Modified Agreement by sending the wire transfer, and they tendered performance by the wire transfer and the offer to pay communicated by their attorney. Based on this showing, and relying on case law to the effect that specific performance is an appropriate remedy to enforce a stock purchase agreement for a closely held corporation whose stock had no ascertainable market value at the time the agreement was entered into, the court concluded that the plaintiffs were entitled to specific performance of McCurdy's obligation under the Modified Agreement.

5. Failure to Make Capital Contribution

Jiao v. Xu, 28 F.4th 591 (5th Cir. 2022).

The court held that either the assignors or assignees, or both, of membership interests in a Texas LLC had standing to bring a derivative action against the LLC's majority member, the trial court did not err in declaring part of the majority member's interest invalid due to the member's failure to pay all of his required capital contribution, and a turnover order in favor of the LLC against the member requiring the member to turn over his remaining membership interest in partial satisfaction of the judgment against the member for unauthorized withdrawals from the LLC's account did not violate the exclusivity provision of the charging order statute.

In 2016, Ningbo Xu, Xiongen Jiao, Zhonghua Yu, and Pengfei Zhou formed Dongtai Investment Group, LLC for the purpose of acquiring the Crowne Plaza Hotel in Houston. Jiao, Yu, and Zhou each made a capital contribution of \$1,000,000 for a 16.66% membership interest in the LLC. Xu was contractually obligated to pay \$3,000,000 for a 50.02% membership interest. Jiao, Yu, and Zhou later assigned their membership interests to their children. Upon discovering financial wrongdoing by Xu, the assignors and assignees brought various claims against Xu and LCL Company, LLC (collectively, "Xu"), including claims for breach of contract, fraud, derivative and non-derivative breach of fiduciary duty, and violations of § 10(b) of the Securities Exchange Act.

The district court granted the plaintiffs' motion for preliminary injunction and declaratory judgment against Xu. The district court found that Xu did not make his agreed \$3,000,000 capital contribution for his membership interest in the LLC but instead only paid \$867,889. Based on that finding, the court declared Xu's unit certificates invalid and ordered the LLC to provide Xu with new certificates reflecting the ownership interest derived from the amount Xu had actually paid. The district court also declared that Xu owed the LLC \$1,304,400 based on numerous unauthorized withdrawals from the LLC's accounts. The district court then entered a turnover order that required Xu to return his membership interest to the LLC in partial satisfaction of the declaratory judgment award.

After rejecting Xu's contention that the district court erred in denying his motion to dismiss based on the plaintiffs' lack of standing to assert shareholder derivative claims and concluding that the plaintiffs met their pleading burden with respect to the federal securities fraud claims and that the plaintiffs showed a substantial threat of irreparable injury sufficient to support the preliminary injunction, the court considered Xu's challenges to the declaratory relief awarded by the district court. The district court found that Xu only paid \$867,889 for his membership interest, declared his unit certificates invalid, and ordered the LLC to provide Xu with new certificates based on the amount he actually paid. The district court also declared that Xu "owes and is indebted to [the LLC] for \$1,304,400.80."

Xu argued that the district court's declaration that part of his membership interest was invalid resulted functionally in his expulsion from the LLC and that the declaration thus violated Section 101.107 of the Texas Business Organization Code. *See* TEX. BUS. ORGS. CODE § 101.107 ("A member of a limited liability company may not withdraw or be expelled from the company."). The court, however, found no error in the district court's determination in this regard. The court explained that the declaratory judgment did not expel Xu from the company.

The district court simply invalidated Xu's unit certificates on the basis that Xu had not paid for all the membership units he had contractually agreed to purchase and ordered that Xu be provided new certificates based on the amount of capital he actually contributed.

Xu also asserted that the district court's declaratory relief violated Section 101.112(d) of the Texas Business Organizations Code, which provides that a charging order is the "exclusive remedy" for satisfying a judgment out of the judgment debtor's membership interest. The court stated that this contention lacked merit because the district court's declaratory relief did not implicate Section 101.112(d). Rather than constituting satisfaction of a judgment out of Xu's membership interest, the declaratory relief was a declaration of the percentage of Xu's company ownership, based on the amount of capital Xu paid into the LLC.

Xu also asserted that the declaratory relief violated the plain language of the LLC's operating agreement, which limited the liability of a member "for the losses, debts, liabilities and obligations" of the company and provides that "[n]o member shall have the right to demand and receive any distribution from [Dongtai] in any form other than cash." The court stated that these provisions had no bearing on the district court's declaration that Xu failed to pay for his full membership interest and was thus only entitled to the membership units for which he paid.

Finally, the court affirmed the district court's issuance of a turnover order requiring Xu to turn over his remaining 14.45% membership interest in the LLC in partial satisfaction of the LLC's declaratory judgment award of \$1,304,400 against Xu. The parties disputed whether the district court's turnover order violated Section 101.112 of the Texas Business Organizations Code, which states that "[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest." TEX. BUS. ORGS. CODE § 101.112(d). Based on intermediate appellate case law in Texas, the court made an "*Erie* guess" that the turnover order issued by the district court did not run afoul of this exclusivity provision. Because Dongtai was the judgment creditor seeking Xu's membership interest in Dongtai, and the turnover order involved an explicit award of the membership interest from Xu to Dongtai, the court concluded that § 101.112(d) did not preclude the turnover of Xu's interest to partially satisfy Dongtai's judgment against him.

6. Spousal Consent

Arya Risk Management Systems, Pvt. Ltd. v. Dufossat Capital Puerto Rico, LLC, No. H-16-3595, 2021 WL 6197360 (S.D. Tex. Dec. 30, 2021), amended on reconsideration in part, 2022 WL 358251 (S.D. Tex. Feb. 2022).

The court held that multiple common-law claims (including claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty), which were asserted by an LLC against a member, his spouse, and other parties, were preempted by the Texas Uniform Trade Secrets Act because the claims were based on converting, using, and misappropriating the LLC's confidential information. The court held that there was no evidence of a preexisting relationship between a member's spouse and the LLC so as to give rise to an informal duty in the business relationship between the LLC and the member's spouse, and the spousal consent to the LLC operating agreement signed by the spouse did not impose on the spouse the contractual duties and obligations imposed by the operating agreement.

Manaj Ghayalod ("Manaj") was hired as the Managing Director of Quantitative Research and Analytics of an energy and commodities trading company named West Oaks Energy, L.P. ("West Oaks") formed by Ashton Soniat and Mark Schwausch. Manaj recommended that West Oaks hire his wife, Pallavi Ghayalod ("Pallavi") to identify and recruit programmers in India. With West Oaks' agreement, Pallavi formed Arya Risk Management Systems, Pvt. Ltd. ("Arya") to recruit computer programmers. When Soniat and Schwausch parted ways, Soniat formed defendant Dufossat Capital Puerto Rico, LLC, ("Dufossat"), in which Manoj received a one percent membership interest. Manoj signed the operating agreement of Dufossat, and Pallavi signed a spousal assent. This case was a combination of three actions, and this opinion addressed various motions and requests to file motions for summary judgment by the parties.

The preemption provision of the Texas Uniform Trade Secrets Act (TUTSA) was the basis for the court's rulings as to numerous claims in this opinion. TUTSA's preemption provision states:

- (a) Except as provided by Subsection (b), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.

- (b) This chapter does not affect:
- (1) contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (2) other civil remedies that are not based upon misappropriation of a trade secret; or
 - (3) criminal remedies, whether or not based upon misappropriation of a trade secret.

Tex. Civ. Prac. & Rem. Code § 134A.007.

Among the claims addressed in this opinion were counterclaims asserted by defendant Dufossat against Manoj and Pallavi for breach of fiduciary duty, constructive fraud, aiding and abetting, assisting and participating, conspiracy, joint enterprise, and spousal agency liability. The court examined the factual allegations supporting each of these claims and concluded that almost all of them were preempted by TUTSA because they were based on misappropriating, converting, or using trade secrets. For example, in support of the counterclaim for aiding and abetting asserted against Manoj and Pallavi, Dufossat alleged:

Manoj was both an employee and an owner of Dufossat. Accordingly, he owed a fiduciary duty to act in the best interests of Dufossat. In a supposed attempt to save money, Manoj recommended to Soniat that Dufossat hire India Programmers. In addition, Manoj encouraged Soniat to engage his wife, Pallavi, to recruit the India Programmers. Manoj assured Soniat that he would train and supervise the India Programmers and that he would protect Dufossat's confidential information, including its Trader App software.

As opposed to protecting Dufossat's confidential information, especially the Trader App software, Manoj aided and abetted Pallavi, his wife, in converting and misappropriating Dufossat's confidential information. To be specific, Manoj actively assisted Pallavi in copying Dufossat's Trader App software on a server in India for the purpose of misappropriating the software. In addition, Manoj actively assisted his wife in converting Dufossat's confidential information, including Dufossat's e-mail system. Finally, Manoj (while still employed by Dufossat) actively assisted his wife in obtaining Dufossat's confidential information to use in her competing business.

With the exception of one allegation against Manoj for breach of fiduciary duty based on his alleged neglect of his duties related to the "Follow Book," the court concluded that all of the claims for breach of fiduciary duty, constructive fraud, aiding and abetting, assisting and participating, conspiracy, joint enterprise, and spousal agency liability were preempted by TUTSA.

Among the other claims and issues addressed by the court were breach-of-contract claims against Pallavi based on alleged breaches of non-disclosure, confidentiality, and noncompete provisions of Dufossat's operating agreement. Dufossat relied on the following spousal assent signed by Pavalli as a basis to hold her liable for breach of the operating agreement:

The undersigned Spouse ("Spouse") of MANOJ GHAYALOD ("Member," ...), hereby signs this ASSENT AND AFFIRMATION ("Assent") and joins in the execution of that certain Operating Agreement dated August 28, 2013, as may be amended from time-to-time ("Agreement") for the purposes of evidencing his or her knowledge of the Agreement's existence and substance after thorough inspection thereof; evidencing his or her acknowledgment that he or she agrees to the provisions contained in the Agreement; and affirming and/or re-affirming, as the case may be, the corporate documentation contained Company's corporate Records ("Records"), including but not limited to any restrictions on transfer of an interest or rights of repurchase surrounding spouses.

...

... This Assent is intended solely as an assent, affirmation and/or reaffirmation of the Agreement and the Records. It is not intended to, and shall not be construed as, conferring, confirming or creating any separate or community property interest in any ownership interest of the Company in favor of the Member's Spouse. Moreover, as is consistent with the Records, no further consent or signature of Member's Spouse shall be required with respect to any future action taken by such Member or the Company under or in connection with this Agreement, the Records or the Company.

Relying on *Wilshire Villa Association v. Strauss*, No. 94-40111, 1994 WL 612411, at *5 (5th Cir. October 24, 1994), which involved a spousal assent to a partnership agreement, the court concluded that Pallavi’s signature on the spousal assent was intended to relieve Dufossat or its members from having to obtain her consent for Manoj’s or Dufossat’s acts. According to the court, the spousal assent did not make her “anything other than a third-party to the Operating Agreement,” and she was entitled to summary judgment on this claim by Dufossat.

The court also addressed a breach-of-fiduciary-duty claim by Dufossat against Pallavi “by virtue of her business relationship with the Dufossat Defendants where she was provided with confidential information and provided with access to the Dufossat Defendants’ e-mail account.” Dufossat alleged that she breached this fiduciary duty by locking the Dufossat Defendants out of their email systems. The court stated that Dufossat “fail[ed] to cite any authority for the proposition that parties to commercial transactions such as those in which Dufossat engaged with Pallavi owe fiduciary duties to one another.” The court acknowledged that Texas law recognizes a fiduciary duty as a matter of law in certain formal relationships and also recognizes an informal fiduciary duty may arise from “a moral, social, domestic or purely personal relationship of trust and confidence.” However, “[t]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.” Here, there was no evidence of a preexisting relationship between Dufossat and Pallavi, and the fact that Dufossat trusted Pallavi did not transform their business arrangement into a fiduciary relationship. Furthermore, the court stated that agreements requiring confidentiality generally do not create fiduciary relationships. Thus, the commercial dealings described in Dufossat’s counterclaims against Pallavi did not transform their arm’s length business transactions into a fiduciary relationship.

7. Indemnification and Advancement

In re DeMattia, 644 S.W.3d 225 (Tex. App.—Dallas 2022, orig. proceeding).

The court of appeals relied on Delaware and Texas case law to conclude that a Texas LLC that sued its former managing member was obligated by the indemnification and advancement provision of the LLC’s regulations (i.e., company agreement) to advance the managing member’s legal fees incurred in defending the lawsuit notwithstanding the LLC’s arguments that enforcement of the provision would violate public policy because advancement would “radically skew the litigation dynamics” and the managing member had unclean hands.

Restoration Specialists, LLC (“Restoration”) provided emergency services to properties damaged by storm, floods, and fires, as well as performing commercial construction and job order services. Prior to the acquisition of Restoration in 2018 by WyoTexGa, LLC, Restoration was owned by Mark DeMattia (“DeMattia”) and his brother. DeMattia was the managing member, and his brother was the minority member. After the sale of Restoration in 2018, Restoration sued DeMattia for breach of fiduciary duty and theft of trade secrets based on DeMattia’s alleged wrongful copying and deletion of Restoration’s project history files a few days before the closing of the sale of Restoration and while he was still managing member.

DeMattia claimed that he was entitled to advancement of his legal fees under the broad and mandatory indemnification and advancement rights provision contained in Restoration’s Regulations, which were adopted in 2004. [Under the Texas Limited Liability Company Act, the equivalent to the “company agreement” under current law was the “regulations.”] Section 9.6 of Restoration’s Regulations provided:

To the fullest extent permitted by the Act: (a) the Company shall indemnify each Member who was, is, or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding (“Proceeding”), any appeal thereof, or any inquiry or investigation preliminary thereto, *by reason of the fact that he or she is or was a Member*; (b) the Company shall pay or reimburse a Member for expenses incurred by such Member (i) in advance of the final disposition of a Proceeding to which such Member was, is, or is threatened to be made a party, and (ii) in connection with his or her appearance as a witness or other participation in any Proceeding. The Company shall indemnify and advance expenses to a Manager or officer of the Company to the extent required to do so by the Act or other applicable law. The Company, by adoption of a resolution of the Members, may indemnify and advance expenses to a Manager, officer, employee, or agent of the Company to the same extent and subject to the same conditions under which it may indemnify and advance expenses to Members under the preceding provisions. The provisions of this Section 9.6 shall not be exclusive of any other right under any law, provision of the Articles,

or these Regulations, or otherwise. The Company may purchase and maintain insurance to protect itself and any Member, Manager, officer, employee, or agent of the Company, whether or not the Company would have the power to indemnify such person under this Section 9.6.

(Emphasis added).

After the Texas Business Organizations Code was enacted, the Regulations were amended as follows: Section 9.6 of the Regulations is hereby modified to provide that the indemnification, advance of expenses, and insurance which the Company is required to or does maintain shall include Members acting as a Member, Manager, and/or as an officer, agent, or employee of the Company to the fullest extent permitted by the Act and the Texas Business Organizations Code.

After the trial court denied DeMattia's motion for summary judgment seeking advancement of his legal expenses, DeMattia filed a petition for writ of mandamus alleging that the trial court abused its discretion by denying advancement of his legal expenses.

DeMattia argued that Section 8.002(b) of the Texas Business Organizations Code provides that an advancement provision adopted in an LLC's governing documents is enforceable and that Restoration's Regulations required Restoration to advance expenses incurred by a current or former member in an action brought against him "by reason of the fact that he or she is or was" a member, and Restoration must "pay or reimburse" such expenses "in advance of the final disposition" of the proceeding and "to the fullest extent" permitted by the Business Organizations Code. Restoration argued that it was not required to advance the requested legal expenses for several reasons.

After determining that mandamus is the appropriate relief to correct an order denying advancement of a claimant's legal fees when a trial court clearly fails to analyze or correctly apply the law in the context of an advancement claim, the court of appeals proceeded to analyze whether the trial court abused its discretion in denying advancement.

The court noted that there is limited Texas case law addressing advancement under the Texas Business Corporation Act or the Texas Business Organizations Code, but Delaware courts have addressed advancement on numerous occasions. Citing *L Series, LLC v. Holt*, 571 S.W.3d 864, 871 (Tex. App—Fort Worth 2019, pet. denied) and *In re Aguilar*, 344 S.W.3d 41, 46-47 (Tex. App—El Paso 2011, orig. proceeding), the court stated that courts across the United States, including Texas, look to Delaware on matters of corporate law. The court explained the policy rationale for indemnification and the distinction between indemnification and advancement as follows:

... Indemnification encourages corporate service by protecting an official's personal financial resources from depletion by the expenses incurred during litigation that results from the official's service. *Aguilar*, 344 S.W.3d at 46 (citing *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005)). "Advancement is an especially important corollary to indemnification" because it provides corporate officials with immediate interim relief from the burden of paying for a defense. *Aguilar*, 344 S.W.3d at 46. "Although the right to indemnification and advancement are correlative, they are separate and distinct legal actions." *Id.* The right to advancement is not dependent on the right to indemnification. *Id.* "A now long line of recent cases enforces mandatory advancement provisions. These cases all stand for the proposition that a ... bylaw ... provision mandating advancement in no way renders the right to advances dependent upon the right to indemnity." *Id.* (citing Stephen A. Radin, "*Sinners Who Find Religion*": *Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 268-69 (2006)). The "ultimate purpose" of advancement is to "protect[] corporate officials' personal financial resources" from the significant expense in litigation resulting from the official's service. *L Series*, 571 S.W.3d at 878-79.

The court stated that it construes advancement provisions under the normal rules of contract construction—ascertaining the true intent of the members, considering the entire document to harmonize and give effect to all provisions, bearing in mind the particular business activity sought to be served, and avoiding an inequitable, unreasonable, or oppressive construction.

After reviewing the evolution of the indemnification provisions of the Texas Limited Liability Company Act, the court summed up current law regarding indemnification and advancement as follows:

Under current Texas law, an LLC's governing documents may adopt the business organizations code's advancement provisions or "contain other provisions, which will be enforceable, relating to: (1) indemnification; [or] (2) advancement of expenses." TEX. BUS. ORGS. CODE § 8.002(b). Importantly, section 8.105(d) expressly permits advancement of reasonable expenses to both current and former officers/governing persons. And, as courts have made clear, advancement is required if a company's governing documents so state. *See L Series*, 571 S.W.3d at 874–75; *Aguilar*, 344 S.W.3d at 49–51.

Restoration argued that Section 9.6(a) (the indemnification clause of the Regulations), and Section 9.6(b) (the advancement clause), must be read separately and that the two clauses distinguish between current and former members in such a way as to provide for indemnification of both current and former members, but to provide for advancement only to current members. The court rejected this argument relying on a Delaware case that interpreted a similar advancement provision and applied it to a former member. *See Weinstock v. Lazard Debt Recovery GP, LLC*, No. CIV.A 20048, 2003 WL 21843254, at *1–7 (Del. Ch. Aug. 8, 2003)(rejecting the argument that an advancement obligation did not apply to former members where the indemnification provision applied to a "person who was or is a party to any ... action, suit or proceeding ... by reason of the fact that such person is or was a member," while the advancement provision did not contain such "language granting advancement to a person who 'is or was' " a member; explaining that the advancement provision referred to "members ... 'defending such ... proceeding[s],' " which created an "obvious linkage back to the proceedings defined in [the indemnity provision]"—i.e., those in which a person was made a party "by reason of the fact that such person is or was a member").

The court here stated that the use of the capitalized term "Proceeding" in the Regulations' advancement provision provided an "obvious linkage" to the immediately preceding indemnity provision defining such "Proceeding" as an "action, suit, or proceeding" to which a Member is or was "made a party ... by reason of the fact that he or she is or was a Member." The court compared this "obvious linkage" between the provisions to that in *Weinstock* where the absence of the "is or was a Member" language in the advancement provision was merely to avoid redundancy, as the term "Proceeding" was already defined to encompass actions against former members. Further, the court here characterized the advancement provision's use of the term "such Member" as an even stronger linkage than the one in *Weinstock*, due to the direct relationship between the "is or was a Member" language of the indemnity provision and the advancement provision.

The court next rejected Restoration's argument that the Regulations were ambiguous. Applying the plain language of the contract, the court concluded the advancement clause clearly applied to both current and former members. According to the court, Restoration's interpretation was not reasonable because it would require the court to disregard the definition of "Proceeding" as set out in section 9.6(a) (the indemnification clause) as including a "threatened, pending, or completed action, suit, or proceeding ... any appeal therefor, or any inquiry or investigation thereto, by reason of the fact that he or she is or was a member" with respect to section 9.6(b) and infer that "such Member" in section 9.6(b) must mean a current member. Because Restoration's interpretation of the contract was not reasonable, the contract was not ambiguous.

Finally, the court rejected Restoration's argument that public policy barred advancement because (1) advancement of fees to DeMattia would radically skew the litigation dynamics, and (2) DeMattia had unclean hands.

The court distinguished the case relied upon by Restoration to support its argument that advancement of fees would skew the litigation dynamics and stated that Restoration did not explain how enforcement of the Regulations would unfairly skew the proceedings. Furthermore, the court stated that Restoration's argument was inconsistent with Texas's strong public policy favoring preservation of the freedom to contract. According to the court, "[t]he principle of freedom of contract requires us to recognize that 'sophisticated parties have broad latitude in defining the terms of their business relationship,' and courts are obliged to enforce the parties' bargain according to its terms and may not rewrite a contract under the guise of interpretation."

The court also disagreed with Restoration’s argument that DeMattia’s allegedly unclean hands disqualified him from seeking equitable relief and from enforcing the advancement clause. The court harkened back to Delaware case law and the recent Texas *L Series* case that relied on Delaware case law as follows:

... Restoration concedes that Delaware courts enforce advancement clauses even when, as here, a former member is sued for misconduct committed while he or she was a member. But, notwithstanding Delaware law and without acknowledging Texas law to the contrary, *see L Series*, 571 S.W.3d at 875, Restoration concludes without support that we should declare the advancement clause void as violating public policy because Restoration has “alleged [relator] is guilty of misappropriating trade secrets, violating the Texas Theft Liability Act, and breach[ing] his fiduciary duties.” But all lawsuits involve allegations of wrongdoing by the other party; Restoration’s argument would render the contract term meaningless and predetermine the merits of its claim. *See Reddy v. Elec. Data Sys. Corp.*, No. CIV.A. 19467, 2002 WL 1358761, at *9 (Del. Ch. June 18, 2002) (mem. op.) (noting that corporation’s unclean hands theory “would turn every advancement case into a trial on the merits of the underlying claims of official misconduct”). Whether relator engaged in wrongdoing is a question for the fact-finder to resolve at the end of the case, not at this preliminary stage.

Restoration’s allegations of misconduct do not change the nature of the right relator has to advancement of fees. *See L Series*, 571 S.W.3d at 875 (citing *Reddy*, 2002 WL 1358761, at *5–6). It is true that corporate advancement practice has an “admittedly maddening aspect.” *L Series*, 571 S.W.3d at 874. That is because, at the time that an advancement dispute ripens, it is often the case that the corporate board has drawn harsh conclusions about the integrity and fidelity of the corporate official seeking advancement. *Id.* The board may well have a firm basis to believe that the official intentionally injured the corporation and is therefore reluctant to advance funds for his defense, fearing that the funds will never be paid back and resisting the idea of seeing further depletion of corporate resources at the instance of someone perceived to be a faithless fiduciary. *Id.* But the Delaware courts have determined that to “give effect to this natural human reaction as public policy would be unwise” because the possibility exists that the company’s allegations are untrue or cannot be proven. *Id.* In that circumstance, it would be difficult to conceive of an argument that would properly leave the corporate official holding the bag for all of his legal fees and expenses; moreover, to do so would make the company’s prelitigation promise illusory. *Id.* Thus, Delaware courts have “often been required to uphold the indemnification and advancement rights of corporate officials accused of serious misconduct.” *Id.*; *see also Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 737 (Del. Ch. 2008) (“The very purpose of an advancement right is to enable a corporate official to protect herself against claims of official wrongdoing.”).

We agree with the Fort Worth court’s decision to follow Delaware law in this situation and conclude Restoration’s arguments to the contrary lack merit. We reject Restoration’s contention that we should declare the advancement provision unenforceable because relator’s alleged conduct was improper and against public policy. *See L Series*, 571 S.W.3d at 875.

8. Post-termination Covenant Not to Compete

Houston Metro Ortho and Spine Surgery, LLC v. Juansrich, Ltd., No. 14-19-00732-CV, 2021 WL 2799643 (Tex. App.—Houston [14th Dist.] July 6, 2021, pet. denied) (mem. op.).

The court of appeals determined that the owner of an interest in an LLC ambulatory surgical center, should take nothing on its conversion, aiding and abetting, and unjust enrichment causes of action due to the economic loss rule doctrine and the presence of the LLC Agreement. The court of appeals also concluded that the owner could not simply elect to recover under its breach-of-contract claim seeking payment for its ownership interest because there were fact questions related to the owner’s termination under the LLC Agreement. With respect to a post-termination covenant not to compete contained in the LLC Agreement, the court held that the covenant did not violate Texas law because the Texas Business and Commerce Code provides that its requirements do not apply to

a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center. The court remanded the breach-of-contract cause of action for further proceedings.

Appellee Richard Francis, M.D. through his business entity Juansrich, Ltd. (collectively "Juansrich") owned an interest in appellant Houston Metro Ortho and Spine Surgery, LLC ("Metro"), an ambulatory surgical center. Juansrich shared ownership in Metro with several other surgeons who were appellants in the dispute. As Class A members of Metro, the surgeons agreed, among other things, that each would conduct a certain percentage of their eligible procedures at Metro. A dispute began when appellants believed that Dr. Francis had stopped performing procedures at Metro.

Metro terminated Juansrich's ownership interest and then filed suit against Dr. Francis seeking to enforce a noncompetition agreement contained in the "Company Agreement of Houston Metro Ortho and Spine Surgery Center LLC" (the "LLC Agreement"). Believing that it was owed significant sums as payment for its ownership interest in Metro, as well as for missed distributions of earnings made while it was still a member of Metro, Juansrich filed counterclaims alleging numerous causes of action, including breach of contract, conversion, aiding and abetting, and unjust enrichment.

The trial court granted Dr. Francis's motion for partial summary judgment on the grounds that the noncompetition agreement was unenforceable. It then realigned the parties making Juansrich the plaintiff. The trial court subsequently granted two Rule 166 motions filed by Juansrich and conducted a bench trial on the remaining issues. At the conclusion of the bench trial, the trial court found in favor of Juansrich and signed findings of fact and conclusions of law supporting recovery on theories of conversion, aiding and abetting, unjust enrichment, and breach of contract. Juansrich elected to recover on its conversion cause of action, and the trial court signed a final judgment awarding Juansrich \$9,855,596.85 in damages.

The court of appeals began by citing Texas Business Organizations Code § 101.052 and observing that "[a]s with all limited liability companies, Metro is governed by a contract, the LLC Agreement." The court then presented some of the "key provisions" in the LLC Agreement:

Section 2.3

Section 2.3(b)(iv) provides that each Class A member "shall perform at least one-third of such Class A Member's procedures that require or can be performed at an ambulatory surgery center at the [Metro] Center."

Section 4.3

Section 4.3 addresses redemption of members' ownership interests. Section 4.3 divides terminating events with respect to a member's ownership interest as either "Adverse Terminating Events" or "Non-Adverse Terminating Events." It further provides that the redemption price for a Class A member's units "shall be based on whether the Terminating Event is an Adverse Terminating Event or a Non-Adverse Terminating Event." An Adverse Terminating Event occurs when, among other events not at issue here, a Class A Member materially breaches the LLC Agreement. A Non-Adverse Terminating Event occurs with respect to a Class A Member if, among other things, the Class A Member is removed "for any reason or no reason," by "Supermajority Approval." The redemption price is also affected by whether Metro has become "Operational" as defined in the LLC Agreement. Metro becomes "Operational" once it "is Medicare certified as an ambulatory surgical center." If Metro is not "Operational," or the termination is "Adverse," then the redemption price for a departing Class A Member's Units is limited to the departing Member's capital contribution. If Metro is "Operational," and the termination is "Non-Adverse," the redemption price is determined by a formula found in section 4.3(g)(ii) of the LLC Agreement.

Section 10.7

Section 10.7 of the LLC Agreement contains a non-competition clause. It provides that

[d]uring the term of a Class A Member's membership in [Metro], and for a period of one year thereafter, no Class A Member nor any of such Class A Member's Affiliates, except as provided below or through [Metro], shall, without prior written Consent of the Class B Member, directly or indirectly own, manage, operate, control, or participate in any manner in the ownership, management, operation, or control of, or serve as a partner, employee, principal, agent,

consultant, or otherwise contract with, or have any financial interest in, or aid or assist any other person or entity that operates a facility (including an ambulatory surgical center or office-based or practice-based facility or operating site or room that provides any of the services offered by [Metro]) to provide outpatient surgical services, including a state-licensed, Medicare-certified or accredited surgery center or office-based surgical facility, within 10 miles of the location of [Metro's ambulatory surgical center] (the "Restricted Territory") nor may a Class A Member provide Facility Fee Procedures in such Class A Member's office. The preceding sentence shall not be construed to prevent a Class A Member or any of a Class A Member's Affiliate's from (i) maintaining staff privileges at any facility, (ii) providing professional surgical services and earning a professional fee thereon (but not acting as an owner or having a compensation or financial relationship) in any other ambulatory surgical center or hospital, (iii) performing any in-office procedures under local anesthesia that does not require the presence of an anesthesiologist or a certified registered nurse anesthetist, or (iv) having any financial relationship or owning an interest in any hospital within the Restricted Territory. For purposes of this Section 10.7, it shall be presumed that a person or entity competes with [Metro] and violates this provision if such person or entity has any interest in any facility or center of any type whatsoever for the conduct of, or compensation relationship with, any outpatient surgery center within the Restricted Territory.

On appeal, Metro argued that because the dispute was governed by a contract (the LLC Agreement), the trial court erred in allowing Juansrich to recover on its conversion cause of action. The court of appeals agreed that the economic loss rule precluded Juansrich's recovery in tort.

The court of appeals also determined that the trial court's findings supporting a recovery by Juansrich for unjust enrichment were improper because a contract covered all aspects of the claim.

The court of appeals then concluded that the trial court had erred by granting Juansrich's Rule 166 motions. With respect to the first motion, the court of appeals initially determined that the trial court erred by ruling as a matter of law that Juansrich's termination was non-adverse. According to the court of appeals, there was a fact question on whether Juansrich had complied with § 2.3 of the LLC Agreement that required each Class A member to perform at least one-third of the member's procedures at Metro.

The court of appeals then determined that, due to a statutory change, the trial court had erred in concluding that the covenant not to compete in the LLC Agreement was unenforceable:

Metro also argues that the trial court erred when it partially based its first Rule 166 order on its previous summary judgment order declaring the covenant not to compete found in the LLC Agreement unenforceable. The trial court had previously determined that the covenant not to compete in the LLC Agreement was unenforceable because it failed to comply with the requirements set forth in subsection 15.50(b) of the Business and Commerce Code. *See* Tex. Bus. & Com. Code Ann. § 15.50(b) (establishing requirements that a covenant not to compete relating to the practice of medicine must comply with to be enforceable). Metro did not deny that the covenant not to compete found in the LLC Agreement did not include those restrictions. Metro instead argued that the LLC Agreement did not need to comply with the subsection 15.50(b) requirements because the legislature had amended the statute by adding subsection (c), which provides that "subsection (b) does not apply to a physician's business ownership interest in a licensed hospital or licensed ambulatory surgical center." *Id.* at § 15.50(c). As a result of this addition to the statute, Metro argued the covenant not to compete did not need to comply with subsection 15.50(b) and was otherwise enforceable against Dr. Francis. We agree with Metro. ...

Here, it is undisputed that the covenant not to compete at issue here was contained in the LLC Agreement forming Metro, the entity owning and operating an ambulatory surgical center. As a result, pursuant to the plain language of the statute, the covenant not to compete in the LLC Agreement was not required to comply with the limitations found in subsection (b) of the statute.

See Tex. Bus. & Com. Code Ann. § 15.50(c) (providing that subsection 15.50(b) of the Business and Commerce Code “does not apply to a physician’s business ownership interest in a licensed hospital or licensed ambulatory surgical center”); *Novamed Surgery Ctr. of Tyler, L.P. v. Bochow*, No. 12-12-00159-CV, 2013 WL 2725544, at *4 (Tex. App.—Tyler June 12, 2013, no pet.) (mem. op.) (“Before the [2009] amendment, a noncompetition covenant involving a physician’s ownership interest in an [ambulatory surgical center] required a buyout provision. Following the amendment, it did not. It is more than a ‘clarification.’ It is a change in the law.”) (internal citations omitted). We therefore hold that the trial court erred when it ruled that the covenant not to compete in the LLC Agreement was unenforceable because it did not contain the limitations found in subsection 15.50(b) of the Business and Commerce Code and then relied on that ruling in part to determine that Metro’s termination of Dr. Francis and Juansrich was non-adverse.

9. Forum Selection

Leary v. Coinmint LLC, No. 14-20-00375-CV, 2022 WL 1498197 (Tex. App.—Houston [14th Dist.] May 12, 2022, no pet. h.) (mem. op.).

The court held that the Delaware LLC statute did not preclude a manager of a Delaware LLC from waiving his right to maintain a legal action in Delaware and that a provision of the operating agreement (which was signed by the manager in his individual capacity) fixing venue in Harris County, Texas, was an enforceable forum-selection clause that constituted a consent to personal jurisdiction and satisfied the plaintiffs’ initial burden to overcome the manager’s special appearance.

