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

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2023 LLCs, LPs and PARTNERSHIPS

July 13–14, 2023

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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 (excluding federal tax). 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

Magee v. Nike Inc., No. 3:21-cv-01726-G-BT, 2023 WL 3357594 (N.D. Tex. Apr. 24, 2023), report and recommendation adopted, 2023 WL 3362607 (N.D. Tex. May 10, 2023).

The plaintiff failed to sufficiently allege a partnership between two entities in this trademark infringement action.

In this pro se trademark infringement case, the plaintiff was given an opportunity to amend and shore up his claims that Nike Inc. should be vicariously liable for trademark infringement by two other entities, Hooplife Basketball Academy, LLC ("HLBA") and BSN Sports, LLC ("BSN Sports"). In response, the plaintiff added a number of new allegations, including that of a partnership between BSN Sports and Nike and the content of conversations the plaintiff allegedly had with Nike. The court concluded that the plaintiff's allegations were inadequate to support a claim for vicarious liability on the part of Nike, stating:

> Vicarious liability for trademark infringement requires "a finding that the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product." ... When reviewing whether an agency relationship exists, courts "reference [ ] traditional vicarious liability rules" and "look[ ] to the Restatement (Second) of Agency [ ] in determining those rules. ... "[V]ague, puffery-like references to a 'partnership' " between entities are insufficient to support vicarious liability. ...
>
> Magee fails to sufficiently allege any agency relationship between a direct infringer and Nike to support a claim for vicarious trademark infringement. ... Magee's assertion of a "partnership"—devoid of any reference to authority, representations, control, or supervision—merely recites the elements required for vicarious liability. ...
>
> ... Because Magee's formulaic and conclusory allegations do not support a claim for vicarious liability, Nike's motion to dismiss on this ground should be granted.

Liserio v. Colt Oilfield Services, LLC, No. SA-19-CV-01159-XR, 2022 WL 16542585 (W.D. Tex. Oct. 28, 2022).

The court concluded that the plaintiff was a mere employee (rather than a partner) of the venture. As a result, the defendants' motion for partial summary judgment was granted.

Defendant Colt, a Texas LLC, was formed on October 24, 2008 to conduct "torque and testing" operations for oilfields. Devin Nevilles managed Colt's operations. Terry Booker provided consulting services and acquired business for Colt. In late 2009, Nevilles hired plaintiff Robert Liserio as the Wyoming field manager to oversee all torque and testing operations within the state.

Colt's certificate of formation showed defendant Eddie Aguilar as its sole member and manager. Nevertheless, plaintiff alleged that himself, Nevilles, and Booker were "silent partners" and part owners of Colt. Plaintiff claimed that in 2010, Booker told him that plaintiff, Booker, and Nevilles were silent partners, that plaintiff's ownership share in the company was 15% (which later increased to 25% after Nevilles left in 2016), and that plaintiff would receive a 15% annual "distribution" pursuant to that ownership interest. Plaintiff claimed that this conversation was evidenced by three writings: (1) a December 21, 2009 paystub that states "Equity Robert Liserio" in the description category; (2) an August 25, 2010 letter from David Ryza, Colt's Chief Financial Officer, that was on Colt letterhead and that stated that "Robert Liserio received a check at the end of each year for his partnership interest in Colt Oilfield Services, LLC"; and (3) A 2010 "Texas Franchise Public Information Report" that listed plaintiff as a "member" of Colt.

Plaintiff's relationship with the defendants soured in late 2016. The plaintiff alleged that he did not receive distributions in 2017 or 2018, and he ultimately left Colt in 2018. Defendant Aguilar sold Colt to PetroStar Services, LLC later in 2018. The sale price was $32,318,140. Plaintiff alleged that, unbeknownst to him, defendants Booker and Aguilar had marketed Colt for sale in 2017. Plaintiff claimed that he left Colt in 2018 without knowledge of Colt's impending sale and that defendants schemed to cause his departure and the loss of his share of the sale proceeds.

Plaintiff sued and asserted, among other claims, a breach of fiduciary duty cause of action against the defendants. He alleged that Aguilar and Booker owed him fiduciary duties because all three were partners in Colt. He further claimed that "these fiduciary duties were breached when Aguilar and Booker refused to account for the 2017-2018 distributions, improperly denied Plaintiff distributions for those years, hid the sale negotiations from Plaintiff, and forced Plaintiff to quit and forfeit his 25% of the Colt sale proceeds." The defendants moved for summary judgment on the basis that plaintiff was a mere employee rather than a partner or owner of Colt.

The court began its analysis by citing the five-factor partnership test under § 152.052 of the Business Organizations Code:

> A partnership is "an association of two or more persons to carry on a business for profit as owners," regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a partnership, joint venture, or other name. Tex. Bus. Orgs. Code Ann. § 152.051. Whether a partnership exists requires an examination of the totality of the circumstances. Texas law establishes five factors that indicate whether persons have created a partnership, although no one factor is decisive: (1) the right to receive a share of profits of the business; (2) an expression of intent to be partners in the business; (3) the right to participate in control of the business; (4) an agreement to share: (a) losses of the business; or (b) liability for claims by third parties against the business; (5) agreement to contribute or contribution of money to the business. Tex. Bus. Orgs. Code § 152.052(a)(1)-(5). However, the receipt of, or right to receive, a share of profits as payment of wages or other compensation to an employee does not indicate that a person is a partner. *Id.* § 152.052(b)(1)(B). Finally, a "representation or other conduct indicating that a person is a partner in an existing partnership, if that is not the case, does not of itself make that person a partner in the partnership." Tex. Bus. Orgs. Code Ann. § 152.054.

With respect to the right to receive a share of the profits, the court noted that both parties agreed that defendants and plaintiff shared profits of the business. The court cited § 152.052(b)(1)(B) of the TBOC, however, and observed that sharing profits does not necessarily make someone a partner. According to the court, Colt paid plaintiff as it would pay an employee. For example, plaintiff testified that he received his distributions "sometimes" through Form 1099s, typically reserved for independent contractors, and sometimes through the typical payroll process. Further, plaintiff testified that he never received a K-1 form from Colt. The court observed that "[c]orporations should report partner interests through K-1 forms; the absence of such forms is thus telling evidence." Although plaintiff shared in profits, "his own testimony that he received the distributions through the typical payroll process indicates that such distributions were made as part of his compensation package as an employee and not as a partner."

The court then turned to the expression of an intent to be partners. Plaintiff cited to Nevilles' and Aguilar's depositions, arguing that their testimony demonstrated that plaintiff was a partner. The court disagreed:

> An objective reading of the depositions does not support Plaintiff's conclusion. Nevilles' deposition indicates, at best, that Nevilles spoke with Aguilar generally about hiring Nevilles' former employees. It does not support Plaintiff's claim that Nevilles and Aguilar specifically

> discussed making Plaintiff an owner. Moreover, Aguilar called Plaintiff a "special case employee" but prefaced it by saying that "Robert [Liserio] didn't have any say-so when money was pulled." Instead of indicating that Aguilar thought of Plaintiff as having a partner's role, the cited deposition indicates Plaintiff was excluded from accessing the company's finances. Plaintiff's argument is unpersuasive.

Next, plaintiff offered the August 2010 letter and the 2010 Franchise Report as evidence that he partially owned Colt. The court concluded that the documents were insufficient to raise a genuine dispute of fact:

> First, as Defendant points out, neither document evinces Aguilar's intent to convey an ownership interest to Plaintiff. It is the partner's intent that matters; because Aguilar is the only undisputed partner, only he can convey an ownership interest in Colt. There is simply no evidence that Aguilar expressed his intent to partner with Plaintiff. Plaintiff's own deposition shows, instead, that Plaintiff never spoke with Aguilar about Plaintiff's ownership or operational role.
>
> Second, both documents were created by David Ryza, Colt's Chief Financial Officer. The letter and Report indicate, at best, that Ryza believed Plaintiff had an ownership interest in Colt. However, Ryza was not a partner in Colt, either documented or silent. Therefore, Ryza's understanding is inconsequential. Moreover, Plaintiff offers no evidence that Ryza was authorized to extend any partnership interests on Aguilar's behalf.
>
> Finally, as Defendants point out, both documents were created in 2009 or 2010, very early in the company's history. Defendants note that Colt has been treated as a single-member LLC for tax purposes since its formation. All earnings were reported on Defendant Aguilar's tax return. In contrast, Plaintiff testified that he never received a Form K-1 from Colt, the form used for partners to record their ownership interests. If Plaintiff was a member of Colt, a Schedule K should have been issued.
>
> Even viewing this evidence in the light most favorable to the nonmovant, there is insufficient evidence that any authorized representative of Defendant Colt expressed an intent to partner with Plaintiff.

The court then turned to the right to participate in the control of the business, which it defined as the right to make executive decisions. This included managing business operations, viewing and managing the books, writing checks, and controlling assets. Plaintiff, however, admitted that he had no authority to write checks or to access Colt's books, and he testified that he never spoke with Aguilar about plaintiff's overarching role in Colt's operations. Plaintiff received no monthly reports on Colt's performance, attended no meetings with banks, received no bank statements regarding Colt, and took out no lines of credit on behalf of Colt. Although plaintiff was a field manager, there was no indication that he had any control over Colt's executive functioning. According to the court, this lack of evidence of participation in control weighed strongly against the existence of a partnership.

When discussing the sharing of losses or liability, the court noted that "[a]lthough an agreement to share losses is not a necessary element of a partnership, it is nonetheless indicative of one." The plaintiff maintained that he agreed to be liable for any of Colt's losses or liabilities by not rejecting "the Partnership Confirmation provided to him by Colt." The court referenced its earlier discussion, however, and noted that "Defendants did not express nor confirm Plaintiff's partnership interest." There was also no affirmative agreement for plaintiff to share Colt's losses or to be responsible for Colt's liabilities. Moreover, the court noted that "Plaintiff's actions do not indicate he implicitly assumed this responsibility; Plaintiff's deposition indicates that he never signed 'any personal guarantees for Colt' and took out no lines of credit on Colt's behalf." According to the court, there was no evidence that Plaintiff prepared or expected to share in Colt's losses or liabilities. As a result, this factor also weighed against finding a partnership.

Finally, the court observed that "[a]n agreement to contribute money or property to the business is indicative of a partnership." Plaintiff claimed that he "furnished equipment and vehicles" to Colt, but his deposition clarified that his wife purchased approximately five trucks when Colt struggled financially and that these trucks were used exclusively for Colt. Defendants countered that "without any evidence Plaintiff himself contributed money or property," this factor was not met. The court agreed with the defendants. The plaintiff then argued that he contributed to the business as a "key man ensuring that Colt could operate." The court acknowledged the plaintiff's contributions, but was still unpersuaded that this distinguished him from an employee:

> . . . . Plaintiff has offered no evidence distinguishing his value as an employee from the contributions of a partner. *See Ingram*, 288 S.W.3d at 903 ("Employees may contribute to business endeavors by lending their time and reputation, but that is not a contribution to the venture indicative of a partnership interest."). Relevant to this discussion is the fact that Plaintiff was hired after Colt was formed. This indicates that his services were not essential to the formation of the company in the way that a partner's service contributions would be. Ultimately, Plaintiff's technical skill is not indicative of his partnership interest but instead of his value as an employee.

The court then summarized its analysis and ultimate conclusion:

> Taking the facts in the light most favorable to the Plaintiff, it appears that Plaintiff shared Colt's profits and was referred to as a "partner" on several documents completed by the company's CFO during the first two years of its formation. However, it is possible to both share in profits and be referred by unauthorized persons as a "partner," but nonetheless not be a member of a partnership. Furthermore, Plaintiff had no affirmative agreement to share in the losses of the company, made no contributions to Colt's formation and, most importantly, had no say in the company's executive operations. Although Colt's employees sloppily referred to Plaintiff as a partner on several occasions, the totality of the circumstance indicates that Plaintiff was a mere employee, albeit a valuable one, and not a partner or owner of Colt. . . . For the foregoing reasons, Defendants' Motion for Partial Summary Judgment . . . is GRANTED.

Galyean v. Guinn, No. 4:21-CV-1287-P, 2022 WL 15527769 (N.D. Tex. Oct. 24, 2022).

The court denied a summary judgment motion after concluding that there was a fact issue regarding whether a partnership existed. The court also determined that the doctrine of "quasi-estoppel" was inapplicable.

Thomas Guinn bought a stallion named Metallic Rebel. Two years later, Guinn purchased another stallion named Rollz Royce. Beau Galyean—a successful trainer and rider in the cutting horse industry—trained and showed both stallions.

Guinn argued that Galyean was a hired manager and trainer—only receiving payment for his services and 50% of the prize money for the competitions he won. In support, Guinn pointed to Galyean's commissions, tax returns, and past statements that Guinn was the owner. Guinn also emphasized that he paid almost all of the expenses related to the horses. Galyean disputed this characterization and argued that after Guinn purchased Metallic Rebel, they executed an oral partnership agreement which entitled Galyean to a 25% ownership stake in the stallion and managing partner status. After Guinn bought Rollz Royce, Galyean alleged that Guinn added the horse to the partnership agreement, giving Galyean a 25% ownership interest in the newly purchased horse.

After the stallions' success in competition, Guinn and Galyean both agreed that the stallions should "stand stud" and start their breeding careers. In furtherance of this, Galyean advised and managed the book of eligible mares for the horses and received 25% of the stud fee. Guinn argued that this 25% was a commission. Galyean claimed that it was a partnership distribution flowing from his 25% ownership position in the horses.

Galyean decided to build his own breeding facility. He stated that his only reason for building the facility was to contribute capital to the partnership by boarding both stallions for free and obtaining the best mare bookings possible. Guinn claimed that he, at all times, paid nearly all expenses related to the horses. Both horses ended up breeding at the newly erected Beau Galyean Stallion Services, LLC ("BGSS") facility.

At the new facility, Guinn paid BGSS monthly for mare contracts, stud fees, and chute fees. Guinn claimed that these fees were paid under a new contractual management and agency relationship created between Guinn, Galyean, and the new BGSS entity. For taxes, Galyean treated these payments as ordinary "breeding season" revenue. He also did not declare the horses on his taxes or claim them as partnership assets. Galyean asserted that these omissions were due to ignorance as he was not an accountant and had never filed his own tax returns.

Galyean ultimately sued Guinn for various causes of action, including breach of fiduciary duty, conversion of partnership assets, and a declaratory judgment on the existence of a partnership. Guinn countersued for breach of fiduciary duty and other wrongs, and he also sought his own declaratory judgment.

Guinn moved for summary judgment, arguing that there was no evidence of a partnership. The court began by citing the five-factor partnership test under § 152.052 of the Business Organizations Code:

> In Texas, courts consider five factors to determine whether the parties formed a partnership: (1) the receipt or right to receive a share of profits of the business, (2) the expression of an intent to be partners, (3) the right to participate in the control of the business, (4) an agreement to share or sharing losses of the business or liability for claims by third parties, and (5) an agreement to contribute money or property to the business. TEX. BUS. ORGS. CODE ANN. § 152.052(a) (West); *Ingram v. Deere*, 288 S.W.3d 886, 894, 898–903 (Tex. 2009). As no one factor is dispositive, the Court considers the totality of the circumstances.

Galyean produced five separate affidavits alleging that an oral partnership existed. The affidavits stated that (1) a partnership existed between Guinn and Galyean, (2) the partnership gave Galyean a 25% ownership interest in Metallic Rebel, (3) Galyean received payments consistent with his 25% ownership interest, (4) Galyean provided services at his own expense for the horses, and (5) Galyean built the breeding facility solely to contribute to the partnership. The court displayed a chart that indicated how the sworn testimony of each individual satisfied the factors needed to prove a Texas partnership. Although Guinn highlighted many inconsistencies in Galyean's evidence, the court stated that it "may not assess the credibility of Galyean's evidence at this stage," and it ultimately concluded that "Galyean thus satisfies his burden of showing a material dispute of fact as to the partnership's existence."

Guinn also argued that the doctrine of quasi-estoppel barred Galyean from claiming that a partnership existed due to Galyean's failure to file tax returns in line with his claimed partnership assets. According to the court, "[t]he equitable doctrine of quasi-estoppel 'precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken.'" The doctrine applies "when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." The court concluded, however, that the doctrine was inapplicable, in part because "a finding that a partnership exists would not discharge Galyean from the consequences of his tax returns," as "the IRS will not let Galyean off the hook." The court denied Guinn's motion for summary judgment.

The court also rejected Galyean's argument that "Guinn's declaratory judgment claim is a mirror image claim that the Court should dismiss." As the court observed: "The Court need not apply the mirror image rule here. In the event a partnership is found . . . Guinn alternatively seeks a declaratory judgment over the horse's ownership. This claim has a basis in the Texas law of partnerships, as the existence of a partnership does not automatically determine the ownership of partnership assets. *See* TEX. BUS. ORG. CODE § 152.102(c). The claim further narrows the potential ruling of a jury and solidifies a judgment. As such, the claim is different in kind from the declaration sought by Galyean—that an oral partnership agreement exists."

Mehta v. Ahmed, No. 01-20-00568-CV, 2022 WL 3720181 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, no pet. h.) (mem. op.).

The court concluded that the evidence was insufficient to support the existence of a partnership. As a consequence, the court reversed the jury's findings of a breach of fiduciary duty and the accompanying damages award.

Mohammed Ahmed alleged that in June 2017, the West Oaks Mall, a 60-acre property in a prime west Houston location, was listed for sale. Sunil Kumar Mehta, a Houston-area businessman with experience in real estate development, was interested in acquiring the mall. On June 22, 2017, Mehta submitted a letter of intent to the seller of the West Oaks Mall, expressing an interest in purchasing the property. In response, the seller's broker at Allied Advisors suggested that Mehta submit a $10,000,000 cash offer with a short closing period. The response from the seller's broker was problematic for Mehta because "he did not have anywhere close to $10,000,000 in immediately-available cash." Mehta spoke with a banker, Morag McInnes, at Community Bank of Texas, N.A., with whom Mehta had a banking history. Because Mehta needed to "quickly borrow $10,000,000," McInnes contacted Ahmed, a long-standing customer of Community Bank, to see if he had any interest in lending Mehta the money. Although Ahmed had an interest in acquiring the West Oaks Mall, he had "no interest in being a lender"; thus, he told McInnes "that he would only be interested in a deal if it involved some form of equity or ownership position in" the West Oaks Mall. McInnes relayed this information to Mehta.

According to Ahmed, Mehta "quickly called [him] to discuss the deal." On the telephone call, they agreed to "jointly acquire" the West Oaks Mall. Later, when Mehta and Ahmed each had separate conversations with McInnes about their telephone call, both told her that "there would be some form of equity split/partnership." Mehta testified that he never agreed to enter a partnership with Ahmed to acquire or develop the West Oaks Mall. He also denied that he had agreed to any split of the mall with Ahmed. According to Mehta, he emphasized to Ahmed that he only wanted to borrow money and desired to pursue the West Oaks Mall venture without a partner. Mehta stated that he was particularly uninterested in partnering with Ahmed after learning from Ahmed in their early conversations that Ahmed was involved in "big lawsuits" against his previous business partners.

Ahmed ultimately sued Mehta for breach of fiduciary duty and other actions. He alleged that a fiduciary relationship was created when he and Mehta "agreed to form a partnership for the purpose of buying and developing" the West Oaks Mall. He further asserted that "Mehta owed Ahmed the duties of candor, to refrain from self-dealing, fair and honest dealing, and full disclosure." According to Ahmed, Mehta breached those duties and injured Ahmed.

The jury found that Mehta and Ahmed had "form[ed] a partnership to acquire and develop the West Oaks Mall" and Mehta had "fail[ed] to comply with his fiduciary duty to Ahmed as to the West Oaks Mall." Further, the jury found that Mehta's "breach of fiduciary duty [was not] excused" and it awarded Ahmed $1,000,000 in damages.

On appeal, Mehta argued that the evidence was legally insufficient to establish a partnership between Mehta and Ahmed. The court began by discussing the five-factor test for creating a partnership under the TBOC:

> To recover on a breach-of-fiduciary-duty claim, a plaintiff must first establish the existence of a fiduciary relationship. The Texas Supreme Court has recognized that in certain formal relationships, including partnerships, a fiduciary duty arises as a matter of law. As the supreme court has explained, the relationship between partners "is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951).
>
> In his fourth amended petition, Ahmed alleged that he formed a partnership with Mehta to jointly acquire and develop the West Oaks Mall. Under long-standing common-law principles, which have since been codified, a partnership may be either express or implied from the parties' conduct. *See Ingram v. Deere*, 288 S.W.3d 886, 893–94 (Tex. 2009). Under 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." TEX. BUS. ORGS. CODE ANN. § 152.051(b).
>
> Five statutory factors guide the question of partnership formation:
>
> (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.
>
> *Id.* § 152.052(a); *see also Ingram*, 288 S.W.3d at 894–95.
>
> With some minor deviation, in this case, the trial court's charge instructed the jury on these factors that "indicat[e] that [the] parties ha[d] formed a partnership" and asked the jury whether "Ahmed and Mehta form[ed] a partnership to acquire and develop the West Oaks Mall." The trial court's charge instructed the jury that "[a] written agreement to form a partnership [was] not required" and "[t]he parties' intent to engage in the conduct that create[d] a partnership determine[d] if a partnership exist[ed] between the parties." . . .
>
> As the trial court's charge instructed and the Texas Supreme Court has determined, a party seeking to establish the existence of a partnership is not required to provide evidence of all five factors. *See Ingram*, 288 S.W.3d at 896. Rather, the Texas Business Organizations Code

> "contemplates a less formalistic and more practical approach to recognizing the formation of a partnership." *See id.* at 895. We apply a totality-of-the-circumstances test, considering all the evidence bearing on the partnership factors together on a continuum. At one end of the continuum, "a partnership exists as a matter of law when conclusive evidence supports all five statutory factors." *Nguyen*, 507 S.W.3d at 372. At the other end, "a partnership does not exist as a matter of law when there is no evidence as to any of the five factors." *Id.* "Even conclusive evidence of only one factor normally will be insufficient to establish the existence of a partnership." *Ingram*, 288 S.W.3d at 898 (to hold otherwise would create probability that some business owners would be legally required to share profits with or be held liable for actions of individuals who were neither treated as nor intended to be partners). The challenge of the totality-of-the-circumstances test is its application between these points on the continuum. *Id.*

The court observed that sharing of profits and control are generally considered the most important factors in establishing the existence of a partnership. With respect to profit sharing, Ahmed testified that the parties orally agreed to a "65/35 split" for the West Oaks Mall as evidence of his right to receive a share of the profits. The court noted, however, that the testimony did not reveal "*what* the parties agreed to split—that is, whether the split regarded profits relevant to the formation inquiry or something different, such as co-ownership of the real property or gross revenue from the tenants' rental payments." By statute, "neither of those arrangements [co-ownership of the real property or sharing gross revenue], by themselves, would indicate a partnership." The court determined that "Ahmed's testimony about the '65/35 split' is conclusory and no evidence of a right to receive a share of the profits of the West Oaks Mall."

Turning to expression of an intent to be partners, the court provided background on how that factor should be analyzed:

> The second factor indicating that the parties formed a partnership is the "expression of an intent to be partners in the business." TEX. BUS. ORGS. CODE ANN. § 152.052(a)(2). *Ingram* is instructive of the boundaries we must observe in our review of this factor. Those boundaries are: (1) the question is separate and apart from a review of the other factors; (2) we are to consider only that evidence which is not specifically probative of other factors; and (3) the terms used by the parties do not control—except that we consider the terminology used by "the putative partners," and the context in which any statements were made, as well as who made the statements and to whom they were made. There must also be "evidence that both parties expressed their intent to be partners." *Ingram*, 288 S.W.3d at 900.
>
> Much of the evidence identified by Ahmed in his briefing to support the second factor concerns his own understanding that the parties had become "partners." That is, Ahmed's testimony included multiple conclusory references to Mehta being his "partner" and to their "partnership." However, such conclusory statements are not a legally sufficient expression of an intent to form a business partnership, and Ahmed's mere belief there may be a partnership is not probative evidence of a partnership. As noted in *Ingram*, the term "partner" is a term that "is regularly used in common vernacular and may be used in a variety of ways." *Ingram*, 288 S.W.3d at 900 (internal quotations omitted). When a person refers to another as "partner," that fact alone does not signal the expression of an intent to form a partnership. *See id.* (internal quotations omitted).
>
> Because Mehta is the party denying the existence of a partnership, an expression of intent to be partners by Mehta would be of particular importance.

After an examination of the evidence presented at trial, the court concluded that "Ahmed presented only weak and self-contradictory evidence of the parties' mutual expression of intent to be partners."

Regarding control, the court began by observing what courts typically look for when examining this factor:

> The third factor indicating that the parties formed a partnership is "participation or [a] right to participate in control of the business." TEX. BUS. ORGS. CODE ANN. § 152.052(a)(3). As previously stated, this and the sharing of profits are the "most important factors" in determining

> the existence of a partnership."The right to control a business is the right to make executive decisions." *Ingram*, 288 S.W.3d at 901. Texas courts have held that various facts can be relevant to this factor, such as exercising authority over the business's operations, the right to write checks on the business's checking account, control over and access to the business's books, and receiving and managing the business's assets and monies. Evidence relevant to this factor also includes whether a putative partner only has "input" over business decisions and whether another person "retain[s] ultimate control over business decisions."

Because it was undisputed that Ahmed did not actually participate in the control of the West Oaks Mall, the court noted that the relevant inquiry was whether Ahmed had the "right to participate" in control of the mall. The court concluded that there was no more than a scintilla of evidence on this point.

With respect to the sharing of losses, the court noted that an agreement by the owners of a business to share losses is not necessary to create a partnership, but the existence of such an agreement can support a contention that a partnership exists. According to the court, the inquiry for this factor is not whether evidence exists that the business ever lost money, but whether the putative partners shared or agreed to share losses or liabilities. Ahmed acknowledged that the evidence of this factor was slight, but he again pointed to his testimony that the parties orally agreed to a "65/35 split" in the mall as supportive evidence. The court was unpersuaded: "For the same reason that we have concluded that Ahmed's testimony about a '65/35 split' is no evidence of an agreement to share the West Oaks Mall profits, we conclude that it is also no evidence of an agreement to share losses."

Regarding the contribution of money or property, Mehta argued that there was no evidence presented because Ahmed did not actually contribute any money or property toward the acquisition and development of the mall. In support of his argument, Mehta cited a decision of the Beaumont Court of Appeals for the proposition that a putative partner's failure to contribute money prevents the formation of a partnership. The court noted, however, that the opinion "predate[d] the codification of the statutory factors for partnership formation in the Texas Business Organizations Code." Moreover, "as Ahmed correctly points out, the fifth factor regarding the contribution of money or property, as codified, is not limited to actual contributions of money or property; it also concerns 'agreement[s] to contribute . . . money or property to the business.'" The court observed that "the evidence presented at trial included testimony that Ahmed allowed Mehta to use his financial standing with Community Bank to obtain the proof-of-funds letter and Ahmed had agreed to contribute money to fund the acquisition of the West Oaks Mall." According to the court, this was some evidence that Ahmed agreed to contribute money or property to the business.

When balancing all of the factors, the court ultimately concluded that there was insufficient evidence that a partnership had been formed:

> "Whether a partnership exists must be determined by an examination of the totality of the circumstances." *Ingram*, 288 S.W.3d at 903–04. The Texas Supreme Court in *Ingram* opined that conclusive evidence of all five statutory factors supports the recognition of a partnership as a matter of law, while the absence of evidence as to all five factors will preclude it. As this case demonstrates, the challenge is when the evidence falls somewhere between these two points on the continuum. We cannot say that Ahmed put on conclusive evidence of any of the statutory factors. When viewed in the appropriate light, there is some evidence, albeit . . . weak and self-contradictory, of the parties' expression of intent to be partners and some evidence that Ahmed agreed to contribute his line of credit to acquire the West Oaks Mall, at least until the property could be refinanced. But this alone is not enough to hold that the jury's finding of a partnership is supported by legally sufficient evidence. There is no evidence that the parties agreed to share profits or that Ahmed controlled or possessed a right to control the business, the two most important factors, and no evidence that the parties agreed to share losses. Moreover, Ahmed's assertion of the existence of a partnership was contradicted by his own acknowledgment that a "partnership was never created in the first place," which is evidence we conclude the jury could not reasonably disregard. We therefore hold that the evidence is legally insufficient to support the jury's finding that the parties formed a partnership to acquire and develop the West Oaks Mall.
>
> We sustain the portion of Mehta's first issue challenging the legal sufficiency of the evidence supporting the existence of a partnership. Absent an existing partnership, the jury's

> findings that Mehta breached his fiduciary duties and the resulting damages are immaterial because Mehta owed Ahmed no fiduciary duty.

Zurovec v. Rueben, No. 09-21-00379-CV, 2022 WL 3650128 (Tex. App.—Beaumont Aug. 25, 2022, no pet. h.) (mem. op.).

The court of appeals concluded that the trial court did not abuse its discretion in determining that the plaintiff was entitled to a temporary injunction because the plaintiff had presented evidence that the parties had an agreement to be partners or to share an ownership interest in a business. Nevertheless, the injunction was dissolved on unrelated procedural grounds.

Nehemias Rueben, an electrician by trade, and Jeremy Chaffin, an instrument technician, met in 2012 while working on an oil rig. At the end of 2018, the two of them and Chaffin's wife, Laronda Zurovec, discussed starting a new business and splitting everything fifty-fifty. In early 2019, Zurovec filed a dba (doing business as) form with Montgomery County and began operating Collaborative Services, LLC ("CS"), which provided electrical services and specialized in generator installation in Houston and the surrounding areas. In approximately March of 2019, Rueben began working as a project manager for CS. In October 2019, Zurovec filed a Certificate of Formation with the Texas Secretary of State for CS. The Certificate of Formation listed Zurovec as the sole managing member.

In 2019, Rueben received a 1099 from CS showing total payments of $14,000. In 2020, Rueben received a W-2 from CS, which showed he received a salary of $59,000, and in May 2021, Rueben received a raise, which increased his salary to $9,000 per month. In October 2021, CS severed its relationship with Rueben. According to Zurovec and Chaffin, Rueben was causing problems on jobs, behaving erratically, and using drugs, so they terminated his at-will employment with CS.

Rueben argued (a) that he made multiple monetary contributions to CS, (b) that the parties agreed prior to CS's formation that they were going into business together and would split everything down the middle, and (c) that he owned an interest in the business. Zurovec and Chaffin countered that Rueben's monetary contributions to the company were loans, which were repayable on demand, and in consideration for these loans, Rueben received an increased salary in 2021. There was no written documentation memorializing the terms of these loans.

On September 30, 2021, a Certificate of Formation was filed with the Texas Secretary of State for Collaborative Generators and Power Solutions, LLC ("CGPS"), naming Zurovec, Chaffin, Rebecca Dahlberg, Justin Dahlberg, Josh Paninski, and Michael Guest as managing members. CGPS provided similar services as CS but served an expanding market in North Texas. On October 2, 2021, Rueben received a text message from Chaffin notifying him they were going to part ways with him.

Rueben sued and asserted various causes of action. He sought a temporary injunction that would enjoin CS from transferring its goods, services, and assets to CGPS. The trial court granted the injunction. On appeal, appellants Zurovec, Chaffin, and CS asserted, among other arguments, that Rueben failed to establish his probable right to recovery and failed to demonstrate that imminent and irreparable harm would occur in the absence of a temporary injunction.

With respect to the probable right to recovery, the court determined that the trial court did not abuse its discretion by determining that the parties had an agreement to be partners or to share an ownership interest in CS:

> Appellants point to factors courts weigh in determining the existence of an implied partnership and assert that Ruben did not meet these factors. The five factors courts consider for an implied partnership are: (1) the receipt or right to receive a share of the profits; (2) the expression of an intent to be partners; (3) the right to participate in control of the business; (4) an agreement to share losses or liabilities, and (5) an agreement to contribute money or property to the business. *See* Tex. Bus. Orgs. Code Ann. § 152.052(a); *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2009).
>
> Here, Rueben testified that he, Zurovec and Chaffin agreed to start a business in late 2018, and that they agreed he would own fifty percent of the business. By early 2019, Zurovec admitted she had filed dba paperwork for CS. Zurovec, Chaffin, and Rueben all testified that Ruben started working at CS soon after. Multiple non-party witnesses testified that Zurovec, Chaffin, and Ruben held themselves out as partners, and one witness, Rosenhahn, testified the three represented themselves as co-owners. Additionally, their insurance agent, Vazquez, testified Zurovec excluded

> Rueben from workers' compensation coverage because he was an owner. Rueben testified he had authority to hire and fire employees, even though Zurovec disputed his testimony.
>
> After operating for almost a year, Zurovec filed a Certificate of Formation turning CS into an LLC. Rueben testified he only learned of this after the fact and tried to address it immediately by hiring a lawyer. All three parties agreed that Rueben provided capital for CS, although they disputed whether these monetary contributions were loans or investments. Despite Zurovec and Chaffin's contentions that these were loans rather than investments, Rueben provided documentary evidence of a check written by CS and signed by Zurovec with a memo noting it was a partial return on investment. Rueben also provided testimony that after Chaffin advised him they were going to part ways, Chaffin told him they would go through everything and split it fifty-fifty.
>
> While the parties presented conflicting evidence regarding the existence of an oral agreement, a trial court does not abuse its discretion by basing its decision on conflicting evidence. Viewing the evidence in the light most favorable to the trial court's ruling and deferring to its resolution of conflicting evidence, we hold the trial court did not abuse its discretion by determining the parties had an agreement to be partners or share an ownership interest in CS. We overrule issue one.

The court subsequently turned its attention to the imminent and irreparable harm requirement. It concluded that the requirement had been met:

> In their third issue, Appellants argue the trial court abused its discretion by finding Rueben faces imminent and irreparable harm in the absence of an injunction, as he only alleged monetary damages. . . .
>
> Here, in addition to a breach of contract cause of action, Rueben asserted claims for breach of fiduciary duty and fraud. There was some evidence presented at the temporary injunction hearing which established that: (1) Zurovec and Chaffin "parted ways" with Rueben; (2) Zurovec, Chaffin, and others formed a new entity CGPS engaged in providing the same services as CS shortly after parting ways with Rueben; (3) materials and inventory from CS were transferred to CGPS; (4) despite assurances that CGPS would pay for the materials and inventory, at the time of the hearing CGPS had not made any such payments to CS; (5) there were no terms for repayment between CGPS and CS for the materials; and (6) Rueben had provided capitalization to purchase some of the materials and inventory. Rueben also testified that Chaffin agreed they would go through the inventory and split it fifty-fifty and denied all he sought was money. Rather, he testified he wanted "what's mine."
>
> Appellants focus on Rueben's claims that he was entitled to a share of the profits, and therefore monetary damages only. However, Rueben claimed an interest in the inventory, property, and tools, among other things. The evidence showed that there was not simply a fear that property would be transferred from CS to CGPS, but that substantial materials and inventory had already been transferred and CS had not been paid for that inventory. Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that it did not abuse its discretion in determining that Rueben met his burden of showing an imminent and irreparable injury in the absence of a temporary injunction.

Despite concluding that the trial court did not abuse its discretion in determining that Rueben was entitled to a temporary injunction preserving the status quo, the court dissolved the injunction and remanded the case to the trial court "because the trial court's order fails to comply with Rule 683's mandatory requirements." As the court observed, "Texas Rule of Civil Procedure 683 requires every order granting an injunction 1) set forth the reasons for its issuance, 2) be specific in terms, and 3) describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained." Rule 683's procedural requirements "are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved."

Capelo v. Lilliman, No. 14-20-00804-CV, 2022 WL 3592516 (Tex. App.—Houston [14th Dist.] Aug. 23, 2022, no pet. h.) (mem. op.).

The court determined that a fact question existed on the existence of a partnership and correspondingly reversed the trial court's grant of summary judgment for the defendant.

Jennifer Capelo (administrator of the estate of decedent June Rivera) alleged that a partnership existed between Gale Lilliman and Rivera to own and operate a bail bonds business. In her petition, Capelo alleged that Rivera and Lilliman formed a partnership in 1986 and jointly owned and operated various bail bonds businesses in Galveston and surrounding counties. Rivera provided the "business know how" and cash, and Lilliman provided "sweat equity" and cash. Capelo further alleged that in 2001, Lilliman told Rivera, who apparently had health issues, that she should stay home and still receive her share of partnership profits, which she received until her death in 2016. As part of the arrangement, Rivera agreed that her partnership share would be reduced to 40 percent. After Rivera's death, Lilliman denied the existence of the partnership.

Capelo sought an accounting of partnership assets and a winding up of partnership affairs. Lilliman denied that a partnership existed and filed a traditional motion for summary judgment on that ground, which the trial court granted.

On appeal, the court began by concluding that § 1704.001 of the Occupations Code did not prohibit partnerships from owning or operating bail bonds businesses. The court then turned to the evidentiary arguments regarding whether a partnership had been formed. Without citing the statutory test under TBOC § 152.052 or making any reference to the five factors mentioned in that provision, the court reversed the trial court and determined that a fact question existed on the existence of a partnership:

> In support of his contention that the existence of a partnership was conclusively disproven, Lilliman cited his own affidavit as well as two applications for a bail bond license filed by Rivera in Galveston County and the assumed name record certificate for Gulf Coast Bail Bonds also filed in Galveston County. In the two applications for a license, dating from 1998 and 2000, Rivera stated that "[t]he name under which my business as a professional bondsman shall be conducted is A&A Associates Bail Bonds." She did not deny in the applications that she was a partner with Lilliman. Lilliman did not offer any applications from other years or counties. In her petition, Capelo alleged that Rivera and Lilliman formed a partnership in 1986 and jointly owned and operated various bail bonds businesses, including specifically Gulf Coast Bail Bonds and A&A Associates Bail Bonds. Nothing in the applications conclusively refutes the claim that Rivera and Lilliman were partners.
>
> The assumed name certificate from 1986 for Gulf Coast Bail Bonds states that the business is a "proprietorship" and lists only Lilliman as owner. Although this may be relevant evidence regarding whether a partnership existed, the fact that Lilliman listed only himself as an owner of a business on this form does not conclusively negate the existence of a partnership, and Lilliman has offered no specific argument to the contrary.
>
> Lilliman did not cite any specific part of his affidavit as conclusively disproving a partnership existed, but we note that he denied the existence of a partnership in the affidavit and asserted instead that he employed Rivera in the bail bond business until the late 1990s when he terminated her employment but continued paying her monthly bills until her death in 2016. [Lilliman did not offer any specific reason for the continuing payments to Rivera but mentioned she "had essentially become family to" him and suggested she had originally told him about the business opportunity in bail bonds. In her petition, Capelo asserted that Rivera and Lilliman had a romantic relationship that ended in the early 1990s.] Rivera was married at the time of her death in 2016. A summary judgment may be based on the uncontroverted testimonial evidence of an interested witness if the evidence is clear, positive, and direct; otherwise credible and free from contradictions and inconsistencies; and could have been readily controverted. Assuming Lilliman's denial of a partnership in his affidavit could have been readily controverted if untrue, we turn to a consideration of Capelo's evidence.
>
> Capelo's key evidence was her own affidavit . . . . Among the statements in the affidavit that we will consider in our review, Capelo explained that the business was originally run out of her mother Rivera's home and that Capelo would answer the phone when Rivera became too

> exhausted to do so. Capelo also described an argument between Rivera and Lilliman that she personally observed in 1987, in which Rivera "argued that they each owned fifty percent and [Lilliman] countered with 'most of the money was mine so you should only get twenty percent.'" According to Capelo, they then settled on a 60/40 split favoring Lilliman. Capelo provided sufficient basis for her personal knowledge reflected in these statements (i.e., personal observation), and the trial court erred in sustaining the conclusory objection to this portion of the affidavit. Viewed in the light most favorable to Capelo, these statements directly controvert Lilliman's assertion that no partnership existed. . . .
>
> Statements in the affidavit of Gerald Ramos also tend to corroborate Capelo's statements regarding the existence of a partnership. Ramos explained that he was employed by the bail bonds business from 1998 to 2000. Rivera interviewed, hired, and trained him for the job and ran the business without Lilliman for the first six months or so that Ramos worked there. Ramos also stated that the mail delivered to the business was usually addressed to both Rivera and Lilliman. Once Lilliman returned to the business, Ramos stated that Lilliman and Rivera appeared to run the business as equals and each often deferred to the other. Lilliman objected to [the] Ramos affidavit on the ground that it was mostly irrelevant and the portions that were not were conclusory. The trial court sustained the objections. Although some of Ramos's statements are irrelevant and some are conclusory and do not clearly flow from his employment in the business, the nonclusory [sic] statements—the ones stemming directly from his personal observation—tend to corroborate Capelo's testimony regarding the existence of a partnership, even if they are not sufficient standing alone to establish the existence of a partnership.
>
> . . . . Because those statements and the corroborating evidence, viewed in the light most favorable to Capelo, controvert Lilliman's assertion that no partnership existed, the trial court erred in granting summary judgment favoring Lilliman on the ground that there was no genuine issue of fact regarding the existence of a partnership. . . . We reverse the trial court's summary judgment and remand . . . the case to the trial court for further proceedings.

Giant Resources, LP v. Lonestar Resources, Inc., No. 02-21-00349-CV, 2022 WL 2840265 (Tex. App.—Fort Worth July 21, 2022, no pet. h.) ("Generally, a joint venture is governed by the same rules as a partnership. Taylor, as [a] representative of Giant, one of the joint venturers, was acting on behalf of the joint venture, and his conduct was binding on the joint venture. *See* Tex. Bus. Orgs. Code Ann. §§ 152.301–.302 (each partner is the agent of the partnership for the purpose of partnership business and an act of a partner binds the partnership if the act is apparently done for carrying on the partnership business in the ordinary course of business, unless exceptions apply).").

B. Partner's Personal Liability for Obligations of Partnership

Bartenwerfer v. Buckley, 598 U.S. __, 143 S.Ct. 665 (2023).

The Supreme Court unanimously held that the debt of a spouse arising by virtue of her status as a partner in a business partnership with her husband was nondischargeable because the debt resulted from her husband's fraudulent misrepresentations in selling a house that the partnership had remodeled. Because the debtor-wife was liable under state partnership law for a debt that was for money obtained by false pretenses, a false representation, or actual fraud within the meaning of the discharge exception, the debtor-wife was precluded from discharge even if she had no culpability in the fraudulent misrepresentations.

Kate and David Bartenwerfer jointly purchased a house in San Francisco and decided to remodel and sell it for a profit. David was in charge of the project, and Kate was largely uninvolved. After remodeling the house, they sold it to Buckley. The Bartenwerfers represented that they had disclosed all material facts related to the property, but Buckley discovered several defects that they had failed to disclose. Buckley sued and obtained a judgment against the Bartenwerfers for more than $200,000. The Bartenwerfers filed for Chapter 7 bankruptcy. Buckley filed an adversary complaint and alleged that the debt owed him on the state-court judgment was nondischargeable under the Bankruptcy Code's exception to discharge of "any debt ... for money ... to the extent obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The bankruptcy court found that David had committed fraud and imputed his fraudulent intent to Kate because the two had formed a partnership to renovate and sell the property. The bankruptcy appellate panel held that § 523(a)(2)(A) of the Bankruptcy Code precluded Kate from discharge only if she knew or had reason to know of David's fraud, and the bankruptcy court concluded on remand that Kate did not have knowledge of David's fraud and that her liability on the debt to Buckley was thus dischargeable. The Ninth Circuit Court of Appeals reversed, holding that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability.

The Supreme Court focused on the text of § 523(a)(2)(A), which states:

> A discharge under section 727 ... of this title does not discharge an individual debtor from any debt
> ...
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

The court stated that the terms of the text precluded Kate Bartenwerfer from discharging her liability for the state-court judgment in favor of Buckley because (1) Kate was an "individual debtor," (2) the judgment was a "debt," and (3) the debt arose from the sale proceeds obtained by David's fraudulent misrepresentations and thus was a debt "for money ... obtained by ... false pretenses, a false representation, or actual fraud."

Kate disputed the third premise. Acknowledging that, as a grammatical matter, the passive-voice statute does not specify a fraudulent actor, she asserted that the statute is most naturally read to bar the discharge of debts for money obtained by the debtor's fraud. The court discussed and rejected Kate's arguments regarding the use of the passive voice in relation to the actor, and the court also rejected arguments pointing to surrounding provisions of the Bankruptcy Code and bankruptcy policy.

In addition to rejecting Kate's arguments based on the text of the statute, the court explained that its precedent required it to reject Kate's interpretation of the statute:

> Our precedent, along with Congress's response to it, eliminates any possible doubt about our textual analysis. In the late 19th century, the discharge exception for fraud read as follows: "[N]o debt created by the fraud or embezzlement *of the bankrupt* ... shall be discharged under this act." Act of Mar. 2, 1867, § 33, 14 Stat. 533 (emphasis added). This language seemed to limit the exception to fraud committed by the debtor herself—the position that Bartenwerfer advocates here.
>
> But we held otherwise in *Strang v. Bradner*. In that case, the business partner of John and Joseph Holland lied to fellow merchants in order to secure promissory notes for the benefit of their partnership. 114 U.S. at 557–558, 5 S.Ct. 1038. After a state court held all three partners liable for fraud, the Hollands tried to discharge their debts in bankruptcy on the ground that their partner's misrepresentations "were not made by their direction nor with their knowledge." *Id*., at 557, 561, 5 S.Ct. 1038. Even though the statute required the debt to be created by the fraud "of the bankrupt," we held that the Hollands could not discharge their debts to the deceived merchants. *Id*., at 561, 5 S.Ct. 1038. The fraud of one partner, we explained, is the fraud of all because "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership." *Ibid*. And the reason for this rule was particularly easy to see because "the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid*.

The court went on to explain that Congress not only re-enacted the predecessor statutory provision with awareness of this precedent, but also deleted "of the bankrupt" from the discharge exception for fraud when it did so.

In response to Kate's fairness arguments, the court stated:

> It also bears emphasis—because the thread is easily lost in Bartenwerfer's argument—that § 523(a)(2)(A) does not define the scope of one person's liability for another's fraud. That is the function of the underlying law—here, the law of California. Section 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, § 523(a)(2)(A) would have

no role to play. Bartenwerfer's fairness-based critiques seem better directed toward the state law that imposed the obligation on her in the first place.

> And while Bartenwerfer paints a picture of liability imposed willy-nilly on hapless bystanders, the law of fraud does not work that way. Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship, and even then, defenses to liability are available. For instance, though an employer is generally accountable for the wrongdoing of an employee, he usually can escape liability if he proves that the employee's action was committed outside the scope of employment. Restatement (Third) of Agency § 7.07 (2006); D. Dobbs, P. Hayden, & E. Bublick, Law of Torts § 425 (2022). Similarly, if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook. Uniform Partnership Act § 305 (2013). Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts. *See, e.g.*, § 306(c) (limited-liability partnerships); Uniform Limited Partnership Act § 303(a) (2013) (limited partnerships); Uniform Limited Liability Company Act § 304(a) (2013) (limited-liability companies).

The court concluded by expressing some sympathy for Kate but stated that it was not the court's role to second-guess the judgment of Congress, which has "evidently concluded that the creditors' interest in recovering full payment of debts" obtained by fraud "outweigh[s] the debtors' interest in a complete fresh start."

A concurrence by Justice Sotomayer, in which Justice Jackson joined, emphasized that the legal context of this case "concerns fraud only by 'agents' and 'partners within the scope of the partnership" and that the court in this case "does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."

Konogeris v. Pinnacle Health Facilities GP I, LLC, 657 S.W.3d 421 (Tex. App.—El Paso 2022, no pet. h.).

The court determined that a general partner of a limited partnership was not directly liable on a health care liability claim because the general partner was not a physician or a health care provider and it did not control or supervise any of the individuals providing treatment. The court also determined that the general partner could not be held vicariously liable for the limited partnership's obligations because the limited partnership had been severed from the suit and there was no judgment against it. As a result, the court affirmed the grant of summary judgment in favor of the general partner.

Appellants were the family members and the executor of the Estate of Elizabeth Konogeris. They filed a health care liability claim against several entities and individuals contending that Elizabeth died from negligent care that she received while residing in a skilled nursing facility known as the Oaks at Radford Hills. The Estate brought claims against Pinnacle Health Facilities GP I, LLC ("Pinnacle GP") and Pinnacle Health Facilities of Texas, X, L.P. ("Pinnacle X"). Pinnacle X was the limited partnership that owned and operated the Oaks; Pinnacle GP was the general partner of Pinnacle X. [Note: the opinion often refers to Pinnacle X as a limited partner, but it seems clear from the context that Pinnacle X was a limited partnership.]

After Pinnacle X filed a suggestion of bankruptcy, the trial court granted the Estate's motion to sever Pinnacle X from the lawsuit, allowing the Estate's case to go forward against Pinnacle GP and other defendants. Pinnacle GP then filed a traditional motion for summary judgment, alleging that it could not be held liable for Elizabeth's death. As part of that motion, Pinnacle GP argued that it could not be held directly liable for Elizabeth's death because (1) it did not operate the Oaks; (2) it had no employees working at the facility; and (3) it had "never provided or overseen the provision of patient care and treatment" for Elizabeth. Instead, Pinnacle GP alleged that Pinnacle X was the licensed health care provider responsible for operating the Oaks, and that Pinnacle X's employees had been responsible for providing Elizabeth's care.

Pinnacle GP's motion also addressed the question of whether it could be held vicariously liable for Pinnacle X's conduct under either common-law or statutory principles—even though the Estate had yet to allege a theory of vicarious liability. First, Pinnacle GP argued that under common-law principles, only Pinnacle X could be held vicariously liable for its employees' alleged negligence in providing care to Elizabeth, as it was Pinnacle X that controlled their actions. Next, Pinnacle GP argued that under the Texas Business Organizations Code, it could not be held liable as a general partner for Pinnacle X's actions unless there was a judgment entered against Pinnacle X. In particular, Pinnacle GP pointed out that the TBOC only makes a general partner responsible for a limited partnership's "debts and liabilities." Because Pinnacle X, the limited partnership, had been severed from the suit before its liability had been determined, no judgment could be entered against it in the current proceeding. In other words, Pinnacle GP argued that because its liability was wholly dependent on a finding that Pinnacle X was liable to Appellees for Elizabeth's death, there was no basis for the Estate's claim against it in light of Pinnacle X's absence from the suit.

The trial court granted Pinnacle GP's motion. On appeal, the Estate argued that it had a right to proceed against Pinnacle GP for Pinnacle X's alleged negligence and that it did not matter that Pinnacle X had been severed from the lawsuit. The court disagreed:

> First, to be held directly liable on a health care liability claim, a defendant must be either a physician or a health care provider who provided substandard care, which in turn led to a claimant's injury or death. *See Lake Jackson Med. Spa, Ltd. v. Gaytan*, 640 S.W.3d 830, 840 (Tex. 2022) (a health care liability claim under the Medical Liability Act "includes three basic elements: (1) the defendant must be a physician or health care provider; (2) the claim must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's conduct must proximately cause the claimant's injury or death"). In a similar situation, our sister court in Amarillo held that the general partners of an entity that owned a nursing home facility could not be held directly liable for the negligent treatment that led to a resident's death, where they did not provide any medical treatment to her or otherwise participate in her care. *See Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 220-21 (Tex.App.—Amarillo 2003, no pet.); *see also Doctors Hosp. at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545, 551 (Tex. 2016) (holding that general partner—which was not in the health care business—could not be held directly liable for the alleged negligence of a doctor who was part of a limited partnership that owned the hospital). Here, the undisputed evidence established that Pinnacle GP was neither a physician nor a health care provider. Further, Pinnacle GP did not control or supervise any of the individuals who provided treatment to Elizabeth. Pinnacle GP therefore could not be held directly liable on the Estate's health care liability claim.
>
> As Pinnacle GP acknowledges, however, given its status as Pinnacle X's general partner, it could be held vicariously or derivatively liable for any judgment entered against Pinnacle X under the Texas Business Organizations Code. *Freeman*, 134 S.W.3d at 220 (recognizing that although general partners of entity that owned a nursing home facility could not be held directly liable for the negligent treatment that led to a resident's death, they could be held vicariously liable for any judgment rendered against the entity); *see also Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 474 (Tex.App.—Dallas 2008, pet. denied) (recognizing that in a limited partnership, "the general partner is always liable for the debts and obligations of the partnership"); *see also Sunbelt Serv. Corp. v. Vandenburg*, 774 S.W.2d 815, 817 (Tex.App.—El Paso 1989, writ denied) ("General partners of a limited partnership are personally liable to creditors for the limited partnership's debts the same as a partner in a general partnership."); *American Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 429 (Tex. 2015) (recognizing that a partner is "jointly and severally liable for all obligations of the partnership."), citing TEX.BUS.ORGS.CODE ANN. § 152.304(a) (subject to limited exceptions, "all partners are jointly and severally liable for all obligations of the partnership"). Thus, when Pinnacle X was a named defendant in the lawsuit, the Estate had a viable vicarious liability claim against Pinnacle GP. The Estate's argument that it also has a claim against Pinnacle GP in the absence of Pinnacle X, or a judgment against Pinnacle X, is unavailing.
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> The Estate pitches its argument on the holding in *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427 (Tex. 2015). That case, however, supports the opposite conclusion. . . . The takeaway from *Stowers* is that a plaintiff has two choices when it wishes to sue a partner based on its derivative liability under the Code. First, the plaintiff may name both the partnership and its partners in one lawsuit, and if successful, the suit could result in a joint

judgment against both. Second, the plaintiff may bring its initial claim solely against the partnership, and if a judgment is entered against the partnership, the plaintiff may then bring a separate enforcement action against the partners to collect on the partner's assets if the partnership's assets cannot satisfy the judgment against it. But the case does not support a basis for a plaintiff to file a separate suit against a partner for a partnership's debt or obligation before an adjudication of the partnership's liability.

Thus, the Estate had a right to name both Pinnacle X and Pinnacle GP—as its general partner—in this litigation, based on Pinnacle GP's derivative liability for Pinnacle X's debts and obligations under the Code. Once Pinnacle X was severed from the lawsuit, however, there was no possibility that a judgment could be entered against it, and in turn, no possibility that Pinnacle GP could be held derivatively liable in the pending lawsuit. *See El Paso Ref., Inc. v. I.R.S.*, 205 B.R. 497, 500 (W.D. Tex. 1996) (in order to hold a general partner vicariously liable for a debt, there must first be an assessment against the limited partnership, as the general partner cannot "be liable for an obligation which never existed against the limited partner[ship]"). So there is no basis for allowing the Estate to proceed in what is in effect a "separate action" against Pinnacle GP, where Pinnacle GP has no independent liability to the Estate, and there is no chance that a judgment will be entered against Pinnacle X which could be enforced against Pinnacle GP.

In a final argument, the Estate contends that the Texas Business Organizations Code allows Pinnacle GP to remain as a defendant in the case, given Pinnacle X's status as a "debtor in bankruptcy." In support of that argument, the Estate relies on section 152.306 of the Code, which provides, among other things, that in enforcing a judgment, a creditor may proceed "directly against the property of one or more partners if . . . the partnership is a debtor in bankruptcy." TEX.BUS.ORGS.CODE ANN. § 152.306 (c)(1). The Estate reads this statute to mean that it may proceed "directly" against Pinnacle GP given Pinnacle X's bankruptcy filing. But, by its express terms, the statute only addresses situations in which a party has already obtained a judgment against a partnership and the party is seeking to enforce the judgment against one of the partners. *See Lemon v. Hagood*, 545 S.W.3d 105, 114-15 (Tex.App.—El Paso 2017, pet. denied) (recognizing the need to obtain a judgment against the partnership before the collection provisions of section 152.306 are triggered), citing *Stowers*, 457 S.W.3d at 431 (a "claim must be litigated against the partnership so that its obligation is determined, reduced to damages, and fixed in a judgment" before a collection proceeding may be initiated under the statute). And as the Estate has yet to obtain a judgment against Pinnacle X that it is seeking to enforce against Pinnacle GP, we find this Code provision to be inapplicable.

We thus conclude that given Pinnacle X's severance from the suit, there is no basis for holding Pinnacle GP liable in the Estate's pending health care liability suit. The trial court therefore did not err in granting summary judgment disposing of the Estate's claim against Pinnacle GP.

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

Newsom, Terry & Newsom, LLP v. Henry S. Miller Commercial Co., No. 05-20-00379-CV, 2022 WL 3908542 (Tex. App.—Dallas Aug. 31, 2022, pet. filed) (mem. op.) (stating that "[a] firm practicing as a limited liability partnership is liable for the malpractice of its partners").

Giant Resources, LP v. Lonestar Resources, Inc., No. 02-21-00349-CV, 2022 WL 2840265 (Tex. App.—Fort Worth July 21, 2022, no pet. h.) ("Generally, a joint venture is governed by the same rules as a partnership. Taylor, as [a] representative of Giant, one of the joint venturers, was acting on behalf of the joint venture, and his conduct was binding on the joint venture. *See* Tex. Bus. Orgs. Code Ann. §§ 152.301–.302 (each partner is the agent of the partnership for the purpose of partnership business and an act of a partner binds the partnership if the act is apparently done for carrying on the partnership business in the ordinary course of business, unless exceptions apply).").

D. Fiduciary Duties of Partners and Affiliates

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims for breach of fiduciary duty (direct and derivative) and oppression. The jury found in her favor on those claims, but the court of appeals reversed on one derivative claim based on her lack of standing because she was not an owner of the entity on whose behalf she brought that claim. The court of appeals reversed as to another derivative claim for breach of fiduciary duty brought on behalf of a limited partnership because the plaintiff did not show that the individual who allegedly breached his fiduciary duty to the limited partnership exercised the requisite control over the general partner to owe a fiduciary duty to the limited partnership. The court of appeals affirmed a claim for breach of fiduciary duty against the general partner of the limited partnership based on the limited partnership's payment of personal legal fees incurred by individual defendants. The court also affirmed as to a claim based on an informal fiduciary duty owed by one of the individual defendants. The court reversed the jury's finding of oppression, concluding that the evidence did not meet the standard for oppression as a matter of law.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board,

and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

With respect to the malicious prosecution claim (which was based on the involuntary commitment proceeding against Lisa), Wes Jr., Stacey, and Lee argued that (1) Lisa did not meet her burden to establish that Wes Jr. lacked probable cause to file the commitment application, (2) the trial court abused its discretion in excluding evidence of Lisa's health history, (3) the actual and punitive damages awarded for malicious prosecution were excessive, and (4) there was insufficient evidence to support the actual and punitive damages against Lee and Stacey. The court discussed the applicable law and the evidence at length and concluded that there was conflicting evidence regarding the facts and circumstances underlying Wes Jr.'s decision to initiate involuntary commitment proceedings against Lisa, but it was the jury's province to resolve the conflicts. Viewing the evidence in the light most favorable to the verdict, the court concluded that there was some evidence supporting the jury's finding that Wes Jr. possessed a private motive to harm Lisa and that he lacked probable cause to initiate the proceedings based on the facts and circumstances known to him at the time he filed the application. Given the state of the entire record and the testimony of Lisa's siblings regarding past concerns about Lisa's mental health and the family history of mental illness, the court concluded that the excluded additional evidence (especially evidence from decades before) regarding Lisa's behavior and health history was not reversible error. The court also overruled the challenges to the actual and punitive damages awarded on the malicious prosecution claim against Wes Jr. and co-conspirators Stacey and Lee.

The court reversed the award of actual damages to Lisa on her defamation claim (which was based on statements to employees of the business that Lisa was mentally ill and posed a danger) because the court found there was no evidence that these statements were the proximate cause of Lisa's past mental anguish, and the court reversed the award of exemplary damages because Lisa was not entitled to recover exemplary damages absent actual damages.

The court addressed a challenge to Lisa's standing to assert a derivative claim brought by Lisa on behalf of SignAd GP, LLC. The individual and entity defendants argued that all relief granted by the trial court based on the derivative claim Lisa asserted on behalf of SignAd GP, LLC for breach of fiduciary duty against Wes Jr., Lee, and Stacey should be reversed because Lisa had no ownership interest in SignAd GP, LLC and thus lacked standing to bring derivative claims on its behalf. With respect to this claim, the jury found that Wes Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC by (1) failing to maintain internal controls on employee fringe benefits and (2) selling company vehicles for less than fair market value. The jury awarded more than $500,000 in damages for this claim, and the trial court awarded Lisa one-sixth of the damage award under Section 153.405 of the Texas Business Organizations Code (TBOC). The court analyzed this issue and concluded that Lisa lacked standing to assert the derivative claim on behalf of SignAd GP, LLC due to her lack of an ownership interest in that entity. In the course of that analysis, the court refuted a contention by Lisa that the jury question "'mistakenly (but harmlessly) presented the issue to the jury in terms of a fiduciary obligation to SignAd GP instead of to SignAd, Ltd.'" The court stated that "SignAd, Ltd. and SignAd GP, LLC are distinct legal entities and any duties Wes, Jr., Lee, and Stacey may owe to SignAd, Ltd. are not necessarily the same as any duties they may owe to SignAd GP, LLC." The court emphasized that the jury question asked about duties owed to SignAd GP, LLC, not SignAd, Ltd., and the court stated that it could not simply substitute another entity for SignAd GP, LLC as Lisa suggested. The court stated that "[t]he question presented is one of standing," and Lisa lacked standing to bring a derivative claim on behalf of SignAd GP, LLC.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim against Wes Jr. on behalf of SignAd, Ltd. asserting that Wes Jr. had engaged in self-dealing transactions with his side business ProIce Solutions, LLC" ("ProIce"). The jury was instructed that "[b]ecause Wesley Gilbreath, Jr. was President of SignAd, Ltd., he owed SignAd, Ltd. a fiduciary duty." The jury found that Wes, Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with [ProIce]."

SignAd GP, LLC's Board of Managers approved a policy that allowed other companies in which the managers had an interest to use its vacant billboards in exchange for paying only administrative costs. Pursuant to the policy, Wes Jr. allowed ProIce, a company in which he was a passive investor, to advertise on the company's vacant billboards. ProIce was not billed for and did not pay for administrative costs. According to Wes Jr., the omission was inadvertent. He also contended that ProIce's use of the billboards was disclosed to and discussed by the board at board meetings and that there was no loss of revenue to SignAd, Ltd. from ProIce's use of its billboards because there was no evidence ProIce ever advertised on billboards for which SignAd, Ltd. had a paying customer wanting to pay for the billboard. In addition to arguing that the judgment against him on this claim should be reversed due to the absence of evidence that SignAd, Ltd. sustained a loss of revenue as a result of ProIce's use of its billboards, Wes Jr. argued that the trial court's judgment must be reversed because there was no evidence he owed a fiduciary duty to SignAd, Ltd. and no jury finding that such a fiduciary relationship existed.

The court of appeals recited the elements of a claim for breach of fiduciary duty (a plaintiff must establish that (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach resulted in injury to the plaintiff or benefit to the defendant) and explained that the existence of a formal fiduciary duty is a question of law, but the underlying facts giving rise to a formal fiduciary duty are issues for the fact finder if those facts are disputed. Although the parties here disagreed as to whether Wes Jr. owed a fiduciary duty to SignAd, Ltd., the court said that they did not appear to disagree about the underlying facts.

The court explained that SignAd GP, LLC, as SignAd, Ltd.'s General Partner with "the sole and exclusive right" to manage SignAd, Ltd.'s business, owed fiduciary duties to SignAd, Ltd. and its limited partners. Wes Jr., as an officer of SignAd GP, LLC, owed a fiduciary duty to SignAd GP, LLC. The relevant question was whether Wes Jr., as an officer of SignAd GP, LLC, owed a fiduciary duty to SignAd, Ltd. The jury was not asked to determine whether Wes Jr. owed a fiduciary duty to SignAd, Ltd. but was instructed that Wes Jr. was the President of SignAd, Ltd. and that as the President of that entity, he owed a fiduciary duty to SignAd, Ltd. The court pointed out, however, that Wes Jr. was not the President of SignAd, Ltd.; rather, he was President of SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court discussed Texas case law under which a person who controls a general partner of a limited partnership has been deemed to owe a fiduciary duty to the limited partnership and its limited partners and concluded that Wes Jr. did not have the requisite control over SignAd GP, LLC, SignAd, Ltd.'s General Partner:

> Lisa argues that despite the erroneous instruction, she was not required to obtain a jury finding that Wes, Jr. owed a fiduciary duty to SignAd, Ltd. Relying on several decisions from the Fifth Circuit Court of Appeals, she claims that Wes, Jr. owed a fiduciary duty to SignAd, Ltd. as a matter of law based on the "control" he exercised over SignAd GP, LLC and SignAd, Ltd.'s daily operations. *See FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615, 621–22 (5th Cir. 2011) (holding officer of general partner of limited partnership who "exercised near-complete control over both tiers of the entity" owed fiduciary duties to limited partnership under Texas law); *McBeth v. Carpenter*, 565 F.3d 171, 178 (5th Cir. 2009) (holding president of general partner who had "exclusive right to manage all contracts and agreements ... relating to the [l]and" under development and controlled operations of limited partnership owed fiduciary duties to limited partnership); *LSP Inv. P'ship v. Bennett (In re Bennett)*, 989 F.2d 779, 790 (5th Cir. 1993) (holding individual who was sole general partner of sole general partner of limited partnership owed fiduciary duty to limited partners because individual was only person with power or authority to direct affairs of second-tier general partner who had "full, exclusive and complete authority and discretion to manage, control and make all decisions affecting the purposes of the partnership and to take any action required to effectuate the purpose of the partnership").
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> Assuming, without deciding, that such a "control" test exists and could form the basis of a fiduciary duty, Lisa's argument does not carry the day. [The court noted in a footnote here that Lisa had not cited and the court had not found any Texas case holding that an officer of a general partner of a limited partnership owes a fiduciary duty to the limited partnership as a matter of law.] The holdings in each of the cases Lisa cites focus on the control the person alleged to owe the fiduciary duty exercised over the relevant limited partnership. The oldest of the opinions on which Lisa relies, *LSP Investment Partnership v. Bennett (In re Bennett)*, 989 F.2d 779 (5th Cir. 1993), relied upon the reasoning of *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) and the extent and degree of control exercised by the individual in that case who purportedly owed the fiduciary duty. *See In re Bennett*, 989 F.2d at 790 ("[B]ased on the holding in *Crenshaw* and the cases cited therein, we find that Bennett, as the managing partner of the managing partner, owed to the MG limited partners 'the highest fiduciary duty recognized in the law.' ").

In *Crenshaw*, the Austin Court of Appeals, relying on the law of trusts, held that Elizabeth Swenson, the general partner of the general partner of a limited partnership, owed a fiduciary duty to the limited partners. 611 S.W.2d at 891. The court, however, did not hold that the general partners of a general partner owe fiduciary duties to limited partners as a matter of law. Limiting its holding to the "facts of the present case," the court held that Swenson, who was the sole general partner of the general partner (and who no one contested exercised complete control over the limited partnership), owed a fiduciary duty to the limited partners. *See id.* at 890–91 ("In a limited partnership, the general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust."). [The court noted in a footnote here that the Legislature has expressly rejected the analogy of a partner to a trustee in Tex. Bus. Orgs. Code § 152.204(d).]

Relying on *Crenshaw* and other cases, the Fifth Circuit Court of Appeals in *In re Bennett* held that Bennett, who was the sole general partner of Mariner Interest No. 20, Ltd. ("No. 20"), the general partner of Mariner/Greenspoint, Ltd. ("MG"), owed a fiduciary duty to MG's limited partners because of the degree of control Bennett exercised over No. 20 and MG. *See In re Bennett*, 989 F.2d at 781, 790. The court explained that "[u]nder the terms of the MG partnership agreement, the general partner, No. 20, was charged with management of the partnership and had full, exclusive and complete authority and discretion to manage, control and make all decisions affecting the purposes of the partnership," and that "Bennett, as the sole general partner of No. 20, was the only individual with the power or authority to direct the affairs of No. 20 and MG." *Id*. at 781. As such, the court held, Bennett owed a fiduciary duty to MG's limited partners. *Id*. at 790[.] In so holding, the court noted that under Texas law, "the issue of control has always been the critical fact looked to by the courts in imposing this high level of responsibility." *Id*. at 789–90 (concluding that by virtue of his control, Bennett owed a fiduciary duty to MG's limited partners).

Like the court in *In re Bennett*, the courts in *In re Harwood* and *McBeth* focused much of their duty analysis on the degree of control exercised by Harwood and Carpenter over the general partnership and limited partnership in those cases, holding that by virtue of their control over both tiers of the relevant entities, Harwood and Carpenter, as officers of the general partner, owed fiduciary duties to the limited partnerships. *See In re Harwood*, 637 F.3d at 623 (stating "Harwood exercised near-complete control over both tiers of the entity until a few months prior to his termination" and board "paid little attention to the day-to-day operations of FNFS," and "the other managing shareholder and chief executive officer of B&W, was not able to exercise meaningful oversight because he had no particular banking expertise"); *McBeth*, 565 F.3d at 178 (stating that under limited partnership agreement "the general partner retained exclusive control and management over the partnership" and noting "extensive testimony" established that Carpenter, who often referred to himself as "the general partner," "was 'the man in control' and 'heading the efforts' of the partnership" with "exclusive right to manage all contracts and agreements ... relating to the [l]and"); *see also Allen*, 367 S.W.3d at 391 (holding "a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity").

There is no evidence of such requisite control here. SignAd GP, LLC is a single-member limited liability company. Stacey is the sole member of SignAd GP, LLC. Lee is the Chairman of SignAd GP, LLC's Board of Managers and its Chief Executive Officer. Wes, Jr. is the President of SignAd GP, LLC (not SignAd, Ltd.) and SignAd GP, LLC's Chief Operating Officer. Wes, Jr., Lee, Stacey, and Lisa are the current members of SignAd GP, LLC's Board of Managers.

SignAd GP, LLC has "the sole and exclusive right to manage the business of" SignAd, Ltd. under the limited partnership agreement. And SignAd GP, LLC's Board of Managers manages the business and affairs of SignAd, Ltd. and "develop[s] policies and procedures to be implemented and followed by the officers and employees in their day-to-day operations." Pursuant to SignAd GP, LLC's regulations, Wes, Jr., as President of SignAd GP, LLC, controls SignAd GP, LLC's "business and affairs," but he does so subject to the Chairman of the Board and the Board of Managers. Specifically, Section 4.6 of SignAd GP, LLC's regulations states: "Subject to the Chairman of the Board, if any, and the Board of Managers, itself, the President shall in general supervise and control all of the business and affairs of" SignAd GP, LLC and "in general shall perform all duties incident to the office of President."

> Unlike the passive minority owner in *Allen* and the other managing shareholder and chief executive officer of the general partner in *In re Harwood* who "was not able to exercise meaningful oversight because he had no particular banking expertise," Lisa testified she had been actively involved in the family business for decades as an owner and board member, and that Brett, her ally on the board for many years, had been the company's vice president of real estate. Also, unlike *In re Harwood* where the board "paid little attention to the day-to-day operations" of the company, Lisa, and the other members of SignAd GP, LLC's Board of Managers, reviewed regular financial information and developed and implemented policies governing the running of SignAd GP, LLC and SignAd, Ltd., including the free billboard policy. Although Wes, Jr. decided which properties, if any, to purchase, the Board of Managers set the limit on his spending authority and any sales of real property had to be presented to and approved by the Board of Managers. Based on this evidence, we conclude that the degree of control Wes, Jr. exercised as an officer of SignAd GP, LLC did not, under the circumstances presented here, create a fiduciary duty as a matter of law as to SignAd, Ltd. [footnotes omitted]

The court thus sustained Wes Jr.'s challenge to the jury's finding that he failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and reversed the trial court's judgment in favor of Lisa on her derivative claim for breach of fiduciary duty against Wes Jr. based on his transactions with ProIce.

Next the court of appeals discussed Lee's challenge to the jury's finding that he failed to comply with an informal fiduciary duty to Lisa, which the trial court relied on in part to grant injunctive relief in favor of Lisa and appoint a rehabilitative receiver to oversee an equitable buyout by the entity defendants of Lisa's interests in the Limited Partnerships and General Partners. Lee argued that the finding was immaterial because there was no evidence or finding that Lisa was damaged by Lee's breach of fiduciary duty or that Lee improperly benefitted from the breach. The jury question on Lee's breach of fiduciary duty to Lisa instructed the jury that to establish Lee failed to comply with his fiduciary duty to Lisa, Lisa had to establish one of five scenarios, one of which was that "[Lee] placed his own interests before Lisa Horan's, used the advantage of his position to gain a benefit for himself at the expense of Lisa Horan or placed himself in a position where his self-interest might conflict with his obligations as a fiduciary." The court said that the elements of causation and damages were thus included in the charge and that the jury's affirmative finding was an implicit finding that Lee personally benefitted from his breach of fiduciary duty to Lisa.