Mintvest Capital, Ltd (“Capital”) and Coinmint Living Trust, LLC, a Delaware entity, (“CLT”) were members of Coinmint, LLC (“Coinmint”), a private bitcoin mining farm that operated the largest digital currency center in North America. Prieur Leary, III (“Leary”) was the president and manager of Capital. Ashton Soniat (“Soniat”) was the trustee and manager of CLT. In 2016, Capital and CLT formed Coinmint as a Delaware limited liability company, and Coinmint’s members and managers executed the entity’s operating agreement. The operating agreement stated that Coinmint was a manager-managed limited liability company and that each member could designate a manager. CLT designated itself as a manager, and Capital designated Leary as a manager. The operating agreement contained a forum-selection and choice-of-law clause that stated, “[t]his Agreement and the application o[r] interpretation hereof, shall be governed exclusively by the laws of the State of Delaware, and specifically the [Delaware Limited Liability Company Act]. Venue for any dispute shall lie in Harris County, Texas.” Soniat signed the operating agreement in his representative capacity for CLT as a member and in his representative capacity for CLT as a manager. Leary signed the Operating Agreement in his representative capacity for Capital as a member and in his individual capacity as a manager.

Following a conflict between Leary and Soniat, Coinmint and CLT filed suit against Leary in 2019 for breach of contract in Harris County, Texas. Coinmint and CLT later amended their petition to name Capital as a defendant. Leary and Capital filed a special appearance, challenging the lack of sufficient evidence to establish their minimum contacts under either a specific or general-jurisdiction analysis, and contending that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. Leary specifically argued that the “mere fact that [Capital] and Mr. Leary signed an operating agreement with an unenforceable venue clause is insufficient to establish personal jurisdiction over [Capital] or Mr. Leary.”

Coinmint and CLT filed a response to Leary and Capital’s special appearance, arguing that “the forum-selection clause operated as Leary’s and Capital’s consent to the Texas forum.” Coinmint and CLT specifically asserted that the “provision is a valid mandatory forum-selection clause which requires enforcement under both Delaware and Texas law, and that even if the clause were construed as permissive, it operates as a valid ‘consent to jurisdiction.’” The trial court issued an order denying Leary and Capital’s special appearance. Subsequently, Leary and Capital filed an appeal, but only Leary filed a brief. Capital’s appeal was dismissed for want of prosecution.

The primary issue on appeal was whether the trial court erred in denying Leary’s special appearance because the operating agreement’s forum-selection clause was valid under Texas and Delaware law. During the pendency of the appeal, Coinmint and CLT also moved for sanctions. The court found that Coinmint and CLT satisfied their initial burden by asserting that their claims fell under a valid forum-selection clause.

The court noted that personal jurisdiction is a waivable right and that a litigant may give express or implied consent to the personal jurisdiction of the court, such as via a contractual consent-to-jurisdiction clause. Texas courts must enforce forum-selection clauses in contracts between the parties “unless the party opposing enforcement ‘clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.’”

First, Leary focused his argument on the second sentence of 6 Del. C. § 18-109(d), which states that a member that is “not a Manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.” 6 Del. C. § 18-109(d). Leary alleged that as Capital could not waive its right to maintain a legal action in Delaware courts (as a non-managing member), neither could Leary as its representative. The court rejected this argument because Leary, not Capital, had been designated a manager, and Leary had signed the operating agreement in his individual capacity.

Second, Leary argued that the Delaware statute rendered the forum-selection clause a nullity because the statute may apply to Capital. The court disagreed and found the reasoning of *Li v. loanDepot.com, LLC* persuasive. (No. CV 2019-0026-JTL, 2019 WL 1792307, at *2 (Del. Ch. Apr. 24, 2019). The *Li* court found that “[t]he plain language of the second sentence only extends to nonmanaging members, and it only preserves the ability of a nonmanaging member to bring or maintain a suit in Delaware... The second sentence of Section 18-109(d) is thus a narrow provision that only preserves the ability of a nonmanaging member to sue in Delaware.” The court here agreed with the court in *Li* that the second sentence of the statute is a “narrow provision” that did not invalidate the forum-selection clause. The court said the statutory provision would have allowed Capital, as a non-managing member, to assert internal governance claims in Delaware notwithstanding the forum-selection clause, but Capital was not asserting any claims. As Leary was a manager who signed in his individual capacity, he could not avoid the operating agreement’s forum-selection clause.

Finally, the court decided not to grant Coinmint and CLT’s motion for sanctions. The court found the question of how to reconcile the operating agreement’s mandatory forum-selection clause against Delaware’s no-venue-waiver provision to be “an issue worthy of resolution.”

Xia v. Floyd, 638 S.W.3d 821 (Tex. App.—Fort Worth 2021, no pet. h.).

The court of appeals held that a clause in the operating agreement of an LLC was a forum-selection clause, not a venue-selection clause, and the clause applied to a member’s derivative claims.

Wenxin “Cindy” Xia and Raymond Floyd signed an operating agreement for Garth Rollbrook, LLC (“GR”), a Texas LLC formed in 2016. The certificate of formation listed GR’s “business address” in Denton County. The operating agreement identified Xia and Floyd as members, and each acquired a 50% ownership interest. Floyd was identified as the manager with power to make all decisions regarding management of GR’s business. GR’s purposes as stated in the operating agreement included “the acquisition, development, management, leasing, financing and sale of real property located in the City of Baytown, County of Harris, State of Texas.” The agreement provided that GR’s “principal place of business” was in Tustin, California, “or at any other place which the Manager(s) selects, including an office in Texas.” The agreement included the following “Jurisdiction and Venue/Equitable Remedies” clause:

[GR] and each Member hereby expressly agrees that if, under any circumstances, any dispute or controversy arising out of or relating to or in any way connected with this Agreement shall, notwithstanding Article IX [i.e., the dispute-resolution article], be the subject of any court action at law or in equity, such action shall be filed exclusively in the courts of the State of California or of the United States of America located in the counties of ... Orange or Los Angeles, as selected by the Member that is the plaintiff in the actions, or that initiates the proceeding or arbitration. Each Member agrees not to commence any action, suit or other proceeding arising from, relating to, or in connection with this Agreement except in such a court and each Member irrevocably and unconditionally consents and submits to the personal and exclusive jurisdiction of such courts for the purposes of litigating any such actions, and hereby grants jurisdiction to such courts Members will be entitled to recover all reasonable costs and expenses, including but not limited to all reasonable attorneys’ fees, expert and consultants’ fees, incurred in connection with the enforcement of this Section.

After Xia discovered that Floyd had been managing GR in a way she believed solely benefitted him and disadvantaged GR, she filed suit against GR and Floyd in Harris County state district court. Xia alleged that Floyd had breached his fiduciary duty to her, which rendered the operating agreement void and justified the dissolution of GR. She pleaded that venue was proper in Harris County based on the statutory mandatory-venue provision fixing venue in the county in which all or part of real property the subject of the suit is located. Tex. Civ. Prac. & Rem. Code § 15.011. Floyd and GR answered the Harris County suit and argued that Xia’s claims were governed by the mandatory forum-selection clause in the operating agreement. In 2020, Xia filed this suit in a Denton County state district court, raising individual and derivative claims against Floyd for fraud, breach of fiduciary duty, and theft. She further sought a temporary restraining order, a temporary injunction, and a receiver to liquidate GR. Xia alleged venue was proper in Denton County because she was seeking to liquidate GR through a receivership, which may be filed in the district court where GR’s principal place of business or registered office is located. *See* Tex. Bus. Orgs. Code § 11.402(b). She characterized Section 11.402 as a mandatory-venue provision and argued that “a suit involving two or more claims must be brought in the mandatory venue”—Denton County. *See* Tex. Civ. Prac. & Rem. Code § 15.004. The trial court issued a TRO and granted Xia’s motion for expedited discovery

Floyd filed a verified plea in abatement based on the Harris County suit and a combined motion to dismiss Xia’s suit for improper venue based on the agreement’s forum-selection clause and a motion to compel arbitration based on a separate arbitration clause in the operating agreement. The substance of his motion sought dismissal on the basis of the forum-selection clause. Floyd also filed a designation that he was moving GR’s principal place of business from California to Harris County. The trial court held a hearing on Floyd’s motion to dismiss, motion to compel arbitration, and plea in abatement and orally granted the “Motion to Dismiss” and signed an order granting Floyd’s “Motion to Dismiss for Improper Venue” and ordering Xia to personally pay “legal fees and costs” to Floyd. The trial court also dissolved the TRO. Xia filed a motion for new trial, which the trial court denied.

On appeal, Xia argued, as she did in the trial court, that the purported forum-selection clause was instead a venue-selection clause and that Floyd waived the venue issue by failing to file a proper motion to transfer venue before filing his plea to the jurisdiction.

The court of appeals explained that forum-selection clauses, which are presumptively valid and enforceable unless shown to be unreasonable, are enforced through a motion to dismiss in contrast to a contractual venue-selection clause, which is enforced through a timely motion to transfer venue or the issue is waived. A forum-selection clause contractually selects the adjudicative body in which jurisdiction is properly invoked, typically a nation or state, whereas a venue-selection clause selects the geographic place of trial. The clause at issue here required that any dispute or controversy regarding the agreement be filed either in a California state court or in a California federal court located in Orange or Los Angeles County. The clause also contained a consent to “personal and exclusive” jurisdiction for suit only in the specified California fora. Although a county was attached to the selection of a California federal court, the clause specified another state (California) or sovereign (the United States courts located in California’s Orange or Los Angeles County) as the exclusive jurisdiction for any disputes regarding the agreement. The court concluded that the clause was in fact a forum-selection clause (even though partially entitled as a venue clause in the agreement) which was appropriately enforced through a motion to dismiss.

After concluding that Floyd met his initial burden to prove the existence of a forum-selection clause, the court addressed Xia’s argument that the provision only applied to GR’s members—Xia and Floyd—and not to GR, i.e., that her derivative claims were not within the scope of the forum-selection clause. The forum-selection clause provided that “any dispute or controversy” arising out of, related to, or “in any way connected with” the agreement shall be filed in the selected California fora. In support of her argument that the forum-selection clause did not apply to her derivative claims, Xia pointed to the dispute-resolution clause in the agreement, which provided that “any dispute or disagreement *solely between* or among any of [the members] arising out of, relating to, or in connection with this Agreement” would be subject to mediation and arbitration. [Emphasis added.] The court pointed out, however, that the dispute-resolution clause was part of Article IX of the agreement, and the forum-selection clause expressly stated that its provisions applied “notwithstanding Article IX.” Thus, the court concluded that the dispute-resolution clause did not prevent application of the forum-selection clause to Xia’s derivative claims.

Xia next argued that the forum-selection clause obligated only Xia and Floyd individually, not GR, because only Xia and Floyd signed the agreement and no authorized representative of GR signed it. The court acknowledged that a forum-selection clause generally may be enforced only by and against a party to the agreement containing the clause, but the court concluded that Floyd and Xia clearly signed in both their individual and representative capacities in the signature portion of the agreement, which was as follows:

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written [i.e., October 30, 2016].

GARTH ROLLBROOK, LLC,
a Texas limited liability company

RAYMOND FLOYD,
an individual
By: /s/ Raymond Floyd
Raymond Floyd
Manager

WENXIN XIA,
an individual
By: /s/ Winxin Xia
Wenxin Xia
Member

Xia further argued that the terms of the agreement did not bind GR and, thus, did not apply to her derivative claims, but the court pointed out that the forum-selection clause expressly stated that the members *and* GR agreed to the selected fora for any dispute or controversy arising out of, relating to, or in any way connected to the agreement. Thus, the court rejected this argument as well.

Ray v. Lynass, No. A-21-CV-00020-LY, 2021 WL 8443684 (W.D. Tex. Nov. 9, 2021).

The court determined that a forum-selection clause in a company agreement of a Texas LLC permitted disputes to be litigated in Texas state court but did not preclude disputes from being litigated in federal court, that the forum-selection clause at issue did not waive a nonresident member’s challenge to personal jurisdiction, that the non-resident member in this case had sufficient minimum contacts in Texas to support the exercise of specific personal jurisdiction over him, that the forum-selection clause did not specify venue, and that venue in this case was proper in the Western District of Texas.

In 2015, Michelle Ray and Patrick Lynass, a resident of California, co-founded Absolute Facility Solutions, LLC (“Absolute”), a Texas limited liability company based in Texas, and executed a company agreement. The company agreement contained a provision entitled “Settling Disputes” (the “Forum-Selection Clause”) that stated that “[a]ny lawsuit will be under the jurisdiction of the state of Texas.”

In 2020, Absolute voted to terminate Lynass as director of sales and treasurer of the company. Ray and Absolute subsequently brought suit against Lynass under ten causes of action for violations of the Anti-Cybersquatting Consumer Protection Act, the Texas Uniform Trade Secrets Act, and the Defend Trade Secrets Act, as well as for breach of fiduciary duty, conversion, tortious interference, and breach of contract. Absolute and Ray alleged Lynass had misappropriated company property and confidential information for his separate use in interstate commerce. Absolute and Ray further alleged that Lynass used the company’s information to thwart Absolute’s relationship with “employees, contracts, and clients.” Lynass moved to dismiss Ray and Absolute’s claims against him based on the Forum-Selection Clause executed between the parties, as well as for lack of personal jurisdiction, improper venue, and failure to state a claim.

First, Lynass argued that the Forum-Selection Clause unambiguously required the parties to adjudicate any lawsuit arising from the agreement in Texas state court because the clause was mandatory. Absolute and Ray responded that the Forum-Selection Clause allowed for disputes arising out of the company agreement to be filed in federal court because the clause was permissive.

The magistrate court rejected Lynass’s argument and recommended that the district court dismiss Lynass’s motion because the Forum-Selection Clause was permissive. As an initial matter, the court noted that Texas law governed the interpretation of the forum-selection clause. A mandatory forum-selection clause requires that litigation arising from the contract be carried out in a given forum. However, a permissive forum-selection clause is only a contractual waiver of personal jurisdiction and venue objections if litigation is commenced in the specified forum. A forum-selection clause is permissive if it does not foreclose the possibility that other courts may also have

jurisdiction. While the Forum-Selection Clause appeared to mandate jurisdiction in Texas state courts, it “neither prohibit[ed] litigation in jurisdictions other than” state court nor provided that state courts in Texas “h[ad] exclusive jurisdiction over all claims arising out of the contract.”

Second, Lynass argued that the district court should dismiss the claims against him for lack of personal jurisdiction over him because Ray and Absolute alleged “no specific act or conduct” by him in Texas and that the Forum-Selection Clause only waived his challenges to personal jurisdiction and venue in Texas state courts. Absolute and Ray responded that Lynass waived any objection to personal jurisdiction in Texas by agreeing to the Forum-Selection Clause in the company agreement. Lynass replied that the law did not support Absolute and Ray’s position.

The court determined that the Forum-Selection Clause did not waive Lynass’s challenge to personal jurisdiction in federal court in Texas. The court stated that the issue was whether the Forum-Selection Clause called for “all lawsuits” arising under the company agreement to be “under the jurisdiction of the state of Texas” and waived Lynass’s objections to jurisdiction in federal court in Texas. The court concluded that the Forum-Selection Clause did not waive Lynass’s objections to personal jurisdiction in federal court in Texas because the lawsuit was not initiated in the forum specified in the clause.

The court determined, however, that Lynass had sufficient minimum contacts in the forum to support the exercise of specific personal jurisdiction over him. As the Texas long-arm statute meets the limits of the Due Process Clause, only two elements exist for the exercise of personal jurisdiction over Lynass: (1) the defendant must have purposefully availed itself of the benefits and protections of the forum state by establishing “minimum contacts” with that state such that it would reasonably anticipate being brought to court there; and (2) the exercise of jurisdiction over the defendant must “comport[] with fair play and substantial justice.” Lynass should have “reasonably anticipated being haled into Texas courts to defend any allegations [arising from a breach] of contract” knowing that the company agreement was formed in Texas and governed by Texas law. Further, Lynass possessed “purposeful contacts” with Texas in forming and leading Absolute in combination with the “foreseeable harmful effects” in Texas of his alleged breach of responsibilities under the company agreement and refusal to return Absolute property and confidential property after his termination. Therefore, the court determined that Ray and Absolute satisfied both elements and that the court could exercise personal jurisdiction over Lynass.

Third, Lynass argued that the district court should dismiss the lawsuit because Ray and Absolute brought the case in the wrong venue. Ray and Absolute responded that Lynass waived any objections to venue via the Forum-Selection Clause. Lynass replied that the Forum-Selection Clause only subjected him to jurisdiction and venue in Texas state court. The court found that the Forum-Selection Clause did not waive Lynass’s objections to venue in the Western District of Texas. A permissive forum-selection clause only serves as a contractual waiver of venue objections “if litigation is commenced in the specified forum.” The Forum-Selection Clause did not specify a particular venue but only the jurisdiction of the “state of Texas.” Therefore, Ray and Absolute did not bring the litigation in the forum specified in the clause.

However, the court found that venue was proper in the Western District of Texas and recommended that the district court deny Lynass’s motion to dismiss based on improper venue. Venue is proper in a district where a “substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). The court found that venue was properly in the Western District of Texas because Ray’s and Absolute’s claims arose from an alleged breach of contract that Ray and Absolute entered into to form a Texas-based company and the harm that Lynass allegedly caused occurred in the Western District of Texas. These reasons were sufficient to establish venue despite Lynass’s residence in California during his tenure as a co-founder and sales director for Absolute.

10. Arbitration

Matter of Marriage of Bowers, 635 S.W.3d 756 (Tex. App.—Amarillo 2021, no pet. h.).

The court of appeals concluded that a motion to compel arbitration in a dispute concerning the sale of one party’s interest in an LLC should not have been denied by the trial court, even though the parties were in the midst of divorce proceedings and were subject to a standing order prohibiting the transfer or encumbrance of community assets.

Christian Bowers and Jamie Bowers were married in 2004. In November of 2011, they formed Bola Pizza, LLC, a Texas limited liability company. They were the sole members and managers of the company, and each owned a 50% membership interest.

In April of 2019, Christian filed for divorce from Jamie, who filed a counterpetition for divorce. Both parties attached to their pleadings a copy of the Travis County Standing Order Regarding Children, Property, and Conduct of the Parties, as required by the Travis County District Clerk. The standing order, which was promulgated by the district courts of Travis County and applied in every divorce suit filed there, included provisions intended to protect the parties and to preserve their property while the divorce suit was pending. Among other things, the parties must refrain from “[d]estroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of one or both of the parties” and from “[s]elling, transferring, assigning, mortgaging, encumbering, or in any other manner alienating any of the property of either party, whether personal property or real estate property, and whether separate or community, except as specifically authorized by [the] order.”

On August 19, 2020, Christian notified Jamie of his offer to buy her membership interest in the company for a total purchase price of \$1,500,000. Christian’s notice was given pursuant to a buyout option that was included in the company agreement:

Each Member (the “Offering Member”) may at any time, including during a pending Proceeding, give written notice to all of the other Members of the Offering Member’s desire to either (i) sell all of the Offering Member’s Membership Interest in the Company to the other Member(s) or (ii) buy all of another Member’s Membership Interests in the Company, specifying therein the price per Unit and the other terms and conditions upon which the Offering Member will buy or sell. The other Member(s) shall have an option, for a period of sixty (60) days after receiving such notice, to elect to purchase the Membership Interest of the Offering Member at the same price per Unit and upon the same terms and conditions that the Offering Member is offering to purchase the other Member’s Membership Interests, the transaction to be closed in the manner specified in this Article 11 with thirty (30) days after the end of such sixty (60) day period. If such option to purchase is not exercised by any Member within the aforementioned period of sixty (60) days, then the Offering Member shall be obligated to purchase the membership interests of the other Member(s) at the price per Unit and upon the terms and conditions specified in the aforementioned notice, and the Members receiving the notice shall be obligated to sell their membership interests to the Offering Member upon such terms and conditions, the transaction to be closed in the manner specified in Article 11 within thirty (30) days after the end of such sixty (60) day period.

Jamie responded to the notice by filing a motion to enforce the Travis County Standing Order, which she argued precluded the exercise of the buyout provision during the pendency of the divorce. Christian then filed a motion to compel arbitration pursuant to a provision in the LLC agreement, asserting that Jamie should be ordered to make an election under the buyout provision or, if a dispute existed, compelled to arbitrate. (Under the mandatory dispute resolution procedure in Bola Pizza’s LLC agreement, any court proceeding brought by an owner against another owner of the company must first be submitted to mediation and, barring resolution of the dispute through mediation, binding arbitration.) Christian requested, in the alternative, a partial lift of the trial court’s standing order to allow for arbitration. The trial court denied Christian’s motion “pursuant to Texas Family Code Section 6.501,” which authorizes courts to impose temporary restraining orders for the protection of the parties and the preservation of their property.

On appeal, Christian argued that he and Jamie contractually agreed to resolve company-related disagreements through mediation and, if mediation was unsuccessful, binding arbitration. He asserted that he was required to seek arbitration to resolve the impasse resulting from Jamie’s failure to respond to his buyout offer. Jamie, on the other hand, argued that the trial court properly exercised its authority to decline to compel arbitration in a suit for the dissolution of a marriage. She claimed that enforcement of the buyout provision would result in a transfer, sale, or encumbrance of community property, which is prohibited by the trial court’s standing order.

The court of appeals teed up the issue to be decided as “whether a party to a pending divorce proceeding can compel the other party to arbitrate a business dispute concerning the sale of one party’s interest in a limited liability company when that interest is subject to the trial court’s standing order prohibiting the transfer or encumbrance of community assets.” The court concluded that compelling arbitration was appropriate:

Both federal and state law strongly favor arbitration. We resolve any doubts about the scope of an arbitration agreement in favor of arbitration and we focus on the factual allegations rather than the legal causes of action asserted. If the facts alleged in support of a claim are “intertwined with” or “occur[] as a direct result from” the contract that contains the arbitration agreement, then the claim is within the scope of the arbitration agreement.

Section 12.02 of the company agreement governs when the mediation-then-arbitration dispute resolution procedure applies, providing: “If a Company-related dispute exists between Members that may disrupt the business, or become a court Proceeding, the Members shall resolve the disagreement according to the following dispute resolution procedure ...” In section 12.03, the parties agreed that this was “the exclusive procedure as to resolving intra-Member and intra-Manager disputes relating to the business of the Company.”

It is undisputed that Christian initiated the buyout process, specifically referencing the option set forth in ... the company agreement and providing Jamie 60 days to make her election. Jamie refused to engage in the process. Christian then asserted that Jamie had breached the parties’ agreement and sought arbitration.

Christian’s invocation of the buyout provision and his allegations that Jamie breached the agreement are matters arising directly from the company agreement. Jamie’s refusal to follow the buyout procedure set forth in the company agreement led to a “company-related dispute” intended to be resolved by arbitration.

Jamie asserts that “business operations disputes” are arbitrable under the company agreement, but the instant dispute over the buyout provision is not. She argues that, in seeking to enforce the buyout provision, Christian is in fact attempting to bind the trial court to an arbitrated division of the parties’ community property business, which is beyond the scope of the company agreement. We are unpersuaded by this argument.

In section 13.02 of their company agreement, entitled “Divorce Between Members,” Christian and Jamie decided:

[i]f a divorce Proceeding takes place between Members, the divorcing Members acknowledge and agree that, to the extent the divorcing Members reach a resolution as to Company matters and assets and Membership Interests using methods provided for in this Agreement (including the Buyout provision in Article 11, and the dispute resolution procedures in Article 12), each divorcing Member mutually agrees to execute any additional documents deemed necessary by the other divorcing Member to ensure that the disposition of the divorce Proceeding(s) incorporates the prior settlement between the divorcing Members as to the Company matters and assets, and Membership Interests.

This provision reflects that Christian and Jamie contemplated that, should a divorce occur, they might have disputes concerning business operations, company assets, and membership interests. They agreed to resolve those disputes using the provisions and procedures set forth in the company agreement, including the buyout provision and the mediation/arbitration provision. Christian and Jamie did not contractually agree that only business operations disputes, and not membership interest disputes, would be arbitrated in the event of a divorce proceeding. They did not agree that the buyout provision would become ineffective or unenforceable upon a party’s filing for divorce. “We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.” *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

Moreover, the buyout provision contemplates an end result of either Christian’s purchase of Jamie’s membership interest or Jamie’s purchase of Christian’s membership interest. Neither outcome changes the character of the community property. Neither outcome removes any membership interest in the company from the community estate. Thus, enforcement of the buyout provision does not interfere with the trial court’s authority to divide the marital estate.

Because Christian met his burden of establishing that the dispute at hand falls within the scope of a valid arbitration agreement, the burden then shifted to Jamie to plead and prove a defense to enforcement of the arbitration agreement. The defense offered by Jamie is the trial court's authority under section 6.6015(b) of the Family Code, which allows the trial court to stay or refuse to compel arbitration "on any other ground provided by law." She reasons that the trial court relied on such an "other ground provided by law," namely section 6.501 of the Family Code, to properly refuse to compel arbitration. Section 6.501 authorizes courts to render temporary restraining orders, such as the one in place in this case, for the protection of parties and preservation of their property. *See* TEX. FAM. CODE ANN. § 6.501(a).

We acknowledge that the trial court has an interest in keeping the parties and their property in a stable position pending resolution of the underlying divorce. However, Texas has a "strong public policy favoring freedom of contract" that is "firmly embedded in our jurisprudence." *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016). Texas law recognizes that parties "shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by [c]ourts." *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). The public policy favoring enforcement of contracts encompasses agreements that directly affect the division of property acquired during marriage.

Jamie has cited no cases relying on section 6.501 or section 6.6015 of the Family Code as authority for denying arbitration under a valid arbitration agreement. In light of this lack of authority, we are unconvinced that the interplay between the company agreement and the divorce proceeding creates a defense to enforcement of the arbitration agreement for which the parties bargained.

Therefore, we conclude that Jamie failed to establish a cognizable defense to the arbitration provision. Accordingly, the trial court abused its discretion by denying Christian's motion to compel arbitration or to partially lift the trial court's standing order to allow for arbitration.... [W]e reverse the district court's order denying Christian's motion and remand the case to the trial court for further proceedings consistent with this opinion.

CDIC of NC Protected Cell A-600 LLC v. Gottlieb, Civ. A. No. 4:18-CV-04142, 2021 WL 2201311 (S.D. Tex. June 1, 2021).

The district court denied a motion to compel arbitration on the grounds that the movant had waived his right to arbitration by litigating for over two years.

Plaintiff CDIC of NC Protected Cell A-600 LLC ("PCC A-600") was a North Carolina limited liability company. Joshua Gottlieb and William Y. Webb were appointed as co-managers of PCC A-600. A provision in the operating agreement stated that "[a]ny dispute arising out of or in connection with this Agreement or the breach thereof shall be decided by arbitration" in North Carolina.

After he was served with process in this action, Gottlieb sent an email in December 2018 saying that "the venue agreed upon if there is a dispute is arbitration in lieu of litigation." But Gottlieb failed to move at that time to compel arbitration. He instead proceeded in the instant action for well over two years.

PCC A-600, along with fellow Plaintiffs Aquamarine Risk Management LLC, Aquamarine Pools of Houston LLC, and Aquamarine Pools of Texas LLC, moved for leave to file a third amended complaint in October 2020. The motion sought (in relevant part) to add Webb as a party. PCC A-600 then initiated arbitration against Webb in April 2021 before a decision on the motion seeking leave.

Gottlieb filed a motion to compel arbitration as to all claims against him in a consolidated proceeding along with Webb. PCC A-600 responded, arguing that Gottlieb waived his right to compel arbitration. The district court began by stating the standards associated with waiving a right to arbitration:

But the "right to arbitrate a dispute, like all contractual rights, is subject to waiver." *Nicholas v KBR, Inc.*, 565 F3d 904, 907 (5th Cir 2009). A party waives its right to arbitration "by substantially invoking the judicial process, to the detriment or prejudice of the other party." *Maldonado v FirstService Residential, Inc.*, 2021 WL 966064, *4 (SD Tex), citing *Pacheco v PCM Construction Services, LLC*, 602 F Appx 945, 948 (5th Cir 2015, per curiam). To substantially

invoke the judicial process, a party “must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration.” *In re Mirant*, 613 F3d 584, 589 (5th Cir 2010), quoting *Subway Equipment Leasing Corp v. Forte*, 169 F3d 324, 326 (5th Cir 1999). And to show prejudice, a party must demonstrate “inherent unfairness in terms of delay, expense, or damage to a party’s legal position that occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” *Republic Insurance Co. v PAICO Receivables, LLC*, 383 F3d 341, 346 (5th Cir 2004) (citations and quotations omitted).

The Fifth Circuit holds that “a bright-line rule is inappropriate for deciding whether a party has waived its right to arbitration.” *In re Mirant*, 613 F3d at 589. Instead, the question of what constitutes a waiver of the right of arbitration depends upon the facts of each case. *Tenneco Resins, Inc. v Davy International, AG*, 770 F2d 416, 420 (5th Cir 1985). But there’s “a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden.” *Republic Insurance*, 383 F3d at 344; *see also In re Mirant*, 613 F3d at 588.

The court then concluded that Gottlieb had waived his right to compel arbitration:

Plaintiffs argue in response to the motion that Gottlieb has substantially invoked the judicial process in this action. Gottlieb doesn’t address this argument in his reply.

When determining whether a party has substantially invoked the judicial process, courts consider “the extent to which the party seeking arbitration filed pleadings or motions indicating a desire to have the court rather than an arbitrator resolve the dispute.” *Electrostim Medical Services, Inc v Health Care Service Corp.*, 2012 WL 5373462, *6 (SD Tex). Also pertinent in this respect is whether that party has engaged in discovery and other pretrial activity.

One aspect of this inquiry is quite clear. “A party waives arbitration by seeking a decision on the merits before attempting to arbitrate.” *Petroleum Pipe Americas Corp v Jindal Saw, Ltd.*, 575 F3d 476, 480 (5th Cir 2009); *In re Mirant*, 613 F3d at 589. ...

Gottlieb has likewise substantially invoked the judicial process. He knew that he had a right to compel arbitration by at least December 7, 2018, as evidenced by his email that day. But he proceeded to seek dismissal of the claims against him, without seeking to compel arbitration in the alternative. What’s more, his motion to dismiss was granted in part *nearly two years ago*, with this action proceeding through substantial litigation since then.

Plaintiffs have satisfied their burden to show that Gottlieb substantially invoked the judicial process in this action. ...

Plaintiffs argue in response to the motion that they would be prejudiced if the motion to compel arbitration were granted.

Gottlieb raises a number of arguments in reply. First, he argues that all of Plaintiffs’ litigation efforts to this point were directed towards all Defendants rather than specifically towards Gottlieb. Second, Gottlieb further argues that even if his motion to compel is denied, PCC A-600 still needs to resolve its claims against him in arbitration because its claims against Webb “are directly tied to” those against him. Third, Gottlieb faults Plaintiffs for failing “to point to a single ‘discovery tool’ or aspect of ‘motion practice’ that is prohibited in arbitration and was used by Mr. Gottlieb to PCC A-600's disadvantage.” Fourth, Gottlieb asserts that preserving the status quo would thwart “judicial economy and uniformity.”

This misperceives the necessary showing. “Prejudice to the party opposing arbitration, not prejudice to the party seeking arbitration, is determinative of whether a court should deny arbitration on the basis of waiver.” *Price v Drexel Burnham Lambert, Inc.*, 791 F2d 1156, 1159 (5th Cir 1986) (emphasis added). True, the party opposing arbitration “carries the burden of demonstrating prejudice.” *Qazi v Stage Stores, Inc.*, 2020 WL 1321538, *6 (SD Tex), citing *Forby*, 909 F3d at 784. But Chief Judge Rosenthal has previously noted that “prejudice can take the form of heavy legal expenses incurred in responding to the movants’ litigation conduct; of allowing a party the advantages of discovery through litigation that would be unavailable in arbitration; the

costs attendant to delay; and the risk of relitigating issues the court has already decided.” *National Oilwell Varco, LP v Sadagopan*, 2018 WL 276364, *5 (SD Tex). And while delay in asserting arbitration doesn’t alone constitute prejudice, courts do consider it when determining whether the nonmovant would be prejudiced. ...

Plaintiffs here would likewise experience substantial prejudice if forced to arbitrate their claims against Gottlieb at this late juncture. That’s because Gottlieb has waited nearly three years since Plaintiffs initiated this action to attempt to compel arbitration. Plaintiffs submit that they “have incurred \$642,317 in attorney’s fees and costs litigating in this forum.” They have also responded to at least 286 document requests and produced over 3,000 pages, reviewed over 70,000 files and documents produced by Defendants, taken depositions, and begun preparing trial materials.

Gottlieb doesn’t address these facts at all, largely ignoring the extent to which granting the motion to compel would prejudice Plaintiffs. He simply argues (in essence) that Plaintiffs shouldn’t be able to pursue arbitration against one co-manager while proceeding here in litigation against the other. Of course, he doesn’t at all address what’s to become of this litigation as to all of the other Defendants, which claims by Plaintiffs are not subject to arbitration. Regardless, any such prudential concerns can in no way be said to outweigh the enormous amount of time and resources that Gottlieb has devoted to this action—and which he has required Plaintiffs—and this Court—to devote to this action.

Plaintiffs have sufficiently demonstrated that they would be prejudiced if this matter were now sent to arbitration. ...

Defendant Joshua Gottlieb has waived his right to compel arbitration. His motion by to compel arbitration is DENIED.

G. Assignment or Transfer of Membership Interest

Longhorn Integrity Inspection Services, LLC v. McCurdy, No. H-16-1649, 2017 WL 11675395 (S.D. Tex. Nov. 20, 2017) (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 concluded that three equal members of an LLC entered into an enforceable agreement (evidenced by a writing that was subsequently orally modified) pursuant to which one of the members agreed to sell a 28 1/3% membership interest to the other two members, notwithstanding transfer restrictions contained in the LLC’s regulations previously adopted by the members, and that the purchasing members were entitled to specific performance by the selling member because there was no evidence that the membership interest had an ascertainable market value.

In 2014, Garrett Pletcher, Bryan Harper, and Berwin McCurdy Jr. formed Longhorn Integrity Inspection Services, LLC (“LIIS”), a Texas limited liability company. At its inception, each of the three members owned an equal 33 1/3% membership interest. In connection with the formation of LIIS, the members adopted company regulations entitled “Limited Liability Company Documents of Longhorn Integrity Inspection Services LLC” (the “LIIS Regulations”). Section 3.17 of the LIIS Regulations, entitled “Restrictions on Sale and Transfer of Membership Interests,” provided that “[n]o membership interest of [LIIS] ... shall be sold or transferred, nor shall any purported sale or transfer of membership interests be valid: 1. Without a current resolution of the Managers approving the transfer; or ... 5. Without following the detailed issue and transfer procedures set out in the Company Record Book Section Five: Membership.” Section 3.15 of the LIIS Regulations, entitled “Mandatory Prerequisites before Sale or Transfer of Membership Interests,” stated that LIIS “shall sell no membership interests ... except ... [if] there is on file in the Company record a written attorney’s opinion, satisfactory to the Company.”

On April 15, 2015, Pletcher, Harper, and McCurdy entered into an agreement for McCurdy to sell McCurdy’s one-third (33 1/3%) membership interest in LIIS to Pletcher and Harper, in exchange for \$15,000 (the “Agreement”). Pletcher and Harper signed one copy, and Pletcher and McCurdy signed another copy. Subsequently, McCurdy, Pletcher, and Harper orally discussed and agreed that McCurdy would sell a 28 1/3% membership interest in LIIS to Pletcher and Harper in exchange for \$10,000 (the “Modified Agreement”). Pursuant to wire transfer instructions provided by McCurdy, Pletcher and Harper sent a wire transfer of \$10,000 to McCurdy’s bank account, but the funds were returned because the account had been closed. Pletcher and Harper offered McCurdy

\$10,000 through their lawyer at the time, but McCurdy did not transfer his 28 1/3% membership interest. Pletcher, Harper, and LIIS brought this suit alleging breach of contract by McCurdy and specific performance of his agreement to transfer a 28 13/% membership interest in exchange for \$10,000.

McCurdy contended the Agreement was not enforceable because (1) Pletcher, Harper, and McCurdy did not all three sign the Agreement; (2) the Agreement was later modified; and (3) the parties did not properly follow the LIIS Regulations. The court rejected these arguments and concluded that Pletcher and Harper were entitled to specific performance of the Modified Agreement.

The court rejected McCurdy's first argument because the Agreement stated that it was to be signed by Pletcher, Harper, and McCurdy, and Pletcher and Harper signed one copy of the Agreement, and Pletcher and McCurdy signed an identical copy of the Agreement. Although Harper's and McCurdy's signatures appeared on separate documents, the two copies were kept together, and Pletcher testified he filed both copies of the Agreement in LIIS's company files. Further, the Agreement did not explicitly state and there was no evidence presented that the parties intended signatures as a condition of the parties' mutual assent. Construing both copies together and in light of the parties' intent, the court concluded that the Agreement was a valid and enforceable contract.

The court next concluded that Pletcher, Harper, and McCurdy orally and validly modified the Agreement based on their testimony that they orally agreed to modify the Agreement, and an email message that indicated they discussed and agreed to the terms of the Modified Agreement.

Next, the court rejected McCurdy's contention that the Modified Agreement was not valid because the Modified Agreement and LIIS Regulations should be construed together. Because the Regulations and the Modified Agreement were not entered into at the same time, and based on Pletcher's testimony that he was unaware of Section 3.15 and Section 3.17 and that the parties did not contemplate the LIIS Regulations at the time the parties entered into the Agreement and the Modified Agreement, the court concluded that the parties did not intend the LIIS Regulations and the Modified Agreement to be read together. Based on that conclusion, the court found the Modified Agreement was an enforceable contract for McCurdy to sell 28 1/3% of McCurdy's membership interest in LIIS in exchange for \$10,000.

The court concluded that time was not of the essence with respect to the transfer of the funds, and McCurdy was not excused from his obligation to transfer a 28 1/3% membership interest. Because McCurdy did not transfer the interest, he breached his obligation under the Modified Agreement.

The court found that the plaintiffs showed that they were ready, willing, and able to timely perform their obligations under the Modified Agreement by sending the wire transfer, and they tendered performance by the wire transfer and the offer to pay communicated by their attorney. Based on this showing, and relying on case law to the effect that specific performance is an appropriate remedy to enforce a stock purchase agreement for a closely held corporation whose stock had no ascertainable market value at the time the agreement was entered into, the court concluded that the plaintiffs were entitled to specific performance of McCurdy's obligation under the Modified Agreement.

H. Judicial Dissolution/Winding Up

Travis v. Travis, No. 09-20-00116-CV, 2022 WL 1177611 (Tex. App.—Beaumont Apr. 21, 2022, no pet. h.) (mem. op.).

The court held that there were genuine issues of fact that precluded summary judgment in a case in which one member of a two-member LLC sought judicial winding up of the LLC.

Daniel Travis and Tommy Travis formed Travis Brothers Building Automation Texas, LLC in 2007. Article 2 of the operating agreement of the LLC provided that “[t]he Members initially shall contribute to the Company capital as described in Exhibit 3 attached to this Agreement. The agreed value of such property and cash is \$11,000.” The agreement further provided that “the description and each individual portion of this capital contribution is as follows” and shows Daniel providing \$6,000 and Tommy providing \$5,000. The agreement allocated the LLC's profits and losses to the members in proportion to each member's relative capital interest in the LLC. According to the operating agreement, the members voted on managers. Although both brothers were initially named managers, Daniel was elected Chief Executive Manager (“CEM”) and had the “primary responsibility for managing the operations of the Company and for effectuating the decisions of the Managers.” The operating agreement also provided that the members “[b]y a vote of the Members holding a majority of the capital

interests in the Company as set forth in Exhibit 2, as amended from time to time, shall elect so many Managers as the Members determine[.]”

In 2018, Tommy filed a petition for dissolution and an application for temporary restraining order and injunctive relief, naming Daniel and the LLC as defendants. The court granted a TRO, and Tommy subsequently filed a motion to appoint a receiver. In 2020, Tommy filed a motion for summary judgment and requested a court-appointed person to carry out the winding up of the LLC. Tommy argued that Section 11.314 of the Texas Business Organizations Code authorized a winding up of the LLC because: (1) the economic purpose of the LLC was likely to be frustrated; (2) Daniel’s conduct made it impracticable to carry on business with him; and (3) Daniel’s actions made it not reasonably practicable to carry on the LLC’s business in conformity with its governing documents. Tommy also requested the court appoint a person to wind up the LLC pursuant to Section 11.054 of the Texas Business Organizations Code.

Tommy’s summary judgment evidence included his original petition and application for TRO, in which he alleged that he and Daniel each had a fifty percent ownership interest, were equal managers, and that Daniel was appointed CEO. He also alleged that Daniel’s actions had caused and continued to cause substantial damages to him and that the brothers were deadlocked due to discord and distrust for which there was no expectation of resolution. Tommy complained that Daniel attempted to lock him out of the LLC, removed him as a signer from their bank account, and reduced his responsibilities by naming him as Fleet Coordinator. Tommy’s summary judgment evidence also included a statement from American Express showing charges from July 2013 to March 2015, a federal tax lien notice against the LLC from 2017 and 2018 totaling \$580,289, the Company Operating Agreement, a letter dated May 15, 2018 from Daniel to the LLC’s bank requesting that Tommy be deleted as a person authorized to sign on the account, an email from a former employee explaining why she decided to leave her job, and an email from Daniel to Tommy dated May 17, 2018, regarding his new role as Fleet Coordinator.

Daniel and the LLC filed their response to the summary judgment motion, which included the affidavit of the LLC’s controller Jessie Travis (who was not related to the brothers), the LLC operating agreement, Jessie’s CV, a reconciliation of the capital accounts of the members, and certified copies of federal tax lien releases. The defendants asserted that there was not any competent evidence supporting the grounds for winding up under Section 11.314 of the Texas Business Organizations Code or that, at a minimum, their summary judgment evidence created fact issues on those questions. For example, the defendants pointed to the operating agreement, which showed Tommy contributed \$5,000 of the \$11,000 startup capital, giving him a 45.45% ownership interest in the LLC even though he claimed he owned 50% of the LLC. The defendants argued Daniel owned a majority interest in the LLC and could thus elect or remove managers as he saw fit. As the LLC’s CEM, the defendants said Daniel had the authority to make the decisions that he made on the LLC’s behalf. The defendants also objected to Tommy’s summary judgment evidence, including the original petition, arguing that the pleadings Tommy filed did not constitute summary-judgment proof. They also objected to the American Express statement and the former employee’s email discussing why she left the LLC, relying on Texas Rules of Evidence 802, 901, and 902.

The trial court held a hearing and found that Tommy and Daniel each held a 50% ownership interest in the LLC and that “the members are unable to jointly agree on any business matters or management of the Company’s affairs, the members are unable to break the deadlock, and, as a result, Court ordered winding up of the Company is necessary and proper.” The defendants appealed.

Assuming without deciding that Tommy’s summary-judgment evidence was admissible, the court of appeals concluded that Tommy still failed to prove he was entitled to judgment as a matter of law, as explained below, because genuine issues of material fact existed with respect to Tommy’s ownership share and whether he was entitled to have the company involuntarily wound up.

The court reviewed the summary-judgment evidence with respect to each of the grounds for winding up under Section 11.314 of the Texas Business Organizations Code, which provides as follows:

A district court in the county in which the registered office or principal place of business in this state of a domestic partnership or limited liability company is located has jurisdiction to order the winding up and termination of the domestic partnership or limited liability company on application by an owner of the partnership or limited liability company 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.

First, the court addressed whether Tommy had established as a matter of law that the economic purpose of the LLC was likely to be frustrated. Tommy asserted that Daniel created a toxic work environment, used funds for inappropriate entertainment and housing, allowed a federal tax lien to be filed, and attempted to lock Tommy out of the LLC. Tommy relied upon an American Express statement with charges between 2013 and 2015 purporting to show inappropriate charges, a federal tax lien, and a former employee's email complaining of Daniel, but the court concluded that Jessie's affidavit and supporting documents created a fact issue on whether the LLC's purpose was likely to be frustrated. The court stated that Jessie, a CPA, was qualified to express opinions about the LLC's operations. She stated that she interacted with the LLC's employees and customers, and she opined that the LLC had sought and obtained additional profitable projects. She attached certified copies of releases of tax liens to her affidavit and swore that the LLC was current on all its federal and state taxes and currently had no tax liens against its property. She attached a copy of the LLC operating agreement and explained that the agreement provided for a total initial capital contribution of \$11,000, of which Tommy contributed \$5,000, and Daniel contributed \$6,000. She explained that Daniel owned 6/11 or 54.55% and Tommy owned 5/11 or 45.45% of the LLC, and the LLC's records did not reflect or show any additional capital contributions of cash or property, testimony that contradicted Tommy's claim that he contributed additional capital consisting of a truck and tools. Testimony of the LLC's prior controller, Gina Crisci, also contradicted Tommy's claims that he provided additional capital to the LLC. With regard to Tommy's argument that Daniel's actions harmed the LLC, the court pointed out that the American Express statement showed charges from three to five years before the lawsuit was filed, and Jessie averred that any charges that were not legitimate business expenses were "treated as distributions to the partner who made the charge or received the benefit of the expenditure." The court stated that the former employee's email showed the former employee was generally unhappy but did not provide any conclusive evidence that the economic purposes of the LLC were likely frustrated. Jessie explained that the LLC was viable and had good customers, was current on its taxes, and had over \$250,000 in equity based on the capital account reconciliation for the LLC. Thus, the court concluded that a genuine issue of material fact existed regarding whether the LLC's economic purpose was likely to be frustrated.

Next, the court addressed whether Tommy conclusively established that Daniel engaged in conduct relating to the entity's business that made it not reasonably practicable to carry on with Daniel. Tommy argued it was not practicable to carry on the business with Daniel based on the American Express statement (which showed what Tommy asserted were inappropriate expenditures of LLC funds) and correspondence showing that Daniel removed Tommy from the account at the LLC's bank, reduced Tommy's role in the LLC, and unilaterally reduced Tommy's salary. Again the court pointed to Jessie's affidavit and Cursci's affidavit, which addressed the treatment of expenses, Daniel's right to make decisions, Tommy's continued receipt of payments despite not currently providing services to the LLC, and the improved financial condition of the LLC since Tommy filed suit. Based on this summary judgment evidence, the court concluded that a genuine issue of material fact existed as to whether Daniel's conduct made it impracticable to carry on the business with Daniel, thus precluding summary judgment on this ground.

Finally, the court addressed whether Tommy conclusively established that it was not reasonably practicable to carry on the LLC's business in conformity with its governing documents. Tommy contended that Daniel's attempts to assume full control of the LLC ran afoul of the LLC operating agreement, which listed both brothers as managers, and the trial court's finding that each member owned 50% of the LLC. Tommy asserted that the parties were deadlocked and unable to agree on business matters or management of the LLC as a result of Daniel's attempts to lock Tommy out. Tommy's argument hinged on the trial court's finding that the brothers each owned a 50% interest, but the court concluded that the defendants' summary judgment evidence suggested that Daniel owned a 6/11 interest, and Tommy owned a 5/11 interest, which would result in Daniel having the right to elect or remove managers as he saw fit. Further, Jessie averred that the LLC continued to operate in accordance with its operating agreement and delineated the reasons why. Thus, the court concluded that the defendants' evidence created a genuine issue of material fact precluding summary judgment under Section 11.314(3).

The court concluded its opinion by revisiting the trial court's finding as to the members' ownership interest, which was the basis of the trial court's finding of a deadlock that necessitated a winding up. The court again pointed to the operating agreement, which undercut Tommy's argument that he and Daniel each owned a 50% interest. The court cited provisions of the Texas Business Organizations Code addressing recording keeping by the LLC regarding each member's capital contributions. Even assuming the trial court properly considered testimony by Tommy and Daniel's sister that she participated in a family meeting at which her brothers discussed forming a company that they intended to own 50-50, this testimony did not conclusively establish equal ownership in light of the terms of the operating agreement and Daniel's testimony that he added an extra \$1,000 to the \$5,000 their father gave each brother to start the business in case a dispute arose between the owners. Daniel testified that Tommy saw the document with the amounts on it, signed it, expected an unequal split, and did not object to Daniel owning five or six percent more of the LLC. As for federal tax documents that showed each brother owned 50%, both Jessie and Crisci testified that the federal tax filings were erroneous. Crisci explained that the CPA firm responsible for preparing the LLC's tax documents made the error because the accounting firm was never given a copy of the operating agreement and instead assumed the brothers each owned 50% shares in the LLC. The trial court relied on federal tax returns and on Tommy's testimony that he contributed additional capital to the LLC in the form of a truck and tools, but the affidavits of Jessie and Crisci, as well as the LLC records (which showed no additional capital contributions by Tommy), created a genuine issue of material fact as to the interests owned by the brothers in the LLC.

I. Merger, Conversion, Sale of Assets

1400 FM 1417 LLC v. CertainTeed Corporation, 4:21-cv-00847, 2022 WL 906192 (E.D. Tex. Mar. 28, 2022).

The court held that a Delaware corporation was not a proper party to a suit arising out of a lease entered into by the corporation where the corporation no longer existed due to its conversion to a Delaware limited liability company, which then converted to a Texas limited liability company, which then underwent a divisive merger into two Texas limited liability companies, one of which was allocated the lease at issue and then converted into a Delaware limited liability company. The court analyzed the citizenship of the Delaware limited liability company that ultimately resulted from these transactions and held that the LLC was a citizen of Delaware and Pennsylvania based on its members at the time when the case was removed. Although there was diversity of citizenship between the parties, the case was remanded due to the defendant's failure to establish that the amount in controversy exceeded \$75,000.

In 2003, CertainTeed Corporation entered into a long-term lease agreement with the State of Texas to lease commercial property. Following Texas's sale of the property to 1400 FM 1417 LLC ("1400 FM"), 1400 FM became the owner and lessor of the property. On September 24, 2021, 1400 FM served CertainTeed LLC with an eviction notice, claiming that CertainTeed LLC was in default of the lease agreement. 1400 FM filed a forcible detainer suit in a justice of the peace court after CertainTeed LLC refused to vacate the property. Subsequently, CertainTeed LLC removed the case to federal court.

On October 22, 2019, CertainTeed Corporation converted from a Delaware corporation to a Delaware limited liability company. Then on October 23, 2019, the entity converted from a Delaware limited liability company to a Texas limited liability company. On that same day, the entity effected a divisional merger under Tex. Bus. Orgs. Code § 10.001. The entity split into CertainTeed LLC and DBMP LLC (both of which were Texas entities). CertainTeed LLC was the successor in interest on all assets and liabilities unrelated to asbestos litigation. Later that same day, CertainTeed LLC converted to a Delaware limited liability company.

1400 FM argued that CertainTeed LLC failed to establish complete diversity of citizenship, making removal improper. Subject matter jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship between the parties based on the facts as they exist at the time of removal. For diversity purposes, a corporation is a citizen of the state of its incorporation and the state where its principal place of business is located. The citizenship of a limited liability company is determined by the citizenship of all of its members. After concluding that CertainTeed LLC adequately alleged that 1400 LM was a citizen of Texas, the court turned to the issue of what entity was the proper defendant. The plaintiff insisted that CertainTeed Corporation was the proper defendant as the entity that entered into the lease, but the court pointed out that CertainTeed Corporation no longer existed as a result of the divisive merger described in the opinion.

The court found that CertainTeed LLC was a citizen of Delaware and Pennsylvania for diversity purposes. Due to the change in the entity's form resulting from a merger, the court considered whether to determine citizenship based upon the dividing corporation or the surviving limited liability company. The court stated that where there has been a merger of entities, the citizenship of the surviving entity generally is controlling for diversity purposes. A court may still consider the citizenship of the merging corporation if it is unclear that a complete and effective merger has occurred, but the court found that an effective merger occurred, as shown by the Certificate of Divisional Merger issued by the Texas Secretary of State. Following the divisive merger, CertainTeed LLC, a Texas limited liability company, converted to a Delaware limited liability company. Therefore, the court considered the citizenship of the Delaware limited liability company at the time of the removal. CertainTeed LLC possessed one member, CertainTeed Holding Corporation. CertainTeed Holding Corporation was incorporated in Delaware and had its principal place of business in Pennsylvania. Thus, CertainTeed LLC was a citizen of Delaware and Pennsylvania.

The court found that 1400 FM's misnomer of CertainTeed LLC as CertainTeed Corporation did not deprive the court of subject matter jurisdiction. Where two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity, the misidentification is fatal to jurisdiction and requires remand. However, a misnomer where a plaintiff sues the correct entity under a mistaken name does not destroy diversity jurisdiction. The pleadings indicated that 1400 FM intended to sue the entity that was the lessee of the property. Thus, 1400 FM's error constituted a misnomer of CertainTeed LLC that did not require remand. Further, removal in this case did not involve a diverse third-party attempting to create subject-matter jurisdiction by substituting itself for a non-diverse defendant. CertainTeed LLC was the successor in interest of CertainTeed Corporation. Additionally, CertainTeed Corporation no longer existed as an entity at the time the case was filed and removed.

Although there was diversity of citizenship between the parties, the court ultimately determined that the case must be remanded because CertainTeed LLC did not prove that the amount in controversy exceeded \$75,000 as required for diversity jurisdiction.

J. Forfeiture and Involuntary Termination

G Force Framing LLC v. MacSouth Forest Products, L.L.C., No. 05-20-00835-CV, 2022 WL 500027 (Tex. App.—Dallas Feb. 18, 2022, no pet. h.) (mem. op.).

The court of appeals held that an LLC that suffered a tax forfeiture and was reinstated more than three years later was not a "terminated entity" as defined by the Texas Business Organizations Code. Claims by the LLC based on contracts entered into during the period of forfeiture and asserted after the LLC's reinstatement were not barred by Sections 11.253, 11.356, and 11.359 of the Texas Business Organizations Code addressing the effect of reinstatement after involuntary termination by the Secretary of State, three-year post-termination survival, and extinguishment of claims.

G Force Framing LLC ("G Force") was formed on April 1, 2014, and went through tax forfeiture on January 29, 2016. After the forfeiture, during 2016 and 2017, G Force entered into three sub-contracts with Stoneleigh Construction Company, LLC ("Stoneleigh"). Disputes arose during the construction projects, and Stoneleigh sued G Force for breach of contract and negligence. G Force asserted numerous counterclaims and cross-claims against Stoneleigh and other parties (collectively, "appellees"). Appellees filed a motion for summary judgment, arguing that G Force had no capacity to sue on post-dissolution contractually based claims. G Force responded that it was entitled to pursue its claims because G Force had been reinstated. G Force's summary judgment evidence included the following: (i) a September 23, 2019, Tax Clearance Letter for Reinstatement from the Texas Comptroller of Public Accounts concerning G Force providing "The referenced entity has met all franchise tax requirements and is eligible for reinstatement through May 16, 2020[]" and (ii) a September 23, 2019 Certificate of Filing of G Force from the Office of the Secretary of State stating G Force "has been reinstated to active status on the records of this office." The trial court granted summary judgment in favor of appellees on G Force's claims on the basis that G Force's post-termination claims had expired due to G Force's failure to reinstate during the three-year period following its forfeiture. G Force appealed.

The court of appeals reviewed the relevant statutory provisions of the Texas Tax Code and Texas Business Organizations Code (TBOC) and concluded that the trial court erred in rendering the summary judgment because G Force was not a "terminated entity" whose claims were barred under the TBOC.

The court first reviewed the provisions of the Texas Tax Code providing for forfeiture of a taxable entity's right to transact business in Texas, a process that the parties did not dispute had occurred with respect to G Force. See Texas Tax Code §§ 171.2515, 171.309, 171.252(1–2). Based on G Force's tax forfeiture, appellees argued that G Force became a "terminated entity" as defined in TBOC § 11.001(4), which provides:

- (4) "Terminated entity" means a domestic entity the existence of which has been:
 - (A) terminated in a manner authorized or required by this code, unless the entity has been reinstated in the manner provided by this code; or
 - (B) forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.

Appellees argued that G Force's failure to reinstate from January 29, 2016, to January 29, 2019, resulted in its involuntary termination under the TBOC, but the court reviewed the involuntary termination provisions under the TBOC and pointed out that the tax forfeiture of G Force was not an involuntary termination by the Secretary of State under the TBOC because failure to pay franchise taxes is not a ground for the Secretary of State to involuntarily terminate an entity under the TBOC.

Next, the court addressed whether G Force was a "terminated entity" under TBOC due to its failure to pay its franchise tax under the Texas Tax Code. The court explained that G Force's tax forfeiture was set aside, resulting in the reinstatement of its active status on the records of the Secretary of State pursuant to the provisions of the Texas Tax Code. Section 171.313(a) of the Texas Tax Code provides that if a corporation's charter or certificate of authority has been forfeited, "a stockholder, director, or officer of the corporation at the time of the forfeiture ... may request in the name of the corporation that the secretary of state set aside the forfeiture of the charter or certificate. "If, as was the case for G Force, a request is made and the delinquent tax is paid, Section 171.313 provides that "the secretary shall set aside the forfeiture of the corporation's charter or certificate of authority." It was undisputed that G Force's tax forfeiture was set aside in September 2019, resulting in its reinstatement "to active status on the records of [the Texas Secretary of State]."

The court next rejected the appellees' argument that G Force had only three years from its date of forfeiture to reinstate as follows:

Nevertheless, appellees argue that G Force had only three years from its date of tax forfeiture to reinstate. Appellees direct us to three sections of the TBOC: (i) TBOC § 11.356, which provides a terminated filing entity's limited survival after termination; (ii) TBOC § 11.359, which enumerates a terminated entity's extinguishment of existing claims; and (iii) TBOC § 11.253, which provides that a terminated entity "is considered to have continued in existence without interruption from the date of termination," if the terminated entity was reinstated before the third anniversary of the date of its involuntary termination. BUS. ORGS. §§ 11.356, 11.359, 11.253. However, each of these sections of the TBOC applies to a terminated entity.

As concluded above, G Force was not involuntarily terminated under TBOC § 11.251(b). Furthermore, Texas Tax Code § 171.313 contains no time limitation for setting aside a tax forfeiture, so G Force's reinstatement under the Texas Tax Code after three years is not dispositive. TAX § 171.313. Appellees direct us to our opinion in *Donica Group, LP v. Thompson Excavating, Inc.*, wherein we held an entity that failed to pay its franchise taxes was a "terminated entity," subject to the limitations of limited survival after termination under TBOC § 11.356. No. 05-19-00235-CV, 2020 WL 57340, at *3 (Tex. App.—Dallas Jan. 6, 2020, no pet.) (mem. op.). However, Thompson Excavating, Inc. in *Donica Group, LP* did not reinstate after its most recent, pertinent forfeiture. *Id.* Unlike in *Donica Group, LP*, G Force was reinstated under the tax code. Under TBOC § 11.001(4)(B), this reinstatement and setting aside of G Force's tax forfeiture removed its status as a "terminated entity." BUS. ORGS. § 11.001(4)(B). For those reasons, we must conclude G Force was not a terminated entity under the TBOC § 11.001(4)(B) and therefore not subject to the limitations found in TBOC §§ 11.356, 11.359, and 11.253. See BUS. ORGS. §§ 11.001(4), 11.356, 11.359, 11.253. As G Force was not a terminated entity, it retained the ability to pursue claims. See BUS. ORGS. § 3.003. Accordingly, we must conclude that the trial court erred in granting appellees' motion for summary judgment on G Force's claims.

The court next addressed counterclaims and cross-claims that were asserted by Kerry Graves—in the alternative—in his individual capacity, in the event that the trial court found G Force was a terminated entity. As to these claims, the court pointed out that it was undisputed that the agreements were between G Force and Stoneleigh—not Graves in his individual capacity. Because the court concluded that no termination barred G Force from pursuing its claims against Stoneleigh, G Force retained title to its claims. The court additionally addressed amended pleadings filed after the trial court dismissed G Force’s claims, in which Graves asserted claims (i) “on behalf of” G Force and (ii) as himself, doing business as G Force. Relying on Texas Supreme Court precedent stating that a stockholder cannot recover personally for wrongs done solely to the corporation, the court of appeals held that the trial court did not err in dismissing the claims asserted by Grave individually because he did not have the right to recover personally for harms to G Force. Although the trial court entered no specific ruling on the “derivative-like” claims asserted by Graves “on behalf of” G Force, the court of appeals stated that its resolution of the ability of G Force to pursue its claims obviated any need for Graves to pursue “derivative-like” claims.

Benbow v. Al-Barnawi, No. 13-20-00131-CV, 2021 WL 3556214 (Tex. App.—Corpus Christi Aug. 12, 2021, no pet. h.) (mem. op.).

The court of appeals reversed the trial court’s determination that a member-manager of an LLC could not be held personally liable under § 171.255 of the Texas Tax Code. The court of appeals concluded that the trial court had misapplied § 171.255 by wrongfully determining that the plaintiff’s claim sounded in negligence.

Appellant Aaron Benbow sued appellee Mohammad Al-Barnawi, alleging that he “[p]aid for auto repairs that were never performed” by Al-Barnawi’s business, Auto Mechanic Service Plus, LLC. Auto Mechanic had its right to transact business in Texas forfeited on September 29, 2017 for failure to pay franchise taxes. Its charter was forfeited on February 2, 2018. Benbow alleged that he took his vehicle to Auto Mechanic in February of 2019 for the specific purpose of having the air conditioning evaporator core replaced. He paid Auto Mechanic \$1,075 to replace the part and \$760 to perform additional repairs that Auto Mechanic recommended. After problems persisted with his vehicle, Benbow took it to a dealership. A mechanic at the dealership told Benbow that the evaporator core had not been replaced and that the other work performed by the LLC was unnecessary.

Benbow claimed that Al-Barnawi was the sole member-manager of Auto Mechanic and was actively engaged in the day-to-day operations of the business. He filed a small claims suit against Al-Barnawi, alleging that he “[p]aid for auto repairs that were never performed” by the LLC. On September 17, 2019, after a trial on the merits, the justice of the peace court rendered a judgment in favor of Benbow and awarded him \$3,500 in damages. Auto Mechanic had its charter reinstated on September 29, 2019, and thereafter Al-Barnawi appealed the judgment to a county court at law for a trial de novo.

The county court held a trial on the merits and rendered a take nothing judgment in favor of Al-Barnawi. The court found that Benbow engaged the LLC to perform the repair work; an employee of the LLC, not Al-Barnawi, performed the repair work; the LLC invoiced Benbow; and Benbow paid the LLC. Based on these findings, the court concluded that “the entity that is subject to any liability for the negligent repair work that is being alleged by [Benbow] is [the LLC].” The trial court further concluded that Benbow could not hold Al-Barnawi personally liable for the wrongful conduct of the LLC under § 171.255 of the Texas Tax Code because the statute does not apply to unintentional torts, and Benbow’s claim was “for negligent repair work.” Benbow appealed the decision.

The court of appeals began by explaining the relationship between the limited liability offered by an LLC and the potential for personal liability provided by § 171.255 of the Texas Tax Code:

“Generally, members are not personally liable for the debts of a limited liability company.” *Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.) (citing *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)). This shield from personal liability is based on a presumption of legal separateness that exists between an LLC and its members.

Section 171.255(a) of the [T]ax [C]ode provides an exception to that rule:

If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the

date on which the report, tax, or penalty is due and before the corporate privileges are revived.

TEX. TAX. CODE ANN. § 171.255(a). The statute is penal in nature and is intended to hold those directors and officers liable who “have abused the corporate privilege by continuing to create and incur debts after the franchise tax is delinquent.” *Rossmann v. Bishop Colorado Retail Plaza, L.P.*, 455 S.W.3d 797, 802 (Tex. App.—Dallas 2015 pet. denied) (quoting *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879, 883 (Tex. App.—Dallas 2007, no pet.)).

However, § 171.255(c) contains a safe harbor provision for unwitting directors and officers:

A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred:

- (1) over the director’s objection; or
- (2) without the director’s knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.

TEX. TAX. CODE ANN. § 171.255(c). Because the safe harbor provision turns on the director or officer’s knowledge or consent, we have previously concluded that corporate “debt” does not include liability for unintentional torts. [*Williams v. Adams*, 74 S.W.3d 437 (Tex. App.—Corpus Christi 2002, pet. denied).] Therefore, § 171.255(a) does not create personal liability for “tort judgments predicated on negligence liability.” *Id.* at [442].

The court of appeals then agreed with Benbow and concluded that the trial court had misapplied § 171.255 to Benbow’s claim:

.... First, the trial court mischaracterized his claim as one for “negligent repair work.” Benbow did not allege that the repairs were negligently performed; instead, he alleged that he “[p]aid for auto repairs that were never performed.” Construing his pleading liberally in his favor and looking to his intent, Benbow clearly alleged that he was defrauded—based on the LLC’s knowing misrepresentations, he paid the company for repairs that it never performed in the first instance.

Fraud is an intentional tort. *See LTTS Charter Sch., Inc. v. Palasota*, 362 S.W.3d 202, 209 (Tex. App.—Dallas 2012, no pet.) (holding appellant’s claim for fraud was excepted from Texas Tort Claims Act because fraud is an intentional tort); *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 219 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (same); *Sanders v. City of Grapevine*, 218 S.W.3d 772, 779 (Tex. App.—Fort Worth 2007, pet. denied) (same); *Gen. Elec. Co. v. City of Abilene*, 795 S.W.2d 311, 313 (Tex. App.—Eastland 1990, no writ) (same). Therefore, the trial court’s reliance on our opinion in *Adams* was misguided.

To the contrary, our analysis in *Adams* leads us to the conclusion that a corporate “debt” under § 171.255 includes liability for fraud claims because, unlike a negligence claim, fraudulent conduct is intentional. At least one of our sister courts has reached the same conclusion, *see Skrepnek v. Shearson Lehman Bros., Inc.*, 889 S.W.2d 578, 581–82 (Tex. App.—Houston [14th Dist.] 1994, no writ.), and § 171.255 has also been used to impose personal liability on a corporate officer for a breach of contract claim against the corporation. *See Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 134–35 (Tex. App.—Fort Worth 2016, no pet.). So, although a corporate director or officer may invoke and ultimately prevail under the safe harbor provision, a plaintiff is not categorically excluded as a matter of law from pursuing personal liability against a director or officer for fraudulent conduct by the corporation or its employees under § 171.255(a). Because the trial court concluded otherwise, we sustain Benbow’s sole issue. ... We reverse and remand for a new trial.

K. Veil Piercing

Helmer v. Rusco Operating, LLC, No. 03-21-00148-CV, 2022 WL 963236 (Tex. App.—Austin Mar. 31, 2022, no pet. h.) (mem. op.).

The court concluded that the evidence was insufficient to support the trial court’s implied finding that an alter-ego relationship existed between an LLC and its sole member for purposes of imputing the contacts of the LLC to the member for purposes of exercising personal jurisdiction over the member.