The court then explained that there was evidence to support the jury's implied finding that Lee's breach of his fiduciary duty to Lisa either injured Lisa or benefitted Lee as follows:

> The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay certain non-business-related legal fees for Wes, Jr., Lee, Stacey, and Mark. The jury awarded $375,000 in damages for that claim. In the Amended Final Judgment, the trial court awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The jury found that Lee knowingly participated in the breach and it apportioned 25% of the responsibility for the breach to Lee.
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> As discussed later in the opinion, the record also reflects that Wes, Jr., Lee, and Stacey voted to amend SignAd GP, LLC's regulations to allow themselves, as the majority of the Board of Managers, to create SignAd GP, LLC's Special Litigation Committee over Lisa's objections, and they appointed themselves to the committee. There is also some evidence that SignAd, Ltd. paid the personal legal fees of Wes, Jr., Lee, Stacey, and Mark at Wes, Jr.'s direction and that the Special Litigation Committee gave Wes, Jr. the authority to make such decisions. Based on this evidence, the jury reasonably could have concluded that Lee breached his fiduciary duty to Lisa through his knowing participation in the Special Litigation Committee which authorized Wes, Jr. to cause SignAd, Ltd. to pay for Lee's personal legal fees, constituting not only a benefit to Lee, but also injuring Lisa's interest in SignAd, Ltd. [footnotes omitted]

The court thus overruled Lee's challenge to the portions of the judgment based on the jury's finding that he failed to comply with his informal fiduciary duty to Lisa.

Another claim for breach of fiduciary duty asserted by Lisa was a derivative claim on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses that SignAd, Ltd. improperly paid. Enriquez opined that the payments were not consistent with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller, as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was thus some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis of their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

The entity defendants also argued that pleading deficiencies by Lisa precluded the submission of the jury questions associated with this breach-of-fiduciary-duty claim because Lisa did not adequately address the allegedly wrongful fee payments and never alleged that the individual defendants "knowingly participated" in any alleged breach. Because Texas follows a "fair notice" standard of pleading, the court rejected these arguments given the wrongful conduct she alleged.

The entity defendants argued there was insufficient evidence of damages because Enriquez's testimony that SignAd, Ltd. could be subject to potential tax penalties due to SignAd GP, LLC's alleged breach of its fiduciary duty was speculative and thus irrelevant. Enriquez explained her concern that the payment of personal legal fees by SignAd, Ltd. put SignAd, Ltd.'s S-corporation status at risk if the payments were found to be dividends that were disproportionately paid in violation of S-corporation requirements. The entity defendants argued that this was only a "theoretical possibility" because the Internal Revenue Service had not made any inquiries and no penalties had been assessed or paid. Lisa countered that the misapplication of funds of SignAd, Ltd. by paying personal legal fees of the individuals was a breach of fiduciary duty by the general partner in any event, and the court agreed. The court stated that "[w]hether or not SignAd GP, LLC's breach of its fiduciary duty risked SignAd, Ltd.'s status as an S-Corporation, the evidence established SignAd GP, LLC damaged SignAd, Ltd. because SignAd GP, LLC authorized the payment of legal fees incurred by Wes, Jr., Lee, Stacey, and Mark for matters unrelated to SignAd, Ltd." The court thus concluded that the jury's finding on damages was supported by the evidence.

The entity defendants also argued that the trial court's judgment improperly awarded money damages directly to Lisa under Section 153.405 of the Texas Business Organizations Code (as in effect prior to September 1, 2019) on her derivative claim filed on behalf of SignAd, Ltd. (The Legislature significantly amended the provisions of Chapter 153 on derivative proceedings involving limited partnerships in 2019, but the pre-amendment provisions applied in this case.) The defendants argued that an individual stakeholder in a legal entity does not have the right to recover personally for harms done to the legal entity and that Section 153.405 of the TBOC did not authorize the direct distribution of damages recovered in a derivative claim brought on behalf of a limited partnership to a single limited partner. When the trial court entered judgment, Section 153.405 of the TBOC, entitled "Expenses of Plaintiff," stated: "If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff." The court held that the plain language of Section 153.405 only permitted Lisa to recover her "reasonable expenses, including reasonable attorney's fees" and that Lisa was not entitled to a direct distribution of the damages awarded for her derivative claim.

Lisa relied on *Beach Capital Partnership, L.P. v. DeepRock Venture Partners L.P.*, 442 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2014, no pet.) in arguing that the court had discretion under Section 153.405 of the TBOC to award a share of the recovered damages directly to a limited partner in proportion to her ownership interest in a derivative action brought on behalf of a closely held limited partnership, but the court found her reliance was misplaced. The court said that it held in that case that the trial court had not erred in awarding a portion of a derivative damage award directly to a limited partner under Section 153.405 because "the judgment dissolved

Playa and ordered Playa's receiver to distribute all remaining assets to DeepRock." Because this part of the judgment was not challenged by the parties in that case, the court held that the direct award to DeepRock was "entirely consistent with a payment of $500,000 to Playa and its simultaneous distribution to Playa's partners," especially "in light of the unchallenged judgment that all of [the dissolved partnership's] remaining assets be distributed immediately to [the limited partner]." The court said that the holding in *Beach Capital Partnership* had no application in this case since SignAd, Ltd. had not been dissolved and the trial court did not direct a receiver to distribute the remaining assets of the partnership to the limited partners. Lisa thus was not entitled to a direct distribution of damages for the derivative claim she filed on behalf of SignAd, Ltd., and the court reversed the portion of the judgment awarding Lisa direct damages for the derivative claim she asserted on behalf of SignAd, Ltd.

The entity defendants also raised numerous challenges to the jury's finding of oppression. After a lengthy discussion of the current state of Texas law regarding oppression and the evidence in this case, the court sustained the entity defendants' challenge to the sufficiency of the evidence to support the jury's finding of oppression.

The court began its discussion by pointing out that Section 11.404 of the Texas Business Organizations Code (TBOC) authorizes a Texas court to appoint a receiver to rehabilitate a domestic entity under certain circumstances, including when it is established in an action brought by an owner or member of the entity "that ... the actions of the governing persons of the entity are illegal, oppressive, or fraudulent." Tex. Bus. Orgs. Code § 11.404(a)(1)(C). The term "oppressive" is not defined in the statute, and the Texas Supreme Court, in *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), has pronounced that an entity's directors or managers engage in oppressive action "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]." The Texas Supreme Court said that the Legislature signaled that the term "oppressive" should be construed to include acts that are as serious as illegal or fraudulent acts.

The court acknowledged that it is within the jury's province to determine whether certain acts occurred, but the court stated that it was not obligated to give deference to the trial court's conclusion that such acts constituted oppression, which is a question of law for the court.

The question of oppression was presented to the jury by posing the following question for each of the nine Limited Partnerships as well as two of the General Partners: "Do you find that the actions of the governing persons of the entities listed below were oppressive?" The jury was instructed that:

> An entity's directors or managers engage in oppressive actions when they abuse their authority over the entity with the intent to harm the interests of one or more of the partners or member[s], in a manner that does not comport with the honest exercise of their business judgment, and by doing so they create a serious risk of harm to the entity.
> Oppressive actions include acts that have the following characteristics:
> • They are severe and create exigent circumstances;
> • They involve an unjust exercise or abuse of power that harms the rights or interests of persons subject to the governing persons' authority and disserves the purpose for which the power is authorized; and
> • They are inconsistent with the governing person's duty to exercise their honest business judgment for the benefit of the entities.

The jury answered "yes" to this question for all nine of the Limited Partnerships as well as for the two indicated General Partners. The trial court granted injunctive relief and appointed a rehabilitative receiver based in part on the jury's findings of oppression.

The jury question defined the term "governing person" as follows: "A person is a governing person of an entity if he is the person or is among the group of persons who are entitled to manage and direct the affairs of an entity. An officer is not a governing person." The question did not identify any individual by name, and the jury was not asked to respond as to any named individual. Because Lisa fell within the definition of a "governing person" as a member of the Board of Managers, the court acknowledged that the jury's finding of oppression could have been based on Lisa's own conduct (consistent with the jury's finding pursuant to another question that Lisa engaged in conduct relating to the partnership business of each of the nine Limited Partnerships that made "it not reasonably practicable to carry on the business in partnership with [her]," especially given that the jury found that Wes Jr., Lee, Stacey, SignAd GP, LLC, and the other General Partners had not engaged in such conduct). However, the court said that the fact that the oppression finding could have been based on Lisa's own conduct, did not mean that the jury's findings of oppression should be disregarded.

Lisa argued that Wes Jr., Lee, and Stacey, as a controlling majority abused their power to marginalize her by withholding information, refusing her requests for more transparency, and effectively excluding her from the family business. After years of stonewalling Lisa on her requests for additional financial information, Lisa had to resort to hiring a lawyer and eventually litigation to obtain information necessary to conduct a forensic audit. When the requested information was finally provided, Lisa claimed it revealed irregularities, improper use of company funds, and accounting deficiencies that threatened the S-corporation status of SignAd, Ltd. Lisa also pointed to the highly contentious March 2013 board meeting at which her siblings took actions that effectively excluded Lisa from management or, at a minimum, greatly diminished her role. Lisa further pointed to the action taken to involuntarily commit her to a mental hospital. According to Lisa, the sum of these actions were sufficient evidence to establish "abuse of power by Wes, Jr., Lee and Stacey as control persons of the SignAd entities that harmed both Lisa and the company, created exigent circumstances, and were completely inconsistent with the honest exercise of business judgment."

The court stated that Lisa cited no authority to support her argument that the alleged conduct constituted oppression as a matter of law. The entity defendants responded that the alleged actions did not constitute oppression because as a limited partner, Lisa was not allowed to take part in the management of the partnership and that the Board on which she served acts by majority vote. The defendants argued that outvoting Lisa on her request for audits, not appointing her to the Executive Committee, and reducing the frequency of Board meetings was not oppression. Finally, the entity defendants argued that once Lisa received the financial information she requested, she did not find evidence of fraud, but only "hypothetical potential tax penalties unlikely to ever be assessed." More significantly, they argued that none of the findings described any "act taken directly against Lisa, as is required for 'oppressive conduct.'"

The court agreed with the defendants that the conduct Lisa described did not amount to oppression as a matter of law.

> While the sum of Lisa's complained-of conduct certainly impacted Lisa negatively, and some of the conduct was found by the jury to be improper, such as the failure to provide Lisa with the financial records to which she was entitled, we cannot say that Wes, Jr., Lee, or Stacey abused their authority over any of the Company Appellants by engaging in such conduct in a manner that did not comport with the honest exercise of their business judgment thereby creating a serious risk of harm to the business. *See Ritchie*, 443 S.W.3d at 871 (holding directors or managers engage in oppressive actions "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]").
>
> Lisa points to the fact that once she received the Company Appellants' financial information, her accountant, Enriquez, discovered evidence of self-dealing transactions by Wes, Jr., such as failures to maintain internal controls, improper use of company funds and assets, and accounting deficiencies Enriquez believed could result in substantial IRS penalties and the loss of SignAd, Ltd.'s S-Corporation status. The jury found that Wes, Jr. breached his fiduciary duties to SignAd, Ltd. in self-dealing transactions with ProIce which caused a loss of $750 for the fair market value of services provided to ProIce in the past, plus $300 per month for the value of services that, in reasonable probability, will be provided to ProIce in the future. The jury also found that Wes, Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC, causing a loss of $461,193 for "lack of internal controls regarding fringe benefits," and $40,000 for selling company vehicles for less than fair market value. And the jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes, Jr., Lee, Mark, and Stacey. The jury further found that Wes, Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each.

> Even if wrongful and detrimental to Lisa, we cannot, on the record before us, conclude that the alleged actions "created a serious risk of harm" to the entities or were "severe and create[d] exigent circumstances" for the Company Appellants as to constitute oppression. *See Ritchie*, 443 S.W.3d at 867, 870–71 (defining what constitutes oppression and further holding that to qualify as type of "oppressive" conduct that justifies appointment of receiver, purported conduct must "create exigent circumstances for the corporation"). While there is some evidence to support the alleged conduct on which Lisa relies, the conduct itself does not constitute oppression as a matter of law. *See id.* at 870–71 (defining oppression and holding that directors' refusal to meet with minority shareholder's potential buyers did not constitute oppression); *see also Argo Data Res. Corp.*, 380 S.W.3d at 265 (stating courts must exercise caution in determining what actions constitute oppressive conduct). [footnotes omitted]

The court thus sustained the entity defendants' challenge to the sufficiency of the evidence supporting the jury's affirmative finding of oppression.

Having reversed as to the finding of oppression, the court addressed whether there were nevertheless grounds to support the trial court's appointment of a rehabilitative receiver. The trial court appointed a rehabilitative receiver "to oversee the equitable buyout of Lisa Horan, Trustee's interests in the Limited Partnerships and General Partners in which she holds an interest," finding that such appointment "would avoid further damage to Lisa ... and conserve the property and business of the entities." The trial court appointed the rehabilitative receiver based on the jury's finding that (1) Lee breached his fiduciary duty to Lisa, and (2) nine of the Limited Partnerships and two General Partners engaged in oppression.

The court explained the nature and purpose of a receiver and noted that appointment of a receiver is a "harsh, drastic, and extraordinary remedy" that should be exercised "cautiously" and only if there is no other lesser legal or equitable remedy. The court set forth the provisions of Section 11.404 of the TBOC, under which a court may appoint a receiver for an entity's property and business if it is established in an action by an owner that any of several grounds exist, including that "the actions of the governing persons of the entity are illegal, oppressive, or fraudulent " or "the property of the entity is being misapplied or wasted." Even in such cases, the court must also determine "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(a), (b).

As discussed above, the court held that there was no evidence to support the jury's finding of oppression, which the court said was "particularly significant because the only remedy for oppression is the appointment of a rehabilitative receiver." *See Ritchie*, 443 S.W.3d at 877. Lisa contended that a receivership was nevertheless appropriate based on the jury's findings that (1) Wes Jr. misused billboard space for his side business ProIce, (2) SignAd GP, LLC misused SignAd, Ltd.'s funds to pay for personal legal fees, and (3) SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. because it failed to maintain internal controls on fringe benefits and sold company vehicles below market value. However, the court pointed out that it was reversing as to the claims in nos. (1) and (3), and the trial court did not base its appointment of a receiver on any of those three causes of action. The trial court appointed a receiver based on only two grounds: (1) "the governing persons of the General Partners and the Limited Partnerships engaged in oppressive conduct," and (2) Lee breached his informal fiduciary duty to Lisa. Because the court reversed as to the finding of oppression, the only remaining basis to support the trial court's appointment of a rehabilitative receiver was the jury's finding that Lee breached his informal fiduciary duty to Lisa, and the court found no authority that such a breach of fiduciary duty authorizes a trial court, without more, to appoint a rehabilitative receiver. Because there are several remedies available for a breach of fiduciary duty, and Lisa already obtained injunctive relief based in part on Lee's breach of fiduciary duty, the court concluded that a receiver was not warranted.

The entity defendants argued that the injunctive relief awarded to Lisa by the trial court was improper for numerous reasons. The trial court granted injunctive relief based on the jury's findings that (1) Wes Jr., Stacey, and Lee breached their fiduciary duties to SignAd GP, LLC by failing to maintain internal controls on employee fringe benefits and selling company vehicles for less than fair market value (reversed by the court of appeals based on Lisa's lack of standing), (2) Wes Jr. breached his fiduciary duty to SignAd, Ltd. based on transactions involving ProIce (reversed by the court of appeals based on Wes's lack of sufficient control over the General Partner to support the existence of a fiduciary duty to the partnership), (3) Wes Jr., Stacey, Mark, and Lee knowingly participated in SignAd GP, LLC's breach of its fiduciary duty to SignAd, Ltd. involving payment of non-business-related legal fees, (4) Lee breached his informal fiduciary duty to Lisa, (5) the Limited Partnerships and two General Partners engaged in oppression (reversed by the court of appeals because the misconduct did not rise to the level of oppression as defined in *Ritchie v. Rupe*), and (6) the General Partners failed to provide Lisa with certain books and records. Having reversed as to nos. (1), (2), and (5) above, the court addressed the defendants' challenge to the trial court's injunctive relief.

The first part of the injunction constrained action by the entity defendants through committees. Section 6(i) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "conducting the business of any of the General Partners and Limited Partnerships through any committee in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Section 6(ii) of the injunction prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without unanimous approval of all partners." Section 6(iii) prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee."

The record reflected that SignAd GP, LLC had two committees: a Special Litigation Committee and an Executive Committee. The court said that it did not find, and Lisa did not identify, any evidence that Wes Jr., Lee, Stacey, and SignAd GP, LLC acted through the Executive Committee in "derogation of the responsibility of their respective Boards of Managers to manage SignAd." However, the evidence demonstrated that Wes Jr., Lee, and Stacey, as members of the SignAd GP, LLC Board of Managers and the Special Litigation Committee, authorized SignAd, Ltd. to pay for their personal legal fees because the Special Litigation Committee had given Wes Jr. the right to authorize such payments. The jury's finding that SignAd GP, LLC, which could only act through its Board of Managers, breached its fiduciary duties to SignAd, Ltd. by causing it to pay non-business-related legal fees demonstrated that Wes Jr., Lee, and Stacey operated SignAd GP, LLC's Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Thus, the court concluded that the trial court could have inferred that Wes Jr., Lee, and Stacey would continue to operate the Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd" and did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(i).

Because the regulations of SignAd GP, LLC, as amended in 2014, allowed a majority of the Board to create a committee to act on behalf of the Board (in contrast to the previous unanimous vote required to create a committee before the amendment), the court stated that it was lawful for SignAd GP, LLC's Board of Managers to act "through any committee without unanimous approval of all partners" under the regulations, and the trial court abused its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(ii).

Unlike Section 6(ii), the court stated that Section 6(iii) did not prohibit lawful conduct. SignAd GP, LLC's Regulations provided that committees "shall be required to keep accurate records of all actions taken by [them]." The court pointed to evidence from which the trial court reasonably could have inferred that Wes Jr., Lee, Stacey, and SignAd GP, LLC had conducted business through a committee in the past "without keeping accurate records of all actions taken by any committee" and would continue to do so in the future unless enjoined. Thus, the trial court did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee," as set forth in Section 6(iii).

Because there was no evidence that the Board of any entity defendant other than SignAd GP, LLC conducted business through a committee or failed to keep accurate records, and no evidence from which the trial court could have inferred that any of the other entity defendants would engage in such conduct in the future, the court concluded that there was no evidence that Lisa would suffer imminent harm if the other entities were not enjoined from engaging in the conduct prohibited by Sections 6(i)–(iii), and the trial court abused its discretion by awarding Lisa injunctive relief as to those entity defendants.

After addressing Sections 6(iv) through (vi) of the injunction, which dealt with books and records, cash reserves, and modifying company documents, the court addressed Section 6(vii) of the injunction, which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "devaluing the General Partners' and Limited Partnership Defendants' assets or interests." The entity defendants argued that the permanent injunction was impermissibly vague because it did not define the term "devaluing," provide a metric by which values should be determined, or otherwise specify the acts that would violate this particular injunction. The court of appeals agreed that the term "devaluing" did not provide enough information to the enjoined parties to allow them to determine what conduct was prohibited. Also, this injunctive relief was based in part on the jury's findings of breaches of fiduciary duties by Wes Jr., Lee, Stacey, and SignAd GP, LLC and the jury's finding of oppression. Because the court was reversing the portion of the judgment in Lisa's favor on two of the causes of action for breach of fiduciary duty and the finding of oppression, the court remanded this portion of the injunction to the trial court to (1) determine whether the requested relief was supported in light of the court of appeals' opinion, and if so, (2) to clarify the specific acts and persons or entities to be enjoined under Section 6(vii).

The court then discussed Section 6(viii), which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using monies or assets from or generated by (or revenues generated by) any of the General Partners or Limited Partnership Defendants to pay personal expenses of or to unjustly enrich Wes, Jr., [Stacey] or Lee, including payment of individual legal fees not related to their agency for SignAd, Ltd. or its related entities." The court concluded that Lisa's pleadings were sufficient to have put the parties on notice that she would be entitled to have such conduct enjoined, and the court pointed out that there was evidence that SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Lee, Mark, and Stacey from which the trial court reasonably could have inferred that the Special Litigation Committee would continue to authorize SignAd, Ltd. to pay personal legal fees for Wes Jr., Lee, Mark, and Stacey given the parties' ongoing disputes. There was thus some evidence of imminent harm with respect to Wes Jr., Lee, Stacey, SignAd GP, LLC, and SignAd, Ltd. Because there was no evidence that other limited partnerships ever used their assets to pay personal expenses of or to unjustly enrich the individual defendants or that any of their General Partners authorized them to do so, the trial abused its discretion by awarding Lisa injunctive relief against parties other than SignAd, Ltd., SignAd GP, LLC, Wes Jr., Lee, and Stacey under Section 6(viii).

Section 6(ix) prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using any personal property, personnel, or inventory of the SignAd entities in connection with separate business endeavors of [Wes, Jr.], [Stacey], and/or [Lee] without full disclosure and only after a unanimous vote by the partners that the transaction is fair to SignAd, Ltd. or any of the other General Partners and/or Limited Partnerships." This injunctive relief was based on the jury's finding that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and the jury's finding of oppression. Because the court was reversing the portion of the judgment awarding judgment in Lisa's favor on that breach-of-fiduciary-duty cause of action and the finding of oppression, there was no finding of liability with respect to a cause of action that would support the injunctive relief in Section 6(ix), and the trial court thus abused its discretion in awarding the injunctive relief under Section 6(ix).

After addressing Section 6(x) of the injunction on distributions, the court discussed Section 6(xi), which enjoined "the General Partners, the Limited Partnerships, the Individual Defendants, and their agents, servants, employees, representatives, and those acting in concert or participation with them" from "paying any attorney's fees or damages of any of the Individual Defendants from income or accounts belonging to any of the General Partners or Limited Partnerships that constitute any part of the SignAd enterprise." The court held that Section 6(xi) was overly broad because it prohibited payment of all attorney's fees and damages for Wes Jr., Lee, and Stacey, even though they were entitled to indemnity under certain circumstances, such as when acting in their official capacities. The court remanded this portion of the injunction with instructions to the trial court to modify the scope of the injunction under Section 6(xi) as to Wes Jr., Lee, Stacey, SignAd, Ltd., and SignAd GP, LLC consistent with the court's opinion. Because there was no evidence that any entity other than SignAd, Ltd., through the SignAd GP, LLC Board of Managers and Special Litigation Committee, ever paid attorney's fees or damages for any of the individual defendants or from which the trial court could have inferred that any of the other entity defendants would engage in that conduct in the future, the trial court abused its discretion by awarding Lisa injunctive relief against all other parties.

VTX Communications, LLC v. AT&T Inc., No. 7:19-cv-00269, 2023 WL 2144154 (S.D. Tex. Feb. 21, 2023).

In lengthy opinion detailing a dispute arising out of three Delaware telecommunications limited partnerships that operated in the South Texas market, the court held that the general partner breached its fiduciary duty of loyalty to the limited partners and breached the partnership agreements in connection with certain self-dealing transactions.

The parent holding company of the general partner was also liable for breach of the duty of loyalty under Delaware law since the limited partners showed that the parent exercised control over the assets of the partnerships.

This dispute arose out of three telecommunications partnerships involving VTX, SWT, and Riviera as limited partners (collectively, the "Limited Partners" or "Plaintiffs") and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility as the general partner (the "General Partner"). AT&T Inc. ("AT&T") is the parent of the General Partner. In the 1980s, the Federal Communications Commission (FCC) issued licenses for mobile cellular service pursuant to a lottery system. The Limited Partners won the lottery for their geographic areas and formed three limited partnerships with what was then Cingular, now AT&T. These limited partnerships were the McAllen-Edinburg-Mission SMSA Limited Partnership (the "McAllen Partnership" or "McAllen"), the Texas RSA 18 Limited Partnership ("RSA 18"), and the Texas RSA 19 Limited Partnership ("RSA 19") (collectively, the "Partnerships"). Plaintiff VTX is a Limited Partner in all three, Plaintiff SWT is a Limited Partner only in RSA 18, and Plaintiff Riviera is a Limited Partner only in RSA 19.

Throughout the lifespan of the partnership agreements of the Partnerships, the precise nature of networks and the services provided by the Partnerships changed with the times, but the Partnerships continued until the present day to incur costs to construct and maintain the equipment to provide the latest iteration of cellular service. Over time, AT&T began to see the Partnerships as dead weight, and going back as far as 2000, AT&T launched a business plan under the name of Project Smoothie or Project LESS that aimed to cut distributions to Limited Partners.

Traditionally, AT&T customers had postpaid service plans, and if they lived within the Partnership service area, they were "homed" there, received a local phone number, and became Partnership customers. The Partnerships made money by having customers. Non-homed cellular users—whether another carrier's customers or AT&T customers from outside a Partnership's service area—were said to be "roaming" on the Partnership network when they used it, and cellular carriers and network owners created various agreements over time to compensate each other when their customers roamed on each other's networks. In 2010, the General Partner adopted (on behalf of the Partnerships) a data cost sharing methodology for allocating costs between AT&T affiliates and the Partnerships. Under that system, the Partnerships would continue receiving a roaming rate for voice roaming on their networks but would be compensated at cost for data roaming.

In 2014, AT&T merged its own prepaid line with Cricket, creating New Cricket. In contrast to the contribution of postpaid customers in Cingular's 2004 acquisition of AT&T, Cricket customers homed in the Partnership area did not become Partnership customers. Instead, AT&T adopted a new methodology to compensate the Partnerships when Cricket customers used Partnership networks. The measure for compensating the Partnerships when Cricket customers used their networks depended upon whether Cricket users were "homed" inside the service areas of the Partnerships (in which case reseller rate based on weighted averaging was used) or were non-homed Cricket customers (in which case a roaming rate was used for voice and cost for data).

The evolution of services in this space required new FCC licenses apart from those initially won by the Limited Partners, and the court discussed in the opinion the extent to which the Partnership Agreements mandated that the Partnerships (as opposed to AT&T) own those licenses. In any event, AT&T retained certain licenses and charged the Partnerships to use those frequencies pursuant to spectrum Service Agreements. In 2015, AT&T backdated the service charges and made a capital call in an attempt to squeeze VTX out of the McAllen Partnership. AT&T eventually backed off the capital call, but the decision created a rift between the parties that set them on a path to litigation.

The Plaintiffs sued the General Partner as well as several affiliates. The court explained the relationship of the Defendants as follows:

> The General Partner as well as Non-Partner Defendants AT&T Mobility Corporation, Cricket Wireless, LLC, and Cricket Communications, LLC, are wholly owned, indirect subsidiaries of the holding company AT&T Inc. But these corporate distinctions play little role in AT&T's employee's day-to-day experience; the key players in this case moved entities frequently. The question of who worked where is further muddied by the fact that "[i]ndividuals who act on behalf of AT&T entities like AT&T Mobility Corporation and New Cingular Wireless PCS, LLC are employed by various affiliated payroll entities, such as AT&T Services, Inc. and AT&T Mobility Services LLC." Even at the highest levels of leadership, AT&T Mobility Corporation had officers

> in common with AT&T Inc., which were selected for their roles and paid by AT&T Management Services Inc., one of the payroll entities. [footnotes omitted]

Claims that survived a motion to dismiss were: (1) breach of fiduciary duties against the General Partner; (2) breach of contract against the General Partner; (3) breach of the duty of loyalty against non-partner Defendants; (4) conversion against non-partner Defendants; and (5) tortious interference against non-partner Defendants. The opinion addressed motions for summary judgment by both sides. The Plaintiffs sought summary judgment on three self-dealing transactions: the data cost sharing methodology, the Cricket arrangement, and the spectrum Services Agreements. Defendants sought summary judgment dismissing all claims on the basis that they were time-barred, that the parties contractually agreed to less-than-fiduciary duties, and that the elements of the various claims were not met.

After analyzing the Defendants' argument that the Plaintiffs claims were time-barred and determining that the Plaintiffs brought the claims timely, the court turned to the merits of the claims.

The court began its discussion of the merits of the claims by reviewing the standards of judicial review that the court would need to employ in addressing whether the Plaintiffs prevailed on their claims against the General Partner. The claims against the General Partner encompassed claims for breach of fiduciary duty and breach of contract and involved the interpretation and application of Delaware law and the provisions of the Partnership Agreements.

The court noted that "majority partners owe traditional fiduciary duties to minority partners under Delaware law," but Delaware law allows those duties to be modified by contract. The duty at issue in this case was the duty of loyalty, specifically whether and to what extent the General Partner was permitted to self-deal. The court explained that the Partnership Agreements differed in how they addressed fiduciary duties:

> In this Court's order on Defendants' motion to dismiss, the Court held that the General Partner owed traditional fiduciary duties to Plaintiffs under the McAllen Partnership Agreement, which does not contain a safe harbor provision for conflicted transactions. As to that Agreement, Defendants now argue that the sheer number of references to the General Partner's authority in the partnership agreements, as well as their regulatory context, evince that the parties intended for the business judgment rule to apply even to conflicted transactions. But the Court has already ruled against this point. The business judgment rule applies to how the controller maximizes the interest of the partnership, not whether they did so (the question in this case).
>
> On the other hand, the RSA 18 and RSA 19 Partnership Agreements—through section 7.5—do "displace fiduciary duties." Neither common law doctrines of business judgment nor entire fairness are wholly applicable once the parties have plainly opted for a contractual standard of review. Therefore, Plaintiffs' claims against the General Partner arising out of those two partnership agreements are appropriately cast as breach of contract claims. [footnotes omitted]

Because the McAllen Partnership Agreement did not displace fiduciary duties, the entire fairness standard applied to the General Partner's self-dealing transactions. The entire fairness standard has two components—fair dealing and fair price—and the fiduciary bears the burden of proof.

The court explained that all three Partnership Agreements included an exculpation provision. The court explained the effect of the exculpation provisions as follows:

> Exculpation provisions are allowed under DRULPA § 17-1101(f) and differ from provisions under subsection (d) in that they limit *liability* as opposed to paring back the *duties themselves*. The McAllen Partnership Agreement says that "the General Partner will not be liable for any loss to the Partnership or the Limited Partners by reason of any act or failure to act unless the General Partner was guilty of willful misconduct or gross negligence."
>
> The Court has already held that "far from eliminating fiduciary duties, Section 16.1's language is consistent with fiduciary duties." In *Feeley v. NHAOCG*, Vice Chancellor Laster considered an LLC's exculpatory provision that was materially similar to those in the Partnership Agreements here. He held that the provision did "not disclaim or eliminate fiduciary duties" but "rather (i) assume[d] that default fiduciary duties exist[ed], (ii) limit[ed] only potential availability

> of monetary remedy, not the potential for injunctive or other equitable relief, and (iii) restore[d] the availability of damages as a remedy for, among other things, gross negligence and willful misconduct."
>
> A few things are clear. First, consistent with *Feeley*, this Court has already held that section 16.1 does not eliminate fiduciary duties. Second, *Feeley* clearly holds that exculpatory provisions limit monetary liability but do not touch equitable remedies such as restitution and injunction. Under Delaware law, a plaintiff alleging a breach of fiduciary duty or diversion of a corporate opportunity may seek disgorgement or imposition of a constructive trust. Even when an exculpatory provision precludes monetary liability, "injunctive relief, a decree of specific performance, rescission, the imposition of a constructive trust, and a myriad of other non-liability-based remedies remain in play." In their complaint, Plaintiffs request the relevant equitable relief including accounting for profits, disgorgement, and injunctive relief. These are mutually exclusive alternatives to damages-based recovery in which Plaintiffs do not seek recovery for harm from the breach of fiduciary duty or expectation on the contract; they seek the Defendants' net profits from their wrongdoing. Delaware courts use profit-based remedies when the counterfactual—what would Plaintiffs have without Defendants' misconduct?—is so speculative that it cannot provide an adequate remedy. The Court HOLDS that on any claims where Plaintiffs elect equitable remedies in the alternative to damages or losses, section 16.1 does not limit that recovery. [footnotes omitted]

The court then addressed the operation of the exculpation clause in the McAllen Partnership Agreement if the Plaintiffs elected damages. Although the court said that Delaware case law has not directly addressed who bears the burden of proof as to whether a party is exculpated or not, the court relied on Delaware law in the corporate context to conclude that the burden is on the fiduciary unless the exculpation clause shifts the burden. Here, the court found no burden shifting provision in the McAllen Partnership Agreement. Thus, the court said that if the court found a breach of fiduciary duty under entire fairness, the General Partner would have the opportunity to prove that it was exculpated from monetary liability, i.e., that its conduct was not "gross negligence or willful misconduct." Because the Plaintiffs challenged intentional decisions involving self-dealing, the court said that willful misconduct rather than gross negligence would be the issue. The court discussed the concepts of bad faith and good faith as they relate to willful misconduct and concluded that "[t]he exculpation that Defendants seek is available where they can prove that they did not intentionally act with a purpose other than advancing the best interest of the McAllen Partnership."

In sum, as to the Plaintiffs' claims against the General Partner pursuant to the McAllen Partnership Agreement, the court would evaluate the General Partner's conduct under entire fairness review. If Plaintiffs then based their theory of recovery in equity (i.e., injunctive relief and disgorgement of net profits), then the exculpation provision would not apply and entire fairness would be the end of the matter. If, however, the Plaintiffs based their theory of recovery in monetary damages, then AT&T would have the opportunity to prove that it is exculpated from damages for non-willful misconduct.

The court next turned to the standards that would apply to the alleged breaches of duty of loyalty under the RSA 18 and RSA 19 Partnership Agreements. The court explained that the RSA Partnership Agreements were similar to the McAllen Partnership Agreement in providing for an overarching duty of loyalty by requiring the General Partner to act in the best interest of the Partnerships, but the RSA Partnership Agreements differed by providing a safe harbor for conflicted transactions if "such transactions are comparable to, or not substantially less favorable than, similar arms'-length transactions between the General Partner or its Affiliates and unrelated third parties" and the transactions are not entered into with "gross negligence or willful misconduct." The court distinguished a safe harbor provision from an exculpatory provisions as follows: "Unlike an exculpatory provision, a safe harbor provision does modify the underlying duties, not just liability on theories of monetary relief." Before the court could apply the safe harbor provision, the court needed to determine whether it was applicable to the transactions at issue.

After dissecting the language of section 7.5 (the safe harbor provision) and addressing the use and placement of various words in the provision, the court concluded that:

> section 7.5 of the RSA 18 and RSA 19 Partnership Agreements applies only to AT&T's data cost sharing process and spectrum Service Agreement. The duty of loyalty established in section 8.1 applies to the Cricket arrangement and allocation of other revenue streams, which are effectively diversions of partnership opportunities. Furthermore, section 7.5's "willful misconduct and gross negligence" standard applies only once the Court determines that the terms were at arm's length.

Next the court discussed the process of judicial review under section 7.5 and ultimately determined that, where section 7.5 is applicable, the Plaintiffs bore the burden of proving either that the conflicted transaction's terms were not at arm's length or that it was entered into with gross negligence or willful misconduct. If the Plaintiffs did not establish either of these, then the conflicted transaction was within the General Partner's contractual rights. If the Plaintiffs succeed, then the court would proceed to apply an entire fairness review under section 8.1, the provision generally recognizing a duty on the part of the General Partner to act in the best interest of the Partnership.

Finally, the court explained that application of the exculpation provision in the context of the RSA Partnerships was the same as application of the exculpation provision to the McAllen Partnership, including inapplicability to equitable relief, except that the RSA Agreements required the court to determine by "clear and convincing evidence" that the General Partner was guilty of willful misconduct or gross negligence.

After providing its lengthy explanation of the judicial review to be applied to the claims for breach of fiduciary duty and breach of contract against the General Partner, the court applied the standards described above to the three self-dealing transactions at issue. The court discussed the evidence relating to the data cost sharing methodology, Cricket arrangement, and spectrum Services Agreement in detail and concluded that each breached the applicable fiduciary or contractual standard and amounted to non-exculpable conduct.

After discussing the summary judgment evidence relating to the data cost sharing methodology in detail, the court concluded by stating:

> AT&T has an obligation to each Partnership individually, not an obligation to a Frankenstein's monster of all its nationwide partnerships collectively. Each Partnership here has its own Agreement with AT&T in which AT&T promises to do what is in that Partnership's best interest. But the summary judgment evidence shows that AT&T did not take an individualized approach to setting data compensation rates: there is no per-partnership market analysis, no negotiation with limited partners, no partnership meetings to discuss possibilities. All that AT&T has to stand on is EY's conclusions from an audit of one partnership. [footnote omitted]
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> The resulting one-size-fits-none approach is willful misconduct under Delaware law. The adoption of data cost sharing was inconsistent with the General Partner's obligation to do what is in the best interest of Partnerships that are net data providers, and AT&T knew that some partnerships would be net providers. Perhaps a partnership like McAllen would have been comfortable with a low or cost rate anticipating that its balance of traffic might be negative or neutral. But a partnership like RSA 18 or 19 would never have agreed to that because they knew they would be net providers of data services for roaming AT&T subscribers. There is clear and convincing evidence that AT&T's decision to mulch all these interests together was intentional, and exculpation under section 16.1 is DENIED.

In a lengthy discussion of the summary judgment evidence regarding the Cricket arrangement, which did not fall within the safe harbor provisions of the RSA agreements and was thus subject to entire fairness review in all three Partnerships, the court concluded that the arrangement satisfied neither the fair price nor the fair dealing prong of entire fairness. Based on the fact that the arrangement was not fairly priced and the failure to consider factors relevant to the General Partner's obligations to Plaintiffs, the court held that the General Partner breached its fiduciary duty in the context of all three Partnerships. The court also held that the General Partner breached a provision of the Partnership Agreements requiring the arrangement to be included in the Partnership records. The court also found the General Partner engaged in willful misconduct such that its liability was not exculpated under the exculpation clause. In explaining how the evidence showed willful misconduct, the court said, "When dissenting AT&T employees question the propriety of the arrangement, it responds—and the Court quotes an entire email—'hush'."

As to the spectrum Services Agreements, the court again reviewed the summary judgment evidence in detail and concluded that the General Partner's treatment of spectrum licenses breached its fiduciary duty under the common law and contractual standards applicable in the context of each partnership. The court summed up its discussion of this transaction as follows:

> Use of the spectrum Services Agreements as a smoke screen for an attempted squeeze out is not fair dealing. In fact, Plaintiffs have met their burden to prove AT&T's willful misconduct. The very licenses that AT&T should have allocated to the Partnerships under the default application of their contract were retained and used to generate a surprise capital call to pry control of the Partnerships out of Plaintiffs' hands. Therefore, the Court need not even consider whether AT&T's decision to charge its fees based on fair value instead of book value met the fair price prong, other than to say that it is not within the terms of the waiver provided by VTX.
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> Therefore, the Court GRANTS Plaintiffs' motion for summary judgment and finds that, as to the McAllen Partnership Agreement, the General Partner's treatment of spectrum licenses BREACHED ITS FIDUCIARY DUTY, and as to the RSA 18 and RSA 19 Partnership Agreements, the General Partner BREACHED SECTION 7.5 by willfully using undisclosed charges booked under the spectrum Service Agreements to divert distributions and attempt a squeeze out in 2014. The Court finds clear and convincing evidence of the General Partner's willful misconduct such that exculpation is unavailable under either the McAllen Partnership or RSA 18 and 19. [footnotes omitted]

The court next addressed the Plaintiffs' claims against non-partner Defendants AT&T Inc., AT&T Mobility Corporation, and Cricket.

In connection with the Plaintiffs' claims against the non-partner Defendants for breach of fiduciary duty the court explained:

> It is well established law in Delaware that affiliates "who ultimately control a corporate general partner owe fiduciary duties to the limited partnership." That is, they owe a "duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The word "property" is key. "[T]o have any fiduciary duties to an entity, the affiliate must exert control over the assets of that entity." [footnotes omitted]

The Defendants argued that the corporate shield protected the parent holding company, AT&T Inc., from liability and also argued that the record contained no evidence that AT&T exercised any control over the challenged actions. The court, however, pointed to evidence of a lack of separateness between AT&T entities as well as the exercise of control over the property of the Partnerships so as to make AT&T a fiduciary under *In re USACafes, L.P. Litig*., 600 A.2d 43 (Del. Ch. 1991). The court concluded that the record indicated that AT&T Inc. exercised control over Partnership assets such that it owed a duty of loyalty to the Limited Partners in exercising that control. Likewise, the court concluded that AT&T Mobility Corp. owed a duty of loyalty to the Limited Partners based on its control over the General Partner and thus Partnership assets. Thus, the court denied the motions for summary judgment of AT&T Inc. and AT&T Mobility Corp. As for Cricket, the court stated that the evidence did not show that it exercised control over Partnership assets. According to the court, "having a seat at the table is not the standard under *USACafes*." Thus the court granted summary judgment dismissing the fiduciary claims against Cricket.

The court applied the elements of a claim for conversion under Delaware law and concluded that Cricket as well as the other non-partner defendants could be liable for conversion of the Plaintiffs' property rights and interests. The court stated:

> A defendant need not be a fiduciary to be a converter. There is an independent duty not to convert property, and Plaintiffs have raised a genuine dispute about conversion as to each Non-Partner Defendant. For example, the Court has already held that the retention of Cricket customers homed in the Partnership service areas was improper. Under fiduciary or contractual duties owed by the General Partner, the Limited Partners had property interests and possessory

> rights to those customer accounts. But Cricket wrongfully possessed those accounts and booked them as its own assets. Similarly, AT&T Inc. wrongfully possessed, through its subsidiaries, spectrum licenses that the Partnerships had property interests in and possessory rights over. More abstractly (but still tortiously), all Non-Partner Defendants have treated the Partnerships' networks—over which the Partnerships certainly had property interest and possessory rights—as their own by compensating only costs for their non-homed subscribers' data roaming. Therefore, Defendants' motion for summary judgment as to Plaintiffs' conversion claims is DENIED. [footnotes omitted]

Finally, the court applied the elements of tortious interference under Delaware law and concluded that AT&T Inc. and AT&T Mobility Corp. could be liable on a theory for tortious interference, but not Cricket. The court explained that

> affiliates regularly confer with each other regarding their contractual obligations, and Delaware law bestows a privilege on good faith recommendations that a contract be terminated. Thus, "where Corporations affiliated through joint ownership confer with respect to a contract to which one of them is party and a breach of that contract follows, there can be no non-contractual liability to the affiliated Corporation, which is privileged to consult and counsel with its affiliates, unless the plaintiff pleads and proves that the affiliate sought not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff." [footnotes omitted]

Thus, the non-partner Defendants were privileged to make good faith recommendations to the General Partner about termination, modification, or breach of the Partnership Agreements.

The court then discussed the concept of bad faith in this context and concluded that AT&T Inc. and AT&T Mobility Corp. could be liable on a theory for tortious interference, but not Cricket. While AT&T Inc. and the General Partner's manager were very aware of the terms of the Partnership Agreements, and AT&T's general counsel reviewed to reach the erroneous conclusion that they allowed implementation of the data cost sharing methodology, there was no evidence that Cricket had access to the Partnership Agreements or any reason to know of their content. The court said there was also a dearth of evidence that Cricket, as opposed to AT&T Inc. and AT&T Mobility Corp., had any nefarious interest in diverting prepaid customers and data network revenue. In the court's view, "Cricket's interests in getting the best deals for itself [were] 'legitimate profit seeking.'"

Sohani v. Sunesara, No. 01-20-00114-CV, 2023 WL 1112165 (Tex. App.—Houston [1st Dist.] Jan. 31, 2023, pet. filed) (mem. op.) ("It is well established that the relationship between partners is fiduciary in character. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).).

In re Alta Mesa Resources, Inc., Case No. 19-35133, 2022 WL 7750353 (Bankr. S.D. Tex. Oct. 13, 2022). The court dismissed claims for breach of fiduciary duty against certain defendants in a multi-tiered limited partnership dispute after concluding that they did not owe fiduciary duties to the limited partnership. The court determined that other defendants, however, did owe such duties, and it refused to dismiss claims for breach of fiduciary duty against them.

Alta Mesa, a Texas limited partnership, had a multi-tiered ownership structure: "At the top was AMR, a Delaware corporation, which owned and controlled SRII OpCo GP, LLC. SRII OpCo GP, LLC was the general partner of SRII OpCo, LP. SRII OpCo, LP held Alta Mesa's limited partnership interests while Alta Mesa GP, a Delaware limited liability company, was Alta Mesa's general partner." David Dunn, the Trustee of the Alta Mesa Holdings Litigation Trust, sued former directors and officers of AMR, Alta Mesa GP, and Alta Mesa. There were three defendant categories: (1) the AMR board of directors (Chapelle, Ellis, Hackett, Dimitrievich, Lapeyre, and Leuschen); (2) the Alta Mesa GP officers (Chapelle, Ellis, and Hackett); and (3) the Alta Mesa officers (Chapelle, Ellis, and Turner). Dunn alleged that the defendants breached their fiduciary duties to Alta Mesa by approving and continuing to operate a drilling program despite early indications of lower-than-predicted production levels. The defendants filed a motion to dismiss arguing that they did not owe fiduciary duties to Alta Mesa, and even if they did, the duties were not breached.

The court began by stating that "[t]o prevail on a claim for breach of fiduciary duty, a plaintiff must prove: (i) a fiduciary relationship between plaintiff and defendant; (ii) the defendant breached that duty; and (iii) the breach resulted in injury." It then rejected the argument that the AMR directors owed fiduciary duties to Alta Mesa. The court highlighted that the Alta Mesa limited partnership agreement stated that the general partner of Alta Mesa owed fiduciary duties to Alta Mesa, but "[n]owhere does the Agreement state that directors or officers of AMR owe fiduciary duties to Alta Mesa." Similarly, "the Texas Business Organizations Code does not impose such a duty on the directors of a parent corporation." The court then discussed that corporate law did not change this result:

> Although Alta Mesa is a Texas limited partnership, AMR is a Delaware corporation. Under the internal affairs doctrine, AMR's matters of corporate governance, such as fiduciary duties, are governed by Delaware corporate law. The parties' arguments on corporate law's treatment of fiduciary duties debate whether they run to subsidiaries. Under Delaware law, the directors and officers of a corporation act as fiduciaries to the corporation they serve. A parent company owes no fiduciary duties to its wholly owned subsidiary, and the "'directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent.'" *U.S. Bank Nat. Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 437 (5th Cir. 2014), as revised (Sept. 2, 2014) (applying Delaware law) (quoting *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988)). In arguing against the application of this rule to the defendants, Dunn argues that Alta Mesa is not "wholly owned" by AMR. Dunn misconstrues the law on this issue in two respects.
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> First, Dunn misinterprets the caveat that directors of a wholly owned subsidiary do not owe fiduciary duties to the subsidiary. The complaint does not allege that the defendants are directors of the subsidiary (Alta Mesa), but rather that they are directors of the parent (AMR). Dunn cannot use its inverse—that the director of a subsidiary would owe fiduciary duties to a subsidiary if it is not wholly owned—to argue that the AMR directors owed fiduciary duties in this case. Second, Dunn takes the general rule—a parent owes no fiduciary duty to its wholly owned subsidiary—and uses it to suggest that because Alta Mesa is not a wholly owned subsidiary, its parent must be a fiduciary of the subsidiary. But that still does not explain how the directors of the parent are fiduciaries of the subsidiary.
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> Simply put, directors of a parent corporation do not owe fiduciary duties running to subsidiaries solely because they are directors. Multiple levels of entities separate AMR from Alta Mesa. . . .
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> Often, the distinction between being an officer of the parent and an officer of the child would not have an economic effect. If the parent entity breaches a duty to the child, the parent entity (in this case AMR) might be liable to the child (Alta Mesa). If AMR's directors and officers allowed that breach to occur (creating AMR liability for the breach), then AMR's officers and directors could possibly be sued by (i) AMR; or (ii) an unsatisfied judgment creditor acting derivatively. The problem in this case is that AMR was released from all liability by Alta Mesa. Dunn is attempting to sue AMR's officers and directors directly because no derivative suit exists as a result of the release. Dunn has not successfully navigated such a difficult journey around the AMR release.

The court then discussed whether the Alta Mesa GP officers owed a fiduciary duty to Alta Mesa. The court distinguished the Fifth Circuit's *McBeth v. Carpenter* decision in concluding that they did not:

> Chappelle, Ellis, and Hackett each served as a manager or officer of Alta Mesa GP at the time of the alleged breach. As with the AMR directors, nowhere does the [limited partnership] Agreement state that the officers of the general partner owe a fiduciary duty to Alta Mesa, nor does the law impose such a duty. Dunn argues that if the defendants did not owe fiduciary duties to Alta Mesa, then no one did. This is not the case. The directors and officers of Alta Mesa owed Alta Mesa fiduciary duties. Likewise, Alta Mesa GP owed fiduciary duties to Alta Mesa as general partner of Alta Mesa. However, Dunn did not assert a claim against Alta Mesa GP. Instead, Dunn argues that the defendants themselves owed fiduciary duties running directly to a subsidiary.

> Dunn argues that "the several levels of general partners that existed between Alta Mesa and AMR do not insulate Defendants from liability to Alta Mesa." In *McBeth v. Carpenter*, the Fifth Circuit found that "under Texas law, the usual general partner fiduciary duties apply in this two-tiered structure where [defendant] was acting as the general partner of a general partner." 565 F.3d 171, 178 (5th Cir. 2009). This case is distinguishable. *McBeth* involves an individual general partner of a general partner of the partnership to which the Fifth Circuit found the individual owed a fiduciary duty. *Id.* Here, while there are "tiers" in the organizational structure, the defendants are not themselves general partners of any entity within that structure. They were (i) officers of the LLC that is Alta Mesa's general partner and (ii) directors of AMR. Neither of those relationships is analogous to *McBeth*. General partners in general partnerships do not enjoy the same limited liability as officers and directors of LLCs and corporations. *Compare* Del. Code Ann. tit. 8, § 325 (2021) (limiting the liability of corporate directors and officers), *and* Del. Code Ann. tit. 6, § 18-303 (2021) (limiting the liability of members of an LLC), *with* Tex. Bus. Orgs. Code Ann. § 152.304 (2021) (providing that general "partners are jointly and severally liable for all obligations of the partnership").
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> To make a plausible claim against the officers of Alta Mesa GP, Dunn would have to first argue that Alta Mesa GP breached its fiduciary duties to Alta Mesa. *See Grierson v. Parker Energy Partners* 1984-I, 737 S.W.2d 375, 378 (Tex. App.—Houston [14th Dist.] 1987, no writ) (reasoning that holding a corporate officer directly liable to a subsidiary without piercing the veil requires knowing participation in the corporation's breach of its fiduciary duty to the subsidiary of which the corporation is a general partner). Dunn "only seeks to hold defendants liable for breaching the duties they personally owed to Alta Mesa." This is perhaps because both AMR and Alta Mesa GP received a release from liability under the plan.
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> To the extent Dunn attempts to argue that the defendants owed fiduciary duties to Alta Mesa through their roles as either directors of AMR or officers of Alta Mesa GP, Dunn fails to state a claim for relief. As Dimitrievich, Lapeyre, Hackett, and Leuschen only served in those capacities, the Court grants the motion to dismiss those four defendants.

The court then addressed the Alta Mesa officers and whether they owed fiduciary duties to Alta Mesa. The court observed that neither the Texas Business Organizations Code nor the limited partnership agreement expressly imposed fiduciary duties on the officers of a limited partnership. Nevertheless, the court noted that Texas common law supported a theory of control as a basis for fiduciary duties, and it concluded that Dunn had sufficiently alleged such control:

> The Fifth Circuit found in *Harwood* that
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> > [A]n officer of a corporate general partner who is entrusted with the management of the limited partnership and who exercises control over the limited partnership . . . owes a fiduciary duty to the partnership . . . . We emphasize that it is not only the control that the officer actually exerts over the partnership, but also the confidence and trust placed in the hands of the controlling officer. . . .
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> *FNFS, LTD. v. Harwood (In re Harwood)*, 637 F.3d 615, 622 (5th Cir. 2011). . . .
>
> The Fifth Circuit based its analysis on facts which tended to show the defendant exercised control over a limited partnership. *Id.* at 623. The defendant was given management authority, he had sole authority over the partnership's daily operations, the board did nothing to limit the defendant's power over the partnership, the defendant exercised control over the funds of the partnership, and he held himself out as the president of the partnership—which the court found compelling even though he was not actually the president. *Id.*
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> Dunn pleads numerous factual allegations that demonstrate the high degree of control that Chappelle, Ellis, and Turner exercised over the operations of Alta Mesa. Dunn alleges that they were involved in the decision-making process at every stage of the drilling program from the testing that began before the merger to the decision to install ESPs [electrical submersible pumps] when production fell below projected levels. They were charged with presenting information on the program to the board of AMR and to investors. There is no indication that the board did

> anything to interfere with the officers' control until almost a year after they approved the drilling program. Unlike the defendant in *Harwood*, the defendants did far more than "hold themselves out" as officers of Alta Mesa. They actually were officers of Alta Mesa, and exercised power in that capacity.
>
> The totality of the circumstances, if proven, would support a finding of a fiduciary relationship. To clarify, the Court does not base its analysis on the directors' positions or purported positions as officers of Alta Mesa GP. That fact is merely another marker of the control the defendants exercised over Alta Mesa in their capacity as officers of Alta Mesa directly. Dunn's complaint sufficiently alleges facts to support the claim that Chappelle, Ellis, and Turner owed fiduciary duties, looking to the totality of the nature of their relationship to Alta Mesa.

Having concluded that Dunn sufficiently alleged that the Alta Mesa officers owed a fiduciary duty to Alta Mesa, the court then considered the officers' argument that they did not breach any duties because Dunn's allegations failed to overcome the business judgment rule:

> . . . . The two primary fiduciary duties in Texas are the duty of care and the duty of loyalty. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984). In Texas, the business judgment rule is treated as a "rule of substantive law that requires a plaintiff . . . to plead and prove (1) that the conduct . . . was outside the exercise of judgment and discretion the rule is meant to protect, or (2) that the directors had a personal interest in the transactions complained of." *Resol. Tr. Corp. v. Norris*, 830 F. Supp. 351, 356 (S.D. Tex. 1993). Therefore, Dunn must plead around the business judgment rule in alleging the officers breached either their duty of care or their duty of loyalty to survive dismissal.
>
> Few Texas courts have analyzed what a plaintiff must allege at the pleading stage to rebut the business judgment rule outside of the shareholder derivative suit context and where there are no allegations that the directors acted in self-interest (e.g., were on both sides of a transaction). There is some debate as to whether, in this context, an allegation of gross negligence is enough to overcome the business judgment rule. *See, e.g.*, *Resol. Tr. Corp.*, 830 F. Supp. at 358 ("The court has not found any Texas or Fifth Circuit cases directly addressing whether the Texas business judgment rule precludes a cause of action for gross negligence.").

With respect to the duty of care, the court concluded that Dunn's pleading did not defeat the presumption of the business judgment rule:

> To abide by the duty of care, directors generally must "inform themselves, before making a business decision, of all material information reasonably available to them." *Katchadurian v. NGP Energy Cap. Mgmt., LLC* (*In re Northstar Offshore Group, LLC*), 616 B.R. 695, 741 (citing *TVI Corp. v. Gallagher*, No. 7798-VCP, 2013 WL 5809271, at *13 (Del. Ch. Oct. 28, 2013)).
>
> In *Northstar*, this Court held that the trustee had not sufficiently plead around the business judgment rule because
>
> > [The Trustee's] allegations [were] focused on the outcome of the directors' decisions, rather than on the process of the directors' decisions. To properly allege a breach of the duty of care, such that it would rebut the business judgment rule presumption, the Complaint must allege facts, that, taken as true, demonstrate egregiousness in the process, not the outcome. The outcome of a decision is exactly what the business judgment rule is designed to protect.
>
> *Id.* at 742. A poor decision that leads to a bad outcome is not a breach; failing to properly gather and analyze information while making that decision is a breach. In *Northstar*, this Court reasoned that the core of the trustee's allegations was that the directors were not misinformed or underinformed, but rather that their decisions were motivated by self-interest and bad faith. *Id.* The Court noted that this raised the issue of the duty of loyalty, not the duty of care. *Id.*
>
> The Complaint indicates that Chappelle, Ellis, and Turner went to great effort to inform themselves and had intricate knowledge of how the wells were performing. They did not breach

> their duty of care simply because their decisions turned out poorly. Alternatively, Dunn alleges that having gathered and analyzed all the information necessary to make an informed business decision, Chappelle, Ellis, and Turner failed to disclose that information to the AMR directors and investors and even actively withheld and hid that information from the AMR directors. Like *Northstar*, Dunn raises the issue of the duty of loyalty rather than the duty of care.

With respect to the duty of loyalty, however, the court concluded that Dunn's pleading sufficiently rebutted the business judgment rule:

> "The duty of loyalty dictates that a director must act in good faith and must not allow his personal interests to prevail over the interests of the corporation." *Gearhart*, 741 F.2d at 719. The business judgment rule does not apply to self-dealing transactions. *Northstar*, 616 B.R. at 739. Because the duty of loyalty is most commonly called into question in instances involving self-dealing, the business judgment rule does not typically apply to the duty of loyalty. Here, there are no allegations that the officers were self-interested, and there is little case law addressing what constitutes "good faith" in this context. The duty of loyalty in Texas includes duties of candor and disclosure. Deciding whether to share specific information is itself a business decision. Because disclosure is a business decision, to the extent the allegations of breach of the duty to disclose do not allege self-dealing, the business judgement rule applies. A complaint successfully pleads around the business judgment rule where the facts support an inference that the officers acted dishonestly or deceptively in the withholding of information.
>
> The issue is whether having properly and thoroughly informed themselves, Chappelle, Ellis, and Turner breached their duty of loyalty. Dunn does not suggest that Chappelle, Ellis, and Turner engaged in self-dealing transactions with respect to the implementation and execution of the drilling program. If they breached the duty of loyalty, Dunn must allege facts supporting a breach of the duties of candor and disclosure.
>
> Dunn alleges not only that Chappelle, Ellis, and Turner withheld information from the board, but further suggests they intentionally manipulated data presented to the AMR board and to investors to obscure the fact that the drilling program's performance fell below projections. Specifically, the complaint alleges that Chappelle and Turner decided to present "cleaned up" data. They cut off a graph comparing well production to type curves right before the point where the graph showed actual production falling below the type curves. They also recalculated average production from the wells by removing the poorest performing wells from that calculation. Additionally, the complaint alleges that Ellis knew the patterns were underperforming and did not inform the board, and he participated in presentations of manipulated data to the investors and the board knowing the data had been similarly "cleaned up." These factual allegations involve dishonesty and deception and call into question whether the officers acted in good faith or, as the trustee alleges, in an effort to save their jobs. Motive will be a matter for trial. But, the complaint sufficiently overcomes the business judgment rule's presumption to plausibly plead a breach of the duty of loyalty with respect to defendants Chappelle, Ellis, and Turner.

LMP Austin English Aire, LLC through Lafayette English Partner, LLC v. Lafayette English Apartments, LP, 654 S.W.3d 265 (Tex. App.—Austin 2022, no pet. h.).

The court concluded that the Texas Citizens Participation Act ("TCPA") applied to a claim for knowing participation in a breach of fiduciary duty and required the claim's dismissal.

In 2006, Lafayette English Apartments, LP financed its purchase of two apartment complexes ("the Properties") with a $17,300,000 loan from RAIT Partnership, LP (the "Lender") that was secured by the Properties. Appellants owned interests in business entities that bought the Properties. In 2009, contending that the Properties were underperforming, the Lender took control of the Properties and the entities that owned the Properties were reorganized. The Properties were sold in 2015, and in 2018, Appellants filed suit challenging the sale.

In their suit, Appellants asserted derivative claims against various parties, including (1) the reorganized entities that owned the Properties (Lafayette English GP, LLC and Scott Schaeffer), and (2) the parties who purchased the Properties in 2015 from the lender-controlled owners ("First Buyers"). Appellants pleaded various claims, including "knowing participation/aiding and abetting breach of fiduciary duty."

Appellees responded with several motions, including a motion to dismiss under the TCPA. After hearing the motions, the trial court signed a series of interlocutory orders, including an order granting a partial motion to dismiss under the TCPA as to Appellants' claim for "knowing participation/aiding and abetting breach of fiduciary duty." Appellants challenged this order on appeal.

The court engaged in a lengthy analysis of the TCPA and concluded that it applied to Appellants' claim of "knowing participation/aiding and abetting breach of fiduciary duty" based on the implication of First Buyers' right of association. Because First Buyers demonstrated that the TCPA applied, the court then considered whether Appellants presented clear and specific evidence establishing a prima facie case for each essential element of their knowing participation claim:

> Under the second step of the TCPA process, Appellants had the burden to establish by clear and specific evidence a prima facie case for each element of their claim against First Buyers. At the outset, we note that Appellants pleaded their claim as "knowing participation/aiding and abetting breach of fiduciary duty." We have previously concluded that there is no common-law claim for "aiding and abetting" in Texas.
>
> However, the Texas Supreme Court has recognized a claim for knowing participation in a breach of fiduciary duty: "It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942). Establishing a claim of knowing participation in a breach of fiduciary duty requires showing that: (1) there was a fiduciary duty owed by a third party to the plaintiff; (2) the defendant knew of the fiduciary relationship; and (3) the defendant was aware of his participation in the third party's breach of its duty. . . .

The court concluded that Appellants failed to present clear and convincing evidence of these elements. The court rejected an argument that First Buyers' knowledge of the fiduciary duties owed may be inferred from Howard Treatman's (a manager of First Buyers) request for and receipt of a CD in 2015 containing copies of the loan and acquisition documents concerning the conveyance of the Properties. According to the court, Treatman confirmed in his deposition that: (1) he did not review the CD or read the organizational documents when they were sent; (2) he never had discussions with Schaeffer (an officer of the Lender) about the necessity of an Independent Manager to authorize any sale of the original partnership's assets; and (3) if there were such a requirement, he was unaware of it. Thus, the court observed that "we cannot conclude that Appellants presented any clear and specific evidence to support a rational inference that First Buyers had actual knowledge of a fiduciary relationship among Schaeffer, General Partner, and Appellants." The court similarly rejected Appellants' contention that knowledge of a fiduciary relationship could be imputed to First Buyers based on the knowledge of their attorneys: "[W]e have stated that '[a] cause of action premised on contribution to a breach of a fiduciary duty . . . must involve the knowing participation in such a breach.' Accordingly, 'imputed knowledge is insufficient to find knowing participation in a breach of fiduciary duty.'" As a result of these conclusions, the court upheld the dismissal of the knowing participation claim: "In sum, because First Buyers met their burden of showing that Appellants' claim of knowing participation in a breach of fiduciary duty had the requisite connection to the exercise of the right of association and because Appellants failed to meet their burden of establishing by clear and specific evidence a prima facie case for each element of their knowing participation claim, the TCPA required dismissal of it."

Mehta v. Ahmed, No. 01-20-00568-CV, 2022 WL 3720181 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, no pet. h.) (mem. op.) ("The Texas Supreme Court has recognized that in certain formal relationships, including partnerships, a fiduciary duty arises as a matter of law. As the supreme court has explained, the relationship between partners 'is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.' *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951).").

Stress Engineering Services, Inc. v. Olson, Civ. A. No. CV H-21-3210, 2022 WL 4086574 (S.D. Tex. Aug. 4, 2022), report and recommendation adopted, No. CV H-21-3210, 2022 WL 4084433 (S.D. Tex. Sept. 6, 2022) ("Texas law recognizes two types of fiduciary relationship: formal and informal. The formal fiduciary relationship arises as a matter of law in agency, partnership, and joint venture.").

Young v. Ershick, 617 F. Supp. 3d 563 (E.D. Tex. 2022) ("A fiduciary duty arises 'as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.'").

E. Partnership Property and Partnership Interest

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, No. 08-00225-CV, 2023 WL 3672025 (Tex. App.—El Paso May 25, 2023, no pet. h.) (mem. op.).

In this companion appeal to the case summarized below, the court discussed principles of partnership property and the charging order remedy and concluded that "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt."

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. This appeal by Rio Grande LP challenged the trial court's dismissal of its lawsuit against La Zona. Like the other appeal, which directly addressed the authority of the receiver appointed in the litigation between the judgement debtor and judgment creditor, the court was essentially called upon to analyze the receiver's authority to seize assets of the limited partnership that was allegedly affiliated with the judgment debtor. The court stated:

> As we explained in that case, even if Rio Grande, LP's general partner was affiliated with WCCG, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 563 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing that a "judgment creditor may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted).
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> Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the individual partner has received or is owed and must do so through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of judgment debtor's partnership interest) (*citing Stanley*, 314 S.W.3d at 664).
>
> We recognized in our opinion that certain limited exceptions to this rule allow a court to issue a turnover order of a partnership's assets, i.e., when the debtor is the only member of the

partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disruption to the partnership's business and to protect the other partners' interests. *See Heckert v. Heckert*, No. 02-16-00213-CV, 2017 WL 5184840, at *7-9 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.) (upholding turnover order directing ex-husband to turn over to ex-wife assets he placed in a non-operating LLC and partnership in which he was the sole member and partner, as there would be no disruption to the operating business or detriment to other individuals) (citing Michael C. Riddle, et al., *Choice of Business Entity in Texas*, 4 Hous. Bus. & Tax L.J. 292, 318 (2004)) ("[T]he charging order developed as a way to prevent the creditor of one partner from holding up the business of the entire partnership and causing injustice to the other partners."). But we noted that the record in the first case reflected that Rio Grande, LP was a partnership with at least two other partners possessing a substantial interest in the partnership. And we concluded that absent evidence the other partners were themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of Rio Grande, LP's cause of action and its property as part of its collection efforts to satisfy WCCG's debt. We therefore reversed the trial court's judgment in that case and remanded the matter to the trial court for further proceedings to reconsider whether [the receiver] had the authority to appear and act on behalf of Rio Grande, LP as he did.

The court concluded that the record in this case was deficient in the same manner as the other appeal. Although the receiver supplied additional evidence linking Rio Grande LP's general partner to WCCG, the record did not support the finding that the two limited partners had any relationship to WCCG. Because "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt," the court reversed and remanded the dismissal of the case for the trial court to further consider the receiver's authority in light of the court's analysis.

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, __ S.W.3d __, 2023 WL 3663550 (Tex. App.—El Paso May 25, 2023, no pet. h.).

The court of appeals held that the record did not support the trial court's finding that a receiver appointed to collect a judgment against a party in another case had authority to act for a limited partnership in this case. Although the receiver argued that the limited partnership in this case was a subsidiary of the judgment debtor, the court stated that the record did not establish that the receiver had authority to directly reach the assets of the limited partnership, and the record did not support the receiver's asserted right to manage the limited partnership or its LLC general partner given the exclusivity of the charging order remedy.

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. In this appeal, Rio Grande LP essentially argued that the receiver lacked the authority to appear in the suit and act on Rio Grande LP's behalf.

After addressing procedural issues and concluding that a prior appellate opinion by another court affirming that the receiver was properly appointed in the case between Princeton and WCCG did not preclude the court in this case from reviewing the validity of the receivership order provisions (at least insofar as the order applied to the receiver's actions in the case affecting Rio Grande LP's interests), the court analyzed whether the record supported the trial court's finding that the receiver was authorized to settle Rio Grande LP's lawsuit with La Zona. The court first noted that the receiver entered his appearance in this case by providing a "notice" stating he was WCCG's receiver and that Rio Grande, LP was a WCCG "subsidiary." The receiver asserted he was appearing as counsel of record for WCCG and its "subsidiary" Rio Grande LP, replacing Rio Grande LP's prior counsel. The receiver did not provide any documentation showing that Rio Grande, LP was a "subsidiary" of WCCG or that the receiver had any authority to seize any assets belonging to the partnership. Rio Grande, LP supplied the limited record available to the court in this case.

La Zona argued that the receiver had the authority to replace Rio Grande, LP's attorney in the lawsuit and settle the lawsuit against La Zona based on the receivership order, which directed WCCG to identify and turn over to the receiver all interests of WCCG in any business venture, including LLCs and limited partnerships. According to La Zona, the receivership order broadly authorized the receiver "to seize the membership interest of" any LLC in which WCCG was a member and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." La Zona contended that this authority included taking possession of "real property ... causes of action ... [and] contract rights." According to La Zona the receiver did that by seizing WCCG's membership interest in the general partner of La Grande LP and acting on La Grande LP's behalf in this litigation. The court found La Zona's argument to be problematic on at least two levels.

A. No right to seize partnership assets or the partnership's cause of action

First, La Zona Rio's argument conflates several separate provisions in the Receivership Order. The provision giving [the receiver] the right to take possession of "real property ... causes of action ... [and] contract rights" relates to assets belonging to WCCG—the judgment debtor. Here, [the receiver] took "possession" of a cause of action filed by Rio Grande, LP.

A business entity, such as a partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members, and has the right to bring suit on its behalf. A partnership's assets belong to the partnership itself, not to the individual partners. The "partnership interest" of a partner is his "share of profits and losses or similar items and the right to receive distributions."

Accordingly, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing "judgment creditor may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted). Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the partner has received or is owed, which may only be done through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of a judgment debtor's partnership interest) (citing *Stanley*, 314 S.W.3d at 664).

La Zona Rio points out exceptions to this rule that allow a court to issue a turnover order of a partnership's assets, such as when the debtor is the only member of the partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disrupting the partnership's business and to protect the other partners' interests. The record reflects that Rio Grande, LP is a partnership with at least two other partners that possess a substantial interest in the partnership. Absent evidence that the two other partners are themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of the partnership's cause of action or any of its property as part of its collection efforts to satisfy WCCG's debt.

B. No right to manage the partnership

Second, La Zona Rio also seeks to uphold [the receiver]'s actions by pointing to the Receivership Order provision giving [the receiver] the right "to seize the membership interest of

> any Limited Liability Company in which [WCCG] is a member," and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." Although La Zona Rio appears to recognize that the Receivership Order does not give [the receiver] the authority to manage or operate Rio Grande, LP directly, as it was not a Limited Liability Company, La Zona Rio contends [the receiver] was authorized to do so indirectly by taking over the management and operation of Rio Grande, LP's general partner, Rio Grande, GP, LLC, which was in fact a limited liability company. And in turn, La Zona Rio contends that "managing litigation falls squarely within the descriptions of 'manag[ing]' and 'operat[ing]' " the LLC, which it contends gave [the receiver] the authority to settle Rio Grande, LP's lawsuit.
>
> La Zona Rio's argument is dependent upon a finding that WCCG has a "membership interest" in Rio Grande, GP, LLC. According to La Zona Rio, we should find that WCCG has such an interest by virtue of Natin Paul's involvement as the president and "governing person" for the LLC. And while La Zona Rio is correct that both this Court and the Third Court of Appeals have recognized that Paul does "business through a network of entities which used 'World Class' or 'WC' in their names," with his "principal entity" being WCCG, this alone is not a sufficient basis upon which to conclude WCCG has a "membership interest" in every limited liability company (or partnership) in which Paul is involved. Even if we were to conclude that WCCG had a membership interest in Rio Grande GP, LLC, there is nothing in this record on which the trial court could have relied to conclude [the receiver] had the authority as general partner of Rio Grande, LP to manage, operate, and even transact the partnership's assets under the guise of collecting on the general partner's debt. [footnotes omitted]

In footnotes, the court elaborated on some of the points made above including the distinction between partnership property and a partner's partnership interest and the nature of a charging order. In one of its footnotes, the court addressed an argument by La Zona that the holding in *Pajooh* regarding the exclusivity of the charging order and the inability to reach a partnership's assets when collecting a judgment against a partner. In this regard, the court stated:

> La Zona Rio contends that the holding in *Pajooh* only applies to judgment creditors and not to court-appointed receivers. However, La Zona Rio cites no authority for the proposition that a receiver is to be treated differently than a judgment creditor in collecting on a judgment from a partner in an LP. And there appear to be cases in which courts have, at least indirectly, indicated that a receiver must also apply for a charging order to be entitled to seize a partnership interest belonging to a judgment debtor. *See, e.g., Howe v. Red Oak State Bank*, No. 10-90-037-CV, 1990 WL 10089566, at *3 (Tex. App.—Waco Dec. 20, 1990, no writ) (finding receiver was authorized to apply for a charging order to collect on a judgment).

Galyean v. Guinn, No. 4:21-CV-1287-P, 2022 WL 15527769 (N.D. Tex. Oct. 24, 2022) (stating that "the existence of a partnership does not automatically determine the ownership of partnership assets," and citing Tex. Bus. Orgs. Code § 152.102(c)).

In re Breitburn Operating LP, No. 14-21-00337-CV, 2022 WL 2920679 (Tex. App.—Houston [14th Dist.] July 26, 2022, orig. proceeding) (mem. op.).

"A Texas [p]artnership is 'an entity distinct from its partners.' *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 429 (Tex. 2015) (quoting Tex. Bus. Orgs. Code § 152.056). 'As an independent entity, a partnership may enter into contracts in its own name, may own its own property, and may sue and be sued in its own name.' *Id.* (citing Tex. Bus. Orgs. Code § 152.101; Tex. R. Civ. P. 28). 'Partnership property is not property of the partners.' Tex. Bus. Orgs. Code § 152.101; *see also Siller v. LPP Mortg., Ltd.*, 264 S.W.3d 324, 329 (Tex. App.—San Antonio 2008, no pet.) ('[I]f the property was, in fact, partnership property, it could not be considered property of the individual partners.'). 'A 'partnership' is not an interest in any specific partnership property. Instead, it is the partner's right to receive his distributive share of the profits and surpluses of the partnership.' *Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.). In Texas, a cause of action accruing to the partnership is partnership property and a partner may not bring suit on such cause of action. *See Cates v. Int'l Tel. & Tex. Corp.*, 756 F.2d 1161, 1173, 1176 (5th Circ. 1985) (applying rule to general partnership)."

Doty v. Davidson, No. 04-20-00583-CV, 2022 WL 2334547 (Tex. App.—San Antonio June 29, 2022, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's denial of statute of limitations and standing/capacity defenses in a partnership dispute. The court also determined that a fact issue existed as to whether a partnership or certain individuals owned a ranch; consequently, the court reversed the trial court's grant of summary judgment on the ownership issue and remanded for further proceedings.