The plaintiff relied on the alter-ego doctrine in order to impute the Texas contacts of a Louisiana LLC to its sole member and manager for purposes of personal jurisdiction. The trial court impliedly found an alter-ego relationship by denying the member’s special appearance, and the member challenged the sufficiency of the evidence to support that finding. The court of appeals discussed the alter-ego doctrine and factors relevant to a determination of alter ego and stated that “[u]ltimately, for a court to find personal jurisdiction based on a theory of alter ego, the evidence must show that there is such unity between the corporation and the individual that the separateness of the corporation has ceased and that holding only the corporation liable would result in an injustice.”

The court characterized the undisputed evidence, viewed in the light most favorable to the trial court’s alter ego finding, as demonstrating that Helmer, an individual, owned and managed two business entities, the LLC and a corporation; that Helmer alone controlled, “based on his own personal wishes,” how funds belonging to the LLC would be allocated; and that “[o]n several occasions,” Helmer withdrew funds from the LLC for purposes unrelated to the LLC, specifically, to pay expenses for the corporation owned by Helmer. The plaintiff argued that this evidence was sufficient to support a finding of alter ego as to Helmer because it demonstrated “[a] failure to observe corporate formalities, a lack of capitalization and ability to pay creditors, and Helmer’s misdirection of corporate assets for his own personal benefit and to the detriment of [the LLC].” The court of appeals disagreed.

First, the court stated that the plaintiff did not explain what formalities were not observed by the LLC, and the failure to comply with corporate formalities is no longer a factor in considering whether an alter ego exists in any event. Second, the court stated that it could not infer from Helmer’s transfer of funds or from the LLC’s failure to pay the plaintiff that the LLC was inadequately capitalized, and there was no evidence presented as to the LLC’s financial condition. Finally, the fact that “on several occasions,” Helmer withdrew funds from the LLC and used the funds for purposes unrelated to the LLC was insufficient, standing alone, to show that the LLC was operated as a “mere tool or business conduit” because the Texas LLC statute recognizes that an LLC member may be entitled to receive a distribution of company funds (*see* Tex. Bus. Orgs. Code § 101.203 addressing sharing of distributions), and case law has stated that an owner’s taking a draw from a company is not sufficient to show alter ego. Without additional evidence of the dealings between Helmer and the LLC, the court could not conclude from the fact that Helmer withdrew funds that he “divert[ed] company profits” or “fail[ed] to keep corporate and personal assets separate,” such that “the separateness [of the LLC] has ceased.”

In a footnote, the court noted the distinction between veil piercing for purposes of establishing liability and veil piercing for jurisdictional purposes and stated that the plaintiff’s allegations of fraud on the part of Helmer had “no place in assessing veil piercing for the purpose of establishing jurisdiction” and that reliance on Helmer’s alleged fraudulent conduct as a basis to impute jurisdiction was misplaced.

HHH Farms, L.L.C. v. Fannin Bank, __ S.W.3d __, 2022 WL 175967 (Tex. App.—Texarkana 2022, pet. filed).

The court of appeals held that the plaintiff’s summary-judgment proof failed to conclusively establish all of the elements required for the plaintiff’s veil piercing claim against an LLC’s affiliate.

This case involved a dispute involving agricultural loans to Hartwell Farms, LLC (“H. Farms”), which were guaranteed by Waymon Scott Hartwell (“Hartwell”). Two of the loans (“Note One” and “Note Two”) were made by Fannin Bank (“Fannin”).

Among the issues addressed on appeal was Fannin’s traditional motion for summary judgment alleging that HHH Farms, LLC (“HHH”), another entity formed and owned by Hartwell, was jointly and severally liable to Fannin as the alter ego of H. Farms and Hartwell. In support of this claim, Fannin produced summary judgment evidence that Hartwell was the sole member of H. Farms as well as the sole member of HHH. Hartwell formed HHH shortly after he signed Notes One and Two on behalf of H. Farms. After Hartwell formed HHH, he transferred equipment from H. Farms to HHH, assumed all the leases H. Farms previously leased, and began farming exclusively under the HHH entity—thereby rendering H. Farms a shell. Hartwell did not inform Fannin that he

created HHH and began farming exclusively under HHH. When H. Farms filed for bankruptcy, Hartwell claimed that it had no cash and that the 775 acres of wheat that had been planted were owned by HHH. Fannin claimed that this sequence of events was designed to avoid Hartwell's debt to Fannin and that HHH should be jointly and severally liable to Fannin for the debts of H. Farms. The trial court granted Fannin's requested relief. The court of appeals concluded that summary judgment was not appropriate based on this record, providing the following explanation:

Under Section 101.101(a) of the Texas Business Organizations Code, "a member or manager of a limited liability company is not liable for the company's debts, obligations, or liabilities except to the extent the company agreement specifically provides otherwise." *Fin & Feather Club*, 415 S.W.3d at 556; see TEX. BUS. ORGS. CODE ANN. §§ 101.104, 101.114; see also TEX. BUS. ORGS. CODE ANN. § 101.113. "The statutory protections afforded to members and managers of an LLC give way only when a plaintiff can show that the LLC was used for the purpose of perpetrating, and did perpetrate, an actual fraud for the member or the manager's direct personal benefit." *Fin & Feather Club*, 415 S.W.3d at 556 (policies governing piercing veil of corporation also apply to limited liability companies) (citing *Shook v. Walden*, 368 S.W.3d 604, 621 (Tex. App.—Austin 2012, pet. denied)); see TEX. BUS. ORGS. CODE ANN. § 21.223(b) ("Subsection (a)(2) does not prevent or limit the liability of a holder ... if the obligee demonstrates that the holder ... caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder").

Although the term "actual fraud" is not defined in the statute, we have construed this term as "dishonesty of purpose or intent to deceive." *Fin & Feather Club*, 415 S.W.3d at 55625 (citing *Menetti v. Chavers*, 974 S.W.2d 168, 174 (Tex. App.—San Antonio 1998, no pet.)); see *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.); *Priddy v. Rawson*, 282 S.W.3d 588, 600 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Dick's Last Resort of W. End, Inc. v. Mkt./Ross, Ltd.*, 273 S.W.3d 905, 909 (Tex. App.—Dallas 2008, pet. denied); *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 387 (Tex. App.—Houston [14th Dist.] 2007, no pet.). "[I]n the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud. Instead, in that context, actual fraud involves 'dishonesty of purpose or intent to deceive.'" *Latham*, 320 S.W.3d at 607 (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986), superseded by statute on other grounds, *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)).

Fannin argues that Hartwell's conduct in transferring the assets of H. Farms to HHH after he executed Notes One and Two on behalf of H. Farms, thereby rendering H. Farms a shell, as described above, established "dishonesty of purpose or intent to deceive" as a matter of law. To prove entitlement to pierce HHH's corporate veil, Fannin was required to show, as a matter of law, that Hartwell (1) used H. Farms and HHH with "dishonesty of purpose or intent to deceive" and (2) did so for his direct personal benefit. See *Fin & Feather Club*, 415 S.W.3d at 556.

In (1) considering the evidence in the light most favorable to the Hartwell Parties, (2) indulging all reasonable inferences in favor of the Hartwell Parties, and (3) resolving any doubts in their favor, we cannot conclude that each of these elements was conclusively established as a matter of law. "The ... bas[is] for disregarding the corporate fiction involve[s] questions of fact." *Castleberry*, 721 S.W.2d at 277 (Tex. 1986). "Except in very special circumstances, fact questions should be determined by the jury." *Id.* (citing TEX. CONST. art I, § 15; *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975)); see *Atl. Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 447 (Tex. App.—Texarkana 1993, writ denied) (alter ego determination is finding of fact). Moreover, "[i]ntent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986); see *Logan v. Mullis*, 686 S.W.2d 605, 608 (Tex. 1985) (intent is generally "a question of fact to be decided by the jury").

Ace Real Property Investments, LP v. Cedar Knob Investments, LLC, No. 09-19-00375-CV, 2022 WL 120016 (Tex. App.—Beaumont Jan. 13, 2022, pet. filed) (mem. op.).

“Cedar Knob also moved for no-evidence summary judgment on Ace’s corporate veil-piercing theory wherein it sought to hold Williams individually liable. Ace argued the court should pierce the corporate veil, because: (1) Williams caused Cedar Knob to be used for the purpose of perpetrating or did perpetrate an actual fraud on Ace primarily for her direct personal benefit; (2) organized and operated Cedar Knob as a mere tool or business conduit of another; (3) used Cedar Knob to circumvent a statute; (4) and/or used Cedar Knob to protect against the discovery of a crime or to justify a wrong; and/or (5) Cedar Knob was undercapitalized. In its no-evidence motion for summary judgment, Cedar Knob argued there was no evidence of any of these allegations.

Cedar Knob is a limited liability company, and Williams acted as its president. Members are generally not personally liable for the debts of a limited liability company. *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). As a limited liability company, state law principles for piercing the corporate veil apply. *See id.* Therefore, Ace could only hold Williams liable for its claims to the extent it pierced the corporate veil. *See Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006). Considering the no-evidence motion challenging each of Ace’s pleaded corporate veil-piercing theory allegations, the burden shifted to Ace to produce more than a scintilla of probative evidence creating a genuine issue of material fact on each of these allegations, which it failed to do. *See Tex. R. Civ. P. 166a(i)*. The trial court properly granted Cedar Knob’s no-evidence motion for summary judgment on the corporate veil-piercing theory. *See id.*”

Pelletier v. Victoria Air Conditioning, Ltd., No. 13-20-00011-CV, 2022 WL 52810 (Tex. App.—Corpus Christi Jan. 6, 2022, no pet. h.) (mem. op.).

The court of appeals held the evidence was sufficient to support the jury’s finding that the sole member of two judgment-debtor LLCs was liable for their judgments based on alter ego.

Victoria Air Conditioning, Ltd. (“VAC”) sued Gaetan Pelletier (“Pelletier”), an individual, and Pelletier Management and Consulting, LLC (“PMC”) seeking to hold them liable on the basis of alter ego for the judgment debt of QI Wholesale Lumber, LLC (“QI”) and TexInn, LLC (“TexInn”). Pelletier was a member and owner of PMC, QI, and TexInn. Each of these LLCs was involved in the construction of the TexInn Hotel in Cuero, Texas. VAC was hired to provide plumbing work for the project. Litigation ensued, and VAC obtained a default judgment against QI and TexInn in state court. Shortly before the state court entered its default judgment, Pelletier filed suit in federal court alleging claims against VAC. In the federal case, the Fifth Circuit Court of Appeals affirmed the district court’s dismissal of that case on the basis that Pelletier lacked standing because “Pelletier did not establish that he personally owned the hotel and he offered no other valid cause of action for his personal claim against [VAC]”

While the federal suit was pending, VAC conducted post-judgment discovery, including deposing Pelletier. VAC filed a third-party alter-ego claim against Pelletier and PMC, alleging that Pelletier used QI and TexInn to further his individual objectives without regard to the LLCs’ business concerns. VAC also alleged that Pelletier engaged in actual fraud by representing that QI and TexInn were the parties contracting with VAC and were the actual owners of the hotel. Pelletier asserted counterclaims similar to those initially asserted by QI and TexInn in the prior suit in state court. These claims were dismissed by the trial court, and PMC then filed similar counterclaims against VAC, alleging that a contract had been formed with PMC pursuant to a bid letter or that PMC was a third-party beneficiary. The trial court granted summary judgment in favor of VAC on PMC’s claims, and the case went to trial on VAC’s alter-ego claim against Pelletier. The jury answered “yes” on the sole question submitted, which inquired whether Pelletier was responsible for the conduct of QI or TexInn. The question read as follows:

Is Gaetan Pelletier responsible for the conduct of [QI] or [TexInn]?

Gaetan Pelletier is “responsible” for the conduct of [QI] or [TexInn] if—

[QI] and [TexInn] were organized and operated as mere tools or business conduits of Gaetan Pelletier; there was such unity between [QI] or [TexInn] and Gaetan Pelletier that the separateness of [QI] or [TexInn] had ceased and holding only [QI] or [TexInn] responsible would result in injustice; and Gaetan Pelletier caused [QI] or [TexInn] to be used for the purpose of perpetrating

and did perpetrate an actual fraud on [VAC] primarily for the direct personal benefit of Gaetan Pelletier.

“Actual Fraud” is defined as involving dishonesty of purpose or intent to deceive. Actual fraud can consist of a material misrepresentation, concealment of material facts or the failure to disclose a material fact.

In deciding whether there was such unity between [QI] or [TexInn] and Gaetan Pelletier that the separateness of [QI] or [TexInn] had ceased, you are to consider the total dealings of [QI] and [TexInn] and Gaetan Pelletier, including—

1. the degree to which [QI] or [TexInn’s] property had been kept separate from that of Gaetan Pelletier.
2. the amount of financial interest, ownership, and control Gaetan Pelletier maintained over [QI] or [TexInn]; and
3. whether [QI] or [TexInn] had been used for personal purposes of Gaetan Pelletier.

Among the issues addressed on appeal was Pelletier’s argument that the evidence was legally and factually insufficient to support the jury’s alter-ego finding. The court held that the evidence was sufficient to support the jury’s finding with the following explanation:

B. Applicable Law

“Disregarding the corporate structure involves two considerations: (1) the relationship between the entities, and (2) whether the entities’ use of limited liability was illegitimate.” *U.S. KingKing, LLC v. Precision Energy Svcs., Inc.*, 555 S.W.3d 200, 213–14 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dismissed). Thus, to pierce the corporate veil and impose liability under an alter-ego theory, the plaintiff must demonstrate (1) that the entity on which it seeks to impose liability 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. *Tryco*, 390 S.W.3d at 508; see TEX. BUS. ORGS. CODE ANN. § 21.223(b). The principles applicable to piercing the corporate veil apply equally to limited liability companies. *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 590–91 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); see TEX. BUS. ORGS. CODE ANN. § 101.002(a) (providing that § 21.223 applies to limited liability companies and their members).

C. Analysis

Appellants limit their sufficiency challenge to the second element of VAC’s claim—whether Pelletier caused QI or TexInn to be used for the purpose of perpetrating an actual fraud primarily for Pelletier’s direct personal benefit. Specifically, appellants argue that “there is no or factually insufficient evidence of fraud.” Appellants primarily rely on the traditional tort definition of fraud to support their sufficiency arguments. However, “in the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud.” *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.). Rather, courts have construed the statutory term as “involv[ing] dishonesty of purpose or intent to deceive.” *Tryco*, 390 S.W.3d at 508; see *TecLogistics, Inc. v. Dresser–Rand Grp., Inc.*, 527 S.W.3d 589, 598 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Therefore, we will limit our sufficiency review accordingly.

As detailed above, the trial record provides that PMC was the owner of the hotel and the premises and that it secured financing for the construction of the hotel. Pelletier also continued to claim at trial that he owned the hotel building personally. The loans for the construction of the hotel were taken out by PMC. Pelletier testified that TexInn was a pass-through entity that collected funds from Pelletier and PMC “to pay the bills.”

Pelletier provided contrary representations to Heilker on each of these points. For instance, Pelletier told Heilker that TexInn owned the hotel and that TexInn and QI secured financing for the hotel's construction. Pelletier informed Heilker that he worked for TexInn and that TexInn would be responsible paying VAC for its services. While Pelletier denied certain aspects of Heilker's testimony, the jury was free to disbelieve Pelletier, and we must presume it resolved the conflicting testimony in favor of its verdict. *See City of Keller*, 168 S.W.3d at 819. The jury could have reasonably inferred from this evidence that Pelletier intended to deceive VAC so that it would be willing to contract with LLCs that were pass-through entities with no assets. *See Dick's Last Resort of W. End, Inc. v. Mkt./Ross, Ltd.*, 273 S.W.3d 905, 912 (Tex. App.—Dallas 2008, pet. denied) (considering as evidence of actual fraud the fact that the appellants used the corporation to ensure the landlord could not recover any assets in the event that the corporation decided to vacate leased premises before the end of a ten-year lease term).

VAC also presented evidence that Pelletier transferred all of the funds in QI and TexInn's bank accounts to his personal account after he was served with an application for writ of garnishment for those two entities. These actions also constitute evidence of actual fraud. *See Tryco*, 390 S.W.3d at 510 (considering, as evidence of actual fraud the fact that the owners transferred assets away from the corporation after a judgment had been entered against the corporation); *Latham*, 320 S.W.3d at 610 (holding that there was sufficient evidence to support a finding of actual fraud when, after a corporation had been threatened with a lawsuit, a shareholder dissolved the corporation and took the corporation's assets and property for himself).

For the foregoing reasons, we conclude that the evidence would enable reasonable and fair-minded people to reach the challenged finding of actual fraud. *See City of Keller*, 168 S.W.3d at 827. We further conclude that the jury's finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Bennett*, 489 S.W.3d at 66. Accordingly, we overrule appellants' third issue.

Wadi Petroleum, Inc. v. Miller, No. 13-21-00014-CV, 2021 WL 4466320 (Tex. App.—Corpus Christi Sept. 30, 2021, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's granting of Ethan Miller's special appearance with respect to the unintentional torts allegedly committed by Miller, but reversed the special appearance with respect to the intentional torts allegedly committed by Miller. As part of its jurisdictional analysis, the court of appeals rejected appellants' alter-ego claims.

In 2004, appellants Wadi Petroleum, Inc., Dice Exploration Company, Inc., South Bay Corporation, Lamb Oil & Gas, Inc., and Betaco, LLC, along with other working interest owners, acquired leases and began operations on what would eventually become nine oil and gas wells and saltwater disposal wells located in southern Louisiana. The wells were operated under five separate joint operating agreements ("JOAs"). The first three JOAs originally designated Wadi, a Texas corporation, as the operator and Louisiana Delta Oil Company, LLC as a non-operating working interest owner. The final two JOAs, executed in 2007 and 2008, designated Louisiana Delta as the operator and Wadi as a non-operating working interest owner.

Louisiana Delta was a Virginia limited liability company formed by Miller and Phil Bryant Jr., a Texas resident. Miller and Bryant elected to establish the company's principal place of business in Texas for sixteen years, first in Houston, and then in Lakeway. Bryant served as the company's president. Miller, a licensed attorney residing in Virginia, served as its chief financial officer and chief legal officer. Bryant, along with the company's geological and accounting staff, oversaw the daily operations of the oil and gas wells from the company's Texas office. Miller traveled to the company's corporate office between ten and nineteen times from 2001 until 2015 in his capacity as a manager and owner of the company. Miller maintained the company's books concerning revenues at his office in Virginia and was responsible for remitting revenues to the other working interest owners. In 2016, Bryant resigned as president, and Miller moved the company's principal place of business to Virginia.

By this point, Louisiana Delta had become the operator under all five JOAs. After Bryant's resignation, the other working interest owners disagreed on whether Miller's company should continue to serve as operator. Miller began lobbying the other owners, culminating in a May 2016 meeting in Houston between the owners. In an affidavit, Kirk Dice, Vice President and co-owner of Wadi and Dice Exploration, said that Miller organized the May 2016 meeting in Houston and that "Miller made certain representations about himself and his companies that

turned out to be untrue.” In particular, Dice said that Miller “told [him] that his companies were professional oil and gas operations companies[,] and [that] they would operate the wells strictly in accordance with the law, the [JOA]s in place, and ... standards of performance and conduct.” Dice contends that Miller’s representations about “professional experience and acumen” proved untrue and that Dice’s companies relied on those representations to their detriment by deciding to do business with Miller’s companies. Dice alleged that “[d]uring the course of operations, Mr. Miller and his companies made charges for operations that did not take place” and overcharged for other operations that benefitted Miller personally. Dice believed Miller “defrauded [his] companies, and other working interest owners, by his lack of truthfulness, over-billing, and general incompetence in operations of the wells at issue.” Dice’s brother, Kevin, also a principal owner of Wadi and Dice Exploration, provided a substantively identical affidavit.

In 2018, appellants filed suit against Miller, Bryant, Louisiana Delta, and others. The petition included allegations of intentional and unintentional torts, and an amended petition asserted that the entity defendants were alter egos of the individual defendants. Miller filed a special appearance, which the trial court granted.

On appeal, the court observed that “[t]he sole issue before us is whether Miller’s contacts with Texas are sufficient to confer the trial court with specific jurisdiction over him as to appellants’ various tort claims.” The appellants argued that the entity defendants were Miller’s alter egos such that the contacts of the entities, all of which did business in Texas, should be imputed to Miller. The court of appeals disagreed:

.... Even assuming the alter ego theory was properly considered by the trial court, we cannot conclude that it applies here.

“[T]he party seeking to ascribe one corporation’s actions to another corporation or individual for jurisdictional purposes by piercing the corporate veil must prove the alter ego relationship.” As support for their alter ego allegation, appellants have not pointed us to any evidence in the jurisdictional record. Instead, appellants only cite to the alter ego allegations in their petition, the entirety of which are set out below:

[Appellants] assert that the individual Defendants used the corporate structures of the corporate Defendants as shells and false fronts for operations carried out by, and for the benefit of, the individual Defendants, and thereby perpetrated frauds and other tortious conduct, ignored corporate formalities, and otherwise abused the legitimate purpose of corporate structures such that all actions by the corporate Defendants should be attributed to the individual Defendants under the doctrine of alter ego.

These conclusory allegations alone are insufficient to pierce the corporate veil for jurisdictional purposes. Moreover, although fraud is necessary to pierce the corporate veil for purposes of liability, it “has no place in assessing contacts to determine jurisdiction.” Rather, courts consider evidence of (1) commingled funds, (2) representations that the individual would financially back the companies, (3) the diversion of company profits to the individual for his personal use, and (4) other failures to keep company and personal assets separate. Having failed to point us to any such evidence, appellants have not established that all the contacts of Miller’s companies should be imputed to Miller. Accordingly, we turn to the nature and quality of Miller’s individual contacts with Texas.

The court then engaged in a full-blown jurisdictional analysis with respect to Miller. The court concluded that “Miller purposefully availed himself of the privilege of conducting business in Texas,” and it then proceeded to address “whether the claims against Miller arose out of or were related to his contacts with the state.” With respect to the appellants’ unintentional tort claims for negligence and gross negligence, the court concluded that there was “no substantial connection between these claims and Miller’s contacts with Texas.” With respect to the appellants’ intentional tort claims, however, the court determined that they were “sufficiently connected to Miller’s Texas contacts.” After finding that the exercise of jurisdiction would comport with traditional notions of fair play and substantial justice, the court of appeals concluded that the trial court erred when it granted Miller’s special appearance as to the intentional tort claims, but it affirmed the special appearance with respect to the unintentional

tort claims. As the court observed: “We reverse the trial court’s order granting Miller’s special appearance concerning appellants’ claims for fraud, breach of fiduciary duty, conversion, and money had and received. We affirm the trial court’s order in all other respects.”

In re GTG Solutions, Inc., 642 S.W.3d 41(Tex. App.—El Paso Aug. 25, 2021, orig. proceeding).

The court of appeals denied a petition for writ of mandamus on the ground that the trial court did not abuse its discretion in severing an alter-ego claim from the underlying litigation between the parties.

GTG Solutions, Inc. provided septic services at drilling sites. FLX Energy Services, LLC contracted for some of those services. When a dispute arose over several unpaid invoices, FLX filed a declaratory relief claim to establish the amount of any sums owed. FLX also added a fraud in the inducement claim, contending that GTG represented that it would service the contract locally, when it actually did so from a remote location that increased the amount charged.

GTG answered and filed a counterclaim against FLX, asserting its own claims for declaratory relief, breach of contract, quantum meruit, unjust enrichment, breach of fiduciary duty, conversion of trust funds, and fraud. GTG then obtained leave of court to join the owners of FLX, Michael and Mary Rylee, as third-party defendants. GTG’s claim against the Rylees was based on an alter-ego theory, as the claim sought to hold the Rylees individually liable for the counterclaims that GTG asserted against FLX.

FLX and the Rylees filed a motion to sever and abate GTG’s alter-ego counterclaim against the Rylees, which GTG opposed. Following a hearing, the trial court granted the motion to sever and abate. GTG then filed its petition for writ of mandamus claiming that the trial court abused its discretion by granting the motion.

The court of appeals began by noting that mandamus is an extraordinary remedy and that “[t]he question is whether the trial court acted without reference to any guiding rules and principles.” When considering the severance of claims, the court looked to the language of Texas Rule of Civil Procedure 41 providing that “[a]ny claim against a party may be severed and proceeded with separately.” The court also cited case law indicating that severance is proper when: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of an independently asserted lawsuit; and (3) the severed claim is not so interwoven with the remaining action that the actions involve the same facts and issues. The court observed that the “controlling reasons” for a severance are to do justice, avoid prejudice, and further convenience, and it noted that trial courts have broad discretion in deciding whether to sever claims. Mandamus, according to the court, is an appropriate vehicle to challenge a severance order.

The court of appeals then turned to GTG’s alter-ego claim against the Rylees and concluded that the trial court did not abuse its discretion in severing the claim:

Sometimes referred to as “pierc[ing] the corporate veil,” an alter ego claim seeks to disregard a corporate entity and hold the entity’s individual owners or officers liable for a claim against the entity. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990). Alter ego “veil-piercing” is only permissible “when there exists such unity between corporation and individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice.” *Id.* Or as more recently articulated by this Court:

Use of the limited liability company form ordinarily functions to insulate members and managers from personal liability for the LLC’s obligations. As applied in this case, alter-ego liability requires a particular relationship between the LLC and an individual member in order to disregard the entity form—the LLC must be organized and operated as a mere tool or business conduit of the individual. Stated differently, alter-ego liability can be imposed only when there is such unity between company and individual that the separateness of the LLC has ceased and holding only the company liable would result in injustice.

Hawxhurst v. Austin’s Boat Tours, No. 08-19-00257-CV, 2020 WL 5094673, at *7 (Tex.App.—El Paso Aug. 28, 2020, no pet.) (mem. op.) (footnotes omitted), citing TEX.BUS.ORG.CODE ANN. § 101.114 and *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 456 & n.57 (Tex. 2008). ...

GTG's mandamus petition focuses on the third element of severability—whether the severed claim is interwoven with the remaining action such that both actions involve the same facts and issues. It argues that FLX and the Rylees did not meet that element because the claims arise out of one set of operative facts. On the other hand, FLX and the Rylees contend that GTG's alter ego claims involve separate and distinct facts and issues. We agree that the trial court did not abuse its discretion in siding with FLX and the Rylees on this question.

GTG's counterclaim against FLX alleges contractual, quasi-contractual, and extra-contractual causes of action arising from the non-payment of invoices. By contrast, GTG's alter ego counterclaim against the Rylees consists of allegations that they "are individually liable for the actions of FLX." GTG acknowledged in its briefing below that "[t]he only issue [in the counterclaim against the Rylees] is whether the individual owners and officers are individually liable" for GTG's claims against FLX. Notably, an action to enforce a judgment based on an alter ego theory "does not require relitigation of [the underlying] claim." *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 434 (Tex. 2015). The only issues in such an action are (1) whether an underlying judgment exists, and (2) whether the corporate entity should be disregarded and the individuals held liable. *Id.*

None of the parties have alleged that there was any oral or written contract between GTG and the Rylees. While GTG's counterclaim against FLX will require evidence of elements such as the existence and terms of the alleged contract, performance and/or breach by both parties, and the amount of damages, its alter ego counterclaim against the Rylees will require evidence of unity between FLX and the Rylees and use of the corporate fiction for an illegitimate purpose. In short, GTG's claim against the Rylees is essentially a matter of post-judgment collectability that is separate and distinct from the underlying merits. If a judgment is rendered in GTG's favor against FLX and FLX pays the judgment, there will be no basis for GTG to proceed with an alter ego claim against the Rylees.

GTG's reply brief raises an additional argument under the second prong of the severance test—whether the severed claim is one that would be the proper subject of an independently asserted lawsuit. GTG asserts that "alter ego cannot be asserted independently." While this argument was not raised in the trial court, nor GTG's mandamus petition, we choose to address it.

Contrary to GTG's claim, a judgment creditor may pursue a third party under an alter ego theory after the judgment creditor's attempts to collect an underlying judgment against the principal debtor have proven unsuccessful. A judgment creditor did just that in *Matthews Constr. Co. v. Rosen*, when it filed a separate suit asserting alter ego liability against a judgment debtor's president and sole shareholder. 796 S.W.2d 692, 693 (Tex. 1990). The court concluded that the statute of limitations on the alter ego claim was tolled during the pendency of the underlying suit to establish the debt, which necessarily presupposes that a second suit was proper. *Id.*; see also *In re Trammell*, 246 S.W.3d 815, 822-23 (Tex.App.--Dallas 2008, orig. proceeding) ("Often, a plaintiff files suit against a director or officer, seeking to hold that director or officer personally liable for a corporate debt pursuant to section 171.255, after the entry of a judgment against the corporation."); *McCarroll v. My Sentinel, LLC*, No. 14-08-01171-CV, 2009 WL 4667403, at *2 (Tex.App.--Houston [14th Dist.] Dec. 10, 2009, no pet.) (mem. op.) (res judicata did not bar second suit against directors and officers to collect on a judgment previously obtained against corporation-debtor); *Peterson, Goldman & Villani, Inc. v. Ancor Holdings, LP*, 584 S.W.3d 556, 560 (Tex.App.--Fort Worth 2019, pet. denied) (same). So, while courts have sometimes stated that the mere fact that a corporation operates as an alter ego does not give rise to a separate and independent cause of action, a party may assert an alter ego theory against a third party in a second suit to collect a judgment.

Accordingly, the record here satisfies each of the three elements needed for severance. The trial court did not abuse its discretion in severing the alter ego claim from the underlying litigation between GTG and FTX.

K. Griff Investigations, Inc. v. Cronin, 633 S.W.3d 81 (Tex. App.—Houston [14th Dist.] 2021, no pet. h.).

The court of appeals affirmed the grant of summary judgment in favor of a principal of an LLC, apparently on limited liability grounds, even though the plaintiffs had asserted tort claims against the principal.

Kathy Griffin owned K. Griff Investigations, Inc. (“K. Griff”), an investigative agency that performed services such as background checks, surveillance, and service of civil process. Griffin advertised her desire to sell K. Griff and received a response from Cronin, Riordan & Whitman Security Consultants, LLC (“CRW”). The principals in CRW were John Cronin, Mark Riordan, and Hank Whitman.

The parties engaged in negotiations regarding a possible asset sale, but the deal ultimately fell apart. Griffin and K. Griff sued CRW, Cronin, Riordan, Whitman, and others asserting claims for breach of contract, promissory estoppel, fraud, negligent misrepresentation, conspiracy, and negligence. After the defendants filed summary judgments, the trial court (among other rulings) granted summary judgment for CRW, Cronin, Riordan, and Whitman on the breach of contract, negligence, and fraud claims.

Whitman later moved for summary judgment on the remaining promissory estoppel, negligent misrepresentation, and conspiracy claims against him. He argued that he was a member of CRW, a limited liability company, during the relevant time period and that he could not be individually liable for plaintiffs’ alleged claims. Whitman relied on the language of § 101.114 of the Texas Business Organizations Code providing that “[e]xcept 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.” The trial court granted Whitman’s motion and dismissed the remaining claims against him.

On appeal, the court first upheld the summary judgment granted for CRW, Cronin, Riordan, and Whitman on the breach of contract, negligence, and fraud claims. The court of appeals then upheld the grant of summary judgment in favor of Whitman on the remainder of the claims:

Appellants [i.e., plaintiffs Griffin and K. Griff] concede that section 101.114 means that a member may be individually liable only upon proof that the member “use[d] the LLC for the purpose of perpetrating an actual fraud for the member[’s] ... personal benefit,” citing *Metroplex Mailing Service, LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 896 (Tex. App.—Dallas 2013, no pet.), *abrogated on other grounds by Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Appellants argue, however, that they raised a fact question whether Whitman perpetuated a fraud for his own benefit.

In their brief, appellants refer to their argument regarding the trial court’s ruling on their fraud claim against the CRW defendants to support their assertion that Whitman can be held individually liable for perpetuating a fraud for his own benefit. We have already concluded that the trial court did not err in granting summary judgment on appellants’ fraud claim in favor of the CRW defendants, including Whitman. Because appellants rely solely on their briefed argument regarding the CRW defendants’ alleged fraud to contend that a fact question remains whether Whitman should be shielded by section 101.114, we conclude that appellants’ argument as briefed presents no basis for us to conclude that Whitman can be held individually liable for CRW’s actions or omissions.

Appellants also argue that section 101.114 “does not apply to an employee,” that Whitman was an employee of CRW, and thus the statute does not shield him from liability for appellants’ promissory estoppel, negligent misrepresentation, and conspiracy claims. Appellants do not cite to any evidence in the record that establishes that Whitman was an employee of CRW. Accordingly, to the extent their asserted legal proposition is correct, a question we need not reach, appellants did not present evidence creating a fact issue that would preclude summary judgment.

Mungas v. Odyssey Space Research, LLC, No. 14-19-00378-CV, 2021 WL 3416500 (Tex. App.—Houston [14th Dist.] Aug. 5, 2021, no pet. h.) (mem. op.).

The court of appeals concluded that the jury’s alter-ego finding of liability against the sole owner of an LLC was not supported by legally sufficient evidence of actual fraud. As a result, the trial court’s judgment imposing individual liability was reversed.

Greg Mungas was the president and sole owner of Firestar Engineering, LLC. Between 2011 and 2014, Firestar was developing technologies related to non-toxic rocket fuel. Firestar and appellee Odyssey Space Research, LLC (owned by Dave Strack and Brian Rishikof) became entwined in a variety of business dealings, including the creation of an entity called Typhon Labs, LLC that set up test facilities for the non-toxic rocket-fuel technology. To get Typhon's test labs operational, Firestar borrowed funds from Odyssey, which was memorialized in three promissory notes from December 2010, April 2011, and June 2011. The notes were never repaid.