On February 16, 2012, Richard Davidson filed suit against Kevin Doty alleging that in March or April of 2002, Davidson and Doty agreed to purchase certain property in Jim Hogg County ("the Ranch"). Davidson asserted that the parties discussed creating a partnership, under which both Davidson and Doty would contribute half of the expenses associated with the Ranch. Davidson also asserted that in April 2009, Davidson sought to sell his 50% interest in the Ranch, but Doty prohibited him from doing so.

In July 2016, Davidson filed a third amended petition, adding Javelin Ranch, LP as a plaintiff to the suit. This amended petition requested a declaratory judgment that the partnership (i.e., Javelin Ranch, LP) between Davidson and Doty was the owner of the Ranch; the partnership was an equal partnership, wherein Davidson and Doty each owned fifty percent; Davidson, as an owner and partner, was entitled to sell his undivided one-half interest in the partnership to a willing buyer without Doty's approval, and that the Dotys (Kevin and Elizabeth) were required to execute any and all documents necessary to effect a sale of Davidson's declared interest in the partnership. Appellees Davidson and Javelin Ranch, LP also alleged, with their request for a partition, that the partnership between Davidson and the Dotys was the sole owner of the Ranch and, alternatively, that Davidson and the Dotys were the owners. A suit to quiet title was also brought, alleging that the Ranch was recorded under the Dotys' names despite an agreement between the parties that the Ranch would be purchased by and belong to Javelin Ranch, LP. Davidson alleged that the Dotys' names on the recorded title created a cloud on Javelin Ranch, LP's title on the Ranch, and Davidson sought to remove the cloud.

On September 9, 2016, the Dotys filed a motion for summary judgment based upon statute of limitations and standing/capacity defenses, asserting that appellees' claims were barred by the statute of limitations as a matter of law and that Davidson lacked both standing and capacity to sue. In June 2017, appellees filed a motion for summary judgment concerning ownership of the Ranch, asserting that they were entitled to judgment as a matter of law because Javelin Ranch, LP owned the Ranch.

On November 21, 2018, the trial court granted appellees' motion for summary judgment. The trial court declared that the Ranch "was bought with partnership funds and full title should vest in the partnership known as Javelin Ranch[, LP]"; it ordered Davidson and the Dotys to "execute a warranty deed conveying their interests to Javelin Ranch[, LP]"; and it ordered that "all deeds of trust or interests which cloud the title to the [Ranch shall be] stricken and held for naught." On November 6, 2020, the trial court denied the Dotys's motion for summary judgment based upon the statute of limitations and standing/capacity defenses. The Dotys appealed the granting of appellee's motion and the denial of their motion.

The court of appeals began by concluding that the trial court had properly denied the summary judgment motion based upon the statute of limitations. As the court observed: "Because appellees' requests for declaratory relief are, in substance, a remedy for their suit to quiet title, we look to the applicable statute of limitations for their suit to quiet title. The Dotys did not address the applicable statute of limitations for appellees' suit to quiet title. Therefore, the Dotys failed to establish as a matter of law that the applicable statute of limitations barred appellees' claims."

The court then turned its attention to the standing/capacity issue. The Dotys argued in their motion for summary judgment that only Javelin Ranch, LP (and not Davidson) had standing to bring ownership claims. The court disagreed and concluded that "Davidson had standing and capacity to individually bring suit against Kevin, another partner, to enforce his rights under the alleged partnership agreement." The court affirmed the trial court's order denying the Dotys' motion for summary judgment on the standing/capacity defense.

Finally, the court addressed the Dotys' challenge to the trial court's order regarding ownership of the Ranch. The court concluded that a fact question existed as to whether Javelin Ranch, LP should hold title to the Ranch:

In their motion for summary judgment, appellees contend that title to the Ranch, held in the Dotys's names, must be placed in the name of Javelin Ranch, LP because appellees presented evidence establishing that Javelin Ranch, LP owns the Ranch as a matter of law. Under Texas law, a suit to quiet title is an equitable remedy intended to clarify ownership and remove any cloud of title on property. A cloud of title exists when an outstanding claim or encumbrance, which on its face, if valid, would affect or impair the property owner's title. If a plaintiff prevails in a suit to quiet title, the court declares invalid or ineffective the defendant's claim to title. To prevail in a suit to quiet title, a plaintiff must prove: (1) he has an interest in a specific property; (2) title to the property is affected by a claim by the defendant; and (3) the claim, although facially valid, is invalid or unenforceable. A suit to quiet title relies on the invalidity of the defendant's claim to the property. Yet, a plaintiff can only recover on the strength of his or her own title, not on the weakness of the defendant's title. The plaintiff has the burden of supplying the proof necessary to establish his superior equity and right to relief. That is, "the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Appellees attached summary judgment evidence including: the Dotys's responses to their requests for admission that 1) money deposited into a bank account owned by the parties was used to pay the mortgage on the Ranch and 2) the partnership was to receive title upon retirement of the purchase money note by the partners in the course of the partnership which never occurred; Kevin's responses to their interrogatories in which he stated that the agreement between the parties included Kevin purchasing the Ranch and Davidson paying half of the expenses associated with the loan to purchase the Ranch as well as the upkeep, maintenance and improvements to the Ranch; the Dotys's counterclaim in which they state that Javelin Ranch, LP would own and acquire title to the Ranch and that Davidson paid $15,391.22 into a bank account styled "Javelin Ranch" opened for the partnership; and an agreement between the Dotys and Carl J. Kolb, P.C. that assigns twenty percent of the Ranch to Carl J. Kolb, P.C. and defines the "Clients" as "Kevin Dale Doty, Individually and in his capacity as Partner of Javelin Ranch, a Partnership, and Elizabeth A. Doty, Individually." Appellees argued this evidence creates a presumption that the Ranch is partnership property because the evidence shows that it was acquired with partnership property. *See* TEX. BUS. ORG. CODE ANN. § 152.102(b) ("Property is presumed to be partnership property if acquired with partnership property[.]").

The Dotys responded to appellees' motion for summary judgment, arguing genuine issues of material fact exist relating to whether Javelin Ranch, LP owns the Ranch because the evidence shows that record title is in the Dotys's names and the evidence, at most, only shows that Davidson was making various financial contributions to the partnership account and not that partnership property purchased the Ranch. The Dotys attached: their loan application for funds to purchase the Ranch dated February 26, 2002; a promissory note signed by them dated April 15, 2002; and the distribution of the loan proceeds by the mortgage company on April 22, 2002. They contend that this evidence rebuts the presumption in section 152.102 of the Texas Business Organizations Code because it shows that the Ranch was not acquired with partnership property, but with the proceeds from this loan in the Dotys's names distributed to the sellers of the Ranch on April 22, 2002. The Dotys also contend that genuine issues of material fact exist as to the terms of the alleged partnership agreement, if one even exists, which is not in writing.

Taking all evidence favorable to the Dotys as true and making all reasonable inferences in their favor, we hold that the summary judgment evidence raises a fact issue as to whether Javelin Ranch, LP should hold title to the Ranch instead of the Dotys. The parties provide conflicting evidence as to whether a partnership existed, the terms of the partnership agreement, if one exists, and whether appellees have any interest in the Ranch.

Therefore, we reverse the trial court's order granting summary judgment in favor of appellees' suit to quiet title and remand this claim, along with their claims for declaratory relief, to the trial court for further proceedings.

F. Interpretation and Enforcement of Partnership Agreement

1. Contractual Modification of Fiduciary Duties; Exculpation

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims based on breach of fiduciary duty (direct and derivative), denial of her right of access to books and records, and oppression. The jury found in the plaintiff's favor on those claims, and the trial court awarded actual and punitive damages as well as declaratory and injunctive relief. On appeal, the defendants relied in part on provisions in the governing documents, claiming that the provisions permitted the actions they took or prevented the court from awarding the relief granted. The court of appeals addressed these arguments and largely rejected the defendants' interpretation of the provisions. With regard to the exculpatory provisions relied upon by the defendants, the court explained that those provisions protected against liability but not declaratory or injunctive relief.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

One of Lisa's claims for breach of fiduciary duty was a derivative claim on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses that SignAd, Ltd. improperly paid. Enriquez opined that the payments were not consistent with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller, as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was thus some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis of their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

Another claim asserted by Lisa was a claim for a judgment declaring her rights (under Tex. Civ. Prac. & Rem. Code § 37.004) to access the books and records of the General Partners and Limited Partnerships under various provisions of the Texas Business Organizations Code (TBOC) (Tex. Bus. Orgs. Code §§ 3.151-3.153, 101.502, 153.552) and the Partnership Agreements. She also sought declarations that the General Partners had failed to provide her with access to the relevant records in the past.

Pursuant to findings of the jury, the trial court entered a declaratory judgment declaring in part that: (1) certain General Partners breached the Limited Partnership Agreements and violated Section 153.552 of the TBOC by failing to provide her with books and records of those Limited Partnerships; (2) certain General Partners violated Section 101.502 of the TBOC by failing to provide Lisa with books and records of those General Partner LLCs; and (3) certain General Partners violated Sections 3.151 and 3.152 of the TBOC by failing to provide Lisa with books and records of those General Partners. The court declared that Lisa was entitled to recover attorney's fees pursuant to Section 3.152 and granted injunctive relief based on Lisa's contractual and statutory claims for access to the books and records.

One of the grounds on which the entity defendants challenged the relief awarded to Lisa on the books-and-records claim was an argument that the limitation-of-liability clauses in the Limited Partnership Agreements precluded any finding of wrongdoing against the General Partners, and that Lisa never "properly pleaded any of those legal theories." The court stated that the Texas Rules of Civil Procedure require matters submitted to the jury to have been "raised by the written pleadings and the evidence" (Tex. R. Civ. P. 278), and Lisa pleaded claims for declaratory relief and breach of fiduciary duty in connection with her claims for access to the books and records, asserting violations of the Limited Partnership Agreements and the TBOC. The entity defendants filed affirmative defenses to her claims based on the exculpatory clauses included in the Limited Partnership Agreements. The court quoted the exculpatory clauses as follows:

> Section 12.3 of the SignAd, Ltd. Partnership Agreement states:
>
> The General Partner shall not be liable to the Partnership or any Partner for any claim, demand, liability, cost, damage, or cause of action arising out of the General Partner's management of the Partnership's affairs, except where the claim at issue is based upon gross negligence, bad faith, willful breach of any material provision of this Agreement, or willful misconduct of the General Partner.
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> Section 8.02 of the Limited Partnership Agreements for Big Signs & Leasing (#1–6), Big Eastex #1, Ltd., and Ben Nevis West, Ltd. states:
>
> ... Always, unless fraud, deceit, or a wrongful taking shall be involved, the General Partner shall not be liable or obligated to the Limited Partners for any mistake of fact or judgment made by the General Partner in operating the business of the Partnership, which results in any loss of the Partnership or its Partners.... Neither shall the General Partner be responsible to any Limited Partner because of a loss of his investment or a loss in operations, unless it shall have been occasioned by fraud, deceit, or a wrongful taking by the General Partner.

The court of appeals stated that it was not necessary for Lisa to plead these affirmative defenses or any exceptions to them because the theories of "fraud, deceit, or a wrongful taking" and "gross negligence, bad faith, [and] willful breach" were pleaded by the General Partners as part of their affirmative defenses and presented to the jury at their request.

The court stated that nothing in these clauses precluded Lisa's declaratory judgment action because the clauses precluded a finding of "liability" but not a declaration of rights. Furthermore, to the extent the clauses applied, the jury was instructed on those limitations. Thus, the court said that the issues were specifically presented to the jury, who found that each of the General Partners breached their obligations under the Limited Partnership Agreements. Although the entity defendants argued there was no evidence of "fraud, deceit, or a wrongful taking" or "gross negligence, bad faith, or willful breach," the court said that they offered no elaboration of that argument. The court reiterated that there was sufficient evidence that the General Partners breached their obligations under the Limited Partnership Agreements to grant Lisa access to the books and records by initially refusing to provide access and then failing to provide everything she requested for three years.

VTX Communications, LLC v. AT&T Inc., No. 7:19-cv-00269, 2023 WL 2144154 (S.D. Tex. Feb. 21, 2023).

In lengthy opinion detailing a dispute arising out of three Delaware telecommunications limited partnerships that operated in the South Texas market, the court held that the general partner breached its fiduciary duty of loyalty to the limited partners and breached the partnership agreements in connection with certain self-dealing transactions. The parent holding company of the general partner was also liable for breach of the duty of loyalty under Delaware law since the limited partners showed that the parent exercised control over the assets of the partnerships.

This dispute arose out of three telecommunications partnerships involving VTX, SWT, and Riviera as limited partners (collectively, the "Limited Partners" or "Plaintiffs") and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility as the general partner (the "General Partner"). AT&T Inc. ("AT&T") is the parent of the General Partner. In the 1980s, the Federal Communications Commission (FCC) issued licenses for mobile cellular service pursuant to a lottery system. The Limited Partners won the lottery for their geographic areas and formed three limited partnerships with what was then Cingular, now AT&T. These limited partnerships were the McAllen-Edinburg-Mission SMSA Limited Partnership (the "McAllen Partnership" or "McAllen"), the Texas RSA 18 Limited Partnership ("RSA 18"), and the Texas RSA 19 Limited Partnership ("RSA 19") (collectively, the "Partnerships"). Plaintiff VTX is a Limited Partner in all three, Plaintiff SWT is a Limited Partner only in RSA 18, and Plaintiff Riviera is a Limited Partner only in RSA 19.

Throughout the lifespan of the partnership agreements of the Partnerships, the precise nature of networks and the services provided by the Partnerships changed with the times, but the Partnerships continued until the present day to incur costs to construct and maintain the equipment to provide the latest iteration of cellular service. Over time, AT&T began to see the Partnerships as dead weight, and going back as far as 2000, AT&T launched a business plan under the name of Project Smoothie or Project LESS that aimed to cut distributions to Limited Partners.

Traditionally, AT&T customers had postpaid service plans, and if they lived within the Partnership service area, they were "homed" there, received a local phone number, and became Partnership customers. The Partnerships made money by having customers. Non-homed cellular users—whether another carrier's customers or AT&T customers from outside a Partnership's service area—were said to be "roaming" on the Partnership network when they used it, and cellular carriers and network owners created various agreements over time to compensate each other when their customers roamed on each other's networks. In 2010, the General Partner adopted (on behalf of the Partnerships) a data cost sharing methodology for allocating costs between AT&T affiliates and the Partnerships. Under that system, the Partnerships would continue receiving a roaming rate for voice roaming on their networks but would be compensated at cost for data roaming.

In 2014, AT&T merged its own prepaid line with Cricket, creating New Cricket. In contrast to the contribution of postpaid customers in Cingular's 2004 acquisition of AT&T, Cricket customers homed in the Partnership area did not become Partnership customers. Instead, AT&T adopted a new methodology to compensate the Partnerships when Cricket customers used Partnership networks. The measure for compensating the Partnerships when Cricket customers used their networks depended upon whether Cricket users were "homed" inside the service areas of the Partnerships (in which case reseller rate based on weighted averaging was used) or were non-homed Cricket customers (in which case a roaming rate was used for voice and cost for data).

The evolution of services in this space required new FCC licenses apart from those initially won by the Limited Partners, and the court discussed in the opinion the extent to which the Partnership Agreements mandated that the Partnerships (as opposed to AT&T) own those licenses. In any event, AT&T retained certain licenses and charged the Partnerships to use those frequencies pursuant to spectrum Service Agreements. In 2015, AT&T backdated the service charges and made a capital call in an attempt to squeeze VTX out of the McAllen Partnership.

AT&T eventually backed off the capital call, but the decision created a rift between the parties that set them on a path to litigation.

The Plaintiffs sued the General Partner as well as several affiliates. The court explained the relationship of the Defendants as follows:

> The General Partner as well as Non-Partner Defendants AT&T Mobility Corporation, Cricket Wireless, LLC, and Cricket Communications, LLC, are wholly owned, indirect subsidiaries of the holding company AT&T Inc. But these corporate distinctions play little role in AT&T's employee's day-to-day experience; the key players in this case moved entities frequently. The question of who worked where is further muddied by the fact that "[i]ndividuals who act on behalf of AT&T entities like AT&T Mobility Corporation and New Cingular Wireless PCS, LLC are employed by various affiliated payroll entities, such as AT&T Services, Inc. and AT&T Mobility Services LLC." Even at the highest levels of leadership, AT&T Mobility Corporation had officers in common with AT&T Inc., which were selected for their roles and paid by AT&T Management Services Inc., one of the payroll entities. [footnotes omitted]

Claims that survived a motion to dismiss were: (1) breach of fiduciary duties against the General Partner; (2) breach of contract against the General Partner; (3) breach of the duty of loyalty against non-partner Defendants; (4) conversion against non-partner Defendants; and (5) tortious interference against non-partner Defendants. The opinion addressed motions for summary judgment by both sides. The Plaintiffs sought summary judgment on three self-dealing transactions: the data cost sharing methodology, the Cricket arrangement, and the spectrum Services Agreements. Defendants sought summary judgment dismissing all claims on the basis that they were time-barred, that the parties contractually agreed to less-than-fiduciary duties, and that the elements of the various claims were not met.

After analyzing the Defendants' argument that the Plaintiffs claims were time-barred and determining that the Plaintiffs brought the claims timely, the court turned to the merits of the claims.

The court began its discussion of the merits of the claims by reviewing the standards of judicial review that the court would need to employ in addressing whether the Plaintiffs prevailed on their claims against the General Partner. The claims against the General Partner encompassed claims for breach of fiduciary duty and breach of contract and involved the interpretation and application of Delaware law and the provisions of the Partnership Agreements.

The court noted that "majority partners owe traditional fiduciary duties to minority partners under Delaware law," but Delaware law allows those duties to be modified by contract. The duty at issue in this case was the duty of loyalty, specifically whether and to what extent the General Partner was permitted to self-deal. The court explained that the Partnership Agreements differed in how they addressed fiduciary duties:

> In this Court's order on Defendants' motion to dismiss, the Court held that the General Partner owed traditional fiduciary duties to Plaintiffs under the McAllen Partnership Agreement, which does not contain a safe harbor provision for conflicted transactions. As to that Agreement, Defendants now argue that the sheer number of references to the General Partner's authority in the partnership agreements, as well as their regulatory context, evince that the parties intended for the business judgment rule to apply even to conflicted transactions. But the Court has already ruled against this point. The business judgment rule applies to how the controller maximizes the interest of the partnership, not whether they did so (the question in this case).
>
> On the other hand, the RSA 18 and RSA 19 Partnership Agreements—through section 7.5—do "displace fiduciary duties." Neither common law doctrines of business judgment nor entire fairness are wholly applicable once the parties have plainly opted for a contractual standard of review. Therefore, Plaintiffs' claims against the General Partner arising out of those two partnership agreements are appropriately cast as breach of contract claims. [footnotes omitted]

Because the McAllen Partnership Agreement did not displace fiduciary duties, the entire fairness standard applied to the General Partner's self-dealing transactions. The entire fairness standard has two components—fair dealing and fair price—and the fiduciary bears the burden of proof.

The court explained that all three Partnership Agreements included an exculpation provision. The court explained the effect of the exculpation provisions as follows:

> Exculpation provisions are allowed under DRULPA § 17-1101(f) and differ from provisions under subsection (d) in that they limit *liability* as opposed to paring back the *duties themselves*. The McAllen Partnership Agreement says that "the General Partner will not be liable for any loss to the Partnership or the Limited Partners by reason of any act or failure to act unless the General Partner was guilty of willful misconduct or gross negligence."
>
> The Court has already held that "far from eliminating fiduciary duties, Section 16.1's language is consistent with fiduciary duties." In *Feeley v. NHAOCG*, Vice Chancellor Laster considered an LLC's exculpatory provision that was materially similar to those in the Partnership Agreements here. He held that the provision did "not disclaim or eliminate fiduciary duties" but "rather (i) assume[d] that default fiduciary duties exist[ed], (ii) limit[ed] only potential availability of monetary remedy, not the potential for injunctive or other equitable relief, and (iii) restore[d] the availability of damages as a remedy for, among other things, gross negligence and willful misconduct."
>
> A few things are clear. First, consistent with *Feeley*, this Court has already held that section 16.1 does not eliminate fiduciary duties. Second, *Feeley* clearly holds that exculpatory provisions limit monetary liability but do not touch equitable remedies such as restitution and injunction. Under Delaware law, a plaintiff alleging a breach of fiduciary duty or diversion of a corporate opportunity may seek disgorgement or imposition of a constructive trust. Even when an exculpatory provision precludes monetary liability, "injunctive relief, a decree of specific performance, rescission, the imposition of a constructive trust, and a myriad of other non-liability-based remedies remain in play." In their complaint, Plaintiffs request the relevant equitable relief including accounting for profits, disgorgement, and injunctive relief. These are mutually exclusive alternatives to damages-based recovery in which Plaintiffs do not seek recovery for harm from the breach of fiduciary duty or expectation on the contract; they seek the Defendants' net profits from their wrongdoing. Delaware courts use profit-based remedies when the counterfactual—what would Plaintiffs have without Defendants' misconduct?—is so speculative that it cannot provide an adequate remedy. The Court HOLDS that on any claims where Plaintiffs elect equitable remedies in the alternative to damages or losses, section 16.1 does not limit that recovery. [footnotes omitted]

The court then addressed the operation of the exculpation clause in the McAllen Partnership Agreement if the Plaintiffs elected damages. Although the court said that Delaware case law has not directly addressed who bears the burden of proof as to whether a party is exculpated or not, the court relied on Delaware law in the corporate context to conclude that the burden is on the fiduciary unless the exculpation clause shifts the burden. Here, the court found no burden shifting provision in the McAllen Partnership Agreement. Thus, the court said that if the court found a breach of fiduciary duty under entire fairness, the General Partner would have the opportunity to prove that it was exculpated from monetary liability, i.e., that its conduct was not "gross negligence or willful misconduct." Because the Plaintiffs challenged intentional decisions involving self-dealing, the court said that willful misconduct rather than gross negligence would be the issue. The court discussed the concepts of bad faith and good faith as they relate to willful misconduct and concluded that "[t]he exculpation that Defendants seek is available where they can prove that they did not intentionally act with a purpose other than advancing the best interest of the McAllen Partnership."

In sum, as to the Plaintiffs' claims against the General Partner pursuant to the McAllen Partnership Agreement, the court would evaluate the General Partner's conduct under entire fairness review. If Plaintiffs then based their theory of recovery in equity (i.e., injunctive relief and disgorgement of net profits), then the exculpation provision would not apply and entire fairness would be the end of the matter. If, however, the Plaintiffs based their theory of recovery in monetary damages, then AT&T would have the opportunity to prove that it is exculpated from damages for non-willful misconduct.

The court next turned to the standards that would apply to the alleged breaches of duty of loyalty under the RSA 18 and RSA 19 Partnership Agreements. The court explained that the RSA Partnership Agreements were similar to the McAllen Partnership Agreement in providing for an overarching duty of loyalty by requiring the General Partner to act in the best interest of the Partnerships, but the RSA Partnership Agreements differed by providing a safe harbor for conflicted transactions if "such transactions are comparable to, or not substantially less favorable than, similar arms'-length transactions between the General Partner or its Affiliates and unrelated third parties" and the transactions are not entered into with "gross negligence or willful misconduct." The court distinguished a safe harbor provision from an exculpatory provisions as follows: "Unlike an exculpatory provision, a safe harbor provision does modify the underlying duties, not just liability on theories of monetary relief." Before the court could apply the safe harbor provision, the court needed to determine whether it was applicable to the transactions at issue.

After dissecting the language of section 7.5 (the safe harbor provision) and addressing the use and placement of various words in the provision, the court concluded that:

> section 7.5 of the RSA 18 and RSA 19 Partnership Agreements applies only to AT&T's data cost sharing process and spectrum Service Agreement. The duty of loyalty established in section 8.1 applies to the Cricket arrangement and allocation of other revenue streams, which are effectively diversions of partnership opportunities. Furthermore, section 7.5's "willful misconduct and gross negligence" standard applies only once the Court determines that the terms were at arm's length.

Next the court discussed the process of judicial review under section 7.5 and ultimately determined that, where section 7.5 is applicable, the Plaintiffs bore the burden of proving either that the conflicted transaction's terms were not at arm's length or that it was entered into with gross negligence or willful misconduct. If the Plaintiffs did not establish either of these, then the conflicted transaction was within the General Partner's contractual rights. If the Plaintiffs succeed, then the court would proceed to apply an entire fairness review under section 8.1, the provision generally recognizing a duty on the part of the General Partner to act in the best interest of the Partnership.

Finally, the court explained that application of the exculpation provision in the context of the RSA Partnerships was the same as application of the exculpation provision to the McAllen Partnership, including inapplicability to equitable relief, except that the RSA Agreements required the court to determine by "clear and convincing evidence" that the General Partner was guilty of willful misconduct or gross negligence.

After providing its lengthy explanation of the judicial review to be applied to the claims for breach of fiduciary duty and breach of contract against the General Partner, the court applied the standards described above to the three self-dealing transactions at issue. The court discussed the evidence relating to the data cost sharing methodology, Cricket arrangement, and spectrum Services Agreement in detail and concluded that each breached the applicable fiduciary or contractual standard and amounted to non-exculpable conduct.

After discussing the summary judgment evidence relating to the data cost sharing methodology in detail, the court concluded by stating:

> AT&T has an obligation to each Partnership individually, not an obligation to a Frankenstein's monster of all its nationwide partnerships collectively. Each Partnership here has its own Agreement with AT&T in which AT&T promises to do what is in that Partnership's best interest. But the summary judgment evidence shows that AT&T did not take an individualized approach to setting data compensation rates: there is no per-partnership market analysis, no negotiation with limited partners, no partnership meetings to discuss possibilities. All that AT&T has to stand on is EY's conclusions from an audit of one partnership. [footnote omitted]
>
> The resulting one-size-fits-none approach is willful misconduct under Delaware law. The adoption of data cost sharing was inconsistent with the General Partner's obligation to do what is in the best interest of Partnerships that are net data providers, and AT&T knew that some partnerships would be net providers. Perhaps a partnership like McAllen would have been comfortable with a low or cost rate anticipating that its balance of traffic might be negative or neutral. But a partnership like RSA 18 or 19 would never have agreed to that because they knew they would be net providers of data services for roaming AT&T subscribers. There is clear and convincing evidence that AT&T's decision to mulch all these interests together was intentional, and exculpation under section 16.1 is DENIED.

In a lengthy discussion of the summary judgment evidence regarding the Cricket arrangement, which did not fall within the safe harbor provisions of the RSA agreements and was thus subject to entire fairness review in all three Partnerships, the court concluded that the arrangement satisfied neither the fair price nor the fair dealing prong of entire fairness. Based on the fact that the arrangement was not fairly priced and the failure to consider factors relevant to the General Partner's obligations to Plaintiffs, the court held that the General Partner breached its fiduciary duty in the context of all three Partnerships. The court also held that the General Partner breached a provision of the Partnership Agreements requiring the arrangement to be included in the Partnership records. The court also found the General Partner engaged in willful misconduct such that its liability was not exculpated under the exculpation clause. In explaining how the evidence showed willful misconduct, the court said, "When dissenting AT&T employees question the propriety of the arrangement, it responds—and the Court quotes an entire email—'hush'."

As to the spectrum Services Agreements, the court again reviewed the summary judgment evidence in detail and concluded that the General Partner's treatment of spectrum licenses breached its fiduciary duty under the common law and contractual standards applicable in the context of each partnership. The court summed up its discussion of this transaction as follows:

> Use of the spectrum Services Agreements as a smoke screen for an attempted squeeze out is not fair dealing. In fact, Plaintiffs have met their burden to prove AT&T's willful misconduct. The very licenses that AT&T should have allocated to the Partnerships under the default application of their contract were retained and used to generate a surprise capital call to pry control of the Partnerships out of Plaintiffs' hands. Therefore, the Court need not even consider whether AT&T's decision to charge its fees based on fair value instead of book value met the fair price prong, other than to say that it is not within the terms of the waiver provided by VTX.
>
> Therefore, the Court GRANTS Plaintiffs' motion for summary judgment and finds that, as to the McAllen Partnership Agreement, the General Partner's treatment of spectrum licenses BREACHED ITS FIDUCIARY DUTY, and as to the RSA 18 and RSA 19 Partnership Agreements, the General Partner BREACHED SECTION 7.5 by willfully using undisclosed charges booked under the spectrum Service Agreements to divert distributions and attempt a squeeze out in 2014. The Court finds clear and convincing evidence of the General Partner's willful misconduct such that exculpation is unavailable under either the McAllen Partnership or RSA 18 and 19. [footnotes omitted]

The court next addressed the Plaintiffs' claims against non-partner Defendants AT&T Inc., AT&T Mobility Corporation, and Cricket.

In connection with the Plaintiffs' claims against the non-partner Defendants for breach of fiduciary duty the court explained:

> It is well established law in Delaware that affiliates "who ultimately control a corporate general partner owe fiduciary duties to the limited partnership." That is, they owe a "duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The word "property" is key. "[T]o have any fiduciary duties to an entity, the affiliate must exert control over the assets of that entity." [footnotes omitted]

The Defendants argued that the corporate shield protected the parent holding company, AT&T Inc., from liability and also argued that the record contained no evidence that AT&T exercised any control over the challenged actions. The court, however, pointed to evidence of a lack of separateness between AT&T entities as well as the exercise of control over the property of the Partnerships so as to make AT&T a fiduciary under *In re USACafes, L.P. Litig*., 600 A.2d 43 (Del. Ch. 1991). The court concluded that the record indicated that AT&T Inc. exercised control over Partnership assets such that it owed a duty of loyalty to the Limited Partners in exercising that control. Likewise, the court concluded that AT&T Mobility Corp. owed a duty of loyalty to the Limited Partners based on its control over the General Partner and thus Partnership assets. Thus, the court denied the motions for summary judgment of AT&T Inc. and AT&T Mobility Corp. As for Cricket, the court stated that the evidence did not show that it exercised control over Partnership assets. According to the court, "having a seat at the table is not the standard under *USACafes*." Thus the court granted summary judgment dismissing the fiduciary claims against Cricket.

The court applied the elements of a claim for conversion under Delaware law and concluded that Cricket as well as the other non-partner defendants could be liable for conversion of the Plaintiffs' property rights and interests. The court stated:

> A defendant need not be a fiduciary to be a converter. There is an independent duty not to convert property, and Plaintiffs have raised a genuine dispute about conversion as to each Non-Partner Defendant. For example, the Court has already held that the retention of Cricket customers homed in the Partnership service areas was improper. Under fiduciary or contractual duties owed by the General Partner, the Limited Partners had property interests and possessory rights to those customer accounts. But Cricket wrongfully possessed those accounts and booked them as its own assets. Similarly, AT&T Inc. wrongfully possessed, through its subsidiaries, spectrum licenses that the Partnerships had property interests in and possessory rights over. More abstractly (but still tortiously), all Non-Partner Defendants have treated the Partnerships' networks—over which the Partnerships certainly had property interest and possessory rights—as their own by compensating only costs for their non-homed subscribers' data roaming. Therefore, Defendants' motion for summary judgment as to Plaintiffs' conversion claims is DENIED. [footnotes omitted]

Finally, the court applied the elements of tortious interference under Delaware law and concluded that AT&T Inc. and AT&T Mobility Corp. could be liable on a theory for tortious interference, but not Cricket. The court explained that

> affiliates regularly confer with each other regarding their contractual obligations, and Delaware law bestows a privilege on good faith recommendations that a contract be terminated. Thus, "where Corporations affiliated through joint ownership confer with respect to a contract to which one of them is party and a breach of that contract follows, there can be no non-contractual liability to the affiliated Corporation, which is privileged to consult and counsel with its affiliates, unless the plaintiff pleads and proves that the affiliate sought not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff." [footnotes omitted]

Thus, the non-partner Defendants were privileged to make good faith recommendations to the General Partner about termination, modification, or breach of the Partnership Agreements.

The court then discussed the concept of bad faith in this context and concluded that AT&T Inc. and AT&T Mobility Corp. could be liable on a theory for tortious interference, but not Cricket. While AT&T Inc. and the General Partner's manager were very aware of the terms of the Partnership Agreements, and AT&T's general counsel reviewed to reach the erroneous conclusion that they allowed implementation of the data cost sharing methodology, there was no evidence that Cricket had access to the Partnership Agreements or any reason to know of their content. The court said there was also a dearth of evidence that Cricket, as opposed to AT&T Inc. and AT&T Mobility Corp., had any nefarious interest in diverting prepaid customers and data network revenue. In the court's view, "Cricket's interests in getting the best deals for itself [were] 'legitimate profit seeking.'"

2. Restriction on Transfer of Partner's Interest

Keefer v. United States, Civ. A. No. 3:20-CV-0836-B, 2022 WL 3227853 (N.D. Tex. Aug. 10, 2022).

"Nor could signing the June 8, 2015 DAF Packet have 'legally obligated' Kevin to transfer the asset, as the Keefers now argue, given the Burbank General Partner's 'sole, absolute, and subject discretion' to consent to a transfer and the requirement that such consent be obtained, in writing, before any transfer of interest. Though the Keefers argue for the first time in their reply that the Texas statute governing partnership law 'expressly gives any partner the power to transfer his interest,' [TBOC] § 152.401 is merely a default rule that can be overridden by the terms of a partnership agreement. *See* Tex. Bus. Orgs. Code § 152.002(a) ('Except as provided by Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. *To the* *extent that the partnership agreement does not otherwise provide*, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.' (emphasis added)). Here, the Partnership Agreement's express prohibition on transfer without the partner first having obtained the general partner's written consent means that any purported transfer by Kevin before that time was without legal effect."

3. Indemnification

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." After her release, she brought a lawsuit asserting numerous claims, including claims based on breach of fiduciary duty (direct and derivative), denial of her right of access to books and records, and oppression. The court of appeals affirmed a claim for breach of fiduciary duty against the general partner of the limited partnership based on the limited partnership's payment of personal legal fees incurred by individual defendants. On appeal, the defendants claimed that provisions of the governing documents of the entities, including indemnification provisions in the limited partnership agreement, permitted the payment of their personal legal fees by the limited partnership. The court of appeals rejected the defendants' argument.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board,

and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

One of Lisa's claims for breach of fiduciary duty was a derivative claim on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds. One of these grounds involved interpretation of an indemnification provision in the SignAd Ltd. Partnership Agreement.

The defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis of their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

4. Injunctive Relief

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. The plaintiff asserted numerous claims, including claims based on breach of fiduciary duty (direct and derivative), denial of her right of access to books and records, and oppression. The jury answered in favor of the plaintiff on most of her claims, and the trial court awarded actual and punitive damages as well as declaratory and injunctive relief. On appeal, the court held that portions of the permanent injunction granted in favor of the plaintiff against the general partners, limited partnerships, and individual defendants were overly broad and vague and prohibited lawful conduct because the enjoined acts were permitted by the governing documents of the entities.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

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Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

In its analysis of the injunctive relief awarded by the trial court, the court of appeals addressed certain provisions of the Limited Partnership Agreements and LLC regulations of the General Partners. The entity defendants argued that the injunctive relief awarded to Lisa by the trial court was improper for numerous reasons. The trial court granted injunctive relief based on the jury's findings that (1) Wes Jr., Stacey, and Lee breached their fiduciary duties to SignAd GP, LLC by failing to maintain internal controls on employee fringe benefits and selling company vehicles for less than fair market value (reversed by the court of appeals based on Lisa's lack of standing), (2) Wes Jr. breached his fiduciary duty to SignAd, Ltd. based on transactions involving ProIce (reversed by the court of appeals based on Wes's lack of sufficient control over the General Partner to support the existence of a fiduciary duty to the partnership), (3) Wes Jr., Stacey, Mark, and Lee knowingly participated in SignAd GP, LLC's breach of its fiduciary duty to SignAd, Ltd. involving payment of non-business-related legal fees, (4) Lee breached his informal fiduciary duty to Lisa, (5) the Limited Partnerships and two General Partners engaged in oppression (reversed by the court of appeals because the misconduct did not rise to the level of oppression as defined in *Ritchie v. Rupe*), and (6) the General Partners failed to provide Lisa with certain books and records. Having reversed as to nos. (1), (2), and (5) above, the court addressed the defendants' challenge to the trial court's injunctive relief. A recurring legal principle relied upon the by the court of appeals was that an injunction must be narrowly drawn and "must not be so broad that it would enjoin a defendant from acting within its lawful rights." The court referred to the governing documents of the entity defendants at numerous junctures to determine whether the trial court had properly or improperly enjoined actions in view of what was permitted or not permitted by the governing documents of the entities.

The first part of the injunction constrained action by the entity defendants through committees. Section 6(i) of the injunction prohibited the General Partners, the Limited Partnerships, the individual defendants, and their representatives from "conducting the business of any of the General Partners and Limited Partnerships through any committee in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Section 6(ii) of the injunction prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without unanimous approval of all partners." Section 6(iii) prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee."

The record reflected that SignAd GP, LLC had two committees: a Special Litigation Committee and an Executive Committee. The court said that it did not find, and Lisa did not identify, any evidence that Wes Jr., Lee, Stacey, and SignAd GP, LLC acted through the Executive Committee in "derogation of the responsibility of their respective Boards of Managers to manage SignAd." However, the evidence demonstrated that Wes Jr., Lee, and Stacey, as members of the SignAd GP, LLC Board of Managers and the Special Litigation Committee, authorized SignAd, Ltd. to pay for their personal legal fees because the Special Litigation Committee had given Wes Jr. the right to authorize such payments. The jury's finding that SignAd GP, LLC, which could only act through its Board of Managers, breached its fiduciary duties to SignAd, Ltd. by causing it to pay non-business-related legal fees demonstrated that Wes Jr., Lee, and Stacey operated SignAd GP, LLC's Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Thus, the court concluded that the trial court could have inferred that Wes Jr., Lee, and Stacey would continue to operate the Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd" and did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(i).

Because the regulations of SignAd GP, LLC, as amended in 2014, allowed a majority of the Board to create a committee to act on behalf of the Board (in contrast to the previous unanimous vote required to create a committee before the amendment), the court stated that it was lawful for SignAd GP, LLC's Board of Managers to act "through any committee without unanimous approval of all partners" under the regulations, and the trial court abused its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(ii).

Unlike Section 6(ii), the court stated that Section 6(iii) did not prohibit lawful conduct. SignAd GP, LLC's regulations provided that committees "shall be required to keep accurate records of all actions taken by [them]." The court pointed to evidence from which the trial court reasonably could have inferred that Wes Jr., Lee, Stacey, and SignAd GP, LLC had conducted business through a committee in the past "without keeping accurate records of all actions taken by any committee" and would continue to do so in the future unless enjoined. Thus, the trial court did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee," as set forth in Section 6(iii).

Because there was no evidence that the Board of any entity defendant other than SignAd GP, LLC conducted business through a committee or failed to keep accurate records, and no evidence from which the trial court could have inferred that any of the other entity defendants would engage in such conduct in the future, the court concluded that there was no evidence that Lisa would suffer imminent harm if the other entities were not enjoined from engaging in the conduct prohibited by Sections 6(i)–(iii), and the trial court abused its discretion by awarding Lisa injunctive relief as to those entity defendants.

Section 6(iv) of the trial court's judgment enjoined various parties from "denying [Lisa] access to the books and records of the General Partners and Limited Partnerships as per the operative agreements and under Texas law until such time as an equitable buyout of Lisa Horan, Trustee's interests are bought out and fully paid for or she no longer serves on the boards of managers of any entity, whichever comes later." The jury found that the General Partners—SignAd GP, LLC, Culcreuch West, LLC, Realty Acquisitions & Holdings LLC, and Big Leasing, LLC—failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC, and there was sufficient evidence supporting the jury's findings (Wes Jr.'s statement to Lisa's lawyer in March 2013 that he would never allow Lisa to access the books and records, the fact that Lisa had to file suit to obtain the documents and information to which she was entitled, and Lisa's failure to receive everything she requested for three years). The court said that the trial court could reasonably infer from this evidence that the General Partners would continue to withhold the companies' books and records from Lisa in the future. The court thus held that the trial court did not abuse its discretion by enjoining the General Partners and their managers—Wes Jr., Lee, and Stacey—from engaging in the conduct prohibited by Section 6(iv). On the other hand, Lisa did not assert a similar cause of action against any of the Limited Partnerships and there were no findings that any of the partnerships breached an agreement or violated any statutory provisions relating to books and records. Because liability for the Limited Partnerships was not established, the trial court abused its discretion by enjoining the Limited Partnerships from denying Lisa access to the books and records as set forth in Section 6(iv).

Section 6(v) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "retaining as cash reserves any more than 12% of each of the Limited Partnerships' net cash whether from operations or from the proceeds of capital transactions, without unanimous approval of the Board of Managers of each General Partner." The Limited Partnership Agreements allowed the General Partner for each of the Limited Partnerships to retain cash for cash reserves at its discretion without any cap on the amount that may be retained. For example, SignAd, Ltd.'s Partnership Agreement stated: "Net cash of the Partnership, if any, whether from operations or from the proceeds of capital transactions, shall from time to time, but not less often than once annually, be distributed to the Partners in the ratio of their Partnership Interests; provided, however, the Partnership may, as determined by the General Partner in its sole discretion, retain cash for cash reserves to insure the availability of funds for conducting operations of the Partnership and for paying any and all appropriate expenses and obligations of the Partnership." Provisions in the other Limited Partnership Agreements similarly provided that the General Partner "shall determine when, if ever, cash distributions shall be made to the partners, pursuant to the provisions and the tenor of this Agreement." The court said that none of the governing documents required "unanimous approval of the Board of Managers of each General Partner"; therefore, the governing documents of the entities permitted them to retain "cash reserves [of] more than 12% of each of the Limited Partnerships' net cash whether from operations or from the proceeds of capital transactions, without unanimous approval of the Board of Managers of each General Partner." The court thus concluded that the trial court abused its discretion by awarding the injunctive relief set forth in Section 6(v).

Section 6(vi) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "attempting to further modify any of the governing documents of the Limited Partnership Defendants." The Limited Partnership Agreement of SignAd, Ltd., however, expressly allowed its General Partner, SignAd GP, LLC, to "amend or otherwise change" the partnership agreement, as long as more than 51% of the partners agreed. The Limited Partnership Agreements for Ben Nevis West, Ltd., Big Eastex #1, Ltd., Big Signs & Leasing ##1–6, Ltd. also allow their respective General Partners to modify the partnership's governing document. Thus, it court concluded that it was lawful to "amend or otherwise change" the Limited Partnership Agreements, and the trial court abused its discretion by awarding the injunctive relief set forth in Section 6(vi).

Section 6(vii) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "devaluing the General Partners' and Limited Partnership Defendants' assets or interests." The entity defendants argued that the permanent injunction was impermissibly vague because it did not define the term "devaluing," provide a metric by which values should be determined, or otherwise specify the acts that would violate this particular injunction. The court of appeals agreed that the term "devaluing" did not provide enough information to the enjoined parties to allow them to determine what conduct was prohibited. Also, this injunctive relief was based in part on the jury's findings of breaches of fiduciary duties by Wes Jr., Lee, Stacey, and SignAd GP, LLC and the jury's finding of oppression. Because the court was reversing the portion of the judgment in Lisa's favor on two of the causes of action for breach of fiduciary duty and the finding of oppression, the court remanded this portion of the injunction to the trial court to (1) determine whether the requested relief was supported in light of the court of appeals' opinion, and if so, (2) to clarify the specific acts and persons or entities to be enjoined under Section 6(vii).

The court next discussed Section 6(viii), which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using monies or assets from or generated by (or revenues generated by) any of the General Partners or Limited Partnership Defendants to pay personal expenses of or to unjustly enrich Wes, Jr., [Stacey] or Lee, including payment of individual legal fees not related to their agency for SignAd, Ltd. or its related entities." The court concluded that Lisa's pleadings were sufficient to have put the parties on notice that she would be entitled to have such conduct enjoined, and the court pointed out that there was evidence that SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Lee, Mark, and Stacey from which the trial court reasonably could have inferred that the Special Litigation Committee would continue to authorize SignAd, Ltd. to pay personal legal fees for Wes Jr., Lee, Mark, and Stacey given the parties' ongoing disputes. There was thus some evidence of imminent harm with respect to Wes Jr., Lee, Stacey, SignAd GP, LLC, and SignAd, Ltd. Because there was no evidence that other limited partnerships ever used their assets to pay personal expenses of or to unjustly enrich the individual defendants or that any of their General Partners authorized them to do so, the trial abused its discretion by awarding Lisa injunctive relief against parties other than SignAd, Ltd., SignAd GP, LLC, Wes Jr., Lee, and Stacey under Section 6(viii).

Section 6(ix) prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using any personal property, personnel, or inventory of the SignAd entities in connection with separate business endeavors of [Wes, Jr.], [Stacey], and/or [Lee] without full disclosure and only after a unanimous vote by the partners that the transaction is fair to SignAd, Ltd. or any of the other General Partners and/or Limited Partnerships." This injunctive relief was based on the jury's finding that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and the jury's finding of oppression. Because the court was reversing the portion of the judgment awarding judgment in Lisa's favor on that breach-of-fiduciary-duty cause of action and the finding of oppression, there was no finding of liability with respect to a cause of action that would support the injunctive relief in Section 6(ix), the trial court thus abused its discretion in awarding the injunctive relief under Section 6(ix).

Section 6(x) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "withholding from Lisa Horan, Trustee and [sic] distributions of earnings until such time as the buyout of her interest in the SignAd entities is completed and she has received full payment of fair value for her interest." The court did not find and was not directed by Lisa to any evidence that any of the entity defendants withheld any distributions of earnings from her in the past or would continue to do so in the future unless prohibited; therefore, there was no evidence of imminent harm with respect to the conduct prohibited in Section 6(x), and the trial court abused its discretion by awarding Lisa injunctive relief on this basis.

The court then discussed Section 6(xi), which enjoined the Limited Partnerships, General Partners, individual defendants, and their representatives from "paying any attorney's fees or damages of any of the Individual Defendants from income or accounts belonging to any of the General Partners or Limited Partnerships that constitute any part of the SignAd enterprise." The court held that Section 6(xi) was overly broad because it prohibited payment of all attorney's fees and damages for Wes Jr., Lee, and Stacey, even though they were entitled to indemnity under certain circumstances, such as when acting in their official capacities. The court remanded this portion of the injunction with instructions to the trial court to modify the scope of the injunction under Section 6(xi) as to Wes Jr., Lee, Stacey, SignAd, Ltd., and SignAd GP, LLC consistent with the court's opinion. Because there was no evidence that any entity other than SignAd, Ltd., through the SignAd GP, LLC Board of Managers and Special Litigation Committee, ever paid attorney's fees or damages for any of the individual defendants or from which the trial court could have inferred that any of the other entity defendants would engage in that conduct in the future, the trial court abused its discretion by awarding Lisa injunctive relief against all other parties.

5. Arbitration

Moncrief v. Moncrief, __ S.W.3d __, 2023 WL 3695417 (Tex. App.—Fort Worth 2023, no pet. h.).

In a dispute over who were the general partners of a family limited partnership, which turned on the validity of a challenged amendment to the partnership agreement specifying successor general partners, the court held that the arbitration provision in the partnership agreement delegated the gateway issue of arbitrability to the arbitrator. A dissenting justice argued that the mental capacity of the general partner at the time of the challenged amendment to the partnership agreement was a threshold issue for the trial court.

This ongoing litigation involved multiple claims by multiple parties concerning the Moncrief family trusts and business entities. In this opinion, the court of appeals addressed an interlocutory appeal from the trial court's order granting a temporary injunction prohibiting the appellants from proceeding to arbitration against the appellees and the court's refusal to rule on the appellants' concurrent motion to refer to arbitration the appellees' counterclaims against the appellants. The court of appeals reversed the trial court's temporary injunction, finding that the arbitration provision in the partnership agreement delegated to the arbitrators the gateway issue of the validity of the disputed amendment to the partnership agreement that contained the arbitration provision.

The appellants were Richard W. Moncrief (Dick) and Marshall Searcy (Marshall) individually and in their respective capacities as alleged successor General Partners of the Moncrief Family Partnership, L.P. (MFP) and alleged Trustees of the W.A. Moncrief, Jr. Management Trust (Management Trust), and on behalf of the Management Trust and MFP. The appellees were Tom Oil Moncrief (Tom), Gloria Moncrief (Gloria), and Gary R. Allen (Gary).

MFP was confirmed in 2010 by an Amended and Restated Limited Partnership Agreement of Moncrief Family Partnership, L.P. (MFP Agreement). The signatory parties to the MFP Agreement were Tex Moncrief (Tex) and the Estate of Deborah B. Moncrief, as General Partners, and Tex and the Estate of Deborah Moncrief, as Limited Partners. Tex signed in his individual capacity, in both General Partner and Limited Partner capacities, and as Personal Representative of the Estate of Deborah Moncrief in both capacities. Charlie Moncrief (Charlie), who later predeceased Tex, was designated as an automatic successor General Partner in the event of Tex's death, disability, or legal incapacity.

The MFP Agreement provided that the General Partners could amend the agreement with the written approval of all Partners. The term "Partners" was defined to include both General Partners and Limited Partners. The Management Trust became a Limited Partner of MFP on January 1, 2012, under the First Amendment to the MFP Agreement, substituting for Tex, individually, as a Limited Partner. Its status as Limited Partner did not subsequently change.

The MFP Agreement contained a broad arbitration clause providing in part:

> If at any time during the existence of the Partnership, any question, disagreement, difference[,] or controversy shall arise between the Partners concerning the Partnership, or its affairs, transactions, business[,] or accounts, or the meaning or interpretation of this Agreement, or the rights, duties[,] or obligations of the Partners, then any Partner may cause such question, disagreement, difference[,] or controversy to be submitted to and determined by arbitration, in accordance with the rules then in effect of the American Arbitration Association.

The MFP Agreement also stated that "[t]his Agreement shall be binding upon the parties hereto and their respective ... successors."

The signatories to the Fourth Amendment, dated June 19, 2019, were General Partners Tex, individually, and as Trustee for the Deborah Beggs Moncrief Family Trust, and Limited Partners Tex, as Trustee of the Deborah Beggs Moncrief Family Trust and as Trustee of the Management Trust. The Fourth Amendment named Charlie, Tom, and Gary as successor General Partners of MFP in the event of Tex's death, disability, or legal incapacity, and Gloria as automatic successor to Charlie in the event of his death, disability, or legal incapacity. Subsequently, Gloria succeeded to Charlie. The Fourth Amendment did not amend or delete the arbitration agreement and expressly ratified and continued all non-amended portions of the MFP Agreement.

The Fifth Amendment, which was signed by Tex effective in August 2021, appointed Tom, Dick, and Marshall as the new successor General Partners in the event of Tex's death, disability, or legal incapacity. Tex again signed as General Partner individually and on behalf of the Deborah Beggs Moncrief Family Trust, and as Limited Partners on behalf of the Deborah Beggs Moncrief Family Trust and the Management Trust. The Fifth Amendment, like the Fourth, did not delete or amend the arbitration agreement and expressly ratified and continued all non-amended portions of the MFP Agreement. Tex died on December 29, 2021, at 101 years of age.

In 2022, the appellees filed a counterclaim against the appellants disputing the validity of the Fifth Amendment, alleging that Tex did not have the mental capacity, or was unduly influenced, to execute it. The MFP, through Dick and Marshall in their capacities as alleged General Partners of MFP, then instituted an arbitration proceeding with the American Arbitration Association under the broad arbitration clause in the MFP Agreement. In the arbitration proceeding, Dick and Marshall challenged the validity of the Fourth Amendment under which the appellees claimed to be General Partners. Dick and Marshall made this challenge as General Partners of MFP under the Fifth Amendment, as the Trustees of the Management Trust (a Limited Partner of MFP), and on behalf of MFP itself. Dick and Marshall alleged that they took this action because the Fourth Amendment was superseded by the Fifth Amendment, which made them successor General Partners along with Tom.

The appellees filed an amended counterclaim that continued to dispute the validity of the Fifth Amendment by alleging that Tex did not have the mental capacity or was unduly influenced to sign it. The appellees, as counterclaimants, claimed to be General Partners in MFP under the Fourth Amendment and sought, in part, temporary and permanent injunctive relief against the appellants to prevent the appellants from proceeding with arbitration under the Fifth Amendment. The appellees also sought declaratory relief on various issues. The trial court issued a temporary injunction enjoining the appellants from proceeding with arbitration, and the court set a trial date for the case on the merits.

In a nutshell, the court of appeals boiled down the context, issues, and disposition in this appeal as follows:

> Reduced to its simplest, most relevant terms for purposes of this appeal, the dispute on the merits is who are the successor general partners of the MFP: Appellees under the Fourth Amendment or Appellants under the Fifth Amendment. Appellees contend that the Fifth Amendment is

> unenforceable because Tex lacked the mental capacity to execute it, or that Appellants procured it through undue influence, which Dick and Marshall deny.
>
> The issue presented in this appeal is who should decide this dispute. Appellants assert that the case should be sent to arbitration and that the arbitrator should decide it. Appellees contend that it is the court's role to decide the undue influence and lack of mental capacity issues because they are "gateway" issues regarding the formation of a valid contract. Appellants respond that the arbitration agreement, which is a part of the MFP Agreement, originally and as amended in the Fourth and Fifth Amendments, delegates the "gateway" issues of lack of capacity and undue influence regarding the Fifth Amendment, entrusting the decision to the arbitrator, not the court. Because we hold that the counterclaim, which is the same dispute that Appellants submitted to arbitration, should have been referred to arbitration, the trial court abused its discretion in granting the temporary injunction. We will reverse the order granting the temporary injunction and remand the case to the trial court for further proceedings consistent with this opinion.

The court's analysis relied on a three-step inquiry regarding arbitrability drawn from United States Supreme Court and Texas cases.

The first step for the court was to determine: Did a contract form? The court answered this question in the affirmative, explaining that the MFP Agreement was initially entered into by two parties although only Tex physically signed it. Tex signed the agreement on behalf of two parties in two capacities: himself personally and as Representative of the Estate of Deborah B. Moncrief as both General Partners and Limited Partners. The court said that the parties to the MFP Agreement anticipated that someday there would be different parties involved as successor partners and unequivocally provided that arbitration of disputes between them would be the agreed form of dispute resolution unless amended to provide otherwise. No party to the appeal contested the validity of the MFP Agreement, and the court thus concluded that the MFP Agreement became the "container agreement" for the arbitration agreement contained in it. The Fourth Amendment, signed by Tex for all parties, added Tom, Gary, and Gloria as successor General Partners but did not delete or amend the arbitration provision; rather, the arbitration provision was ratified and continued along with all other unamended provisions of the MFP Agreement. Tom, Gloria, and Gary conceded in the trial court that they were parties to the arbitration agreement and claimed to be the successor General Partners in the MFP under the Fourth Amendment and sought relief based on that status; therefore, in addition to being successors to the MFP Agreement, they claimed the benefit of the Fourth Amendment and were bound to the terms of the MFP Agreement, including the arbitration provision.

The second step of the three-part inquiry was: Do the arbitration covenants in a validly formed contract delegate contract validity issues to the arbitrator? The court answered this question in the affirmative as well. The court said that a court generally may consider an arbitration agreement's terms to determine which issues must be arbitrated unless the parties have agreed to send gateway issues such as arbitrability to the arbitrator. If the parties have so agreed, courts must compel arbitration unless the clause's validity is challenged on legal or public policy grounds. Thus, the proper procedure is for a court to first determine if there is a binding arbitration agreement that delegates arbitrability to the arbitrator. If so, the court must then compel arbitration so the arbitrator may decide gateway issues the parties have agreed to arbitrate. The court reviewed the broad terms of the clause at issue in this case and case law interpreting similar provisions and concluded that the provision in this case delegated contract validity issues to the arbitrator.

Finally, the court addressed the third step of the inquiry: If the arbitration clause delegates contract validity questions to the arbitrator, is the party resisting arbitration leveling complaints about the validity of the arbitration clause specifically, or the validity of the container contract as a whole? In this regard, issues regarding the validity of the container contract will be decided by the arbitrator, whereas issues regarding the validity of the arbitration clauses themselves must be decided by the trial court. The court concluded that the appellees' objections went to the container contract as a whole, not the arbitration agreement; therefore, the complaints were for the arbitrator to decide. The court pointed out that the appellees' objections were to the Fifth Amendment to the MFP Agreement, the container contract. They contended that Tex either did not have the mental capacity to execute it or was unduly influenced to sign it. If they are correct, then the changes to the Fourth Amendment by the Fifth Amendment making the appellants General Partners in the MFP would not be effective, leaving the appellees as General Partners, in which case the appellants arguably would have no right to seek arbitration since they would not be "Partners" entitled to seek arbitration under the agreement. The appellants, however, did not challenge the existence of the arbitration clause contained in the underlying container agreement. Although the court found no cases specifically on point, the court discussed an opinion by the Texas Supreme Court in another context that it believed supported its conclusion.

Based on the three-step analysis above, the court of appeals concluded that the trial court abused its discretion in granting the temporary injunction, and the court reversed the trial court's order enjoining the arbitration proceeding.

A dissenting justice reasoned that if Tex lacked capacity to enter the Fifth Amendment of the MFP Agreement, then the Fourth Amendment remained in effect as the last formed agreement. Thus, the dissenting justice argued that Tex's capacity was a threshold issue for the trial court to determine.

G. Access to Books and Records

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." After her release, she brought a lawsuit asserting numerous claims, including claims based on breach of fiduciary duty (direct and derivative) and denial of her right of access to books and records. The court of appeals overruled a challenge to the judgment in favor of the plaintiff on her books and records claims, holding that the plaintiff was entitled to declaratory relief and that exculpation clauses in the limited partnership agreements did not preclude findings of wrongdoing on the part of the general partners. The court of appeals also determined that the plaintiff had a right to recover attorney's fees in connection with her books and records claim, but the court remanded because the plaintiff was required to segregate her fees as to the separate entities.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the

President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Among Lisa's claims in the litigation was a plea for a declaration of her rights (under Tex. Civ. Prac. & Rem. Code § 37.004) to access the books and records of the General Partners and Limited Partnerships under various provisions of the Texas Business Organizations Code (TBOC) (Tex. Bus. Orgs. Code §§ 3.151-3.153, 101.502, 153.552) and the Partnership Agreements. She also sought declarations that the General Partners had failed to provide her with access to the relevant records in the past.

Pursuant to findings of the jury, the trial court entered a declaratory judgment declaring in part that: (1) certain General Partners breached the Limited Partnership Agreements and violated Section 153.552 of the TBOC by failing to provide her with books and records of those Limited Partnerships; (2) certain General Partners violated Section 101.502 of the TBOC by failing to provide Lisa with books and records of those General Partner LLCs; and (3) certain General Partners violated Sections 3.151 and 3.152 of the TBOC by failing to provide Lisa with books and records of those General Partners. The court declared that Lisa was entitled to recover attorney's fees pursuant to Section 3.152 and granted injunctive relief based on Lisa's contractual and statutory claims for access to the books and records. The entity defendants challenged the declarations and injunctive relief on various grounds.

The entity defendants argued that the trial court lacked subject matter jurisdiction to enter the declaratory judgment because there was no justiciable controversy among the parties. The defendants argued that Lisa received the requested books and records before trial, and there was thus no longer a dispute among the parties over that issue. The court explained that the Uniform Declaratory Judgment Act is remedial in nature and that its"purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Tex. Civ. Prac. & Rem. Code § 37.002(b). A trial court may render a declaratory judgment if it serves a useful purpose or will terminate the controversy between the parties. Although Lisa received access to the books and records prior to trial, the evidence reflected that she was denied access repeatedly and had to file suit to obtain the information. Lisa's request for a declaration of her right to access the books and records of the Limited Partnerships and General Partners under the Partnership Agreements and Texas law included her right to do so in the future; therefore, her request was not moot. A live controversy on her right of access still existed at trial, and the trial court had jurisdiction to hear her claim.

The entity defendants argued that there was no evidence the General Partners failed to provide Lisa with the books and records to which she was entitled. The record reflected that Lisa's attorney contacted SignAd GP, LLC and other General Partners in March 2013 to obtain the books and records, both in writing and by phone, and Wes Jr. told Lisa's lawyer that he would never allow Lisa to access the books and records. SignAd Outdoor's attorney later agreed to allow Lisa to come to his office and inspect the books and records, but SignAd Outdoor hired new counsel before Lisa was able to inspect the books. After several months of negotiations, the parties executed a confidentiality agreement. Some records were eventually provided, but Lisa ultimately had to file suit to obtain the remaining documents and information. She did not receive everything she requested until three years after making her initial request.

Although the Limited Partnership Agreements stated that the "General Partner shall keep at the principal place of business and make available to all Partners at any time during normal business hours, just and true books of account and all other Partnership records," Lisa testified she was allowed to go to SignAd Outdoor's office only twice and only outside of regular business hours. She also testified that she was only allowed to view a limited amount of information in a conference room and that there were two police officers there to observe her, her accountant, and her attorney. The court stated that this testimony alone was some evidence the General Partners failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC.

The entity defendants argued that there was no evidence Lisa had a "proper purpose" for examining the companies' books and records, or that her requests were "just and reasonable," as required under the TBOC. The court noted that there was evidence Lisa requested the documents for the purpose of conducting a forensic audit to verify whether the Limited Partnerships' business and finances were being managed properly. Lisa's accountant, Enriquez, conducted a forensic audit using the information requested. The court said this was some evidence that Lisa requested the materials for a "proper purpose," i.e., to conduct a forensic audit, and that her requests for documents to conduct an audit were "just and reasonable." The court noted that the Limited Partnership Agreements did not have a similar "proper purpose" requirement.

The entity defendants argued that jury questions inquiring into whether the General Partners breached the Limited Partnership Agreements by refusing to produce books and records voluntarily, as well as jury questions inquiring whether SignAd GP, LLC and other General Partners violated statutory provisions requiring access to the books and records, were "immaterial" because they were not tied to any damage question. The court pointed out that Lisa did not assert a breach-of-contract claim regarding the denial of access to books and records and did not seek damages for past breach of the Limited Partnership Agreements. She sought equitable relief based in part on the past violations of her contractual and statutory rights. The court concluded that the jury questions regarding the parties' past violations of the Limited Partnership Agreements and the TBOC provisions were material because the jury's answers to those questions formed the basis of the injunctive relief the trial court granted, specifically the questions of imminent harm.

Section 6(iv) of the trial court's judgment enjoined various parties from "denying [Lisa] access to the books and records of the General Partners and Limited Partnerships as per the operative agreements and under Texas law until such time as an equitable buyout of Lisa Horan, Trustee's interests are bought out and fully paid for or she no longer serves on the boards of managers of any entity, whichever comes later." The jury found that the General Partners—SignAd GP, LLC, Culcreuch West, LLC, Realty Acquisitions & Holdings LLC, and Big Leasing, LLC—failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC, and there was sufficient evidence supporting the jury's findings (Wes Jr.'s statement to Lisa's lawyer in March 2013 that he would never allow Lisa to access the books and records, the fact that Lisa had to file suit to obtain the documents and information to which she was entitled, and Lisa's failure to receive everything she requested for three years). The court said that the trial court could reasonably infer from this evidence that the General Partners would continue to withhold the companies' books and records from Lisa in the future. The court thus held that the trial court did not abuse its discretion by enjoining the General Partners and their managers—Wes Jr., Lee, and Stacey—from engaging in the conduct prohibited by Section 6(iv). On the other hand, Lisa did not assert a similar cause of action against any of the Limited Partnerships and there were no findings that any of the partnerships breached an agreement or violated any statutory provisions relating to books and records. Because liability for the Limited Partnerships was not established, the trial court abused its discretion by enjoining the Limited Partnerships from denying Lisa access to the books and records as set forth in Section 6(iv).

The entity defendants argued that Lisa was not entitled to declaratory relief because Lisa "couched her books and records claims, in part, in terms of a breach of the limited partnership agreements" and her claims for declaratory relief were based on the same theories, but the court of appeals said that Lisa's claims that the General Partners violated her statutory rights under the TBOC were not the proper subject of a breach-of-contract claim and did not encompass issues already before the court. Additionally, Lisa did not seek damages for a breach-of-contract claim; she sought a declaration of her right of access to the books and records under the Limited Partnership Agreements and TBOC, and she provided evidence that certain General Partners violated the agreements in the past by refusing her access.

The entity defendants also argued that the limitation-of-liability clauses in the Limited Partnership Agreements precluded any finding of wrongdoing against the General Partners, and that Lisa never "properly pleaded any of those legal theories." The court stated that the Texas Rules of Civil Procedure require matters submitted to the jury to have been "raised by the written pleadings and the evidence" (Tex. R. Civ. P. 278), and Lisa pleaded claims for declaratory relief and breach of fiduciary duty in connection with her claims for access to the books and records, asserting violations of the Limited Partnership Agreements and the TBOC. The entity defendants filed affirmative defenses to her claims based on the exculpatory clauses included in the Limited Partnership Agreements. The court quoted the exculpatory clauses as follows:

> Section 12.3 of the SignAd, Ltd. Partnership Agreement states:
> The General Partner shall not be liable to the Partnership or any Partner for any claim, demand, liability, cost, damage, or cause of action arising out of the General Partner's management of the Partnership's affairs, except where the claim at issue is based upon gross negligence, bad faith, willful breach of any material provision of this Agreement, or willful misconduct of the General Partner.
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> Section 8.02 of the Limited Partnership Agreements for Big Signs & Leasing (#1–6), Big Eastex #1, Ltd., and Ben Nevis West, Ltd. states:

> ... Always, unless fraud, deceit, or a wrongful taking shall be involved, the General Partner shall not be liable or obligated to the Limited Partners for any mistake of fact or judgment made by the General Partner in operating the business of the Partnership, which results in any loss of the Partnership or its Partners.... Neither shall the General Partner be responsible to any Limited Partner because of a loss of his investment or a loss in operations, unless it shall have been occasioned by fraud, deceit, or a wrongful taking by the General Partner.

The court of appeals stated that it was not necessary for Lisa to plead these affirmative defenses or any exceptions to them because the theories of "fraud, deceit, or a wrongful taking" and "gross negligence, bad faith, [and] willful breach" were pleaded by the General Partners as part of their affirmative defenses and presented to the jury at their request.

The court stated that nothing in these clauses precluded Lisa's declaratory judgment action because the clauses precluded a finding of "liability" but not a declaration of rights. Furthermore, to the extent the clauses applied, the jury was instructed on those limitations. Thus, the court said that the issues were specifically presented to the jury, who found that each of the General Partners breached their obligations under the Limited Partnership Agreements. Although the entity defendants argued there was no evidence of "fraud, deceit, or a wrongful taking" or "gross negligence, bad faith, or willful breach," the court said that they offered no elaboration of that argument. The court reiterated that there was sufficient evidence that General Partners breached their obligations under the Limited Partnership Agreements to grant Lisa access to the books and records by initially refusing to provide access and then failing to provide everything she requested for three years.

The trial court awarded Lisa $162,755.00 in attorney's fees and expenses in connection with her books and records claims to be paid by the General Partners, jointly and severally, pursuant to Sections 3.151 and 3.152 of the TBOC. The General Partners lodged numerous challenges to this award.

Section 3.151 of the TBOC sets forth the recordkeeping requirements for entities. Section 3.152 confers rights of access to records by governing persons as follows:

> (a) A governing person of a filing entity may examine the entity's books and records maintained under Section 3.151 and other books and records of the entity for a purpose reasonably related to the governing person's service as a governing person.
> (b) A court may require a filing entity to open the books and records of the filing entity, including the books and records maintained under Section 3.151, to permit a governing person to inspect, make copies of, or take extracts from the books and records on a showing by the governing person that:
> (1) the person is a governing person of the entity;
> (2) the person demanded to inspect the entity's books and records;
> (3) the person's purpose for inspecting the entity's books and records is reasonably related to the person's service as a governing person; and
> (4) the entity refused the person's good faith demand to inspect the books and records.
> (c) A court may award a governing person attorney's fees and any other proper relief in a suit to require a filing entity to open its books and records under Subsection (b).
> (d) This section does not apply to limited partnerships. Section 153.552 applies to limited partnerships.

Tex. Bus. Orgs. Code § 3.152. Although Section 3.151 does not authorize an award of attorney's fees, Section 3.152(c) does ("A court may award a governing person attorney's fees and any other proper relief in a suit to require a filing entity to open its books and records under Subsection (b)."). The entity defendants argued that Section 3.152 was inapplicable because Lisa did not bring a claim in this lawsuit in her capacity as a governing person to require an entity defendant to "open its books and records" under Section 3.152(b) and that there further was no evidence that Lisa satisfied the statutory conditions.

The entity defendants did not dispute that Lisa was a governing person, and the court stated that there was evidence with respect to the remaining requirements under Section 3.152(b). The entity defendants argued that by the time Lisa asserted a claim under Section 3.152 she had already received the "complete books and records" and thus could not have sued to "open" their books and records, as required by Section 3.152(b) and (c), but the only evidence cited in support of that argument was a statement in the opening statement of Lisa's attorney, which was not evidence. The trial court submitted a question to the jury on Lisa's claim against the General Partners under the statute, which inquired as follows:

> Did the General Partners of which Lisa Horan was a governing person fail to provide:
> (1) books and records of accounts;
> (2) a current record of the name and mailing address of each owner or member of the filing entity;
> (3) the General Partners' federal, state, and local information or income tax returns for each of the General Partners' six most recent tax years;
> (4) the General Partners agreement and certificate of formation and all amendments or restatements; or
> (5) other information regarding the business, affairs, and financial condition of the company that is reasonable for the person to examine and copy.

The instructions for this question tracked the requirements of Section 3.152(b). The jury was instructed that in order "to find a General Partner failed to provide documents, you must find" that:

> (1) [Lisa] is a governing person of the entity;
> (2) [Lisa] demanded to inspect the entity's books and records;
> (3) [Lisa's] purpose for inspecting the entity's books and records is reasonably related to [Lisa's] service as a governing person; and
> (4) the entity refused [Lisa's] good faith demand to inspect the books and records.

The jury found that the each of the General Partners failed to provide Lisa access to the books and records, and the trial court entered a judgment in favor of Lisa in accordance with the jury's findings.

Viewing the evidence and inferences in the light most favorable to the trial court's finding, the court concluded there was some evidence that (1) Lisa was a governing person who demanded to inspect the books and records of the General Partners, (2) she had a proper purpose for doing so, (3) the General Partners refused her demand, and (4) Lisa sued the General Partners to force them to open their books and records.

The entity defendants argued that the trial court abused its discretion by awarding attorney's fees against the General Partners "jointly and severally" because Lisa was required to segregate the fees owed by the different parties. Lisa contended that the requirement that fees be segregated between parties did not apply in this case because her books and records claims against the General Partners were essentially the same claim, based on the same course of conduct by the same decision-makers. The court stated that the General Partners were "separate and distinct legal entities, each with their own respective books and records and corresponding obligations to provide or grant access to such records." Lisa herself noted that each books-and-records question involved different entities and obligations under contractual or statutory grounds. Thus, the court held that Lisa was required to segregate the fees owed by the various entities, and the court remanded for a new trial on attorney's fees with respect to Lisa's books and records claims.

H. Dissolution/Winding Up

Hillegeist Family Enterprises, LLP v. Hillegeist, No. 01-21-00121-CV, 2022 WL 3162367 (Tex. App.—Houston [1st Dist.] Aug. 9, 2022, no pet. h.).

The court of appeals affirmed the trial court's grant of an application to supervise the voluntary winding up of a partnership. The court rejected the argument that the trial court had actually ordered an involuntary winding up of the business.

Hillegeist Family Enterprises, LLP ("HFE") was a general partnership that owned a strip mall. Three brothers—Blake, Brian, and Bruce—were partners in HFE; the fourth partner was Hillegeist Family Partnership, Ltd., another family-owned partnership. Blake was the managing partner of the strip mall enterprise, but Brian and Bruce ("the Brothers") began to suspect Blake of mismanaging the partnership money. The Brothers and HFE sued Blake, asserting claims for breach of fiduciary duty, theft under the Texas Theft Liability Act, and money had and received. Blake responded by asserting multiple counterclaims against the Brothers.

While the suit was pending, the Brothers filed an Application for Order Not to Interfere with Winding Up, asking the trial court to order Blake not to interfere with winding up the partnership. The Brothers subsequently filed an Amended Application for Order Regarding Winding Up, asking the trial court to supervise the partnership's winding up and to appoint Bruce to carry out the winding up. The Brothers claimed in the amended application that HFE held a partnership meeting and that the Brothers voted to voluntarily wind up the partnership. Blake voted against winding up, but the Brothers claimed that they held a majority-in-interest of the partnership because they also held the majority of Hillegeist Partnership Enterprises, Ltd., the fourth partner of HFE. The trial court granted their application to supervise the voluntary winding up of the partnership and appointed Bruce to carry out the winding up.