In early 2012, Firestar was awarded a Small Business Innovative Research ("SBIR") Phase I contract by NASA, in which Odyssey performed certain work as a "key subcontractor." Although Odyssey performed all the work required by September 2012, Firestar did not pay Odyssey until January 2014. NASA awarded Firestar a SBIR Phase II contract in late 2012, in which Firestar again contracted with Odyssey to perform some work. The original contract between Firestar and Odyssey for this SBIR work was signed in January 2013. By March 2014, Odyssey had completed all of the Phase II work and had invoiced Firestar, although Firestar had not made any payment on those invoices. Mungas contacted Strack and Rishikof and requested a "novation" of the contract between Odyssey and Firestar. He advised Strack and Rishikof that Firestar was struggling financially and was unable to pay its creditors.

After negotiations, Firestar and Odyssey entered into an agreement on May 9th to address the obligations of Firestar to Odyssey under the SBIR contract for the completed Phase II work. In addition to an expanded Phase II scope of work, the agreement called for a joint-checking account to be set up under the control of Strack and Rishikof. Firestar agreed to direct the entirety of the remaining Phase II SBIR payments due from NASA to the joint account to ensure that Odyssey would receive payment for its SBIR work. Following the May 9th agreement, Odyssey was paid for three of the four invoices submitted to Firestar for Phase II SBIR work. Mungas redirected the final payment from NASA in February 2015 away from the joint account. As a result, Odyssey was never paid on its final SBIR invoice.

Odyssey ultimately filed suit against Firestar for recovery of the monies owed to Odyssey under the three promissory notes and for the final payment due to Odyssey for the SBIR work. Mungas was also sued individually on an alter-ego theory of liability. A jury trial resulted in a verdict against Firestar. The jury also found that Mungas was liable for Firestar's obligations based on the alter-ego theory. Mungas appealed and argued that the evidence was insufficient to support a liability finding against him.

The court of appeals began by discussing the statutory standards related to imposing individual liability for LLC obligations:

Firestar is a limited-liability company. A member or manager of a limited-liability company is not liable for the company's debts, obligations, or liabilities under a judgment, decree, or order of a court except to the extent the company agreement specifically provides otherwise. *See* Tex. Bus. Orgs. Code Ann. § 101.114. However, the principles and law applicable to disregarding the corporate fiction apply to limited-liability companies. Tex. Bus. Orgs. Code Ann. § 101.002(a) (providing that section 21.223 applies to limited-liability companies and their members).

A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally be shielded from personal liability for the corporation's contractual obligations as a separate legal entity. Under the common law, when the corporation's affiliate—such as an owner, shareholder, officer, or director—has used the corporate form "as part of a basically unfair device to achieve an inequitable result," courts have been willing to disregard the corporate structure and have allowed a corporate obligee to hold a corporate affiliate personally liable for the corporation's obligations. *See, e.g., Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986). However, the legislature has taken a "stricter approach to disregarding the corporate structure." *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008).

The Business Organizations Code reflects the legislative limits on recovery from an individual based on a corporation's obligations. The Business Organizations Code provides, in relevant part, that:

- (a) A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of

such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to:

....

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including the failure to:

(A) comply with this code or the certificate of formation or bylaws of the corporation; or

(B) observe any requirement prescribed by this code or the certificate of formation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders.

Id. § 21.223(a)(2), (a)(3). Section 21.223(b) provides the following exception to the statutory protection.

Subsection (a)(2) does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.

Id. § 21.223(b). This statute is “exclusive and preempts any other liability imposed for that obligation under common law or otherwise.” Tex. Bus. Orgs. Code Ann. § 21.224. “Generally, alter ego will not apply to disregard the corporate form absent exceptional circumstances.” *Nugent v. Estate of Ellickson*, 543 S.W.3d 243, 266 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The court observed that the jury charge provided three elements that were required to support liability against Mungas: “(1) Firestar was organized and operated as mere tool or business conduit of Greg Mungas; (2) there was such unity between Firestar and Greg Mungas that the separateness of Firestar has ceased and holding only Firestar responsible would result in injustice; and (3) Greg Mungas caused Firestar to be used for the purpose of perpetrating and did perpetrate an actual fraud on Odyssey primarily for the direct personal benefit of Greg Mungas.” The court began with the third element and ultimately concluded that it had not been met with respect to the three unpaid promissory notes:

The jury charge, consistent with statute, required supporting evidence that Mungas perpetrated an actual fraud on Odyssey primarily for his direct personal benefit. The term “actual fraud” appearing in the jury charge is not defined. The term as used in section 21.223(b) is also not defined. In *Castleberry v. Branscum*, the supreme court defined actual fraud in the context of piercing the corporate veil as “involving dishonesty of purpose or intent to deceive.” 721 S.W.2d at 273. This court and several others have endorsed the *Castleberry* definition of “dishonesty of purpose or intent to deceive” for addressing claims of alter-ego liability. ...

We first consider whether Mungas used Firestar to perpetrate an actual fraud on Odyssey for his direct personal benefit. Odyssey argues that Mungas acted with “dishonesty of purpose or intent to deceive” because “he was having Firestar borrow money while he had Firestar paying himself for purported loans.” Odyssey further argues that a reasonable jury could believe that Mungas engaged in those actions for his own benefit. In response, Mungas argues he did not utilize Firestar to engage in any fraudulent conduct, nor did he receive any personal benefit with respect

to the promissory notes. In addition, he argues that Odyssey knew it was dealing with a limited-liability company and did not request a guarantee or security.

This court's precedent is instructive. In *Viajes Gerpa*, we considered the legal sufficiency of the evidence supporting an alter-ego theory to pierce the corporate veil and impose personal liability on an individual. 522 S.W.3d at 533–35. Underlying the dispute in *Viajes Gerpa* was a 2007 settlement agreement that required The Ticket Company and its president, Seyed Fazeli, to remit payments to the plaintiff and other travel agencies to compensate for a failure to procure tickets to the World Cup tournament. After The Ticket Company failed to make its required payments, the plaintiff sued Fazeli and others alleging that Fazeli was individually liable under section 21.223 for The Ticket Company's debts created pursuant to the 2007 settlement agreement. The jury returned a verdict for the plaintiff on its alter-ego claim, on which the court rendered judgment. On the defendants' subsequent motion for new trial, the trial court vacated the judgment and rendered a take-nothing judgment in favor of Fazeli and The Ticket Company.

In affirming the trial court, we explained: “[T]o support individual liability under section 21.223, there must be evidence of direct personal benefit to [Fazeli] resulting from fraud in connection to The Ticket Company and the [settlement agreement] with [the plaintiff.]” The evidence showed that Fazeli used The Ticket Company's funds to pay his mortgage, and the Company's banking records reflected regular large cash withdrawals. Concluding that the evidence was legally insufficient to support individual liability under section 21.223, we stated that the evidence “reflect[ed] general (mis)handling of corporate accounts, record keeping, and operations,” but failed to demonstrate that any fraudulent conduct was related to the 2007 settlement agreement.

Similarly, the jury charge—tracking the language of section 21.223—required supporting evidence in the record of a direct personal benefit to Mungas resulting from fraud in connection to Odyssey and the promissory notes. Odyssey cites the fact that Mungas made “transfers” to and from himself in the same year that he borrowed funds from Odyssey. Odyssey claims this pattern of loans and repayments to avoid tax liability, as well Mungas's testimony that he renewed his loans to extend the statute of limitations, reflects a direct personal benefit to Mungas. However, even if Mungas's actions in extending statutes of limitation on his loans to the company conferred a direct personal benefit to Mungas, Odyssey did not produce any evidence that this benefit was had in connection with fraud perpetrated on Odyssey. The promissory notes were executed in favor of Odyssey for the purpose of securing and preparing testing facilities for Typhon. Mungas testified that all three promissory notes were used for securing the facilities and equipment. Though Dave Strack of Odyssey testified that Mungas originally represented that the third promissory note was to be used for an intellectual-property payment, rather than equipment, Odyssey does not contend that Firestar or Mungas failed to set up those facilities or secure the equipment or intellectual property required for Typhon. Though Strack did testify there were differences of opinion as to the cost of equipment purchased for Typhon, this testimony does not provide evidence of dishonesty of purpose or intent to deceive.

That Mungas renewed loans he made to Firestar during the same year that Firestar executed the promissory notes to Odyssey is not enough to establish actual fraud on the part of Mungas in connection with the promissory notes. The evidence may reflect financial mismanagement of funds, as in *Viajes Gerpa*, or it may reflect that Firestar anticipated raising more funds or securing revenue streams that never came to fruition. Regardless, the evidence is not legally sufficient to support the conclusion that Mungas used Firestar to perpetrate a fraud on Odyssey in connection with the promissory notes.

The court of appeals then turned its attention to the unpaid SBIR invoice and similarly concluded that there was insufficient evidence of actual fraud:

Turning to Firestar's breach of the May 9th agreement, there is no dispute that Firestar did not make the final payment as required by the agreement. Mungas admitted that he redirected the payment from NASA but asserts there is no evidence of fraudulent conduct on his part. Firestar paid three of the four invoices for the Phase II SBIR covered by the May 9th agreement, which

Mungas relies on as evidence that he did not perpetrate an actual fraud on Odyssey by entering into the May 9th agreement. Because Odyssey had already filed suit on the promissory notes when the final invoice was due, Mungas argues his withholding of the final payment was tied to the dispute between the parties.

Emphasizing that Mungas waited until the Phase II SBIR work was complete before redirecting the final payment, Odyssey maintains that Mungas satisfied the fraud requirement by acting “with dishonesty of purpose” by failing to advise Odyssey that he was going to redirect the final payment. Odyssey further argues the evidence at trial established that Mungas misdirected the final payment to Odyssey for his own benefit, to pay himself on loans. However, as discussed with regard to the promissory notes, Odyssey had the burden to support its alter-ego claim with evidence of a direct personal benefit to Mungas resulting from actual fraud in connection to Odyssey and the May 9th agreement. The transaction at issue is the May 9th agreement, not Mungas’s later actions resulting in Firestar’s breach of contract. The only conduct identified by Odyssey as evidence of actual fraud in connection with the May 9th agreement was Mungas’s failure to advise Odyssey that he intended to redirect the payment, which occurred well after the parties entered the agreement.

The testimony at trial does not reflect that Mungas engaged in any dishonesty of purpose or intent to deceive in connection with the May 9th agreement. Mungas approached Strack and Rishikof requesting “novation” of the contract for SBIR work in March 2014. At the time, Mungas testified that Firestar had approximately \$500,000 to \$700,000 in debt. Leading up to the May 9th agreement, Mungas communicated to Strack and Rishikof that Firestar was not able to pay existing debt. Mungas described a situation in which Firestar did not have adequate income streams to pay its expenses. He further described that the related entities in which Odyssey was involved, Typhon and ISPH, were also unable to cover their costs and owed significant debt to Firestar. Mungas explained Firestar’s financial condition in part as attributable to working on “projects that don’t pay (and have a long history on the books of doing so).” Rishikof also testified that during the negotiations of the May 9th agreement he was concerned there was significant likelihood that Odyssey might be unpaid on the expanded scope of work agreed to in the May 9th agreement. Assuming Firestar breached the May 9th agreement, any such breach by Firestar standing alone is not enough to disregard the corporate fiction.

The record does not reflect that Mungas induced Odyssey into entering an agreement that Firestar had no intention of honoring. It is undisputed that Firestar paid Odyssey for all the work it performed under the Phase I SBIR and three of the four invoices submitted by Odyssey for the Phase II SBIR work. Though many of the payments due to Odyssey were paid late; this course of dealing does not support a finding that Mungas used Firestar to perpetrate a fraud on Odyssey. It is also noteworthy that Odyssey was aware that Firestar was struggling financially and unable to service its existing debt. Despite this knowledge, Odyssey entered the May 9th agreement and expanded its scope of work without seeking a personal guaranty. Therefore, we conclude the evidence is not legally sufficient to support the jury’s finding that Mungas used Firestar to perpetrate an actual fraud on Odyssey in connection with the May 9th agreement.

Based on its determinations that insufficient evidence of actual fraud existed, the court of appeals reversed the trial court’s judgment against Mungas and rendered a take-nothing judgment on Odyssey’s claims against him.

L. Foreign LLC

Grisel v. Everest International, LLC, No. 02-19-00401-CV, 2022 WL 714516 (Tex. App.—Fort Worth Mar. 10, 2022, pet. filed) (mem. op.).

The court of appeals held that the trial court did not err in denying the defendant’s plea in abatement where the plaintiff, a foreign LLC that was prohibited from maintaining this action if its activities constituted transacting business in Texas, was not registered when it commenced the suit but testified that it had registered during the pendency of the suit. It was the defendant’s burden to present evidence that the defendant was not registered, and the defendant never brought forward evidence that the plaintiff had not in fact registered.

Everest International, LLC (“Everest”), a Florida limited liability company that alleged in its pleadings that it was doing business in Tarrant County, Texas, sued the defendants in Texas state court, and the defendants filed a plea in abatement challenging Everest’s capacity to sue on the basis that Everest was not registered to transact business in Texas as required by the Texas Business Organizations Code (TBOC). In Texas, “a foreign filing entity” (which includes a foreign LLC) is not permitted to “maintain an action, suit, or proceeding in a court of this state ... on a cause of action that arises out of the transaction of business in this state unless the foreign filing entity is registered in accordance with” Chapter 9 of the TBOC. Tex. Bus. Orgs. Code § 9.051(b).

The defendants bore the burden of establishing lack of capacity and pointed to Everest’s statement in its pleadings that it was doing business in Tarrant County, correspondence from the Texas Secretary of State’s office stating that its records reflected that Everest was not registered to do business in Texas, and deposition testimony of a representative of Everest that Everest was a Florida corporation that operated in Texas. Everest pointed out that the Business Organizations Code expressly provides that specific activities “do not constitute transaction of business in this state,” including maintaining an action or suit, maintaining a bank account, and “transacting business in interstate commerce.” Tex. Bus. Orgs. Code § 9.251(1), (3), (9). Everest responded that it did business in Tarrant County, but “[a]t all relevant times” its principal office and administrative functions were based out of Florida, and its business activities in Texas and Florida involved interstate commerce. Thus, Everest argued, it was not required to register in Texas as a foreign LLC to maintain its suit. Everest further asserted that, “out of an abundance of caution, in order to avoid any argument over the matter and [to] avoid any unnecessary delay or abatement of this lawsuit,” Everest filed with the Secretary of State on January 28, 2019, an “Application for Registration of a Foreign Limited Liability Company,” along with the required filing fees. Everest provided a copy of its application, which was stamped “RECEIVED” by the Secretary of State, and a prepaid invoice from Austin-based Lawyer’s Aid Service, Inc. reflecting that the service had filed the application and paid the filing fees to the Secretary of State on Everest’s behalf. The defendants’ lawyer at the hearing on the plea argued that he had not received any confirmation from the Secretary of State that the application had been received or accepted. The trial court denied the plea “for the time being” and allowed the trial to proceed on the basis that the matter could be cured up until the time of judgment.

Assuming that the defendants preserved their capacity complaint for review on appeal, and that Everest was required to register to do business in Texas to maintain suit, the court of appeals concludes that the trial court did not abuse its discretion by denying the plea in abatement. The defendants presented evidence that Everest was not registered to conduct business in Texas, but Everest presented evidence that it had submitted an application to the Secretary of State and paid the required fees. The TBOC provides that a filing instrument submitted to the Secretary of State takes effect on filing, and the Secretary of State is required to file a filing instrument upon finding that it conforms to the TBOC and the required fees are paid. See Tex. Bus. Orgs. Code §§ 4.051, 4.002(a). The defendants never offered any evidence that Everest’s application was not in fact filed by the Texas Secretary of State. Further, the court of appeals on its own and for the first time on appeal may take judicial notice of adjudicative facts that are matters of public record. The court stated that a search of Everest’s franchise-tax-account status on the Texas Comptroller’s website showed Everest’s right to transact business in Texas to be “active” with an effective registration date of January 28, 2019. Thus, the court took judicial notice of these facts showing that Everest was in fact registered to do business.

M. Creditor’s Remedies: Charging Order, Turnover Order, Injunctive Relief

Jiao v. Xu, 28 F.4th 591 (5th Cir. 2022).

The court held that either the assignors or assignees, or both, of membership interests in a Texas LLC had standing to bring a derivative action against the LLC’s majority member, the trial court did not err in declaring part of the majority member’s interest invalid due to the member’s failure to pay all of his required capital contribution, and a turnover order in favor of the LLC against the member requiring the member to turn over his remaining membership interest in partial satisfaction of the judgment against the member for unauthorized withdrawals from the LLC’s account did not violate the exclusivity provision of the charging order statute.

In 2016, Ningbo Xu, Xiongen Jiao, Zhonghua Yu, and Pengfei Zhou formed Dongtai Investment Group, LLC for the purpose of acquiring the Crowne Plaza Hotel in Houston. Jiao, Yu, and Zhou each made a capital contribution of \$1,000,000 for a 16.66% membership interest in the LLC. Xu was contractually obligated to pay \$3,000,000 for a 50.02% membership interest. Jiao, Yu, and Zhou later assigned their membership interests to their

children. Upon discovering financial wrongdoing by Xu, the assignors and assignees brought various claims against Xu and LCL Company, LLC (collectively, “Xu”), including claims for breach of contract, fraud, derivative and non-derivative breach of fiduciary duty, and violations of § 10(b) of the Securities Exchange Act.

The district court granted the plaintiffs’ motion for preliminary injunction and declaratory judgment against Xu. The district court found that Xu did not make his agreed \$3,000,000 capital contribution for his membership interest in the LLC but instead only paid \$867,889. Based on that finding, the court declared Xu’s unit certificates invalid and ordered the LLC to provide Xu with new certificates reflecting the ownership interest derived from the amount Xu had actually paid. The district court also declared that Xu owed the LLC \$1,304,400 based on numerous unauthorized withdrawals from the LLC’s accounts. The district court then entered a turnover order that required Xu to return his membership interest to the LLC in partial satisfaction of the declaratory judgment award.

The court rejected Xu’s contention that the district court erred in denying his motion to dismiss based on the plaintiffs’ lack of standing to assert shareholder derivative claims, explaining:

... [U]nder Texas law, a member of a closely held limited liability company can bring a derivative proceeding. TEX. BUS. ORGS. CODE § 101.463(c). It is undisputed that Dongtai is a closely held limited liability company. The original investors were members of Dongtai and assigned their membership interests to their children. “An assignor of a membership interest in a limited liability company continues to be a member of the company and is entitled to exercise any unassigned rights or powers of a member of the company until the assignee becomes a member of the company.” TEX. BUS. ORGS. CODE § 101.111(a). Thus, even if the assignees failed to comply with the requirements set out in Dongtai’s operating agreement for becoming members, as Xu alleges, the assignors would still be members of Dongtai. Either way, at least one group, if not both, has sufficient membership interest in Dongtai to confer standing to bring a derivative proceeding. *See, e.g., Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.”)

After concluding that the plaintiffs met their pleading burden with respect to the federal securities fraud claims and that the plaintiffs showed a substantial threat of irreparable injury sufficient to support the preliminary injunction, the court considered Xu’s challenges to the declaratory relief awarded by the district court. The district court found that Xu only paid \$867,889 for his membership interest, declared his unit certificates invalid, and ordered the LLC to provide Xu with new certificates based on the amount he actually paid. The district court also declared that Xu “owes and is indebted to [the LLC] for \$1,304,400.80.”

Xu argued that the district court’s declaration that part of his membership interest was invalid resulted functionally in his expulsion from the LLC and that the declaration thus violated Section 101.107 of the Texas Business Organization Code. *See* TEX. BUS. ORGS. CODE § 101.107 (“A member of a limited liability company may not withdraw or be expelled from the company.”). The court, however, found no error in the district court’s determination in this regard. The court explained that the declaratory judgment did not expel Xu from the company. The district court simply invalidated Xu’s unit certificates on the basis that Xu had not paid for all the membership units he had contractually agreed to purchase and ordered that Xu be provided new certificates based on the amount of capital he actually contributed.

Xu also asserted that the district court’s declaratory relief violated Section 101.112(d) of the Texas Business Organizations Code, which provides that a charging order is the “exclusive remedy” for satisfying a judgment out of the judgment debtor’s membership interest. The court stated that this contention lacked merit because the district court’s declaratory relief did not implicate Section 101.112(d). Rather than constituting satisfaction of a judgment out of Xu’s membership interest, the declaratory relief was a declaration of the percentage of Xu’s company ownership, based on the amount of capital Xu paid into the LLC.

Xu also asserted that the declaratory relief violated the plain language of the LLC’s operating agreement, which limited the liability of a member “for the losses, debts, liabilities and obligations” of the company and provides that “[n]o member shall have the right to demand and receive any distribution from [Dongtai] in any form other than cash.” The court stated that these provisions had no bearing on the district court’s declaration that Xu failed to pay for his full membership interest and was thus only entitled to the membership units for which he paid.

Finally, the court affirmed the district court’s issuance of a turnover order requiring Xu to turn over his remaining 14.45% membership interest in the LLC in partial satisfaction of the LLC’s declaratory judgment award of \$1,304,400 against Xu. The parties disputed whether the district court’s turnover order violated Section 101.112 of the Texas Business Organizations Code, which states that “[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.” TEX. BUS. ORGS. CODE § 101.112(d). The court explained its “*Erie* guess” that the turnover order issued by the district court did not run afoul of this exclusivity provision as follows:

The Texas Supreme Court has not spoken to the interplay between turnover orders and § 101.112(d), but Texas intermediate courts have held that § 101.112(d) does not preclude the turnover of a member’s interest in a limited liability company “when the judgment creditor seeking the membership interest is the entity from which the membership interest derives” and the turnover order “involves an explicit award of the membership interest itself from one party to the other as part of the judgment.” *Gillet v. ZUPT, LLC*, 523 S.W.3d 749, 758 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also Heckert v. Heckert*, No. 02-16-00213-CV, 2017 WL 5184840, at *8 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.). This is because “the reasoning behind requiring a charging order as the exclusive remedy is inapposite” in such circumstances. *Gillet*, 523 S.W.3d at 758; *accord Heckert*, 2017 WL 5184840, at *8 (“[I]n these types of situations, the purpose of a charging order has not come into play: the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the ... member’s entity interest”). In this case, Dongtai is the judgment creditor seeking Xu’s membership interest in Dongtai, and the turnover order involves an explicit award of the membership interest from Xu to Dongtai. Accordingly, § 101.112(d) does not preclude the turnover of Xu’s interest to partially satisfy Dongtai’s judgment against him.

Thomas v. Hughes, 27 F.4th 363 (5th Cir. 2022).

The court held that the district court’s order requiring a judgment debtor to obtain court approval before transferring her membership interest in a single-member LLC and before causing the LLC to transfer its real property or any of its funds other than transactions in the ordinary course of business did not violate Texas’s charging order statute because the order was a justifiable exercise of the court’s inherent power to enforce its judgment.

After a \$3.9 million judgment was entered in favor of plaintiffs Percy and Thomas against defendant Hughes in 2020, the district court granted the motion of Percy and Thomas for a charging order against Hughes’s interest in M. G. & Sons, LLC, a single-member LLC owned by Hughes. The 2020 judgment was based on fraudulent transfers made by Hughes to evade a prior state-court judgment as well as other causes of action against Hughes and a related entity. M. G. & Sons, LLC (“M. G. & Sons”) was formed by Hughes in 2010, a month before the prior state-court lawsuit proceeded to trial. The sole asset of M. G. & Sons was real property in San Antonio, Texas (the “Property”), which Hughes owned personally for several years before transferring it to M. G. & Sons.

The district court’s order granting the motion of Percy and Thomas for a charging order gave Percy and Thomas “the right to receive any distribution to which Hughes would otherwise be entitled in respect of her membership interest in M. G. & Sons, LLC” and further provided:

Hughes and M. G. & Sons, LLC must obtain leave of this court before [a)] transferring the Property to any third party; b) transferring any funds to any third party except for transactions in the ordinary course of business; or c) transferring Hughes’[s] interest (or any part thereof) in M. G. & Sons, LLC to any third party.

Hughes challenged the requirement that Hughes and M. G. & Sons obtain leave of court before transferring the Property, funds, or Hughes’s membership interest to any third party, contending that the requirement contravenes Texas law because it exceeds the governing statute’s scope and interferes with M. G. & Sons’s business.

The court began its analysis by setting forth relevant provisions of the charging order statute:

Under Texas law, “[o]n application by a judgment creditor of a member of a limited liability company or of any other owner of a membership interest in a limited liability company, a court having jurisdiction may charge the membership interest of the judgment debtor to satisfy the judgment.” TEX. BUS. CODE ORGS ANN. § 101.112(a). If a charging order is issued, “the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest.” *Id.* § 101.112(b). The creditor “does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.” *Id.* § 101.112(f). Moreover, the statute states that “[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.” *Id.* § 101.112(d).

Hughes argued that the requirement that court approval be obtained for a transfer of the Property, funds of M. G. & Sons (excepting transactions in the ordinary course of business), or Hughes’s membership interest was an improper “legal or equitable remed[y] with respect to[] the property of the limited liability company,” prohibited by the charging order statute, and that because a charging order is the “exclusive remedy” by which Percy and Thomas may satisfy their judgment out of Hughes’s interest in M. G. & Sons, the restriction on transfers of these assets was invalid.

The court rejected Hughes’s argument, pointing to federal and state case law stating that courts have the inherent power to enforce their judgments. The court then relied on a Texas appellate opinion in support of the court’s power to use injunctive relief to do so. *See Int. of M.W.M.*, No. 05-19-00757-CV, 2020 WL 6054337, at *2 (Tex. App.—Dallas Oct. 14, 2020, no pet.) (mem. op.).

In *M.W.M.*, the trial court entered a charging order that “charged” a “[f]ather’s interest in certain entities with [his ex-wife’s] judgments and ordered those entities not to pay [the f]ather any money or expend any money for [his] personal benefit until the judgments were paid.” *Id.* at *1. The father argued on appeal that the order “act[ed] as an injunction” and thus exceeded the court’s authority under the charging statute. *Id.* at *3. But the Texas Court of Appeals rejected that argument, finding that the statute “was not the trial court’s sole means of enforcing its judgments.” *Id.* Instead, the court held that “[i]njunctive relief is an available means to enforce a judgment.” *Id.* And in doing so, it affirmed the order’s restrictions on the LLCs’ payments as a form of injunctive relief. *Id.*

The same reasoning applies here. The district court entered a valid charging order, requiring “any distribution to which Hughes would otherwise be entitled in respect of her membership interest in M. G. & Sons” to go to satisfy Percy and Thomas’s judgment. *See* TEX. BUS. ORGS. CODE ANN. § 101.112(a)–(b). Then the district court added injunctive relief as a means of enforcing its judgment, just as in *M.W.M.* The district court did not abuse its discretion in fashioning relief as it did.

The court further concluded that the injunctive relief awarded by the court was not an abuse of discretion given the authority under Texas law to enjoin a judgment debtor from “dissipating or transferring assets to avoid satisfaction of a judgment.” The district court concluded that the transfer restriction was “justified in light of Hughes’s history of fraudulent transfers to avoid payment of a judgment.” Thus, the district court not only contemplated that Hughes was “likely to dissipate or transfer” assets to avoid the court’s judgment, but based its injunction on the fact that the jury found that she already had. Specifically, the jury found that Hughes had fraudulently transferred assets from one entity she controlled to another to evade the underlying state court judgment—a judgment that remains unsatisfied. In view of Hughes’s long history of “evading the payment of monetary judgments,” the court concluded that the district court did not abuse its discretion in granting injunctive relief.

Hughes further argued that, irrespective of the limitations in the charging order statute, the transfer restriction was invalid because it interfered with M. G. & Sons’s day-to-day business, relying on TEX. CIV. PRAC. & REM CODE § 52.006(e) (“[T]he trial court may not make any order that interferes with the judgment debtor’s use, transfer, conveyance, or dissipation of assets in the normal course of business.”). But the court concluded that the

restriction did not interfere with M. G. & Sons's day-to-day business because the district court explicitly exempted "transactions in the ordinary course of business" from its order.

The appellate court did agree with one argument made by Hughes and made one refinement to the district court's order, which the court pointed out essentially preserved the effect of the restriction on transfer in the order. Hughes argued that the district court erred by subjecting M. G. & Sons to its injunctive relief because M. G. & Sons was neither a judgment debtor nor a party to this action. The court agreed with this contention and pointed out that, unlike Hughes, M. G. & Sons had no liability for the underlying judgment and could not be considered a judgment debtor with respect to the judgment. Thus, the court modified the district court's order to the extent that it enjoined M. G. & Sons by striking M. G. & Sons from the order, as follows:

c. Hughes ~~and M. G. & Sons, LLC~~ must obtain leave of this court before a) transferring the Property to any third party; b) transferring any M. G. & Sons funds to any third party except for transactions in the ordinary course of business; or c) transferring Hughes's interest (or any part thereof) in M. G. & Sons, LLC to any third party.

The court stated that this modification "clarif[ies] that we read the district court's order, even as unmodified, to enjoin Hughes, as the judgment debtor and as M. G. & Sons's sole member, from causing M. G. & Sons to effectuate any proscribed transfer indirectly that Hughes could not make directly. In other words, even with M. G. & Sons excised from the order, Hughes cannot accomplish indirectly what she is enjoined from doing directly."

In sum, the court stated: "It is well established that courts have the power to enforce their judgments through injunctive relief. The district court properly exercised this power, in addition to charging Hughes's interest in M. G. & Sons according to Texas law, by restricting Hughes from transferring assets to evade the court's judgment. Accordingly, we AFFIRM the district court's order, as MODIFIED above."

N. Attorney's Fees

[Prior to September 1, 2021, Tex. Civ. Prac. & Rem. Code § 38.001(b) authorized recovery of attorney's fees for services, labor, sworn account, and contracts against any "individual or corporation." In suits filed on or after September 1, 2021, Tex. Civ. Prac. & Rem. Code § 38.001(b) allows for the recovery of attorney's fees from "an individual or organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust." *Id.* (amended by Acts 2021, 87th Leg., ch. 665 (H.B. 1578), § 1, eff. Sept. 1, 2021). An "organization" is defined with reference to Tex. Bus. Orgs. Code § 1.002, under which an "organization" means "a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign." *Id.*; Tex. Bus. Orgs. Code Ann. § 1.002(62).]

Renegade Well Services, LLC v. Amerivax, Inc., No. 07-21-00211-CV, 2022 WL 1462274 (Tex. App.—Amarillo May 9, 2022, no pet. h.) (mem. op.).

The plaintiff attempted to establish an implied agreement by an LLC to pay attorney's fees, recognizing that under Section 38.001 of the Texas Civil Practice and Remedies Code at the time of the suit attorney's fees were not recoverable against an LLC. The plaintiff failed to establish an implied agreement by the LLC to pay attorney's fees.

Amerivax, Inc. ("Amerivax") had an ongoing business relationship with Renegade Well Services, LLC ("Renegade") pursuant to which Amerivax rented equipment to Renegade and periodically serviced their portable toilets at various job sites. Renegade failed to pay several invoices from Amerivax, and Amerivax brought suit against Renegade to collect on the unpaid invoices. On the issue of attorney's fees, the trial court ruled in favor of Amerivax. Renegade appealed the trial court's judgment on the issue of the sufficiency of the evidence underlying the award of attorney's fees, among other issues.

The court of appeals explained the context for the claim for attorney's fees in this case as follows:

The award of attorney’s fees in Texas is governed by the “American Rule.” Under it, they are recoverable only if authorized by statute or contract. *Intercont’l Grp. P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Prior to September of 2021, statute authorized recovery of attorney’s fees for services, labor, sworn account, and contracts against any “individual or corporation.” TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(b). A limited liability company, such as Renegade, was neither a corporation nor individual; thus, fees were not recoverable against it under § 38.001. *D. Webb Indus., LLC v. Permian Equip. Rentals, LLC*, No. 11-18-00221-CV, 2020 WL 4875879, 2020 Tex. App. LEXIS 6690 (Tex. App.—Eastland Aug. 20, 2020, no pet.) (mem. op.). Amerivax acknowledged as much and viewed the only avenue available to recover fees lay in proving the existence of an agreement permitting them. The agreement in question purportedly arose not from expressed consent but rather implication and course of conduct. Renegade disputes the existence of evidence illustrating that such occurred. . . .

The court of appeals examined the evidence and concluded that the evidence was legally insufficient evidence to support a finding of an implied agreement by Renegade to pay attorney’s fees.

Texas Construction Specialists, LLC v. Ski Team VIP, L.L.C., __ S.W.3d __, 2022 WL 619756 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.).

The court acknowledged that it had previously held that Section 38.001 of the Texas Civil Practice and Remedies Code as in effect at the time of this case did not authorize the recovery of attorney’s fees in a breach-of-contract action against an LLC, but the LLC in this case failed to preserve its complaint for review, and the court thus allowed the trial court’s award of attorney’s fees against it to stand.

Target Corporation v. D&H Properties, LLC, 637 S.W.3d 816 (Tex. App.—Houston [14th Dist.] Nov. 23, 2021, pet. denied) (“... Target’s only avenue for recovery of attorney’s fees based on its breach of contract claim is Civil Practice and Remedies Code section 38.001. But because D&H is a limited liability company, Target may not recover attorney’s fees for its breach of contract claim under section 38.001. Although the current version of Civil Practice and Remedies Code section 38.001 permits the recovery of attorney’s fees against a limited liability company for a breach of contract claim, this version did not take effect until September 1, 2021, after this lawsuit was tried. *See* Tex. Civ. Prac. & Rem. Code § 38.001 (eff. Sept. 1, 2021).”).