On appeal, Blake argued that the trial court erred in ordering an involuntary winding up of the partnership. The Brothers argued in response that they did not seek an involuntary winding up order; instead, they sought court supervision of a voluntary winding up, which the trial court had broad discretion to issue. The court agreed with the Brothers:

> The winding up of a partnership is the process of winding up the business and affairs of the partnership; when winding up is completed, the partnership is terminated. TEX. BUS. ORGS. CODE §§ 11.001(8), 152.701. Several events may trigger a required winding up of the partnership, including a voluntary decision to wind up the partnership or a court order requiring the winding up of the partnership. *Id.* § 11.051(2), (5).
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> Section 11.314 of the Business Organizations Code permits a district court to order the involuntary winding up and termination of a partnership, on application by an owner of the partnership, "if the court determines that: (1) the economic purpose of the [partnership] is likely to be unreasonably frustrated; (2) another owner has engaged in conduct relating to the [partnership]'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 [partnership]'s business in conformity with its governing documents." *Id.* § 11.314. A court may also, on application of the partnership or an owner of the partnership: "(1) supervise the winding up of the [partnership]; (2) appoint a person to carry out the winding up of the [partnership]; and (3) make any other order, direction, or inquiry that the circumstances may require." *Id.* § 11.054.
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> Blake argues the trial court erred in ordering the involuntary winding up of the partnership without proper pleadings and proof to support the cause of action. He argues the trial court should not have ordered the involuntary winding up without at least a summary-judgment proceeding because a trial court's determination under Section 11.314 is subject to the normal standards of pleading and proof, which the Brothers failed to meet. They did not plead a cause of action for involuntary winding up, did not file a summary-judgment motion for involuntary winding up, and did not present formal evidence proving their entitlement to an order of involuntary winding up. Thus, Blake argues, the trial court erred in entering the order regarding winding up.
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> The Brothers, however, argue that the trial court did not order an involuntary winding up under Section 11.314. They argue that the partnership, after voting to voluntarily wind up, applied for court supervision of the winding up under Section 11.054 of the Business Organizations Code, which does not require a summary-judgment level of proof. *See id.* § 11.054 ("[A] court may . . . supervise the winding up of the [partnership]."). The Brothers provided uncontroverted affidavits stating the partners held a meeting, and a majority-in-interest voted to wind up the partnership. *See id.* § 11.057(a) ("[A] voluntary decision to wind up a domestic general partnership . . . requires the express will of a majority-in-interest of the partners who have not assigned their interests."). The Brothers moved for the trial court's supervision of this voluntary winding up.
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> The trial court's order, which was incorporated into the final judgment, did not make any determination under Section 11.314 and instead stated that, pursuant to its supervisory authority under Sections 11.054 and 152.702 of the Texas Business Organizations Code, the court was appointing Bruce, one of the Brothers, as the person to carry out the winding up of the partnership. The trial court also "confirmed" facts the Brothers stated in their uncontroverted affidavits: the vote by which the Brothers elected to wind up the partnership was a valid action of the partnership, and Bruce, as the person appointed to carry out the winding up of the partnership, was entitled to

receive all information necessary to effectuate the winding up and termination of the partnership. Blake did not offer evidence to controvert those facts.

Regardless of whether Blake is correct that an order under Section 11.314 requires formal pleading and proof, the trial court did not make a determination or order [of] involuntary winding up under Section 11.314. Brian and Bruce did not formally plead or prove a cause of action under Section 11.314, and the trial court did not make a determination under Section 11.314, but formal compliance with Section 11.314 in this case was not necessary because the trial court's authority to supervise the winding up under Section 11.054 was based on the voluntary decision to wind up the partnership. The Brothers did not need to plead and prove a cause of action they did not invoke.

Blake has not cited any authority to suggest that a trial court's order under Section 11.054 after a voluntary winding up must be subject to a summary-judgment standard of proof. The statute itself does not require the trial court to make any determinations, unlike Section 11.314, and does not require a summary-judgment proceeding. Rather, the statute gives the trial court broad discretion to supervise the partnership's winding up and "make any other order, direction, or inquiry that the circumstances may require." *Id.* § 11.054; *see also Tucker v. Bubak*, Nos. 13-18-00427-CV & 13-18-00613-CV, 2019 WL 2529674, at *6 (Tex. App.—Corpus Christi–Edinburg June 20, 2019, pet. denied) (mem. op.) (noting request for order under Section 11.054 was "not a ground for summary judgment" that needed to be set out in summary-judgment motion but rather was subject to "trial court['s] broad authority" under that statute). We may not impose our own judicial meaning on a statute by adding words not contained in the statute. Further, Blake has not challenged the substance of the order itself on appeal; he has only argued that the trial court did not follow the proper procedure for issuing an order under Section 11.314, which the trial court did not do in this case, because the trial court issued the order regarding winding up under its supervisory authority under Section 11.054.

Blake also argues that Section 11.054 does not "serve as a judicial carte blanche" that allows the trial court to take action that is not expressly permitted elsewhere in the Business Organizations Code. *See Tucker*, 2019 WL 2529674, at *8 ("We do not believe § 11.054(3) was intended to serve as a judicial carte blanche that would allow a trial court unfettered authority to take actions—such as the rendition of an order requiring the involuntary termination of a corporation—that are not explicitly permitted elsewhere in the [Business Organizations C]ode."). Blake argues that, instead, a trial court's supervisory authority under Section 11.054 is conditioned on the court's determination that an event requiring winding up has already occurred. In this case, though, the Brothers presented affidavit testimony that an event requiring winding up had already occurred: they voluntarily voted to wind up the partnership. A voluntary decision to wind up the partnership is an event requiring winding up. TEX. BUS. ORGS. CODE § 11.051(2). Therefore Blake, by his own reasoning, has not shown that the trial court did not have supervisory authority under Section 11.054.

Gaddy v. Fenenbock, 652 S.W.3d 860 (Tex. App.—El Paso 2022, no pet. h.).

The court of appeals reversed the trial court's denial of a special appearance and concluded that a partnership winding up claim was insufficient, under the facts of the case, to provide a jurisdictional basis over a particular defendant.

Mark Fenenbock and Glenna Gaddy were siblings. Glenna had two children: Lane and Weston. Mark also had two children: Elysa and Lauren. In 1995, Bernard Fenenbock—Mark and Glenna's father—created the Fenenbock/Gaddy Magoffin Trust to hold assets for his four grandchildren: Weston, Lane, Elysa, and Lauren. Each grandchild received an equal share of the Trust's assets. In 2015, when Weston turned 30 years old, the trust terminated by its terms and by operation of law.

One of those assets was a Texas limited partnership, Silver Magoffin I, Ltd. (the Partnership). As limited partners, Mark, Glenna, and the Trust each owned a 33% interest in the Partnership. The other 1% was owned by Silver Magoffin, Inc., whose sole purpose was to act as the general partner of the Partnership. Mark and Glenna were equal shareholders in Silver Magoffin, Inc.

The Partnership owned a piece of real property located at 1720 Magoffin Drive in El Paso, Texas (the Property). In 1995, the Partnership leased the Property to W. Silver Recycling, Inc., which ran a recycling operation. Its president was Lane Gaddy, and Glenna Gaddy served as its secretary.

Elysa's petition alleged that in February 2000, the Texas Secretary of State involuntarily dissolved the Partnership, which caused the beneficial ownership of the Partnership's assets to be transferred to the partners. Based on that transfer, the owners of the Property and their percentages of undivided ownership in the Property were asserted to be the following: Silver Magoffin, Inc. 1%, Glenna Gaddy 33%, Mark Fenenbock 33%, Lane Gaddy 8.25%, Weston Gaddy 8.25%, Lauren Fenenbock 8.25%, and Elysa Fenenbock 8.25%.

According to Elysa's petition, the Partnership's general partner, Silver Magoffin, Inc., was required to wind up the affairs of the partnership upon the termination of the Partnership's existence, but it failed to do so. Elysa sued Weston and the other members of the Fenenbock/Gaddy family, along with Silver Magoffin, Inc. and W. Silver Recycling, Inc. Her first claim for relief asked the trial court to appoint herself or another person to wind up the Partnership by conveying deeds to the partners as tenants in common of the Property. The deeds would reflect their respective shares of ownership in the Property. This claim was made under section 11.054 of the Texas Business Organizations Code, which allows a court to appoint a receiver and to supervise the winding up of domestic limited partnerships.

Weston filed a special appearance, which the court ultimately granted after finding no general or specific jurisdiction over Weston. As part of the specific jurisdiction analysis, the court addressed Elysa's receivership claim and rejected her argument that the claim provided a sufficient jurisdictional basis over Weston:

> In her first claim, Elysa sought to have the court appoint a receiver to wind up the Partnership pursuant to section 11.054 of the Texas Business Organizations Code. *See* TEX.BUS.ORGS.CODE ANN. § 11.054. Under that statute, "Subject to the other provisions of this code, on application of a domestic entity or an owner or member of a domestic entity, a court may: (1) supervise the winding up of the domestic entity; (2) appoint a person to carry out the winding up of the domestic entity; and (3) make any other order, direction, or inquiry that the circumstances may require." *Id.*
>
> Based on her petition, the following are the only pleaded facts that would support jurisdiction under that claim: (1) Weston was the beneficiary of a trust; (2) the trust terminated and Weston received his share of its assets; (3) one of the assets was a limited partnership that held a piece of real property located in Texas; (4) in February 2000, the Texas Secretary of State terminated the partnership; and (5) as a result of the termination, an undivided share of the beneficial ownership of the Texas real property passed to Weston. And without saying as much, the "winding-up" claim thus effectively asserts that Weston is amenable to the jurisdiction of a Texas court so he can receive a deed that formalizes his beneficial ownership in the real property.
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> But even assuming that Weston is a necessary party to that determination—a valid question in its own right—our record contains evidence that the Texas Secretary of State has reinstated the Partnership. A court-appointed receiver stated in a letter brought to the attention of the trial court below that the Partnership was reinstated by the Texas Secretary of State on July 8, 2019. That determination undercuts the allegation that the beneficial ownership of the limited partnership's property was passed to Weston. *See* TEX.BUS.ORGS.CODE ANN. § 11.206(a) ("When the reinstatement of a terminated entity takes effect: (1) the existence of the terminated entity is considered to have continued without interruption from the date of termination; and (2) the terminated entity may carry on its business as if the termination of its existence had not occurred."). And the need to distribute deeds to all the beneficial owners of the property is the only jurisdictional hook even arguably pleaded for the first claim. That is to say, there are no allegations that Weston took any part in the control of the Partnership. Nor are there any allegations that Weston took any specific action in Texas germane to the dissolution of the Partnership (now reinstated). At most, he is alleged to be a passive beneficial owner of a piece of Texas land. And the reinstatement of the Partnership's legal status removes any need to pass legal title in the Property to Weston.

> This turn of events effectively renders [Elysa's] first claim moot. . . . Whatever the merits of the first claim might have been as to issuance of deeds for the 1720 Magoffin Drive property, it is now moot, and cannot provide a jurisdictional basis for bringing Weston into the lawsuit.

I. Expulsion of Partner

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff in the suit was a sibling of the individual defendants and an owner and/or governing person of the entity defendants. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal."

The plaintiff, who was a manager of the LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. The plaintiff alleged claims based on violation of her right to access books and records of the entities, breach of fiduciary duty (direct and derivative), unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, statutory oppression, malicious prosecution, dissolution, and constructive trust. The defendants asserted counterclaims for equitable or judicial expulsion of the plaintiff from the limited partnerships. The trial court entered a judgment in favor of the plaintiff for actual and punitive damages as well as declaratory and injunctive relief on a number of her claims.

On appeal, the court of appeals: (1) held that the plaintiff lacked standing to bring her derivative claim on behalf of an LLC general partner because she lacked an ownership interest in the LLC; (2) found sufficient evidence to support a judgment for actual and exemplary damages against several of the plaintiff's siblings for malicious prosecution of (and conspiracy to maliciously prosecute) the plaintiff based on their actions in having the plaintiff involuntarily committed; (3) sustained a challenge to the award of damages for mental anguish in favor of the plaintiff on her defamation claim; (4) held that one of the plaintiff's siblings did not exercise sufficient control over an LLC general partner to owe a fiduciary duty to the limited partnership and thus reversed the judgment against that sibling on the plaintiff's derivative claim for breach of fiduciary duty; (5) overruled a challenge by one of the plaintiff's siblings to the portions of the judgment based on the jury's finding that he breached an informal fiduciary duty to the plaintiff; (6) overruled a challenge to the judgment in favor of the plaintiff on her books and records claims, holding that the plaintiff was entitled to declaratory relief and that exculpation clauses in the limited partnership agreements did not preclude findings of wrongdoing on the part of the general partners; (7) held that there was sufficient evidence supporting the jury's findings of breach of fiduciary duty and damages on a derivative claim of the plaintiff on behalf of one of the limited partnerships based on the partnership's payment of personal legal fees of the plaintiff's siblings but held that the plaintiff was not entitled to recover directly a pro rata portion of the damages on the derivative claim; (8) concluded that the plaintiff did not establish statutory oppression on the part of her siblings and reversed the appointment of a rehabilitative receiver; (9) held that portions of a permanent injunction granted in favor of the plaintiff against the general partners, limited partnerships, and individual defendants were overly broad and vague and prohibited lawful conduct; (10) remanded for additional consideration of the defendants' request for expulsion of the plaintiff from the limited partnerships; (11) remanded for a new trial on the award of attorney's fees under various statutory provisions of the Business Organizations Code relating to books-and-records claims and derivative claims.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Most of the court of appeals' opinion addressed issues relating to claims for relief by Lisa against the individual and entity defendants, but the court also addressed claims by the entity defendants seeking expulsion of Lisa from the Limited Partnerships under Section 152.501(b)(5)(C) of the Texas Business Organizations Code (TBOC). That provision states that a partner may be expelled from a partnership by judicial decree "on application by the partnership or another partner, if the judicial decree determines that the partner" has "engaged in conduct relating to the partnership business that made it not reasonably practicable to carry on the business in partnership with that partner." Tex. Bus. Orgs. Code § 152.501(b)(5)(C). The defendants argued that Lisa should be expelled from the Limited Partnerships based primarily on her repeated disruptive and hostile conduct at board meetings and interactions with other board members and the entities' management teams. The jury found that Lisa engaged in conduct relating to the business of each of the nine Limited Partnerships that made it not reasonably practicable to carry on the business in partnership with her, and the jury found that the individual defendants and General Partners did not. The trial court, however, did not address this finding or grant the entity defendants' request for a decree of expulsion. The defendants argued that the trial court was not at liberty to disregard the jury's finding and erred by failing to decree that Lisa should be expelled from the Limited Partnerships. Lisa argued that Section 152.501 of the TBOC only applies to general partnerships and not to limited partnerships.

The court disagreed with Lisa that Section 152.501 does not apply to limited partnerships based on Section 153.003(a), which provides that issues not addressed in Chapter 153 are controlled by "the provisions of Chapter 152 governing partnerships that are not limited partnerships." Tex. Bus. Orgs. Code § 153.003(a). The court cited a federal district court that determined that Section 152.501(b)(6)(B) applies to a limited partnership. *See Faulkner v. Kornman*, No. 10-301, 2012 WL 1066736, at *4 (Bankr. S.D. Tex. Mar. 28, 2012).

Lisa also argued that the jury's finding that she satisfied the criteria for expulsion was immaterial because the jury found multiple grounds supporting the appointment of a receiver and an equitable buyout, including oppression and breach of a fiduciary duty to Lisa, and that the court could not simultaneously order an equitable buyout and expulsion. Lisa further argued the court was not "required" to grant expulsion because the relief is equitable in nature and the court has discretion to decide upon the proper remedy. The court of appeals stated that, even if the jury's finding that Lisa satisfied the criteria for expulsion was rendered immaterial by the oppression finding, that finding was being reversed along with the corresponding appointment of a rehabilitative receiver. Under the circumstances, the court found it appropriate to remand to the trial court to consider the jury's finding regarding Lisa's conduct and the entity defendants' request for a decree of expulsion under Section 152.501(b)(5)(C).

J. Creditor's Remedies: Charging Order, Turnover Order

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, No. 08-00225-CV, 2023 WL 3672025 (Tex. App.—El Paso May 25, 2023, no pet. h.) (mem. op.).

In this companion appeal to the case summarized below, the court discussed principles of partnership property and the charging order remedy and concluded that "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt."

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. This appeal by Rio Grande LP challenged the trial court's dismissal of its lawsuit against La Zona. Like the other appeal, which directly addressed the authority of the receiver appointed in the litigation between the judgement debtor and judgment creditor, the court was essentially called upon to analyze the receiver's authority to seize assets of the limited partnership that was allegedly affiliated with the judgment debtor. The court stated:

> As we explained in that case, even if Rio Grande, LP's general partner was affiliated with WCCG, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 563 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing that a "judgment creditor may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted).
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> Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the individual partner has received or is owed and must do so through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of judgment debtor's partnership interest) (*citing Stanley*, 314 S.W.3d at 664).
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> We recognized in our opinion that certain limited exceptions to this rule allow a court to issue a turnover order of a partnership's assets, i.e., when the debtor is the only member of the partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disruption to the partnership's business and to protect the other partners' interests. *See Heckert v. Heckert*, No. 02-16-00213-CV, 2017 WL 5184840, at *7-9 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.) (upholding turnover order directing ex-husband to turn over to ex-wife assets he placed in a non-operating LLC and partnership in which he was the sole member and partner, as there would be no disruption to the operating business or detriment to other individuals) (citing Michael C. Riddle, et al., *Choice of Business Entity in Texas*, 4 Hous. Bus. & Tax L.J. 292, 318 (2004))

("[T]he charging order developed as a way to prevent the creditor of one partner from holding up the business of the entire partnership and causing injustice to the other partners."). But we noted that the record in the first case reflected that Rio Grande, LP was a partnership with at least two other partners possessing a substantial interest in the partnership. And we concluded that absent evidence the other partners were themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of Rio Grande, LP's cause of action and its property as part of its collection efforts to satisfy WCCG's debt. We therefore reversed the trial court's judgment in that case and remanded the matter to the trial court for further proceedings to reconsider whether [the receiver] had the authority to appear and act on behalf of Rio Grande, LP as he did.

The court concluded that the record in this case was deficient in the same manner as the other appeal. Although the receiver supplied additional evidence linking Rio Grande LP's general partner to WCCG, the record did not support the finding that the two limited partners had any relationship to WCCG. Because "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt," the court reversed and remanded the dismissal of the case for the trial court to further consider the receiver's authority in light of the court's analysis.

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, __ S.W.3d __, 2023 WL 3663550 (Tex. App.—El Paso May 25, 2023, no pet. h.).

The court of appeals held that the record did not support the trial court's finding that a receiver appointed to collect a judgment against a party in another case had authority to act for a limited partnership in this case. Although the receiver argued that the limited partnership in this case was a subsidiary of the judgment debtor, the court stated that the record did not establish that the receiver had authority to directly reach the assets of the limited partnership, and the record did not support the receiver's asserted right to manage the limited partnership or its LLC general partner given the exclusivity of the charging order remedy.

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. In this appeal, Rio Grande LP essentially argued that the receiver lacked the authority to appear in the suit and act on Rio Grande LP's behalf.

After addressing procedural issues and concluding that a prior appellate opinion by another court affirming that the receiver was properly appointed in the case between Princeton and WCCG did not preclude the court in this case from reviewing the validity of the receivership order provisions (at least insofar as the order applied to the receiver's actions in the case affecting Rio Grande LP's interests), the court analyzed whether the record supported the trial court's finding that the receiver was authorized to settle Rio Grande LP's lawsuit with La Zona. The court first noted that the receiver entered his appearance in this case by providing a "notice" stating he was WCCG's receiver and that Rio Grande, LP was a WCCG "subsidiary." The receiver asserted he was appearing as counsel of record for WCCG and its "subsidiary" Rio Grande LP, replacing Rio Grande LP's prior counsel. The receiver did not provide any documentation showing that Rio Grande, LP was a "subsidiary" of WCCG or that the receiver had any authority to seize any assets belonging to the partnership. Rio Grande, LP supplied the limited record available to the court in this case.

La Zona argued that the receiver had the authority to replace Rio Grande, LP's attorney in the lawsuit and settle the lawsuit against La Zona based on the receivership order, which directed WCCG to identify and turn over to the receiver all interests of WCCG in any business venture, including LLCs and limited partnerships. According to La Zona, the receivership order broadly authorized the receiver "to seize the membership interest of" any LLC in which WCCG was a member and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." La Zona contended that this authority included taking possession of "real property ...

causes of action ... [and] contract rights." According to La Zona the receiver did that by seizing WCCG's membership interest in the general partner of La Grande LP and acting on La Grande LP's behalf in this litigation. The court found La Zona's argument to be problematic on at least two levels.

A. No right to seize partnership assets or the partnership's cause of action

First, La Zona Rio's argument conflates several separate provisions in the Receivership Order. The provision giving [the receiver] the right to take possession of "real property ... causes of action ... [and] contract rights" relates to assets belonging to WCCG—the judgment debtor. Here, [the receiver] took "possession" of a cause of action filed by Rio Grande, LP.

A business entity, such as a partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members, and has the right to bring suit on its behalf. A partnership's assets belong to the partnership itself, not to the individual partners. The "partnership interest" of a partner is his "share of profits and losses or similar items and the right to receive distributions."

Accordingly, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing "judgment creditor may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted). Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the partner has received or is owed, which may only be done through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of a judgment debtor's partnership interest) (citing *Stanley*, 314 S.W.3d at 664).

La Zona Rio points out exceptions to this rule that allow a court to issue a turnover order of a partnership's assets, such as when the debtor is the only member of the partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disrupting the partnership's business and to protect the other partners' interests. The record reflects that Rio Grande, LP is a partnership with at least two other partners that possess a substantial interest in the partnership. Absent evidence that the two other partners are themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of the partnership's cause of action or any of its property as part of its collection efforts to satisfy WCCG's debt.

B. No right to manage the partnership

Second, La Zona Rio also seeks to uphold [the receiver]'s actions by pointing to the Receivership Order provision giving [the receiver] the right "to seize the membership interest of any Limited Liability Company in which [WCCG] is a member," and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." Although La Zona Rio appears to recognize that the Receivership Order does not give [the receiver] the authority to manage or operate Rio Grande, LP directly, as it was not a Limited Liability Company, La Zona Rio contends [the receiver] was authorized to do so indirectly by taking over the management and operation of Rio Grande, LP's general partner, Rio Grande, GP, LLC, which was in fact a limited liability company. And in turn, La Zona Rio contends that "managing litigation falls squarely within the descriptions of 'manag[ing]' and 'operat[ing]' " the LLC, which it contends gave [the receiver] the authority to settle Rio Grande, LP's lawsuit.

> La Zona Rio's argument is dependent upon a finding that WCCG has a "membership interest" in Rio Grande, GP, LLC. According to La Zona Rio, we should find that WCCG has such an interest by virtue of Natin Paul's involvement as the president and "governing person" for the LLC. And while La Zona Rio is correct that both this Court and the Third Court of Appeals have recognized that Paul does "business through a network of entities which used 'World Class' or 'WC' in their names," with his "principal entity" being WCCG, this alone is not a sufficient basis upon which to conclude WCCG has a "membership interest" in every limited liability company (or partnership) in which Paul is involved. Even if we were to conclude that WCCG had a membership interest in Rio Grande GP, LLC, there is nothing in this record on which the trial court could have relied to conclude [the receiver] had the authority as general partner of Rio Grande, LP to manage, operate, and even transact the partnership's assets under the guise of collecting on the general partner's debt. [footnotes omitted]

In footnotes, the court elaborated on some of the points made above including the distinction between partnership property and a partner's partnership interest and the nature of a charging order. In one of its footnotes, the court addressed an argument by La Zona that the holding in *Pajooh* regarding the exclusivity of the charging order and the inability to reach a partnership's assets when collecting a judgment against a partner. In this regard, the court stated:

> La Zona Rio contends that the holding in *Pajooh* only applies to judgment creditors and not to court-appointed receivers. However, La Zona Rio cites no authority for the proposition that a receiver is to be treated differently than a judgment creditor in collecting on a judgment from a partner in an LP. And there appear to be cases in which courts have, at least indirectly, indicated that a receiver must also apply for a charging order to be entitled to seize a partnership interest belonging to a judgment debtor. *See, e.g., Howe v. Red Oak State Bank*, No. 10-90-037-CV, 1990 WL 10089566, at *3 (Tex. App.—Waco Dec. 20, 1990, no writ) (finding receiver was authorized to apply for a charging order to collect on a judgment).

Myers v. HCB Real Holdings, LLC, No. 05-20-00419-CV, 2022 WL 4298553 (Tex. App.—Dallas Sept. 19, 2022, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's entry of a turnover order and a charging order. The court rejected appellant Richard Myers' arguments that the turnover order required him to relinquish his business interests and that the charging order interfered with a security interest.

On May 17, 2016, the trial court signed a final judgment, which awarded HCB Real Holdings, LLC ("HCB") a judgment in the amount of $873,786.50 against Myers and Thomas J. Wouters, jointly and severally. To collect on this judgment, HCB applied for a turnover order, and the trial court granted the application on February 26, 2020. The order named a receiver, identified assets and records subject the receiver's control, and ordered Myers to cooperate with the receiver and to deliver to him all of the assets and records identified in the order that were in Myers' possession or control.

On September 24, 2020, HCB filed an application in the trial court for a charging order against Myers' interest in S/R Myers Family, L.P. in the amount of the unsatisfied final judgment. Myers filed no response to the application. The trial court granted the application and entered a charging order providing that Myers' membership interest in S/R Myers Family, L.P. was subject to the order and that distributions due to Myers based on that membership interest were to be paid directly to HCB, up to the amount of $1,163,745.48. Myers appealed.

The court began by observing that the Texas turnover statute provides judgment creditors with a procedural device to assist them in satisfying their judgment debts. The purpose of a turnover proceeding is to ascertain whether an asset is in the possession of the judgment debtor or is subject to the debtor's control. After discussing the evidence submitted by the parties, the court concluded that "HCB presented some evidence of a substantive and probative character to support its application for a turnover order."

Myers then argued that the turnover order inappropriately required him to relinquish his interests in partnerships and LLCs, which violated the exclusivity of the charging order remedy. The court disagreed with Myers' position:

> In his second issue, Myers argues that the trial court abused its discretion by ordering him to turn over certain assets that are not properly subject to turnover orders. Specifically, he argues that a charging order is the exclusive remedy by which (a) a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest, and (b) a judgment creditor of a member or of any other owner of a membership interest in a limited liability company may satisfy a judgment out of the judgment debtor's membership interest.
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> Myers complains specifically that the Turnover Orders define his "interest in all entities [he] owns or controls, including but not limited to trusts, limited liability companies, corporations, Subchapter S corporations, partnerships, or joint ventures" as "Receivership Interests." He contends that the powers granted to the receiver related to these Receivership Assets would subject Myers's businesses to disruption by the receiver and would "directly circumvent both settled case law and legislative intent." He relies on Business Organizations Code sections related to charging orders and ownership interests, which provide mechanisms for a judgment creditor to access the debtor's interest directly from the business. See TEX. BUS. ORGS. CODE ANN. §§ 153.256(d) (regarding partnership interests), 101.112(d) (regarding membership interests in limited liability companies).
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> Myers's reading of the Turnover Orders is too limited in its scope. Settled law requires the effect of a court's order to be interpreted with reference to the entire order. Thus, Myers points to the inclusion of his business "interests" in the list of Receivership Assets, but he overlooks the fact that the entire list is modified by the adjective "non-exempt." The receiver must view all listed assets through that "non-exempt" filter.
>
> Moreover, after defining the non-exempt items subject to the Turnover Order[] as Receivership Assets, the orders go on to require Myers: "to fully cooperate with the Receiver and [he] shall deliver to the Receiver . . . all Receivership Assets in the possession or control of the Defendant." Myers acknowledges that this Court has held that the Business Organizations Code provisions he cites do not preclude turnover of a judgment debtor's distributions from a partnership or limited liability company after they are made. *See Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 669 (Tex. App.—Dallas 2010, no pet.); *Henderson*, 2016 WL 1702221, at *2. Thus—as *Stanley* and *Henderson* permit and as Myers concedes—he is bound by the Turnover Orders to deliver to the receiver only what is in his possession and control, i.e., the distributions he has already received from his business entities.
>
> We conclude the Turnover Orders do not address direct access to a judgment debtor's business interests. We overrule Myers's second issue.

Myers then argued that the charging order (1) represented an impermissible attempt to amend the turnover order, which was already on appeal, and (2) granted HCB more relief than it originally requested in its application by including language requiring Myers "to turn over to HCB all proceeds from his [partnership] interest." The court noted that Myers did not file a response to HCB's Application for Charging Order. According to the court, "[t]hese purported flaws in the Charging Order were not raised in the trial court and, therefore, present nothing for our review."

Myers final argument was that the trial court signed the charging order without taking account of the security interest that his attorneys held in his partnership interest in S/R Myers Family, LP. Myers asserted that the charging order impermissibly subordinated that security interest to HCB's right of recovery under the charging order. The court of appeals disagreed:

> . . . . With the trial court's permission, counsel for Myers, William Wolf, filed his declaration, asserting that Wolf & Henderson, P.C. "currently holds a security interest in [Myers's] interest in [S/R Myers Family, L.P.] that any Charging Order would be subordinate to."

However, by raising this issue Myers asserts a security interest that he does not hold; according to Wolf's declaration, Wolf & Henderson, P.C. (the Firm) holds the interest. Myers has not identified any authority giving him the legal capacity to raise the Firm's security interest in this appeal.

Nor has the Firm taken any action that would give it the legal capacity to raise the security interest in this appeal: it has not intervened in the underlying suit; it has filed no pleading and requested no relief other than making an objection to the Charging Order. Stated simply, the Firm is not a party to this case. We conclude that any issue raised by its security interest in Myers's partnership interest is not properly before us in this appeal.

K. Standing or Capacity to Sue

Breitburn Operating, LP v. Parsons, No. 14-21-00310-CV, 2023 WL 2257782 (Tex. App.—Houston [14th Dist.] Feb. 28, 2023, no pet. h.) (mem. op.).

The court held that the trial court abused its discretion in issuing a temporary injunction because the partner who sought the temporary injunction did not have a probable right of recovery on his claims for breach of certain conveyance agreements. The partner did not have the capacity to sue individually for breach of the conveyance agreements because the agreements were with the partnership and the claims for breach thus belonged to the partnership rather than the partner.

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 "Conveyances"), 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 Operating, LP) breached the Conveyances by failing to pay the Trust tens of millions of dollars in royalties. The predecessor of Breitburn Operating, LP 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 Conveyances. Breitburn Operating LP ("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. 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 a prior 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, and the court of appeals agreed with Breitburn that the order for deposit of the funds into the registry of the court should be vacated because the Trust did not have the capacity to recover the funds in the court's registry. In this opinion, the court of appeals addressed whether a temporary injunction issued by the trial court in favor of Parsons was an abuse of discretion. The temporary injunction order prohibited Breitburn from withdrawing or transferring any of the funds in the Wells Fargo account.

In this appeal, the court of appeals addressed whether the trial court abused its discretion by issuing the temporary injunction order. To obtain a temporary injunction, an applicant must establish (1) a claim against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. The trial court found that Parsons had established a probable right to relief on his claims against Breitburn and its predecessors for breach of their duty to make overriding royalty payments as required by the Conveyances. Breitburn argued that the trial court abused its discretion in finding that Parsons had a probable right to relief. The court explained that the Partnership had two partners: (1) the Trust, a non-managing general partner; and (2) ConocoPhillips, the managing general partner. Parsons was the trustee of the Trust. Breitburn contended that Parsons lacked capacity to pursue claims for alleged breaches of the Conveyances. 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 Conveyances, had capacity to sue for the funds. The court explained that the Texas Supreme Court has concluded that the question of whether a claim brought by a partner actually belongs to the partnership is a question of capacity because it is a challenge to the partner's legal authority to assert the claim. A partner's lack of authority to recover on a claim that belongs to the partnership is not a matter of constitutional standing and does not implicate subject-matter jurisdiction. The court noted that the Partnership was not a party to the case and that Parsons' live pleading and his application for deposit into the court 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 Am. Star Energy & Minerals Corp. v. Stowers,* 457 S.W.3d 427, 429 (Tex. 2015); Tex. Bus. Orgs. Code §§ 152.056, 152.101. The court also recited principles of partnership property and the distinction between a partnership interest and partnership property. *See Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.). 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. 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 the trial court abused its discretion in finding that Parsons had a probable right to the relief he sought, the trial court abused its discretion in granting Parsons' application for a temporary injunction.

AciTech, L.P. v. LaCore Nutraceuticals, Inc. (In re ActiTech, L.P.), Case No. 22-30049, Adversary No. 22-03001, 2023 WL 2051894 (Bankr. N.D. Tex. Feb. 13, 2023).

The court rejected an argument that the limited partnership debtor/plaintiff in this adversary proceeding lacked standing to be a plaintiff because it lacked a limited partner.

In a footnote, to the court's conclusion of law that the limited partnership debtor/plaintiff in this adversary proceeding had standing to bring the claims, the court stated:

> At trial and in their post-trial brief, Defendants alleged for the first time that ActiTech does not have standing to be a Plaintiff in this Adversary Proceeding because it lacks a limited partner, which is required under Texas law for a limited partnership to exist. According to Defendants, the undisputed evidence is that ActiTech's limited partner, Active Organics, Inc. f/k/a Active Organics, LP, was sold to and merged with Lipotec USA, Inc. Further according to Defendants, because a party that lacks a legal or factual existence under Texas law may not prosecute a lawsuit and obtain a judgment in its favor, they contend ActiTech is not entitled to a judgment as a matter of law. See Post-Hearing Brief, Doc., 220 at n. 1—which cites no specific authority. The court finds this argument unsubstantiated and unpersuasive. Moreover, the court also notes that this issue was only superficially referred to in the Pre-Trial Order (see Doc. 167, ¶¶ 29 & 30 therein), which governs this proceeding.

LMP Austin English Aire, LLC through Lafayette English Partner, LLC v. Lafayette English Apartments, LP, 654 S.W.3d 265 (Tex. App.—Austin 2022, no pet. h.).

The court concluded that owners of partnership interests are not creditors with standing to assert claims under the Texas Uniform Fraudulent Transfer Act ("TUFTA").

In 2006, Lafayette English Apartments, LP financed its purchase of two apartment complexes ("the Properties") with a $17,300,000 loan from RAIT Partnership, LP (the "Lender") that was secured by the Properties. Appellants owned interests in business entities that bought the Properties. In 2009, contending that the Properties were underperforming, the Lender took control of the Properties and the entities that owned the Properties were reorganized. The Properties were sold in 2015, and in 2018, Appellants filed suit challenging the sale.

In their suit, Appellants asserted derivative claims against various parties, including (1) the reorganized entities that owned the Properties (Lafayette English GP, LLC and Scott Schaeffer), and (2) the parties who purchased the Properties in 2015 from the lender-controlled owners ("First Buyers"). Appellants pleaded various claims, including violations of TUFTA.

Appellees responded with several motions, including a plea to the jurisdiction. After hearing the motions, the trial court signed a series of interlocutory orders, including an order that granted Appellees' plea to the jurisdiction as to Appellants' TUFTA claims. Appellants challenged this order on appeal.

The Austin Court of Appeals concluded that Appellants, as owners of partnership interests, were not "creditors" under the TUFTA. Consequently, they lacked standing to bring a TUFTA claim:

> In response to Appellants' pleading of "creditor" status, First Buyers refer to a provision in the 2006 Original Partnership Agreement expressly disclaiming creditor status: "No Partner shall have any interest in any specific assets of the Partnership, and no Partner shall have the status of a creditor with respect to any distribution pursuant to Section 16 [discussing distributions to partners]." Thus, as First Buyers note, it is undisputed that Limited Partner, in which Subsidiary Limited Partner had a 46.5% interest, owns equity interest—not debt—in Original Partnership. Relying on the construction of the UFTA by other courts, First Buyers contend that being a holder of an equity interest in a limited partnership is inconsistent with being a "creditor" in the context of statutory fraudulent transfer claims. We agree.
>
> First Buyers point to the customary distinction between equity interests and debt, as referenced by a Pennsylvania federal district court: "[I]t is well-established that a limited partnership interest constitutes an equity security. In turn, courts within the Third Circuit have consistently held that equity interests are not 'debt' within the meaning of PUFTA [Pennsylvania Uniform Fraudulent Transfer Act] or the Bankruptcy Code's analogous fraudulent transfer provision." *United States v. Rocky Mountain Holdings, Inc.*, 782 F. Supp. 2d 106, 122 (E.D. Pa. 2011) (internal citation omitted); *see* 11 U.S.C. § 548. That court also distinguished the fixed nature of creditors' claims from the variable distributions to partners: "It is widely held that true creditors 'hold claims regardless of the performance of the partnership business,' whereas payment of partnership distributions are 'subject to [ ] profits or losses.'" *Id.* (quoting *In re Riverside-Linden Inv. Co.*, 925 F.2d 320, 323 (9th Cir. 1991)). First Buyers also cite as persuasive authority the Ninth Circuit's conclusions that "[a] partnership interest is not a claim" and that "if partnership interests are not 'claims,' then the holders of those interests are not 'creditors.'" *In re Riverside-Linden Inv. Co.*, 925 F.2d at 323.
>
> State courts have similarly rejected the notion that holders of equity interests or investments have "creditor" status under the Uniform Fraudulent Transfer Act. One court determined, as part of its constructive-fraud analysis under the Arizona UFTA, that an "interest in a partnership is not a debt of the partnership." *Hullett v. Cousin*, 204 Ariz. 292, 63 P.3d 1029, 1035-36 (2003). Another court recognized, when applying the Hawaii UFTA, that "the return of a capital contribution to or for the benefit of an investor is not the same as the repayment of indebtedness to a creditor." *Schmidt v. HSC, Inc.*, 358 P.3d 727, 737-739 (Haw. Ct. App. 2015), *cert. denied*, 2015 WL 8682934, 2015 Haw. LEXIS 330 (Haw. Dec. 9, 2015). And another court concluded that: "Equity investments neither trigger a right to payment nor transform capitalists into creditors. Consequently, [plaintiff's] alleged equity interest in [a business entity] does not constitute a claim for the purposes of the UFTA, and [he] cannot claim creditor status on its account." *Maloney v. Alliance Dev. Grp., LLC*, No. 06 CVS 6776, 2006 WL 2787895, at *8, 2006 NCBC LEXIS 14, at *20 (N.C. Super. Ct. Sept. 18, 2006).
>
> Debt holders, by contrast, have been afforded statutory "creditor" status under TUFTA. . . .

> On this record, we conclude that Subsidiary Limited Partner's partnership interest in Original Partnership, as the 46.5% interest holder in Limited Partner, is an equity interest that does not constitute a "debt" or a "claim" as those terms are defined in TUFTA. Moreover, because TUFTA defines a "creditor" as "a person . . . who has a claim," the lack of a "claim" defeats Appellants' pleaded status as a "creditor." *See* Tex. Bus. & Com. Code § 24.002(4). Finally, because Appellants are not statutory "creditors" of Original Partnership, the seller of the Properties, Appellants lacked standing to bring their TUFTA claims as pleaded against First Buyers, the 2015 purchasers of the Properties.

In re Breitburn Operating LP, No. 14-21-00337-CV, 2022 WL 2920679 (Tex. App.—Houston [14th Dist.] July 26, 2022, orig. proceeding) (mem. op.).

The court of appeals determined that a partner did not have capacity to sue individually on a partnership claim. The court vacated a lower court order that compelled the deposit of $13.4 million into the registry of the court.

In June 1983, the Louisiana Land and Exploration Company ("LLEC") created the LL&E Trust (the "Trust"). LLEC and the Trust then created the LL&E Royalty Partnership (the "Partnership"). The Trust had a 99% interest in the Partnership and LLEC had a 1% interest and was the managing general partner. The Partnership was formed for the purpose of receiving and holding the overriding royalty interests, receiving proceeds from the overriding royalty interests, paying the liabilities and expenses of the Partnership, and disbursing remaining revenues to the Trust and managing general partner.

Through a series of acquisitions, ConocoPhillips Company became LLEC's successor as managing general partner of the Partnership. Breitburn Operating LP became contractually obligated to pay certain sums to the Partnership under a "Conveyance" agreement.

Roger Parsons, the trustee of the Trust, ultimately brought suit on behalf of the Partnership against Breitburn and other defendants. The parties got into a dispute over monies in a Wells Fargo bank account, and the trial court ultimately ordered Breitburn to deposit $13,400,000 into the registry of the court. Breitburn filed a mandamus proceeding and asserted, among other arguments, that the Trust did not have the capacity to recover the funds ordered into the court's registry. More specifically, Breitburn contended that Parsons lacked capacity to pursue the funds because only the Partnership, which was the assignee under the Conveyance, had capacity to sue for the funds.

The court began by noting that "[a] party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." The issue of capacity "is conceived as a procedural issue dealing with the personal qualifications of a party to litigate." The court then observed that the Partnership was not a party to the case, as Parsons' counterclaim made clear that he was the party seeking damages. Indeed, Parsons listed himself as "Defendant/Counter-Plaintiff/Third Party Plaintiff" in his counterclaim and third-party petition and repeatedly referred to himself as the party bringing claims against Breitburn. Moreover, in his application for deposit into the court's registry and temporary injunction, Parsons asserted that he was bringing the application in his capacity as trustee of the Trust.

Parsons first argued that Breitburn did not properly verify that Parsons lacked capacity to recover the funds in the court's registry. Specifically, Parsons asserted that the affidavit attached in support of Breitburn's verified answer was not sufficient because it did not verify any of the facts alleged as to Parsons and the Trust as true and correct and it was not based on personal knowledge. Therefore, according to Parsons, Breitburn waived its capacity defense. The court observed that "Rule 93 requires that a pleading, which alleges that the plaintiff does not have the legal capacity to sue or is not entitled to recover in the capacity in which it sues, must be verified unless the truth of such matters appear of record." It also noted that "[a] party who fails to raise the issue of capacity in the trial court may not raise it for the first time on appeal." According to the court, Parsons never objected to any lack of pleadings by Breitburn on its capacity argument. Parsons had an opportunity to object to any lack of pleading of capacity, but it instead addressed the merits of the defense. As a consequence, the court concluded that "the issue of capacity was tried by consent."

The court then proceeded to discuss the merits of the capacity argument. Ultimately, Parsons' failure to assert that he was bringing claims on behalf of the Partnership was determinative for the court in concluding that Breitburn successfully established a capacity defense:

A Texas [p]artnership is "an entity distinct from its partners." *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 429 (Tex. 2015) (quoting Tex. Bus. Orgs. Code § 152.056). "As an independent entity, a partnership may enter into contracts in its own name, may own its own property, and may sue and be sued in its own name." *Id.* (citing Tex. Bus. Orgs. Code § 152.101; Tex. R. Civ. P. 28). "Partnership property is not property of the partners." Tex. Bus. Orgs. Code § 152.101; *see also Siller v. LPP Mortg., Ltd.*, 264 S.W.3d 324, 329 (Tex. App.—San Antonio 2008, no pet.) ("[I]f the property was, in fact, partnership property, it could not be considered property of the individual partners."). "A 'partnership' is not an interest in any specific partnership property. Instead, it is the partner's right to receive his distributive share of the profits and surpluses of the partnership." *Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.). In Texas, a cause of action accruing to the partnership is partnership property and a partner may not bring suit on such cause of action. *See Cates v. Int'l Tel. & Tex. Corp.*, 756 F.2d 1161, 1173, 1176 (5th Circ. 1985) (applying rule to general partnership).

Parsons acknowledges that a general partnership in Texas may file a claim on its own behalf under the Texas Business Organizations Code, but argues that there is no statute or common law rule holding that only the partnership, and not the partners, may pursue the rights of the partnership. Instead, according to Parsons, the common law rule in Texas is that general partners are proper parties to pursue the rights of a general partnership. *See, e.g., Eagle Props., Ltd. v. Texas Commerce Bank*, No. 08-00-00118-CV, 2000 WL 1268185, *1 (Tex. App.—El Paso Sept. 7, 2000, no pet.) (mem. op., not designated for publication) (stating that "[a] partner may bring suit on behalf of a partnership").

Parsons argues 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. *See Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257 (Tex. App.—Houston [14th Dist.] 1992, no writ). In *Allied Chemical Company*, DeHaven, Novak, Phillips, and Reams were partners of Maglon Partnership. *Id.* at 260. DeHaven sued Maglon, Novak, Phillips, Reams, Allied, Gambrell, and others for fraud and conspiracy in the breach of a contract. *Id.* Allied asserted that DeHaven lacked standing "*to sue on behalf of Maglon*," the partnership. *Id.* at 264 (emphasis added). The court observed that DeHaven was a Maglon partner at all relevant times relating to the transaction that formed the basis of the lawsuit. *Id.* The court stated that "[a]lthough a partnership has standing to file suit in its own name, Tex. R. Civ. P. 28, the common law rule that all partners can bring suit themselves on behalf of the partnership is still in force." *Id.* (emphasis added). The court explained that the purpose for the common law rule was to protect third parties from multiple lawsuits and judgments. *Id.* Therefore, the facts that DeHaven was the plaintiff and Reams, Phillips, Novak, and Maglon were defendants were irrelevant and the common law rule was satisfied because all partners were parties to the suit. *Id.*

Parsons argues that nothing in the Texas Business Organizations Code limits or restricts *Allied's* holding that any general partner may pursue claims for a general partnership if all partners are parties to the suit. Breitburn argues that the legislature's statutory scheme has replaced the common law rule.

Parsons's reliance on *Allied* is misplaced and it is not necessary to decide whether the common law rule has been abrogated by statutes enacted subsequent to the *Allied* decision. [*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 Service, 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.] In *Allied*, the court specifically explained that the common law rule . . . "that all partners can bring suit themselves *on behalf of the partnership* is still in force." *Id.* (emphasis added). Here, Parsons never pleaded that he, as trustee of the Trust, which was a partner in the Partnership, was bringing any claims on behalf of the Partnership.

> We conclude that Breitburn established the affirmative defense of capacity and, therefore, the trial court abused its discretion by ordering Breitburn to deposit the disputed funds into the court's registry.

Doty v. Davidson, No. 04-20-00583-CV, 2022 WL 2334547 (Tex. App.—San Antonio June 29, 2022, pet. denied) (mem. op.).

The court of appeals affirmed the trial court's denial of statute of limitations and standing/capacity defenses in a partnership dispute. The court also determined that a fact issue existed as to whether a partnership or certain individuals owned a ranch; consequently, the court reversed the trial court's grant of summary judgment on the ownership issue and remanded for further proceedings.

On February 16, 2012, Richard Davidson filed suit against Kevin Doty alleging that in March or April of 2002, Davidson and Doty agreed to purchase certain property in Jim Hogg County ("the Ranch"). Davidson asserted that the parties discussed creating a partnership, under which both Davidson and Doty would contribute half of the expenses associated with the Ranch. Davidson also asserted that in April 2009, Davidson sought to sell his 50% interest in the Ranch, but Doty prohibited him from doing so.

In July 2016, Davidson filed a third amended petition, adding Javelin Ranch, LP as a plaintiff to the suit. This amended petition requested a declaratory judgment that the partnership (i.e., Javelin Ranch, LP) between Davidson and Doty was the owner of the Ranch; the partnership was an equal partnership, wherein Davidson and Doty each owned fifty percent; Davidson, as an owner and partner, was entitled to sell his undivided one-half interest in the partnership to a willing buyer without Doty's approval, and that the Dotys (Kevin and Elizabeth) were required to execute any and all documents necessary to effect a sale of Davidson's declared interest in the partnership. Appellees Davidson and Javelin Ranch, LP also alleged, with their request for a partition, that the partnership between Davidson and the Dotys was the sole owner of the Ranch and, alternatively, that Davidson and the Dotys were the owners. A suit to quiet title was also brought, alleging that the Ranch was recorded under the Dotys' names despite an agreement between the parties that the Ranch would be purchased by and belong to Javelin Ranch, LP. Davidson alleged that the Dotys' names on the recorded title created a cloud on Javelin Ranch, LP's title on the Ranch, and Davidson sought to remove the cloud.

On September 9, 2016, the Dotys filed a motion for summary judgment based upon statute of limitations and standing/capacity defenses, asserting that appellees' claims were barred by the statute of limitations as a matter of law and that Davidson lacked both standing and capacity to sue. In June 2017, appellees filed a motion for summary judgment concerning ownership of the Ranch, asserting that they were entitled to judgment as a matter of law because Javelin Ranch, LP owned the Ranch.

On November 21, 2018, the trial court granted appellees' motion for summary judgment. The trial court declared that the Ranch "was bought with partnership funds and full title should vest in the partnership known as Javelin Ranch[, LP]"; it ordered Davidson and the Dotys to "execute a warranty deed conveying their interests to Javelin Ranch[, LP]"; and it ordered that "all deeds of trust or interests which cloud the title to the [Ranch shall be] stricken and held for naught." On November 6, 2020, the trial court denied the Dotys's motion for summary judgment based upon the statute of limitations and standing/capacity defenses. The Dotys appealed the granting of appellee's motion and the denial of their motion.

The court of appeals began by concluding that the trial court had properly denied the summary judgment motion based upon the statute of limitations. As the court observed: "Because appellees' requests for declaratory relief are, in substance, a remedy for their suit to quiet title, we look to the applicable statute of limitations for their suit to quiet title. The Dotys did not address the applicable statute of limitations for appellees' suit to quiet title. Therefore, the Dotys failed to establish as a matter of law that the applicable statute of limitations barred appellees' claims."

The court then turned its attention to the standing/capacity issue. The Dotys argued in their motion for summary judgment that only Javelin Ranch, LP (and not Davidson) had standing to bring ownership claims. The court disagreed:

> "Both capacity and standing are necessary to bring a lawsuit." *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 775 (Tex. 2020). "A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id.* (quoting

> *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). A plaintiff lacks capacity when he "is not entitled to recover in the capacity in which he sues." TEX. R. CIV. P. 93(2).
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> Taking appellees' allegations as true in their fourth amended petition, Davidson has standing and capacity, as a partner, to maintain an action against the partnership or another partner for legal or equitable relief to enforce his rights under an alleged partnership agreement. See TEX. BUS. ORG. CODE ANN. § 152.211(b). "A partner is liable to a partnership and the other partners for: (1) a breach of the partnership agreement; or (2) a violation of a duty to the partnership or other partners under this chapter that causes harm to the partnership or the other partners." *Id.* § 152.210. "A partner may maintain an action against the partnership or another partner for legal or equitable relief . . . to . . . enforce a right under the partnership agreement; [or to] . . . enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship." *Id.* § 152.211(b). Davidson, as a partner who alleged he was personally aggrieved, was able to bring claims for those injuries he suffered directly. Accordingly, Davidson had standing and capacity to individually bring suit against Kevin, another partner, to enforce his rights under the alleged partnership agreement. *See* TEX. BUS. ORG. CODE ANN. §§ 152.210, 152.211(b).
>
> We overrule the Dotys's issue regarding the trial court's denial of their motion for summary judgment on limitations and standing/capacity and affirm the trial court's order denying this motion.

Finally, the court addressed the Dotys' challenge to the trial court's order regarding ownership of the Ranch. The court concluded that a fact question existed as to whether Javelin Ranch, LP should hold title to the Ranch. It reversed the trial court's order granting summary judgment in favor of appellees' suit to quiet title and remanded the claim, along with the claims for declaratory relief, to the trial court for further proceedings.

See also Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.); ***Bierschenk v. Chester***, No. 2:22-CV-215-Z-BR, 2023 WL 223176 (W.D. Tex. Jan. 17, 2023) **summarized below under "Derivative Litigation."**

L. Derivative Litigation

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims for breach of fiduciary duty (direct and derivative). The jury found in the plaintiff's favor on her claims, but the court of appeals reversed on one derivative claim based on her lack of standing because she was not an owner of the entity on whose behalf she brought that claim. The court of appeals reversed as to another derivative claim for breach of fiduciary duty brought on behalf of a limited partnership because the plaintiff did not show that the individual who allegedly breached his fiduciary duty to the limited partnership exercised the requisite control over the general partner to owe a fiduciary duty to the limited partnership. The court of appeals affirmed a claim for breach of fiduciary duty against the general partner of the limited partnership based on the limited partnership's payment of personal legal fees incurred by individual defendants. The trial court awarded the plaintiff a direct share of the damages on one of the derivative claims as well as attorney's fees. The court of appeals reversed as to the award of damages directly and also held that attorney's fees for prosecution of the derivative claims must be paid from the recovery based on the "common fund" doctrine.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

On appeal, the individual and entity defendants both challenged Lisa's standing to bring derivative claims on behalf of SignAd GP, LLC. The court addressed this issue at the beginning of its opinion because standing is a necessary component of subject matter jurisdiction. The individual and entity defendants argued that all relief granted by the trial court based on the derivative claim Lisa asserted on behalf of SignAd GP, LLC for breach of fiduciary duty against Wes Jr., Lee, and Stacey should be reversed because Lisa had no ownership interest in SignAd GP, LLC and thus lacked standing to bring derivative claims on its behalf. With respect to this claim, the jury found that Wes Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC by (1) failing to maintain internal controls on employee fringe benefits and (2) selling company vehicles for less than fair market value. The jury awarded more than $500,000 in damages for this claim, and the trial court awarded Lisa one-sixth of the damage award under Section 153.405 of the Texas Business Organizations Code (TBOC). The court analyzed this issue and concluded that Lisa lacked standing to assert the derivative claim on behalf of SignAd GP, LLC due to her lack of an ownership interest in that entity, stating:

> Standing is a constitutional prerequisite to maintaining suit. *Sneed v. Webre*, 465 S.W.3d 169, 179–80 (Tex. 2015); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Generally, unless standing is conferred by statute, "a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Sneed*, 465 S.W.3d at 180 (quoting *Williams v. Lara*, 52 S.W.3d 171, 178–79 (Tex. 2001)). "The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest

in its outcome." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (citation omitted). "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.' " *Tex. Ass'n of Bus*., 852 S.W.2d at 446 (quoting *Bd. of Water Eng'rs v. City of San Antonio*, 155 Tex. 111, 283 S.W.2d 722, 724 (1955)). A party's lack of standing deprives a court of subject matter jurisdiction and renders any trial court action void. *Phillips v. Phillips*, 244 S.W.3d 433, 434–35 (Tex. App.—Houston [1st. Dist.] 2007, no pet.).

Lisa acknowledges that she does not have an ownership interest in SignAd GP, LLC. Indeed, SignAd GP, LLC is "a single member limited liability company owned by [Stacey Gilbreath] Powell." Despite her lack of an ownership interest in SignAd GP, LLC, Lisa argues she has standing to file suit on its behalf because she is a beneficial owner of one-sixth of the entire "SignAd Enterprise," of which SignAd GP, LLC is a part, and she is also a permanent member of SignAd GP, LLC's Board of Managers. Lisa's argument hinges on her theory that the SignAd entities, all of which undisputedly are distinct and separate legal entities, constitute a single "integrated business." Lisa's argument is unavailing.

Lisa never pleaded an enterprise theory or obtained findings that would allow us to disregard the fact that SignAd GP, LLC, on whose behalf Lisa sued, and SignAd, Ltd., the entity in which Lisa has an ownership interest, are two separate entities. *See Docudata Records Mgmt. Servs., Inc. v. Wieser*, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (stating that under Texas law, "the separate identity of corporations will be observed by the courts, even in instances where one may dominate or control the other, or may even treat it as a mere department, instrumentality or agency of the other") (quoting *Pulaski Bank & Trust Co. v. Tex. Am. Bank, N.A.*, 759 S.W.2d 723, 731 (Tex. App.—Dallas 1988, writ denied)).

Moreover, the TBOC, which sets forth the parameters for derivative proceedings for limited liability companies, states that a "member" of a closely held limited liability company may bring a derivative suit on behalf of the LLC, and further identifies when such derivative actions are permitted. *See* TEX. BUS. ORGS. CODE §§ 101.452, .463. Under the TBOC, Lisa's status as a board member of SignAd GP, LLC does not confer standing on her to bring a derivative suit on behalf of the entity. Stacey, as the single member of SignAd GP, LLC, is the person who has standing to assert a derivative claim on behalf of the LLC; Lisa does not.

Lisa argues that because Section 101.463 of the TBOC does not state that derivative standing is strictly limited to owner-members of an LLC, she can establish standing. Without argument or explanation, she then cites to *Neff v. Brady*, 527 S.W.3d 511 (Tex. App.—Houston [1st Dist.] 2017, no pet.) adding a parenthetical stating that double-derivative standing is recognized where the "plaintiff is a beneficial owner of the entity harmed by [the] breach of fiduciary duty to an affiliate." To the extent Lisa argues *Neff* supports her argument that she has standing to assert a claim on behalf of SignAd GP, LLC, we reject her argument. [In a footnote, the court explained that "[a] double derivate [sic] suit is a 'vehicle for bringing a derivate [sic] suit across a second degree of separation.' ... and that it "'[t]ypically ... takes the form of a suit brough [sic] by shareholders of a parent company to assert the rights of a subsidiary.'"]

Neff analyzes standing under the laws of Bermuda and Switzerland and does not address whether Lisa, as a non-member of an LLC, can assert a derivative claim on behalf of SignAd GP, LLC. Furthermore, *Neff* confirms that when, as here, standing has been conferred through statute, "the statute itself serves as the proper framework for the analysis." *Id*. at 522. The "proper analysis is to determine whether the claimant falls within the category of claimants upon whom the Legislature conferred standing." [citations omitted] Because Lisa is not a member of SignAd GP, LLC, she does not "fall within the category of claimants upon whom the Legislature [has] conferred standing" under the TBOC. *See Nephrology Leaders*, 573 S.W.3d at 916; TEX. BUS. ORGS. CODE § 101.463. [In a footnote, the court refuted Lisa's contention that, even if she lacked standing to sue on behalf of SignAd GP, LLC, the jury question "'mistakenly (but harmlessly) presented the issue to the jury in terms of a fiduciary obligation to SignAd GP instead of to SignAd, Ltd.'" The court stated that "SignAd, Ltd. and SignAd GP, LLC are distinct legal entities and any duties Wes, Jr., Lee, and Stacey may owe to SignAd, Ltd. are not necessarily the same as

> any duties they may owe to SignAd GP, LLC." The court emphasized that the jury question asked about duties owed to SignAd GP, LLC, not SignAd, Ltd., and the court stated that it could not simply substitute another entity for SignAd GP, LLC as Lisa suggested. The court stated that "[t]he question presented is one of standing," and Lisa lacked standing to bring a derivative claim on behalf of SignAd GP, LLC.] [footnotes omitted]

Thus, the court sustained the defendants' challenge to Lisa's standing and reversed the trial court's judgment with respect to Lisa's derivative claim for breach of fiduciary duty filed on behalf of SignAd GP, LLC due to lack of subject matter jurisdiction.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim against Wes Jr. on behalf of SignAd, Ltd. asserting that Wes Jr. had engaged in self-dealing transactions with his side business ProIce Solutions, LLC" ("ProIce"). The jury was instructed that "[b]ecause Wesley Gilbreath, Jr. was President of SignAd, Ltd., he owed SignAd, Ltd. a fiduciary duty." The jury found that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with [ProIce]." The court pointed out that Wes Jr. was not in fact the president of SignAd, Ltd. but was the president of SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court discussed Texas case law under which a person who controls a general partner of a limited partnership has been deemed to owe a fiduciary duty to the limited partnership and its limited partners and concluded that Wes Jr. did not have the requisite control over SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court thus reversed the trial court's judgment in favor of Lisa on her derivative claim for breach of fiduciary duty against Wes Jr. based on his transactions with ProIce.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim for breach of fiduciary duty on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses improperly paid by SignAd, Ltd. Enriquez opined that the payments did not conform with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures they considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis for their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

The entity defendants also argued that pleading deficiencies by Lisa precluded the submission of the jury questions associated with this breach-of-fiduciary-duty claim because Lisa did not adequately address the allegedly wrongful fee payments and never alleged that the individual defendants "knowingly participated" in any alleged breach. Because Texas follows a "fair notice" standard of pleading, the court rejected these arguments given the wrongful conduct she alleged.

The entity defendants argued there was insufficient evidence of damages because Enriquez's testimony that SignAd, Ltd. could be subject to potential tax penalties due to SignAd GP, LLC's alleged breach of its fiduciary duty was speculative and thus irrelevant. Enriquez explained her concern that the payment of personal legal fees by SignAd, Ltd. put SignAd, Ltd.'s S-corporation status at risk if the payments were found to be dividends that were disproportionately paid in violation of S-corporation requirements. The entity defendants argued that this was only a "theoretical possibility" because the Internal Revenue Service had not made any inquiries and no penalties had been assessed or paid. Lisa countered that the misapplication of funds of SignAd, Ltd. by paying personal legal fees of the individuals was a breach of fiduciary duty by the general partner in any event, and the court agreed. The court stated that "[w]hether or not SignAd GP, LLC's breach of its fiduciary duty risked SignAd, Ltd.'s status as an S-Corporation, the evidence established SignAd GP, LLC damaged SignAd, Ltd. because SignAd GP, LLC authorized the payment of legal fees incurred by Wes, Jr., Lee, Stacey, and Mark for matters unrelated to SignAd, Ltd." The court thus concluded that the jury's finding on damages was supported by the evidence.

The entity defendants also argued that the trial court's judgment improperly awarded money damages directly to Lisa under Section 153.405 of the TBOC (as in effect prior to September 1, 2019) on her derivative claim filed on behalf of SignAd, Ltd. (The Legislature significantly amended the provisions of Chapter 153 on derivative proceedings involving limited partnerships in 2019, but the pre-amendment provisions applied in this case.) The defendants argued that an individual stakeholder in a legal entity does not have the right to recover personally for harms done to the legal entity and that Section 153.405 did not authorize the direct distribution of damages recovered in a derivative claim brought on behalf of a limited partnership to a single limited partner. When the trial court entered judgment, Section 153.405 of the TBOC, entitled "Expenses of Plaintiff," stated: "If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff." The court held that the plain language of Section 153.405 only permitted Lisa to recover her "reasonable expenses, including reasonable attorney's fees" and that Lisa was not entitled to a direct distribution of the damages awarded for her derivative claim.

Lisa relied on *Beach Capital Partnership, L.P. v. DeepRock Venture Partners L.P.*, 442 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2014, no pet.) in arguing that the court had discretion under Section 153.405 of the TBOC to award a share of the recovered damages directly to a limited partner in proportion to her ownership interest in a derivative action brought on behalf of a closely held limited partnership, but the court found her reliance was misplaced. The court said that it held in that case that the trial court had not erred in awarding a portion of a derivative damage award directly to a limited partner under Section 153.405 because "the judgment dissolved Playa and ordered Playa's receiver to distribute all remaining assets to DeepRock." Because this part of the judgment was not challenged by the parties in that case, the court held that the direct award to DeepRock was "entirely consistent with a payment of $500,000 to Playa and its simultaneous distribution to Playa's partners," especially "in light of the unchallenged judgment that all of [the dissolved partnership's] remaining assets be distributed immediately to [the limited partner]." The court said that the holding in *Beach Capital Partnership* had no application in this case since SignAd, Ltd. had not been dissolved and the trial court did not direct a receiver to distribute the remaining assets of the partnership to the limited partners. Lisa thus was not entitled to a direct distribution of damages for the derivative claim she filed on behalf of SignAd, Ltd., and the court reversed the portion of the judgment awarding Lisa direct damages for the derivative claim she asserted on behalf of SignAd, Ltd.

The trial court awarded Lisa $1,844,347 in attorney's fees and expenses in connection with her three derivative claims to be paid by SignAd, Ltd. pursuant to Sections 101.461(b)(1) and 153.405 of the TBOC. The entity defendants argued that the trial court abused its discretion because the plain language of Section 153.405 authorizes an award of fees and expenses to the derivative plaintiff out of any proceeds recovered by the plaintiff rather than as a separate award of fees and expenses in addition to the damages awarded. The entity defendants also argued that Lisa was not entitled to recover her fees and expenses under Section 101.461(b)(1) because that section applies only to derivative claims brought on behalf of an LLC. The jury found for Lisa on three derivative claims, but the court reversed as two of them, and the only remaining derivative claim was Lisa's claim filed on behalf of SignAd, Ltd. for payment of personal legal fees. Thus, the court reversed the portion of the judgment awarding Lisa attorney's fees on the other two derivative claims.

As to the remaining derivative claim on behalf of SignAd, Ltd. based on payment of personal legal fees, the court agreed that Section 101.461(b)(1)(which states that "[o]n termination of a derivative proceeding, the court may order ... the limited liability company to pay expenses the plaintiff incurred in the proceeding if the court finds the proceeding has resulted in a substantial benefit to the limited liability company"), applies only to derivative proceedings initiated on behalf of LLCs. Thus, the court said the only basis for Lisa to recover attorney's fees for her remaining derivative claim was Section 153.405 of the TBOC. Section 153.405 as it was in effect at the time of this lawsuit (the derivative suit provisions of Chapter 153 having been amended in 2019) provided:

> If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff.

Tex. Bus. Orgs. Code § 153.405.

The court of appeals discussed case law in Texas and other jurisdictions and concluded that recovery of fees under Section 153.405 must come from the recovery obtained for the entity under the so-called "common fund" doctrine, and fees are not separately recoverable in addition to the recovery.

> In *CBIF Limited Partnership v. TGI Friday's Inc*., No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.), the Dallas Court of Appeals addressed whether Section 153.405 provides an independent basis for the award of attorney's fees. The court stated:
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> > Section 153.405 of the business organizations code does not provide an independent basis for an award of attorney's fees to the [plaintiff] as against [the defendants]. TEX. BUS. ORG. CODE ANN. § 153.405 (West 2012). Section 153.405 provides, "[i]f a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or a claim constituting part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff. *Id.* This statutory allocation of attorney's fees in derivative actions is analogous to the common-fund doctrine. *See, e.g., Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (the common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses); *see also Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied) (attorney's fees are allowed in shareholder derivative suits where it is shown the suit has conferred substantial benefits on the corporation and its shareholders).
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> *Id*. at *6 n.7. We have not found any other Texas cases directly addressing this issue.
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> Courts in other jurisdictions have addressed the issue with respect to similar statutes and reached differing conclusions. ... [The court discussed a Virginia case and a Nebraska case.]
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> We consider *Little* [a Virginia case] and *CBIF Limited Partnership* to be more persuasive and consistent with Texas jurisprudence. The Texas Supreme Court has adopted the common fund doctrine, an equitable exception to the American Rule which provides that each litigant must bear his own attorney's fees, absent a statutory or contractual basis for an award of attorney's fees. *See Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974); *see also Martin–Simon v. Womack*, 68 S.W.3d 793, 798 n.3 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("The Texas Supreme Court has adopted a 'common fund' equitable exception to the general rule prohibiting recovery of attorney's fees absent contractual agreement or statute."). Under the common fund doctrine, a trial court may award reasonable attorney's fees to a plaintiff "who at his own expense has maintained a suit which creates a fund benefitting other parties as well as himself." *City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (citing *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1881); Knebel, 518 S.W.2d at 799–801). Any attorney's fees or expenses awarded must be paid from the common fund. City of Dallas, 762 S.W.2d at 954 (citing Greenough, 105 U.S. at 532–37; Knebel, 518 S.W.2d at 799). This is consistent with the common fund doctrine's underlying principle namely "that those receiving the benefits of the suit should bear their fair share of the expenses." *City of Dallas*, 762 S.W.2d at 954 (citing *Greenough*, 105 U.S. at 532–37; *Knebel*, 518 S.W.2d at 799). Although the common fund doctrine is often applied in class actions, Texas courts have also analyzed the equitable doctrine in derivative claims brought on behalf of corporations. *See Bayliss v. Cernock*, 773 S.W.2d 384, 386–87 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (discussing requirements for application of common fund doctrine for derivative claim on behalf of corporation).
>
> Our holding is also consistent with the express language of Section 153.405 providing that "the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the *remainder of the proceeds* received by the plaintiff." TEX. BUS. ORG. CODE § 153.405 (emphasis added). This suggests that

> an award of expenses under Section 153.405 must be paid out of recovered proceeds. Had the Legislature intended for a derivative plaintiff to recover expenses as a separate award under Section 153.405 it could have stated so. It did not.
>
> We thus hold that expenses and attorney's fees are not recoverable in addition to the damages awarded to the partnership under Section 153.405. Any award of "reasonable expenses, including reasonable attorney's fees" to Lisa under Section 153.405 must be paid out of the proceeds she recovered on behalf of SignAd, Ltd. [footnotes omitted]

The court thus reversed the award of attorney's fees for Lisa's derivative claim stemming from the improper payment of personal legal fees for Wes Jr., Stacey, Lee, and Mark and remanded for a new trial on the issue of attorney's fees and expenses with respect to this claim consistent with Section 153.405 and the court's opinion.

The entity defendants argued they were entitled to recover their attorney's fees under Section 101.461(b)(2) of the TBOC, which at the time of this lawsuit provided (and similarly provides under the current provision) that on termination of a derivative proceeding brought on behalf of an LLC, "the court may order ... the plaintiff to pay the expenses the ... limited liability company or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose." Tex. Bus. Orgs. Code § 101.461(b)(2).

The jury found for Lisa with respect to the sole derivative claim she asserted on behalf of an LLC, SignAd GP, LLC, and the trial court rendered judgment in her favor based on the jury's verdict, but the court of appeals in this opinion reversed based on Lisa's lack of standing to assert the derivative claim on behalf of SignAd GP, LLC. The court thus remanded to the trial court to determine whether SignAd GP, LLC was entitled to recover its expenses incurred in investigating and defending against Lisa's derivative claim under Section 101.461(b)(1) of the TBOC.

The entity defendants further argued that they were entitled to recover their attorney's fees under Section 153.404(e) of the TBOC because Lisa's derivative claims were not supportable. Under the version then in effect, Section 153.404(e) stated: "The court, on final judgment for a defendant and on a finding that [a derivative suit] was brought [on behalf of a limited partnership] without reasonable cause against the defendant, may require the plaintiff to pay reasonable expenses, including reasonable attorney's fees, to the defendant, regardless of whether security has been required." Tex. Bus. Orgs. Code § 153.404(e). Because Lisa prevailed on her derivative claim on behalf of SignAd, Ltd. asserting SignAd GP, LLC improperly directed SignAd, Ltd. to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark, and the court of appeals affirmed as to this claim, the court of appeals held that SignAd GP, LLC was not entitled to attorney's fees under Section 153.404(e).

Bierschenk v. Chester, No. 2:22-CV-215-Z-BR, 2023 WL 223176 (W.D. Tex. Jan. 17, 2023).

In this dispute over a family farming limited partnership, the court held that a former limited partner whose interest in the partnership was awarded to his wife upon divorce lacked capacity to bring a derivative suit on behalf of the partnership since he was no longer a limited partner.

The plaintiff, the ex-husband of Jacque Bierschenk, sued Jacque's parents alleging that, after divorce became inevitable, Jacque's parents violated fiduciary duties owed to the plaintiff by unilaterally amending the limited partnership agreement of Chester Farms, LP, a family farming partnership, to devalue the plaintiff's interest in the partnership and increase their own value in the entity. Before the divorce, Jacque owned a 48.5% interest, and the plaintiff owned a 1% interest in the partnership. The entire marital interest in the partnership was awarded to Jacque in the divorce, and the defendants in this case sought to dismiss the plaintiff's claims against them on the basis that they were derivative claims belonging to the partnership and that the plaintiff lacked standing and capacity to assert the claims since he was not a limited partner at the time of the suit.

The court discussed the distinction between standing and capacity, explaining that a plaintiff has standing when the plaintiff is personally aggrieved, regardless of whether the plaintiff is acting with legal authority. A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. As the Texas Supreme Court made clear in *Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763 (Tex. 2020), 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 even if the partner or stakeholder does not have capacity to bring the claim. The statutory provisions that define and limit a stakeholder's ability to recover certain damages go to the merits of the claim and do not strip a court of subject-matter jurisdiction if the stakeholder fails to meet the statutory requirements. Because the plaintiff in this case pled an injury in fact, the court concluded that the plaintiff had standing.

The court next addressed whether the plaintiff had capacity to bring the suit. The plaintiff had three arguments supporting his capacity to bring the suit. First, he argued that he had capacity under Tex. Bus. Orgs. Code § 153.402. Second, he argued that "a certain type of fiduciary action" may be asserted where there is fraud during the pendency of a divorce. Third, the plaintiff argued that he had capacity because the destruction of his interest in the limited partnership was involuntary. The court rejected each of these arguments.

Based on Section 153.402(a)(1)(A) of the Texas Business Organizations Code, the plaintiff argued that he had standing because he "was a limited partner at the time of the act or omission complained of." The court agreed with the defendants that the statute requires that the plaintiff be a limited partner when the action is brought as well as at the time of the transaction that is the subject of the lawsuit. The court relied on case law and the plain text of the statute to reach this conclusion and stated that the legislature's deletion of the explicit requirement that "the plaintiff must be a limited partner when the action is brought" was likely only meant to subtract superfluous language and did not change the meaning of the statute. The court stated that the requirement that the person bringing the suit be a limited partner is implicit in Section 153.402(a), and is also bolstered by the requirement in Section 153.402(a)(2) that the limited partner "fairly and adequately represents the interests of the limited partnership in enforcing the rights of the limited partnership." (For similar reasons, the court stated that the plaintiff's request for appointment of a receiver for the partnership failed. Section 11.404 of the Texas Business Organizations Code authorizes a court having jurisdiction over a domestic entity to "appoint a receiver for the entity's property and business" only where the action is brought by "an owner or member" or "a creditor" of the domestic entity, and the plaintiff fell into none of those categories.)

The plaintiff's next argument was that "the capacity element was satisfied by the former ownership of property disposed of in the divorce, i.e., that a breach of fiduciary action may be asserted where there is "fraud on the community." The court acknowledged that if a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse under Texas law against the property or estate of the disposing spouse, and if that recourse proves to be of no avail, then the aggrieved spouse may pursue the proceeds to the extent of the aggrieved spouse's community interest into the hands of the party to whom the funds have been conveyed. The defendants argued that the final orders in the divorce indicated that there was no evidence to counter Jacque's testimony that she was not contemplating divorce when the changes to the partnership were made, and the court found that the defendants' changes updated the agreement to reflect current practices and changed the priority of how debts and distributions would be made. Additionally, the entire marital interest in the partnership was awarded to Jacque by agreement of the parties. The court declined to treat the final orders in the divorce as dispositive of the plaintiff's fraud claim, but the court stated that the plaintiff's argument suffered from a fatal flaw in that it was Jacque rather than the defendants who now owned the plaintiff's former partnership interest, and the court understood Texas law to require that he first establish recourse against Jacque's property would be of no avail before pursuing the defendants. The plaintiff argued that he only had a remedy for a "vanishingly small period of time" because the alleged misconduct took place right before the divorce proceedings. Based on the time when the changes were made and the time when Jacque filed for divorce, the court stated that the plaintiff had a few months to challenge the misconduct while he was still a limited partner, and the court stated that while this was a relatively short period of time, the court was not convinced the Texas Legislature had no intent to exclude former limited partners from bringing derivative suits.

The plaintiff's final argument in favor of capacity was based on his argument that his limited partner status was "involuntarily destroyed." The plaintiff argued that the rule that a plaintiff cannot maintain a derivative action where the plaintiff voluntarily disposes of the interest in the entity should not apply to an award of a partnership interest in a contested divorce because such an award should not be characterized as "voluntary." The court disagreed because the award of the marital interest in this case was agreed to by the plaintiff and Jacque. Furthermore, the court said that the plaintiff's argument failed even if it was not viewed as a voluntary disposition. Although Texas case law suggests that a court of equity may allow a shareholder to maintain a derivative action if the shareholder's status is destroyed without a valid business purpose, e.g., merely to destroy the shareholder's ability to maintain the suit, the court did not view this rule as applying to a judge during divorce proceedings. The court said it would make no sense to determine whether a divorce court destroyed the plaintiff's limited partner status without a valid business purpose. And even if the inquiry were directed toward the defendants, the court said their actions did not destroy his status as a limited partner; the plaintiff alleged only that the changes they made to the partnership agreement devalued his interest and increased the value of their own.

Having determined that the plaintiff lacked capacity to bring his claims, the court granted the defendants' motion to dismiss.

M. Divorce of Partner

Bierschenk v. Chester, No. 2:22-CV-215-Z-BR, 2023 WL 223176 (W.D. Tex. Jan. 17, 2023).

In this dispute over a family farming limited partnership, the court held that a former limited partner whose interest in the partnership was awarded to his wife upon divorce lacked capacity to bring a derivative suit on behalf of the partnership since he was no longer a limited partner.

The plaintiff, the ex-husband of Jacque Bierschenk, sued Jacque's parents alleging that, after divorce became inevitable, Jacque's parents violated fiduciary duties owed to the plaintiff by unilaterally amending the limited partnership agreement of Chester Farms, LP, a family farming partnership, to devalue the plaintiff's interest in the partnership and increase their own value in the entity. Before the divorce, Jacque owned a 48.5% interest, and the plaintiff owned a 1% interest in the partnership. The entire marital interest in the partnership was awarded to Jacque in the divorce, and the defendants in this case sought to dismiss the plaintiff's claims against them on the basis that they were derivative claims belonging to the partnership and that the plaintiff lacked standing and capacity to assert the claims since he was not a limited partner at the time of the suit.

The court discussed the distinction between standing and capacity, explaining that a plaintiff has standing when the plaintiff is personally aggrieved, regardless of whether the plaintiff is acting with legal authority. A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. As the Texas Supreme Court made clear in *Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763 (Tex. 2020), 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 even if the partner or stakeholder does not have capacity to bring the claim. The statutory provisions that define and limit a stakeholder's ability to recover certain damages go to the merits of the claim and do not strip a court of subject-matter jurisdiction if the stakeholder fails to meet the statutory requirements. Because the plaintiff in this case pled an injury in fact, the court concluded that the plaintiff had standing.

The court next addressed whether the plaintiff had capacity to bring the suit. The plaintiff had three arguments supporting his capacity to bring the suit. First, he argued that he had capacity under Tex. Bus. Orgs. Code § 153.402. Second, he argued that "a certain type of fiduciary action" may be asserted where there is fraud during the pendency of a divorce. Third, the plaintiff argued that he had capacity because the destruction of his interest in the limited partnership was involuntary. The court rejected each of these arguments.

Based on Section 153.402(a)(1)(A) of the Texas Business Organizations Code, the plaintiff argued that he had standing because he "was a limited partner at the time of the act or omission complained of." The court agreed with the defendants that the statute requires that the plaintiff be a limited partner when the action is brought as well as at the time of the transaction that is the subject of the lawsuit. The court relied on case law and the plain text of the statute to reach this conclusion and stated that the legislature's deletion of the explicit requirement that "the plaintiff must be a limited partner when the action is brought" was likely only meant to subtract superfluous language and did not change the meaning of the statute. The court stated that the requirement that the person bringing the suit be a limited partner is implicit in Section 153.402(a), and is also bolstered by the requirement in Section 153.402(a)(2) that the limited partner "fairly and adequately represents the interests of the limited partnership in enforcing the rights of the limited partnership." (For similar reasons, the court stated that the plaintiff's request for appointment of a receiver for the partnership failed. Section 11.404 of the Texas Business Organizations Code authorizes a court having jurisdiction over a domestic entity to "appoint a receiver for the entity's property and business" only where the action is brought by "an owner or member" or "a creditor" of the domestic entity, and the plaintiff fell into none of those categories.)

The plaintiff's next argument was that "the capacity element was satisfied by the former ownership of property disposed of in the divorce, i.e., that a breach of fiduciary action may be asserted where there is "fraud on the community." The court acknowledged that if a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse under Texas law against the property or estate of the disposing spouse, and if that recourse proves to be of no avail, then the aggrieved spouse may pursue the proceeds to the extent of the aggrieved spouse's community interest into the hands of the party to whom the funds have been conveyed. The defendants argued that the final orders in the divorce indicated that there was no evidence to counter Jacque's testimony that she was not contemplating divorce when the changes to the partnership were made, and the court found that the defendants' changes updated the agreement to reflect current practices and changed the priority of how debts and distributions would be made. Additionally, the entire marital interest in the partnership was awarded to Jacque by agreement of the parties. The court declined to treat the final orders in the divorce as dispositive of the plaintiff's fraud claim, but the court stated that the plaintiff's argument suffered from a fatal flaw in that it was Jacque rather than the defendants who now owned the plaintiff's former partnership interest, and the court understood Texas law to require that he first establish recourse against Jacque's property would be of no avail before pursuing the defendants. The plaintiff argued that he only had a remedy for a "vanishingly small period of time" because the alleged misconduct took place right before the divorce proceedings. Based on the time when the changes were made and the time when Jacque filed for divorce, the court stated that the plaintiff had a few months to challenge the misconduct while he was still a limited partner, and the court stated that while this was a relatively short period of time, the court was not convinced the Texas Legislature had no intent to exclude former limited partners from bringing derivative suits.

The plaintiff's final argument in favor of capacity was based on his argument that his limited partner status was "involuntarily destroyed." The plaintiff argued that the rule that a plaintiff cannot maintain a derivative action where the plaintiff voluntarily disposes of the interest in the entity should not apply to an award of a partnership interest in a contested divorce because such an award should not be characterized as "voluntary." The court disagreed because the award of the marital interest in this case was agreed to by the plaintiff and Jacque. Furthermore, the court said that the plaintiff's argument failed even if it was not viewed as a voluntary disposition. Although Texas case law suggests that a court of equity may allow a shareholder to maintain a derivative action if the shareholder's status is destroyed without a valid business purpose, e.g., merely to destroy the shareholder's ability to maintain the suit, the court did not view this rule as applying to a judge during divorce proceedings. The court said it would make no sense to determine whether a divorce court destroyed the plaintiff's limited partner status without a valid business purpose. And even if the inquiry were directed toward the defendants, the court said their actions did not destroy his status as a limited partner; the plaintiff alleged only that the changes they made to the partnership agreement devalued his interest and increased the value of their own.

Having determined that the plaintiff lacked capacity to bring his claims, the court granted the defendants' motion to dismiss.

N. Bankruptcy

Bartenwerfer v. Buckley, 598 U.S. __, 143 S.Ct. 665 (2023).

The Supreme Court unanimously held that the debt of a spouse arising by virtue of her status as a partner in a business partnership with her husband was nondischargeable because the debt resulted from her husband's fraudulent misrepresentations in selling a house that the partnership had remodeled. Because the debtor-wife was liable under state partnership law for a debt that was for money obtained by false pretenses, a false representation, or actual fraud within the meaning of the discharge exception, the debtor-wife was precluded from discharge even if she had no culpability in the fraudulent misrepresentations.

Kate and David Bartenwerfer jointly purchased a house in San Francisco and decided to remodel and sell it for a profit. David was in charge of the project, and Kate was largely uninvolved. After remodeling the house, they sold it to Buckley. The Bartenwerfers represented that they had disclosed all material facts related to the property, but Buckley discovered several defects that they had failed to disclose. Buckley sued and obtained a judgment against the Bartenwerfers for more than $200,000. The Bartenwerfers filed for Chapter 7 bankruptcy. Buckley filed an adversary complaint and alleged that the debt owed him on the state-court judgment was nondischargeable under the Bankruptcy Code's exception to discharge of "any debt ... for money ... to the extent obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The bankruptcy court found that David had committed fraud and imputed his fraudulent intent to Kate because the two had formed a partnership to renovate and sell the property. The bankruptcy appellate panel held that § 523(a)(2)(A) of the Bankruptcy Code precluded Kate from discharge only if she knew or had reason to know of David's fraud, and the bankruptcy court concluded on remand that Kate did not have knowledge of David's fraud and that her liability on the debt to Buckley was thus dischargeable. The Ninth Circuit Court of Appeals reversed, holding that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability.

The Supreme Court focused on the text of § 523(a)(2)(A), which states:

> A discharge under section 727 ... of this title does not discharge an individual debtor from any debt ...
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

The court stated that the terms of the text precluded Kate Bartenwerfer from discharging her liability for the state-court judgment in favor of Buckley because (1) Kate was an "individual debtor," (2) the judgment was a "debt," and (3) the debt arose from the sale proceeds obtained by David's fraudulent misrepresentations and thus was a debt "for money ... obtained by ... false pretenses, a false representation, or actual fraud."

Kate disputed the third premise. Acknowledging that, as a grammatical matter, the passive-voice statute does not specify a fraudulent actor, she asserted that the statute is most naturally read to bar the discharge of debts for money obtained by the debtor's fraud. The court discussed and rejected Kate's arguments regarding the use of the passive voice in relation to the actor, and the court also rejected arguments pointing to surrounding provisions of the Bankruptcy Code and bankruptcy policy.

In addition to rejecting Kate's arguments based on the text of the statute, the court explained that its precedent required it to reject Kate's interpretation of the statute:

> Our precedent, along with Congress's response to it, eliminates any possible doubt about our textual analysis. In the late 19th century, the discharge exception for fraud read as follows: "[N]o debt created by the fraud or embezzlement *of the bankrupt* ... shall be discharged under this act." Act of Mar. 2, 1867, § 33, 14 Stat. 533 (emphasis added). This language seemed to limit the exception to fraud committed by the debtor herself—the position that Bartenwerfer advocates here.
>
> But we held otherwise in *Strang v. Bradner*. In that case, the business partner of John and Joseph Holland lied to fellow merchants in order to secure promissory notes for the benefit of their partnership. 114 U.S. at 557–558, 5 S.Ct. 1038. After a state court held all three partners liable for fraud, the Hollands tried to discharge their debts in bankruptcy on the ground that their partner's misrepresentations "were not made by their direction nor with their knowledge." *Id*., at 557, 561, 5 S.Ct. 1038. Even though the statute required the debt to be created by the fraud "of the bankrupt," we held that the Hollands could not discharge their debts to the deceived merchants. *Id*., at 561, 5 S.Ct. 1038. The fraud of one partner, we explained, is the fraud of all because "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership." *Ibid*. And the reason for this rule was particularly easy to see because "the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid*.

The court went on to explain that Congress not only re-enacted the predecessor statutory provision with awareness of this precedent, but also deleted "of the bankrupt" from the discharge exception for fraud when it did so.

In response to Kate's fairness arguments, the court stated:

> It also bears emphasis—because the thread is easily lost in Bartenwerfer's argument—that § 523(a)(2)(A) does not define the scope of one person's liability for another's fraud. That is the function of the underlying law—here, the law of California. Section 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, § 523(a)(2)(A) would have no role to play. Bartenwerfer's fairness-based critiques seem better directed toward the state law that imposed the obligation on her in the first place.

> And while Bartenwerfer paints a picture of liability imposed willy-nilly on hapless bystanders, the law of fraud does not work that way. Ordinarily, a faultless individual is responsible for another's debt only when the two have a special relationship, and even then, defenses to liability are available. For instance, though an employer is generally accountable for the wrongdoing of an employee, he usually can escape liability if he proves that the employee's action was committed outside the scope of employment. Restatement (Third) of Agency § 7.07 (2006); D. Dobbs, P. Hayden, & E. Bublick, Law of Torts § 425 (2022). Similarly, if one partner takes a wrongful act without authority or outside the ordinary course of business, then the partnership—and by extension, the innocent partners—are generally not on the hook. Uniform Partnership Act § 305 (2013). Partnerships and other businesses can also organize as limited-liability entities, which insulate individuals from personal exposure to the business's debts. *See, e.g.*, § 306(c) (limited-liability partnerships); Uniform Limited Partnership Act § 303(a) (2013) (limited partnerships); Uniform Limited Liability Company Act § 304(a) (2013) (limited-liability companies).

The court concluded by expressing some sympathy for Kate but stated that it was not the court's role to second-guess the judgment of Congress, which has "evidently concluded that the creditors' interest in recovering full payment of debts" obtained by fraud "outweigh[s] the debtors' interest in a complete fresh start."

A concurrence by Justice Sotomayer, in which Justice Jackson joined, emphasized that the legal context of this case "concerns fraud only by 'agents' and 'partners within the scope of the partnership" and that the court in this case "does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor."

O. Receivership

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, No. 08-00225-CV, 2023 WL 3672025 (Tex. App.—El Paso May 25, 2023, no pet. h.) (mem. op.).

In this companion appeal to the case summarized below, the court discussed principles of partnership property and the charging order remedy and concluded that "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt."

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. This appeal by Rio Grande LP challenged the trial court's dismissal of its lawsuit against La Zona. Like the other appeal, which directly addressed the authority of the receiver appointed in the litigation between the judgement debtor and judgment creditor, the court was essentially called upon to analyze the receiver's authority to seize assets of the limited partnership that was allegedly affiliated with the judgment debtor. The court stated:

> As we explained in that case, even if Rio Grande, LP's general partner was affiliated with WCCG, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 563 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing that a "judgment creditor may not obtain

> possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted).
>
> Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the individual partner has received or is owed and must do so through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of judgment debtor's partnership interest) (*citing Stanley*, 314 S.W.3d at 664).
>
> We recognized in our opinion that certain limited exceptions to this rule allow a court to issue a turnover order of a partnership's assets, i.e., when the debtor is the only member of the partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disruption to the partnership's business and to protect the other partners' interests. *See Heckert v. Heckert*, No. 02-16-00213-CV, 2017 WL 5184840, at *7-9 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.) (upholding turnover order directing ex-husband to turn over to ex-wife assets he placed in a non-operating LLC and partnership in which he was the sole member and partner, as there would be no disruption to the operating business or detriment to other individuals) (citing Michael C. Riddle, et al., *Choice of Business Entity in Texas*, 4 Hous. Bus. & Tax L.J. 292, 318 (2004)) ("[T]he charging order developed as a way to prevent the creditor of one partner from holding up the business of the entire partnership and causing injustice to the other partners."). But we noted that the record in the first case reflected that Rio Grande, LP was a partnership with at least two other partners possessing a substantial interest in the partnership. And we concluded that absent evidence the other partners were themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of Rio Grande, LP's cause of action and its property as part of its collection efforts to satisfy WCCG's debt. We therefore reversed the trial court's judgment in that case and remanded the matter to the trial court for further proceedings to reconsider whether [the receiver] had the authority to appear and act on behalf of Rio Grande, LP as he did.

The court concluded that the record in this case was deficient in the same manner as the other appeal. Although the receiver supplied additional evidence linking Rio Grande LP's general partner to WCCG, the record did not support the finding that the two limited partners had any relationship to WCCG. Because "a judgment creditor may not seize the assets of a legitimate partnership to the detriment of other partners and the partnership itself to satisfy an individual partner's judgment debt," the court reversed and remanded the dismissal of the case for the trial court to further consider the receiver's authority in light of the court's analysis.

WC 4th and Rio Grande, LP v. La Zona Rio, LLC, __ S.W.3d __, 2023 WL 3663550 (Tex. App.—El Paso May 25, 2023, no pet. h.).

The court of appeals held that the record did not support the trial court's finding that a receiver appointed to collect a judgment against a party in another case had authority to act for a limited partnership in this case. Although the receiver argued that the limited partnership in this case was a subsidiary of the judgment debtor, the court stated that the record did not establish that the receiver had authority to directly reach the assets of the limited partnership, and the record did not support the receiver's asserted right to manage the limited partnership or its LLC general partner given the exclusivity of the charging order remedy.

This lawsuit was filed by WC 4th and Rio Grande, LP ("Rio Grande LP") against La Zona Rio, LLC ("La Zona"). La Grande LP sought to avoid foreclosure on a building owned by Rio Grande LP securing a promissory note held by La Zona. While this suit was pending between the parties, a receiver intervened and represented that it had authority to act for Rio Grande LP. The receiver had been appointed in another case to collect a judgment obtained by Princeton Capital Corporation against World Class Capital Group, LLC ("WCCG"). The receiver represented to the court that Rio Grande LP was a "subsidiary" of WCCG, and the receiver purported to replace Rio Grande LP's prior counsel and settle this lawsuit between Rio Grande LP and La Zona by allowing La Zona to foreclose on the building. The trial court in this suit recognized the receiver's authority to act and dismissed the lawsuit between Rio Grande LP and La Zona based on the settlement. In this appeal, Rio Grande LP essentially argued that the receiver lacked the authority to appear in the suit and act on Rio Grande LP's behalf.

After addressing procedural issues and concluding that a prior appellate opinion by another court affirming that the receiver was properly appointed in the case between Princeton and WCCG did not preclude the court in this case from reviewing the validity of the receivership order provisions (at least insofar as the order applied to the receiver's actions in the case affecting Rio Grande LP's interests), the court analyzed whether the record supported the trial court's finding that the receiver was authorized to settle Rio Grande LP's lawsuit with La Zona. The court first noted that the receiver entered his appearance in this case by providing a "notice" stating he was WCCG's receiver and that Rio Grande, LP was a WCCG "subsidiary." The receiver asserted he was appearing as counsel of record for WCCG and its "subsidiary" Rio Grande LP, replacing Rio Grande LP's prior counsel. The receiver did not provide any documentation showing that Rio Grande, LP was a "subsidiary" of WCCG or that the receiver had any authority to seize any assets belonging to the partnership. Rio Grande, LP supplied the limited record available to the court in this case.

La Zona argued that the receiver had the authority to replace Rio Grande, LP's attorney in the lawsuit and settle the lawsuit against La Zona based on the receivership order, which directed WCCG to identify and turn over to the receiver all interests of WCCG in any business venture, including LLCs and limited partnerships. According to La Zona, the receivership order broadly authorized the receiver "to seize the membership interest of" any LLC in which WCCG was a member and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." La Zona contended that this authority included taking possession of "real property ... causes of action ... [and] contract rights." According to La Zona the receiver did that by seizing WCCG's membership interest in the general partner of La Grande LP and acting on La Grande LP's behalf in this litigation. The court found La Zona's argument to be problematic on at least two levels.

> **A. No right to seize partnership assets or the partnership's cause of action**
>
> First, La Zona Rio's argument conflates several separate provisions in the Receivership Order. The provision giving [the receiver] the right to take possession of "real property ... causes of action ... [and] contract rights" relates to assets belonging to WCCG—the judgment debtor. Here, [the receiver] took "possession" of a cause of action filed by Rio Grande, LP.
>
> A business entity, such as a partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members, and has the right to bring suit on its behalf. A partnership's assets belong to the partnership itself, not to the individual partners. The "partnership interest" of a partner is his "share of profits and losses or similar items and the right to receive distributions."
>
> Accordingly, a judgment creditor of an individual partner has no right to obtain possession of or otherwise exercise "legal or equitable remedies" with respect to a limited partnership's property when collecting on that judgment. TEX. BUS. ORGS. CODE ANN. § 153.256(f) (the "creditor of a partner or of any other owner of a partnership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership"); *see also Pajooh v. Royal W. Investments LLC, Series E*, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing "judgment creditor may not obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited partnership") (internal quotation marks omitted). Instead, a judgment creditor of an individual partner may only seek to satisfy the judgment from any distributions that the partner has received or is owed, which may only be done through a charging order. *See Pajooh*, 518 S.W.3d at 562 (recognizing that entry of a charging order attaching a partner's distributions is the "exclusive remedy" by which a partner's judgment creditor may "satisfy a judgment out of the judgment debtor's partnership interest") (citing TEX. BUS. ORGS. CODE ANN. § 153.256(d) ("The entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or of any other owner of a partnership interest may satisfy a judgment out of the judgment debtor's

partnership interest")); *see also In re Prodigy Servs., LLC*, 2014 WL 2936928, at *5 (recognizing that a charging order is the exclusive remedy by which a partner's judgment creditor may satisfy a judgment out of a judgment debtor's partnership interest) (citing *Stanley*, 314 S.W.3d at 664).

> La Zona Rio points out exceptions to this rule that allow a court to issue a turnover order of a partnership's assets, such as when the debtor is the only member of the partnership, no other partner's interests are at stake, and the order will not interfere with the entity's business—as the purpose of requiring a charging order is to avoid disrupting the partnership's business and to protect the other partners' interests. The record reflects that Rio Grande, LP is a partnership with at least two other partners that possess a substantial interest in the partnership. Absent evidence that the two other partners are themselves connected to WCCG, the Receivership Order could not have authorized [the receiver] to "take possession" of the partnership's cause of action or any of its property as part of its collection efforts to satisfy WCCG's debt.
>
> **B. No right to manage the partnership**
>
> Second, La Zona Rio also seeks to uphold [the receiver]'s actions by pointing to the Receivership Order provision giving [the receiver] the right "to seize the membership interest of any Limited Liability Company in which [WCCG] is a member," and "to sell, manage, and operate the Limited Liability Company as the Receiver shall think appropriate." Although La Zona Rio appears to recognize that the Receivership Order does not give [the receiver] the authority to manage or operate Rio Grande, LP directly, as it was not a Limited Liability Company, La Zona Rio contends [the receiver] was authorized to do so indirectly by taking over the management and operation of Rio Grande, LP's general partner, Rio Grande, GP, LLC, which was in fact a limited liability company. And in turn, La Zona Rio contends that "managing litigation falls squarely within the descriptions of 'manag[ing]' and 'operat[ing]' " the LLC, which it contends gave [the receiver] the authority to settle Rio Grande, LP's lawsuit.
>
> La Zona Rio's argument is dependent upon a finding that WCCG has a "membership interest" in Rio Grande, GP, LLC. According to La Zona Rio, we should find that WCCG has such an interest by virtue of Natin Paul's involvement as the president and "governing person" for the LLC. And while La Zona Rio is correct that both this Court and the Third Court of Appeals have recognized that Paul does "business through a network of entities which used 'World Class' or 'WC' in their names," with his "principal entity" being WCCG, this alone is not a sufficient basis upon which to conclude WCCG has a "membership interest" in every limited liability company (or partnership) in which Paul is involved. Even if we were to conclude that WCCG had a membership interest in Rio Grande GP, LLC, there is nothing in this record on which the trial court could have relied to conclude [the receiver] had the authority as general partner of Rio Grande, LP to manage, operate, and even transact the partnership's assets under the guise of collecting on the general partner's debt. [footnotes omitted]

In footnotes, the court elaborated on some of the points made above including the distinction between partnership property and a partner's partnership interest and the nature of a charging order. In one of its footnotes, the court addressed an argument by La Zona that the holding in *Pajooh* regarding the exclusivity of the charging order and the inability to reach a partnership's assets when collecting a judgment against a partner. In this regard, the court stated:

> La Zona Rio contends that the holding in *Pajooh* only applies to judgment creditors and not to court-appointed receivers. However, La Zona Rio cites no authority for the proposition that a receiver is to be treated differently than a judgment creditor in collecting on a judgment from a partner in an LP. And there appear to be cases in which courts have, at least indirectly, indicated that a receiver must also apply for a charging order to be entitled to seize a partnership interest belonging to a judgment debtor. *See, e.g., Howe v. Red Oak State Bank*, No. 10-90-037-CV, 1990 WL 10089566, at *3 (Tex. App.—Waco Dec. 20, 1990, no writ) (finding receiver was authorized to apply for a charging order to collect on a judgment).

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff in the suit was a sibling of the individual defendants and an owner and/or governing person of the entity defendants. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal."

The plaintiff, who was a manager of the LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. The plaintiff alleged claims based on violation of her right to access books and records of the entities, breach of fiduciary duty (direct and derivative), unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, statutory oppression, malicious prosecution, dissolution, and constructive trust. The defendants asserted counterclaims for equitable or judicial expulsion of the plaintiff from the limited partnerships. The trial court entered a judgment in favor of the plaintiff for actual and punitive damages as well as declaratory and injunctive relief on a number of her claims.

On appeal, the court of appeals: (1) held that the plaintiff lacked standing to bring her derivative claim on behalf of an LLC general partner because she lacked an ownership interest in the LLC; (2) found sufficient evidence to support a judgment for actual and exemplary damages against several of the plaintiff's siblings for malicious prosecution of (and conspiracy to maliciously prosecute) the plaintiff based on their actions in having the plaintiff involuntarily committed; (3) sustained a challenge to the award of damages for mental anguish in favor of the plaintiff on her defamation claim; (4) held that one of the plaintiff's siblings did not exercise sufficient control over an LLC general partner to owe a fiduciary duty to the limited partnership and thus reversed the judgment against that sibling on the plaintiff's derivative claim for breach of fiduciary duty; (5) overruled a challenge by one of the plaintiff's siblings to the portions of the judgment based on the jury's finding that he breached an informal fiduciary duty to the plaintiff; (6) overruled a challenge to the judgment in favor of the plaintiff on her books and records claims, holding that the plaintiff was entitled to declaratory relief and that exculpation clauses in the limited partnership agreements did not preclude findings of wrongdoing on the part of the general partners; (7) held that there was sufficient evidence supporting the jury's findings of breach of fiduciary duty and damages on a derivative claim of the plaintiff on behalf of one of the limited partnerships based on the partnership's payment of personal legal fees of the plaintiff's siblings but held that the plaintiff was not entitled to recover directly a pro rata portion of the damages on the derivative claim; (8) concluded that the plaintiff did not establish statutory oppression on the part of her siblings and reversed the appointment of a rehabilitative receiver; (9) held that portions of a permanent injunction granted in favor of the plaintiff against the general partners, limited partnerships, and individual defendants were overly broad and vague and prohibited lawful conduct; (10) remanded for additional consideration of the defendants' request for expulsion of the plaintiff from the limited partnerships; (11) remanded for a new trial on the award of attorney's fees under various statutory provisions of the Business Organizations Code relating to books-and-records claims and derivative claims.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The

General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and

Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

On appeal, the entity defendants raised numerous challenges to the jury's finding of oppression. After a lengthy discussion of the current state of Texas law regarding oppression and the evidence in this case, the court sustained the entity defendants' challenge to the sufficiency of the evidence to support the jury's finding of oppression.

The court began its discussion by pointing out that Section 11.404 of the Texas Business Organizations Code (TBOC) authorizes a Texas court to appoint a receiver to rehabilitate a domestic entity under certain circumstances, including when it is established in an action brought by an owner or member of the entity "that ... the actions of the governing persons of the entity are illegal, oppressive, or fraudulent." Tex. Bus. Orgs. Code § 11.404(a)(1)(C). The term "oppressive" is not defined in the statute, and the Texas Supreme Court, in *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), has pronounced that an entity's directors or managers engage in oppressive action "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]." The Texas Supreme Court said that the Legislature signaled that the term "oppressive" should be construed to include acts that are as serious as illegal or fraudulent acts.

The court acknowledged that it is within the jury's province to determine whether certain acts occurred, but the court stated that it was not obligated to give deference to the trial court's conclusion that such acts constituted oppression, which is a question of law for the court.

The question of oppression was presented to the jury by posing the following question for each of the nine Limited Partnerships as well as two of the General Partners: "Do you find that the actions of the governing persons of the entities listed below were oppressive?" The jury was instructed that:

> An entity's directors or managers engage in oppressive actions when they abuse their authority over the entity with the intent to harm the interests of one or more of the partners or member[s], in a manner that does not comport with the honest exercise of their business judgment, and by doing so they create a serious risk of harm to the entity.
> Oppressive actions include acts that have the following characteristics:
> • They are severe and create exigent circumstances;
> • They involve an unjust exercise or abuse of power that harms the rights or interests of persons subject to the governing persons' authority and disserves the purpose for which the power is authorized; and
> • They are inconsistent with the governing person's duty to exercise their honest business judgment for the benefit of the entities.

The jury answered "yes" to this question for all nine of the Limited Partnerships as well as for the two indicated General Partners. The trial court granted injunctive relief and appointed a rehabilitative receiver based in part on the jury's findings of oppression.

The jury question defined the term "governing person" as follows: "A person is a governing person of an entity if he is the person or is among the group of persons who are entitled to manage and direct the affairs of an entity. An officer is not a governing person." The question did not identify any individual by name, and the jury was not asked to respond as to any named individual. Because Lisa fell within the definition of a "governing person" as a member of the Board of Managers, the court acknowledged that the jury's finding of oppression could have been based on Lisa's own conduct (consistent with the jury's finding pursuant to another question that Lisa engaged in conduct relating to the partnership business of each of the nine Limited Partnerships that made "it not reasonably practicable to carry on the business in partnership with [her]," especially given that the jury found that Wes Jr., Lee, Stacey, SignAd GP, LLC, and the other General Partners had not engaged in such conduct). However, the court said that the fact that the oppression finding could have been based on Lisa's own conduct, did not mean that the jury's findings of oppression should be disregarded.

Lisa argued that Wes Jr., Lee, and Stacey, as a controlling majority abused their power to marginalize her by withholding information, refusing her requests for more transparency, and effectively excluding her from the family business. After years of stonewalling Lisa on her requests for additional financial information, Lisa had to resort to hiring a lawyer and eventually litigation to obtain information necessary to conduct a forensic audit. When the requested information was finally provided, Lisa claimed it revealed irregularities, improper use of company funds, and accounting deficiencies that threatened the S-corporation status of SignAd, Ltd. Lisa also pointed to the highly contentious March 2013 board meeting at which her siblings took actions that effectively excluded Lisa from management or, at a minimum, greatly diminished her role. Lisa further pointed to the action taken to involuntarily commit her to a mental hospital. According to Lisa, the sum of these actions were sufficient evidence to establish "abuse of power by Wes, Jr., Lee and Stacey as control persons of the SignAd entities that harmed both Lisa and the company, created exigent circumstances, and were completely inconsistent with the honest exercise of business judgment."

The court stated that Lisa cited no authority to support her argument that the alleged conduct constituted oppression as a matter of law. The entity defendants responded that the alleged actions did not constitute oppression because as a limited partner, Lisa was not allowed to take part in the management of the partnership and that the Board on which she served acts by majority vote. The defendants argued that outvoting Lisa on her request for audits, not appointing her to the Executive Committee, and reducing the frequency of Board meetings was not oppression. Finally, the entity defendants argued that once Lisa received the financial information she requested, she did not find evidence of fraud, but only "hypothetical potential tax penalties unlikely to ever be assessed." More significantly, they argued that none of the findings described any "act taken directly against Lisa, as is required for 'oppressive conduct.'"

The court agreed with the defendants that the conduct Lisa described did not amount to oppression as a matter of law.

> While the sum of Lisa's complained-of conduct certainly impacted Lisa negatively, and some of the conduct was found by the jury to be improper, such as the failure to provide Lisa with the financial records to which she was entitled, we cannot say that Wes, Jr., Lee, or Stacey abused their authority over any of the Company Appellants by engaging in such conduct in a manner that did not comport with the honest exercise of their business judgment thereby creating a serious risk of harm to the business. *See Ritchie*, 443 S.W.3d at 871 (holding directors or managers engage in oppressive actions "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]").
>
> Lisa points to the fact that once she received the Company Appellants' financial information, her accountant, Enriquez, discovered evidence of self-dealing transactions by Wes, Jr., such as failures to maintain internal controls, improper use of company funds and assets, and accounting deficiencies Enriquez believed could result in substantial IRS penalties and the loss of SignAd, Ltd.'s S-Corporation status. The jury found that Wes, Jr. breached his fiduciary duties to SignAd, Ltd. in self-dealing transactions with ProIce which caused a loss of $750 for the fair market value of services provided to ProIce in the past, plus $300 per month for the value of services that, in reasonable probability, will be provided to ProIce in the future. The jury also found

> that Wes, Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC, causing a loss of $461,193 for "lack of internal controls regarding fringe benefits," and $40,000 for selling company vehicles for less than fair market value. And the jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes, Jr., Lee, Mark, and Stacey. The jury further found that Wes, Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each.
>
> Even if wrongful and detrimental to Lisa, we cannot, on the record before us, conclude that the alleged actions "created a serious risk of harm" to the entities or were "severe and create[d] exigent circumstances" for the Company Appellants as to constitute oppression. *See Ritchie*, 443 S.W.3d at 867, 870–71 (defining what constitutes oppression and further holding that to qualify as type of "oppressive" conduct that justifies appointment of receiver, purported conduct must "create exigent circumstances for the corporation"). While there is some evidence to support the alleged conduct on which Lisa relies, the conduct itself does not constitute oppression as a matter of law. *See id.* at 870–71 (defining oppression and holding that directors' refusal to meet with minority shareholder's potential buyers did not constitute oppression); *see also Argo Data Res. Corp.*, 380 S.W.3d at 265 (stating courts must exercise caution in determining what actions constitute oppressive conduct). [footnotes omitted]

The court thus sustained the entity defendants' challenge to the sufficiency of the evidence supporting the jury's affirmative finding of oppression.

Having reversed as to the finding of oppression, the court addressed whether there were nevertheless grounds to support the trial court's appointment of a rehabilitative receiver. The trial court appointed a rehabilitative receiver "to oversee the equitable buyout of Lisa Horan, Trustee's interests in the Limited Partnerships and General Partners in which she holds an interest," finding that such appointment "would avoid further damage to Lisa ... and conserve the property and business of the entities." The trial court appointed the rehabilitative receiver based on the jury's finding that (1) Lee breached his fiduciary duty to Lisa, and (2) nine of the Limited Partnerships and two General Partners engaged in oppression.

The court explained the nature and purpose of a receiver and noted that appointment of a receiver is a "harsh, drastic, and extraordinary remedy" that should be exercised "cautiously" and only if there is no other lesser legal or equitable remedy. The court set forth the provisions of Section 11.404 of the TBOC, under which a court may appoint a receiver for an entity's property and business if it is established in an action by an owner that any of several grounds exist, including that "the actions of the governing persons of the entity are illegal, oppressive, or fraudulent " or "the property of the entity is being misapplied or wasted." Even in such cases, the court must also determine "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(a), (b).

As discussed above, the court held that there was no evidence to support the jury's finding of oppression, which the court said was "particularly significant because the only remedy for oppression is the appointment of a rehabilitative receiver." *See Ritchie*, 443 S.W.3d at 877. Lisa contended that a receivership was nevertheless appropriate based on the jury's findings that (1) Wes Jr. misused billboard space for his side business ProIce, (2) SignAd GP, LLC misused SignAd, Ltd.'s funds to pay for personal legal fees, and (3) SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. because it failed to maintain internal controls on fringe benefits and sold company vehicles below market value. However, the court pointed out that it was reversing as to the claims in nos. (1) and (3), and the trial court did not base its appointment of a receiver on any of those three causes of action. The trial court appointed a receiver based on only two grounds: (1) "the governing persons of the General Partners and the Limited Partnerships engaged in oppressive conduct," and (2) Lee breached his informal fiduciary duty to Lisa. Because the court reversed as to the finding of oppression, the only remaining basis to support the trial court's appointment of a rehabilitative receiver was the jury's finding that Lee breached his informal fiduciary duty to Lisa, and the court found no authority that such a breach of fiduciary duty authorizes a trial court, without more, to appoint a rehabilitative receiver. Because there are several remedies available for a breach of fiduciary duty, and Lisa already obtained injunctive relief based in part on Lee's breach of fiduciary duty, the court concluded that a receiver was not warranted.

Bierschenk v. Chester, No. 2:22-CV-215-Z-BR, 2023 WL 223176 (W.D. Tex. Jan. 17, 2023).

In this dispute over a family farming limited partnership, the court held that a former limited partner whose interest in the partnership was awarded to his wife upon divorce lacked capacity to bring a derivative suit on behalf of the partnership since he was no longer a limited partner. For similar reasons, the court stated that the plaintiff's request for appointment of a receiver for the partnership failed. Section 11.404 of the Texas Business Organizations Code authorizes a court having jurisdiction over a domestic entity to "appoint a receiver for the entity's property and business" only where the action is brought by "an owner or member" or "a creditor" of the domestic entity, and the plaintiff fell into none of those categories.

1st & Trinity Super Majority, LLC v. Milligan, 657 S.W.3d 349 (Tex. App.—El Paso 2022, no pet. h.).

The court of appeals rejected a breach of fiduciary duty claim against a court-appointed receiver of two limited partnerships on the ground that the receiver was entitled to immunity. Claims against the receiver for conversion and breach of contract were also rejected.

Nate Paul was a real estate investor who did business through a network of entities which used "World Class" or "WC" in their names. One such entity was the "World Class Capital Group," but he also owned and controlled two other entities, known as "WC 1st and Trinity, LP" and "WC 3rd and Congress, LP" (collectively, the Limited Partnerships). These two limited partnerships each owned properties in downtown Austin at the locations suggested by their names: "WC 1st and Trinity, LP" owned property at the corner of First and Trinity Streets, and "WC 3rd and Congress, LP" owned property at the corner of Third Street and Congress Avenue.

The Limited Partnerships designated the World Class Capital Group as their limited partner and named the general partners and the majority interest holders as two limited liability companies with almost the same name as the partnerships themselves: "WC 1st and Trinity GP, LLC" and "WC 3rd and Congress GP, LLC" (collectively, the World Class General Partners). Nate Paul also owned and controlled these two entities. In accordance with the limited partnership agreements, each general partner owned a controlling interest in its respective limited partnership and had sole authority to manage the respective limited partnership's affairs.

In 2011, Appellee, the Roy F. & Joann Cole Mitte Foundation (Mitte), a nonprofit organization that provided community grants and scholarships, invested a portion of its endowment with the Limited Partnerships. It acquired approximately 16% of the Trinity Limited Partnership and approximately 6% of the Congress Limited Partnership. Mitte signed agreements in which it acknowledged that the World Class General Partners would retain the sole authority to manage the partnerships.

A dispute between Mitte and the several World Class entities began in 2018 when the World Class General Partners allegedly refused Mitte's request to review financial information about the Limited Partnerships. Mitte sued in the 126th District Court of Travis County, naming as defendants the World Class General Partners and the Limited Partnerships (collectively, the World Class Entities).

Mitte eventually petitioned the court to appoint a receiver over the Limited Partnerships and the partnership properties under section 64.001 of the Civil Practice and Remedies Code. The court issued an order appointing Gregory Milligan as receiver over the Limited Partnerships and all of their properties (the Appointment Order). The Appointment Order not only granted Milligan all powers to control the Limited Partnerships' assets, but also granted Milligan the same authority to manage the Limited Partnerships that the general partners themselves possessed under the respective partnership agreements. (In an earlier opinion, the court of appeals also expressly affirmed the broad authority that the district court's receivership order gave to Milligan. The court of appeals recognized that the order gave Milligan full authority to manage not only the properties at issue, but also to control the affairs of the Limited Partnerships.)

On April 21, 2020, Nate Paul created two Delaware corporate entities, which were the Appellants in this case: "1st and Trinity Super Majority, LLC" and "3rd and Congress Super Majority, LLC" (collectively, the Super Majority Entities). Also on April 21, the World Class General Partners transferred their interest in the Limited Partnerships to the Super Majority Entities. Nate Paul executed the documents on behalf of both transferor and transferee.

On July 8, 2020, the Super Majority Entities filed their original petition in the current proceeding, in which they sought a declaratory judgment over the lawfulness of the Appointment Order and further requested a declaration on the scope of Milligan's authority. The suit also alleged, among other claims, that Milligan (1) breached fiduciary duties owed to the Super Majority Entities; (2) converted assets to his own use or the use of

Mitte; and (3) breached the original limited partnership agreements. The trial court dismissed the lawsuit and the Super Majority Entities appealed.

With respect to the breach of fiduciary duty claim, the Super Majority Entities contended that Milligan, as receiver, owed them a fiduciary duty to act in their best interest while serving as the receiver over the Limited Partnerships. They alleged that Milligan breached this duty by "(i) holding himself out as having the ability to control the affairs of the Limited Partnerships; (ii) supporting a clandestine effort by Mitte to purchase a loan securing one of the properties in order to manufacture a sham default and move precipitously to foreclose; (iii) conspiring to loot the Limited Partnerships of valuable assets; (iv) interfering with the Limited Partnerships' other business relationships; and (v) otherwise encumbering the Limited Partnerships with unnecessary litigation, expenses, and other obligations, including this lawsuit."

In addressing the fiduciary duty claim, the court of appeals began by observing that court-appointed receivers are generally entitled to immunity:

> Certain court-appointees, including court-appointed receivers who act as agents of the court, are generally entitled to quasi-judicial immunity (also known as derived judicial immunity) for actions taken in the course and scope of performing their duties. *See, e.g., Wilkinson v. USAA Fed. Sav. Bank Tr. Services*, No. 14-13-00111-CV, 2014 WL 3002400, at *9 (Tex.App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op) (a court-appointed receiver acting within the scope of his authority is entitled to derived judicial immunity); *Davis*, 317 S.W.3d at 307 (recognizing that a court-appointed receiver acts as an arm of the court and is therefore immune from liability for actions grounded in his conduct as receiver), *citing Rehabworks, LLC v. Flanagan*, No. 03-07-00552-CV, 2009 WL 483207 (Tex.App.—Austin Feb. 26, 2009, pet. denied) (mem. op.); *see generally Hawkins v. Walvoord*, 25 S.W.3d 882, 891 (Tex.App.--El Paso 2000, pet. denied) (recognizing that in Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as court-appointed receivers and trustees). In effect, this immunity derives from the absolute immunity to which judges are entitled when they act in their official judicial capacity, which serves to protect the interest of the judge as well as the public's interest in an independent judiciary. So when a judge appoints an individual to perform services for the court, the same absolute immunity attaches to the appointee as well. As our sister court has recognized, the policy underlying derived judicial immunity "guarantee[s] an independent, disinterested decision-making process" and "prevent[s] the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion." *Alpert v. Gerstner*, 232 S.W.3d 117, 125-26 (Tex.App.—Houston [1st Dist.] 2006, pet. denied).
>
> It is also generally recognized that a court-appointed receiver is entitled to immunity from civil claims, including claims for breach of fiduciary duty, poor performance of duties, and wrongful, dishonest, or even fraudulent conduct in performance. *See Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at *4-5 (Tex.App.—Fort Worth June 9, 2016, no pet.) (mem. op.) (receiver who was given broad authority to take control of the parties' property in a divorce proceeding had derived judicial immunity where wife sued him for breach of fiduciary duty, fraud, negligence, and gross negligence in performing his duties), *citing Ramirez v. Burnside & Rishebarger, LLC*, No. 04-04-00160-CV, 2005 WL 1812595, at *2 (Tex.App.—San Antonio Aug. 3, 2005, no pet.) (mem. op.) (receiver was entitled to derived judicial immunity from plaintiff's claim that he made false representations while performing his duties); *see also Wilkinson*, 2014 WL 3002400, at *8 (receiver was entitled to derived judicial immunity where plaintiff alleged claims for defamation, fraud, breach of fiduciary duty, and DTPA violations that he allegedly committed while performing his duties); *Davis*, 317 S.W.3d at 307 (once a court appointee is "cloaked" with derived judicial immunity, every action he takes in performing his assigned duties—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit).

The Super Majority Entities argued, however, that their pleadings left open the question of whether Milligan was in fact acting within the scope of his assigned duties in conducting the affairs of the Limited

Partnerships, which in turn raised a question of whether he lost his entitlement to derived judicial immunity. According to the court, a receiver may lose immunity while committing acts without jurisdiction and outside the scope of his authority. Moreover, a receiver is not entitled to derived judicial immunity even if he is fulfilling tasks assigned by the court if those tasks cannot properly be categorized as those belonging to a receiver. The court of appeals noted that it must take a "functional approach" in determining whether a person is entitled to derived judicial immunity. It should not just look at the label or title given to a court-appointee, but must instead consider their assigned duties and whether they are in fact operating as an "arm of the court" in performing those duties. Under these standards, the court concluded that Milligan acted within his authority and with appropriate duties:

> Parsing out the Super Majority Entities' allegations in their pleadings, however, we find nothing in their claims that would support a finding that the trial court assigned any duties to Milligan outside his role as a receiver, or that Milligan exceeded his authority in performing his duties. First, the Third Court of Appeals has already recognized the duties that the trial court assigned to Milligan—to control the assets and affairs of the Limited Partnerships—were within the prescribed duties of a receiver in accordance with Chapter 11 of the Texas Business and Organizations Code. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *12, *citing* TEX.BUS.ORGS.CODE § 11.404(a)(1)(A), (C). Moreover, the actions about which the Super Majority Entities complain were all actions Milligan took in performing those duties. Given his express right to conduct the affairs of the Limited Partnerships, Milligan was entitled to "hold himself out" as having that authority when meeting with third parties, including third parties doing business with the Limited Partnerships. As well, given Milligan's express right to control the Limited Partnerships' assets, the Super Majority Entities' complaint that he mishandled those assets still relates solely to actions that fell within the scope of his authority. And finally, although the Super Majority Entities complain that Milligan subjected the Limited Partnerships to "unnecessary litigation, expenses, and other obligations, including this lawsuit," a receiver in Milligan's position is expressly authorized by statute to conduct and participate in litigation. TEX.BUS.ORGS.CODE ANN. § 11.406(a)(3) (a receiver appointed under this section may "sue and be sued in the receiver's name in any court"). Thus, the Super Majority Entities have failed to allege any conduct that exceeded Milligan's authority, and he was entitled to derived judicial immunity as a matter of law. For these reasons, the trial court properly dismissed the Super Majority Entities' claim against Milligan for breach of fiduciary duty under Rule 91a as having no basis in law or fact.

The court also held that Milligan's attorneys were "entitled to immunity under the doctrine of attorney immunity for claims brought against them by non-clients."

The court of appeals then concluded that the conversion and breach of contract claims against Milligan failed as well:

> The [conversion] claim fails for two reasons. First, both Milligan and the attorney-defendants would have a right to immunity against this claim, as Milligan's actions were all taken in his capacity as the receiver, and there is no allegation that the attorney-defendants acted outside the scope of representing their clients. Second, the conversion claim fails as a matter of law, as the Super Majority Entities have failed to plead any facts that could support all the elements of the claim. To establish a claim for conversion of personal property, a plaintiff must allege and prove that: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. The Super Majority Entities' pleading fails to allege facts to support all these elements.
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> The Super Majority Entities have failed to allege any facts to support a finding that Milligan acted "unlawfully" in exercising "control" or "dominion" over the Limited Partnerships' assets, or in tendering his proposed liquidation plan to the court. To the contrary, the trial court

expressly authorized Milligan to engage in those actions. Moreover, Milligan's proposed liquidation plan was just that, a plan, and could not be acted upon without court approval. . . .

The Super Majority Entities seek to establish the necessary privity between Milligan—who did not sign the underlying limited partnership agreements—and the other signatories by alleging that Milligan, "in his capacity as putative receiver or in the guise of a putative receiver," stepped into the "shoes" of the World Class Entities as for their obligations under the agreements. The Super Majority Entities, however, cite no authority suggesting that a receiver appointed to take control of a partnership's assets somehow becomes a signatory to the partnership's contracts. To the contrary, a receiver is appointed to serve as an independent arm of the court in performing assigned duties and does not step into the shoes of any of the parties involved in the receivership, or otherwise take on their contractual duties. *See generally Davis*, 317 S.W.3d at 307 (a court-appointed receiver acts as an arm of the court). We thus conclude that there was no basis in law or fact for holding Milligan liable on a claim for breach of contract.

P. Pro Se Representation

Ubiquitous Connectivity, LP v. TXU Energy Retail Company, LLC, No. 3:18-cv-2084-K Lead Case, No. 3:20-cv-3586-K Consolidated Case, 2022 WL 17364274 (N.D. Tex. Nov. 9, 2022), report and recommendation adopted, 2023 WL 17364261 (N.D. Tex. Nov. 30, 2022).

After the withdrawal of counsel for the plaintiff, Ubiquitous Connectivity, LP ("Ubiquitous") in this patent infringement case, the district court ordered replacement counsel to appear for Ubiquitous. Because the plaintiff was a limited partnership, it was not permitted to proceed *pro se* or through a non-attorney. Instead of hiring counsel, the plaintiff's president, Charles Shamoon, assigned Ubiquitous's patent rights to himself. The magistrate court in this opinion stated that Shamoon's motion to substitute parties amounted to an attempt to do what the limited partnership was told it could not do, i.e., have a non-lawyer prosecute its case. According to the court, "The fact that the assignment was executed the same day that Shamoon tried to take over representation in this matter, without any evidence to the contrary, indicates that these actions were part of a concerted effort to disregard the Court's order – and the law – and have Shamoon, the president of Ubiquitous, represent Ubiquitous's interests instead of licensed counsel. This attempt by Ubiquitous to represent itself *pro se* violates the requirement that LPs are represented by licensed counsel." The magistrate court recommended that the district court grant the defendant's motion to dismiss the case without prejudice.

Centro de Contacto Avanzado, S.A. de C.V. v. Grupo Televisa, S.A.B., No. A-22-CV-151-LY-ML, 2022 WL 2761376 (W.D. Tex. Apr. 5, 2022), report and recommendation adopted sub nom. Centro de Contacto Avanzado, S.A. de C.V. v. Groupo Televisa, S.A.B., No. 1:22-CV-151-LY, 2022 WL 3337806 (W.D. Tex. May 10, 2022) ("'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.' 28 U.S.C. § 1654. While § 1654 authorizes pro se litigation for individuals, a *pro se* plaintiff is only entitled to 'appear on behalf of one's self; one cannot represent another separate legal entity, such as another person, a corporation, or a partnership, pro se.' *Patent Group, LLC v. Johnny Ray, LLC*, 2:10-cv-380, 2010 WL 4287200, at *1 (E.D. Tex. Nov. 1, 2010) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (per curiam)). It has been the law for the better part of two centuries that a corporation may appear in the federal courts only through licensed counsel. As fictional legal entities, corporations and partnerships cannot appear for themselves personally. Their only proper representative is a licensed attorney, 'not an unlicensed layman regardless of how close his association with the partnership or corporation.'").

Securities & Exchange Commission v. Jaitley, No. A-21-CV-832-LY, 2022 WL 2763154 (W.D. Tex. Mar. 9, 2022) ("As the SEC accurately notes, as a legal entity OTA [an LLC] cannot appear pro se but must instead be represented by legal counsel. A pro se plaintiff is only entitled to 'appear on behalf of one's self; one cannot represent another separate legal entity, such as another person, a corporation, or a partnership, pro se.' *Patent Group, LLC v. Johnny Ray, LLC*, 2010 WL 4287200, at *1 (E.D. Tex. Nov. 1, 2010) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (per curiam)). As fictional legal entities, corporations and partnerships cannot appear for themselves personally. Their only proper representative is a licensed attorney, 'not an unlicensed layman regardless of how close his association with the partnership or corporation.' Despite assertions to the contrary, an attorney has not entered an appearance on behalf of OTA, nor has an attorney signed or submitted any pleadings on behalf of OTA. Simply put, OTA is not represented by counsel and all pleadings submitted on its behalf should be stricken.").

Q. Texas Citizens Participation Act

LMP Austin English Aire, LLC through Lafayette English Partner, LLC v. Lafayette English Apartments, LP, 654 S.W.3d 265 (Tex. App.—Austin 2022, no pet. h.).

The court concluded that the Texas Citizens Participation Act ("TCPA") applied to a claim for knowing participation in a breach of fiduciary duty and required the claim's dismissal.

In 2006, Lafayette English Apartments, LP financed its purchase of two apartment complexes ("the Properties") with a $17,300,000 loan from RAIT Partnership, LP (the "Lender") that was secured by the Properties. Appellants owned interests in business entities that bought the Properties. In 2009, contending that the Properties were underperforming, the Lender took control of the Properties and the entities that owned the Properties were reorganized. The Properties were sold in 2015, and in 2018, Appellants filed suit challenging the sale.

In their suit, Appellants asserted derivative claims against various parties, including (1) the reorganized entities that owned the Properties (Lafayette English GP, LLC and Scott Schaeffer), and (2) the parties who purchased the Properties in 2015 from the lender-controlled owners ("First Buyers"). Appellants pleaded various claims, including "knowing participation/aiding and abetting breach of fiduciary duty."

Appellees responded with several motions, including a motion to dismiss under the TCPA. After hearing the motions, the trial court signed a series of interlocutory orders, including an order granting a partial motion to dismiss under the TCPA as to Appellants' claim for "knowing participation/aiding and abetting breach of fiduciary duty." Appellants challenged this order on appeal.

The court engaged in a lengthy analysis of the TCPA and concluded that it applied to Appellants' claim of "knowing participation/aiding and abetting breach of fiduciary duty" based on the implication of First Buyers' right of association. Because First Buyers demonstrated that the TCPA applied, the court then considered whether Appellants presented clear and specific evidence establishing a prima facie case for each essential element of their knowing participation claim:

> Under the second step of the TCPA process, Appellants had the burden to establish by clear and specific evidence a prima facie case for each element of their claim against First Buyers. At the outset, we note that Appellants pleaded their claim as "knowing participation/aiding and abetting breach of fiduciary duty." We have previously concluded that there is no common-law claim for "aiding and abetting" in Texas.
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> However, the Texas Supreme Court has recognized a claim for knowing participation in a breach of fiduciary duty: "It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942). Establishing a claim of knowing participation in a breach of fiduciary duty requires showing that: (1) there was a fiduciary duty owed by a third party to the plaintiff; (2) the defendant knew of the fiduciary relationship; and (3) the defendant was aware of his participation in the third party's breach of its duty. . . .

The court concluded that Appellants failed to present clear and convincing evidence of these elements. The court rejected an argument that First Buyers' knowledge of the fiduciary duties owed may be inferred from Howard Treatman's (a manager of First Buyers) request for and receipt of a CD in 2015 containing copies of the loan and acquisition documents concerning the conveyance of the Properties. According to the court, Treatman confirmed in his deposition that: (1) he did not review the CD or read the organizational documents when they were sent; (2) he never had discussions with Schaeffer (an officer of the Lender) about the necessity of an Independent Manager to authorize any sale of the original partnership's assets; and (3) if there were such a requirement, he was unaware of it. Thus, the court observed that "we cannot conclude that Appellants presented any clear and specific evidence to support a rational inference that First Buyers had actual knowledge of a fiduciary relationship among Schaeffer, General Partner, and Appellants." The court similarly rejected Appellants' contention that knowledge of a fiduciary relationship could be imputed to First Buyers based on the knowledge of their attorneys: "[W]e have stated that '[a] cause of action premised on contribution to a breach of a fiduciary duty . . . must involve the knowing participation in such a breach.' Accordingly, 'imputed knowledge is insufficient to find knowing participation in a breach of fiduciary duty.'" As a result of these conclusions, the court upheld the dismissal of the knowing participation claim: "In sum, because First Buyers met their burden of showing that Appellants' claim of knowing participation in a breach of fiduciary duty had the requisite connection to the exercise of the right of association and because Appellants failed to meet their burden of establishing by clear and specific evidence a prima facie case for each element of their knowing participation claim, the TCPA required dismissal of it."

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

Moore v. Hooters of America, LLC, No. 11-21-00168-CV, 2023 WL 2697772 (Tex. App.—Eastland Mar. 30, 2023, no pet. h.) (mem. op.).

The court affirmed a summary judgment in favor of the defendant because the plaintiff sued the wrong entity. The plaintiff sued the parent LLC of an LLC that owned a Hooters restaurant at which the plaintiff was injured. The plaintiff failed in its attempt to substitute the subsidiary in place of the parent, and in the absence of any evidence to raise a fact question on veil piercing, the court of appeals affirmed the summary judgment granted by the trial court in favor of the defendant.

A patron of a Hooters restaurant in Odessa was injured by a security guard who was an employee of the security company hired by the restaurant. The restaurant was owned by TW Restaurant Holder, LLC (TWR), and the plaintiff sued its parent company, Hooters of America, LLC (HOA). The court began by explaining that it is common for "commercial branding with an assumed or trade name such as 'Hooters' [to be] used as a marketing tool for business enterprise." The court went on to say that "[c]orporations, including, as here, limited liability corporations [sic] (LLCs), are separate legal entities that insulate owners and/or shareholders from personal liability." The court stated that there was nothing improper about "dividing sectors of that business and/or assets and separating them into distinct corporations or businesses, even if one of the reasons for doing so is to minimize the assets at risk in the event of liability of a lawsuit. Subsidiary and parent corporations are separate and distinct 'persons' as a matter of law."

The plaintiff argued that it used diligence in suing TWR in its common name under Rule 28, which permits a suit against a business entity in its assumed or common name. Alternatively, the plaintiff argued this was a case of misnomer or misidentification. The court said this was not a case encompassed by Rule 28, nor was it a case of misnomer or misidentification. If an entity is sued under its assumed or common name, the plaintiff must amend the petition to correct the legal name of the defendant before judgment. A misnomer arises when a plaintiff sues the correct entity but misnames it in the pleadings, and a misnomer can be corrected by amendment even after the statute of limitations has expired. Misidentification occurs when two separate legal entities have similar names and the plaintiff sues the wrong one. In this case, the plaintiff never served TWR, never attempted to bring TWR into the suit, and did not amend the petition to name TWR. The plaintiff sued HOA under its actual name, and TWR and HOA did not have similar names that would cause the type of confusion leading to misidentification.

Because a parent corporation is not generally liable for the torts of a subsidiary and there was no summary judgment evidence that would allow the court to disregard the limitation on liability afforded by the corporate structure, there was no summary judgment evidence to support holding HOA liable for the torts of TWR. Further, there was no summary judgment evidence of any alleged duty of HOA to the plaintiff. Because HOA did not own, operate, or control the Hooters restaurant before or on the date of the incident, the plaintiff would have to provide evidence that HOA used the corporate form of TWR as an unfair device to achieve an inequitable result in order to hold HOA liable. There was no evidence in the record of such a use, and summary judgment in favor of HOA was properly granted.

City of Hutto v. Legacy Hutto, LLC, No. 07-21-00089-CV, 2022 WL 2811856 (Tex. App.—Amarillo July 18, 2022, pet. filed) ("Section 2252.908 of the Texas Government Code is a governmental transparency law that prohibits a governmental entity, including a municipality, from entering into certain contracts with a business entity unless the business entity submits a disclosure of interested parties. . . . [W]e reject Legacy's argument that, as a limited liability company, it is not responsible for submitting the disclosure. Section 2252.908(a)(1) defines 'business entity' as 'any entity recognized by law through which business is conducted, including a sole proprietorship, partnership, or corporation.' TEX. GOV'T CODE ANN. § 2252.908(a)(1). Legacy argues that because it is not a sole proprietorship, partnership, or corporation, section 2252.908 does not apply to it. 'As a straightforward definitional matter, including does not mean only or limited to . . . .' *Stonegate Fin. Corp. v. Broughton Maint. Ass'n*, No. 02-18-00091-CV, 2019 WL 3436616, at *5, 2019 Tex. App. LEXIS 6553, at *13 (Tex. App.—Fort Worth July 30, 2019, no pet.) (mem. op.) (emphasis in original). The short list of business entities set forth in 2252.908(a)(1) is not exhaustive, but merely illustrative, and thus we read it to include a limited liability company.").

United States v. Cooper, 38 F.4th 428 (5th Cir. 2022).

"Cooper also challenges his conviction under Count 18 of the indictment. In that count, he was charged and convicted for receiving illegal kickbacks under 42 U.S.C. § 1320a-7b(b)(1). That subsection provides that '[w]hoever knowingly and willfully solicits or receives any remuneration . . . (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony.' 42 U.S.C. § 1320a-7b(b)(1) (emphasis added). Cooper argues that because Count 18 alleged that he solicited and received payment from 'Dandy,' an LLC pharmacy, he did not receive a kickback from 'a person' as § 1320a-7b(b)(1) requires. The government responds that LLCs fall under the definition of 'person' as used in that provision. We agree with the government. . . .

An LLC is a person for the purposes of the anti-kickback statute. For this portion of the U.S. Code, '[t]he term 'person' means an individual, a trust or estate, a partnership, or a corporation.' 42 U.S.C. § 1301(a)(3). The statutory definition thus does not expressly enumerate LLCs. But LLCs did not exist in 1972 when the kickback provision was enacted. An LLC shares features of both partnerships and corporations. And 'person' includes both of those entities. We decline to read the statute to cover corporations and partnerships but not novel business organizations that in substance are a combination of those two types of entities.

Relatedly, the term 'corporation' 'includes associations, joint-stock companies, and insurance companies.' 42 U.S.C. § 1301(a)(4). By using broad terms like 'associations' and 'companies,' the provision contemplates a broad understanding of 'corporation.' Cooper argues that LLCs are not 'associations' because unlike associations, LLCs have a legal identity separate from their members. But corporations also have a legal identity separate from their members, yet the statute states that 'corporation' includes 'associations.' It thus appears that 'corporation' as used here is broader than modern technical definitions of that term. The Regulations back up this notion. They explain that the kickback statute covers payments from 'individuals or entities . . . .' 81 Fed. Reg. 88368, 88369 (Dec. 7, 2016) (emphasis added). Thus, the best reading of 'person' in § 1320a-7b(b)(1)(A) is that it covers all individuals and all business entities like partnerships and corporations.

To the same end, at the time the statute was passed, Black's Law Dictionary gave a broad definition of 'corporation.' It explained that the distinctive features of a corporation are that it is created under legal authority and exists independent of the members that make it up. *Corporation*, Black's Law Dictionary (4th ed. 1968). And the examples of corporations provided by § 1301(a)(4) do not limit that conception of the term. If anything, that provision expands 'corporation' because it expressly lists specific types of entities that otherwise might not be included (like associations).

In sum, 'person' in § 1320a-7b(b)(1)(A) includes corporations and partnerships. At the time of enactment, LLCs did not exist, but 'corporation' was a broad enough term to encompass them. So, when Cooper was charged with receiving an illegal kickback from Dandy, an LLC, he was charged with a federal offense under § 1320a-7b(b)(1). We affirm his conviction on Count 18."

See also **cases included below under "Pro Se Representation"** holding that a limited liability company, as an artificial entity, is not permitted to appear *pro se*.

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

Drywall Elements, LLC v. Edward Wolff & Associates, LLC, Civ. A. No. 4:21-CV-00537-CAN, 2022 WL 4667997 (E.D. Tex. Sept. 30, 2022).

"As to Wolff, EWA is a limited liability company organized in the State of Texas, and Mark Wolff is its sole member. The allegations against Wolff arise from his role as the sole manager of EWA. Plaintiff claims Wolff acted to his personal benefit by making the withheld funds available for his personal use. More specifically, Plaintiff argues Wolff is personally liable for EWA's contractual obligations because he used the LLC to perpetrate actual fraud 'by intentionally misleading Plaintiff to believe that [ ] Wolff is an attorney and EWA & Associates, LLC is a law firm, in order to induce Plaintiff to enter into the Contract.'

Texas law enforces contracts but disfavors extra-contractual remedies, such as allowing creditors of Texas business entities to sue their owners. *Belliveau v. Barco, Inc.*, 987 F.3d 122 (5th Cir. 2021). Under Texas law, 'a member or manager [of a limited liability company] 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.' TEX. BUS. ORGS. CODE § 101.114. 'Due to the limited liability that corporations and LLCs offer to their owners, a plaintiff seeking to impose individual liability on an owner must 'pierce the corporate veil.'' *Spring St. Partners-IV, L.P. v. Lam*, 730 F.3d 427, 443 (5th Cir. 2013).

Piercing the corporate veil is not an independent cause of action, but rather a vehicle to impose liability on a corporate officer for wrongdoing. To hold Wolff liable for EWA's liabilities, Plaintiff must show that Wolff used EWA 'to (1) 'perpetrate an actual fraud' (2) primarily for [Wolff's] 'direct personal benefit.''*See Belliveau*, 987 F.3d at 128-29 (quoting *In re Ritz*, 832 F.3d 560, 566 (5th Cir. 2016)); *see also* TEX. BUS. ORGS. CODE § 21.223 (Texas law 'does not prevent or limit the liability' of an LLC member 'if the obligee demonstrates that the [member] caused the [LLC] 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 member). As the Fifth Circuit noted, '[p]iercing the corporate veil is not a cumulative remedy for creditors of corporate or other legal entities in Texas; that theory does not make owners of such entities codefendants for every breach of contract case. It is a remedy to be used when the actions of the entity's owner amounting to 'actual fraud' have rendered the entity unable to pay its debts.' *Belliveau*, 987 F.3d at 132.

Defendants admit that Wolff is the 'managing member' and 'at all times' acted 'in said capacity.' Defendants argue however that because the veil piercing allegations are 'couched in only general terms and fails to provide any factual basis for the claims against [ ] Wolff individually,' including that he personally and directly benefited from keeping the unremitted funds owed to Plaintiff, Plaintiff's claims against Wolff must be dismissed.

The fact that Wolff was not a party to the contract and was acting within the scope of his role as member of the LLC does not alone preclude his liability. *See, e.g.*, *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 674 (W.D. Tex. 2019) ('a corporate agent may still be liable for his own personal tortious activity, even if acting within the course of his corporate agency, and that applies to breach-of-fiduciary duty claims.'). However, as set forth above, piercing the corporate veil in cases based on claims of breach of contract must be supported by facts showing actual fraud. In this case, all of Plaintiff's causes of action relate to or arise from the contractual obligations allegedly incurred by Defendants. Therefore, to the extent Plaintiff seeks to hold Wolff liable on a veil piercing theory on any of its claims, Plaintiff's ability to pierce the corporate veil is governed by Section 21.223, and Plaintiff must satisfy its stringent standards. At present, Plaintiff has failed to do so and thus fails to state a claim against Wolff under a veil piercing theory. [FN 9: Texas law permits Plaintiff to pursue intentional tort claims against Wolff in his capacity as an individual without having to 'pierce' the corporate veil of EWA.] Plaintiff offers conclusory accusations lacking factual support as to Wolff and further lumps all Defendants together, failing to make specific allegations in connection with each of its claims as to Wolff."

Weller v. Keyes, No. 03-21-00302-CV, 2022 WL 3638204 (Tex. App.—Austin Aug. 24, 2022, pet. filed).

The court of appeals reversed the trial court's grant of summary judgment on the plaintiff's fraud claims. The court concluded that the lower court had incorrectly determined that § 21.223 of the TBOC (which addresses veil-piercing liability) barred claims asserting direct tortious liability against an LLC's agents.

David Weller was the president and sole member of IntegriTech Advisors, LLC, through which he provided consulting services to buyers, sellers, and brokers of airplanes and airplane parts. MonoCoque Diversified Interests

LLC ("MDI") bought and sold airplane parts and was wholly owned by appellees Mary Alice Keyes and Sean Leo Nadeau.

In September 2017, appellees and Weller began discussing a potential business relationship between Weller, IntegriTech Advisors, and MDI. After several months of negotiations, appellees offered Weller several forms of specified compensation if he agreed to full-time employment with MDI and to provide MDI with training services. Weller began working for MDI but disputes arose over whether he was entitled to particular payments. He ultimately sued appellees and MDI and asserted various actions, including several types of fraud claims. Weller alleged that appellees were directly liable for their own fraudulent and tortious conduct notwithstanding that they were acting as agents of MDI.

Appellees and MDI filed a motion for partial summary judgment. Appellees moved for summary judgment on "all of Weller's claims asserted against them in their individual capacities because every act and omission complained of by Weller were performed in their capacities as authorized agents of MDI. Section 21.223(a)(2) of the Texas Business Organizations Code bars all of Weller's claims for relief against Defendants Keyes and Nadeau." The trial court granted appellees' partial-summary-judgment motion as to appellants' fraud claims without specifying the grounds.

On appeal, Weller asserted that the trial court erred in granting appellees' summary judgment because the only ground raised by appellees to support such relief (that § 21.223(a)(2) of the TBOC barred Weller's claims) failed as a matter of law. The court of appeals agreed with Weller and distinguished vicarious veil-piercing liability from direct tortious liability:

> Disposition of this issue hinges on whether Section 21.223 abolishes the long-established common-law rule of agent direct liability in Texas. That rule provides that individuals are always directly liable for their own tortious conduct—even if committed in the course and scope of their employment—independently of whether a plaintiff alleges the individuals' liability under a veil-piercing or similar theory. As discussed below, we hold that appellants' fraud claims against appellees in their individual capacities are not barred as a matter of law by Section 21.223.
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> "Texas has long had two methods for holding individual corporate agents or officers personally liable when they are acting within the course and scope of their employment or role as corporate agents—piercing the corporate veil or direct individual liability." *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 669–70 (W.D. Tex. 2019) (collecting cases and permitting plaintiff to pursue common-law tort claims against corporate agent "individually based on his own personal tortious conduct"). As for the first method—"piercing the corporate veil" or "disregarding the corporate fiction"—in 1989 the legislature curtailed plaintiffs' use of it by enacting the predecessor of Section 21.223. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 (Tex. 2006) (noting that legislature narrowly prescribed circumstances under which shareholder can be held liable for corporate debts by enacting Texas Business Corporations Act article 2.21). While the legislature later amended the statute to "establish a clear legislative standard under which the liability of a shareholder for the obligations of a corporation is to be determined in the context of contractual obligations and all matters relating thereto," *id.* at 272 n.12, the statute remains applicable only to liability (1) for the company's contractual obligations and matters relating to or arising therefrom (2) that is based on a veil-piercing type of theory, *Bates*, 361 F.Supp. 3d at 666–67 (noting that some recent Texas cases have "muddled the distinction" between veil-piercing claims, which are governed by Section 21.223, and direct individual-liability tort claims, which are still governed by common law).
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> The second longstanding method of holding corporate agents personally liable for actions performed within the course and scope of their employment or role as corporate agents—direct individual liability for tortious conduct—remains alive and well under the common law. The supreme court recently reaffirmed this longstanding rule, albeit without mentioning Section 21.223. *See Transcor Astra Grp. S.A. v. Petrobas Am., Inc.*, ––– S.W. 3d ––––, No. 20-0932, 2022 WL 1275238, at *11 (Tex. Apr. 29, 2022) ("the fact that an individual was acting in a corporate capacity does not prevent the individual from being held personally—or 'individually'—liable for the harm caused by those [tortious] acts"); *see Miller*, 90 S.W.3d at 717 (same); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (same).

Moreover, this Court has specifically held that—despite the provisions in the Business Organizations Code limiting corporate agents' liability, and absent "clear direction from the Supreme Court holding that the legislature" has "abrogated longstanding common law recognizing that corporate agents are liable for their own tortious conduct"—LLC members are individually liable for their own tortious conduct in participating and directing wrongdoing, separate and apart from any veil-piercing or similar doctrines. *Key v. Richards*, No. 03-14-00116-CV, 2016 WL 240773, at *3 & n.4 (Tex. App.—Austin Jan. 13, 2016, no pet.) (mem. op.) (holding so even while recognizing that in Business Organizations Code legislature has "broadly insulated LLC members from liability" for LLC's obligations). The majority of appellate courts specifically addressing this issue have agreed with this Court.

Following our own precedent, we agree with *Bates* that Section 21.223 is "aimed [solely] at traditional veil piercing theories, which seek to hold shareholders and beneficial owners liable merely based on their status as an owner or shareholder" and is not to be used as a mechanism to "shield a corporate officer or agent who commits tortious conduct merely because the officer or agent also possesses an ownership interest in the corporation." *Bates*, 361 F. Supp. 3d at 667 (determining that common-law rule is not "superseded by § 21.223 [even] when the tort claim is related to a contractual obligation of the corporation or LLC"). Therefore, we hold that the trial court erred in granting appellees summary judgment on appellants' fraud claims against appellees because of our legal determination that Section 21.223 does not abolish the common-law rule that corporate agents are directly and personally liable for their own tortious conduct even when committed in the course and scope of their employment or in their role as corporate agents.