Benge General Contracting, LLC v. Hertz Electric, LLC, No. 05-19-01506-CV, 2021 WL 5317840 (Tex. App.—Dallas Nov. 16, 2021, no pet. h.) (mem. op.).

The court reversed an award of attorney’s fees against an LLC and its sole owner who was found by a jury to be the alter ego of the LLC.

Appellant Benge General Contracting, LLC (“BGC”) was owned by James Benge. After BGC sued appellees Hertz Electrical, LLC (“Hertz”) and HTJ Global Electric, LLC (“HTJ”), Hertz and HTJ counterclaimed for fraud and breach of contract. Hertz and HTJ also attempted to hold Benge personally liable as the alter ego of BGC.

The jury returned a verdict for Hertz and HTJ on their claims and awarded attorney’s fees against BGC and Benge. The jury also found that Benge was using BGC as his alter ego in perpetrating a fraud on Hertz and HTJ. On appeal, BGC and Benge argued that the trial court erred in making them liable for attorney’s fees because “Texas law prohibits awarding attorney’s fees against a limited liability company” and, therefore, “neither BGC nor, by extension, Benge could be liable for attorney’s fees.” The court of appeals agreed:

Appellees sought attorney’s fees under chapter 38 of the civil practice and remedies code. See TEX. CIV. PRAC. & REM. Code § 38.001. We review an award of attorney’s fees under the statute for an abuse of discretion. A trial court abuses its discretion if it acts without reference to guiding rules and principles.

Texas follows the American Rule, under which litigants may recover attorney’s fees only if specifically allowed by statute or contract. Section 38.001 authorizes an award of attorney’s fees for certain types of claims brought by a “person” against “an individual or corporation.” See TEX. CIV. PRAC. & REM. CODE § 38.001. Under the plain language of section 38.001, a trial court

cannot order limited liability partnerships (LLP), limited liability companies (LLC), or limited partnerships (LP) to pay attorney's fees. The availability of attorney's fees under a particular statute is a question of law for the court.

Appellants argue that the trial court could not order BGC to pay attorney's fees under section 38.001 because BGC is an LLC. The parties do not contest BGC's status as an LLC. Appellants further argue that the trial court was also prohibited from ordering Bengé to pay attorney's fees. According to appellants, if BGC cannot be liable for attorney's fees, and BGC is Bengé's alter ego, then, by extension, Bengé also cannot be liable for attorney's fees.

Appellees contend, however, that it would be unfair to allow Bengé to get the benefit of an LLC that was "a mere 'corporate fiction' and illusory for liability purposes." Although there is a logical appeal to appellees' argument, appellees cite dicta from only one federal case to support their argument. See *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1295 (5th Cir. 1988) ("If we were to uphold the 'alter ego' finding, LDBrinkman Corp. might be liable for attorneys' fees as if it were a contractual maker or guarantor of the note. Because such liability was not established, we express no opinion on whether disregard alone would activate section 38.001 and entitle Gibraltar to attorneys' fees." (internal citations omitted)). Appellees also cite authority establishing that the alter-ego theory permits piercing the corporate veil of an LLC to hold members liable for an LLC's debts. Appellees, however, do not cite any authority applying this doctrine to attorney's fees. Absent mandatory, or at least persuasive, authority applying the alter-ego theory to hold an LLC's members liable for attorney's fees that could not be incurred by the LLC, we must abide by the plain statutory language. Accordingly, we conclude that the trial court abused its discretion in awarding attorney's fees, and we sustain appellants' first issue.

In re Houston Bluebonnet, L.L.C., Case No. 16-34850, 2021 WL 4562255 (Bankr. S.D. Tex. Oct. 5, 2021).

"Still, the Hammans' ability to recover attorneys' fees from Defendants is limited. Section 38.001 of the Civil Practice[] and Remedies Code authorizes plaintiffs to recover attorneys' fees from 'an individual or organization.' However, prior to September 2021, section 38.001 only provided for the recovery of attorneys' fees from 'an individual or corporation.' Under the former provision, the term 'corporation' did not encompass limited liability companies or limited partnerships.

In enacting the new version of section 38.001, the Texas Legislature noted:

The change in law made by this Act applies only to an award of attorney's fees in an action commenced on or after the effective date of this Act. An award of attorney's fees in an action commenced before the effective date of this Act is governed by the law applicable to the award immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Act of June 15, 2021, 87th Leg., R.S., ch. 665, § 2, sec. 31.008, 2021 Tex. Sess. Law Serv. (West) (emphasis added). Based on this provision, the Legislature did not intend for plaintiffs like the Hammans to reap the benefits of section 38.001's amendment. The Hammans are bound by the old version of section 38.001. Under the prior version of section 38.001, the Hammans cannot recover attorneys' fees from Houston Bluebonnet, a Texas limited liability company, or from E&H, a non-resident limited partnership."

Composite Solutions, LLC v. Composite Advanced Technologies LLC, No. 01-20-00413-CV, 2021 WL 4095249 (Tex. App.—Houston [1st Dist.] Sept. 9, 2021, no pet.) (mem. op.) ("In its original petition, Composite Solutions sought attorney's fees against CAT—accurately identified in the petition as a limited liability company—pursuant to Civil Practice and Remedies Code section 38.001. Section 38.001, however, does not authorize the recovery of attorney's fees in a breach-of-contract action against a limited liability company. As a matter of law, the facts pled by Composite Solutions did not support the award of attorney's fees against CAT, and CAT's failure to answer cannot create such liability. Thus, the facts pled by Composite Solutions affirmatively disclosed the invalidity of its claim for attorney's fees, and there was error in the original default judgment on the face of the record. [Footnote 1: The legislature amended Civil Practice and Remedies Code section 38.001 effective September 1, 2021, to permit recovery of attorney's fees from an individual or 'organization,' as defined by

Business Organizations Code section 1.002. This suit was filed prior to that amendment taking effect, and so we apply the version that was in effect when this action was commenced.]”).

iiiTec Ltd. v. Weatherford Technology Holdings, LLC, Civ. A. No. 4:19-03386, 2020 WL 10897508 (S.D. Tex. Dec. 1, 2020) (Although the court issued this opinion in 2020, it is included in this year’s update because it did not appear in the Westlaw database until recently.).

“Texas Civil Practice and Remedies Code § 38.001(8) provides that ‘[a] person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for ... an oral or written contract.’ Weatherford argues that iiiTec may not recover its fees under § 38.001 because Weatherford is a limited liability company (‘LLC’) and § 38.001 only authorizes recovery of attorneys’ fees from ‘an individual or a corporation.’ Weatherford urges the Court to follow *Cypress Engine Accessories, LLC v. HDMS Ltd. Co.*, in which the court surveyed authority on the issue and concluded that courts having considered the issue have ‘overwhelmingly concluded that § 38.001 does not support recovery of attorney’s fees from an LLC.’ 283 F. Supp. 3d 580, 591 (S.D. Tex. 2017) (Rosenthal, J.) (citing *BHL Boresight, Inc. v. Geo-Steering Sols. Inc.*, No. 4–15–CV–00627, 2017 WL 2730739, at *18 (S.D. Tex. June 26, 2017)). In response, iiiTec contends that there is a split of authority regarding whether attorneys’ fees are recoverable from LLCs under § 38.001 and that the Supreme Court of Texas has historically read § 38.001(8) broadly, although that court has not expressly addressed this issue. iiiTec argues that because the relevant law is unsettled, the Court should refrain from ruling on this issue as a matter of law. The Court agrees. On the one hand, in 2016, the Fifth Circuit in dicta endorsed a Texas federal district court’s ruling that concluded:

based on the plain meaning of the terms ‘individual’ and ‘corporation,’ the history of § 38.001 and its predecessor, Article 2226, and the construction given to § 38.001 by Texas courts of appeals and federal courts (including judges of this court), [this District Court] makes an *Erie* prediction that the Supreme Court of Texas would hold that an LLC is neither an ‘individual’ nor a ‘corporation’ within the meaning of § 38.001, and that a party with a valid claim cannot recover attorney’s fees from an LLC under § 38.001.

Hoffman v. L & M Arts, No. 3:10–CV–0953–D, 2015 WL 1000838, at *10 (N.D. Tex. Mar. 6, 2015), *aff’d*, 838 F.3d 568 (5th Cir. 2016). The Fifth Circuit concluded there was no breach of contract and thus did not address the district court’s attorneys’ fees ruling. The Circuit Court did note that ‘an intervening decision by the Court of Appeals of Texas support[ed] the district court’s *Erie* guess that an LLC like L & M is not ‘an individual or corporation’ under section 38.001(8).’ 838 F.3d at 583 n.14 (citing *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 208 (Tex. App.—Houston [1st Dist.] 2016, no pet.)).

On the other hand, the Supreme Court of Texas had previously read § 38.001(8) to allow for the recovery of attorneys’ fees from business entities other than persons or corporations. In *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), and *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998), the Supreme Court read § 38.001(8) broadly to allow for recovery of attorneys’ fees under that statute against a limited partnership and a law firm partnership, respectively.

This case is in a relatively early stage. The Court therefore declines to decide as a matter of law the significant state law issue of whether attorneys’ fees may be recovered from an LLC under Texas Civil Practice and Remedies Code § 38.001(8). The Court denies summary judgment on Count IV as premature.”

U.S. for Use and Benefit of EP Employment Services, LLC v. Build Masters Construction, LLC, EP-19-CV-00362-FM, 2020 WL 10316658 (W.D. Tex. June 2, 2020) (Although the court issued this opinion in 2020, it is included in this year’s update because it did not appear in the Westlaw database until recently.).

“In Texas, attorney’s fees cannot be recovered absent a statute or a contract permitting recovery. Whether a party may recover attorneys’ fees under a statute is a question of law for the court. Section 38.001 of the Texas Civil Practice and Remedies Code (‘Section 38.001’) permits recovery of ‘reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs,’ if the claim is for recovery of damages for services rendered or labor performed, among others.

The Texas Supreme Court has not yet addressed whether Section 38.001 permits the recovery of attorney’s fees from LLCs, which are not expressly mentioned in the statute. ‘If a state’s highest court has not ruled on the

issue in question, a federal court must determine, to the best of its ability, what the highest court of the state would decide.’ Courts rely on state substantive law, including state appellate court guidance, in deciding what the state supreme court would hold. Federal district courts have consistently made an ‘*Erie* guess’ that Section 38.001 does not permit the recovery of attorney’s fees from LLCs. Texas courts have also uniformly interpreted Section 38.001 narrowly to limit recovery of attorney’s fees to individuals and corporations, but not other legal entities such as LLCs.

In construing statutes, Texas courts attempt to give effect to the legislature’s intent. Undefined terms in a statute are typically given their ordinary meanings. The ‘individuals’ and ‘corporations’ from whom attorney’s fees may be collected are undefined by the Texas Civil Practice and Remedies Code as well as the Code Construction Act. However, they are included within, and are therefore narrower than, the Code Construction Act’s definition of the ‘persons’ who may recover under the Section 38.001. Additionally, the ordinary meanings of ‘individual’ and ‘corporation’ do not include LLCs. ‘Individual’ refers to a natural person while a ‘corporation’ is its own distinct legal entity distinguished from LLCs in the Texas Business Code. As these definitions are supported by the plain language of Section 38.001, they are adopted by the court.

Plaintiff traces the history of the statute attempting to undermine the ordinary meanings of both words. However, each argument has been addressed before and dismissed. As originally enacted in Article 2226, attorney’s fees were recoverable against ‘persons and corporations.’ When the section was recodified subsequent to the enactment of the statute creating LLCs, the revisor’s note explained the legislature intended no substantive change except to ensure government entities would not be liable. Plaintiff asserts the court should therefore construe ‘individual’ to be interchangeable with ‘persons.’ First, the meaning of ‘person’ in the Code Construction Act is broader than the meaning of ‘person’ in Article 2226. Therefore, there is not necessarily any contradiction between the legislature’s intent that there be no substantive change and use of the word ‘individual’ as understood by its ordinary meaning. Second, reading other legal entities back into the act where they have been removed by the legislature would ‘defy the plain meaning of the statute and the intent of the legislature.’

Plaintiff also argues that as LLCs did not exist when Section 38.001 was recodified, their exclusion could not have been intentional. While accurate, ‘other legal entities’ were contemplated both before and after recodification. LLCs are still ‘other legal entities’ included within the definition of ‘persons,’ but are not ‘individuals’ or ‘corporations’ against which Section 38.001 authorizes the recovery of attorney’s fees. In sum, Plaintiff’s request for attorney’s fees must be dismissed as no claim for attorney’s fees against LLCs is legally recognized and the Texas Supreme Court is unlikely to hold otherwise.”

Peterson v. 7S Packing, LLC, No. 6:19-CV-028-H, 2019 WL 13175566 (N.D. Tex. Dec. 23, 2019) (Although the court issued this opinion in 2019, it is included in this year’s update because it did not appear in the Westlaw database until recently.).

“In Texas, recovery of attorney’s fees is only permitted when authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). Peterson bases his claim for attorney’s fees on Section 38.001 of the Texas Civil Practice and Remedies Code, which allows plaintiffs to recover attorney’s fees from “an individual or corporation.” 7S Packing argues that Section 38.001 is inapplicable to limited liability companies. Peterson’s request for attorney’s fees, therefore, turns on an interpretation of a Texas statute. When state law provides the rule of decision for a claim, the Court must apply the law as interpreted by the state’s highest court. *See Chaney v. Dreyfus Service Corp.*, 595 F.3d 219, 229 (5th Cir. 2010). Since the Texas Supreme Court has not addressed whether Section 38.001 applies to LLCs, the Court must make an *Erie* guess as to how the Texas Supreme Court would decide the issue. *See id.*

The weight of authority suggests that section 38.001 does not allow for recovery of attorney’s fees from limited liability companies (LLCs). In 2016, the Texas Court of Appeals held as much when it denied attorney’s fees in a breach-of-contract action against an LLC. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452–55 (Tex. Ct. App. 2016). Similarly, the Texas Court of Appeals has held that limited partnerships are not corporations under Section 38.001. *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 214 (Tex. Ct. App. 2016). Courts in the Fifth Circuit have likewise concluded that section 38.001 does not allow recovery of attorney’s fees from LLCs on numerous occasions. *See, e.g., 5G Studio Collaborative, LLC v. Dallas Uptown Hospitality, LLC*, 2017 WL 4750697, at *3 (N.D. Tex. 2017); *Hoffman v. L&M Arts*, 2015 WL 1000838, at *4–5 (Fitzwater, C.J.), *aff’d*, 868 F.3d 568, 583 n.14 (5th Cir. 2016). Based on these authorities, the Court concludes that the Texas Supreme Court would likely hold that LLCs are neither an “individual” nor a “corporation” within the meaning of Section 38.001.

Because Peterson has not pointed to a statute or contractual term authorizing attorney’s fees, his request for attorney’s fees is denied.”

Peck v. Asset Management Associates, LLC, No. 3:17-CV-2923-N, 2019 WL 13168333 (N.D. Tex. July 23, 2019) (Although the court issued this opinion in 2019, it is included in this year’s update because it did not appear in the Westlaw database until recently.) (“Peck also argues that Chapter 38 of the Texas Civil Practice and Remedies Code provides an independent basis for attorneys’ fees. Chapter 38, however, only applies to individuals and corporations, not limited liability companies like AMA. *Hoffman v. L & M Arts*, 2015 WL 1000838, at *10 (N.D. Tex. Mar. 6, 2015), *aff’d*, 838 F.3d 568 (5th Cir. 2016); *see also TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 188 (Tex. App. – Houston [1st Dist.] 2018, pet. filed). Accordingly, the Court denies Peck’s motion for attorneys’ fees.”).

O. Standing or Capacity to Sue

In re Porter Development Partners, LLC, Case No. 15-31305, Case No. 15-31307, Case No. 15-31770, Case No. 15-31772, 2022 WL 1535183 (Bankr. S.D. Tex. May 13, 2022).

The court disallowed numerous claims of investors against a limited partnership and related entities because the investors failed to meet their summary judgment burden to establish standing by failing to allege specific facts supporting an alleged injury fairly traceable to the defendant’s conduct or because the harm alleged was indirect rather than direct (i.e., the harm was suffered by the entities and only indirectly by the investors).

The debtors in these bankruptcy proceedings were Porter Development Partners LLC (“Porter”), WB Murphy Road Development LLC (“Murphy Road”), WB Real Estate Holdings LLC (“WB Holdings”), and Wallace Bajjali Investment Fund II LP (“Fund II”) (collectively the “Debtors”). In the early 2000s, Wallace Bajjali (“Bajjali”) and David Wallace (“Wallace”) formed several entities to acquire and develop real estate. Following the 2008 recession, Wallace and Bajjali proposed to consolidate various entities (including Fund II) into a single holding company, WB Holdings (the “Merger”). The parties in the suit disagreed on whether the requisite approval of the parties was obtained for the Merger and whether it was effective.

In 2012, Wallace and Bajjali planned to launch an initial public offering to raise capital for public-private partnership projects. However, Wallace and Bajjali could not raise the requisite funds to support the initial public offering, and the Debtors filed for bankruptcy. Various individuals, who invested in one or more of Debtors, entities related to Debtors, and non-debtor entities (collectively the “Claimants”) filed separate proofs of claim against each of the Debtors.

Claimants alleged seven causes of action against Debtors: (1) negligence, (2) negligent misrepresentation, (3) breach of fiduciary duty, (4) knowing participation in breach of fiduciary duty, (5) common law fraud, (6) violations of the Texas Securities Act, and (7) civil conspiracy. Additionally, Claimants described three acts that were most relevant to the proceeding. First, Claimants identified “[t]he repayment of a loan from IIRC to BusinessRadio Network LP (an entity that Fund II invested in) by the Wallace Bajjali partnerships to avoid personal liability for Wallace in breach of his fiduciary duty.” Second, Claimants identified “[t]he transfer of ownership of numerous single-purpose entities from three real estate funds to a single holding company called WB Holdings—the Merger—without making full disclosure to interested parties and without corporate approval” Finally, Claimants identified “[t]he diversion of funds from real estate partnerships to Wallace and Bajjali’s personal benefit.”

In the matters at issue in the court’s opinion, the Trustee filed a motion for summary judgment. The court additionally ordered the parties to submit briefing on the issue of standing. The court ultimately found that Claimants failed to establish their summary judgment burden as to standing and disallowed all of Claimants’ claims, except for Claimant Donald Taylor’s claims based on unpaid promissory notes to Porter and Murphy.

As an initial matter, the court stated that Texas law applied because “state law governs ‘[i]n deciding questions of law involving partnerships, including standing.’”

There are three elements for standing under Texas and federal law. First, the plaintiff must be personally injured and plead facts demonstrating that the plaintiff itself suffered the injury. The injury must be concrete and particularized, actual or imminent, not hypothetical. Second, the plaintiff’s alleged injury must be fairly traceable to the defendant’s conduct. Third, the requested relief must be likely to redress the plaintiff’s alleged injury, and the plaintiff must demonstrate standing separately for each form of relief sought.

First, the court found that Claimants failed to meet their burden for standing on Claimants' negligence claims because Claimants' pleadings did not contain any allegations specific to negligence. Because Claimants did not cite particular parts of materials in the record to support their assertion that they had standing to bring a cause of action directly for negligence, they failed to satisfy their burden on the negligence cause of action.

Second, the court disallowed Claimants' negligent misrepresentation claims, except those by Donald Taylor with respect to loans that he made to Porter and Murphy Road. The court considered four distinct categories of negligent misrepresentation claims by Claimants.

Claimant Randall DePue asserted a claim of negligent misrepresentation against WB Holdings for misrepresentation in connection with his investment in the entity. However, the court concluded that Randall DePue's conclusory allegation that WB Holdings made a negligent misrepresentation "in connection with" Randall DePue's investment in the entity did not adequately allege an injury fairly traceable to the defendant without more specific facts or allegations.

Various Claimants asserted claims of negligent misrepresentation against Fund II to recover money that each of those Claimants invested (and subsequently lost) in Fund II. Each of those Claimants alleged that Fund II "raised money from investors to further Wallace's, Frishberg's, and Laffer's personal agendas, which included operating a radio station to attract capital and developing real estate for their own benefit" 106 and that "[t]he WBL Partnerships conspired with Wallace to attract Claimants' capital" However, these allegations failed to mention any misrepresentation "in connection" with Claimants' investments in Fund II, and the court disallowed the claims due to the absence of specific facts supporting the allegation.

Claimant Donald Taylor asserted claims of negligent misrepresentation against Porter and Murphy Road for misrepresentations made by the entities in connection with loans that Donald Taylor made to the entities. Trustee did not object to these claims. Therefore, the court allowed these claims to the extent that the claims were based on unpaid promissory notes and not a cause for negligent misrepresentation.

Third, the court disallowed Claimants' breach-of-fiduciary-duty claims because Claimants asserted that the Trustee controlled any claim for breach of fiduciary duty.

Fourth, the court disallowed Claimants' claims for knowing participation in breach of fiduciary duty because Claimants failed to cite to any affidavits or other evidence to support the elements of standing. As the nonmovants at the summary judgment stage, Claimants could not rest on mere allegations and were required to set forth specific facts by affidavit or other evidence.

Fifth, the court disallowed Claimants' common-law fraud claims. The court considered three distinct categories of common-law fraud claims.

Claimants alleged that Debtors committed common-law fraud by failing to inform Claimants of various matters in the Merger. However, the court noted that "[i]f a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under applicable law, then the cause of action belongs to the [bankruptcy] estate." The court further noted that "[i]nvestors may own claims resulting from fraud or misrepresentation that occurred at the time they made their investment." Claimants alleged that they had standing because the Merger caused harm to Debtors (caused Debtors to collapse), which harmed the Claimants through the loss of their investments. The court disallowed these claims because Claimants failed to demonstrate that they suffered a direct injury rather than indirect harm to a creditor.

Donald Taylor asserted common-law fraud claims against Porter and Murphy Road for the sale of his promissory notes. The Trustee did not object to these claims. Therefore, the court allowed these claims to the extent that the claims were based on unpaid promissory notes and not a cause of action for fraud.

Various Claimants argued that they had standing for their common-law fraud claims against Fund II and WB Holdings because "[t]he fraud claims asserted by the Taylor Claimants are personal to them for the losses they sustained individually investing in each of the Debtors." However, those Claimants had previously stated (in their response to the Trustee's motion for summary judgment) that their investments in Fund II and WB Holdings were "going strong" until 2015. Because the damages arose from post-investment mismanagement of Debtors, an indirect injury to Claimants, the court disallowed these claims.

Sixth, the court disallowed Claimants' conspiracy claims against Debtors based on fraud. A conspiracy claim depends on a defendant's participation in some underlying tort for which the plaintiff seeks to hold another defendant liable; however, no underlying claim of fraud existed because the court disallowed all of Claimants' fraud claims.

Seventh, the court disallowed Claimants' aiding and abetting securities-fraud claims against Debtors because Claimants failed to provide any affidavits or evidence to support these claims.

The court found that the Trustee's evidentiary objection to Claimants' summary-judgment evidence was moot because Claimants failed to carry their summary-judgment burden as to standing.

Grisel v. Everest International, LLC, No. 02-19-00401-CV, 2022 WL 714516 (Tex. App.—Fort Worth Mar. 10, 2022, pet. filed) (mem. op.).

The court of appeals held that the trial court did not err in denying the defendant's plea in abatement where the plaintiff, a foreign LLC that was prohibited from maintaining this action if its activities constituted transacting business in Texas, was not registered when it commenced the suit but testified that it had registered during the pendency of the suit. It was the defendant's burden to present evidence that the defendant was not registered, and the defendant never brought forward evidence that the plaintiff had not in fact registered.

Everest International, LLC ("Everest"), a Florida limited liability company that alleged in its pleadings that it was doing business in Tarrant County, Texas, sued the defendants in Texas state court, and the defendants filed a plea in abatement challenging Everest's capacity to sue on the basis that Everest was not registered to transact business in Texas as required by the Texas Business Organizations Code (TBOC). In Texas, "a foreign filing entity" (which includes a foreign LLC) is not permitted to "maintain an action, suit, or proceeding in a court of this state ... on a cause of action that arises out of the transaction of business in this state unless the foreign filing entity is registered in accordance with" Chapter 9 of the TBOC. Tex. Bus. Orgs. Code § 9.051(b).

The defendants bore the burden of establishing lack of capacity and pointed to Everest's statement in its pleadings that it was doing business in Tarrant County, correspondence from the Texas Secretary of State's office stating that its records reflected that Everest was not registered to do business in Texas, and deposition testimony of a representative of Everest that Everest was a Florida corporation that operated in Texas. Everest pointed out that the Business Organizations Code expressly provides that specific activities "do not constitute transaction of business in this state," including maintaining an action or suit, maintaining a bank account, and "transacting business in interstate commerce." Tex. Bus. Orgs. Code § 9.251(1), (3), (9). Everest responded that it did business in Tarrant County, but "[a]t all relevant times" its principal office and administrative functions were based out of Florida, and its business activities in Texas and Florida involved interstate commerce. Thus, Everest argued, it was not required to register in Texas as a foreign LLC to maintain its suit. Everest further asserted that, "out of an abundance of caution, in order to avoid any argument over the matter and [to] avoid any unnecessary delay or abatement of this lawsuit," Everest filed with the Secretary of State on January 28, 2019, an "Application for Registration of a Foreign Limited Liability Company," along with the required filing fees. Everest provided a copy of its application, which was stamped "RECEIVED" by the Secretary of State, and a prepaid invoice from Austin-based Lawyer's Aid Service, Inc. reflecting that the service had filed the application and paid the filing fees to the Secretary of State on Everest's behalf. The defendants' lawyer at the hearing on the plea argued that he had not received any confirmation from the Secretary of State that the application had been received or accepted. The trial court denied the plea "for the time being" and allowed the trial to proceed on the basis that the matter could be cured up until the time of judgment.

Assuming that the defendants preserved their capacity complaint for review on appeal, and that Everest was required to register to do business in Texas to maintain suit, the court of appeals concludes that the trial court did not abuse its discretion by denying the plea in abatement. The defendants presented evidence that Everest was not registered to conduct business in Texas, but Everest presented evidence that it had submitted an application to the Secretary of State and paid the required fees. The TBOC provides that a filing instrument submitted to the Secretary of State takes effect on filing, and the Secretary of State is required to file a filing instrument upon finding that it conforms to the TBOC and the required fees are paid. See Tex. Bus. Orgs. Code §§ 4.051, 4.002(a). The defendants never offered any evidence that Everest's application was not in fact filed by the Texas Secretary of State. Further, the court of appeals on its own and for the first time on appeal may take judicial notice of adjudicative facts that are matters of public record. The court stated that a search of Everest's franchise-tax-account status on the Texas Comptroller's website showed Everest's right to transact business in Texas to be "active" with an effective registration date of January 28, 2019. Thus, the court took judicial notice of these facts showing that Everest was in fact registered to do business.

Villareal v. Saenz, No. 5-20-CV-00571-OLG-RBF, 2022 WL 1553009 (W.D. Tex. Mar. 4, 2022).

The magistrate court recommended dismissal of the plaintiff's individually asserted claims for breach of fiduciary duty and violations of the Computer Fraud and Abuse Act and the Anti-Cybersquatting Consumer Protection Act on the basis that all of these claims could only be asserted by the LLC that was allegedly damaged by the breaches and violations. With respect to the claim for breach of fiduciary duty, the court stated that members of an LLC do not owe one another a formal fiduciary duty under Texas law.

Jonathan Villarreal, on behalf of himself and his company, ZroBlack, LLC, brought suit against his former business partner, Jonathan Saenz, among others. The district court adopted a report and recommendation resulting in all of Villarreal's claims being dismissed except his claims against Saenz for breach of fiduciary duty, violations of the Computer Fraud and Abuse Act, and the Anti-Cybersquatting Consumer Protection Act. While the report and recommendation was pending before the district court, the court granted a motion to withdraw by Villarreal's counsel. As ZroBlack, LLC failed to timely obtain new counsel, despite the court's multiple warnings and extensions, the district court dismissed all claims by ZroBlack, LLC against Saenz. Saenz then filed a motion to dismiss all of Villarreal's individually held claims asserted against Saenz, and the magistrate court in this opinion issued a report and recommendation to grant Saenz's motion to dismiss all remaining claims that Villarreal asserted individually against Saenz because Villarreal's remaining claims constituted claims that could only be asserted by, and belonged to, ZroBlack, LLC as a matter of law.

In support of its recommendation that Villarreal's remaining individual breach-of-fiduciary-duty claims be dismissed, the court pointed out that Villarreal pleaded that Saenz breached his duty to, and damaged, ZroBlack, LLC, not Villarreal. The court stated that, "under Texas law, members in a limited liability company don't owe a formal fiduciary duty to one another," citing *Chase v. Hodge*, No. 1:20-cv-0175-RP, 2021 WL 1948470, at *8 (W.D. Tex. May 14, 2021). Acknowledging that "an informal fiduciary relationship may under certain circumstances exist between members," the court stated that Villarreal failed to plead any facts to suggest that an informal fiduciary relationship existed between himself and Saenz.

The court further determined that ZroBlack, LLC solely held the claims relating to the Computer Fraud and Abuse Act and the Anti-Cybersquatting Consumer Protection Act. These claims hinged on the allegation that Saenz's actions (Saenz's alleged intentional access of ZroBlack LLC's domain (or mark) on GoDaddy, deletion of ZroBlack LLC's webpage and email server, and refusal to release ZroBlack LLC's GoDaddy account) caused ZroBlack, LLC to suffer injury by losing major contracts, data, and new clients.

Pelletier v. Victoria Air Conditioning, Ltd., No. 13-20-00011-CV, 2022 WL 52810 (Tex. App.—Corpus Christi Jan. 6, 2022, no pet. h.) (mem. op.).

The court of appeals held that the trial court properly dismissed claims asserted individually by the sole member of several LLCs involved in a construction project on which the plaintiff was hired to provide work. Because the property that was the subject of the member's claims was owned by one of his LLCs, he was attempting to bring claims belonging to his LLC and the trial court did not err by dismissing the claims.

Victoria Air Conditioning, Ltd. ("VAC") sued Gaetan Pelletier ("Pelletier") an individual, and Pelletier Management and Consulting, LLC ("PMC") seeking to hold them liable on the basis of alter ego for the judgment debt of QI Wholesale Lumber, LLC ("QI") and TexInn, LLC ("TexInn"). Pelletier was a member and owner of PMC, QI, and TexInn. Each of these LLCs was involved in the construction of the TexInn Hotel in Cuero, Texas. VAC was hired to provide plumbing work for the project. Litigation ensued, and VAC obtained a default judgment against QI and TexInn in state court. Shortly before the state court entered its default judgment, Pelletier filed suit in federal court alleging claims against VAC. In the federal case, the Fifth Circuit Court of Appeals affirmed the district court's dismissal of that case on the basis that Pelletier lacked standing because "Pelletier did not establish that he personally owned the hotel and he offered no other valid cause of action for his personal claim against [VAC]"

While the federal suit was pending, VAC conducted post-judgment discovery, including deposing Pelletier. VAC filed a third-party alter-ego claim against Pelletier and PMC, alleging that Pelletier used QI and TexInn to further his individual objectives without regard to the LLCs' business concerns. VAC also alleged that Pelletier engaged in actual fraud by representing that QI and TexInn were the parties contracting with VAC and were the actual owners of the hotel. Pelletier asserted counterclaims similar to those initially asserted by QI and TexInn in the prior suit in state court. These claims were dismissed by the trial court, and PMC then filed similar counterclaims against VAC, alleging that a contract had been formed with PMC pursuant to a bid letter or that PMC

was a third-party beneficiary. The trial court granted summary judgment in favor of VAC on PMC's claims, and the case went to trial on VAC's alter-ego claim against Pelletier. The jury answered "yes" on the sole question submitted, which inquired whether Pelletier was responsible for the conduct of QI or TexInn.

The first issue addressed by the court of appeals was whether the trial court erred in dismissing Pelletier's counterclaims for lack of standing. The court explained that "[a] member of an LLC does not have an interest in any property of the company. See Tex. Bus. Orgs. Code. § 101.106(b). Furthermore, a member of an LLC does not have standing to assert claims that belong to the company. Recognizing this limitation, Pelletier based his standing to bring his counterclaims on his purported ownership of the hotel improvements. Pelletier argued that he had an ownership interest in the improvements by virtue of a land lease agreement between PMC and Pelletier. VAC responded that the land lease agreement did not convey ownership of the improvements to Pelletier and further argued that the federal court's determination that PMC owned the premises and improvements on the premises had preclusive effect on this issue. The court of appeals agreed with VAC that Pelletier was collaterally estopped from relitigating the issue of ownership. Absent an ownership interest in the premises or property, Pelletier failed to show a concrete injury and a real controversy between the parties. Pelletier was attempting to bring claims belonging to one of his LLCs, and the trial court did not err by dismissing the claims.

Next, the court addressed PMC's counterclaims and concluded that PMC failed to raise a fact issue regarding the existence of a contract between it and VAC and failed to raise a fact issue as to whether it was a third-party beneficiary to a contract. PMC also failed to raise a fact issue on its tort claims. The court of appeals thus concluded that the trial court did not err in granting summary judgment in favor of VAC on PMC's counterclaims.

The court also addressed Pelletier's argument that the evidence was legally and factually insufficient to support the jury's alter-ego finding. The court held that the evidence was sufficient to support the jury's finding.