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

In re Roberson Cartridge Co., LLC, No. 22-20192-rlj, 2023 WL 2393809 (Bankr. N.D. Tex. Mar. 7, 2023).

The court concluded that the sole manager of an LLC had authority to file the LLC debtor's bankruptcy petition, and a blocking provision in the company agreement that required approval of a non-member creditor for the LLC's bankruptcy petition was void as a matter of public policy.

The debtor in this bankruptcy proceeding was Roberson Cartridge Co., LLC ("Roberson Cartridge"), a Texas limited liability company that manufactured cartridges for ammunition. Jeff Roberson supplied Roberson Cartridge's initial capital and received Class A Units in Roberson Cartridge. An amended and restated company agreement listed another individual as a member, but Roberson Cartridge and its creditor Matador Brass Partners, LLC ("Matador Brass") referred to Roberson as the "100% owner" of Roberson Cartridge. Assuming the other individual named as a member held 6,000 Class A Units, Roberson had 94,000 Class A Units and was the sole manager of Roberson Cartridge.

Matador Brass was created to provide financing to Roberson Cartridge, and its loan agreement with Roberson Cartridge required Roberson Cartridge to execute an amended and restated company agreement that required Roberson Cartridge to obtain Matador Brass's written consent before Roberson Cartridge could take "any action that results in a liquidation or dissolution of the Company[.]" The amended and restated company agreement also stated that "[u]ntil Matador's acquisition of Class B Units, Matador shall not be a Member of the Company but shall be a third-party beneficiary of this Agreement with a right to enforce the provisions of this Agreement applicable to Matador."

Roberson Cartridge later defaulted on its loan from Matador Brass and Roberson, without Matador Brass's consent, adopted a resolution in his capacity as manager of Roberson Cartridge to file a Chapter 7 bankruptcy petition for Roberson Cartridge. Matador Brass sought to dismiss the bankruptcy petition on the basis it was filed without proper authority or, alternatively, to convert the bankruptcy to a Chapter 11 case.

The court first discussed Matador Brass's argument that the bankruptcy should be dismissed on the basis that it was not filed with proper authority. Matador Brass relied on three points for dismissal: (1) the effect of Roberson Cartridge's default on the loan was to strip Roberson, the presumptive sole member of Roberson Cartridge, of his right to vote his interests to authorize the filing of a bankruptcy petition, and the resolution he signed authorizing the filing was ineffective, (2) under the amended company agreement, Roberson Cartridge was required to obtain the permission of Matador Brass before filing its Chapter 7 petition, thus rendering the filing ineffective, and (3) Roberson Cartridge filed the case in bad faith.

The court stated that the issue of authority is determined by state law, and the court rejected Matador Brass's argument that Roberson had no right to issue a board resolution authorizing Roberson Cartridge's Chapter 7 filing. The court reasoned as follows that Roberson had authority as the sole manager to authorize the bankruptcy filing regardless of the impact of the default on his rights to vote as a member:

> 6. Matador Brass cites *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010) (Lynn, J.), to support the proposition that voting rights are stripped when those rights are pledged pursuant to a loan agreement and the debtor defaults. Judge Lynn did not expressly state whether the voting rights of the debtor were immediately divested; rather, there he found that the lender acquiesced to the debtor's continued control. *Id*. at 404. The debtor continued to control the company after default, while the lender did not object to the control. *Id*. But "[m]ost tellingly, ... [the lender] commenced involuntary chapter 11 cases against [the debtors]." *Id*. In that case, the lenders did not dispute the debtor's authority to file; however, Judge Lynn did indicate that a pledge of voting rights may strip the pledgor upon default of the underlying loan.
> 7. Matador Brass concedes that Texas Business Organizations Code § 101.108 may prevent it from managing the company; however, it argues that Roberson's voting rights were relinquished immediately upon default so he lacked authority to file Roberson Cartridge's petition. The question at first blush is whether Roberson lost all voting rights immediately upon default. But the controlling issue is whether Roberson, as sole manager, had authority to execute a board resolution authorizing Roberson Cartridge to file a bankruptcy petition.
> 8. The Court has noted that
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> > [M]embership units in an LLC may be assigned, but the assignment does not entitle the assignee to participate in management, to become a member, or to exercise the rights of a member. *See* Tex. Bus. Orgs. Code Ann. § 101.108 (West 2014). The assignee is entitled to an allocation of the economic attributes—income, gain, loss, distributions, etc.—but only to the extent that such benefits have been assigned. *Id*. § 101.109. An assignee may become a member on approval of all members. *Id*.
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> *In re Wilson*, No. 11-50396, 2014 WL 3700634, at *6 (Bankr. N.D. Tex. July 24, 2014).
> 9. Turning to the Amended Company Agreement, "no Member, in its capacity as a Member, shall have the power to act for or on behalf of, or to bind, the Company." Matador Brass Ex. 1G at 22. The members within Roberson Cartridge "have the right to attend meetings of the Members and speak at such meetings. An annual meeting of Members to elect the Managers and transact such other business as is brought before the meeting may be held as determined by the Managers." *Id*. Accordingly, the voting rights of members are limited to electing managers and voting on other matters brought by the managers. [In a footnote, the court pointed out provisions of the company agreement under which the members had authority to elect to wind up Roberson Cartridge or the managers could trigger a winding up by disposing of all or substantially all of Roberson Cartridge's assets.]
> 10. Under Texas Business Organizations Code § 101.251, "[t]he governing authority of a limited liability company consists of: ... the managers of the company, if the company agreement provides that the company is managed by one or more managers[.]" Per the Amended Company Agreement, the board of managers manages, operates, and controls the business and affairs of the company. Matador Brass Ex. 1G at 28. Roberson Cartridge's managers have the authority to act on behalf of the company pursuant to a board resolution. *Id*. As confirmed by Greer's [Matador Brass's president and manager] testimony, Roberson was the sole manager at the time the bankruptcy was filed. In Roberson's capacity as sole manager of Roberson Cartridge, the board entered a resolution to authorize the filing of Roberson Cartridge's chapter 7 petition. Debtor Ex. 1.
> 11. Roberson did not use his voting rights as a member to authorize the filing of the bankruptcy petition, so even if his member voting rights were immediately divested, his authority as sole manager was unaffected. The board resolution thereby effectively authorized Roberson Cartridge to file its petition. This conclusion is also supported by the Texas Business Organizations Code. Section 101.356 requires the affirmative vote of a majority of all members for an LLC to act

> outside the ordinary course of business; however, section 101.552 states that "[a] majority vote of all of the members of a limited liability company or, if the limited liability company has no members, a majority of all of the managers of the company is required to approve (1) a voluntary winding up of the company[.]" There is conflicting evidence on whether another member exists, but, in their briefing, both parties state that Roberson is the sole owner. If Roberson was the sole member, and if he lost his membership interest upon default, then no member existed to vote. Under § 101.552, the manager had authority to approve the winding-up of the business.

The court next addressed Matador Brass's argument that the bankruptcy filing was not authorized because the amended company agreement required the consent of Matador Brass, which was not obtained. In the absence of Fifth Circuit case law directly on point, the court relied on case law in other jurisdictions to conclude that the provision requiring the consent of Matador Brass, a creditor who was not a member (but did have the right under its convertible loan to become a member), was void as against public policy. The court analyzed the so-called "blocking provision" as follows:

> 13. Texas law states that "[t]he governing authority of a limited liability company shall manage the business and affairs of the company as provided by: (1) the company agreement[.]" Tex. Bus. Orgs. Code § 101.252. The Amended Company Agreement requires that Roberson Cartridge obtain Matador Brass's written consent before it takes "any action that results in a liquidation or dissolution of the Company[.]" Matador Brass Ex. 1G at 20. The issue is whether this provision of the Amended Company Agreement limited or blocked the debtor's ability to file a chapter 7 petition.
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> 14. The provision is a form of a blocking provision. *See Franchise Servs. of N. Am.*, 891 F.3d at 205 ("Courts appear to use the term 'blocking provision' as a catch-all to refer to various contractual provisions through which a creditor reserves a right to prevent a debtor from filing for bankruptcy."); see generally 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09 (2022). "In general, the enforceability of blocking provisions depends on who has them. If it is creditors, they are generally unenforceable. If it is equity interest holders, they are generally *enforceable*." 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09[3] (2022) (emphasis added). *Compare In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (A chapter 11 case was dismissed because the LLC's operating agreement required the consent of all members for the LLC to file for bankruptcy relief, and the petitioner—holding a 90% interest in the LLC—did not receive consent from the other member who held the remaining 10% interest.), *with In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (A debtor LLC amended its operating agreement, wherein it granted a creditor the right to approve or disapprove of filing bankruptcy petitions. There, the court held the provision was void as against public policy.).
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> 15. The Fifth Circuit has not directly addressed the issue of pre-petition waivers of the right to file bankruptcy. *See Franchise Servs. of N. Am.*, 891 F.3d at 207 ("Several courts of appeals—though not this one—have opined that a pre-petition waiver of the benefits of bankruptcy is contrary to federal law and therefore void .... As this case is framed, we can assume without deciding that such a waiver is invalid. We leave the resolution of that issue for another case, one in which it is squarely presented.").
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> 16. In *Franchise Services of North America*, the Fifth Circuit held "[f]ederal law does not prevent a *bona fide shareholder* from exercising its right to vote against a bankruptcy petition just because it is also an unsecured creditor." 891 F.3d at 203 (emphasis added). The court acknowledged its holding was limited:
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>> As we note later in this opinion, our holding goes no further. This case involves a bona fide shareholder. The equity investment made by the shareholder at issue here was $15 million and the debt just $3 million. We are not confronted with a case where a creditor has somehow contracted for the right to prevent a bankruptcy or where the equity interest is just a ruse.
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> *Franchise Servs. of N. Am.*, 891 F.3d at 203 n.1.

> 17. *Unlike Franchise Services of North America*, the Court is presented with a case where a creditor holds a convertible loan, not yet converted into a membership interest, and the creditor conditioned the debtor's ability to file bankruptcy on the creditor's approval.
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> 18. Courts have found blocking provisions are void on public policy grounds when a creditor, without an ownership interest, retains the ability to block the filing of a petition. *See In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (Amendments to an LLC's operating agreement that required a creditor's approval before the LLC could file bankruptcy was void as against public policy). A court has gone so far as to hold that public policy voids blocking provisions even when the creditor has an ownership interest but the ownership interest is nominal. *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016) (The operating agreement was amended to include the creditor as the holder of one common unit and required approval of all members holding common units to approve before filing a voluntary bankruptcy petition. The court held the agreement was void as against public policy because the nature and substance of the agreement was to contract away the LLC's right to a discharge in bankruptcy.).
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> 19. "It is a well settled principal [sic] that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy." *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983). "[S]ince bankruptcy is designed to produce a system of reorganization and distribution different from what [one] would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply." *Bank of Am. v. N. LaSalle St. Ltd. P'ship (In re 203 N. Lasalle St. P'ship.)*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000). "This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002).
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> 20. The Amended Company Agreement required that Roberson Cartridge obtain Matador Brass's approval before taking action to liquidate the company.
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> 21. The Amended Company Agreement and loan documents were entered on May 14, 2021. Matador Brass Ex. 1G, 1A. Matador Brass has not converted its interest as a creditor to that of a member. Matador Brass entered a relationship with Roberson Cartridge as a creditor and remains a creditor. Requiring a borrower to waive its right to file a bankruptcy petition, as Matador Brass required of Roberson Cartridge, is void as against public policy. There is no precedent for upholding a blocking provision when the blocking creditor holds no ownership interest in the debtor.

After concluding that Roberson Cartridge's bankruptcy filing was not made in bad faith, the court addressed the request of Matador Brass to convert the Chapter 7 case to a case under subchapter V of Chapter 11. The court found no authority for imposing such a decision on the debtor where the Bankruptcy Code provides that the election to proceed under subchapter V is exclusively the debtor's.

Mike Mizrachi v. Doron Almog, Civ. A. No. CV H-18-2508, 2020 WL 13302648 (S.D. Tex. Mar. 3, 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.)

The trial court concluded that a merger of one LLC into another LLC was properly authorized. The court also resolved a valuation dispute regarding the value of a 1/3 interest in the disappearing entity.

In April 2010, brothers Mike Mizrachi, Ofer Mizrachi, and Doron Almog formed Pattaya LLC, a Texas LLC, for the purpose of owning and operating an apartment complex. After disputes arose between the brothers, plaintiff Mike Mizrachi and Ofer Mizrachi, exercising their majority interest in Pattaya and without prior notice to defendant Almog, consummated an Agreement and Plan of Merger between Pattaya (the "merging entity") and Lahav Investments LLC, a Texas LLC (the "surviving entity"). Pattaya was merged into Lahav, which became the sole surviving entity in the merger. Lahav had as its only two members the two elder brothers (Mike and Ofer), each of whom owned 50% of the entity.

Mike sought a declaratory judgment that the merger was effective and properly authorized. The court agreed and granted the judgment:

5. Business mergers in Texas are governed by Chapter 10 of the Texas Business Organizations Code. "To effect a merger, each domestic entity that is a party to the merger must act on and approve the plan of merger in the manner prescribed by this code for the approval of mergers by the domestic entity." TEX. BUS. ORGS. CODE § 10.001 (b).

6. "A domestic entity subject to dissenters' rights must provide the notice required by Section 10.355." *Id.* § 10.001 (c).

7. Unless its governing documents provide to the contrary, a limited liability company is not a "domestic entity subject to dissenter's rights." *Id.* § 10.351.

8. It is undisputed, and the Court finds as a matter of law, that Pattaya LLC was not a domestic entity subject to dissenters' rights.

9. Subject to exceptions not relevant here, "a fundamental business transaction of a limited liability company . . . must be approved by the affirmative vote of the majority of all of the company's members" and "an action of a limited liability company not apparently for carrying out the ordinary course of business of the company must be approved by the affirmative vote of the majority of all of the company's governing persons." TEX. BUS. ORGS. CODE § 101.356 (b), (c).

10. A limited liability company may act "without holding a meeting, providing notice, or taking a vote if a written consent or consents stating the action to be taken is signed by the number of governing persons, members, or committee members of a limited liability company, as appropriate, necessary to have at least the minimum number of votes that would be necessary to take the action at a meeting at which each governing person, member, or committee member, as appropriate, entitled to vote on the action is present and votes." *Id.* § 101.358(b).

11. Members of a limited liability company may also take action without a meeting "by an affirmative vote of those persons having at least the minimum number of votes that would be necessary to take the action at a meeting at which each member or manager, as appropriate, entitled to vote on the action is present and votes." *Id.* § 101.359(1).

12. Plaintiff Mike Mizrachi and Ofer Mizrachi, who each owned a one-third interest in Pattaya LLC, collectively comprised a majority of Pattaya LLC's members and a majority of Pattaya LLC's governing persons.

13. It is undisputed, and the Court finds as a matter of law, that Plaintiff Mike Mizrachi and Ofer Mizrachi had authority to effect the Merger of Pattaya LLC into Lahav Investments LLC effective May 31, 2018.

14. It is undisputed, and the Court finds as a matter of law, that with the exception of the amount of consideration to be paid to Defendant Doron Almog, the Agreement and Plan of Merger executed on May 30, 2018 by Plaintiff Mike Mizrachi and Ofer Mizrachi, on behalf of both Pattaya LLC and Lahav Investments LLC, was effective and valid under Texas law.

15. At trial, the parties agreed that the question in dispute which requires the Court's resolution is what sum of money Defendant Doron Almog should be paid as fair consideration for his one-third membership interest in Pattaya LLC at the time of its Merger into Lahav Investments LLC on May 31, 2018.

16. In addition to his liability to Defendant as a party, Plaintiff Mike Mizrachi has stipulated and agreed to accept full liability to Defendant Doron Almog also for any liability that might otherwise be attributable to Ofer Mizrachi or Lahav Investments LLC arising out of the Merger, and in consideration therefor Defendant Almog has fully released Ofer Mizrachi and Lahav Investments, LLC from any liability arising from the Merger.

17. In light of these agreements, Plaintiff Mike Mizrachi is liable for the sum of money that Defendant Doron Almog should be paid as fair consideration for his one-third membership interest in Pattaya LLC at the time of the Merger on May 31, 2018, and it is unnecessary to determine how that liability would otherwise have been shared by Mike Mizrachi, Ofer Mizrachi, and Lahav Investments LLC, or whether Plaintiff Mike Mizrachi breached any fiduciary duty that he may have owed to Defendant Doron Almog. . . .

ORDERED that Defendant Doron Almog shall have and recover of and from Plaintiff Mike Mizrachi, after having received credit for the sum of $248,448.37 that Plaintiff caused to be paid into the United States Treasury in withholding tax to be credited to Defendant Almog's foreign income tax liability incurred from being paid for his one-third interest in Pattaya LLC, the net sum of ONE MILLION ONE THOUSAND FIVE HUNDRED FIFTY-ONE AND 63/100 DOLLARS ($1,001,551.63) for all of his interest in and related to Pattaya LLC, which was lawfully merged into Lahav Investments LLC on May 31, 2018.

D. Fiduciary Duties

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims for breach of fiduciary duty (direct and derivative) and oppression. The jury found in her favor on those claims, but the court of appeals reversed on one derivative claim based on her lack of standing because she was not an owner of the entity on whose behalf she brought that claim. The court of appeals reversed as to another derivative claim for breach of fiduciary duty brought on behalf of a limited partnership because the plaintiff did not show that the individual who allegedly breached his fiduciary duty to the limited partnership exercised the requisite control over the general partner to owe a fiduciary duty to the limited partnership. The court of appeals affirmed a claim for breach of fiduciary duty against the general partner of the limited partnership based on the limited partnership's payment of personal legal fees incurred by individual defendants. The court also affirmed as to a claim based on an informal fiduciary duty owed by one of the individual defendants. The court reversed the jury's finding of oppression, concluding that the evidence did not meet the standard for oppression as a matter of law.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the

President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

With respect to the malicious prosecution claim (which was based on the involuntary commitment proceeding against Lisa), Wes Jr., Stacey, and Lee argued that (1) Lisa did not meet her burden to establish that Wes Jr. lacked probable cause to file the commitment application, (2) the trial court abused its discretion in excluding evidence of Lisa's health history, (3) the actual and punitive damages awarded for malicious prosecution were excessive, and (4) there was insufficient evidence to support the actual and punitive damages against Lee and Stacey. The court discussed the applicable law and the evidence at length and concluded that there was conflicting evidence regarding the facts and circumstances underlying Wes Jr.'s decision to initiate involuntary commitment proceedings against Lisa, but it was the jury's province to resolve the conflicts. Viewing the evidence in the light most favorable to the verdict, the court concluded that there was some evidence supporting the jury's finding that Wes Jr. possessed a private motive to harm Lisa and that he lacked probable cause to initiate the proceedings based on the facts and circumstances known to him at the time he filed the application. Given the state of the entire record and the testimony of Lisa's siblings regarding past concerns about Lisa's mental health and the family history of mental illness, the court concluded that the excluded additional evidence (especially evidence from decades before) regarding Lisa's behavior and health history was not reversible error. The court also overruled the challenges to the actual and punitive damages awarded on the malicious prosecution claim against Wes Jr. and co-conspirators Stacey and Lee.

The court reversed the award of actual damages to Lisa on her defamation claim (which was based on statements to employees of the business that Lisa was mentally ill and posed a danger) because the court found there was no evidence that these statements were the proximate cause of Lisa's past mental anguish, and the court reversed the award of exemplary damages because Lisa was not entitled to recover exemplary damages absent actual damages.

The court addressed a challenge to Lisa's standing to assert a derivative claim brought by Lisa on behalf of SignAd GP, LLC. The individual and entity defendants argued that all relief granted by the trial court based on the derivative claim Lisa asserted on behalf of SignAd GP, LLC for breach of fiduciary duty against Wes Jr., Lee, and Stacey should be reversed because Lisa had no ownership interest in SignAd GP, LLC and thus lacked standing to bring derivative claims on its behalf. With respect to this claim, the jury found that Wes Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC by (1) failing to maintain internal controls on employee fringe benefits and (2) selling company vehicles for less than fair market value. The jury awarded more than $500,000 in damages for this claim, and the trial court awarded Lisa one-sixth of the damage award under Section 153.405 of the Texas Business Organizations Code (TBOC). The court analyzed this issue and concluded that Lisa lacked standing to assert the derivative claim on behalf of SignAd GP, LLC due to her lack of an ownership interest in that entity. In the course of that analysis, the court refuted a contention by Lisa that the jury question "'mistakenly (but harmlessly) presented the issue to the jury in terms of a fiduciary obligation to SignAd GP instead of to SignAd, Ltd.'" The court stated that "SignAd, Ltd. and SignAd GP, LLC are distinct legal entities and any duties Wes, Jr., Lee, and Stacey may owe to SignAd, Ltd. are not necessarily the same as any duties they may owe to SignAd GP, LLC." The court emphasized that the jury question asked about duties owed to SignAd GP, LLC, not SignAd, Ltd., and the court stated that it could not simply substitute another entity for SignAd GP, LLC as Lisa suggested. The court stated that "[t]he question presented is one of standing," and Lisa lacked standing to bring a derivative claim on behalf of SignAd GP, LLC.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim against Wes Jr. on behalf of SignAd, Ltd. asserting that Wes Jr. had engaged in self-dealing transactions with his side business ProIce Solutions, LLC" ("ProIce"). The jury was instructed that "[b]ecause Wesley Gilbreath, Jr. was President of SignAd, Ltd., he owed SignAd, Ltd. a fiduciary duty." The jury found that Wes, Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with [ProIce]."

SignAd GP, LLC's Board of Managers approved a policy that allowed other companies in which the managers had an interest to use its vacant billboards in exchange for paying only administrative costs. Pursuant to the policy, Wes Jr. allowed ProIce, a company in which he was a passive investor, to advertise on the company's vacant billboards. ProIce was not billed for and did not pay for administrative costs. According to Wes Jr., the omission was inadvertent. He also contended that ProIce's use of the billboards was disclosed to and discussed by the board at board meetings and that there was no loss of revenue to SignAd, Ltd. from ProIce's use of its billboards because there was no evidence ProIce ever advertised on billboards for which SignAd, Ltd. had a paying customer wanting to pay for the billboard. In addition to arguing that the judgment against him on this claim should be reversed due to the absence of evidence that SignAd, Ltd. sustained a loss of revenue as a result of ProIce's use of its billboards, Wes Jr. argued that the trial court's judgment must be reversed because there was no evidence he owed a fiduciary duty to SignAd, Ltd. and no jury finding that such a fiduciary relationship existed.

The court of appeals recited the elements of a claim for breach of fiduciary duty (a plaintiff must establish that (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach resulted in injury to the plaintiff or benefit to the defendant) and explained that the existence of a formal fiduciary duty is a question of law, but the underlying facts giving rise to a formal fiduciary duty are issues for the fact finder if those facts are disputed. Although the parties here disagreed as to whether Wes Jr. owed a fiduciary duty to SignAd, Ltd., the court said that they did not appear to disagree about the underlying facts.

The court explained that SignAd GP, LLC, as SignAd, Ltd.'s General Partner with "the sole and exclusive right" to manage SignAd, Ltd.'s business, owed fiduciary duties to SignAd, Ltd. and its limited partners. Wes Jr., as an officer of SignAd GP, LLC, owed a fiduciary duty to SignAd GP, LLC. The relevant question was whether Wes Jr., as an officer of SignAd GP, LLC, owed a fiduciary duty to SignAd, Ltd. The jury was not asked to determine whether Wes Jr. owed a fiduciary duty to SignAd, Ltd. but was instructed that Wes Jr. was the President of SignAd, Ltd. and that as the President of that entity, he owed a fiduciary duty to SignAd, Ltd. The court pointed out, however, that Wes Jr. was not the President of SignAd, Ltd.; rather, he was President of SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court discussed Texas case law under which a person who controls a general partner of a limited partnership has been deemed to owe a fiduciary duty to the limited partnership and its limited partners and concluded that Wes Jr. did not have the requisite control over SignAd GP, LLC, SignAd, Ltd.'s General Partner:

> Lisa argues that despite the erroneous instruction, she was not required to obtain a jury finding that Wes, Jr. owed a fiduciary duty to SignAd, Ltd. Relying on several decisions from the Fifth Circuit Court of Appeals, she claims that Wes, Jr. owed a fiduciary duty to SignAd, Ltd. as a matter of law based on the "control" he exercised over SignAd GP, LLC and SignAd, Ltd.'s daily operations. *See FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615, 621–22 (5th Cir. 2011) (holding officer of general partner of limited partnership who "exercised near-complete control over both tiers of the entity" owed fiduciary duties to limited partnership under Texas law); *McBeth v. Carpenter*, 565 F.3d 171, 178 (5th Cir. 2009) (holding president of general partner who had "exclusive right to manage all contracts and agreements ... relating to the [l]and" under development and controlled operations of limited partnership owed fiduciary duties to limited partnership); *LSP Inv. P'ship v. Bennett (In re Bennett)*, 989 F.2d 779, 790 (5th Cir. 1993) (holding individual who was sole general partner of sole general partner of limited partnership owed fiduciary duty to limited partners because individual was only person with power or authority to direct affairs of second-tier general partner who had "full, exclusive and complete authority and discretion to manage, control and make all decisions affecting the purposes of the partnership and to take any action required to effectuate the purpose of the partnership").
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> Assuming, without deciding, that such a "control" test exists and could form the basis of a fiduciary duty, Lisa's argument does not carry the day. [The court noted in a footnote here that Lisa had not cited and the court had not found any Texas case holding that an officer of a general partner of a limited partnership owes a fiduciary duty to the limited partnership as a matter of law.] The holdings in each of the cases Lisa cites focus on the control the person alleged to owe the fiduciary duty exercised over the relevant limited partnership. The oldest of the opinions on which Lisa relies, *LSP Investment Partnership v. Bennett (In re Bennett)*, 989 F.2d 779 (5th Cir. 1993), relied upon the reasoning of *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) and the extent and degree of control exercised by the individual in that case who purportedly owed the fiduciary duty. *See In re Bennett*, 989 F.2d at 790 ("[B]ased on the holding in *Crenshaw* and the cases cited therein, we find that Bennett, as the managing partner of the

managing partner, owed to the MG limited partners 'the highest fiduciary duty recognized in the law.' ").

In *Crenshaw*, the Austin Court of Appeals, relying on the law of trusts, held that Elizabeth Swenson, the general partner of the general partner of a limited partnership, owed a fiduciary duty to the limited partners. 611 S.W.2d at 891. The court, however, did not hold that the general partners of a general partner owe fiduciary duties to limited partners as a matter of law. Limiting its holding to the "facts of the present case," the court held that Swenson, who was the sole general partner of the general partner (and who no one contested exercised complete control over the limited partnership), owed a fiduciary duty to the limited partners. *See id.* at 890–91 ("In a limited partnership, the general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust."). [The court noted in a footnote here that the Legislature has expressly rejected the analogy of a partner to a trustee in Tex. Bus. Orgs. Code § 152.204(d).]

Relying on *Crenshaw* and other cases, the Fifth Circuit Court of Appeals in *In re Bennett* held that Bennett, who was the sole general partner of Mariner Interest No. 20, Ltd. ("No. 20"), the general partner of Mariner/Greenspoint, Ltd. ("MG"), owed a fiduciary duty to MG's limited partners because of the degree of control Bennett exercised over No. 20 and MG. *See In re Bennett*, 989 F.2d at 781, 790. The court explained that "[u]nder the terms of the MG partnership agreement, the general partner, No. 20, was charged with management of the partnership and had full, exclusive and complete authority and discretion to manage, control and make all decisions affecting the purposes of the partnership," and that "Bennett, as the sole general partner of No. 20, was the only individual with the power or authority to direct the affairs of No. 20 and MG." *Id*. at 781. As such, the court held, Bennett owed a fiduciary duty to MG's limited partners. *Id*. at 790[.] In so holding, the court noted that under Texas law, "the issue of control has always been the critical fact looked to by the courts in imposing this high level of responsibility." *Id*. at 789–90 (concluding that by virtue of his control, Bennett owed a fiduciary duty to MG's limited partners).

Like the court in *In re Bennett*, the courts in *In re Harwood* and *McBeth* focused much of their duty analysis on the degree of control exercised by Harwood and Carpenter over the general partnership and limited partnership in those cases, holding that by virtue of their control over both tiers of the relevant entities, Harwood and Carpenter, as officers of the general partner, owed fiduciary duties to the limited partnerships. *See In re Harwood*, 637 F.3d at 623 (stating "Harwood exercised near-complete control over both tiers of the entity until a few months prior to his termination" and board "paid little attention to the day-to-day operations of FNFS," and "the other managing shareholder and chief executive officer of B&W, was not able to exercise meaningful oversight because he had no particular banking expertise"); *McBeth*, 565 F.3d at 178 (stating that under limited partnership agreement "the general partner retained exclusive control and management over the partnership" and noting "extensive testimony" established that Carpenter, who often referred to himself as "the general partner," "was 'the man in control' and 'heading the efforts' of the partnership" with "exclusive right to manage all contracts and agreements ... relating to the [l]and"); *see also Allen*, 367 S.W.3d at 391 (holding "a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity").

There is no evidence of such requisite control here. SignAd GP, LLC is a single-member limited liability company. Stacey is the sole member of SignAd GP, LLC. Lee is the Chairman of SignAd GP, LLC's Board of Managers and its Chief Executive Officer. Wes, Jr. is the President of SignAd GP, LLC (not SignAd, Ltd.) and SignAd GP, LLC's Chief Operating Officer. Wes, Jr., Lee, Stacey, and Lisa are the current members of SignAd GP, LLC's Board of Managers.

SignAd GP, LLC has "the sole and exclusive right to manage the business of" SignAd, Ltd. under the limited partnership agreement. And SignAd GP, LLC's Board of Managers manages the business and affairs of SignAd, Ltd. and "develop[s] policies and procedures to be implemented and followed by the officers and employees in their day-to-day operations." Pursuant to SignAd GP, LLC's regulations, Wes, Jr., as President of SignAd GP, LLC, controls SignAd GP, LLC's "business and affairs," but he does so subject to the Chairman of the Board and the Board of

> Managers. Specifically, Section 4.6 of SignAd GP, LLC's regulations states: "Subject to the Chairman of the Board, if any, and the Board of Managers, itself, the President shall in general supervise and control all of the business and affairs of" SignAd GP, LLC and "in general shall perform all duties incident to the office of President."
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> Unlike the passive minority owner in *Allen* and the other managing shareholder and chief executive officer of the general partner in *In re Harwood* who "was not able to exercise meaningful oversight because he had no particular banking expertise," Lisa testified she had been actively involved in the family business for decades as an owner and board member, and that Brett, her ally on the board for many years, had been the company's vice president of real estate. Also, unlike *In re Harwood* where the board "paid little attention to the day-to-day operations" of the company, Lisa, and the other members of SignAd GP, LLC's Board of Managers, reviewed regular financial information and developed and implemented policies governing the running of SignAd GP, LLC and SignAd, Ltd., including the free billboard policy. Although Wes, Jr. decided which properties, if any, to purchase, the Board of Managers set the limit on his spending authority and any sales of real property had to be presented to and approved by the Board of Managers. Based on this evidence, we conclude that the degree of control Wes, Jr. exercised as an officer of SignAd GP, LLC did not, under the circumstances presented here, create a fiduciary duty as a matter of law as to SignAd, Ltd. [footnotes omitted]

The court thus sustained Wes Jr.'s challenge to the jury's finding that he failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and reversed the trial court's judgment in favor of Lisa on her derivative claim for breach of fiduciary duty against Wes Jr. based on his transactions with ProIce.

Next the court of appeals discussed Lee's challenge to the jury's finding that he failed to comply with an informal fiduciary duty to Lisa, which the trial court relied on in part to grant injunctive relief in favor of Lisa and appoint a rehabilitative receiver to oversee an equitable buyout by the entity defendants of Lisa's interests in the Limited Partnerships and General Partners. Lee argued that the finding was immaterial because there was no evidence or finding that Lisa was damaged by Lee's breach of fiduciary duty or that Lee improperly benefitted from the breach. The jury question on Lee's breach of fiduciary duty to Lisa instructed the jury that to establish Lee failed to comply with his fiduciary duty to Lisa, Lisa had to establish one of five scenarios, one of which was that "[Lee] placed his own interests before Lisa Horan's, used the advantage of his position to gain a benefit for himself at the expense of Lisa Horan or placed himself in a position where his self-interest might conflict with his obligations as a fiduciary." The court said that the elements of causation and damages were thus included in the charge and that the jury's affirmative finding was an implicit finding that Lee personally benefitted from his breach of fiduciary duty to Lisa.

The court then explained that there was evidence to support the jury's implied finding that Lee's breach of his fiduciary duty to Lisa either injured Lisa or benefitted Lee as follows:

> The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay certain non-business-related legal fees for Wes, Jr., Lee, Stacey, and Mark. The jury awarded $375,000 in damages for that claim. In the Amended Final Judgment, the trial court awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The jury found that Lee knowingly participated in the breach and it apportioned 25% of the responsibility for the breach to Lee.
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> As discussed later in the opinion, the record also reflects that Wes, Jr., Lee, and Stacey voted to amend SignAd GP, LLC's regulations to allow themselves, as the majority of the Board of Managers, to create SignAd GP, LLC's Special Litigation Committee over Lisa's objections, and they appointed themselves to the committee. There is also some evidence that SignAd, Ltd. paid the personal legal fees of Wes, Jr., Lee, Stacey, and Mark at Wes, Jr.'s direction and that the Special Litigation Committee gave Wes, Jr. the authority to make such decisions. Based on this evidence, the jury reasonably could have concluded that Lee breached his fiduciary duty to Lisa through his knowing participation in the Special Litigation Committee which authorized Wes, Jr.

to cause SignAd, Ltd. to pay for Lee's personal legal fees, constituting not only a benefit to Lee, but also injuring Lisa's interest in SignAd, Ltd. [footnotes omitted]

The court thus overruled Lee's challenge to the portions of the judgment based on the jury's finding that he failed to comply with his informal fiduciary duty to Lisa.

Another claim for breach of fiduciary duty asserted by Lisa was a derivative claim on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses that SignAd, Ltd. improperly paid. Enriquez opined that the payments were not consistent with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller, as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was thus some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...."

including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis of their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

The entity defendants also argued that pleading deficiencies by Lisa precluded the submission of the jury questions associated with this breach-of-fiduciary-duty claim because Lisa did not adequately address the allegedly wrongful fee payments and never alleged that the individual defendants "knowingly participated" in any alleged breach. Because Texas follows a "fair notice" standard of pleading, the court rejected these arguments given the wrongful conduct she alleged.

The entity defendants argued there was insufficient evidence of damages because Enriquez's testimony that SignAd, Ltd. could be subject to potential tax penalties due to SignAd GP, LLC's alleged breach of its fiduciary duty was speculative and thus irrelevant. Enriquez explained her concern that the payment of personal legal fees by SignAd, Ltd. put SignAd, Ltd.'s S-corporation status at risk if the payments were found to be dividends that were disproportionately paid in violation of S-corporation requirements. The entity defendants argued that this was only a "theoretical possibility" because the Internal Revenue Service had not made any inquiries and no penalties had been assessed or paid. Lisa countered that the misapplication of funds of SignAd, Ltd. by paying personal legal fees of the individuals was a breach of fiduciary duty by the general partner in any event, and the court agreed. The court stated that "[w]hether or not SignAd GP, LLC's breach of its fiduciary duty risked SignAd, Ltd.'s status as an S-Corporation, the evidence established SignAd GP, LLC damaged SignAd, Ltd. because SignAd GP, LLC authorized the payment of legal fees incurred by Wes, Jr., Lee, Stacey, and Mark for matters unrelated to SignAd, Ltd." The court thus concluded that the jury's finding on damages was supported by the evidence.

The entity defendants also argued that the trial court's judgment improperly awarded money damages directly to Lisa under Section 153.405 of the Texas Business Organizations Code (as in effect prior to September 1, 2019) on her derivative claim filed on behalf of SignAd, Ltd. (The Legislature significantly amended the provisions of Chapter 153 on derivative proceedings involving limited partnerships in 2019, but the pre-amendment provisions applied in this case.) The defendants argued that an individual stakeholder in a legal entity does not have the right to recover personally for harms done to the legal entity and that Section 153.405 of the TBOC did not authorize the direct distribution of damages recovered in a derivative claim brought on behalf of a limited partnership to a single limited partner. When the trial court entered judgment, Section 153.405 of the TBOC, entitled "Expenses of Plaintiff," stated: "If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff." The court held that the plain language of Section 153.405 only permitted Lisa to recover her "reasonable expenses, including reasonable attorney's fees" and that Lisa was not entitled to a direct distribution of the damages awarded for her derivative claim.

Lisa relied on *Beach Capital Partnership, L.P. v. DeepRock Venture Partners L.P.*, 442 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2014, no pet.) in arguing that the court had discretion under Section 153.405 of the TBOC to award a share of the recovered damages directly to a limited partner in proportion to her ownership interest in a derivative action brought on behalf of a closely held limited partnership, but the court found her reliance was misplaced. The court said that it held in that case that the trial court had not erred in awarding a portion of a derivative damage award directly to a limited partner under Section 153.405 because "the judgment dissolved Playa and ordered Playa's receiver to distribute all remaining assets to DeepRock." Because this part of the judgment was not challenged by the parties in that case, the court held that the direct award to DeepRock was "entirely consistent with a payment of $500,000 to Playa and its simultaneous distribution to Playa's partners," especially "in light of the unchallenged judgment that all of [the dissolved partnership's] remaining assets be distributed immediately to [the limited partner]." The court said that the holding in *Beach Capital Partnership* had no application in this case since SignAd, Ltd. had not been dissolved and the trial court did not direct a receiver to distribute the remaining assets of the partnership to the limited partners. Lisa thus was not entitled to a direct distribution of damages for the derivative claim she filed on behalf of SignAd, Ltd., and the court reversed the portion of the judgment awarding Lisa direct damages for the derivative claim she asserted on behalf of SignAd, Ltd.

The entity defendants also raised numerous challenges to the jury's finding of oppression. After a lengthy discussion of the current state of Texas law regarding oppression and the evidence in this case, the court sustained the entity defendants' challenge to the sufficiency of the evidence to support the jury's finding of oppression.

The court began its discussion by pointing out that Section 11.404 of the Texas Business Organizations Code (TBOC) authorizes a Texas court to appoint a receiver to rehabilitate a domestic entity under certain circumstances, including when it is established in an action brought by an owner or member of the entity "that ... the actions of the governing persons of the entity are illegal, oppressive, or fraudulent." Tex. Bus. Orgs. Code § 11.404(a)(1)(C). The term "oppressive" is not defined in the statute, and the Texas Supreme Court, in *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), has pronounced that an entity's directors or managers engage in oppressive action "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]." The Texas Supreme Court said that the Legislature signaled that the term "oppressive" should be construed to include acts that are as serious as illegal or fraudulent acts.

The court acknowledged that it is within the jury's province to determine whether certain acts occurred, but the court stated that it was not obligated to give deference to the trial court's conclusion that such acts constituted oppression, which is a question of law for the court.

The question of oppression was presented to the jury by posing the following question for each of the nine Limited Partnerships as well as two of the General Partners: "Do you find that the actions of the governing persons of the entities listed below were oppressive?" The jury was instructed that:

> An entity's directors or managers engage in oppressive actions when they abuse their authority over the entity with the intent to harm the interests of one or more of the partners or member[s], in a manner that does not comport with the honest exercise of their business judgment, and by doing so they create a serious risk of harm to the entity.
> Oppressive actions include acts that have the following characteristics:
> • They are severe and create exigent circumstances;
> • They involve an unjust exercise or abuse of power that harms the rights or interests of persons subject to the governing persons' authority and disserves the purpose for which the power is authorized; and
> • They are inconsistent with the governing person's duty to exercise their honest business judgment for the benefit of the entities.

The jury answered "yes" to this question for all nine of the Limited Partnerships as well as for the two indicated General Partners. The trial court granted injunctive relief and appointed a rehabilitative receiver based in part on the jury's findings of oppression.

The jury question defined the term "governing person" as follows: "A person is a governing person of an entity if he is the person or is among the group of persons who are entitled to manage and direct the affairs of an entity. An officer is not a governing person." The question did not identify any individual by name, and the jury was not asked to respond as to any named individual. Because Lisa fell within the definition of a "governing person" as a member of the Board of Managers, the court acknowledged that the jury's finding of oppression could have been based on Lisa's own conduct (consistent with the jury's finding pursuant to another question that Lisa engaged in conduct relating to the partnership business of each of the nine Limited Partnerships that made "it not reasonably practicable to carry on the business in partnership with [her]," especially given that the jury found that Wes Jr., Lee, Stacey, SignAd GP, LLC, and the other General Partners had not engaged in such conduct). However, the court said that the fact that the oppression finding could have been based on Lisa's own conduct, did not mean that the jury's findings of oppression should be disregarded.

Lisa argued that Wes Jr., Lee, and Stacey, as a controlling majority abused their power to marginalize her by withholding information, refusing her requests for more transparency, and effectively excluding her from the family business. After years of stonewalling Lisa on her requests for additional financial information, Lisa had to resort to hiring a lawyer and eventually litigation to obtain information necessary to conduct a forensic audit. When the requested information was finally provided, Lisa claimed it revealed irregularities, improper use of company funds, and accounting deficiencies that threatened the S-corporation status of SignAd, Ltd. Lisa also pointed to the highly contentious March 2013 board meeting at which her siblings took actions that effectively excluded Lisa from management or, at a minimum, greatly diminished her role. Lisa further pointed to the action taken to involuntarily commit her to a mental hospital. According to Lisa, the sum of these actions were sufficient evidence to establish "abuse of power by Wes, Jr., Lee and Stacey as control persons of the SignAd entities that harmed both Lisa and the company, created exigent circumstances, and were completely inconsistent with the honest exercise of business judgment."

The court stated that Lisa cited no authority to support her argument that the alleged conduct constituted oppression as a matter of law. The entity defendants responded that the alleged actions did not constitute oppression because as a limited partner, Lisa was not allowed to take part in the management of the partnership and that the Board on which she served acts by majority vote. The defendants argued that outvoting Lisa on her request for audits, not appointing her to the Executive Committee, and reducing the frequency of Board meetings was not oppression. Finally, the entity defendants argued that once Lisa received the financial information she requested, she did not find evidence of fraud, but only "hypothetical potential tax penalties unlikely to ever be assessed." More significantly, they argued that none of the findings described any "act taken directly against Lisa, as is required for 'oppressive conduct.'"

The court agreed with the defendants that the conduct Lisa described did not amount to oppression as a matter of law.

> While the sum of Lisa's complained-of conduct certainly impacted Lisa negatively, and some of the conduct was found by the jury to be improper, such as the failure to provide Lisa with the financial records to which she was entitled, we cannot say that Wes, Jr., Lee, or Stacey abused their authority over any of the Company Appellants by engaging in such conduct in a manner that did not comport with the honest exercise of their business judgment thereby creating a serious risk of harm to the business. *See Ritchie*, 443 S.W.3d at 871 (holding directors or managers engage in oppressive actions "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]").
>
> Lisa points to the fact that once she received the Company Appellants' financial information, her accountant, Enriquez, discovered evidence of self-dealing transactions by Wes, Jr., such as failures to maintain internal controls, improper use of company funds and assets, and accounting deficiencies Enriquez believed could result in substantial IRS penalties and the loss of SignAd, Ltd.'s S-Corporation status. The jury found that Wes, Jr. breached his fiduciary duties to SignAd, Ltd. in self-dealing transactions with ProIce which caused a loss of $750 for the fair market value of services provided to ProIce in the past, plus $300 per month for the value of services that, in reasonable probability, will be provided to ProIce in the future. The jury also found that Wes, Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC, causing a loss of $461,193 for "lack of internal controls regarding fringe benefits," and $40,000 for selling company vehicles for less than fair market value. And the jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in

> non-business-related legal fees for Wes, Jr., Lee, Mark, and Stacey. The jury further found that Wes, Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each.
>
> Even if wrongful and detrimental to Lisa, we cannot, on the record before us, conclude that the alleged actions "created a serious risk of harm" to the entities or were "severe and create[d] exigent circumstances" for the Company Appellants as to constitute oppression. *See Ritchie*, 443 S.W.3d at 867, 870–71 (defining what constitutes oppression and further holding that to qualify as type of "oppressive" conduct that justifies appointment of receiver, purported conduct must "create exigent circumstances for the corporation"). While there is some evidence to support the alleged conduct on which Lisa relies, the conduct itself does not constitute oppression as a matter of law. *See id.* at 870–71 (defining oppression and holding that directors' refusal to meet with minority shareholder's potential buyers did not constitute oppression); *see also Argo Data Res. Corp*., 380 S.W.3d at 265 (stating courts must exercise caution in determining what actions constitute oppressive conduct). [footnotes omitted]

The court thus sustained the entity defendants' challenge to the sufficiency of the evidence supporting the jury's affirmative finding of oppression.

Having reversed as to the finding of oppression, the court addressed whether there were nevertheless grounds to support the trial court's appointment of a rehabilitative receiver. The trial court appointed a rehabilitative receiver "to oversee the equitable buyout of Lisa Horan, Trustee's interests in the Limited Partnerships and General Partners in which she holds an interest," finding that such appointment "would avoid further damage to Lisa ... and conserve the property and business of the entities." The trial court appointed the rehabilitative receiver based on the jury's finding that (1) Lee breached his fiduciary duty to Lisa, and (2) nine of the Limited Partnerships and two General Partners engaged in oppression.

The court explained the nature and purpose of a receiver and noted that appointment of a receiver is a "harsh, drastic, and extraordinary remedy" that should be exercised "cautiously" and only if there is no other lesser legal or equitable remedy. The court set forth the provisions of Section 11.404 of the TBOC, under which a court may appoint a receiver for an entity's property and business if it is established in an action by an owner that any of several grounds exist, including that "the actions of the governing persons of the entity are illegal, oppressive, or fraudulent " or "the property of the entity is being misapplied or wasted." Even in such cases, the court must also determine "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(a), (b).

As discussed above, the court held that there was no evidence to support the jury's finding of oppression, which the court said was "particularly significant because the only remedy for oppression is the appointment of a rehabilitative receiver." *See Ritchie*, 443 S.W.3d at 877. Lisa contended that a receivership was nevertheless appropriate based on the jury's findings that (1) Wes Jr. misused billboard space for his side business ProIce, (2) SignAd GP, LLC misused SignAd, Ltd.'s funds to pay for personal legal fees, and (3) SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. because it failed to maintain internal controls on fringe benefits and sold company vehicles below market value. However, the court pointed out that it was reversing as to the claims in nos. (1) and (3), and the trial court did not base its appointment of a receiver on any of those three causes of action. The trial court appointed a receiver based on only two grounds: (1) "the governing persons of the General Partners and the Limited Partnerships engaged in oppressive conduct," and (2) Lee breached his informal fiduciary duty to Lisa. Because the court reversed as to the finding of oppression, the only remaining basis to support the trial court's appointment of a rehabilitative receiver was the jury's finding that Lee breached his informal fiduciary duty to Lisa, and the court found no authority that such a breach of fiduciary duty authorizes a trial court, without more, to appoint a rehabilitative receiver. Because there are several remedies available for a breach of fiduciary duty, and Lisa already obtained injunctive relief based in part on Lee's breach of fiduciary duty, the court concluded that a receiver was not warranted.

The entity defendants argued that the injunctive relief awarded to Lisa by the trial court was improper for numerous reasons. The trial court granted injunctive relief based on the jury's findings that (1) Wes Jr., Stacey, and Lee breached their fiduciary duties to SignAd GP, LLC by failing to maintain internal controls on employee fringe benefits and selling company vehicles for less than fair market value (reversed by the court of appeals based on Lisa's lack of standing), (2) Wes Jr. breached his fiduciary duty to SignAd, Ltd. based on transactions involving

ProIce (reversed by the court of appeals based on Wes's lack of sufficient control over the General Partner to support the existence of a fiduciary duty to the partnership), (3) Wes Jr., Stacey, Mark, and Lee knowingly participated in SignAd GP, LLC's breach of its fiduciary duty to SignAd, Ltd. involving payment of non-business-related legal fees, (4) Lee breached his informal fiduciary duty to Lisa, (5) the Limited Partnerships and two General Partners engaged in oppression (reversed by the court of appeals because the misconduct did not rise to the level of oppression as defined in *Ritchie v. Rupe*), and (6) the General Partners failed to provide Lisa with certain books and records. Having reversed as to nos. (1), (2), and (5) above, the court addressed the defendants' challenge to the trial court's injunctive relief.

The first part of the injunction constrained action by the entity defendants through committees. Section 6(i) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "conducting the business of any of the General Partners and Limited Partnerships through any committee in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Section 6(ii) of the injunction prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without unanimous approval of all partners." Section 6(iii) prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee."

The record reflected that SignAd GP, LLC had two committees: a Special Litigation Committee and an Executive Committee. The court said that it did not find, and Lisa did not identify, any evidence that Wes Jr., Lee, Stacey, and SignAd GP, LLC acted through the Executive Committee in "derogation of the responsibility of their respective Boards of Managers to manage SignAd." However, the evidence demonstrated that Wes Jr., Lee, and Stacey, as members of the SignAd GP, LLC Board of Managers and the Special Litigation Committee, authorized SignAd, Ltd. to pay for their personal legal fees because the Special Litigation Committee had given Wes Jr. the right to authorize such payments. The jury's finding that SignAd GP, LLC, which could only act through its Board of Managers, breached its fiduciary duties to SignAd, Ltd. by causing it to pay non-business-related legal fees demonstrated that Wes Jr., Lee, and Stacey operated SignAd GP, LLC's Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Thus, the court concluded that the trial court could have inferred that Wes Jr., Lee, and Stacey would continue to operate the Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd" and did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(i).

Because the regulations of SignAd GP, LLC, as amended in 2014, allowed a majority of the Board to create a committee to act on behalf of the Board (in contrast to the previous unanimous vote required to create a committee before the amendment), the court stated that it was lawful for SignAd GP, LLC's Board of Managers to act "through any committee without unanimous approval of all partners" under the regulations, and the trial court abused its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(ii).

Unlike Section 6(ii), the court stated that Section 6(iii) did not prohibit lawful conduct. SignAd GP, LLC's Regulations provided that committees "shall be required to keep accurate records of all actions taken by [them]." The court pointed to evidence from which the trial court reasonably could have inferred that Wes Jr., Lee, Stacey, and SignAd GP, LLC had conducted business through a committee in the past "without keeping accurate records of all actions taken by any committee" and would continue to do so in the future unless enjoined. Thus, the trial court did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee," as set forth in Section 6(iii).

Because there was no evidence that the Board of any entity defendant other than SignAd GP, LLC conducted business through a committee or failed to keep accurate records, and no evidence from which the trial court could have inferred that any of the other entity defendants would engage in such conduct in the future, the court concluded that there was no evidence that Lisa would suffer imminent harm if the other entities were not enjoined from engaging in the conduct prohibited by Sections 6(i)–(iii), and the trial court abused its discretion by awarding Lisa injunctive relief as to those entity defendants.

After addressing Sections 6(iv) through (vi) of the injunction, which dealt with books and records, cash reserves, and modifying company documents, the court addressed Section 6(vii) of the injunction, which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "devaluing the

General Partners' and Limited Partnership Defendants' assets or interests." The entity defendants argued that the permanent injunction was impermissibly vague because it did not define the term "devaluing," provide a metric by which values should be determined, or otherwise specify the acts that would violate this particular injunction. The court of appeals agreed that the term "devaluing" did not provide enough information to the enjoined parties to allow them to determine what conduct was prohibited. Also, this injunctive relief was based in part on the jury's findings of breaches of fiduciary duties by Wes Jr., Lee, Stacey, and SignAd GP, LLC and the jury's finding of oppression. Because the court was reversing the portion of the judgment in Lisa's favor on two of the causes of action for breach of fiduciary duty and the finding of oppression, the court remanded this portion of the injunction to the trial court to (1) determine whether the requested relief was supported in light of the court of appeals' opinion, and if so, (2) to clarify the specific acts and persons or entities to be enjoined under Section 6(vii).

The court then discussed Section 6(viii), which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using monies or assets from or generated by (or revenues generated by) any of the General Partners or Limited Partnership Defendants to pay personal expenses of or to unjustly enrich Wes, Jr., [Stacey] or Lee, including payment of individual legal fees not related to their agency for SignAd, Ltd. or its related entities." The court concluded that Lisa's pleadings were sufficient to have put the parties on notice that she would be entitled to have such conduct enjoined, and the court pointed out that there was evidence that SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Lee, Mark, and Stacey from which the trial court reasonably could have inferred that the Special Litigation Committee would continue to authorize SignAd, Ltd. to pay personal legal fees for Wes Jr., Lee, Mark, and Stacey given the parties' ongoing disputes. There was thus some evidence of imminent harm with respect to Wes Jr., Lee, Stacey, SignAd GP, LLC, and SignAd, Ltd. Because there was no evidence that other limited partnerships ever used their assets to pay personal expenses of or to unjustly enrich the individual defendants or that any of their General Partners authorized them to do so, the trial abused its discretion by awarding Lisa injunctive relief against parties other than SignAd, Ltd., SignAd GP, LLC, Wes Jr., Lee, and Stacey under Section 6(viii).

Section 6(ix) prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using any personal property, personnel, or inventory of the SignAd entities in connection with separate business endeavors of [Wes, Jr.], [Stacey], and/or [Lee] without full disclosure and only after a unanimous vote by the partners that the transaction is fair to SignAd, Ltd. or any of the other General Partners and/or Limited Partnerships." This injunctive relief was based on the jury's finding that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and the jury's finding of oppression. Because the court was reversing the portion of the judgment awarding judgment in Lisa's favor on that breach-of-fiduciary-duty cause of action and the finding of oppression, there was no finding of liability with respect to a cause of action that would support the injunctive relief in Section 6(ix), and the trial court thus abused its discretion in awarding the injunctive relief under Section 6(ix).

After addressing Section 6(x) of the injunction on distributions, the court discussed Section 6(xi), which enjoined "the General Partners, the Limited Partnerships, the Individual Defendants, and their agents, servants, employees, representatives, and those acting in concert or participation with them" from "paying any attorney's fees or damages of any of the Individual Defendants from income or accounts belonging to any of the General Partners or Limited Partnerships that constitute any part of the SignAd enterprise." The court held that Section 6(xi) was overly broad because it prohibited payment of all attorney's fees and damages for Wes Jr., Lee, and Stacey, even though they were entitled to indemnity under certain circumstances, such as when acting in their official capacities. The court remanded this portion of the injunction with instructions to the trial court to modify the scope of the injunction under Section 6(xi) as to Wes Jr., Lee, Stacey, SignAd, Ltd., and SignAd GP, LLC consistent with the court's opinion. Because there was no evidence that any entity other than SignAd, Ltd., through the SignAd GP, LLC Board of Managers and Special Litigation Committee, ever paid attorney's fees or damages for any of the individual defendants or from which the trial court could have inferred that any of the other entity defendants would engage in that conduct in the future, the trial court abused its discretion by awarding Lisa injunctive relief against all other parties.

Clingman & Hanger Management Associates LLC v. Reick, No. 4:21-cv-02698, 2023 WL 2744399 (S.D. Tex. Mar. 30, 2023).

The court held that a provision in a Delaware LLC agreement eliminating fiduciary duties of managers and officers was retroactive under Delaware law so as to apply to alleged breaches of duty that occurred before the LLC agreement was amended to include the waiver of fiduciary duties.

A litigation trust was established in the bankruptcy proceeding of Furie Operating Alaska LLC ("Furie"), a natural gas company, and its parent LLC. The trustee of the litigation trust asserted claims for breach of fiduciary duty (and related claims of aiding and abetting and conspiracy), fraudulent transfer, and unjust enrichment against various individuals and entities. The claims were generally based on an alleged scheme by Reick, the de facto head of Furie, and other executives and advising attorneys to divert value to themselves through various insider transactions. Motions for dismissal of the claims for failure to state a claim as well as motions for summary judgment were filed by several of the defendants.

The trustee alleged that numerous defendants owed and breached fiduciary duties to Furie based on the defendants' control or positions as designated or de facto officers. The defendants argued that their fiduciary duties were eliminated by provisions in certain of Furie's amended LLC agreements.

The court explained that Furie was originally formed under the laws of Texas in 1999 and that neither its first nor second amended LLC agreement contained any waiver of fiduciary duties. A third amended and restated operating agreement in late 2017 stated that Furie remained an LLC organized under Texas law and included the following clause, which the court referred to as an "exculpatory clause":

> 9. <u>No Fiduciary Duties; Business Opportunities</u>. To the fullest extent permitted by applicable law, no manager of the Board or officer of the Company, in each case, solely in their respective capacities as such, shall have any duty, fiduciary or otherwise, to the Company in connection with the business and affairs of the Company or any consent or approval given or withheld pursuant to this Agreement.

According to the court, Furie then "reincorporated" as a Delaware LLC and "filed a fourth amended and restated operating agreement effective January 25, 2018" containing "the same exculpatory clause as above, while stating that Delaware law governs." The trustee asserted various claims relating to alleged breaches occurring before the third amended operating agreement was adopted in 2017. Several defendants argued that the fourth amended LLC agreement not only eliminated fiduciary duties of Furie officers going forward, but also broadly exculpated any breach of fiduciary duty that occurred under the prior LLC agreements. One defendant made the same argument under both the third and fourth amended LLC agreements. The trustee contended that the third and fourth amended LLC agreements had "no effect on causes of action that had already arisen in Furie's favor for breaches" under the earlier agreements.

The court emphasized that "the parties agree that the fourth amended LLC agreement selects Delaware law, and that Delaware law thus governs the question of the retroactive effect of that exculpatory clause." The court pointed out that "if that clause has retroactive effect, it subsumes all prior versions—meaning in turn that there would be no need to determine whether the same language in the third amended LLC agreement would also have retroactive effect under Texas law." The court noted that Delaware case law requires the drafters of an LLC agreement to "make their intent to eliminate fiduciary duties plain and unambiguous" and that Delaware statutory law "provides that 'the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement.'"

The court stated that neither party cited controlling authority from the Delaware Supreme Court resolving the retroactive effect of the exculpatory clause at issue in this case, but the parties "appear to agree that the question of whether the fourth amended LLC agreement exculpates fiduciary duties arising before that date is simply one of contractual interpretation." The court quoted from Delaware case law stating that the first step in analyzing a case involving the internal affairs of a Delaware LLC is to examine the contract, which will control unless the provision violates any of the exceedingly few mandatory provisions of the Delaware LLC statute. If the LLC agreement is silent, the next step is to see if there is a statutory default provision, and if neither the agreement nor the statute addresses the issue, the statute directs that "the rules of law and equity...shall govern."

The court relied on the recitals of the fourth amended LLC agreement and the broad language of the exculpatory provision to conclude that the LLC could not assert claims arising under the prior agreements:

The fourth amended LLC agreement begins with certain recitals. One states, "This Agreement amends and restates the Previous Agreement in its entirety." Dkt 157-1 at 306 (emphasis added). The Delaware Chancery Court has held that the amends-and-restates phrasing indicates "that the subsequent operating agreement *replaced and superseded* the predecessor agreement." *Focus Financial Partners LLC v Holsopple*, 241 A3d 784, 822 (Del Ch 2020) (emphasis added). Once an LLC agreement is superseded by a subsequent agreement, a limited liability company can no longer bring claims that arose under the superseded agreement. Id at 823.

Such a conclusion conforms to the broad language of the exculpatory provision. As phrased, it vitiates all fiduciary duties owed by Furie officers to "the fullest extent permitted by applicable law." Dkt 157-1 at 310. Elimination of fiduciary duties *to the fullest extent* permitted by Delaware law necessarily includes—in accord with authority noted immediately above—exculpation of those fiduciary duties owed (and potentially breached) in the past. And indeed, the Trustee conceded at hearing that Delaware law not only permits the exculpation of all fiduciary duties going forward, but also allows an LLC to release its officers from past breaches of fiduciary duty. Dkt 190 at 94; *see CelestialRX Investments, LLC v Krivulka*, 201[7] WL 416990, *16 (Del Ch 2017) (finding exculpatory clause to eliminate fiduciary duties to extent permitted by Delaware law).

All of this simply means that the plain language of the fourth amended LLC agreement not only exculpates all fiduciary duties after January 25, 2018, but also all fiduciary duties that arose under all prior agreements. The Trustee argues to the contrary, noting that the agreement (i) states that it is "effective as of January 25, 2018," (ii) is written prospectively, and (iii) can't be construed as a silent release. Dkt 118 at 16–17. None of these arguments withstands scrutiny.

First, there's a distinction between the effective date of the fourth amended LLC agreement and what it portends as to its exculpatory effect. Section 18-201(d) of the Delaware Limited Liability Company Act provides parties broad discretion regarding the effective date of their agreement. *See also Rodgers v Erickson Air-Crane Co*, 2000 WL 1211157, *5 (Del Superior Ct) (holding that parties can agree that written contract took effect earlier than execution date). But the parties here didn't need to backdate the fourth amended LLC agreement—or even indicate any particular effective date—to exculpate all past breaches of fiduciary duty. That purpose was instead achieved by the *amends-and-restates* language quoted and addressed above. See Dkt 157-1 at 306.

Second, as the Trustee contends, it's true that "the relevant portion of both operating agreements is written *prospectively*" in that they state no manager or officer "shall have" fiduciary duties in connection with Furie. Dkts 171 at 17 (emphasis in original) & 157-1 at 310. But this language doesn't stand alone. It must instead be read in conjunction with the clause's introductory phrase pertaining to modification "[t]o the fullest extent permitted by applicable law." Dkt 157-1 at 310. As determined above, such phrasing signals the exculpation of past breaches of fiduciary duties. Again, this follows from what Delaware law allows in its maximal extent, as conceded above by the Trustee.

And third, contrary to contention by the Trustee, construing the language of the fourth amended LLC agreement to exculpate past breaches isn't a "silent release." Dkt 118 at 17. Quite the contrary. Such a construction simply affords each clause its due legal and textual significance under Delaware law. This is particularly evident where the Delaware Corporate Statute specifically provides, "No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective." 8 Del C § 102(b)(7). Given that this or similar language does not feature in the Delaware Limited Liability Company Act, the *omitted-case canon* of construction undercuts the Trustee's argument. This is "the principle that what a text does not provide is unprovided." Antonin Scalia & Brian A. Garner, *Reading Law* 96 (West 2012). In such view, it simply isn't the province of "the judicial power ... to supply words or even whole provisions that have been omitted." Id at 93. This is particularly true here, for the Delaware legislature certainly knew how to provide limitations on the effect of exculpatory clauses when it so intended. That it didn't do so under Delaware Limited Liability Company Act is the end of the matter. Such a limitation can't later be read into the statute.

In conclusion, the fourth amended LLC agreement exculpates past (and later) breaches of fiduciary duty.

The court proceeded to apply the exculpatory provision to claims brought by the trustee based on the claim and the status of the individual defendant. The claims against the Furie officers were based on duties arising from their roles as Furie officers and were thus dismissed with prejudice because the claims were barred by the exculpatory clause in the fourth amended LLC agreement. The court declined to dismiss claims against one individual that were based on fiduciary duties owed by the individual to Furie as an attorney.

The parties relied without elaboration upon Texas rather than Delaware law for the purpose of certain claims ancillary to breach of fiduciary duty, and the court accordingly addressed those claims under Texas law. The court dismissed with prejudice claims for aiding and abetting breach of fiduciary duty to the extent that the claims were based on duties that the various officers owed to Furie. The court stated that "[w]hile the Supreme Court of Texas hasn't yet expressly so stated, the Fifth Circuit holds that Texas law recognizes a claim for 'knowing participation in a breach of fiduciary duty.' *D'Onofrio v Vacation Publications Inc*, 888 F3d 197, 215–16 (5th Cir 2018). But such a claim requires an underlying breach of fiduciary duty. And none exists here as to officers of Furie." The court also dismissed with prejudice the claims for civil conspiracy insofar as they related to the exculpated duties of Furie officers. The court stated that "[g]enerally speaking, such a claim 'requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means,' and it 'inherently requires a meeting of the minds on the object or course of action.'" *First United Pentecostal Church of Beaumont v Parker*, 514 SW3d 214, 222 (Tex 2017). One of the essential elements of such a claim is that one or more unlawful, overt acts are taken in pursuance of the object or course of action. *Ibid*. But again, any underlying breach of fiduciary duty was exculpated—meaning that it is (or was) no longer unlawful."

The court dismissed without prejudice claims for breach of fiduciary duty and related claims in other contexts because the extent to which those claims arose from fiduciary duties that might exist beyond their roles as Furie officers (such as by virtue of duties that might be owed as officers of Furie's parent LLC) was not clear.

Sohani v. Sunesara, No. 01-20-00114-CV, 2023 WL 1112165 (Tex. App.—Houston [1st Dist.] Jan. 31, 2023, pet. filed) (mem. op.).

The court of appeals held that a member failed to plead and prove a fraud claim that encompassed affirmative misrepresentations on which the member relied to suffer the damages that he alleged. Although the trial court found that the defendants made material misrepresentations in certain respects, there was no evidence that the plaintiff relied on them in taking the actions that caused his injury. Although the court acknowledged that Texas case law generally has not recognized a formal fiduciary relationship between members of an LLC, the court held that there was evidence supporting the existence of an informal fiduciary duty among the members that was breached and caused the plaintiff to suffer damages based on the defendants' failure to identify the plaintiff to the IRS as a member who received distributions, thus causing the plaintiff to pay taxes and penalties upon an audit of the member.

Nizar Sunesara and Anis Virani were cousins who started selling smoking accessories and devices in flea markets on the weekends in 2002, and the next year they established a brick-and-mortar retail shop called "Zig Zag Smoke Shop." Manisch Sohani was a supplier of Zig Zag and college friend and fraternity bother of Sunesara. Sohani, Sunesara, and Virani created MNA Corporation to run Zig Zag. The three men each owned one third of MNA Corporation.

In 2007, the parties decided to open a second retail location, which they called "Burn Smoke Shop" ("Burn I"). The parties incorporated SSV Corporation to operate both smoke shops. SSV corporation initially had the same ownership structure as MNA Corporation, but Sohani requested that he be removed as an owner at some point due to personal financial obligations, and Sunesara and Virani each owned 50% of SSV Corporation after that change.

In 2012, Sunesara, Virani, and Sohani agreed to buy an existing retail smoke shop, whose name they changed to "Burn Smoke Shop Two" ("Burn II"). They also decided to form three LLCs to run the three smoke shops. With authorization of Virani and Sohani, Sunesara prepared and filed the certificates of formation for the three LLCs. The certificates listed Sohani, Virani, and Sunesara as governing persons of the LLCs. The parties transferred Zig Zag from SSV Corporation to one of the LLCs and Burn I from SSV Corporation to another of the LLCs. When the parties purchased Burn II, the third LLC took ownership of that smoke shop. The parties signed and filed a Form 2553 (S election) with the IRS for each LLC. The forms reflected that Sunesara was a one-third member of the LLCs with a one-third ownership interest.

Sunesara testified that neither Virani nor Sohani told him that they did not want him to be a member of the LLCs and that he would not have consented to the formation of the LLCs if he was not going to be a member of the entities. If the LLCs had not been created, SSV Corporation would have continued to own and operate Zig Zag Smoke Shop and Burn Smoke Shop I. Sunesara also testified that neither Sohani nor Virani ever told him that the ownership of the LLCs would be different than the ownership of SSV Corporation.

After federal authorities began targeting the distribution and sale of synthetic marijuana products and searched the warehouse for Sohani's wholesale business, Sunesara decided to take a leave of absence. Although he had minimal communication with Sohani and Virani about the smoke shops during this time, he did not tell either of them that he no longer wanted to be a member of the LLCs, and Sohani and Virani never told Sunesara that he was not a member of the LLCs. Nevertheless, they prepared a tax return that led Sunesara to believe that they wanted to eliminate him from the LLCs. The 2013 tax returns for each of the LLCs filed with the IRS included Schedule K-1s reflecting that Sohani and Virani each had a fifty percent share in the LLCs' profits and losses. These documents did not show that Sunesara was a member of the LLCs. By the time these tax returns were filed, Sohani and Virani had stopped communicating with Sunesara about business matters. Sunesara learned about these tax returns only through speaking with the accountant for the LLCs.

Sunesara was audited by the IRS for the 2012 and 2013 tax years. He testified that he received cash profit distributions from the LLCs during those tax years, but he never received a Schedule K-1 and had no way of reporting that extra income to the IRS. Sunesara had to pay $13,300 in taxes, penalties, and accountant fees due to this audit.

Sunesara later learned that Sohani and Virani executed operating agreements in 2013 for each of the LLCs. The operating agreements listed only Sohani and Virani as members of the LLCs and stated that Sohani and Virani each made "50% of contributions" and owned "50% of profits and assets." The 2018 Texas franchise tax returns—filed during the pendency of this litigation—reflected only Sohani and Virani as members of the LLCs.

After Sohani and Virani refused Sunesara's request to allow him access to books and records of the LLCs, Sohani hired an attorney to assist him, and Sohani and Virani filed a declaratory judgment action in county court in Harris County. Sunesara asserted counterclaims, and that litigation resulted in an appellate opinion acknowledging Sunesara's trial testimony that he made cash contributions to the LLC but concluding that he was not entitled to one-third of the profits because there were no company records documenting his contributions, and the statute allocates profits and losses in proportion to contributions as reflected in the company records. *See Sohani v. Sunesara*, 546 S.W.3d 393, 400 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("*Sohani I*"). In a second appellate opinion, the court of appeals concluded that Sohani and Virani were not entitled to seek post-trial disgorgement of profits that had been distributed to Sunesara in 2012 and 2013. *Sohani v. Sunesara*, 608 S.W.3d 532, 536 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("*Sohani II*").

In this case, Sunesara sued Sohani and Virani for fraud and breach of fiduciary duty. After a bench trial in which the trial court found that Sohani and Virani engaged in fraud and breached their fiduciary duties to Sunesara, Sunesara obtained a judgment in the trial court for actual and exemplary damages. In this appeal, Sohani and Virani challenged the trial court's judgment with respect to both the fraud claim and the claim for breach of fiduciary duty.

With respect to the fraud claim, Sohani and Virani argued that the facts as found by the trial court were not supported by the pleadings or the evidence presented at trial. Sunesara's cause of action for fraud as pleaded alleged only that Sohani and Virani committed fraud by failing to include Sunesara as a member on LLC documents and by failing to provide him with access to the books and records of the LLCs. The allegations in the petition did not mention any material misrepresentations made by Sohani and Virani to Sunesara. After the bench trial, the trial court made the following findings of fact relevant to Sunesara's fraud claim: (1) that both Sohani and Virani engaged in conduct that is fraudulent, dishonest, in bad faith and demonstrates untrustworthiness when they induced Sunesara to transfer the assets of SSV Corporation to two of the new LLCs by representing to Sunesara that he would have a one-third ownership interest in each of the LLCs; (2) that both Sohani and Virani made false promises to Sunesara that they did not intend to keep when made and that influenced Sunesara to transfer the assets of SSV Corporation to two of the new LLCs; and (3) both Sohani and Virani made a material representation to Sunesara that he had a one-third ownership interest in each of the LLCs when they executed IRS Form 2553 for each of the LLCs. In its conclusions of law, the trial court concluded that Sohani and Virani committed fraud and that this fraud consisted of material misrepresentations made by Sohani and Virani in connection with Sunesara's ownership interest in each of the LLCs.

The court of appeals reviewed the evidence and concluded that there was no evidence that Sohani or Virani made affirmative misrepresentations to Sunesara before the transfer of the smoke shops to the LLCs, and Sunesara did not testify that Sohani and Virani made any promises to him concerning an ownership interest or share of the profits. At most, there was testimony that Sohani and Virani did not tell Sunesara certain things, but Sunesara did not argue fraud by non-disclosure. The court of appeals said there was no testimony that Sohani and Virani made affirmative misrepresentations—there was no testimony about anything Sohani and Virani said to Sunesara during this time period. Although the Form 2553s signed by all three men reflected an equal one-third ownership interest for each, there was no evidence that Sunesara saw these forms before SSV Corporation transferred the smoke shops to the LLCs. The fact findings by the trial court that Sohani and Virani fraudulently represented to Sunesara that he would have a one-third ownership interest in the LLCs, inducing him to transfer the smoke shops from SSV Corporation, were not supported by the pleadings or the evidence at trial.

With respect to Sunesara's claim that Sohani and Virani owed Sunesara a fiduciary duty and that they breached their fiduciary duty, Sohani and Virani argued that members of an LLC only owe fiduciary duties to the LLC itself in the absence of a managing or majority member. The court discussed formal and informal fiduciary duties generally and in the LLC context as follows:

> Fiduciaries owe several duties to their principals, including 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 2020, no pet.); *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.) ("A fiduciary owes her principal a strict duty of good faith and candor, as well as the general duty of full disclosure respecting matters affecting the principal's interests."). Fiduciaries have an affirmative duty to "make a full and accurate confession" of all fiduciary activities, transactions, profits, and mistakes. *Cluck v. Mecom*, 401 S.W.3d 110, 114 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
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> Courts recognize both formal and informal fiduciary duties. *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam); *see Ritchie v. Rupe*, 443 S.W.3d 856, 874 n.27 (Tex. 2014) ("Texas law recognizes different kinds of fiduciary duties owed under different circumstances."). In certain formal relationships, such as the attorney-client or trustee relationship, fiduciary duties arise as a matter of law. *Meyer*, 167 S.W.3d at 330. It is well established that the relationship between partners is fiduciary in character. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).
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> Texas law also recognizes an informal fiduciary duty that arises from a moral, social, domestic, or purely personal relationship of trust and confidence. *Ritchie*, 443 S.W.3d at 874 n.27; *Meyer*, 167 S.W.3d at 331; *see Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Outside of the cases in which formal fiduciary duties arise as a matter of law, confidential relationships may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest."); *Associated Indemn. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1988) ("[T]he law recognizes the existence of confidential relationships in those cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed.") (internal quotations omitted). "A person is justified in believing another to be his fiduciary 'only where he or she is accustomed to being guided by the judgment and advice of the other party, and there exists a long association in a business relationship, as well as a personal friendship.' " *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 829 (Tex. App.—Dallas 2010, no pet.).
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> An informal fiduciary relationship is not created lightly. *Meyer*, 167 S.W.3d at 331. Thus, to impose an informal fiduciary duty upon a party in the context of a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement or transaction that forms the basis of the suit. *Ritchie*, 443 S.W.3d at 874 n.27; *Meyer*, 167 S.W.3d at 331; *see Morris*, 981 S.W.2d at 674 (stating that mere subjective trust does not transfer arm's length dealing into fiduciary relationship). The existence of an informal fiduciary duty is typically

> a question of fact, but it becomes a question of law when there is no evidence of such a relationship. *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349, 365 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
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> The Business Organizations Code does not directly address the duties that members of a limited liability company owe to one another. *See Houle v. Casillas*, 594 S.W.3d 524, 546 (Tex. App.—El Paso 2019, no pet.). Section 101.401 merely states, "The 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. ORGS. CODE § 101.401. In a memorandum opinion, the Dallas Court of Appeals concluded that this section presumes the existence of fiduciary duties owed by members, noting that the section provides that "a limited liability company may 'expand or restrict' any duties (including fiduciary duties) of a member, manager, officer, or other person." *Cardwell v. Gurley*, No. 05-09-01068-CV, 2018 WL 3454800, at *5 (Tex. App.—Dallas July 18, 2018, pet. denied) (mem. op.); *see also Straehla v. AL Global Servs., LLC*, 619 S.W.3d 795, 805 (Tex. App.—San Antonio 2020, pet. denied) (presuming "based on the assumption inherent in section 101.401" that member owed same fiduciary duties to company that corporate executive or partner owes to corporation or partnership, unless company agreement demonstrates otherwise).
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> In an earlier opinion, however, the Dallas Court of Appeals construed the predecessor statute to section 101.401 and concluded that the statute did not "mandate a fiduciary relationship between members" of a limited liability company as a matter of law. *Suntech Processing Sys., L.L.C. v. Sun Commc'ns, Inc.*, No. 05-99-00213-CV, 2000 WL 1780236, at *6 (Tex. App.—Dallas Dec. 5, 2000, pet. denied) (mem. op., not designated for publication). The court considered a prior case addressing the same issue in the context of shareholders in a closely held corporation and concluded that whether a fiduciary relationship exists is a fact question dependent upon the unique circumstances of the case. *Id*. One circumstance that the trial court could take into consideration was whether the members had an equal ownership interest or whether the member allegedly owing fiduciary duties held a majority interest. *Id.* at *6–7; *see also Siddiqui*, 504 S.W.3d at 365–69 (declining to recognize informal fiduciary duty among members of LLC in part because investments in LLC were arm's length transactions and company agreement provided that three members had equal ownership interests and none had contractual right to greater control over company than another member).
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> This Court has declined to recognize a "broad formal fiduciary relationship" between members in a limited liability company. *See Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 391 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.) (op. on reh'g). However, we acknowledged that formal fiduciary duties may be owed between members of a limited liability company in certain circumstances, such as when a member who holds a majority ownership interest offers to redeem the interest of a minority member. *Id*. at 394–95.

The court explained that the trial court concluded that Sohani and Virani owed Sunesara a fiduciary duty because Sunesara was accustomed to being guided by their judgment and advice. They had a long business association and personal friendship, and the relationship existed prior to and apart from the relationships and agreements at issue in the lawsuit. Sunesara and Virani were cousins who had known each other their entire lives. Sunesara and Sohani met in college and were members of the same fraternity. Sunesara testified regarding the mutual trust among them. The parties were in business for approximately 10 years before the events forming the basis of the lawsuit occurred. The trial court did not conclude that Sohani and Virani owed Sunesara a fiduciary duty solely because they were members of an LLC. The court of appeals concluded that there was evidence to support the trial court's finding that an informal fiduciary duty existed among the parties based on the familial relationship and longstanding friendship, the business relationship that predated the events underlying the dispute by more than a decade, and Sunesara's testimony that the parties trusted each other.

The court next considered whether the damages awarded related to Sunesara's breach-of-fiduciary-duty claim. The trial court found that Sohani and Virani breached their fiduciary duties to Sunesara by not disclosing all important information to Sunesara regarding the LLCs, not placing Sunesara's interests above their own interests, and using their positions as members of the LLCs to gain a benefit for themselves at Sunesara's expense.

The trial court found that Sunesara sustained $43,300 in damages as a result of Sohani's and Virani's breach of their fiduciary duties. This amount corresponded to the trial court's findings that Sunesara provided $30,000 of start-up contributions and was required to pay $13,300 in penalties to the IRS based upon filings by the LLCs.

The court of appeals concluded that there was no evidence that the breaches of fiduciary duty caused Sunesara to make his start-up contributions. According to the court of appeals, there was evidence that Sohani and Virani breached their fiduciary duties to Sunesara by not including him on the LLCs' governing documents without his knowledge or consent, and they also did not identify Sunesara as a member of the LLCs on federal tax documents. However, there was no evidence that these actions by Sohani and Virani caused Sunesara to make his contributions to the LLCs. Sunesara testified that he contributed $10,000 to Zig Zag Smoke Shop when he and Virani started selling smoking products at flea markets in 2002, and he testified that he contributed $10,000 to Burn I, which the parties opened in 2007. Both contributions were thus years before Sohani and Virani took actions with respect to LLC documents in 2013. Sunesara did not provide a date for when he contributed $10,000 to the LLC that acquired Burn II.

Furthermore, the court said that Sunesara presented no authority that he was entitled to a return of his initial contributions from the LLCs:

> At the time of trial, the LLCs were all still operating and in business. Sunesara testified that he has never withdrawn his membership in the LLCs. He is, therefore, not entitled to a distribution as a withdrawing member of a limited liability company. *See* TEX. BUS. ORGS. CODE § 101.205 ("A member of a limited liability company who validly exercises the member's right to withdraw from the company granted under the company agreement is entitled to receive, within a reasonable time after the date of withdrawal, the fair value of the member's interest in the company as determined as of the date of withdrawal."); *see also id.* § 101.203 ("Distributions of cash and other assets of a limited liability company shall be made to each member of the company according to the agreed value of the member's contribution to the company as stated in the company's records required under Sections 3.151 and 101.501.").

The court concluded that there was evidence that the breach of fiduciary duty by Sohani and Virani caused Sunesara to incur the amounts paid to the IRS after he was audited. The Form 2553s filed with the IRS in 2012 for each of the LLCs listed three members—Sohani, Virani, and Sunesara—with an equal 33.3% ownership interest in the LLCs. The 2013 federal income tax returns for each of the three LLCs reflected that each LLC had only two members, each with a 50% share of the profits and losses of the LLCs. Sunesara received cash distributions from the LLCs during 2012 and 2013 but did not receive a Schedule K-1 from the LLCs for the 2013 tax year. The IRS conducted an audit of Sunesara for the 2012 and 2013 tax years. He testified that "when [the IRS] did [an] audit and they got my bank statements, there was excess cash in my account and I had no way of declaring that income." Sunesara also believed that the IRS conducted the audit in part because the Form 2553s for the LLCs reflected that he was a member of the LLCs, but the LLCs' tax returns did not, and the discrepancy confused the IRS. As a result of the audit, Sunesara paid a total of $13,300 in taxes, penalties, and accountant fees. Sohani and Virani argued that the amounts paid to the IRS by Sunesara were due to his failure to report all his income rather than their actions, but the court of appeals held that Sunesara presented some evidence that the IRS's audit was caused in part by the failure to list him as a member of the LLCs on the 2013 tax returns and failure to issue him a K-1 and that there was sufficient evidence to support the trial court's findings and conclusions that Sunesara sustained damages in the amount of $13,300 (the amount he paid in taxes, penalties, and fees as a result of the audit) due to Sohani's and Virani's breach of their fiduciary duties.

The court discussed the trial court's award of exemplary damages to Sunesara and remanded for the trial court to further consider in view of the fact that the actual damages award was reduced by the court of appeals. Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). "Fraud," as used in this context, means "fraud other than constructive fraud," and "malice" is "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Id.* § 41.001(6)–(7). The court said that an intentional breach of fiduciary duty is a tort for which a plaintiff can recover exemplary damages. The trial court awarded $111,000 in addition to the $61,300 in actual damages that it awarded. This was a ratio of 1.8:1. Because the court of appeals reduced the actual damages award to $13,300, the ratio between actual and exemplary damages would be 8.3:1 if the amount of exemplary damages remained $111,000. The court discussed the indicia of reasonableness of a punitive damages award, including the ratio between actual and punitive damages. In light of the reduced award of actual damages, the court vacated the trial court's award of punitive damages and remanded for the trial court to consider the amount of exemplary damages, if any, to assess against Sohani and Virani.

Weiss v. Arabella Exploration Inc. (In re Arabella Petroleum Company, LLC), 647 B.R. 851 (Bankr. W.D. Tex. 2022).

The court held that distributions from the LLC debtor to its sole member after the LLC was insolvent were constructively fraudulent transfers, and certain other transfers by the LLC debtor to its sole member and a related entity were fraudulent transfers made with actual intent to hinder, delay, or defraud creditors. Because the sole member was also the sole manager and officer of the LLC, he owed the LLC a fiduciary duty, and the court concluded that the transfers made with actual intent to hinder, delay, or defraud were a breach of that fiduciary duty to the LLC. Although the company agreement expressly limited the potential liability of members and managers for breach of fiduciary duty to actions not taken in good faith, the provision did not limit liability for actions constituting fraud, gross negligence, bad faith or willful misconduct, and the court concluded that the member/manager's knowledge of the LLC's deteriorating financial condition established both bad faith and willful misconduct.

Jason Hoisager formed Arabella Petroleum Company, LLC (the "Debtor") in 2007 to buy and sell oil and gas properties in West Texas. Hoisager was the Debtor's sole member and manager, and as manager he appointed himself president, secretary, and treasurer. In 2008, Hoisager formed Arabella Exploration, LLC ("Arabella Exploration"), which began acquiring properties in the Permian Basin in 2011, and Arabella Exploration, Inc ("AEX") was formed on December 24, 2013, by the reverse merger of Arabella Exploration and a Cayman Islands corporation. According to Hoisager, he formed AEX to raise capital to develop oil and gas properties in the Permian Basin. In 2014, AEX formed Arabella Operating LLC ("Arabella Operating") to take over operating wells previously operated by the Debtor under the joint operating agreements.

Hoisager owned 100% of Arabella Exploration until the December 2013 merger, when it became a wholly owned subsidiary of AEX. Mr. Hoisager was the manager of Arabella Exploration and the chief executive officer of AEX following the merger. Arabella Operating was also a wholly owned subsidiary of AEX, and Hoisager was its sole manager. Hoisager owned 30.4% of the shares of AEX at the time of the merger, with the remainder owned by public shareholders. The parties stipulated that the Debtor became insolvent no earlier than December 31, 2013, a few days after AEX was formed.

The Trustee alleged that from 2011 to 2015, Hoisager made many fraudulent transfers from the Debtor to himself, his wife, and other entities that he owned or controlled. The alleged fraudulent transfers consisted of: (1) transfers of properties from the Debtor to AEX; (2) transfers of cash from the Debtor to AEX; (3) transfers of cash from the Debtor to Arabella Operating; and (4) transfers of cash from the Debtor to Hoisager and his wife. The Trustee also alleged that Mr. Hoisager's fraudulent transfers and self-dealing breached his fiduciary duties to the Debtor. The Trustee alleged that Hoisager owed fiduciary duties to the Debtor as its governing person (manager) and that he owed duties to creditors as a "corporate officer" at least as of the end of 2013, the date on which the Debtor became insolvent.

The Trustee relied on the books and records of the Debtor to support his position that Hoisager made many fraudulent transfers. Although substantially all the transfers to Hoisager were recorded in the Debtor's general ledger account as "Owner Distributions," Hoisager later attempted to characterize the payments as "salary & wages," "expense reimbursements," "performance bonuses," and "tax distributions." The court noted many inconsistencies between the books and records and Hoisager's explanations and concluded that Hoisager's "inconsistent, self-serving, and undocumented explanations of how the various documents and payments should be characterized" were not credible. Instead, the court relied on the contemporaneously recorded treatment of the transactions in the Debtor's books and records.

The court described each of the transfers within each of the four categories above and analyzed whether they were fraudulent transfers under the provisions of the Bankruptcy Code or the provisions of the Texas Uniform Fraudulent Transfer Act (TUFTA), which are also applicable pursuant to the Bankruptcy Code. The court provided a "primer" on fraudulent transfers in which it explained the distinction between constructively fraudulent transfers (transfers made by a debtor in exchange for less than reasonably equivalent value at a time when the debtor was either (1) insolvent (meaning the fair salable value of its assets was less than its liabilities), (2) unable to pay its debts as they came due, or (3) had an unreasonably small capital) and actual-intent fraudulent transfers (transfers made with actual intent to delay, hinder, or defraud creditors, with respect to which the intent in question is determined by circumstantial evidence, often with reference to so-called "badges of fraud"). The court also pointed out the remedies available to the Trustee ("avoidance" and "recovery") and certain principles relating to transfers made for an antecedent debt. While transfers made to satisfy antecedent debts cannot be constructively fraudulent transfers, they can be preferences or actual-intent transfers, but the Trustee did not seek to avoid any insider preferences under TUFTA and limited his Section 547 action to payments made to Hoisager.

Turning to each of the alleged fraudulent transfers, the court first analyzed transfers of certain properties from the Debtor to AEX and concluded that the trustee could not recover the properties transferred to AEX as constructively fraudulent transfers because the transfers were for an antecedent debt. The Trustee could not recover the properties transferred to AEX as actual-intent fraudulent transfers because the Trustee failed to show the value of the properties to be recovered.

Next the court analyzed transfers of property and cash made by the Debtor to AEX and transfers of cash from the Debtor to Arabella Operating and concluded that the Trustee could not recover these transfers because the Trustee failed to show that they transfers were made "to or for the benefit of" Hoisager as a "transfer beneficiary."

The court proceeded to explain the relevance of the financial condition of the Debtor to the claims for fraudulent transfer and breach of fiduciary duty. The court said that the evidence made it very clear that the combination of certain high-cost drilling activities by the Debtor and "absurdly large owner distributions" were the biggest contributors to the Debtor's insolvency at the end of 2013.

Based on the fact that the Debtor was insolvent at the end of 2013, $2,803,834 in distributions made to Hoisager after December 31, 2013 were recoverable by the Trustee as constructively fraudulent transfers. As the court pointed out, "owner distributions made while a company is insolvent are quintessential constructively fraudulent transfers." In addition, the court determined that the Trustee could recover cash payments from the Debtor to Hoisager after July 1, 2013 as actual-intent transfers. Here, the court explained and relied upon "badges of fraud" as circumstantial evidence that Hoisager had the requisite intent to "hinder, delay, or defraud" creditors. The court described the facts that indicated Hoisager's intent as follows:

> First, the Debtor made its first six-digit distribution to Mr. Hoisager in July 2013.
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> Next, on top of distributions to Mr. Hoisager, the Debtor made large expenditures, including substantial cost overruns, on the Wolfbone I and II wells—wells in which the Debtor no longer owned a working interest—leading to the Debtor's slide into insolvency. This ship was clearly sinking in 2013, and no one would know that better than Mr. Hoisager.
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> Next, the Debtor transferred almost 5 million dollars to AEX. These transfers were included on Exhibit 85 ...[which revealed that] beginning in July 2013 (again), the Debtor made substantial revenue payments to AEX at times when the AEX joint interest billings due to the Debtor were substantial, and mostly past due. No prudent operator would have failed to offset those revenue payments against the past due joint interest billings.
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> Finally, there is Mr. Hoisager's audacious attempt to transition from his role as a sole proprietor, ... using the Debtor as his private checking account, to a role as the chief executive officer of a public company.
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> Taking all these facts together leads to the inescapable conclusion that starting in July 2013, Mr. Hoisager knew the Debtor was foundering, and he was, at the same time, enticed by the prospect of running AEX, a public company. Preferring his new enterprise over the Debtor, Mr. Hoisager emptied the Debtor of available cash and valuable properties, and diverted it all to himself, AEX, or later, Arabella Operating. And this, at the least, constitutes an intent to delay, hinder, or defraud the creditors of the Debtor, and so the cutoff date for cash transfers to Mr. Hoisager can be moved back to July 1, 2013. Doing so adds $377,535 to the judgment.

With respect to the Trustee's claim for breach of fiduciary duty against Hoisager, the court stated that, as the sole member, manager, and officer (president, secretary, and treasurer) of the Debtor, a Texas LLC, Hoisager owed the Debtor a fiduciary duty. The court stated that "Texas law allows an LLC to limit this duty to some extent, and the Debtor's company agreement does just that, relieving Mr. Hoisager from 'any action taken (or any failure to act) by [him] in good faith on behalf of the company and reasonably believed by [him] to be authorized or within the scope of [his] authority, unless that action (or failure to act) constitutes fraud, gross negligence, bad faith or willful misconduct....'" Hoisager argued that he owed no duties to creditors unless the company stopped operating, and the court stated that the cited case law supports this notion but also affirms that the duty runs to the corporation. The court thought it likely that Texas would ultimately adopt the Delaware view that the fiduciary duties are always owed to the corporation but can be enforced by the residual stakeholders—in this case the creditors since the Debtor was hopelessly insolvent. In any event, the creditors in this case were not seeking to enforce the fiduciary duty owed to the Debtor; rather, a trustee standing in the shoes of the Debtor had the ability to sue to enforce the fiduciary duties owed to the Debtor and recover on behalf of the residual stakeholders.

The court stated that the duty imposed on Hoisager included a duty of care and a duty of loyalty, and the duty of loyalty includes a duty not to engage in self-dealing. Although Hoisager raised the defense of the business judgment rule, the court pointed out that the business judgment rule does not apply to self-dealing or interested party transactions. In such situations, the fiduciary has the burden of proving that the transaction was fair to the corporation.

The court characterized the actions taken by Hoisager to drain the Debtor of cash and properties through transfers to himself and AEX as "the very epitome of self-dealing and interested party transactions." That "he took these actions with full knowledge of the Debtor's deteriorating financial condition establishes both bad faith and willful misconduct."

In addressing the measure of damages, the court concluded that the Debtor was damaged by losing the cash transferred with the actual intent to delay, hinder, or defraud creditors, which included the amounts of cash transferred to Hoisager after July 1, 2013, as well as the non-revenue cash transferred to AEX after July 1, 2013, since those amounts, while not "for or to the benefit of" Hoisager for purposes of fraudulent conveyance law, fell "squarely within the proscription on unfair interested party transactions." Payments of revenue to AEX after July 1, 2013 were also damages for breach of fiduciary duty because those payments should have been retained and set off against the outstanding joint interest billings owed by AEX to the Debtor. Finally, Hoisager failed to carry his burden to prove fairness with respect to certain cash payments to Arabella Operating.

The Trustee requested exemplary damages under Section 41.003 of the Texas Civil Practice and Remedies Code, which permits recovery of exemplary damages when the claimant proves by clear and convincing evidence that the harm arose from fraud, malice, or gross negligence. The Trustee sought to prove that the harm arose from fraud, but the Trustee neither pleaded nor proved fraud. While the Trustee proved "actual intent to hinder, delay, or defraud" creditors, he did so by a preponderance of the evidence with reference to badges of fraud. That showing did not satisfy the elements of common-law fraud (which requires that a plaintiff justifiably rely upon and be injured by a material misrepresentation that the defendant knew was false or recklessly made without knowledge as to its truth, and with an intention that it be acted upon) by clear and convincing evidence. Therefore, the court denied the request for exemplary damages.

In re Neighbors Legacy Holdings, Inc., 645 B.R. 864 (Bankr. S.D. Tex. 2022).

The bankruptcy court dismissed a direct claim for negligence on the basis that officers and directors do not owe the company's individual shareholders a duty of care.

In 2008, a group of emergency room doctors founded the Neighbors Health Network to operate freestanding emergency centers throughout Texas. That group included various officers and directors, including Dr. Paul Alleyne, Dr. Cyril Gillman, Dr. Michael Change, Dr. Andy Chang, Dr. Quang Henderson, Dr. Setul Patel, Dr. Hitesh Patel, and Dr. Dharmesh Patel (collectively, the "Neighbors O&Ds," who were officers and directors of Neighbors Health Systems, Inc. ("Neighbors Health")). In 2011, the Neighbors Network began expanding its operations at the direction of the Neighbors O&Ds. To facilitate this expansion, the Neighbors Network established a web of corporate entities to own and operate a Texas-wide network of freestanding emergency centers.

Generally, each freestanding emergency center was organized as a separate limited partnership. Neighbors GP, LLC acted as each emergency center's general partner and separate, emergency-center-specific limited liability companies acted as limited partners. The Neighbors O&Ds owned a portion of each emergency-center-specific LLC and outside investors owned the remaining interest in each specific entity. The Neighbors Network, acting at the direction of the Neighbors O&Ds, also established entities to provide management and administrative services to each freestanding emergency center. A series of written agreements enumerated the rights and duties that each entity had with respect to other Neighbors Network entities.

Dr. Samara Bowen and her husband, Jermaine Bowen, formed Infinity Emergency Management Group, LLC in mid-2014. The Bowens did so after two of the Neighbors O&Ds, Dr. Setul Patel and Dr. Alleyne, solicited the Bowens' investment in the Neighbors Network. Ultimately, the Bowens, along with other emergency physicians in the area, invested in two emergency-center specific LLCs: Series 114–Eastside, LLC and Series 115–Zaragoza, LLC (together, the "Series LLCs"). Infinity purchased a 65%, non-voting interest in each of the two Series LLCs. The brick-and-mortar emergency centers associated with the Series LLCs were NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). In line with the Neighbors Network's typical corporate structure, Neighbors GP held a 1% interest in the two LPs and NHS LLC held the remaining 99% interest. NHS LLC established the Series LLCs to operate the two Center LPs. Infinity, as a Series LLC owner, was charged with providing physicians to staff the two Center LPs. Neighbors Health (the manager of NHS LLC), through five subsidiaries, was responsible for the two Center LPs' "management and corporate functions."

Under the agreements that defined Infinity's relationship with the Neighbors Network, Infinity's investment entitled it to share in the two Center LPs' profits and losses. Essentially, the Center LPs would bill patients for services rendered, Center LP expenses would be deducted from that revenue, and the net proceeds would be transferred to NHS LLC. Once NHS LLC received the Center LPs' net profits, NHS LLC would allocate those profits to the appropriate Series LLCs. These profits were purportedly reserved for the Series LLC owners (including Infinity). Neighbors Health, through its managerial subsidiaries, was charged with ensuring that profits reserved for the Series LLC owners made it from the Center LPs to the Series LLCs.

Infinity alleged that the Neighbors O&Ds fraudulently induced Infinity into investing in the two Series LLCs and then failed to uphold the contractual and fiduciary duties owed to Infinity. Infinity also levied its allegations against Tensie Axton, the Trustee of the NLH Liquidating Trust, because the Liquidating Trustee was the "successor-in-interest to [Neighbors Health] and [NHS LLC]." The Neighbors O&Ds filed motions to dismiss Infinity's Complaint.

As part of the court's consideration of Infinity's direct causes of action, the court addressed a negligence claim involving Infinity's assertion that the Neighbors O&Ds owed Infinity a duty of care. The court disagreed:

> . . . . Infinity claims the Neighbors O&Ds' duty of care to *Infinity—not the Series LLCs*—arose from their roles as "officers and directors of Neighbors Health," the Series LLCs' managers. Infinity's conclusion—that a company's officers and directors owe the company's individual shareholders a duty of care—is squarely foreclosed by Texas law. *In re Estate of Poe*, 648 S.W.3d 277, 286–87 (Tex. 2022) (citing *Gearhart Indus., Inc. v. Smith Intern., Inc.*, 741 F.2d 707, 721 (5th Cir. 1984)) ("[T]he business and affairs of a corporation are managed through a board of directors . . . . A director's fiduciary status creates three broad duties: duties of obedience, loyalty, and due care. These fiduciary duties run to the corporation, not to individual shareholders or even to a majority of shareholders." (quotation cleaned up and emphasis added)). Still, Texas law recognizes other duties of care based on: "(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy considerations." *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 34 (Tex. 2002). However, nothing in Infinity's Complaint suggests the Neighbors O&Ds owed Infinity, individually, a previously unrecognized duty of care based on the *Texas Home Management* factors.

In re Mijares, Case No. 19-33121-HDH7, 2022 WL 2020344 (Bankr. N.D. Tex. June 1, 2022).

The bankruptcy court did not technically reach the issue of whether a manager and 50% member of an LLC owed a fiduciary duty to the other manager and 50% member. Nevertheless, it did make observations strongly suggesting that a fiduciary duty would be found and that a breach of fiduciary duty claim was properly raised in a direct action.

Plaintiff Jordan Pastorek, M.D. claimed that defendant Daniel Wilfred Mijares, M.D. defrauded him and breached fiduciary duties owed to him by charging improper, excessive, and unauthorized expenses to their medical practice (MD Request, PLLC), which caused Pastorek's distributions from the practice to be reduced during the roughly six years that they practiced medicine together. Pastorek and Mijares each owned 50% of the membership interests of MD Request, and each was appointed as a manager of MD Request in the company agreement. Pastorek sought a declaration that his claims for fraud and breach of fiduciary duty were nondischargeable pursuant to sections 523(a)(2)(A) and (a)(4) of the Bankruptcy Code.

Ultimately, the bankruptcy court did not reach the issue of whether Pastorek held a claim for breach of fiduciary duty against Mijares. Nevertheless, the court made the following observations with respect to the fiduciary duty claim:

> In addition to the claim for fraud, the Plaintiff also asserted a claim against the Defendant for breach of fiduciary duty. Under Texas law, to prevail on a breach of fiduciary duty claim, a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant, (2) that the defendant breached his fiduciary duty to the plaintiff, and (3) that the defendant's breach resulted in injury to the plaintiff or benefit to the defendant.
>
> It is not clear whether there was a fiduciary relationship directly between the Plaintiff and the Defendant. Courts generally hold that a managing member of a limited liability company does not necessarily owe fiduciary duties to other members. Although "the Texas statute governing limited liability companies implies that certain duties may be owed, it does not define any such duties, but rather allows the contracting parties to specify the breadth of those duties in the company agreement."
>
> Per the Company Agreement, both the Plaintiff and the Defendant served as Manager-Members. Article VIII of the Company Agreement provides various rights, duties, and powers of the Managers. Per this section, the Managers "shall have the full, sole, exclusive and complete discretion in the management and control of the business, operations and affairs of the Company; shall make all decisions that are necessary to carry out the business of the Company . . . ." The same section goes on to require that "[a]ll decisions and actions by the Managers shall be made in the best interests of the Company." Thus, the Company Agreement makes it clear that the Defendant owed a fiduciary duty to MD Request but does not resolve the issue of whether the members owed fiduciary duties to each other because it neither disclaims nor expressly imposes such duties.
>
> Nevertheless, Texas law recognizes that an informal fiduciary relationship, "may arise where one person trusts in and relies upon another, whether the relationship is a moral, social, domestic, or purely personal one." The existence of a fiduciary duty is a fact-specific inquiry that takes into account the contract governing the relationship as well as the particularities of the relationships between the parties. Some courts have taken into account the "unequal" positions of power of members in a limited liability company, such as when one member exercises superior control over the company.
>
> Both parties testified during trial that the Defendant almost exclusively handled the finances for MD Request. The Defendant did the calculations and remitted payments to the Plaintiff. Through an established course of dealing for the better part of six years, the Plaintiff placed a special confidence in the Defendant to compensate the Plaintiff accurately and honestly for his revenue, which was to be measured as his monthly collections less his half of the shared expenses.
>
> Based on these facts, the Court believes there is a reasonable argument that the Defendant owed fiduciary duties directly to the Plaintiff, but the Court need not make that determination since the Court has already determined the Plaintiff has a claim for fraud, and the damages for breach of fiduciary duty would be the same as those previously identified for fraud.

In the course of its fiduciary duty analysis, the bankruptcy court also addressed the direct/derivative distinction. Even though "the Court [did] not reach the issue of whether the Plaintiff also holds a claim for breach of fiduciary duty against the Defendant," it strongly suggested that the claim was properly asserted as a direct action:

> The Defendant's argument that the Plaintiff lacks standing to bring the claims in the Complaint is a bit more complicated. The Defendant contends that the Plaintiff's allegations against the Defendant involve wrongs and injuries committed by the Defendant only against MD Request and that the Plaintiff sustained no direct injuries or damages from the Defendant's alleged misconduct. Therefore, the Defendant contends, any claims belong to MD Request, and the

Plaintiff lacks standing to assert the claims or to object to their discharge in this lawsuit. The Court disagrees.

While section 101.463 of the Texas Business Organizations Code allows courts to treat a derivative proceeding brought by a member of a closely held limited liability company as a direct action brought by the member for the member's own benefit if justice so requires—and the Court would find that justice so requires in this case—it is not necessary to do so because the claim in this case is a direct claim.

The injury suffered by the Plaintiff was particular to him and not suffered by the other members, there being only one other member, who benefited from these transactions rather than suffered. In addition, the injury did not merely result in the depreciation of the value of the Plaintiff's interest in MD Request. Rather, the Defendant's actions directly affected the Plaintiff's regular distributions by altering their calculation, and the Plaintiff was the only one harmed.

E. LLC Property and LLC Membership Interest

DiBassie v. DiBassie, No. 09-20-00287-CV, 2022 WL 16973693 (Tex. App.—Beaumont Nov. 17, 2022, pet. denied) ("SCS is a limited liability company, and as such, is a legal entity separate from its members. Damon, as a member of SCS, does not have an interest in any specific property of the company. *See* Tex. Bus. Orgs. Code Ann. § 101.106(b). Property owned by a limited liability company is neither community property nor the separate property of its members. *See id.* § 101.106(a)–(a-1). The business property that is subject to division in a divorce is the interest in the limited liability company and not the company's specific assets. Tex. Bus. Orgs. Code Ann. § 101.106(a-1) (noting membership interest may be community property), (b) (LLC member does not have interest in any specific company property).").

360 Security Partners, LLC v. Hammond, Civ. A. No. 3:21-CV-3004-B, 2022 WL 3159274 (N.D. Tex. Aug. 8, 2022).

"Plaintiffs allege that Pinson is the 'sole member and manager' of [360 Security Partners, LLC] with 'no other equityholders' and that Hammond committed conversion when he 'wrongfully claimed ownership of 360 to the exclusion of its actual owner.' Plaintiffs additionally claim that Hammond's 'intent' to own 360 'manifested itself through conversations with various third parties, including clients and vendors, that [Hammond] is 360's owner' and that 'Hammond in fact even began referring to himself as an owner in communications and messages with Pinson.' Hammond argues 'that a conversion claim cannot result from an expression of opinion of ownership . . . . [and a] statement expressing an opinion or claim about ownership of property is not exercising control over that property.' Plaintiffs respond by citing to Tex. Bus. Orgs. Code Ann. § 101.106. The statute states that [a] 'membership interest in a limited liability company is personal property.' Tex. Bus. Orgs. Code Ann. § 101.106. The Court finds that Plaintiffs have not sufficiently pleaded a conversion claim based on the ownership claim. To begin, they have not pleaded any damages caused by Hammond's actions or shown how Hammond's statements to third parties deprived Pinson of his ownership interest. Furthermore, because an ownership interest is not a form of tangible personal property, Plaintiffs cannot sufficiently plead that an ownership was converted unless the intangible interest was put into a physical form and then converted. For the reasons above, Plaintiffs have not adequately pleaded any basis for their conversion claim."

F. Interpretation and Enforcement of Company Agreement

1. Contractual Modification of Fiduciary Duties; Exculpation

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims based on breach of fiduciary duty (direct and derivative), denial of her right of access to books and records, and oppression. The jury found in the plaintiff's favor on those claims, and the trial court awarded actual and punitive damages as well as declaratory and injunctive relief. On appeal, the defendants relied in part on provisions in the governing documents, claiming that the provisions permitted the actions they took or prevented the court from awarding the relief granted. The court of appeals addressed these arguments and largely rejected the defendants' interpretation of the provisions. With regard to the exculpatory provisions relied upon by the defendants, the court explained that those provisions protected against liability but not declaratory or injunctive relief.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

One of Lisa's claims for breach of fiduciary duty was a derivative claim on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses that SignAd, Ltd. improperly paid. Enriquez opined that the payments were not consistent with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller, as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was thus some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis of their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

Another claim asserted by Lisa was a claim for a judgment declaring her rights (under Tex. Civ. Prac. & Rem. Code § 37.004) to access the books and records of the General Partners and Limited Partnerships under various provisions of the Texas Business Organizations Code (TBOC) (Tex. Bus. Orgs. Code §§ 3.151-3.153, 101.502, 153.552) and the Partnership Agreements. She also sought declarations that the General Partners had failed to provide her with access to the relevant records in the past.

Pursuant to findings of the jury, the trial court entered a declaratory judgment declaring in part that: (1) certain General Partners breached the Limited Partnership Agreements and violated Section 153.552 of the TBOC by failing to provide her with books and records of those Limited Partnerships; (2) certain General Partners violated Section 101.502 of the TBOC by failing to provide Lisa with books and records of those General Partner LLCs; and (3) certain General Partners violated Sections 3.151 and 3.152 of the TBOC by failing to provide Lisa with books and records of those General Partners. The court declared that Lisa was entitled to recover attorney's fees pursuant to Section 3.152 and granted injunctive relief based on Lisa's contractual and statutory claims for access to the books and records.

One of the grounds on which the entity defendants challenged the relief awarded to Lisa on the books-and-records claim was an argument that the limitation-of-liability clauses in the Limited Partnership Agreements precluded any finding of wrongdoing against the General Partners, and that Lisa never "properly pleaded any of those legal theories." The court stated that the Texas Rules of Civil Procedure require matters submitted to the jury to have been "raised by the written pleadings and the evidence" (Tex. R. Civ. P. 278), and Lisa pleaded claims for declaratory relief and breach of fiduciary duty in connection with her claims for access to the books and records, asserting violations of the Limited Partnership Agreements and the TBOC. The entity defendants filed affirmative defenses to her claims based on the exculpatory clauses included in the Limited Partnership Agreements. The court quoted the exculpatory clauses as follows:

> Section 12.3 of the SignAd, Ltd. Partnership Agreement states:
>
> The General Partner shall not be liable to the Partnership or any Partner for any claim, demand, liability, cost, damage, or cause of action arising out of the General Partner's management of the Partnership's affairs, except where the claim at issue is based upon gross negligence, bad faith, willful breach of any material provision of this Agreement, or willful misconduct of the General Partner.
>
> Section 8.02 of the Limited Partnership Agreements for Big Signs & Leasing (#1–6), Big Eastex #1, Ltd., and Ben Nevis West, Ltd. states:
>
> ... Always, unless fraud, deceit, or a wrongful taking shall be involved, the General Partner shall not be liable or obligated to the Limited Partners for any mistake of fact or judgment made by the General Partner in operating the business of the Partnership, which results in any loss of the Partnership or its Partners.... Neither shall the General Partner be responsible to any Limited Partner because of a loss of his investment or a loss in operations, unless it shall have been occasioned by fraud, deceit, or a wrongful taking by the General Partner.

The court of appeals stated that it was not necessary for Lisa to plead these affirmative defenses or any exceptions to them because the theories of "fraud, deceit, or a wrongful taking" and "gross negligence, bad faith, [and] willful breach" were pleaded by the General Partners as part of their affirmative defenses and presented to the jury at their request.

The court stated that nothing in these clauses precluded Lisa's declaratory judgment action because the clauses precluded a finding of "liability" but not a declaration of rights. Furthermore, to the extent the clauses applied, the jury was instructed on those limitations. Thus, the court said that the issues were specifically presented to the jury, who found that each of the General Partners breached their obligations under the Limited Partnership Agreements. Although the entity defendants argued there was no evidence of "fraud, deceit, or a wrongful taking" or "gross negligence, bad faith, or willful breach," the court said that they offered no elaboration of that argument. The court reiterated that there was sufficient evidence that the General Partners breached their obligations under the Limited Partnership Agreements to grant Lisa access to the books and records by initially refusing to provide access and then failing to provide everything she requested for three years.

Clingman & Hanger Management Associates LLC v. Reick, No. 4:21-cv-02698, 2023 WL 2744399 (S.D. Tex. Mar. 30, 2023).

The court held that a provision in a Delaware LLC agreement eliminating fiduciary duties of managers and officers was retroactive under Delaware law so as to apply to alleged breaches of duty that occurred before the LLC agreement was amended to include the waiver of fiduciary duties.

A litigation trust was established in the bankruptcy proceeding of Furie Operating Alaska LLC ("Furie"), a natural gas company, and its parent LLC. The trustee of the litigation trust asserted claims for breach of fiduciary duty (and related claims of aiding and abetting and conspiracy), fraudulent transfer, and unjust enrichment against various individuals and entities. The claims were generally based on an alleged scheme by Reick, the de facto head of Furie, and other executives and advising attorneys to divert value to themselves through various insider transactions. Motions for dismissal of the claims for failure to state a claim as well as motions for summary judgment were filed by several of the defendants.

The trustee alleged that numerous defendants owed and breached fiduciary duties to Furie based on the defendants' control or positions as designated or de facto officers. The defendants argued that their fiduciary duties were eliminated by provisions in certain of Furie's amended LLC agreements.

The court explained that Furie was originally formed under the laws of Texas in 1999 and that neither its first nor second amended LLC agreement contained any waiver of fiduciary duties. A third amended and restated operating agreement in late 2017 stated that Furie remained an LLC organized under Texas law and included the following clause, which the court referred to as an "exculpatory clause":

> 9. <u>No Fiduciary Duties; Business Opportunities</u>. To the fullest extent permitted by applicable law, no manager of the Board or officer of the Company, in each case, solely in their respective capacities as such, shall have any duty, fiduciary or otherwise, to the Company in connection with the business and affairs of the Company or any consent or approval given or withheld pursuant to this Agreement.

According to the court, Furie then "reincorporated" as a Delaware LLC and "filed a fourth amended and restated operating agreement effective January 25, 2018" containing "the same exculpatory clause as above, while stating that Delaware law governs." The trustee asserted various claims relating to alleged breaches occurring before the third amended operating agreement was adopted in 2017. Several defendants argued that the fourth amended LLC agreement not only eliminated fiduciary duties of Furie officers going forward, but also broadly exculpated any breach of fiduciary duty that occurred under the prior LLC agreements. One defendant made the same argument under both the third and fourth amended LLC agreements. The trustee contended that the third and fourth amended LLC agreements had "no effect on causes of action that had already arisen in Furie's favor for breaches" under the earlier agreements.

The court emphasized that "the parties agree that the fourth amended LLC agreement selects Delaware law, and that Delaware law thus governs the question of the retroactive effect of that exculpatory clause." The court pointed out that "if that clause has retroactive effect, it subsumes all prior versions—meaning in turn that there would be no need to determine whether the same language in the third amended LLC agreement would also have retroactive effect under Texas law." The court noted that Delaware case law requires the drafters of an LLC agreement to "make their intent to eliminate fiduciary duties plain and unambiguous" and that Delaware statutory law "provides that 'the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement.'"

The court stated that neither party cited controlling authority from the Delaware Supreme Court resolving the retroactive effect of the exculpatory clause at issue in this case, but the parties "appear to agree that the question of whether the fourth amended LLC agreement exculpates fiduciary duties arising before that date is simply one of contractual interpretation." The court quoted from Delaware case law stating that the first step in analyzing a case involving the internal affairs of a Delaware LLC is to examine the contract, which will control unless the provision violates any of the exceedingly few mandatory provisions of the Delaware LLC statute. If the LLC agreement is silent, the next step is to see if there is a statutory default provision, and if neither the agreement nor the statute addresses the issue, the statute directs that "the rules of law and equity...shall govern."

The court relied on the recitals of the fourth amended LLC agreement and the broad language of the exculpatory provision to conclude that the LLC could not assert claims arising under the prior agreements:

The fourth amended LLC agreement begins with certain recitals. One states, "This Agreement amends and restates the Previous Agreement in its entirety." Dkt 157-1 at 306 (emphasis added). The Delaware Chancery Court has held that the amends-and-restates phrasing indicates "that the subsequent operating agreement *replaced and superseded* the predecessor agreement." *Focus Financial Partners LLC v Holsopple*, 241 A3d 784, 822 (Del Ch 2020) (emphasis added). Once an LLC agreement is superseded by a subsequent agreement, a limited liability company can no longer bring claims that arose under the superseded agreement. Id at 823.

Such a conclusion conforms to the broad language of the exculpatory provision. As phrased, it vitiates all fiduciary duties owed by Furie officers to "the fullest extent permitted by applicable law." Dkt 157-1 at 310. Elimination of fiduciary duties *to the fullest extent* permitted by Delaware law necessarily includes—in accord with authority noted immediately above—exculpation of those fiduciary duties owed (and potentially breached) in the past. And indeed, the Trustee conceded at hearing that Delaware law not only permits the exculpation of all fiduciary duties going forward, but also allows an LLC to release its officers from past breaches of fiduciary duty. Dkt 190 at 94; *see CelestialRX Investments, LLC v Krivulka*, 201[7] WL 416990, *16 (Del Ch 2017) (finding exculpatory clause to eliminate fiduciary duties to extent permitted by Delaware law).

All of this simply means that the plain language of the fourth amended LLC agreement not only exculpates all fiduciary duties after January 25, 2018, but also all fiduciary duties that arose under all prior agreements. The Trustee argues to the contrary, noting that the agreement (i) states that it is "effective as of January 25, 2018," (ii) is written prospectively, and (iii) can't be construed as a silent release. Dkt 118 at 16–17. None of these arguments withstands scrutiny.

First, there's a distinction between the effective date of the fourth amended LLC agreement and what it portends as to its exculpatory effect. Section 18-201(d) of the Delaware Limited Liability Company Act provides parties broad discretion regarding the effective date of their agreement. *See also Rodgers v Erickson Air-Crane Co*, 2000 WL 1211157, *5 (Del Superior Ct) (holding that parties can agree that written contract took effect earlier than execution date). But the parties here didn't need to backdate the fourth amended LLC agreement—or even indicate any particular effective date—to exculpate all past breaches of fiduciary duty. That purpose was instead achieved by the *amends-and-restates* language quoted and addressed above. See Dkt 157-1 at 306.

Second, as the Trustee contends, it's true that "the relevant portion of both operating agreements is written *prospectively*" in that they state no manager or officer "shall have" fiduciary duties in connection with Furie. Dkts 171 at 17 (emphasis in original) & 157-1 at 310. But this language doesn't stand alone. It must instead be read in conjunction with the clause's introductory phrase pertaining to modification "[t]o the fullest extent permitted by applicable law." Dkt 157-1 at 310. As determined above, such phrasing signals the exculpation of past breaches of fiduciary duties. Again, this follows from what Delaware law allows in its maximal extent, as conceded above by the Trustee.

And third, contrary to contention by the Trustee, construing the language of the fourth amended LLC agreement to exculpate past breaches isn't a "silent release." Dkt 118 at 17. Quite the contrary. Such a construction simply affords each clause its due legal and textual significance under Delaware law. This is particularly evident where the Delaware Corporate Statute specifically provides, "No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective." 8 Del C § 102(b)(7). Given that this or similar language does not feature in the Delaware Limited Liability Company Act, the *omitted-case canon* of construction undercuts the Trustee's argument. This is "the principle that what a text does not provide is unprovided." Antonin Scalia & Brian A. Garner, *Reading Law* 96 (West 2012). In such view, it simply isn't the province of "the judicial power ... to supply words or even whole provisions that have been omitted." Id at 93. This is particularly true here, for the Delaware legislature certainly knew how to provide limitations on the effect of exculpatory clauses when it so intended. That it didn't do so under Delaware Limited Liability Company Act is the end of the matter. Such a limitation can't later be read into the statute.

> In conclusion, the fourth amended LLC agreement exculpates past (and later) breaches of fiduciary duty.

The court proceeded to apply the exculpatory provision to claims brought by the trustee based on the claim and the status of the individual defendant. The claims against the Furie officers were based on duties arising from their roles as Furie officers and were thus dismissed with prejudice because the claims were barred by the exculpatory clause in the fourth amended LLC agreement. The court declined to dismiss claims against one individual that were based on fiduciary duties owed by the individual to Furie as an attorney.

The parties relied without elaboration upon Texas rather than Delaware law for the purpose of certain claims ancillary to breach of fiduciary duty, and the court accordingly addressed those claims under Texas law. The court dismissed with prejudice claims for aiding and abetting breach of fiduciary duty to the extent that the claims were based on duties that the various officers owed to Furie. The court stated that "[w]hile the Supreme Court of Texas hasn't yet expressly so stated, the Fifth Circuit holds that Texas law recognizes a claim for 'knowing participation in a breach of fiduciary duty.' *D'Onofrio v Vacation Publications Inc*, 888 F3d 197, 215–16 (5th Cir 2018). But such a claim requires an underlying breach of fiduciary duty. And none exists here as to officers of Furie." The court also dismissed with prejudice the claims for civil conspiracy insofar as they related to the exculpated duties of Furie officers. The court stated that "[g]enerally speaking, such a claim 'requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means,' and it 'inherently requires a meeting of the minds on the object or course of action.'" *First United Pentecostal Church of Beaumont v Parker*, 514 SW3d 214, 222 (Tex 2017). One of the essential elements of such a claim is that one or more unlawful, overt acts are taken in pursuance of the object or course of action. *Ibid*. But again, any underlying breach of fiduciary duty was exculpated—meaning that it is (or was) no longer unlawful."

The court dismissed without prejudice claims for breach of fiduciary duty and related claims in other contexts because the extent to which those claims arose from fiduciary duties that might exist beyond their roles as Furie officers (such as by virtue of duties that might be owed as officers of Furie's parent LLC) was not clear.

Weiss v. Arabella Exploration Inc. (In re Arabella Petroleum Company, LLC), 647 B.R. 851 (Bankr. W.D. Tex. 2022).

The court held that distributions from the LLC debtor to its sole member after the LLC was insolvent were constructively fraudulent transfers, and certain other transfers by the LLC debtor to its sole member and a related entity were fraudulent transfers made with actual intent to hinder, delay, or defraud creditors. Because the sole member was also the sole manager and officer of the LLC, he owed the LLC a fiduciary duty, and the court concluded that the transfers made with actual intent to hinder, delay, or defraud were a breach of that fiduciary duty to the LLC. Although the company agreement expressly limited the potential liability of members and managers for breach of fiduciary duty to actions not taken in good faith, the provision did not limit liability for actions constituting fraud, gross negligence, bad faith or willful misconduct, and the court concluded that the member/manager's knowledge of the LLC's deteriorating financial condition established both bad faith and willful misconduct.

Jason Hoisager formed Arabella Petroleum Company, LLC (the "Debtor") in 2007 to buy and sell oil and gas properties in West Texas. Hoisager was the Debtor's sole member and manager, and as manager he appointed himself president, secretary, and treasurer. In 2008, Hoisager formed Arabella Exploration, LLC ("Arabella Exploration"), which began acquiring properties in the Permian Basin in 2011, and Arabella Exploration, Inc ("AEX") was formed on December 24, 2013, by the reverse merger of Arabella Exploration and a Cayman Islands corporation. According to Hoisager, he formed AEX to raise capital to develop oil and gas properties in the Permian Basin. In 2014, AEX formed Arabella Operating LLC ("Arabella Operating") to take over operating wells previously operated by the Debtor under the joint operating agreements.

Hoisager owned 100% of Arabella Exploration until the December 2013 merger, when it became a wholly owned subsidiary of AEX. Mr. Hoisager was the manager of Arabella Exploration and the chief executive officer of AEX following the merger. Arabella Operating was also a wholly owned subsidiary of AEX, and Hoisager was its sole manager. Hoisager owned 30.4% of the shares of AEX at the time of the merger, with the remainder owned by public shareholders. The parties stipulated that the Debtor became insolvent no earlier than December 31, 2013, a few days after AEX was formed.

The Trustee alleged that from 2011 to 2015, Hoisager made many fraudulent transfers from the Debtor to himself, his wife, and other entities that he owned or controlled. The alleged fraudulent transfers consisted of: (1) transfers of properties from the Debtor to AEX; (2) transfers of cash from the Debtor to AEX; (3) transfers of cash from the Debtor to Arabella Operating; and (4) transfers of cash from the Debtor to Hoisager and his wife. The Trustee also alleged that Mr. Hoisager's fraudulent transfers and self-dealing breached his fiduciary duties to the Debtor. The Trustee alleged that Hoisager owed fiduciary duties to the Debtor as its governing person (manager) and that he owed duties to creditors as a "corporate officer" at least as of the end of 2013, the date on which the Debtor became insolvent.

The Trustee relied on the books and records of the Debtor to support his position that Hoisager made many fraudulent transfers. Although substantially all the transfers to Hoisager were recorded in the Debtor's general ledger account as "Owner Distributions," Hoisager later attempted to characterize the payments as "salary & wages," "expense reimbursements," "performance bonuses," and "tax distributions." The court noted many inconsistencies between the books and records and Hoisager's explanations and concluded that Hoisager's "inconsistent, self-serving, and undocumented explanations of how the various documents and payments should be characterized" were not credible. Instead, the court relied on the contemporaneously recorded treatment of the transactions in the Debtor's books and records.

The court described each of the transfers within each of the four categories above and analyzed whether they were fraudulent transfers under the provisions of the Bankruptcy Code or the provisions of the Texas Uniform Fraudulent Transfer Act (TUFTA), which are also applicable pursuant to the Bankruptcy Code. The court provided a "primer" on fraudulent transfers in which it explained the distinction between constructively fraudulent transfers (transfers made by a debtor in exchange for less than reasonably equivalent value at a time when the debtor was either (1) insolvent (meaning the fair salable value of its assets was less than its liabilities), (2) unable to pay its debts as they came due, or (3) had an unreasonably small capital) and actual-intent fraudulent transfers (transfers made with actual intent to delay, hinder, or defraud creditors, with respect to which the intent in question is determined by circumstantial evidence, often with reference to so-called "badges of fraud"). The court also pointed out the remedies available to the Trustee ("avoidance" and "recovery") and certain principles relating to transfers made for an antecedent debt. While transfers made to satisfy antecedent debts cannot be constructively fraudulent transfers, they can be preferences or actual-intent transfers, but the Trustee did not seek to avoid any insider preferences under TUFTA and limited his Section 547 action to payments made to Hoisager.

Turning to each of the alleged fraudulent transfers, the court first analyzed transfers of certain properties from the Debtor to AEX and concluded that the trustee could not recover the properties transferred to AEX as constructively fraudulent transfers because the transfers were for an antecedent debt. The Trustee could not recover the properties transferred to AEX as actual-intent fraudulent transfers because the Trustee failed to show the value of the properties to be recovered.

Next the court analyzed transfers of property and cash made by the Debtor to AEX and transfers of cash from the Debtor to Arabella Operating and concluded that the Trustee could not recover these transfers because the Trustee failed to show that they transfers were made "to or for the benefit of" Hoisager as a "transfer beneficiary."

The court proceeded to explain the relevance of the financial condition of the Debtor to the claims for fraudulent transfer and breach of fiduciary duty. The court said that the evidence made it very clear that the combination of certain high-cost drilling activities by the Debtor and "absurdly large owner distributions" were the biggest contributors to the Debtor's insolvency at the end of 2013.

Based on the fact that the Debtor was insolvent at the end of 2013, \$2,803,834 in distributions made to Hoisager after December 31, 2013 were recoverable by the Trustee as constructively fraudulent transfers. As the court pointed out, "owner distributions made while a company is insolvent are quintessential constructively fraudulent transfers." In addition, the court determined that the Trustee could recover cash payments from the Debtor to Hoisager after July 1, 2013 as actual-intent transfers. Here, the court explained and relied upon "badges of fraud" as circumstantial evidence that Hoisager had the requisite intent to "hinder, delay, or defraud" creditors. The court described the facts that indicated Hoisager's intent as follows:

> First, the Debtor made its first six-digit distribution to Mr. Hoisager in July 2013.
>
> Next, on top of distributions to Mr. Hoisager, the Debtor made large expenditures, including substantial cost overruns, on the Wolfbone I and II wells—wells in which the Debtor no

longer owned a working interest—leading to the Debtor's slide into insolvency. This ship was clearly sinking in 2013, and no one would know that better than Mr. Hoisager.

> Next, the Debtor transferred almost 5 million dollars to AEX. These transfers were included on Exhibit 85 ...[which revealed that] beginning in July 2013 (again), the Debtor made substantial revenue payments to AEX at times when the AEX joint interest billings due to the Debtor were substantial, and mostly past due. No prudent operator would have failed to offset those revenue payments against the past due joint interest billings.
>
> Finally, there is Mr. Hoisager's audacious attempt to transition from his role as a sole proprietor, ... using the Debtor as his private checking account, to a role as the chief executive officer of a public company.
>
> Taking all these facts together leads to the inescapable conclusion that starting in July 2013, Mr. Hoisager knew the Debtor was foundering, and he was, at the same time, enticed by the prospect of running AEX, a public company. Preferring his new enterprise over the Debtor, Mr. Hoisager emptied the Debtor of available cash and valuable properties, and diverted it all to himself, AEX, or later, Arabella Operating. And this, at the least, constitutes an intent to delay, hinder, or defraud the creditors of the Debtor, and so the cutoff date for cash transfers to Mr. Hoisager can be moved back to July 1, 2013. Doing so adds $377,535 to the judgment.

With respect to the Trustee's claim for breach of fiduciary duty against Hoisager, the court stated that, as the sole member, manager, and officer (president, secretary, and treasurer) of the Debtor, a Texas LLC, Hoisager owed the Debtor a fiduciary duty. The court stated that "Texas law allows an LLC to limit this duty to some extent, and the Debtor's company agreement does just that, relieving Mr. Hoisager from 'any action taken (or any failure to act) by [him] in good faith on behalf of the company and reasonably believed by [him] to be authorized or within the scope of [his] authority, unless that action (or failure to act) constitutes fraud, gross negligence, bad faith or willful misconduct....'" Hoisager argued that he owed no duties to creditors unless the company stopped operating, and the court stated that the cited case law supports this notion but also affirms that the duty runs to the corporation. The court thought it likely that Texas would ultimately adopt the Delaware view that the fiduciary duties are always owed to the corporation but can be enforced by the residual stakeholders—in this case the creditors since the Debtor was hopelessly insolvent. In any event, the creditors in this case were not seeking to enforce the fiduciary duty owed to the Debtor; rather, a trustee standing in the shoes of the Debtor had the ability to sue to enforce the fiduciary duties owed to the Debtor and recover on behalf of the residual stakeholders.

The court stated that the duty imposed on Hoisager included a duty of care and a duty of loyalty, and the duty of loyalty includes a duty not to engage in self-dealing. Although Hoisager raised the defense of the business judgment rule, the court pointed out that the business judgment rule does not apply to self-dealing or interested party transactions. In such situations, the fiduciary has the burden of proving that the transaction was fair to the corporation.

The court characterized the actions taken by Hoisager to drain the Debtor of cash and properties through transfers to himself and AEX as "the very epitome of self-dealing and interested party transactions." That "he took these actions with full knowledge of the Debtor's deteriorating financial condition establishes both bad faith and willful misconduct."

2. Amendment and Restatement

Clingman & Hanger Management Associates LLC v. Reick, No. 4:21-cv-02698, 2023 WL 2744399 (S.D. Tex. Mar. 30, 2023).

The court held that a provision in a Delaware LLC agreement eliminating fiduciary duties of managers and officers was retroactive under Delaware law so as to apply to alleged breaches of duty that occurred before the LLC agreement was amended to include the waiver of fiduciary duties.

A litigation trust was established in the bankruptcy proceeding of Furie Operating Alaska LLC ("Furie"), a natural gas company, and its parent LLC. The trustee of the litigation trust asserted claims for breach of fiduciary duty (and related claims of aiding and abetting and conspiracy), fraudulent transfer, and unjust enrichment against various individuals and entities. The claims were generally based on an alleged scheme by Reick, the de facto head of Furie, and other executives and advising attorneys to divert value to themselves through various insider transactions. Motions for dismissal of the claims for failure to state a claim as well as motions for summary judgment were filed by several of the defendants.

The trustee alleged that numerous defendants owed and breached fiduciary duties to Furie based on the defendants' control or positions as designated or de facto officers. The defendants argued that their fiduciary duties were eliminated by provisions in certain of Furie's amended LLC agreements.

The court explained that Furie was originally formed under the laws of Texas in 1999 and that neither its first nor second amended LLC agreement contained any waiver of fiduciary duties. A third amended and restated operating agreement in late 2017 stated that Furie remained an LLC organized under Texas law and included the following clause, which the court referred to as an "exculpatory clause":

> 9. No Fiduciary Duties; Business Opportunities. To the fullest extent permitted by applicable law, no manager of the Board or officer of the Company, in each case, solely in their respective capacities as such, shall have any duty, fiduciary or otherwise, to the Company in connection with the business and affairs of the Company or any consent or approval given or withheld pursuant to this Agreement.

According to the court, Furie then "reincorporated" as a Delaware LLC and "filed a fourth amended and restated operating agreement effective January 25, 2018" containing "the same exculpatory clause as above, while stating that Delaware law governs." The trustee asserted various claims relating to alleged breaches occurring before the third amended operating agreement was adopted in 2017. Several defendants argued that the fourth amended LLC agreement not only eliminated fiduciary duties of Furie officers going forward, but also broadly exculpated any breach of fiduciary duty that occurred under the prior LLC agreements. One defendant made the same argument under both the third and fourth amended LLC agreements. The trustee contended that the third and fourth amended LLC agreements had "no effect on causes of action that had already arisen in Furie's favor for breaches" under the earlier agreements.

The court emphasized that "the parties agree that the fourth amended LLC agreement selects Delaware law, and that Delaware law thus governs the question of the retroactive effect of that exculpatory clause." The court pointed out that "if that clause has retroactive effect, it subsumes all prior versions—meaning in turn that there would be no need to determine whether the same language in the third amended LLC agreement would also have retroactive effect under Texas law." The court noted that Delaware case law requires the drafters of an LLC agreement to "make their intent to eliminate fiduciary duties plain and unambiguous" and that Delaware statutory law "provides that 'the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement.'"

The court stated that neither party cited controlling authority from the Delaware Supreme Court resolving the retroactive effect of the exculpatory clause at issue in this case, but the parties "appear to agree that the question of whether the fourth amended LLC agreement exculpates fiduciary duties arising before that date is simply one of contractual interpretation." The court quoted from Delaware case law stating that the first step in analyzing a case involving the internal affairs of a Delaware LLC is to examine the contract, which will control unless the provision violates any of the exceedingly few mandatory provisions of the Delaware LLC statute. If the LLC agreement is silent, the next step is to see if there is a statutory default provision, and if neither the agreement nor the statute addresses the issue, the statute directs that "the rules of law and equity...shall govern."

The court relied on the recitals of the fourth amended LLC agreement and the broad language of the exculpatory provision to conclude that the LLC could not assert claims arising under the prior agreements:

> The fourth amended LLC agreement begins with certain recitals. One states, "This Agreement amends and restates the Previous Agreement in its entirety." Dkt 157-1 at 306 (emphasis added). The Delaware Chancery Court has held that the amends-and-restates phrasing indicates "that the subsequent operating agreement *replaced and superseded* the predecessor agreement." *Focus Financial Partners LLC v Holsopple*, 241 A3d 784, 822 (Del Ch 2020) (emphasis added). Once an LLC agreement is superseded by a subsequent agreement, a limited liability company can no longer bring claims that arose under the superseded agreement. Id at 823.
>
> Such a conclusion conforms to the broad language of the exculpatory provision. As phrased, it vitiates all fiduciary duties owed by Furie officers to "the fullest extent permitted by

applicable law." Dkt 157-1 at 310. Elimination of fiduciary duties *to the fullest extent* permitted by Delaware law necessarily includes—in accord with authority noted immediately above—exculpation of those fiduciary duties owed (and potentially breached) in the past. And indeed, the Trustee conceded at hearing that Delaware law not only permits the exculpation of all fiduciary duties going forward, but also allows an LLC to release its officers from past breaches of fiduciary duty. Dkt 190 at 94; *see CelestialRX Investments, LLC v Krivulka*, 201[7] WL 416990, *16 (Del Ch 2017) (finding exculpatory clause to eliminate fiduciary duties to extent permitted by Delaware law).

All of this simply means that the plain language of the fourth amended LLC agreement not only exculpates all fiduciary duties after January 25, 2018, but also all fiduciary duties that arose under all prior agreements. The Trustee argues to the contrary, noting that the agreement (i) states that it is "effective as of January 25, 2018," (ii) is written prospectively, and (iii) can't be construed as a silent release. Dkt 118 at 16–17. None of these arguments withstands scrutiny.

First, there's a distinction between the effective date of the fourth amended LLC agreement and what it portends as to its exculpatory effect. Section 18-201(d) of the Delaware Limited Liability Company Act provides parties broad discretion regarding the effective date of their agreement. *See also Rodgers v Erickson Air-Crane Co*, 2000 WL 1211157, *5 (Del Superior Ct) (holding that parties can agree that written contract took effect earlier than execution date). But the parties here didn't need to backdate the fourth amended LLC agreement—or even indicate any particular effective date—to exculpate all past breaches of fiduciary duty. That purpose was instead achieved by the *amends-and-restates* language quoted and addressed above. See Dkt 157-1 at 306.

Second, as the Trustee contends, it's true that "the relevant portion of both operating agreements is written *prospectively*" in that they state no manager or officer "shall have" fiduciary duties in connection with Furie. Dkts 171 at 17 (emphasis in original) & 157-1 at 310. But this language doesn't stand alone. It must instead be read in conjunction with the clause's introductory phrase pertaining to modification "[t]o the fullest extent permitted by applicable law." Dkt 157-1 at 310. As determined above, such phrasing signals the exculpation of past breaches of fiduciary duties. Again, this follows from what Delaware law allows in its maximal extent, as conceded above by the Trustee.

And third, contrary to contention by the Trustee, construing the language of the fourth amended LLC agreement to exculpate past breaches isn't a "silent release." Dkt 118 at 17. Quite the contrary. Such a construction simply affords each clause its due legal and textual significance under Delaware law. This is particularly evident where the Delaware Corporate Statute specifically provides, "No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective." 8 Del C § 102(b)(7). Given that this or similar language does not feature in the Delaware Limited Liability Company Act, the *omitted-case canon* of construction undercuts the Trustee's argument. This is "the principle that what a text does not provide is unprovided." Antonin Scalia & Brian A. Garner, *Reading Law* 96 (West 2012). In such view, it simply isn't the province of "the judicial power ... to supply words or even whole provisions that have been omitted." Id at 93. This is particularly true here, for the Delaware legislature certainly knew how to provide limitations on the effect of exculpatory clauses when it so intended. That it didn't do so under Delaware Limited Liability Company Act is the end of the matter. Such a limitation can't later be read into the statute.

In conclusion, the fourth amended LLC agreement exculpates past (and later) breaches of fiduciary duty.

The court proceeded to apply the exculpatory provision to claims brought by the trustee based on the claim and the status of the individual defendant. The claims against the Furie officers were based on duties arising from their roles as Furie officers and were thus dismissed with prejudice because the claims were barred by the exculpatory clause in the fourth amended LLC agreement. The court declined to dismiss claims against one individual that were based on fiduciary duties owed by the individual to Furie as an attorney.

The parties relied without elaboration upon Texas rather than Delaware law for the purpose of certain claims ancillary to breach of fiduciary duty, and the court accordingly addressed those claims under Texas law. The court dismissed with prejudice claims for aiding and abetting breach of fiduciary duty to the extent that the claims were based on duties that the various officers owed to Furie. The court stated that "[w]hile the Supreme Court of Texas hasn't yet expressly so stated, the Fifth Circuit holds that Texas law recognizes a claim for 'knowing participation in a breach of fiduciary duty.' *D'Onofrio v Vacation Publications Inc*, 888 F3d 197, 215–16 (5th Cir 2018). But such a claim requires an underlying breach of fiduciary duty. And none exists here as to officers of Furie." The court also dismissed with prejudice the claims for civil conspiracy insofar as they related to the exculpated duties of Furie officers. The court stated that "[g]enerally speaking, such a claim 'requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means,' and it 'inherently requires a meeting of the minds on the object or course of action.'" *First United Pentecostal Church of Beaumont v Parker*, 514 SW3d 214, 222 (Tex 2017). One of the essential elements of such a claim is that one or more unlawful, overt acts are taken in pursuance of the object or course of action. *Ibid*. But again, any underlying breach of fiduciary duty was exculpated—meaning that it is (or was) no longer unlawful."

The court dismissed without prejudice claims for breach of fiduciary duty and related claims in other contexts because the extent to which those claims arose from fiduciary duties that might exist beyond their roles as Furie officers (such as by virtue of duties that might be owed as officers of Furie's parent LLC) was not clear.

3. Reformation or Rescission

In re Highland Capital Management, L.P., Case No. 19-34054-sgj-11, 2023 WL 3185266 (Bankr. N.D. Tex. Apr. 28, 2023).

The bankruptcy court sustained the debtor's objection to a claim for reformation and rescission of a company agreement of a Delaware LLC of which the debtor and the claimant were members. The court rejected the claimant's argument that the company agreement reflected any precise mistake or that it was based on a mistaken assumption, and the court also concluded that the company agreement was not an executory contract that was deemed rejected under the terms of the plan of reorganization.

Highland Capital Management, L.P. ("Highland" or the "debtor") objected to a proof of claim filed by HCRE Partner, LLC ("HCRE") relating to the allocation of equity in SE Multifamily Holdings, LLC ("SE Multifamily"), a Delaware LLC. Highland and HCRE entered into the original LLC agreement. Schedule A of the original agreement set forth capital contributions of $51 by HCRE and $49 by Highland and allocated 51% of SE Multifamily's membership interests to HCRE and 49% to Highland. Mr. Dondero signed the agreement on behalf of both members. Mr. McGraner, a minority owner and vice president and secretary of HCRE, testified that the original agreement did not contain any mistakes in the allocation of the membership interests and that the agreement did not fail to reflect the intent of the parties. The agreement gave HCRE the right to appoint the manager of SE Multifamily, and the agreement identified Mr. Dondero (as an officer of HCRE) the initial manager of SE Multifamily with exclusive and unfettered control over the business.

In connection with obtaining a loan to finance the acquisition of real estate, BH Equities, LLC ("BH Equities") worked with Highland and HCRE in anticipation of BH Equities becoming a member. Before a formal agreement was in place, BH Equities contributed approximately $21 million in capital to SE Multifamily to fund expenses and acquisition of real estate by SE Multifamily. Following the closing of the loan transaction, Highland and BH Equities continued negotiating the terms on which BH Equities would become a member of SE Multifamily. Six months after the loan transaction closed, Highland, HCRE, and BH Equities executed a First Amended and Restated Limited Liability Company Agreement for SE Multifamily. An updated Schedule A set forth the amount of each of the parties' capital contributions as follows: $291,146,036 for HCRE, $49,000 for Highland, and $21,213,721 for BH Equities. Schedule A showed their respective percentage interests as 47.94% for HCRE, 46.06% for Highland, and 6% for BH Equities. (Another entity obtained 100% of newly issued preferred interests in exchange for a capital contribution of $5,808,603.) Although HCRE filed a proof of claim in Highland's bankruptcy proceeding seeking reformation or rescission of the agreement to reallocate the equity based on mistake, testimony of Mr. Dondero, Mr. McGraner, and a representative of BH Equities, as well as other evidence, indicated that all of them understood and agreed that the percentages in Schedule A were the agreed percentage interests, and various allocation and distribution provisions of the amended LLC agreement tracked these percentages. Ultimately, Mr. McGraner contended on cross examination that the mistake in the agreement was that the amended agreement should have provided HCRE with the ability to amend the agreement as the transaction unfolded and assets were sold. The court pointed out, however, that the amended agreement contained an amendment provision that gave

HCRE and the manager of SE Multifamily the ability to amend the agreement. The amendment provision differed from the original agreement in that the amended agreement provided for its amendment upon the consent of the manager and HCRE in contrast to the original agreement, which required the consent of the manager and all members. Mr. McGraner acknowledged that Mr. Dondero was in control of both Highland and HCRE and that HCRE made no effort to amend the agreement either before or after Highland's bankruptcy filing. According to the court, "Mr. McGraner confirmed that '[a]t no time in the history of the world did HCRE ever try to amend the restated LLC agreement' and that he 'never instructed anyone to draft an amendment [to the agreement].'" He "also admitted (after being impeached by his prior deposition testimony) that nobody acting on behalf of HCRE ever told BH Equities that there was a mistake in the Amended LLC Agreement or that HCRE wanted to amend it to reflect a different allocation of membership interests for Highland and HCRE and that '[t]he reason HCRE made no effort to amend the agreement is because [it] hoped that the issues that caused the bankruptcy filing would resolve themselves.'"

The court explained that HCRE failed to meet its burden of proof under Delaware law regarding its claim to reallocate the equity of SE Multifamily in accordance with the capital contributions of the members. As to its claim for reformation, the court stated that a plaintiff must show, by clear and convincing evidence, the "precise mistake" and "a specific meeting of the minds regarding a term that was not accurately reflected in the final, written agreement." The court stated that HCRE did not produce any evidence that the parties to the amended LLC agreement had come to a specific understanding, prior to its execution, that the allocation of percentage membership interests in SE Multifamily was different from the percentage allocations contained in the amended agreement. Thus, HCRE was not entitled to reformation of the amended LLC agreement to reallocate the members' membership percentages in accordance with the stated capital contributions of the respective members (or to reformation of any provision of the amended LLC agreement).

As to HCRE's claim for rescission, the court explained that HCRE's claim for reallocation of the equity interests really amounted to a claim for reformation rather than rescission, but the court stated that a claim for rescission in these circumstances failed in any event. Although the court characterized the concepts of rescission and reformation as similar in many ways, the court explained that there are some important differences. "Rescission, under Delaware law, involves an attempt to 'unmake' an agreement and 'return the parties to the *status quo [ante]*' while 'reformation entails an attempt to 'correct[ ] an enforceable agreement's written embodiment to reflect the parties' true agreement.'" While mistaken assumptions or failure of the agreement to reflect a prior understanding of the parties underlie both reformation claims and rescission claims, "'one substantive and relevant difference between the two claims ... is that ... while a failure to read prevents a plaintiff from proceeding with [a rescission] claim as a prima facie matter, a failure to read bars a reformation claim only if '[the plaintiff's] fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.'" Here there was testimony by Mr. Dondero that he did not read the amended agreement prior to signing it. Further, even if his failure to read the agreement did not bar a rescission claim, HCRE failed to present any evidence of the other elements of a rescission claim: that the parties were mistaken as to a basic assumption on which the amended agreement was made and that the mistake had a material effect on the agreed-upon exchange of performances.

Finally, the court addressed HCRE's belated argument that the amended LLC agreement was an executory contract that was deemed rejected under the plan of reorganization. After two and one-half years of litigating the debtor's objection to HCRE's proof of claim, HCRE argued that it was entitled to allowance of its proof of claim and reformation of the amended LLC agreement to reallocate the membership interests in SE Multifamily in proportion to each member's capital contribution because the amended agreement was an executory contract that was rejected by the debtor, who was thus no longer a member of SE Multifamily, but only had an "economic interest" in SE Multifamily. Although HCRE did not cite any legal authority to support its position that the amended LLC agreement was an executory contract that had been rejected by Highland under the terms of the plan, the debtor provided legal analysis and authority to support its contention that the amended LLC agreement was not an executory contract under Section 365 of the Bankruptcy Code, and the court chose to address the argument. The court explained that the Bankruptcy Code does not define the term "executory contract," but the Fifth Circuit has adopted the "Countryman test" (a definition articulated by Professor Vern Countryman) pursuant to which "a contract is executory if 'performance remains due to some extent on both sides' and if 'at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.'" There is no per se rule governing whether a limited liability company operating agreement is an executory contract. The status of a particular operating agreement depends on the facts and circumstances. Relevant factors include whether the operating agreement imposes remote or hypothetical duties, requires ongoing capital contributions, and the level of managerial responsibility imposed on the debtor.

In this case, Highland did not have any material unperformed obligations under the amended LLC agreement as of the petition date, and the court thus concluded that the amended LLC agreement was not an executory contract under Bankruptcy Code § 365 that would have been deemed rejected upon confirmation of the plan. The agreement vested exclusive control of SE Multifamily in Mr. Dondero and HCRE, and Highland was a passive investor with no right to manage or control SE Multifamily and no obligations as a member. For example, members were permitted, but not required, to make future capital contributions to SE Multifamily, and Mr. Dondero testified that there was no expectation that any of the members would put in any additional capital after the agreement was amended. HCRE's counsel pointed to several provisions in the amended LLC agreement that HCRE contended imposed material, affirmative obligations on the debtor as of the petition date, but the debtor systematically refuted these contentions, and HCRE chose not to address the debtor's arguments. Considering the facts and circumstances surrounding the amended LLC agreement, the court concluded that it was not an executory contract under Bankruptcy Code § 365 that was subject to being rejected or assumed under the terms of the plan.