In re Ubican Global, Inc., No. 01-21-00293-CV, 2021 WL 4533281 (Tex. App.—Houston [1st Dist.] Oct. 5, 2021, no pet. h.) (mem. op.) (granting a motion to strike the intervention of JHI (an LLC) on the grounds that JHI had no justiciable interest in the suit: "As discussed above, the record shows that Ubican [a corporation] did not assert any claims against JHI or assert that it is directly or indirectly liable for any of its damages. Ubican brought its claims against Colter [a member of JHI and a director of Ubican], in his individual capacity, for alleged breaches of his fiduciary duties to Ubican while acting as its director. JHI is a limited-liability company and a shareholder [of Ubican], with no fiduciary duties to Ubican. To the extent that JHI attempts to stand in the shoes of its principal, Colter, the law regards JHI and Colter as separate. See *Julka v. U.S. Bank Nat'l Ass'n*, 516 S.W.3d 84, 88 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (noting that 'presumption of legal separateness ... exists between a limited liability company and its members'); *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (stating that limited liability company is a legal entity distinct from its members).").

***See also Jiao v. Xu*, 28 F.4th 591 (5th Cir. 2022) summarized below under "Direct and Derivative Claims."**

P. Direct and Derivative Claims

Jiao v. Xu, 28 F.4th 591 (5th Cir. 2022).

The court held that either the assignors or assignees, or both, of membership interests in a Texas LLC had standing to bring a derivative action against the LLC's majority member, the trial court did not err in declaring part of the majority member's interest invalid due to the member's failure to pay all of his required capital contribution, and a turnover order in favor of the LLC against the member requiring the member to turn over his remaining membership interest in partial satisfaction of the judgment against the member for unauthorized withdrawals from the LLC's account did not violate the exclusivity provision of the charging order statute.

In 2016, Ningbo Xu, Xiongen Jiao, Zhonghua Yu, and Pengfei Zhou formed Dongtai Investment Group, LLC for the purpose of acquiring the Crowne Plaza Hotel in Houston. Jiao, Yu, and Zhou each made a capital contribution of \$1,000,000 for a 16.66% membership interest in the LLC. Xu was contractually obligated to pay \$3,000,000 for a 50.02% membership interest. Jiao, Yu, and Zhou later assigned their membership interests to their

children. Upon discovering financial wrongdoing by Xu, the assignors and assignees brought various claims against Xu and LCL Company, LLC (collectively, “Xu”), including claims for breach of contract, fraud, derivative and non-derivative breach of fiduciary duty, and violations of § 10(b) of the Securities Exchange Act.

The district court granted the plaintiffs’ motion for preliminary injunction and declaratory judgment against Xu. The district court found that Xu did not make his agreed \$3,000,000 capital contribution for his membership interest in the LLC but instead only paid \$867,889. Based on that finding, the court declared Xu’s unit certificates invalid and ordered the LLC to provide Xu with new certificates reflecting the ownership interest derived from the amount Xu had actually paid. The district court also declared that Xu owed the LLC \$1,304,400 based on numerous unauthorized withdrawals from the LLC’s accounts. The district court then entered a turnover order that required Xu to return his membership interest to the LLC in partial satisfaction of the declaratory judgment award.

The court rejected Xu’s contention that the district court erred in denying his motion to dismiss based on the plaintiffs’ lack of standing to assert shareholder derivative claims, explaining:

... [U]nder Texas law, a member of a closely held limited liability company can bring a derivative proceeding. TEX. BUS. ORGS. CODE § 101.463(c). It is undisputed that Dongtai is a closely held limited liability company. The original investors were members of Dongtai and assigned their membership interests to their children. “An assignor of a membership interest in a limited liability company continues to be a member of the company and is entitled to exercise any unassigned rights or powers of a member of the company until the assignee becomes a member of the company.” TEX. BUS. ORGS. CODE § 101.111(a). Thus, even if the assignees failed to comply with the requirements set out in Dongtai’s operating agreement for becoming members, as Xu alleges, the assignors would still be members of Dongtai. Either way, at least one group, if not both, has sufficient membership interest in Dongtai to confer standing to bring a derivative proceeding. *See, e.g., Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.”)

See also Villareal v. Saenz, No. 5-20-CV-00571-OLG-RBF, 2022 WL 1553009 (W.D. Tex. Mar. 4, 2022); *Pelletier v. Victoria Air Conditioning, Ltd.*, No. 13-20-00011-CV, 2022 WL 52810 (Tex. App.—Corpus Christi Jan. 6, 2022, no pet. h.) (mem. op.); *In re Ubican Global, Inc.*, No. 01-21-00293-CV, 2021 WL 4533281 (Tex. App.—Houston [1st Dist.] Oct. 5, 2021, no pet. h.) (mem. op.) **summarized above under “Standing or Capacity to Sue.”**

Q. Securities Laws

U.S. Securities and Exchange Commission v. Silea, No. 4:20-CV-737-SDJ, 2022 WL 269105 (E.D. Tex. Jan. 27, 2022).

In this federal securities fraud case, the court explained that the investments sold by the defendants—membership interests in a Texas limited liability company—were securities under the *Howey* test. According to the private placement memorandum provided to investors, the LLC would use investor funds to, at the investor’s election, either day-trade funds pooled from multiple investors through a so-called “mutual fund” or manage separate “private stock portfolios” for individual investors. The LLC and the investors would then split any profits from the trading based on a percentage negotiated with each investor.

The court explained that the “units” sold in KS Cartel, LLC, a Texas limited liability company, were securities as follows:

It is undisputed that Defendants offered and sold Units in KS Cartel to investors. The “Units” are securities, which the Securities Act broadly defines “to include a long list of financial instruments, including ‘investment contracts.’” *SEC v. Arcturus Corp.*, 928 F.3d 400, 409 (5th Cir. 2019) (citing 15 U.S.C. § 77b(a)(1)).

The Supreme Court in *Howey* articulated a test for determining whether an investment contract qualifies as a security, and the Fifth Circuit has recognized that the test requires three

elements: “(1) an investment of money; (2) in a common enterprise; and (3) on an expectation of profits to be derived solely from the efforts of individuals other than the investor.” *Arcturus*, 928 F.3d at 409 (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946) and quoting *Williamson v. Tucker*, 645 F.2d 404, 417 (5th Cir. 1981)). Courts disregard “legal formalisms” when considering this test and instead “focus on the substance of the deal.” *Id.* (citing *Reves v. Ernst & Young*, 494 U.S. 56, 61, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990)). Even where contracts “superficially resemble private commercial transactions” and lack “the formal attributes of a security,” they can still qualify as securities. *Id.* (quoting *Youmans v. Simon*, 791 F.2d 341, 345 (5th Cir. 1986)).

All of the *Howey* factors are met. There was an “investment of money” because KS Cartel investors paid cash to receive Units. And “commonality is evidenced by the fact that the fortunes of all investors [were] inextricably tied to the efficacy of” Defendants’ efforts. *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974). The Commission has established that commonality exists because Defendants pooled investors’ money and used the funds to, among other things, trade securities, and the investors’ returns depended on the success of Defendants’ trading, which they explained to potential investors and in the PPM. (APP at 9, 11). And investors had no right to participate in managing KS Cartel. Thus, the third requirement is also met, as investors had a reasonable expectation that profits would be derived solely from the efforts of individuals other than themselves.

R. Diversity Jurisdiction

The Fifth Circuit Court of Appeals and federal 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 stating this principle are too numerous to include in this paper, but recent Fifth Circuit opinions or opinions addressing somewhat novel situations or unsettled issues in this context are included below .

1400 FM 1417 LLC v. CertainTeed Corporation, 4:21-cv-00847, 2022 WL 906192 (E.D. Tex. Mar. 28, 2022).

The court held that a Delaware corporation was not a proper party to a suit arising out of a lease entered into by the corporation where the corporation no longer existed due to its conversion to a Delaware limited liability company, which then converted to a Texas limited liability company, which then underwent a divisive merger into two Texas limited liability companies, one of which was allocated the lease at issue and then converted into a Delaware limited liability company. The court analyzed the citizenship of the Delaware limited liability company that ultimately resulted from these transactions and held that the LLC was a citizen of Delaware and Pennsylvania based on its members at the time when the case was removed. Although there was diversity of citizenship between the parties, the case was remanded due to the defendant’s failure to establish that the amount in controversy exceeded \$75,000.

In 2003, CertainTeed Corporation entered into a long-term lease agreement with the State of Texas to lease commercial property. Following Texas’s sale of the property to 1400 FM 1417 LLC (“1400 FM”), 1400 FM became the owner and lessor of the property. On September 24, 2021, 1400 FM served CertainTeed LLC with an eviction notice, claiming that CertainTeed LLC was in default of the lease agreement. 1400 FM filed a forcible detainer suit in a justice of the peace court after CertainTeed LLC refused to vacate the property. Subsequently, CertainTeed LLC removed the case to federal court.

On October 22, 2019, CertainTeed Corporation converted from a Delaware corporation to a Delaware limited liability company. Then on October 23, 2019, the entity converted from a Delaware limited liability company to a Texas limited liability company. On that same day, the entity effected a divisional merger under Tex. Bus. Orgs. Code § 10.001. The entity split into CertainTeed LLC and DBMP LLC (both of which were Texas entities). CertainTeed LLC was the successor in interest on all assets and liabilities unrelated to asbestos litigation. Later that same day, CertainTeed LLC converted to a Delaware limited liability company.

1400 FM argued that CertainTeed LLC failed to establish complete diversity of citizenship, making removal improper. Subject matter jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship between the parties based on the facts as they exist at the time of removal. For diversity purposes, a corporation is a citizen of the state of its incorporation and the state where its principal place of business is located. The citizenship of a limited liability company is determined by the citizenship of all of its members. After concluding that CertainTeed LLC adequately alleged that 1400 LM was a citizen of Texas, the court turned to the issue of what entity was the proper defendant. The plaintiff insisted that CertainTeed Corporation was the proper defendant as the entity that entered into the lease, but the court pointed out that CertainTeed Corporation no longer existed as a result of the divisive merger described in the opinion.

The court found that CertainTeed LLC was a citizen of Delaware and Pennsylvania for diversity purposes. Due to the change in the entity's form resulting from a merger, the court considered whether to determine citizenship based upon the dividing corporation or the surviving limited liability company. The court stated that where there has been a merger of entities, the citizenship of the surviving entity generally is controlling for diversity purposes. A court may still consider the citizenship of the merging corporation if it is unclear that a complete and effective merger has occurred, but the court found that an effective merger occurred, as shown by the Certificate of Divisional Merger issued by the Texas Secretary of State. Following the divisive merger, CertainTeed LLC, a Texas limited liability company, converted to a Delaware limited liability company. Therefore, the court considered the citizenship of the Delaware limited liability company at the time of the removal. CertainTeed LLC possessed one member, CertainTeed Holding Corporation. CertainTeed Holding Corporation was incorporated in Delaware and had its principal place of business in Pennsylvania. Thus, CertainTeed LLC was a citizen of Delaware and Pennsylvania.

The court found that 1400 FM's misnomer of CertainTeed LLC as CertainTeed Corporation did not deprive the court of subject matter jurisdiction. Where two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity, the misidentification is fatal to jurisdiction and requires remand. However, a misnomer where a plaintiff sues the correct entity under a mistaken name does not destroy diversity jurisdiction. The pleadings indicated that 1400 FM intended to sue the entity that was the lessee of the property. Thus, 1400 FM's error constituted a misnomer of CertainTeed LLC that did not require remand. Further, removal in this case did not involve a diverse third-party attempting to create subject-matter jurisdiction by substituting itself for a non-diverse defendant. CertainTeed LLC was the successor in interest of CertainTeed Corporation. Additionally, CertainTeed Corporation no longer existed as an entity at the time the case was filed and removed.

Although there was diversity of citizenship between the parties, the court ultimately determined that the case must be remanded because CertainTeed LLC did not prove that the amount in controversy exceeded \$75,000 as required for diversity jurisdiction.

George v. SI Group, Inc., No. 20-40427, 2021 WL 5095981 (5th Cir. Nov. 2, 2021).

"Citizenship for an individual is synonymous with the person's domicile; for a corporation, it is that of the state in which it is incorporated and the state where it has its principal place of business; for an L.L.C., it is that of any state where its members are citizens...."

We first consider jurisdiction as it relates to Walker [Group Holdings, L.L.C.]. According to a Certificate of Amendment Walker filed with the Texas Secretary of State in 2015, Walker's sole member is Wabash National, LP ('Wabash'). Thus, Walker's citizenship is tied to Wabash's citizenship, and Wabash is a citizen of every state in which one of its partners is a citizen. Evergreen asserts that Wabash has two partners: Wabash National Trailer Centers, Inc. and Wabash National Corporation....Walker's single bare assertion of its own citizenship at the pleadings stage is not enough to clearly establish jurisdiction following summary judgment proceedings. Because appellees have failed to establish Wabash's citizenship, they have failed to establish Walker's citizenship.

Now, Brenner Tank [Services, L.L.C.]. According to Brenner's 2016 Texas Franchise Tax Public Information Report, it has one member, Brenner Tank L.L.C. Thus, like Walker, Brenner Tank's citizenship is tied to Brenner Tank L.L.C.'s citizenship, and Brenner Tank L.L.C. is a citizen of every state in which one of its members is a citizen. Evergreen claims that Brenner Tank L.L.C.'s sole member is Walker.... Because appellees have failed to establish Brenner Tank L.L.C.'s citizenship, they have failed to establish Brenner Tank's citizenship.

Appellees have failed to show clearly that jurisdiction exists with respect to Walker Group Holdings, L.L.C. and Brenner Tank Services, L.L.C. But, as we have noted earlier in this opinion, appellees have proffered some

evidence to suggest that jurisdiction does exist. Under these circumstances—'[w]here ... jurisdiction is not clear from the record, but there is some reason to believe that jurisdiction exists, the Court may remand the case to the district court for amendment of the allegations and for the record to be supplemented.' *Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1228 (5th Cir. 1989) (per curiam). We will do so here.”

Tatfook Technology (Hong Kong) Co. Ltd. v. Schok, LLC, Civ. A. No. 4:21-CV-00411, 2021 WL 4941176 (E.D. Tex. Oct. 22, 2021).

“... For purposes of diversity, the citizenship of a limited liability company is determined by considering the citizenship of all the members and partners. The party invoking jurisdiction under Section 1332 is responsible for showing that the parties are completely diverse.

Plaintiff is a Chinese company organized under the laws of the People’s Republic of China. Defendant is a Delaware limited liability company. Defendant is made up of eight members. Seven of the eight members are natural persons. All individuals are either citizens of Mexico or the United States and reside in either Mexico or Texas. There is one corporate member, and it is incorporated under the laws of Mexico and has its principal place of business in Mexico. Because the citizenship of a limited liability company takes on the citizenship of all of its members, Defendant is a Texas and Mexican citizen.

However, where there are aliens on both sides of the litigation, complete diversity does not exist under Section 1332(a)(2). There are aliens on both sides of this litigation: Plaintiff is a Chinese corporation with its principal place of business in China, and Defendant is comprised of Mexican members. While some of the Defendant’s members are citizens of Texas, complete diversity is still lacking. Under Section 1332(a)(3), a district court may have original jurisdiction in suits between citizens of different states with aliens as additional parties. Here, there are no United States citizens on Plaintiff’s side of the litigation. Therefore, complete diversity of citizenship does not exist, and the Court lacks subject matter jurisdiction under 28 U.S.C. § 1332(a). Thus, the Court grants Defendant’s motion to dismiss for lack of subject matter jurisdiction.”

Bluetarp Finance, Inc. v. Robertson Development, L.L.C., No. 21-30056, 2021 WL 3854785 (5th Cir. Aug. 27, 2021).

“But according to Robertson Development’s filings with the Louisiana Secretary of State, Robertson Development, LLC is, as its name suggests, a limited liability company, not a corporation. Whereas the citizenship of a corporation is determined by its place of incorporation and its principal place of business, ‘the citizenship of a[n] LLC is determined by the citizenship of all of its members.’ *Id.* at 314 (quoting *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008)). BlueTarp did not allege the citizenship of Robertson’s members in its initial complaint. It therefore failed to properly allege complete diversity of citizenship. ...

It is unclear on this record who the members of Robertson Development are or what their citizenship may be. It is, however, possible that jurisdiction exists. We therefore issue a limited remand to the district court to determine whether it has diversity jurisdiction. If jurisdiction does not exist, then the district court must dismiss the case. If there is subject matter jurisdiction, then the record on appeal should be supplemented accordingly.”

Caytrans Project Services Americas, Ltd. v. BBC Chartering & Logistics GmbH & Co., 861 Fed. Appx. 556 (5th Cir. 2021) (“In *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008), this Court held that ‘the citizenship of a LLC is determined by the citizenship of all of its members.’ Consequently, the Company is a citizen of Louisiana and Germany. Thus, whether the Company is joined as a plaintiff or defendant, diversity jurisdiction would be lacking.”).

S. Personal Jurisdiction

Leary v. Coinmint LLC, No. 14-20-00375-CV, 2022 WL 1498197 (Tex. App.—Houston [14th Dist.] May 12, 2022, no pet. h.) (mem. op.).

The court held that the Delaware LLC statute did not preclude a manager of a Delaware LLC from waiving his right to maintain a legal action in Delaware and that a provision of the operating agreement (which was signed by the manager in his individual capacity) fixing venue in Harris County, Texas, was an enforceable forum-selection

clause that constituted a consent to personal jurisdiction and satisfied the plaintiffs' initial burden to overcome the manager's special appearance.

Mintvest Capital, Ltd ("Capital") and Coinmint Living Trust, LLC, a Delaware entity, ("CLT") were members of Coinmint, LLC ("Coinmint"), a private bitcoin mining farm that operated the largest digital currency center in North America. Prieur Leary, III ("Leary") was the president and manager of Capital. Ashton Soniat ("Soniat") was the trustee and manager of CLT. In 2016, Capital and CLT formed Coinmint as a Delaware limited liability company, and Coinmint's members and managers executed the entity's operating agreement. The operating agreement stated that Coinmint was a manager-managed limited liability company and that each member could designate a manager. CLT designated itself as a manager, and Capital designated Leary as a manager. The operating agreement contained a forum-selection and choice-of-law clause that stated, "[t]his Agreement and the application o[r] interpretation hereof, shall be governed exclusively by the laws of the State of Delaware, and specifically the [Delaware Limited Liability Company Act]. Venue for any dispute shall lie in Harris County, Texas." Soniat signed the operating agreement in his representative capacity for CLT as a member and in his representative capacity for CLT as a manager. Leary signed the Operating Agreement in his representative capacity for Capital as a member and in his individual capacity as a manager.

Following a conflict between Leary and Soniat, Coinmint and CLT filed suit against Leary in 2019 for breach of contract in Harris County, Texas. Coinmint and CLT later amended their petition to name Capital as a defendant. Leary and Capital filed a special appearance, challenging the lack of sufficient evidence to establish their minimum contacts under either a specific or general-jurisdiction analysis, and contending that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. Leary specifically argued that the "mere fact that [Capital] and Mr. Leary signed an operating agreement with an unenforceable venue clause is insufficient to establish personal jurisdiction over [Capital] or Mr. Leary."

Coinmint and CLT filed a response to Leary and Capital's special appearance, arguing that "the forum-selection clause operated as Leary's and Capital's consent to the Texas forum." Coinmint and CLT specifically asserted that the "provision is a valid mandatory forum-selection clause which requires enforcement under both Delaware and Texas law, and that even if the clause were construed as permissive, it operates as a valid 'consent to jurisdiction.'" The trial court issued an order denying Leary and Capital's special appearance. Subsequently, Leary and Capital filed an appeal, but only Leary filed a brief. Capital's appeal was dismissed for want of prosecution.

The primary issue on appeal was whether the trial court erred in denying Leary's special appearance because the operating agreement's forum-selection clause was valid under Texas and Delaware law. During the pendency of the appeal, Coinmint and CLT also moved for sanctions. The court found that Coinmint and CLT satisfied their initial burden by asserting that their claims fell under a valid forum-selection clause.

The court noted that personal jurisdiction is a waivable right and that a litigant may give express or implied consent to the personal jurisdiction of the court, such as via a contractual consent-to-jurisdiction clause. Texas courts must enforce forum-selection clauses in contracts between the parties "unless the party opposing enforcement 'clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'"

First, Leary focused his argument on the second sentence of 6 Del. C. § 18-109(d), which states that a member that is "not a Manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company." 6 Del. C. § 18-109(d). Leary alleged that as Capital could not waive its right to maintain a legal action in Delaware courts (as a non-managing member), neither could Leary as its representative. The court rejected this argument because Leary, not Capital, had been designated a manager, and Leary had signed the operating agreement in his individual capacity.

Second, Leary argued that the Delaware statute rendered the forum-selection clause a nullity because the statute may apply to Capital. The court disagreed and found the reasoning of *Li v. loanDepot.com, LLC* persuasive. (No. CV 2019-0026-JTL, 2019 WL 1792307, at *2 (Del. Ch. Apr. 24, 2019). The *Li* court found that "[t]he plain language of the second sentence only extends to nonmanaging members, and it only preserves the ability of a nonmanaging member to bring or maintain a suit in Delaware... The second sentence of Section 18-109(d) is thus a narrow provision that only preserves the ability of a nonmanaging member to sue in Delaware." The court here agreed with the court in *Li* that the second sentence of the statute is a "narrow provision" that did not invalidate the forum-selection clause. The court said the statutory provision would have allowed Capital, as a non-managing

member, to assert internal governance claims in Delaware notwithstanding the forum-selection clause, but Capital was not asserting any claims. As Leary was a manager who signed in his individual capacity, he could not avoid the operating agreement's forum-selection clause.

Finally, the court decided not to grant Coinmint and CLT's motion for sanctions. The court found the question of how to reconcile the operating agreement's mandatory forum-selection clause against Delaware's no-venue-waiver provision to be "an issue worthy of resolution."

Helmer v. Rusco Operating, LLC, No. 03-21-00148-CV, 2022 WL 963236 (Tex. App.—Austin Mar. 31, 2022, no pet. h.) (mem. op.).

The court concluded that the evidence was insufficient to support the trial court's implied finding that an alter-ego relationship existed between an LLC and its sole member for purposes of imputing the contacts of the LLC to the member for purposes of exercising personal jurisdiction over the member.

The plaintiff relied on the alter-ego doctrine in order to impute the Texas contacts of a Louisiana LLC to its sole member and manager for purposes of personal jurisdiction. The trial court impliedly found an alter-ego relationship by denying the member's special appearance, and the member challenged the sufficiency of the evidence to support that finding. The court of appeals discussed the alter-ego doctrine and factors relevant to a determination of alter ego and stated that "[u]ltimately, for a court to find personal jurisdiction based on a theory of alter ego, the evidence must show that there is such unity between the corporation and the individual that the separateness of the corporation has ceased and that holding only the corporation liable would result in an injustice."

The court characterized the undisputed evidence, viewed in the light most favorable to the trial court's alter ego finding, as demonstrating that Helmer, an individual, owned and managed two business entities, the LLC and a corporation; that Helmer alone controlled, "based on his own personal wishes," how funds belonging to the LLC would be allocated; and that "[o]n several occasions," Helmer withdrew funds from the LLC for purposes unrelated to the LLC, specifically, to pay expenses for the corporation owned by Helmer. The plaintiff argued that this evidence was sufficient to support a finding of alter ego as to Helmer because it demonstrated "[a] failure to observe corporate formalities, a lack of capitalization and ability to pay creditors, and Helmer's misdirection of corporate assets for his own personal benefit and to the detriment of [the LLC]." The court of appeals disagreed.

First, the court stated that the plaintiff did not explain what formalities were not observed by the LLC, and the failure to comply with corporate formalities is no longer a factor in considering whether an alter ego exists in any event. Second, the court stated that it could not infer from Helmer's transfer of funds or from the LLC's failure to pay the plaintiff that the LLC was inadequately capitalized, and there was no evidence presented as to the LLC's financial condition. Finally, the fact that "on several occasions," Helmer withdrew funds from the LLC and used the funds for purposes unrelated to the LLC was insufficient, standing alone, to show that the LLC was operated as a "mere tool or business conduit" because the Texas LLC statute recognizes that an LLC member may be entitled to receive a distribution of company funds (*see* Tex. Bus. Orgs. Code § 101.203 addressing sharing of distributions), and case law has stated that an owner's taking a draw from a company is not sufficient to show alter ego. Without additional evidence of the dealings between Helmer and the LLC, the court could not conclude from the fact that Helmer withdrew funds that he "divert[ed] company profits" or "fail[ed] to keep corporate and personal assets separate," such that "the separateness [of the LLC] has ceased."

In a footnote, the court noted the distinction between veil piercing for purposes of establishing liability and veil piercing for jurisdictional purposes and stated that the plaintiff's allegations of fraud on the part of Helmer had "no place in assessing veil piercing for the purpose of establishing jurisdiction" and that reliance on Helmer's alleged fraudulent conduct as a basis to impute jurisdiction was misplaced.

Ray v. Lynass, No. A-21-CV-00020-LY, 2021 WL 8443684 (W.D. Tex. Nov. 9, 2021).

The court determined that a forum-selection clause in a company agreement of a Texas LLC permitted disputes to be litigated in Texas state court but did not preclude disputes from being litigated in federal court, that the forum-selection clause at issue did not waive a nonresident member's challenge to personal jurisdiction, that the non-resident member in this case had sufficient minimum contacts in Texas to support the exercise of specific personal jurisdiction over him, that the forum-selection clause did not specify venue, and that venue in this case was proper in the Western District of Texas.

In 2015, Michelle Ray and Patrick Lynass, a resident of California, co-founded Absolute Facility Solutions, LLC ("Absolute"), a Texas limited liability company based in Texas, and executed a company agreement. The

company agreement contained a provision entitled “Settling Disputes” (the “Forum-Selection Clause”) that stated that “[a]ny lawsuit will be under the jurisdiction of the state of Texas.”

In 2020, Absolute voted to terminate Lynass as director of sales and treasurer of the company. Ray and Absolute subsequently brought suit against Lynass under ten causes of action for violations of the Anti-Cybersquatting Consumer Protection Act, the Texas Uniform Trade Secrets Act, and the Defend Trade Secrets Act, as well as for breach of fiduciary duty, conversion, tortious interference, and breach of contract. Absolute and Ray alleged Lynass had misappropriated company property and confidential information for his separate use in interstate commerce. Absolute and Ray further alleged that Lynass used the company’s information to thwart Absolute’s relationship with “employees, contracts, and clients.” Lynass moved to dismiss Ray and Absolute’s claims against him based on the Forum-Selection Clause executed between the parties, as well as for lack of personal jurisdiction, improper venue, and failure to state a claim.

First, Lynass argued that the Forum-Selection Clause unambiguously required the parties to adjudicate any lawsuit arising from the agreement in Texas state court because the clause was mandatory. Absolute and Ray responded that the Forum-Selection Clause allowed for disputes arising out of the company agreement to be filed in federal court because the clause was permissive.

The magistrate court rejected Lynass’s argument and recommended that the district court dismiss Lynass’s motion because the Forum-Selection Clause was permissive. As an initial matter, the court noted that Texas law governed the interpretation of the forum-selection clause. A mandatory forum-selection clause requires that litigation arising from the contract be carried out in a given forum. However, a permissive forum-selection clause is only a contractual waiver of personal jurisdiction and venue objections if litigation is commenced in the specified forum. A forum-selection clause is permissive if it does not foreclose the possibility that other courts may also have jurisdiction. While the Forum-Selection Clause appeared to mandate jurisdiction in Texas state courts, it “neither prohibit[ed] litigation in jurisdictions other than” state court nor provided that state courts in Texas “h[ad] exclusive jurisdiction over all claims arising out of the contract.”

Second, Lynass argued that the district court should dismiss the claims against him for lack of personal jurisdiction over him because Ray and Absolute alleged “no specific act or conduct” by him in Texas and that the Forum-Selection Clause only waived his challenges to personal jurisdiction and venue in Texas state courts. Absolute and Ray responded that Lynass waived any objection to personal jurisdiction in Texas by agreeing to the Forum-Selection Clause in the company agreement. Lynass replied that the law did not support Absolute and Ray’s position.

The court determined that the Forum-Selection Clause did not waive Lynass’s challenge to personal jurisdiction in federal court in Texas. The court stated that the issue was whether the Forum-Selection Clause called for “all lawsuits” arising under the company agreement to be “under the jurisdiction of the state of Texas” and waived Lynass’s objections to jurisdiction in federal court in Texas. The court concluded that the Forum-Selection Clause did not waive Lynass’s objections to personal jurisdiction in federal court in Texas because the lawsuit was not initiated in the forum specified in the clause.

The court determined, however, that Lynass had sufficient minimum contacts in the forum to support the exercise of specific personal jurisdiction over him. As the Texas long-arm statute meets the limits of the Due Process Clause, only two elements exist for the exercise of personal jurisdiction over Lynass: (1) the defendant must have purposefully availed itself of the benefits and protections of the forum state by establishing “minimum contacts” with that state such that it would reasonably anticipate being brought to court there; and (2) the exercise of jurisdiction over the defendant must “comport[] with fair play and substantial justice.” Lynass should have “reasonably anticipated being haled into Texas courts to defend any allegations [arising from a breach] of contract” knowing that the company agreement was formed in Texas and governed by Texas law. Further, Lynass possessed “purposeful contacts” with Texas in forming and leading Absolute in combination with the “foreseeable harmful effects” in Texas of his alleged breach of responsibilities under the company agreement and refusal to return Absolute property and confidential property after his termination. Therefore, the court determined that Ray and Absolute satisfied both elements and that the court could exercise personal jurisdiction over Lynass.

Third, Lynass argued that the district court should dismiss the lawsuit because Ray and Absolute brought the case in the wrong venue. Ray and Absolute responded that Lynass waived any objections to venue via the Forum-Selection Clause. Lynass replied that the Forum-Selection Clause only subjected him to jurisdiction and venue in Texas state court. The court found that the Forum-Selection Clause did not waive Lynass’s objections to venue in the Western District of Texas. A permissive forum-selection clause only serves as a contractual waiver

of venue objections “if litigation is commenced in the specified forum.” The Forum-Selection Clause did not specify a particular venue but only the jurisdiction of the “state of Texas.” Therefore, Ray and Absolute did not bring the litigation in the forum specified in the clause.

However, the court found that venue was proper in the Western District of Texas and recommended that the district court deny Lynass’s motion to dismiss based on improper venue. Venue is proper in a district where a “substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). The court found that venue was properly in the Western District of Texas because Ray’s and Absolute’s claims arose from an alleged breach of contract that Ray and Absolute entered into to form a Texas-based company and the harm that Lynass allegedly caused occurred in the Western District of Texas. These reasons were sufficient to establish venue despite Lynass’s residence in California during his tenure as a co-founder and sales director for Absolute.

Wadi Petroleum, Inc. v. Miller, No. 13-21-00014-CV, 2021 WL 4466320 (Tex. App.—Corpus Christi Sept. 30, 2021, pet. denied) (mem. op.).

The court of appeals affirmed the trial court’s granting of Ethan Miller’s special appearance with respect to the unintentional torts allegedly committed by Miller, but reversed the special appearance with respect to the intentional torts allegedly committed by Miller. As part of its analysis, the court of appeals rejected Miller’s “fiduciary shield” argument and appellants’ alter-ego claims.

In 2004, appellants Wadi Petroleum, Inc., Dice Exploration Company, Inc., South Bay Corporation, Lamb Oil & Gas, Inc., and Betaco, LLC, along with other working interest owners, acquired leases and began operations on what would eventually become nine oil and gas wells and saltwater disposal wells located in southern Louisiana. The wells were operated under five separate joint operating agreements (“JOAs”). The first three JOAs originally designated Wadi, a Texas corporation, as the operator and Louisiana Delta Oil Company, LLC as a non-operating working interest owner. The final two JOAs, executed in 2007 and 2008, designated Louisiana Delta as the operator and Wadi as a non-operating working interest owner.

Louisiana Delta was a Virginia limited liability company formed by Miller and Phil Bryant Jr., a Texas resident. Miller and Bryant elected to establish the company’s principal place of business in Texas for sixteen years, first in Houston, and then in Lakeway. Bryant served as the company’s president. Miller, a licensed attorney residing in Virginia, served as its chief financial officer and chief legal officer. Bryant, along with the company’s geological and accounting staff, oversaw the daily operations of the oil and gas wells from the company’s Texas office. Miller traveled to the company’s corporate office between ten and nineteen times from 2001 until 2015 in his capacity as a manager and owner of the company. Miller maintained the company’s books concerning revenues at his office in Virginia and was responsible for remitting revenues to the other working interest owners. In 2016, Bryant resigned as president, and Miller moved the company’s principal place of business to Virginia.

By this point, Louisiana Delta had become the operator under all five JOAs. After Bryant’s resignation, the other working interest owners disagreed on whether Miller’s company should continue to serve as operator. Miller began lobbying the other owners, culminating in a May 2016 meeting in Houston between the owners. In an affidavit, Kirk Dice, Vice President and co-owner of Wadi and Dice Exploration, said that Miller organized the May 2016 meeting in Houston and that “Miller made certain representations about himself and his companies that turned out to be untrue.” In particular, Dice said that Miller “told [him] that his companies were professional oil and gas operations companies[,] and [that] they would operate the wells strictly in accordance with the law, the [JOA]s in place, and ... standards of performance and conduct.” Dice contends that Miller’s representations about “professional experience and acumen” proved untrue and that Dice’s companies relied on those representations to their detriment by deciding to do business with Miller’s companies. Dice alleged that “[d]uring the course of operations, Mr. Miller and his companies made charges for operations that did not take place” and overcharged for other operations that benefitted Miller personally. Dice believed Miller “defrauded [his] companies, and other working interest owners, by his lack of truthfulness, over-billing, and general incompetence in operations of the wells at issue.” Dice’s brother, Kevin, also a principal owner of Wadi and Dice Exploration, provided a substantively identical affidavit.

In 2018, appellants filed suit against Miller, Bryant, Louisiana Delta, and others. The petition included allegations of intentional and unintentional torts, and an amended petition asserted that the entity defendants were alter egos of the individual defendants. Miller filed a special appearance, which the trial court granted.

On appeal, the court observed that “[t]he sole issue before us is whether Miller’s contacts with Texas are sufficient to confer the trial court with specific jurisdiction over him as to appellants’ various tort claims.” Miller

alleged that all of his relevant contacts with Texas were in a representative capacity, and therefore, under the fiduciary shield doctrine, the contacts could not be imputed to him personally. The court of appeals disagreed:

.... Generally, the fiduciary shield doctrine protects a nonresident corporate officer or employee from the exercise of personal jurisdiction when all his contacts with Texas were made in a representative capacity. However, courts applying the fiduciary shield doctrine “have limited its application to attempts to exercise general jurisdiction over a nonresident.”

Conversely, a nonresident corporate officer is not shielded from the exercise of specific jurisdiction as to torts for which the officer may be held individually liable. “Thus, a corporate officer is not protected from the exercise of specific jurisdiction, even if all of his contacts were performed in a corporate capacity, if the officer engaged in tortious or fraudulent conduct directed at the forum state for which he may be held personally liable.”

Here, appellants have limited their contract claims to the corporate defendants but alleged torts against Miller for which he can be held individually liable. Thus, the fiduciary-shield doctrine does not protect Miller from the exercise of specific jurisdiction in this case if personal jurisdiction is otherwise proper.

The appellants then argued that the entity defendants were Miller’s alter egos such that the contacts of the entities, all of which did business in Texas, should be imputed to Miller. The court of appeals disagreed with that contention as well:

.... Even assuming the alter ego theory was properly considered by the trial court, we cannot conclude that it applies here.

“[T]he party seeking to ascribe one corporation’s actions to another corporation or individual for jurisdictional purposes by piercing the corporate veil must prove the alter ego relationship.” As support for their alter ego allegation, appellants have not pointed us to any evidence in the jurisdictional record. Instead, appellants only cite to the alter ego allegations in their petition, the entirety of which are set out below:

[Appellants] assert that the individual Defendants used the corporate structures of the corporate Defendants as shells and false fronts for operations carried out by, and for the benefit of, the individual Defendants, and thereby perpetrated frauds and other tortious conduct, ignored corporate formalities, and otherwise abused the legitimate purpose of corporate structures such that all actions by the corporate Defendants should be attributed to the individual Defendants under the doctrine of alter ego.

These conclusory allegations alone are insufficient to pierce the corporate veil for jurisdictional purposes. Moreover, although fraud is necessary to pierce the corporate veil for purposes of liability, it “has no place in assessing contacts to determine jurisdiction.” Rather, courts consider evidence of (1) commingled funds, (2) representations that the individual would financially back the companies, (3) the diversion of company profits to the individual for his personal use, and (4) other failures to keep company and personal assets separate. Having failed to point us to any such evidence, appellants have not established that all the contacts of Miller’s companies should be imputed to Miller. Accordingly, we turn to the nature and quality of Miller’s individual contacts with Texas.

The court then engaged in a full-blown jurisdictional analysis with respect to Miller. The court concluded that “Miller purposefully availed himself of the privilege of conducting business in Texas,” and it then proceeded to address “whether the claims against Miller arose out of or were related to his contacts with the state.” With respect to the appellants’ unintentional tort claims for negligence and gross negligence, the court concluded that there was “no substantial connection between these claims and Miller’s contacts with Texas.” With respect to the appellants’ intentional tort claims, however, the court determined that they were “sufficiently connected to Miller’s

Texas contacts.” After finding that that the exercise of jurisdiction would comport with traditional notions of fair play and substantial justice, the court of appeals concluded that the trial court erred when it granted Miller’s special appearance as to the intentional tort claims, but it affirmed the special appearance with respect to the unintentional tort claims. As the court observed: “We reverse the trial court’s order granting Miller’s special appearance concerning appellants’ claims for fraud, breach of fiduciary duty, conversion, and money had and received. We affirm the trial court’s order in all other respects.”

Forever Living Products International, LLC v. AV Europe GmbH, 638 S.W.3d 719 (Tex. App.—Dallas 2021, no pet. h.) (stating that “[l]imited liability companies like AV Europe are treated like corporations for general-jurisdiction purposes”).

XCO Latin Workout, LLC v. Torres, Civ. A. No. 3:20-CV-198-N, 2021 WL 2858765 (N.D. Tex. July 8, 2021).

The district could not determine whether it possessed personal jurisdiction over a counterclaim defendant on a veil-piercing theory. As a consequence, the court granted leave to the counterclaim plaintiffs to conduct jurisdictional discovery for ninety days.

Plaintiffs Tube Trainer B.V., LLC and XCO Latin Workout, LLC (“XCO”) alleged that they were the owner and exclusive licensee, respectively, of the XCO trademark. Defendant Vanessa Torres was a fitness instructor located in Puerto Rico. She also served as the President of defendant Functional Athletic Training Corporation. Plaintiffs sued the defendants for alleged trademark infringement of the XCO mark. Defendants then brought counterclaims for fraud against XCO, Flexi-Sports GmbH, and Jackeline Rodriguez.

Rodriguez moved to dismiss on the ground that the court lacked personal jurisdiction over her. In response, the counterclaim plaintiffs asserted that Rodriguez regularly appeared in the state of Texas to provide videos, courses, and events to promote herself and her business. The counterclaim defendants argued that Rodriguez was protected by the fiduciary shield doctrine under which “an individual’s transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation[.]”

The court first noted that the fiduciary shield doctrine was inapplicable to the dispute:

However, apart from any veil piercing theory seeking vicarious liability, it has long been established that “a corporation’s employee is personally liable for tortious acts which he directs or participates in during his employment.” *Levendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1985) (recognizing rule and holding employee individually liable for penning a libelous letter in the course and scope of his employment); *see also Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (noting Texas’s longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts). “The law is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of a representative of the corporation.” *Kingston v. Helm*, 82 S.W.3d 755, 759 (Tex. App—Corpus Christi 2002, pet. denied).

Bates Energy Oil & Gas v. Complete Oilfield Servs., 361 F. Supp. 3d 633, 666 (W.D. Tex. 2019). Regardless of the fiduciary shield doctrine’s inapplicability to the case at hand, the fraud counterclaim is unrelated to Rodriguez’s contacts with Texas. The Court determines that it lacks personal jurisdiction over Rodriguez individually.

The court then turned to jurisdictional veil-piercing theories, but it determined that it did not have enough information:

Texas law provides three broad theories under which a court may disregard the corporate fiction and pierce the corporate veil. The Court may pierce the corporate veil “when: 1) the corporation is the alter ego of its owners or shareholders, 2) the corporation is used for illegal

purposes, and 3) the corporation is used as a sham to perpetrate a fraud.” *Fed. & Deposit Co. of Maryland v. Com. Cas. Consultants, Inc.*, 976 F.2d 272, 274–75 (5th Cir. 1992) (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 272–73 (Tex. 1986), *superseded in part by statute*, TEX. BUS. ORGS. CODE § 21.223). When disregarding the corporate fiction, “[n]either fraud nor an intent to defraud need be shown as a prerequisite to disregarding the corporate entity; it is sufficient if recognizing the separate corporate existence would bring about an inequitable result.” *Castleberry*, 721 S.W.2d at 272–83 (requiring only constructive fraud for disregarding the corporate fiction for noncontractual claims). “Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.” *Id.* The Court notes, however, that Texas law distinguishes between jurisdictional and substantive veil piercing. *See PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007) (noting that “fraud—which is vital to piercing the corporate veil [for liability under the Tex. Bus. Org. Code]—has no place in assessing contacts to determine personal jurisdiction.”). While the case law is unclear, it appears that jurisdictional veil piercing typically occurs in the alter ego context, because alter egos are “one and the same corporation for purposes of jurisdiction.” *Id.*; *see also Borehole Seismic, LLC v. Int’l Oil & Gas Tech. Ltd.*, No. CIV.A. H-15-0613, 2015 WL 4979638, at *8 (S.D. Tex. Aug. 19, 2015) (“The Texas Supreme Court has observed that the doctrine of jurisdictional veil piercing is similar to the alter ego concept in substantive liability.”) (emphasis added). The facts of the amended complaint suggest a plausible rationale for disregarding the corporate fiction under a “sham to perpetrate a fraud” theory. However, the Court has, thus far, found no clear authority as to the applicability of a “sham” theory for jurisdictional veil piercing. Moreover, the parties have not briefed the issue at any length. Thus, the Court declines to assert personal jurisdiction over Rodriguez through a sham theory at this time. The Court turns to Counterclaim Plaintiffs’ alter ego theory.

Counterclaim Plaintiffs allege that Jackeline Rodriguez is the alter ego of XCO. “In determining whether an alter ego relationship exists, the court should focus on the relationship between the corporation and the entity or individual that allegedly abused corporate formalities.” *Licea v. Curacao Drydock Co., Inc.*, 952 F.3d 207, 214 (5th Cir. 2015) (citing *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 245 (5th Cir. 1990)). For jurisdictional veil piercing, “the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.” *Id.* at 213 (5th Cir. 2015) (quoting *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007)).

Counterclaim Plaintiffs have provided sparse factual support for their alter ego theory of jurisdiction, stating only that Rodriguez is the owner and controlling officer of XCO. This, along with conclusory statements of alter ego status, is insufficient to establish alter ego status. While the facts presented to the Court suggest a plausible rationale for disregarding the corporate fiction under either alter ego or sham to perpetrate a fraud, the Court is unable to properly determine whether it has jurisdiction over Rodriguez with the record and briefing before it. Thus, the Court grants leave to Counterclaim Plaintiffs to conduct jurisdictional discovery over Rodriguez for ninety (90) days.

T. Service of Process

Perkins v. S&R Gold & Silver Exchange, LLC, No. 3:21-CV-1437-L, 2022 WL 658563 (N.D. Tex. Mar. 4, 2022).

The court concluded that service of process on the defendant limited liability company was not properly effectuated where the record showed that the plaintiff’s attorney had served the defendant by certified mail because Texas law only allows for service by certified mail by the clerk of the court where the case is pending.

The defendant LLC requested that an entry of default be set aside based on improper service of process on the LLC. The plaintiff asserted that he served the LLC by certified mail in accordance with Tex. R. Civ. Pro. 106(a)(2). The court explained that Rule 4(e)(1) of the Federal Rules of Civil Procedure allows for service by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where

the district court is located or where service is made.” The court further pointed out that Texas law provides that “[f]or the purpose of service of process, notice, or demand ... each manager of a manager-managed domestic or foreign limited liability company and each member of a member-managed domestic or foreign limited liability company is an agent of that limited liability company.” Tex. Bus. Orgs. Code § 5.255.

With respect to the plaintiff’s reliance on Tex R. Civ. Pro. 106, the court stated that Tex. R. Civ. Pro. 103 requires that “[s]ervice by registered or certified mail and citation by publication must, if requested, be made by the clerk of the court in which the case is pending.” It was undisputed that the plaintiff’s attorney served the defendant by certified mail, but the court stated that service by registered or certified mail by an attorney is insufficient to satisfy Rules 103 and 106. Thus, the court granted the motion to set aside the entry of default and gave the plaintiff 20 days to effectuate proper service.

Brawley v. Fiesta Mart, LLC, Case No. 3:21-CV-76-S-BK, 2021 WL 5562779 (N.D. Tex. Nov. 15, 2021), report and recommendation adopted, 2021 WL 5505899 (N.D. Tex. Nov. 22, 2021).

The magistrate judge granted defendant’s motion to dismiss for defective service when plaintiff only served a manager at the Fiesta store where plaintiff worked.

Plaintiff Michelle Brawley filed a *pro se* complaint against Fiesta Mart, LLC and another party for employment discrimination under the Americans with Disabilities Act. With the assistance of the U.S. Marshals Service, Brawley served Brandon Smith, a manager at the Fiesta store where Brawley worked. The magistrate judge concluded that the service was defective and dismissed Brawley’s complaint without prejudice:

Rule 4 of the Federal Rules of Civil Procedure establishes the permissible methods for serving a corporation. FED. R. CIV. P. 4(h). For service in a United States judicial district, a corporation may be served by (1) “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made” or (2) “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant.” FED. R. CIV. P. 4(h)(1)(A)–(B) (citing FED. R. CIV. P. 4(e)(1)).

As to the second method outlined in the federal rule, Texas law provides that a corporation may be served through its agents, which includes (1) its president; (2) its vice presidents; and (3) each manager and member of a manager-managed limited liability company. TEX. BUS. ORGS. CODE § 5.255. If a corporation fails to appoint or maintain a registered agent or the registered agent cannot reasonably be found at the registered office, then the corporation may be served through the Texas Secretary of State. *Id.* at § 5.251. Under this method, the person served must be authorized to accept service of process on the corporation’s behalf...

Fiesta ... argues Plaintiff’s claim should be dismissed because she failed to serve its authorized agent. The Court concurs. “At a minimum, a plaintiff should request service upon the appropriate defendant.” [*Rochon v. Dawson*, 828 F.2d 1107, 1110 (5th Cir. 1987).]

A Fiesta store manager does not qualify as a managing agent for the purpose of service under the first method outlined in FED. R. CIV. P. 4(h). Instead, the Plaintiff must demonstrate that the individual sought to be served “actually authorized another to accept service of process on the would-be principal’s behalf.” *Lisson v. ING GROEP N.V.*, 262 Fed. App’x 567, 569 (5th Cir. 2007) (citation omitted) (emphasis added).

Here, Plaintiff does not argue Smith is Fiesta’s officer, managing or general agent, or is otherwise authorized to accept service of process on Fiesta’s behalf. That Smith is a store manager for Fiesta is immaterial absent some evidence indicating he was authorized by Fiesta to accept service. Further, under Texas state law, Plaintiff can serve Fiesta’s president, vice presidents, or registered agent, but Plaintiff does not allege Smith holds either of these positions. TEX. BUS. ORGS. CODE §§ 5.251, 5.255. Indeed, Fiesta affirmatively asserts that Smith was not authorized to accept service of process on its behalf.

Although the Court directed service, Plaintiff is nevertheless responsible for providing the correct information for service. Because Plaintiff failed to properly serve Fiesta, her complaint is subject to dismissal.

U. Pro Se Representation

Pharma Funding LLC v. Verde Pharmacy & Medical Supply, No. 3:20-cv-1731-N-BN, 2022 WL 895056 (N.D. Tex. Mar. 14, 2022), report and recommendation adopted, 2022 WL 1128958 (N.D. Tex. Apr. 15, 2022) (“... Defendant Verde Pharmacy & Medical Supply LLC reportedly is a limited liability company, see Dkt. No. 1 at 2, and, insofar as it 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, see *M3Girl Designs, LLC v. Purple Mountain Sweaters*, No. 3:09-cv-2334-G, 2010 WL 304243, at *2 (N.D. Tex. Jan. 22, 2010). ‘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.”).

Texas Construction Specialists, LLC v. Ski Team VIP, L.L.C., ___ S.W.3d ___, 2022 WL 619756 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.).

“A limited liability company cannot represent itself in a lawsuit but must be represented by a licensed attorney. See *Sherman v. Boston*, 486 S.W.3d 88, 95-96 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). ‘Allowing a non-attorney to present a company’s claim would permit the unlicensed practice of law.’ *Id.* at 95. However, TCS was represented by counsel at the time it filed its pleadings. And there is no case law that supports a trial court striking properly filed pleadings for a limited liability company once the attorney who filed the pleadings withdraws. ...

...

When Young presented for trial on behalf of TCS, this was not an ‘appearance’ by TCS because it could not appear *pro se* but could only appear through counsel. When a party fails to appear for trial, the proper remedy is to dismiss its case for want of prosecution.”

Harvey v. Velocity Commercial Loan Trust, No. 20-CV-2129-E-BK, 2022 WL 257839 (N.D. Tex. Jan. 19, 2022), report and recommendation adopted, 2022 WL 254352 (N.D. Tex. Jan. 27, 2022).

“‘[T]he ‘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 *In re K.M.A., Inc. v. Gen. Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir. 1982)). ‘[T]he rationale for that rule applies equally to all artificial entities’ including partnerships, associations, and the like. *Rowland v. Calif. Men’s Colony*, 506 U.S. 194, 202 (1993). Therefore, ‘28 U.S.C. § 1654, providing that ‘parties may plead and conduct their own cases personally or by counsel,’ does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.’ *Id.* ‘This is so even when the person seeking to represent the corporation is its president and major stockholder.’ *In re K.M.A., Inc.*, 652 F.2d at 399 (citation omitted).

As a ‘cross between a corporation and a partnership,’ a limited liability company is an artificial entity that may only appear in federal court through counsel. *United States v. Hagerman*, 545 F.3d 579, 581-82 (7th Cir. 2008); *Lattanzio v. COMTA*, 481 F.3d 137, 140 (2d Cir. 2007) (per curiam); see also *Moore v. Chiro One Wellness Ctr. of Arlington PLLC*, No. 3:13-CV-2950-N, 2014 WL 6901201, *1 (N.D. Tex. Dec. 8, 2014) (Godbey, J.) (holding that LLC could not proceed pro se). When a fictional entity declines to hire counsel to represent it, the court may dismiss the complaint or strike a defendant's defenses, as applicable. *Moore v. Carrington Mortg. Serv., LLC*, 3:17-CV-3132-G-BN, 2018 WL 3853711, at *3 (N.D. Tex. July 17, 2018) (citing *Donovan*, 736 F.2d at 1005), adopted by 2018 WL 3850635 (N.D. Tex. Aug. 13, 2018).”

Pharma Funding LLC v. Verde Pharmacy & Medical Supply, No. 3:20-cv-1731-N-BN, 2022 WL 138514 (N.D. Tex. Jan. 14, 2022) (“... Defendant Verde Pharmacy & Medical Supply LLC reportedly is a limited liability company, see Dkt. No. 1 at 2, and, insofar as it 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, see *M3Girl Designs, LLC v. Purple Mountain Sweaters*, No. 3:09-cv-2334-G, 2010 WL 304243, at *2 (N.D. Tex. Jan. 22, 2010). ‘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.”).

Balboa Capital Corporation v. Ostrowsky Home Visits MHT LLC, Nos. 3:18-cv-01952-M, 3:18-cv-00898-M, 2021 WL 5866643 (N.D. Tex. Dec. 10, 2021).

Counsel for defendants Ostrowsky Home Visits MHT LLC and Ostrowsky, M.D., Ltd. withdrew, and the entities remained unrepresented by counsel after the court warned them that they were artificial entities that could not continue to proceed unrepresented and that failure to hire new counsel could result in sanctions, including entry of a default judgment. Thus, the court ordered the clerk of court to enter default against the defendants and directed the plaintiff to move for default judgment.

D’Arcy Petroleum, LLC v. Mink, No. 3:19-CV-02770-M-BT, 2021 WL 5218223 (N.D. Tex. Oct. 6, 2021), report and recommendation adopted, 2021 WL 5213035 (N.D. Tex. Nov. 9, 2021).

“In federal court, a corporation is not permitted to proceed *pro se*. The rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations. As a cross between a corporation and a partnership, a limited liability company is also an artificial entity that may only appear in federal court through licensed counsel....

Plaintiffs are entitled to an order striking Union’s answer because it has failed to retain counsel after multiple warnings that it must do so. As an LLC, Union must be represented by counsel in this lawsuit. The Court informed Buster, who is the sole member of Union, of this fact during the hearing regarding his attorney’s Motion to Withdraw, and he assented to understanding that Union ‘would have to have counsel.’ The Court reminded Union of this fact again in its Order Granting Motion to Withdraw, specifically warning Union that ‘if it fail[ed] to comply with this order and retain counsel, the Court m[ight] strike its defenses and grant a motion for default judgment against it.’ In the four intervening months Union has not retained counsel or participated at all in this law suit.

Because Union has failed to retain counsel even though it cannot proceed in this lawsuit without counsel and the Court has warned Union that failure to retain counsel would result in sanctions, the Court should strike Union’s answer.”

Foreman v. Rogers, No. 3:21-CV-13-S-BN, 2021 WL 3811265 (N.D. Tex. Aug. 25, 2021), report and recommendation adopted, 2021 WL 4267507 (N.D. Tex. Sept. 17, 2021).

“In granting the motion to withdraw, United States District Judge Karen Gren Scholer directed Bootstrap [Ventures, LLC] ‘to retain counsel no later than August 15, 2021, lest the Court may strike [its] responsive pleading and direct the entry of a default judgment against it.’ Dkt. No. 18 (citing *Memon v. Allied Domecq QSR*, 385 F.3d 871, 873 (5th Cir. 2004) (citing, in turn, *Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 201-02 (1993) (‘[L]ower courts have uniformly held that 28 U.S.C. § 1654 ... does not allow corporations, partnerships, or associations to appear in federal court otherwise than by licensed counsel’)); *Lattanzio v. COMTA*, 481 F.3d 137, 140 (2d Cir. 2007) (holding that an LLC may only appear in federal court through a licensed attorney)); *see also Donovan v. Road Rangers Country Junction, Inc.*, 736 F.2d 1004, 1005 (5th Cir. 1984) (per curiam) (‘The ‘clear’ rule is ‘that a corporation as a fictional legal person can only be represented by licensed counsel.’ (quoting *K.M.A., Inc. v. Gen. Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir. 1982))).

Bootstrap has so far failed to heed the Court’s directive. ...

‘[T]he appropriate measure for a judge to take when confronted with an unrepresented corporation [or limited liability company] is inherently discretionary.’ *Memon*, 385 F.3d at 873. When a corporation or limited liability company declines or fails to hire counsel to represent it, the Court may properly strike its defenses, if it is a defendant.

Other courts have found default judgment to be the appropriate remedy when a corporation fails, after court warning, to appoint counsel.

Defendant Bootstrap Ventures, LLC cannot continue to proceed unrepresented by counsel in this case. The undersigned has considered the imposition of alternate sanctions short of striking its defenses and entering a default. But, considering all the circumstances, the undersigned finds that lesser sanctions would not serve the interests of justice or advance the disposition of this case on the merits.

If, however, during the 14-day period to file objections to these findings, conclusions, and recommendation, Bootstrap retains counsel who makes an appearance in this action, the undersigned will withdraw the recommendations set out below. ...

The Court should (1) order that Defendants Dennis Rogers and Bootstrap Ventures, LLC's First Amended Answer be stricken as to Defendant Bootstrap Ventures, LLC only; (2) order that Defendant Bootstrap Ventures, LLC is in default; (3) direct the Clerk of Court, pursuant to Federal Rule of Civil Procedure 55(a), to enter default against Defendant Bootstrap Ventures, LLC; and (4) order that Plaintiffs John S. Foreman, III and Andre C. Leblanc move, by no later than a date 30 days from the date of entry of any order accepting or adopting this recommendation, for default judgment against Defendant Bootstrap Ventures, LLC for failure to appear by and through counsel."

JKD Holdings v. Prajapati, No. 3:21-CV-0276-D (BH), 2021 WL 2583067 (N.D. Tex. May 6, 2021), report and recommendation adopted, 2021 WL 2580549 (N.D. Tex. June 23, 2021) ("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. As a cross between a corporation and a partnership, a limited liability company is also an artificial entity that may only appear in federal court through licensed counsel.").

Pipe Hitters Union, LLC v. Pipe Hitters Union MC, LLC, 1:20-CV-167-RP, 2020 WL 10692700 (W.D. Tex. Apr. 27, 2020) (Although the court issued this opinion in 2020, it is included in this year's update because it did not appear in the Westlaw database until recently.).

"Although individual defendants have the right to proceed *pro se*, corporate defendants are fictional legal persons who can only be represented by licensed counsel. This principle applies with equal measure to unincorporated business associations like a limited liability company ('LLC').

When confronted with an unrepresented LLC, the district court has inherent discretion in determining how to proceed. Where the unrepresented LLC is the defendant in the case, the Fifth Circuit has indicated three possible approaches for resolving the issue. The Court may admonish the LLC that it cannot proceed without licensed counsel, order the LLC to retain counsel within a certain period of time, or strike the LLC's defenses. ...

Plaintiff contends the Court should strike Defendant's *pro se* answer because it has failed to appear through licensed counsel in this case. Because Defendant has failed to properly appear, Plaintiff also asks the Court to enter default judgment in its favor. While the Court will strike Defendant's answer for failure to appear by licensed counsel, the Court declines to direct the Clerk to enter default against Defendant without first admonishing Defendant that it must retain counsel.

While the Fifth Circuit has emphasized a district court's inherent discretion in determining how to proceed when confronted with an unrepresented corporate party, that discretion has limits. For example, in *Memon [v. Allied Domecq QSR]*, 385 F.3d 871, 873 (5th Cir. 2004)], the Fifth Circuit reversed a district court's dismissal of an unrepresented corporate plaintiff's claims with prejudice because the district court did not first expressly warn the corporation that it must retain counsel. In reaching this conclusion, the Fifth Circuit noted that dismissal with prejudice was 'too extreme a sanction' to be imposed without first admonishing the unrepresented corporation that it was required to hire an attorney.

The Court determines that entry of default against an unrepresented corporate defendant without prior warning would be likewise too extreme. 'Default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.' *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989). Because default judgment is a drastic remedy—and the Fifth Circuit has cautioned against taking extreme actions against unrepresented corporate parties without first expressly admonishing them to obtain counsel—the Court declines to direct the Clerk to make an entry of default against Defendant at this time. However, Defendant is warned that it must hire licensed counsel to represent it in this action. Failure to do so could result in the entry of default judgment in Plaintiff's favor."

Lohr v. Gilman, No. 3:15-cv-1931-BN, 2017 WL 11679111 (N.D. Tex. June 1, 2017) (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.) (“... [A]s the Court explained at the hearing, Counsel’s withdrawal from this litigation has other implications for this case’s progress going forward. Defendants Oil Migration Group, LLC, and Wavetech29, LLC are limited liability companies, *see* Dkt. No. 1, and, insofar as each is neither an individual nor a sole proprietorship, these defendants are not permitted to proceed *pro se* or through a non-attorney but rather must be represented by an attorney in litigation in federal court, *see M3Girl Designs, LLC v. Purple Mountain Sweaters*, No. 3:09-cv-2334-G, 2010 WL 304243, at *2 (N.D. Tex. Jan. 22, 2010). ‘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.”).

V. Illegality (Prohibition on Practice of Medicine)

Texienne Hospital Systems L.P. v. KKU Surgical Management, LLC, No. 14-21-00006-CV, 2022 WL 1310918 (Tex. App.—Houston [14th Dist.] May 3, 2022, no pet. h.) (mem. op.).

The court of appeals held that the evidence supported the trial court’s conclusion that a contract obligating an LLC to provide physicians to staff the emergency rooms of a hospital system was valid and enforceable because the evidence supported the finding that the LLC was not “practicing medicine” in violation of the prohibition on the practice of medicine by business entities other than certain professional entities.

In February 2016, KKU Surgical Management, LLC (“KKU”) entered into a contract with Apollo Hospital Systems, L.P., which later became Texienne Hospital Systems L.P., (“Apollo”) in which KKU agreed to staff Apollo’s emergency rooms with qualified physicians. In exchange for those services, Apollo agreed to pay KKU a flat fee of \$290,000 per month. During the contract term, Apollo negotiated a sale of its facilities to another hospital system. The new hospital system paid KKU for the remainder of the contract term, but an unpaid balance remained because Apollo did not pay KKU for September 2016, October 2016, or the first few days of November 2016 before the sale occurred. Further, a licensed physician formed KKU, but KKU was an ordinary Texas limited liability company rather than a Texas professional limited liability company.

KKU sued Apollo to recover the unpaid balance, which KKU alleged was \$667,666.67. The case proceeded to a bench trial, where Apollo argued that KKU should recover nothing because KKU was illegally practicing medicine or, alternatively, because KKU’s damages were offset by its own breaches, which were prior and material. The trial court rejected all of Apollo’s defensive arguments. The trial court then signed findings of fact and conclusions of law in favor of KKU and awarded KKU all of its requested relief. KKU appealed the trial court’s judgment, and the court of appeals in this opinion affirmed the trial court’s judgment

The court explained that the general rule in Texas is that business entities are prohibited from practicing medicine. *See* 22 Tex. Admin. Code § 177.17(a); Tex. Occ. Code §§ 155.001, 164.052(a)(17), 165.156. The court pointed out that one exception to this rule is that “a professional association may provide a professional service—such as the practice of medicine—so long as its owners and employees are duly licensed to provide that service. *See* Tex. Bus. Org. Code § 301.006(a). But not every business entity is a ‘professional association.’ To qualify for that status, the association must have been formed for the purpose of providing a professional service, and the association must be governed as a ‘professional entity.’ *See* Tex. Bus. Org. Code § 301.003(2). And a ‘professional entity’ is defined as a ‘professional association, professional corporation, or professional limited liability company.’ *See* Tex. Bus. Org. Code § 301.003(4).”

First, the court addressed Apollo’s arguments that KKU could not legally practice medicine because it was not a “professional entity” and that the contract was an illegal and unenforceable contract because it required KKU to practice medicine. The trial court rejected Apollo’s argument based on the professional status of KKU’s owner, but the fact that KKU was owned by a licensed physician was undisputed, and the court of appeals concluded that the critical issue was whether the contract required KKU to practice medicine. The court of appeals stated that the trial court implicitly found that the contract did not require KKU to practice medicine, and the appellate court concluded that there was evidence to support that finding.

“‘Practicing medicine’ means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions....” Tex. Occ. Code § 151.002(a)(13). The court of appeals explained that “[e]ven though KKU staffed Apollo with physicians who engaged in the practice of medicine, KKU did not also engage in the practice of medicine simply through its provision of that staffing service. *See Doctors Hosp. at Renaissance, Ltd. v. Andrade*,

493 S.W.3d 545, 549 (Tex. 2016) ('Renaissance, as the operator of a hospital, may be in the business of providing facilities, support staff, and supplies to assist doctors in the provision of medical care, without engaging in the illegal practice of medicine by a business entity.')

The court also addressed Apollo's argument that K KU practiced medicine because K KU not only recruited, hired, and fired physicians, but also trained and supervised them. The court interpreted Apollo's argument as invoking case law holding that an entity practices medicine if the entity exercises so much control over the physician that the relationship between the entity and the physician resembles the relationship between an employer and an employee. Although the trial court found that K KU "did not maintain the necessary control over the physicians it placed at Apollo Hospital," Apollo argued that K KU exerted control over the physicians it recruited based on a provision of the contract that stated K KU would provide a Medical Director of Emergency Services for the Emergency Department. Because Apollo did not cite to any evidence that K KU actually provided a medical director or that any such medical director, if provided, or any other individual, was used by K KU to control the manner in which its physicians diagnosed and treated patients, the court concluded that Apollo had not shown that K KU was practicing medicine.

Finally, the court of appeals pointed out that the trial court found that all of K KU's recruited physicians were independent contractors. Because that finding was supported by testimony of K KU's owner, the court of appeals concluded that the trial court did not err when it implicitly found that K KU was not practicing medicine and likewise did not err when it concluded that the contract was valid and enforceable.

W. Texas Citizens Participation Act

Baylor Scott & White v. Project Rose MSO, LLC, 633 S.W.3d 263 (Tex. App.—Tyler Aug. 30, 2021, pet. denied).

"The party asserting a TCPA [Texas Citizens Participation Act] exemption bears the burden of proving its applicability. Just as determining the applicability of the TCPA, the applicability of an exemption may be determined from the pleadings. It would be incongruous to require the nonmovant to prove the elements of these causes of action to show that the exemption applies in order to avoid making the prima facie case of the claim's elements to survive the TCPA motion to dismiss.

If an action falls under a TCPA exemption, the TCPA does not apply and may not be used to dismiss the action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010. Accordingly, application of an exemption means the nonmovant need not make its prima facie case. ...

The TCPA does not apply to 'a legal action based on a common law fraud claim.' TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(12). The 2019 legislative amendment enacted this exemption for the first time. ...

A third party who knowingly aids and assists in the breach of a fiduciary duty may also be liable. To establish a claim for knowing participation in a breach of fiduciary duty under Texas law, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship. This claim is also a derivative tort.

Rose alleged that, as a member and manager of 62 Roses, [LLC,] Texas Spine [and Joint Hospital] owed the fiduciary duties of care, loyalty, candor, and independence to Rose. Rose contends that (1) Texas Spine and Joint committed a tort when it intentionally withheld notice that a transaction involving ownership of the facility had occurred; (2) BSW [Baylor Scott & White] knew of the relationship, knew that it was a tort, and both intended to and did assist Texas Spine and Joint in completing it by participating in the transaction through its fraudulent conduct; and (3) the transaction's timing, BSW's involvement, and the changes to Texas Spine's logo and name would allow a factfinder to conclude that BSW knowingly participated in Texas Spine and Joint's breaches of fiduciary duty. Similar to the civil conspiracy claim, this derivative tort is based on the alleged fraudulent scheme. Accordingly, we hold that it falls within the fraud exemption. ...

In summary, we hold that Rose's legal actions for unjust enrichment, civil conspiracy, and aiding and abetting breach of fiduciary duties are 'legal action[s] based on a common law fraud claim,' and accordingly are exempt from the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(12)."