4. Bankruptcy Blocking Provision

In re Roberson Cartridge Co., LLC, No. 22-20192-rlj, 2023 WL 2393809 (Bankr. N.D. Tex. Mar. 7, 2023).

The court concluded that the sole manager of an LLC had authority to file the LLC debtor's bankruptcy petition, and a blocking provision in the company agreement that required approval of a non-member creditor for the LLC's bankruptcy petition was void as a matter of public policy.

The debtor in this bankruptcy proceeding was Roberson Cartridge Co., LLC ("Roberson Cartridge"), a Texas limited liability company that manufactured cartridges for ammunition. Jeff Roberson supplied Roberson Cartridge's initial capital and received Class A Units in Roberson Cartridge. An amended and restated company agreement listed another individual as a member, but Roberson Cartridge and its creditor Matador Brass Partners, LLC ("Matador Brass") referred to Roberson as the "100% owner" of Roberson Cartridge. Assuming the other individual named as a member held 6,000 Class A Units, Roberson had 94,000 Class A Units and was the sole manager of Roberson Cartridge.

Matador Brass was created to provide financing to Roberson Cartridge, and its loan agreement with Roberson Cartridge required Roberson Cartridge to execute an amended and restated company agreement that required Roberson Cartridge to obtain Matador Brass's written consent before Roberson Cartridge could take "any action that results in a liquidation or dissolution of the Company[.]" The amended and restated company agreement also stated that "[u]ntil Matador's acquisition of Class B Units, Matador shall not be a Member of the Company but shall be a third-party beneficiary of this Agreement with a right to enforce the provisions of this Agreement applicable to Matador."

Roberson Cartridge later defaulted on its loan from Matador Brass and Roberson, without Matador Brass's consent, adopted a resolution in his capacity as manager of Roberson Cartridge to file a Chapter 7 bankruptcy petition for Roberson Cartridge. Matador Brass sought to dismiss the bankruptcy petition on the basis it was filed without proper authority or, alternatively, to convert the bankruptcy to a Chapter 11 case.

The court first discussed Matador Brass's argument that the bankruptcy should be dismissed on the basis that it was not filed with proper authority. Matador Brass relied on three points for dismissal: (1) the effect of Roberson Cartridge's default on the loan was to strip Roberson, the presumptive sole member of Roberson Cartridge, of his right to vote his interests to authorize the filing of a bankruptcy petition, and the resolution he signed authorizing the filing was ineffective, (2) under the amended company agreement, Roberson Cartridge was required to obtain the permission of Matador Brass before filing its Chapter 7 petition, thus rendering the filing ineffective, and (3) Roberson Cartridge filed the case in bad faith.

The court stated that the issue of authority is determined by state law, and the court rejected Matador Brass's argument that Roberson had no right to issue a board resolution authorizing Roberson Cartridge's Chapter 7 filing. The court reasoned as follows that Roberson had authority as the sole manager to authorize the bankruptcy filing regardless of the impact of the default on his rights to vote as a member:

> 6. Matador Brass cites *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010) (Lynn, J.), to support the proposition that voting rights are stripped when those rights are

pledged pursuant to a loan agreement and the debtor defaults. Judge Lynn did not expressly state whether the voting rights of the debtor were immediately divested; rather, there he found that the lender acquiesced to the debtor's continued control. *Id*. at 404. The debtor continued to control the company after default, while the lender did not object to the control. *Id*. But "[m]ost tellingly, ... [the lender] commenced involuntary chapter 11 cases against [the debtors]." *Id*. In that case, the lenders did not dispute the debtor's authority to file; however, Judge Lynn did indicate that a pledge of voting rights may strip the pledgor upon default of the underlying loan.

7. Matador Brass concedes that Texas Business Organizations Code § 101.108 may prevent it from managing the company; however, it argues that Roberson's voting rights were relinquished immediately upon default so he lacked authority to file Roberson Cartridge's petition. The question at first blush is whether Roberson lost all voting rights immediately upon default. But the controlling issue is whether Roberson, as sole manager, had authority to execute a board resolution authorizing Roberson Cartridge to file a bankruptcy petition.

8. The Court has noted that

> [M]embership units in an LLC may be assigned, but the assignment does not entitle the assignee to participate in management, to become a member, or to exercise the rights of a member. *See* Tex. Bus. Orgs. Code Ann. § 101.108 (West 2014). The assignee is entitled to an allocation of the economic attributes—income, gain, loss, distributions, etc.—but only to the extent that such benefits have been assigned. *Id*. § 101.109. An assignee may become a member on approval of all members. *Id*.

In re Wilson, No. 11-50396, 2014 WL 3700634, at *6 (Bankr. N.D. Tex. July 24, 2014).

9. Turning to the Amended Company Agreement, "no Member, in its capacity as a Member, shall have the power to act for or on behalf of, or to bind, the Company." Matador Brass Ex. 1G at 22. The members within Roberson Cartridge "have the right to attend meetings of the Members and speak at such meetings. An annual meeting of Members to elect the Managers and transact such other business as is brought before the meeting may be held as determined by the Managers." *Id*. Accordingly, the voting rights of members are limited to electing managers and voting on other matters brought by the managers. [In a footnote, the court pointed out provisions of the company agreement under which the members had authority to elect to wind up Roberson Cartridge or the managers could trigger a winding up by disposing of all or substantially all of Roberson Cartridge's assets.]

10. Under Texas Business Organizations Code § 101.251, "[t]he governing authority of a limited liability company consists of: ... the managers of the company, if the company agreement provides that the company is managed by one or more managers[.]" Per the Amended Company Agreement, the board of managers manages, operates, and controls the business and affairs of the company. Matador Brass Ex. 1G at 28. Roberson Cartridge's managers have the authority to act on behalf of the company pursuant to a board resolution. *Id*. As confirmed by Greer's [Matador Brass's president and manager] testimony, Roberson was the sole manager at the time the bankruptcy was filed. In Roberson's capacity as sole manager of Roberson Cartridge, the board entered a resolution to authorize the filing of Roberson Cartridge's chapter 7 petition. Debtor Ex. 1.

11. Roberson did not use his voting rights as a member to authorize the filing of the bankruptcy petition, so even if his member voting rights were immediately divested, his authority as sole manager was unaffected. The board resolution thereby effectively authorized Roberson Cartridge to file its petition. This conclusion is also supported by the Texas Business Organizations Code. Section 101.356 requires the affirmative vote of a majority of all members for an LLC to act outside the ordinary course of business; however, section 101.552 states that "[a] majority vote of all of the members of a limited liability company or, if the limited liability company has no members, a majority of all of the managers of the company is required to approve (1) a voluntary winding up of the company[.]" There is conflicting evidence on whether another member exists, but, in their briefing, both parties state that Roberson is the sole owner. If Roberson was the sole member, and if he lost his membership interest upon default, then no member existed to vote. Under § 101.552, the manager had authority to approve the winding-up of the business.

The court next addressed Matador Brass's argument that the bankruptcy filing was not authorized because the amended company agreement required the consent of Matador Brass, which was not obtained. In the absence of Fifth Circuit case law directly on point, the court relied on case law in other jurisdictions to conclude that the provision requiring the consent of Matador Brass, a creditor who was not a member (but did have the right under its convertible loan to become a member), was void as against public policy. The court analyzed the so-called "blocking provision" as follows:

> 13. Texas law states that "[t]he governing authority of a limited liability company shall manage the business and affairs of the company as provided by: (1) the company agreement[.]" Tex. Bus. Orgs. Code § 101.252. The Amended Company Agreement requires that Roberson Cartridge obtain Matador Brass's written consent before it takes "any action that results in a liquidation or dissolution of the Company[.]" Matador Brass Ex. 1G at 20. The issue is whether this provision of the Amended Company Agreement limited or blocked the debtor's ability to file a chapter 7 petition.
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> 14. The provision is a form of a blocking provision. *See Franchise Servs. of N. Am.*, 891 F.3d at 205 ("Courts appear to use the term 'blocking provision' as a catch-all to refer to various contractual provisions through which a creditor reserves a right to prevent a debtor from filing for bankruptcy."); see generally 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09 (2022). "In general, the enforceability of blocking provisions depends on who has them. If it is creditors, they are generally unenforceable. If it is equity interest holders, they are generally *enforceable*." 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09[3] (2022) (emphasis added). *Compare In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (A chapter 11 case was dismissed because the LLC's operating agreement required the consent of all members for the LLC to file for bankruptcy relief, and the petitioner—holding a 90% interest in the LLC—did not receive consent from the other member who held the remaining 10% interest.), *with In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (A debtor LLC amended its operating agreement, wherein it granted a creditor the right to approve or disapprove of filing bankruptcy petitions. There, the court held the provision was void as against public policy.).
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> 15. The Fifth Circuit has not directly addressed the issue of pre-petition waivers of the right to file bankruptcy. *See Franchise Servs. of N. Am.*, 891 F.3d at 207 ("Several courts of appeals—though not this one—have opined that a pre-petition waiver of the benefits of bankruptcy is contrary to federal law and therefore void .... As this case is framed, we can assume without deciding that such a waiver is invalid. We leave the resolution of that issue for another case, one in which it is squarely presented.").
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> 16. In *Franchise Services of North America*, the Fifth Circuit held "[f]ederal law does not prevent a *bona fide shareholder* from exercising its right to vote against a bankruptcy petition just because it is also an unsecured creditor." 891 F.3d at 203 (emphasis added). The court acknowledged its holding was limited:
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>> As we note later in this opinion, our holding goes no further. This case involves a bona fide shareholder. The equity investment made by the shareholder at issue here was $15 million and the debt just $3 million. We are not confronted with a case where a creditor has somehow contracted for the right to prevent a bankruptcy or where the equity interest is just a ruse.
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> *Franchise Servs. of N. Am.*, 891 F.3d at 203 n.1.
>
> 17. *Unlike Franchise Services of North America*, the Court is presented with a case where a creditor holds a convertible loan, not yet converted into a membership interest, and the creditor conditioned the debtor's ability to file bankruptcy on the creditor's approval.
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> 18. Courts have found blocking provisions are void on public policy grounds when a creditor, without an ownership interest, retains the ability to block the filing of a petition. *See In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (Amendments to an LLC's operating agreement that required a creditor's approval before the LLC could file bankruptcy was void as against public policy). A court has gone so far as to hold that public policy

voids blocking provisions even when the creditor has an ownership interest but the ownership interest is nominal. *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016) (The operating agreement was amended to include the creditor as the holder of one common unit and required approval of all members holding common units to approve before filing a voluntary bankruptcy petition. The court held the agreement was void as against public policy because the nature and substance of the agreement was to contract away the LLC's right to a discharge in bankruptcy.).

19. "It is a well settled principal [sic] that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy." *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983). "[S]ince bankruptcy is designed to produce a system of reorganization and distribution different from what [one] would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply." *Bank of Am. v. N. LaSalle St. Ltd. P'ship (In re 203 N. Lasalle St. P'ship.)*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000). "This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002).

20. The Amended Company Agreement required that Roberson Cartridge obtain Matador Brass's approval before taking action to liquidate the company.

21. The Amended Company Agreement and loan documents were entered on May 14, 2021. Matador Brass Ex. 1G, 1A. Matador Brass has not converted its interest as a creditor to that of a member. Matador Brass entered a relationship with Roberson Cartridge as a creditor and remains a creditor. Requiring a borrower to waive its right to file a bankruptcy petition, as Matador Brass required of Roberson Cartridge, is void as against public policy. There is no precedent for upholding a blocking provision when the blocking creditor holds no ownership interest in the debtor.

After concluding that Roberson Cartridge's bankruptcy filing was not made in bad faith, the court addressed the request of Matador Brass to convert the Chapter 7 case to a case under subchapter V of Chapter 11. The court found no authority for imposing such a decision on the debtor where the Bankruptcy Code provides that the election to proceed under subchapter V is exclusively the debtor's.

5. Injunctive Relief

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. The plaintiff asserted numerous claims, including claims based on breach of fiduciary duty (direct and derivative), denial of her right of access to books and records, and oppression. The jury answered in favor of the plaintiff on most of her claims, and the trial court awarded actual and punitive damages as well as declaratory and injunctive relief. On appeal, the court held that portions of the permanent injunction granted in favor of the plaintiff against the general partners, limited partnerships, and individual defendants were overly broad and vague and prohibited lawful conduct because the enjoined acts were permitted by the governing documents of the entities.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey

Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

In its analysis of the injunctive relief awarded by the trial court, the court of appeals addressed certain provisions of the Limited Partnership Agreements and LLC regulations of the General Partners. The entity defendants argued that the injunctive relief awarded to Lisa by the trial court was improper for numerous reasons. The trial court granted injunctive relief based on the jury's findings that (1) Wes Jr., Stacey, and Lee breached their fiduciary duties to SignAd GP, LLC by failing to maintain internal controls on employee fringe benefits and selling company vehicles for less than fair market value (reversed by the court of appeals based on Lisa's lack of standing), (2) Wes Jr. breached his fiduciary duty to SignAd, Ltd. based on transactions involving ProIce (reversed by the court of appeals based on Wes's lack of sufficient control over the General Partner to support the existence of a fiduciary duty to the partnership), (3) Wes Jr., Stacey, Mark, and Lee knowingly participated in SignAd GP, LLC's breach of its fiduciary duty to SignAd, Ltd. involving payment of non-business-related legal fees, (4) Lee breached his informal fiduciary duty to Lisa, (5) the Limited Partnerships and two General Partners engaged in oppression (reversed by the court of appeals because the misconduct did not rise to the level of oppression as defined in *Ritchie v. Rupe*), and (6) the General Partners failed to provide Lisa with certain books and records. Having reversed as to nos. (1), (2), and (5) above, the court addressed the defendants' challenge to the trial court's injunctive relief. A recurring legal principle relied upon the by the court of appeals was that an injunction must be narrowly drawn and "must not be so broad that it would enjoin a defendant from acting within its lawful rights." The court referred to the governing documents of the entity defendants at numerous junctures to determine whether the trial court had properly or improperly enjoined actions in view of what was permitted or not permitted by the governing documents of the entities.

The first part of the injunction constrained action by the entity defendants through committees. Section 6(i) of the injunction prohibited the General Partners, the Limited Partnerships, the individual defendants, and their representatives from "conducting the business of any of the General Partners and Limited Partnerships through any committee in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Section 6(ii) of the injunction prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without unanimous approval of all partners." Section 6(iii) prohibited the same parties from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee."

The record reflected that SignAd GP, LLC had two committees: a Special Litigation Committee and an Executive Committee. The court said that it did not find, and Lisa did not identify, any evidence that Wes Jr., Lee, Stacey, and SignAd GP, LLC acted through the Executive Committee in "derogation of the responsibility of their respective Boards of Managers to manage SignAd." However, the evidence demonstrated that Wes Jr., Lee, and Stacey, as members of the SignAd GP, LLC Board of Managers and the Special Litigation Committee, authorized SignAd, Ltd. to pay for their personal legal fees because the Special Litigation Committee had given Wes Jr. the right to authorize such payments. The jury's finding that SignAd GP, LLC, which could only act through its Board of Managers, breached its fiduciary duties to SignAd, Ltd. by causing it to pay non-business-related legal fees demonstrated that Wes Jr., Lee, and Stacey operated SignAd GP, LLC's Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd." Thus, the court concluded that the trial court could have inferred that Wes Jr., Lee, and Stacey would continue to operate the Special Litigation Committee "in derogation of the responsibility of their respective Boards of Managers to manage SignAd" and did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(i).

Because the regulations of SignAd GP, LLC, as amended in 2014, allowed a majority of the Board to create a committee to act on behalf of the Board (in contrast to the previous unanimous vote required to create a committee before the amendment), the court stated that it was lawful for SignAd GP, LLC's Board of Managers to act "through any committee without unanimous approval of all partners" under the regulations, and the trial court abused its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from engaging in the conduct prohibited by Section 6(ii).

Unlike Section 6(ii), the court stated that Section 6(iii) did not prohibit lawful conduct. SignAd GP, LLC's regulations provided that committees "shall be required to keep accurate records of all actions taken by [them]." The court pointed to evidence from which the trial court reasonably could have inferred that Wes Jr., Lee, Stacey, and SignAd GP, LLC had conducted business through a committee in the past "without keeping accurate records of all actions taken by any committee" and would continue to do so in the future unless enjoined. Thus, the trial court did not abuse its discretion by enjoining Wes Jr., Lee, Stacey, and SignAd GP, LLC from "conducting the business of any of the General Partners and Limited Partnerships through any committee without keeping accurate records of all actions taken by any committee," as set forth in Section 6(iii).

Because there was no evidence that the Board of any entity defendant other than SignAd GP, LLC conducted business through a committee or failed to keep accurate records, and no evidence from which the trial court could have inferred that any of the other entity defendants would engage in such conduct in the future, the court concluded that there was no evidence that Lisa would suffer imminent harm if the other entities were not enjoined from engaging in the conduct prohibited by Sections 6(i)–(iii), and the trial court abused its discretion by awarding Lisa injunctive relief as to those entity defendants.

Section 6(iv) of the trial court's judgment enjoined various parties from "denying [Lisa] access to the books and records of the General Partners and Limited Partnerships as per the operative agreements and under Texas law until such time as an equitable buyout of Lisa Horan, Trustee's interests are bought out and fully paid for or she no longer serves on the boards of managers of any entity, whichever comes later." The jury found that the General Partners—SignAd GP, LLC, Culcreuch West, LLC, Realty Acquisitions & Holdings LLC, and Big Leasing, LLC—failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC, and there was sufficient evidence supporting the jury's findings (Wes Jr.'s statement to Lisa's lawyer in March 2013 that he would never allow Lisa to access the books and records, the fact that Lisa had to file suit to obtain the documents and information to which she was entitled, and Lisa's failure to receive everything she requested for three years). The court said that the trial court could reasonably infer from this evidence that the General Partners would continue to withhold the companies' books and records from Lisa in the future. The court thus held that the trial court did not abuse its discretion by enjoining the General Partners and their managers—Wes Jr., Lee, and Stacey—from engaging in the conduct prohibited by Section 6(iv). On the other hand, Lisa did not assert a similar cause of action against any of the Limited Partnerships and there were no findings that any of the partnerships breached an agreement or violated any statutory provisions relating to books and records. Because liability for the Limited Partnerships was not established, the trial court abused its discretion by enjoining the Limited Partnerships from denying Lisa access to the books and records as set forth in Section 6(iv).

Section 6(v) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "retaining as cash reserves any more than 12% of each of the Limited Partnerships' net cash whether from operations or from the proceeds of capital transactions, without unanimous approval of the Board of Managers of each General Partner." The Limited Partnership Agreements allowed the General Partner for each of the Limited Partnerships to retain cash for cash reserves at its discretion without any cap on the amount that may be retained. For example, SignAd, Ltd.'s Partnership Agreement stated: "Net cash of the Partnership, if any, whether from operations or from the proceeds of capital transactions, shall from time to time, but not less often than once annually, be distributed to the Partners in the ratio of their Partnership Interests; provided, however, the

Partnership may, as determined by the General Partner in its sole discretion, retain cash for cash reserves to insure the availability of funds for conducting operations of the Partnership and for paying any and all appropriate expenses and obligations of the Partnership." Provisions in the other Limited Partnership Agreements similarly provided that the General Partner "shall determine when, if ever, cash distributions shall be made to the partners, pursuant to the provisions and the tenor of this Agreement." The court said that none of the governing documents required "unanimous approval of the Board of Managers of each General Partner"; therefore, the governing documents of the entities permitted them to retain "cash reserves [of] more than 12% of each of the Limited Partnerships' net cash whether from operations or from the proceeds of capital transactions, without unanimous approval of the Board of Managers of each General Partner." The court thus concluded that the trial court abused its discretion by awarding the injunctive relief set forth in Section 6(v).

Section 6(vi) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "attempting to further modify any of the governing documents of the Limited Partnership Defendants." The Limited Partnership Agreement of SignAd, Ltd., however, expressly allowed its General Partner, SignAd GP, LLC, to "amend or otherwise change" the partnership agreement, as long as more than 51% of the partners agreed. The Limited Partnership Agreements for Ben Nevis West, Ltd., Big Eastex #1, Ltd., Big Signs & Leasing ##1–6, Ltd. also allow their respective General Partners to modify the partnership's governing document. Thus, it court concluded that it was lawful to "amend or otherwise change" the Limited Partnership Agreements, and the trial court abused its discretion by awarding the injunctive relief set forth in Section 6(vi).

Section 6(vii) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "devaluing the General Partners' and Limited Partnership Defendants' assets or interests." The entity defendants argued that the permanent injunction was impermissibly vague because it did not define the term "devaluing," provide a metric by which values should be determined, or otherwise specify the acts that would violate this particular injunction. The court of appeals agreed that the term "devaluing" did not provide enough information to the enjoined parties to allow them to determine what conduct was prohibited. Also, this injunctive relief was based in part on the jury's findings of breaches of fiduciary duties by Wes Jr., Lee, Stacey, and SignAd GP, LLC and the jury's finding of oppression. Because the court was reversing the portion of the judgment in Lisa's favor on two of the causes of action for breach of fiduciary duty and the finding of oppression, the court remanded this portion of the injunction to the trial court to (1) determine whether the requested relief was supported in light of the court of appeals' opinion, and if so, (2) to clarify the specific acts and persons or entities to be enjoined under Section 6(vii).

The court next discussed Section 6(viii), which prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using monies or assets from or generated by (or revenues generated by) any of the General Partners or Limited Partnership Defendants to pay personal expenses of or to unjustly enrich Wes, Jr., [Stacey] or Lee, including payment of individual legal fees not related to their agency for SignAd, Ltd. or its related entities." The court concluded that Lisa's pleadings were sufficient to have put the parties on notice that she would be entitled to have such conduct enjoined, and the court pointed out that there was evidence that SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Lee, Mark, and Stacey from which the trial court reasonably could have inferred that the Special Litigation Committee would continue to authorize SignAd, Ltd. to pay personal legal fees for Wes Jr., Lee, Mark, and Stacey given the parties' ongoing disputes. There was thus some evidence of imminent harm with respect to Wes Jr., Lee, Stacey, SignAd GP, LLC, and SignAd, Ltd. Because there was no evidence that other limited partnerships ever used their assets to pay personal expenses of or to unjustly enrich the individual defendants or that any of their General Partners authorized them to do so, the trial abused its discretion by awarding Lisa injunctive relief against parties other than SignAd, Ltd., SignAd GP, LLC, Wes Jr., Lee, and Stacey under Section 6(viii).

Section 6(ix) prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "using any personal property, personnel, or inventory of the SignAd entities in connection with separate business endeavors of [Wes, Jr.], [Stacey], and/or [Lee] without full disclosure and only after a unanimous vote by the partners that the transaction is fair to SignAd, Ltd. or any of the other General Partners and/or Limited Partnerships." This injunctive relief was based on the jury's finding that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with ProIce Solutions, LLC" and the jury's finding of oppression. Because the court was reversing the portion of the judgment awarding judgment in Lisa's favor on that breach-of-fiduciary-duty cause of action and the finding of oppression, there was no finding of liability with respect to a cause of action that would support the injunctive relief in Section 6(ix), the trial court thus abused its discretion in awarding the injunctive relief under Section 6(ix).

Section 6(x) of the injunction prohibited the Limited Partnerships, General Partners, individual defendants, and their representatives from "withholding from Lisa Horan, Trustee and [sic] distributions of earnings until such time as the buyout of her interest in the SignAd entities is completed and she has received full payment of fair value for her interest." The court did not find and was not directed by Lisa to any evidence that any of the entity defendants withheld any distributions of earnings from her in the past or would continue to do so in the future unless prohibited; therefore, there was no evidence of imminent harm with respect to the conduct prohibited in Section 6(x), and the trial court abused its discretion by awarding Lisa injunctive relief on this basis.

The court then discussed Section 6(xi), which enjoined the Limited Partnerships, General Partners, individual defendants, and their representatives from "paying any attorney's fees or damages of any of the Individual Defendants from income or accounts belonging to any of the General Partners or Limited Partnerships that constitute any part of the SignAd enterprise." The court held that Section 6(xi) was overly broad because it prohibited payment of all attorney's fees and damages for Wes Jr., Lee, and Stacey, even though they were entitled to indemnity under certain circumstances, such as when acting in their official capacities. The court remanded this portion of the injunction with instructions to the trial court to modify the scope of the injunction under Section 6(xi) as to Wes Jr., Lee, Stacey, SignAd, Ltd., and SignAd GP, LLC consistent with the court's opinion. Because there was no evidence that any entity other than SignAd, Ltd., through the SignAd GP, LLC Board of Managers and Special Litigation Committee, ever paid attorney's fees or damages for any of the individual defendants or from which the trial court could have inferred that any of the other entity defendants would engage in that conduct in the future, the trial court abused its discretion by awarding Lisa injunctive relief against all other parties.

G. Access to Books and Records

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." After her release, she brought a lawsuit asserting numerous claims, including claims based on breach of fiduciary duty (direct and derivative) and denial of her right of access to books and records. The court of appeals overruled a challenge to the judgment in favor of the plaintiff on her books and records claims, holding that the plaintiff was entitled to declaratory relief and that exculpation clauses in the limited partnership agreements did not preclude findings of wrongdoing on the part of the general partners. The court of appeals also determined that the plaintiff had a right to recover attorney's fees in connection with her books and records claim, but the court remanded because the plaintiff was required to segregate her fees as to the separate entities.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3)

Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

On appeal, the individual defendants and entity defendants asserted many issues. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Among Lisa's claims in the litigation was a plea for a declaration of her rights (under Tex. Civ. Prac. & Rem. Code § 37.004) to access the books and records of the General Partners and Limited Partnerships under various provisions of the Texas Business Organizations Code (TBOC) (Tex. Bus. Orgs. Code §§ 3.151-3.153, 101.502, 153.552) and the Partnership Agreements. She also sought declarations that the General Partners had failed to provide her with access to the relevant records in the past.

Pursuant to findings of the jury, the trial court entered a declaratory judgment declaring in part that: (1) certain General Partners breached the Limited Partnership Agreements and violated Section 153.552 of the TBOC by failing to provide her with books and records of those Limited Partnerships; (2) certain General Partners violated Section 101.502 of the TBOC by failing to provide Lisa with books and records of those General Partner LLCs; and (3) certain General Partners violated Sections 3.151 and 3.152 of the TBOC by failing to provide Lisa with books and records of those General Partners. The court declared that Lisa was entitled to recover attorney's fees pursuant to Section 3.152 and granted injunctive relief based on Lisa's contractual and statutory claims for access to the books and records. The entity defendants challenged the declarations and injunctive relief on various grounds.

The entity defendants argued that the trial court lacked subject matter jurisdiction to enter the declaratory judgment because there was no justiciable controversy among the parties. The defendants argued that Lisa received the requested books and records before trial, and there was thus no longer a dispute among the parties over that issue. The court explained that the Uniform Declaratory Judgment Act is remedial in nature and that its"purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Tex. Civ. Prac. & Rem. Code § 37.002(b). A trial court may render a declaratory judgment if it serves a useful purpose or will terminate the controversy between the parties. Although Lisa received access to the books and records prior to trial, the evidence reflected that she was denied access repeatedly and had to file suit to obtain the information. Lisa's request for a declaration of her right to access the books and records of the Limited Partnerships and General Partners under the Partnership Agreements and Texas law included her right to do so in the future; therefore, her request was not moot. A live controversy on her right of access still existed at trial, and the trial court had jurisdiction to hear her claim.

The entity defendants argued that there was no evidence the General Partners failed to provide Lisa with the books and records to which she was entitled. The record reflected that Lisa's attorney contacted SignAd GP, LLC and other General Partners in March 2013 to obtain the books and records, both in writing and by phone, and Wes Jr. told Lisa's lawyer that he would never allow Lisa to access the books and records. SignAd Outdoor's attorney later agreed to allow Lisa to come to his office and inspect the books and records, but SignAd Outdoor hired new counsel before Lisa was able to inspect the books. After several months of negotiations, the parties executed a confidentiality agreement. Some records were eventually provided, but Lisa ultimately had to file suit to obtain the remaining documents and information. She did not receive everything she requested until three years after making her initial request.

Although the Limited Partnership Agreements stated that the "General Partner shall keep at the principal place of business and make available to all Partners at any time during normal business hours, just and true books of account and all other Partnership records," Lisa testified she was allowed to go to SignAd Outdoor's office only twice and only outside of regular business hours. She also testified that she was only allowed to view a limited amount of information in a conference room and that there were two police officers there to observe her, her accountant, and her attorney. The court stated that this testimony alone was some evidence the General Partners failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC.

The entity defendants argued that there was no evidence Lisa had a "proper purpose" for examining the companies' books and records, or that her requests were "just and reasonable," as required under the TBOC. The court noted that there was evidence Lisa requested the documents for the purpose of conducting a forensic audit to verify whether the Limited Partnerships' business and finances were being managed properly. Lisa's accountant, Enriquez, conducted a forensic audit using the information requested. The court said this was some evidence that Lisa requested the materials for a "proper purpose," i.e., to conduct a forensic audit, and that her requests for documents to conduct an audit were "just and reasonable." The court noted that the Limited Partnership Agreements did not have a similar "proper purpose" requirement.

The entity defendants argued that jury questions inquiring into whether the General Partners breached the Limited Partnership Agreements by refusing to produce books and records voluntarily, as well as jury questions inquiring whether SignAd GP, LLC and other General Partners violated statutory provisions requiring access to the books and records, were "immaterial" because they were not tied to any damage question. The court pointed out that Lisa did not assert a breach-of-contract claim regarding the denial of access to books and records and did not seek damages for past breach of the Limited Partnership Agreements. She sought equitable relief based in part on the past violations of her contractual and statutory rights. The court concluded that the jury questions regarding the parties' past violations of the Limited Partnership Agreements and the TBOC provisions were material because the jury's answers to those questions formed the basis of the injunctive relief the trial court granted, specifically the questions of imminent harm.

Section 6(iv) of the trial court's judgment enjoined various parties from "denying [Lisa] access to the books and records of the General Partners and Limited Partnerships as per the operative agreements and under Texas law until such time as an equitable buyout of Lisa Horan, Trustee's interests are bought out and fully paid for or she no longer serves on the boards of managers of any entity, whichever comes later." The jury found that the General Partners—SignAd GP, LLC, Culcreuch West, LLC, Realty Acquisitions & Holdings LLC, and Big Leasing, LLC—failed to provide Lisa with the books and records she requested in violation of the Limited Partnership Agreements and the TBOC, and there was sufficient evidence supporting the jury's findings (Wes Jr.'s statement to Lisa's lawyer in March 2013 that he would never allow Lisa to access the books and records, the fact that Lisa had to file suit to obtain the documents and information to which she was entitled, and Lisa's failure to receive everything she requested for three years). The court said that the trial court could reasonably infer from this evidence that the General Partners would continue to withhold the companies' books and records from Lisa in the future. The court thus held that the trial court did not abuse its discretion by enjoining the General Partners and their managers—Wes Jr., Lee, and Stacey—from engaging in the conduct prohibited by Section 6(iv). On the other hand, Lisa did not assert a similar cause of action against any of the Limited Partnerships and there were no findings that any of the partnerships breached an agreement or violated any statutory provisions relating to books and records. Because liability for the Limited Partnerships was not established, the trial court abused its discretion by enjoining the Limited Partnerships from denying Lisa access to the books and records as set forth in Section 6(iv).

The entity defendants argued that Lisa was not entitled to declaratory relief because Lisa "couched her books and records claims, in part, in terms of a breach of the limited partnership agreements" and her claims for declaratory relief were based on the same theories, but the court of appeals said that Lisa's claims that the General Partners violated her statutory rights under the TBOC were not the proper subject of a breach-of-contract claim and did not encompass issues already before the court. Additionally, Lisa did not seek damages for a breach-of-contract claim; she sought a declaration of her right of access to the books and records under the Limited Partnership Agreements and TBOC, and she provided evidence that certain General Partners violated the agreements in the past by refusing her access.

The entity defendants also argued that the limitation-of-liability clauses in the Limited Partnership Agreements precluded any finding of wrongdoing against the General Partners, and that Lisa never "properly pleaded any of those legal theories." The court stated that the Texas Rules of Civil Procedure require matters submitted to the jury to have been "raised by the written pleadings and the evidence" (Tex. R. Civ. P. 278), and Lisa pleaded claims for declaratory relief and breach of fiduciary duty in connection with her claims for access to the books and records, asserting violations of the Limited Partnership Agreements and the TBOC. The entity defendants filed affirmative defenses to her claims based on the exculpatory clauses included in the Limited Partnership Agreements. The court quoted the exculpatory clauses as follows:

> Section 12.3 of the SignAd, Ltd. Partnership Agreement states:
> The General Partner shall not be liable to the Partnership or any Partner for any claim, demand, liability, cost, damage, or cause of action arising out of the General Partner's management of the Partnership's affairs, except where the claim at issue is based upon gross negligence, bad faith, willful breach of any material provision of this Agreement, or willful misconduct of the General Partner.
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> Section 8.02 of the Limited Partnership Agreements for Big Signs & Leasing (#1–6), Big Eastex #1, Ltd., and Ben Nevis West, Ltd. states:
> ... Always, unless fraud, deceit, or a wrongful taking shall be involved, the General Partner shall not be liable or obligated to the Limited Partners for any mistake of fact or judgment made by the General Partner in operating the business of the Partnership, which results in any loss of the Partnership or its Partners.... Neither shall the General Partner be responsible to any Limited Partner because of a loss of his investment or a loss in operations, unless it shall have been occasioned by fraud, deceit, or a wrongful taking by the General Partner.

The court of appeals stated that it was not necessary for Lisa to plead these affirmative defenses or any exceptions to them because the theories of "fraud, deceit, or a wrongful taking" and "gross negligence, bad faith, [and] willful breach" were pleaded by the General Partners as part of their affirmative defenses and presented to the jury at their request.

The court stated that nothing in these clauses precluded Lisa's declaratory judgment action because the clauses precluded a finding of "liability" but not a declaration of rights. Furthermore, to the extent the clauses applied, the jury was instructed on those limitations. Thus, the court said that the issues were specifically presented to the jury, who found that each of the General Partners breached their obligations under the Limited Partnership Agreements. Although the entity defendants argued there was no evidence of "fraud, deceit, or a wrongful taking" or "gross negligence, bad faith, or willful breach," the court said that they offered no elaboration of that argument. The court reiterated that there was sufficient evidence that General Partners breached their obligations under the Limited Partnership Agreements to grant Lisa access to the books and records by initially refusing to provide access and then failing to provide everything she requested for three years.

The trial court awarded Lisa $162,755.00 in attorney's fees and expenses in connection with her books and records claims to be paid by the General Partners, jointly and severally, pursuant to Sections 3.151 and 3.152 of the TBOC. The General Partners lodged numerous challenges to this award.

Section 3.151 of the TBOC sets forth the recordkeeping requirements for entities. Section 3.152 confers rights of access to records by governing persons as follows:

> (a) A governing person of a filing entity may examine the entity's books and records maintained under Section 3.151 and other books and records of the entity for a purpose reasonably related to the governing person's service as a governing person.
> (b) A court may require a filing entity to open the books and records of the filing entity, including the books and records maintained under Section 3.151, to permit a governing person to inspect, make copies of, or take extracts from the books and records on a showing by the governing person that:
> (1) the person is a governing person of the entity;
> (2) the person demanded to inspect the entity's books and records;
> (3) the person's purpose for inspecting the entity's books and records is reasonably related to the person's service as a governing person; and

> (4) the entity refused the person's good faith demand to inspect the books and records.
> (c) A court may award a governing person attorney's fees and any other proper relief in a suit to require a filing entity to open its books and records under Subsection (b).
> (d) This section does not apply to limited partnerships. Section 153.552 applies to limited partnerships.

Tex. Bus. Orgs. Code § 3.152. Although Section 3.151 does not authorize an award of attorney's fees, Section 3.152(c) does ("A court may award a governing person attorney's fees and any other proper relief in a suit to require a filing entity to open its books and records under Subsection (b)."). The entity defendants argued that Section 3.152 was inapplicable because Lisa did not bring a claim in this lawsuit in her capacity as a governing person to require an entity defendant to "open its books and records" under Section 3.152(b) and that there further was no evidence that Lisa satisfied the statutory conditions.

The entity defendants did not dispute that Lisa was a governing person, and the court stated that there was evidence with respect to the remaining requirements under Section 3.152(b). The entity defendants argued that by the time Lisa asserted a claim under Section 3.152 she had already received the "complete books and records" and thus could not have sued to "open" their books and records, as required by Section 3.152(b) and (c), but the only evidence cited in support of that argument was a statement in the opening statement of Lisa's attorney, which was not evidence. The trial court submitted a question to the jury on Lisa's claim against the General Partners under the statute, which inquired as follows:

> Did the General Partners of which Lisa Horan was a governing person fail to provide:
> (1) books and records of accounts;
> (2) a current record of the name and mailing address of each owner or member of the filing entity;
> (3) the General Partners' federal, state, and local information or income tax returns for each of the General Partners' six most recent tax years;
> (4) the General Partners agreement and certificate of formation and all amendments or restatements; or
> (5) other information regarding the business, affairs, and financial condition of the company that is reasonable for the person to examine and copy.

The instructions for this question tracked the requirements of Section 3.152(b). The jury was instructed that in order "to find a General Partner failed to provide documents, you must find" that:

> (1) [Lisa] is a governing person of the entity;
> (2) [Lisa] demanded to inspect the entity's books and records;
> (3) [Lisa's] purpose for inspecting the entity's books and records is reasonably related to [Lisa's] service as a governing person; and
> (4) the entity refused [Lisa's] good faith demand to inspect the books and records.

The jury found that the each of the General Partners failed to provide Lisa access to the books and records, and the trial court entered a judgment in favor of Lisa in accordance with the jury's findings.

Viewing the evidence and inferences in the light most favorable to the trial court's finding, the court concluded there was some evidence that (1) Lisa was a governing person who demanded to inspect the books and records of the General Partners, (2) she had a proper purpose for doing so, (3) the General Partners refused her demand, and (4) Lisa sued the General Partners to force them to open their books and records.

The entity defendants argued that the trial court abused its discretion by awarding attorney's fees against the General Partners "jointly and severally" because Lisa was required to segregate the fees owed by the different parties. Lisa contended that the requirement that fees be segregated between parties did not apply in this case because her books and records claims against the General Partners were essentially the same claim, based on the same course of conduct by the same decision-makers. The court stated that the General Partners were "separate and distinct legal entities, each with their own respective books and records and corresponding obligations to provide or grant access to such records." Lisa herself noted that each books-and-records question involved different entities and obligations under contractual or statutory grounds. Thus, the court held that Lisa was required to segregate the fees owed by the various entities, and the court remanded for a new trial on attorney's fees with respect to Lisa's books and records claims.

H. Distributions

Sohani v. Sunesara, No. 01-20-00114-CV, 2023 WL 1112165 (Tex. App.—Houston [1st Dist.] Jan. 31, 2023, pet. filed) (mem. op.).

The court of appeals held that a member failed to plead and prove a fraud claim that encompassed affirmative misrepresentations on which the member relied to suffer the damages that he alleged. Although the trial court found that the defendants made material misrepresentations in certain respects, there was no evidence that the plaintiff relied on them in taking the actions that caused his injury. Although the court acknowledged that Texas case law generally has not recognized a formal fiduciary relationship between members of an LLC, the court held that there was evidence supporting the existence of an informal fiduciary duty among the members that was breached and caused the plaintiff to suffer damages based on the defendants' failure to identify the plaintiff to the IRS as a member who received distributions, thus causing the plaintiff to pay taxes and penalties upon an audit of the member.

Nizar Sunesara and Anis Virani were cousins who started selling smoking accessories and devices in flea markets on the weekends in 2002, and the next year they established a brick-and-mortar retail shop called "Zig Zag Smoke Shop." Manisch Sohani was a supplier of Zig Zag and college friend and fraternity bother of Sunesara. Sohani, Sunesara, and Virani created MNA Corporation to run Zig Zag. The three men each owned one third of MNA Corporation.

In 2007, the parties decided to open a second retail location, which they called "Burn Smoke Shop" ("Burn I"). The parties incorporated SSV Corporation to operate both smoke shops. SSV corporation initially had the same ownership structure as MNA Corporation, but Sohani requested that he be removed as an owner at some point due to personal financial obligations, and Sunesara and Virani each owned 50% of SSV Corporation after that change.

In 2012, Sunesara, Virani, and Sohani agreed to buy an existing retail smoke shop, whose name they changed to "Burn Smoke Shop Two" ("Burn II"). They also decided to form three LLCs to run the three smoke shops. With authorization of Virani and Sohani, Sunesara prepared and filed the certificates of formation for the three LLCs. The certificates listed Sohani, Virani, and Sunesara as governing persons of the LLCs. The parties transferred Zig Zag from SSV Corporation to one of the LLCs and Burn I from SSV Corporation to another of the LLCs. When the parties purchased Burn II, the third LLC took ownership of that smoke shop. The parties signed and filed a Form 2553 (S election) with the IRS for each LLC. The forms reflected that Sunesara was a one-third member of the LLCs with a one-third ownership interest.

Sunesara testified that neither Virani nor Sohani told him that they did not want him to be a member of the LLCs and that he would not have consented to the formation of the LLCs if he was not going to be a member of the entities. If the LLCs had not been created, SSV Corporation would have continued to own and operate Zig Zag Smoke Shop and Burn Smoke Shop I. Sunesara also testified that neither Sohani nor Virani ever told him that the ownership of the LLCs would be different than the ownership of SSV Corporation.

After federal authorities began targeting the distribution and sale of synthetic marijuana products and searched the warehouse for Sohani's wholesale business, Sunesara decided to take a leave of absence. Although he had minimal communication with Sohani and Virani about the smoke shops during this time, he did not tell either of them that he no longer wanted to be a member of the LLCs, and Sohani and Virani never told Sunesara that he was not a member of the LLCs. Nevertheless, they prepared a tax return that led Sunesara to believe that they wanted to eliminate him from the LLCs. The 2013 tax returns for each of the LLCs filed with the IRS included Schedule K-1s reflecting that Sohani and Virani each had a fifty percent share in the LLCs' profits and losses. These documents did not show that Sunesara was a member of the LLCs. By the time these tax returns were filed, Sohani and Virani had stopped communicating with Sunesara about business matters. Sunesara learned about these tax returns only through speaking with the accountant for the LLCs.

Sunesara was audited by the IRS for the 2012 and 2013 tax years. He testified that he received cash profit distributions from the LLCs during those tax years, but he never received a Schedule K-1 and had no way of reporting that extra income to the IRS. Sunesara had to pay $13,300 in taxes, penalties, and accountant fees due to this audit.

Sunesara later learned that Sohani and Virani executed operating agreements in 2013 for each of the LLCs. The operating agreements listed only Sohani and Virani as members of the LLCs and stated that Sohani and Virani each made "50% of contributions" and owned "50% of profits and assets." The 2018 Texas franchise tax returns—filed during the pendency of this litigation—reflected only Sohani and Virani as members of the LLCs.

After Sohani and Virani refused Sunesara's request to allow him access to books and records of the LLCs, Sohani hired an attorney to assist him, and Sohani and Virani filed a declaratory judgment action in county court in Harris County. Sunesara asserted counterclaims, and that litigation resulted in an appellate opinion acknowledging Sunesara's trial testimony that he made cash contributions to the LLC but concluding that he was not entitled to one-third of the profits because there were no company records documenting his contributions, and the statute allocates profits and losses in proportion to contributions as reflected in the company records. *See Sohani v. Sunesara*, 546 S.W.3d 393, 400 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("*Sohani I*"). In a second appellate opinion, the court of appeals concluded that Sohani and Virani were not entitled to seek post-trial disgorgement of profits that had been distributed to Sunesara in 2012 and 2013. *Sohani v. Sunesara*, 608 S.W.3d 532, 536 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("*Sohani II*").

In this case, Sunesara sued Sohani and Virani for fraud and breach of fiduciary duty. After a bench trial in which the trial court found that Sohani and Virani engaged in fraud and breached their fiduciary duties to Sunesara, Sunesara obtained a judgment in the trial court for actual and exemplary damages. In this appeal, Sohani and Virani challenged the trial court's judgment with respect to both the fraud claim and the claim for breach of fiduciary duty.

With respect to the fraud claim, Sohani and Virani argued that the facts as found by the trial court were not supported by the pleadings or the evidence presented at trial. Sunesara's cause of action for fraud as pleaded alleged only that Sohani and Virani committed fraud by failing to include Sunesara as a member on LLC documents and by failing to provide him with access to the books and records of the LLCs. The allegations in the petition did not mention any material misrepresentations made by Sohani and Virani to Sunesara. After the bench trial, the trial court made the following findings of fact relevant to Sunesara's fraud claim: (1) that both Sohani and Virani engaged in conduct that is fraudulent, dishonest, in bad faith and demonstrates untrustworthiness when they induced Sunesara to transfer the assets of SSV Corporation to two of the new LLCs by representing to Sunesara that he would have a one-third ownership interest in each of the LLCs; (2) that both Sohani and Virani made false promises to Sunesara that they did not intend to keep when made and that influenced Sunesara to transfer the assets of SSV Corporation to two of the new LLCs; and (3) both Sohani and Virani made a material representation to Sunesara that he had a one-third ownership interest in each of the LLCs when they executed IRS Form 2553 for each of the LLCs. In its conclusions of law, the trial court concluded that Sohani and Virani committed fraud and that this fraud consisted of material misrepresentations made by Sohani and Virani in connection with Sunesara's ownership interest in each of the LLCs.

The court of appeals reviewed the evidence and concluded that there was no evidence that Sohani or Virani made affirmative misrepresentations to Sunesara before the transfer of the smoke shops to the LLCs, and Sunesara did not testify that Sohani and Virani made any promises to him concerning an ownership interest or share of the profits. At most, there was testimony that Sohani and Virani did not tell Sunesara certain things, but Sunesara did not argue fraud by non-disclosure. The court of appeals said there was no testimony that Sohani and Virani made affirmative misrepresentations—there was no testimony about anything Sohani and Virani said to Sunesara during this time period. Although the Form 2553s signed by all three men reflected an equal one-third ownership interest for each, there was no evidence that Sunesara saw these forms before SSV Corporation transferred the smoke shops to the LLCs. The fact findings by the trial court that Sohani and Virani fraudulently represented to Sunesara that he would have a one-third ownership interest in the LLCs, inducing him to transfer the smoke shops from SSV Corporation, were not supported by the pleadings or the evidence at trial.

With respect to Sunesara's claim that Sohani and Virani owed Sunesara a fiduciary duty and that they breached their fiduciary duty, Sohani and Virani argued that members of an LLC only owe fiduciary duties to the LLC itself in the absence of a managing or majority member, but the court of appeals concluded that there was evidence to support the existence of an informal fiduciary relationship. Sunesara, Sohani, and Virani had a long business association and personal friendship, and the relationship existed prior to and apart from the relationships and agreements at issue in the lawsuit. Sunesara and Virani were cousins who had known each other their entire lives. Sunesara and Sohani met in college and were members of the same fraternity. Sunesara testified regarding the mutual trust among them. The parties were in business for approximately 10 years before the events forming the basis of the lawsuit occurred. The trial court did not conclude that Sohani and Virani owed Sunesara a fiduciary duty solely because they were members of an LLC, and the court of appeals concluded that there was evidence to support the trial court's finding that an informal fiduciary duty existed among the parties based on the familial relationship and longstanding friendship, the business relationship that predated the events underlying the dispute by more than a decade, and Sunesara's testimony that the parties trusted each other.

The court next considered whether the damages awarded related to Sunesara's breach-of-fiduciary-duty claim. The trial court found that Sohani and Virani breached their fiduciary duties to Sunesara by not disclosing all important information to Sunesara regarding the LLCs, not placing Sunesara's interests above their own interests, and using their positions as members of the LLCs to gain a benefit for themselves at Sunesara's expense. The trial court found that Sunesara sustained $43,300 in damages as a result of Sohani's and Virani's breach of their fiduciary duties. This amount corresponded to the trial court's findings that Sunesara provided $30,000 of start-up contributions and was required to pay $13,300 in penalties to the IRS based upon filings by the LLCs.

The court of appeals concluded that there was no evidence that the breaches of fiduciary duty caused Sunesara to make his start-up contributions. According to the court of appeals, there was evidence that Sohani and Virani breached their fiduciary duties to Sunesara by not including him on the LLCs' governing documents without his knowledge or consent, and they also did not identify Sunesara as a member of the LLCs on federal tax documents. However, there was no evidence that these actions by Sohani and Virani caused Sunesara to make his contributions to the LLCs. Sunesara testified that he contributed $10,000 to Zig Zag Smoke Shop when he and Virani started selling smoking products at flea markets in 2002, and he testified that he contributed $10,000 to Burn I, which the parties opened in 2007. Both contributions were thus years before Sohani and Virani took actions with respect to LLC documents in 2013. Sunesara did not provide a date for when he contributed $10,000 to the LLC that acquired Burn II.

Furthermore, the court said that Sunesara presented no authority that he was entitled to a return of his initial contributions from the LLCs:

> At the time of trial, the LLCs were all still operating and in business. Sunesara testified that he has never withdrawn his membership in the LLCs. He is, therefore, not entitled to a distribution as a withdrawing member of a limited liability company. *See* TEX. BUS. ORGS. CODE § 101.205 ("A member of a limited liability company who validly exercises the member's right to withdraw from the company granted under the company agreement is entitled to receive, within a reasonable time after the date of withdrawal, the fair value of the member's interest in the company as determined as of the date of withdrawal."); *see also id.* § 101.203 ("Distributions of cash and other assets of a limited liability company shall be made to each member of the company according to the agreed value of the member's contribution to the company as stated in the company's records required under Sections 3.151 and 101.501.").

The court concluded that there was evidence that the breach of fiduciary duty by Sohani and Virani caused Sunesara to incur the amounts paid to the IRS after he was audited. The Form 2553s filed with the IRS in 2012 for each of the LLCs listed three members—Sohani, Virani, and Sunesara—with an equal 33.3% ownership interest in the LLCs. The 2013 federal income tax returns for each of the three LLCs reflected that each LLC had only two members, each with a 50% share of the profits and losses of the LLCs. Sunesara received cash distributions from the LLCs during 2012 and 2013 but did not receive a Schedule K-1 from the LLCs for the 2013 tax year. The IRS conducted an audit of Sunesara for the 2012 and 2013 tax years. He testified that "when [the IRS] did [an] audit and they got my bank statements, there was excess cash in my account and I had no way of declaring that income." Sunesara also believed that the IRS conducted the audit in part because the Form 2553s for the LLCs reflected that he was a member of the LLCs, but the LLCs' tax returns did not, and the discrepancy confused the IRS. As a result of the audit, Sunesara paid a total of $13,300 in taxes, penalties, and accountant fees. Sohani and Virani argued that the amounts paid to the IRS by Sunesara were due to his failure to report all his income rather than their actions, but the court of appeals held that Sunesara presented some evidence that the IRS's audit was caused in part by the failure to list him as a member of the LLCs on the 2013 tax returns and failure to issue him a K-1 and that there was sufficient evidence to support the trial court's findings and conclusions that Sunesara sustained damages in the amount of $13,300 (the amount he paid in taxes, penalties, and fees as a result of the audit) due to Sohani's and Virani's breach of their fiduciary duties.

The court discussed the trial court's award of exemplary damages to Sunesara and remanded for the trial court to further consider in view of the fact that the actual damages award was reduced by the court of appeals. Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). "Fraud," as used in this context, means "fraud other than constructive fraud," and "malice" is "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Id.* § 41.001(6)–(7). The court said that an intentional breach of fiduciary duty is a tort for which a plaintiff can recover exemplary damages. The trial court awarded $111,000 in addition to the $61,300 in actual damages that it awarded. This was a ratio of 1.8:1. Because the court of appeals reduced the actual damages award to $13,300, the ratio between actual and exemplary damages would be 8.3:1 if the amount of exemplary damages remained $111,000. The court discussed the indicia of reasonableness of a punitive damages award, including the ratio between actual and punitive damages. In light of the reduced award of actual damages, the court vacated the trial court's award of punitive damages and remanded for the trial court to consider the amount of exemplary damages, if any, to assess against Sohani and Virani.

Weiss v. Arabella Exploration Inc. (In re Arabella Petroleum Company, LLC), 647 B.R. 851 (Bankr. W.D. Tex. 2022).

The court held that distributions from the LLC debtor to its sole member after the LLC was insolvent were constructively fraudulent transfers, and certain other transfers by the LLC debtor to its sole member and a related entity were fraudulent transfers made with actual intent to hinder, delay, or defraud creditors. Because the sole member was also the sole manager and officer of the LLC, he owed the LLC a fiduciary duty, and the court concluded that the transfers made with actual intent to hinder, delay, or defraud were a breach of that fiduciary duty to the LLC. Although the company agreement expressly limited the potential liability of members and managers for breach of fiduciary duty to actions not taken in good faith, the provision did not limit liability for actions constituting fraud, gross negligence, bad faith or willful misconduct, and the court concluded that the member/manager's knowledge of the LLC's deteriorating financial condition established both bad faith and willful misconduct.

Jason Hoisager formed Arabella Petroleum Company, LLC (the "Debtor") in 2007 to buy and sell oil and gas properties in West Texas. Hoisager was the Debtor's sole member and manager, and as manager he appointed himself president, secretary, and treasurer. In 2008, Hoisager formed Arabella Exploration, LLC ("Arabella Exploration"), which began acquiring properties in the Permian Basin in 2011, and Arabella Exploration, Inc ("AEX") was formed on December 24, 2013, by the reverse merger of Arabella Exploration and a Cayman Islands corporation. According to Hoisager, he formed AEX to raise capital to develop oil and gas properties in the Permian Basin. In 2014, AEX formed Arabella Operating LLC ("Arabella Operating") to take over operating wells previously operated by the Debtor under the joint operating agreements.

Hoisager owned 100% of Arabella Exploration until the December 2013 merger, when it became a wholly owned subsidiary of AEX. Mr. Hoisager was the manager of Arabella Exploration and the chief executive officer of AEX following the merger. Arabella Operating was also a wholly owned subsidiary of AEX, and Hoisager was its sole manager. Hoisager owned 30.4% of the shares of AEX at the time of the merger, with the remainder owned by public shareholders. The parties stipulated that the Debtor became insolvent no earlier than December 31, 2013, a few days after AEX was formed.

The Trustee alleged that from 2011 to 2015, Hoisager made many fraudulent transfers from the Debtor to himself, his wife, and other entities that he owned or controlled. The alleged fraudulent transfers consisted of: (1) transfers of properties from the Debtor to AEX; (2) transfers of cash from the Debtor to AEX; (3) transfers of cash from the Debtor to Arabella Operating; and (4) transfers of cash from the Debtor to Hoisager and his wife. The Trustee also alleged that Mr. Hoisager's fraudulent transfers and self-dealing breached his fiduciary duties to the Debtor. The Trustee alleged that Hoisager owed fiduciary duties to the Debtor as its governing person (manager) and that he owed duties to creditors as a "corporate officer" at least as of the end of 2013, the date on which the Debtor became insolvent.

The Trustee relied on the books and records of the Debtor to support his position that Hoisager made many fraudulent transfers. Although substantially all the transfers to Hoisager were recorded in the Debtor's general ledger account as "Owner Distributions," Hoisager later attempted to characterize the payments as "salary & wages," "expense reimbursements," "performance bonuses," and "tax distributions." The court noted many inconsistencies between the books and records and Hoisager's explanations and concluded that Hoisager's "inconsistent, self-serving, and undocumented explanations of how the various documents and payments should be characterized" were not credible. Instead, the court relied on the contemporaneously recorded treatment of the transactions in the Debtor's books and records.

The court described each of the transfers within each of the four categories above and analyzed whether they were fraudulent transfers under the provisions of the Bankruptcy Code or the provisions of the Texas Uniform Fraudulent Transfer Act (TUFTA), which are also applicable pursuant to the Bankruptcy Code. The court provided a "primer" on fraudulent transfers in which it explained the distinction between constructively fraudulent transfers (transfers made by a debtor in exchange for less than reasonably equivalent value at a time when the debtor was either (1) insolvent (meaning the fair salable value of its assets was less than its liabilities), (2) unable to pay its debts as they came due, or (3) had an unreasonably small capital) and actual-intent fraudulent transfers (transfers made with actual intent to delay, hinder, or defraud creditors, with respect to which the intent in question is determined by circumstantial evidence, often with reference to so-called "badges of fraud"). The court also pointed out the remedies available to the Trustee ("avoidance" and "recovery") and certain principles relating to transfers made for an antecedent debt. While transfers made to satisfy antecedent debts cannot be constructively fraudulent transfers, they can be preferences or actual-intent transfers, but the Trustee did not seek to avoid any insider preferences under TUFTA and limited his Section 547 action to payments made to Hoisager.

Turning to each of the alleged fraudulent transfers, the court first analyzed transfers of certain properties from the Debtor to AEX and concluded that the trustee could not recover the properties transferred to AEX as constructively fraudulent transfers because the transfers were for an antecedent debt. The Trustee could not recover the properties transferred to AEX as actual-intent fraudulent transfers because the Trustee failed to show the value of the properties to be recovered.

Next the court analyzed transfers of property and cash made by the Debtor to AEX and transfers of cash from the Debtor to Arabella Operating and concluded that the Trustee could not recover these transfers because the Trustee failed to show that they transfers were made "to or for the benefit of" Hoisager as a "transfer beneficiary."

The court proceeded to explain the relevance of the financial condition of the Debtor to the claims for fraudulent transfer and breach of fiduciary duty. The court said that the evidence made it very clear that the combination of certain high-cost drilling activities by the Debtor and "absurdly large owner distributions" were the biggest contributors to the Debtor's insolvency at the end of 2013.

Based on the fact that the Debtor was insolvent at the end of 2013, $2,803,834 in distributions made to Hoisager after December 31, 2013 were recoverable by the Trustee as constructively fraudulent transfers. As the court pointed out, "owner distributions made while a company is insolvent are quintessential constructively fraudulent transfers." In addition, the court determined that the Trustee could recover cash payments from the Debtor to Hoisager after July 1, 2013 as actual-intent transfers. Here, the court explained and relied upon "badges of fraud" as circumstantial evidence that Hoisager had the requisite intent to "hinder, delay, or defraud" creditors. The court described the facts that indicated Hoisager's intent as follows:

> First, the Debtor made its first six-digit distribution to Mr. Hoisager in July 2013.
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> Next, on top of distributions to Mr. Hoisager, the Debtor made large expenditures, including substantial cost overruns, on the Wolfbone I and II wells—wells in which the Debtor no longer owned a working interest—leading to the Debtor's slide into insolvency. This ship was clearly sinking in 2013, and no one would know that better than Mr. Hoisager.
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> Next, the Debtor transferred almost 5 million dollars to AEX. These transfers were included on Exhibit 85 ...[which revealed that] beginning in July 2013 (again), the Debtor made substantial revenue payments to AEX at times when the AEX joint interest billings due to the Debtor were substantial, and mostly past due. No prudent operator would have failed to offset those revenue payments against the past due joint interest billings.
>
> Finally, there is Mr. Hoisager's audacious attempt to transition from his role as a sole proprietor, ... using the Debtor as his private checking account, to a role as the chief executive officer of a public company.
>
> Taking all these facts together leads to the inescapable conclusion that starting in July 2013, Mr. Hoisager knew the Debtor was foundering, and he was, at the same time, enticed by the prospect of running AEX, a public company. Preferring his new enterprise over the Debtor, Mr.

> Hoisager emptied the Debtor of available cash and valuable properties, and diverted it all to himself, AEX, or later, Arabella Operating. And this, at the least, constitutes an intent to delay, hinder, or defraud the creditors of the Debtor, and so the cutoff date for cash transfers to Mr. Hoisager can be moved back to July 1, 2013. Doing so adds $377,535 to the judgment.

With respect to the Trustee's claim for breach of fiduciary duty against Hoisager, the court stated that, as the sole member, manager, and officer (president, secretary, and treasurer) of the Debtor, a Texas LLC, Hoisager owed the Debtor a fiduciary duty. The court stated that "Texas law allows an LLC to limit this duty to some extent, and the Debtor's company agreement does just that, relieving Mr. Hoisager from 'any action taken (or any failure to act) by [him] in good faith on behalf of the company and reasonably believed by [him] to be authorized or within the scope of [his] authority, unless that action (or failure to act) constitutes fraud, gross negligence, bad faith or willful misconduct....'" Hoisager argued that he owed no duties to creditors unless the company stopped operating, and the court stated that the cited case law supports this notion but also affirms that the duty runs to the corporation. The court thought it likely that Texas would ultimately adopt the Delaware view that the fiduciary duties are always owed to the corporation but can be enforced by the residual stakeholders—in this case the creditors since the Debtor was hopelessly insolvent. In any event, the creditors in this case were not seeking to enforce the fiduciary duty owed to the Debtor; rather, a trustee standing in the shoes of the Debtor had the ability to sue to enforce the fiduciary duties owed to the Debtor and recover on behalf of the residual stakeholders.

The court stated that the duty imposed on Hoisager included a duty of care and a duty of loyalty, and the duty of loyalty includes a duty not to engage in self-dealing. Although Hoisager raised the defense of the business judgment rule, the court pointed out that the business judgment rule does not apply to self-dealing or interested party transactions. In such situations, the fiduciary has the burden of proving that the transaction was fair to the corporation.

The court characterized the actions taken by Hoisager to drain the Debtor of cash and properties through transfers to himself and AEX as "the very epitome of self-dealing and interested party transactions." That "he took these actions with full knowledge of the Debtor's deteriorating financial condition establishes both bad faith and willful misconduct."

In addressing the measure of damages, the court concluded that the Debtor was damaged by losing the cash transferred with the actual intent to delay, hinder, or defraud creditors, which included the amounts of cash transferred to Hoisager after July 1, 2013, as well as the non-revenue cash transferred to AEX after July 1, 2013, since those amounts, while not "for or to the benefit of" Hoisager for purposes of fraudulent conveyance law, fell "squarely within the proscription on unfair interested party transactions." Payments of revenue to AEX after July 1, 2013 were also damages for breach of fiduciary duty because those payments should have been retained and set off against the outstanding joint interest billings owed by AEX to the Debtor. Finally, Hoisager failed to carry his burden to prove fairness with respect to certain cash payments to Arabella Operating.

The Trustee requested exemplary damages under Section 41.003 of the Texas Civil Practice and Remedies Code, which permits recovery of exemplary damages when the claimant proves by clear and convincing evidence that the harm arose from fraud, malice, or gross negligence. The Trustee sought to prove that the harm arose from fraud, but the Trustee neither pleaded nor proved fraud. While the Trustee proved "actual intent to hinder, delay, or defraud" creditors, he did so by a preponderance of the evidence with reference to badges of fraud. That showing did not satisfy the elements of common-law fraud (which requires that a plaintiff justifiably rely upon and be injured by a material misrepresentation that the defendant knew was false or recklessly made without knowledge as to its truth, and with an intention that it be acted upon) by clear and convincing evidence. Therefore, the court denied the request for exemplary damages.

I. Merger

Mike Mizrachi v. Doron Almog, Civ. A. No. CV H-18-2508, 2020 WL 13302648 (S.D. Tex. Mar. 3, 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.)

The trial court concluded that a merger of one LLC into another LLC was properly authorized. The court also resolved a valuation dispute regarding the value of a 1/3 interest in the disappearing entity.

In April 2010, brothers Mike Mizrachi, Ofer Mizrachi, and Doron Almog formed Pattaya LLC, a Texas LLC, for the purpose of owning and operating an apartment complex. After disputes arose between the brothers, plaintiff Mike Mizrachi and Ofer Mizrachi, exercising their majority interest in Pattaya and without prior notice to defendant Almog, consummated an Agreement and Plan of Merger between Pattaya (the "merging entity") and Lahav Investments LLC, a Texas LLC (the "surviving entity"). Pattaya was merged into Lahav, which became the sole surviving entity in the merger. Lahav had as its only two members the two elder brothers (Mike and Ofer), each of whom owned 50% of the entity.

Mike sought a declaratory judgment that the merger was effective and properly authorized. The court agreed and granted the judgment:

> 5. Business mergers in Texas are governed by Chapter 10 of the Texas Business Organizations Code. "To effect a merger, each domestic entity that is a party to the merger must act on and approve the plan of merger in the manner prescribed by this code for the approval of mergers by the domestic entity." TEX. BUS. ORGS. CODE § 10.001 (b).
>
> 6. "A domestic entity subject to dissenters' rights must provide the notice required by Section 10.355." *Id.* § 10.001 (c).
>
> 7. Unless its governing documents provide to the contrary, a limited liability company is not a "domestic entity subject to dissenter's rights." *Id.* § 10.351.
>
> 8. It is undisputed, and the Court finds as a matter of law, that Pattaya LLC was not a domestic entity subject to dissenters' rights.
>
> 9. Subject to exceptions not relevant here, "a fundamental business transaction of a limited liability company . . . must be approved by the affirmative vote of the majority of all of the company's members" and "an action of a limited liability company not apparently for carrying out the ordinary course of business of the company must be approved by the affirmative vote of the majority of all of the company's governing persons." TEX. BUS. ORGS. CODE § 101.356 (b), (c).
>
> 10. A limited liability company may act "without holding a meeting, providing notice, or taking a vote if a written consent or consents stating the action to be taken is signed by the number of governing persons, members, or committee members of a limited liability company, as appropriate, necessary to have at least the minimum number of votes that would be necessary to take the action at a meeting at which each governing person, member, or committee member, as appropriate, entitled to vote on the action is present and votes." *Id.* § 101.358(b).
>
> 11. Members of a limited liability company may also take action without a meeting "by an affirmative vote of those persons having at least the minimum number of votes that would be necessary to take the action at a meeting at which each member or manager, as appropriate, entitled to vote on the action is present and votes." *Id.* § 101.359(1).
>
> 12. Plaintiff Mike Mizrachi and Ofer Mizrachi, who each owned a one-third interest in Pattaya LLC, collectively comprised a majority of Pattaya LLC's members and a majority of Pattaya LLC's governing persons.
>
> 13. It is undisputed, and the Court finds as a matter of law, that Plaintiff Mike Mizrachi and Ofer Mizrachi had authority to effect the Merger of Pattaya LLC into Lahav Investments LLC effective May 31, 2018.
>
> 14. It is undisputed, and the Court finds as a matter of law, that with the exception of the amount of consideration to be paid to Defendant Doron Almog, the Agreement and Plan of Merger executed on May 30, 2018 by Plaintiff Mike Mizrachi and Ofer Mizrachi, on behalf of both Pattaya LLC and Lahav Investments LLC, was effective and valid under Texas law.
>
> 15. At trial, the parties agreed that the question in dispute which requires the Court's resolution is what sum of money Defendant Doron Almog should be paid as fair consideration for his one-third membership interest in Pattaya LLC at the time of its Merger into Lahav Investments LLC on May 31, 2018.
>
> 16. In addition to his liability to Defendant as a party, Plaintiff Mike Mizrachi has stipulated and agreed to accept full liability to Defendant Doron Almog also for any liability that might otherwise be attributable to Ofer Mizrachi or Lahav Investments LLC arising out of the

> Merger, and in consideration therefor Defendant Almog has fully released Ofer Mizrachi and Lahav Investments, LLC from any liability arising from the Merger.
>
> 17. In light of these agreements, Plaintiff Mike Mizrachi is liable for the sum of money that Defendant Doron Almog should be paid as fair consideration for his one-third membership interest in Pattaya LLC at the time of the Merger on May 31, 2018, and it is unnecessary to determine how that liability would otherwise have been shared by Mike Mizrachi, Ofer Mizrachi, and Lahav Investments LLC, or whether Plaintiff Mike Mizrachi breached any fiduciary duty that he may have owed to Defendant Doron Almog. . . .
>
> ORDERED that Defendant Doron Almog shall have and recover of and from Plaintiff Mike Mizrachi, after having received credit for the sum of $248,448.37 that Plaintiff caused to be paid into the United States Treasury in withholding tax to be credited to Defendant Almog's foreign income tax liability incurred from being paid for his one-third interest in Pattaya LLC, the net sum of ONE MILLION ONE THOUSAND FIVE HUNDRED FIFTY-ONE AND 63/100 DOLLARS ($1,001,551.63) for all of his interest in and related to Pattaya LLC, which was lawfully merged into Lahav Investments LLC on May 31, 2018.

J. Forfeiture and Involuntary Termination

Highline Innovation Investments Partnership, LLC v. Biolert, Ltd., Civ. A. No. 4:21-CV-00615, 2022 WL 3354775 (E.D. Tex. Aug. 12, 2022).

The court denied a 12(b)(6) motion to dismiss on lack of capacity grounds. The court concluded that an LLC's forfeited charter had been reinstated by the Secretary of State, which resulted in a revival of the LLC's right to sue at the time that it filed its lawsuit.

Highline Innovation Investments Partnership, LLC sued various defendants for fraud and other actions. The defendants filed numerous motions in response, including a 12(b)(6) motion premised on Highline's lack of capacity to sue because its "corporate privileges were forfeited at the time this suit was filed."

The court began by discussing the legal standards related to capacity and forfeiture:

> As noted, Defendants' first argument for dismissal under Rule 12(b)(6) asserts that when this lawsuit was initiated on November 16, 2021, Highline lacked the capacity to sue. Defendants claim that Highline forfeited its corporate privileges on or around April 20, 2021, for failure to pay the Texas state franchise tax. Defendants also offer evidence showing that on August 20, 2021, the Texas Secretary of State (the "SOS") forfeited Highline's corporate charter.
>
> "The capacity of a corporation to bring suit is determined by the law of the state where it is organized." *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *see also* FED. R. CIV. P. 17(b)(3) (providing that for all parties that are not individuals or corporations, the "capacity to sue or be sued is determined . . . by the law of the state where the court is located."). Accordingly, the Court will look to Texas law to determine whether Highline had capacity to sue. *Id.* The Texas Tax Code states that a "taxable entity"—which includes limited liability companies—forfeits its right to sue if the entity fails to pay its state franchise taxes. See TEX. TAX CODE §§ 171.252(2), 171.0002 (including "limited liability company" under the definition of "taxable entity"). "If the corporate privileges of a corporation are forfeited . . . the corporation shall be denied the right to sue or defend in a court of this state." *Id.* at § 171.252(1).
>
> Texas law also provides for the revival of corporate privileges. How revival occurs depends on when the entity remedied the condition that caused it to forfeit its corporate privileges. If the entity "pays any tax, penalty, or interest due" before the forfeiture of its charter, the Texas Comptroller "shall revive" its corporate privileges. TEX. TAX CODE at § 171.258; *see also, generally, YHR Mason Road Partners, LP v. 7-7 Cleaners, Inc.*, No. 01-18-00849-CV, 2020 WL 716732, at *5–6 (Tex. App.—Houston [1st Dist.] Feb. 13, 2020) (discussing the differences between forfeiture of corporate privileges and forfeiture of a charter). But if the entity fails to "revive its forfeited privileges within 120 days after the date that the privileges were forfeited," the SOS may forfeit the entity's corporate charter. TEX. TAX CODE § 171.309 (emphasis added). "The SOS effects a forfeiture by inscribing on the corporation's record the words 'Charter

Forfeited,' the date on which this inscription is made, and a citation to" the Texas Tax Code. *YHR Mason*, 2020 WL 716732, at *5–6 (citing TEX. TAX CODE § 171.311).

Once an entity's corporate charter has been forfeited by the SOS, the entity may be "entitled to have its charter revived, and to have its corporate privileges revived, if:

> (1) the corporation files each report that is required by this chapter and that is delinquent;
>
> (2) the corporation pays the tax, penalty, and interest that is imposed by this chapter and that is due at the time the request under Section 171.313 of this code to set aside forfeiture is made; and
>
> (3) the forfeiture of the corporation's charter or certificate is set aside in a proceeding under Section 171.313 of this code.

Id. (citing TEX. TAX CODE § 171.312). If these conditions are satisfied, the SOS "shall set aside" the forfeiture of the corporation's charter. *Id.* If the SOS sets aside the forfeiture of the charter, the Comptroller "shall revive" the corporate privileges of the corporation. TEX. TAX CODE § 171.314. "Once the corporation pays the delinquent taxes and is reinstated, the payment relates back and revives the corporate rights that were forfeited." *Flameout Design and Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 839 (Tex. App.—Houston [1st Dist.] 1999, no pet.). This same revival process applies to limited liability companies. *Marshall Feature Recognition, LLC v. Pepsi-Cola Co.*, No. 6:12-CV-00956, 2015 WL 5912672, at *1 (E.D. Tex. Sept. 28, 2015).

Based on these standards, the court concluded that Highline had capacity to sue when it filed its lawsuit. As a result, the defendants' 12(b)(6) motion on lack of capacity grounds was denied:

> The Court finds that when this suit was filed on November 16, 2021, Highline had capacity to sue. Highline's charter was forfeited by the SOS. However, neither party disputes that Highline's charter—and thus its authority to transact business in Texas—was reinstated by the SOS on December 1, 2021. And under Texas law, once an entity recovers its charter by paying its delinquent taxes, the entity's "right to sue or defend is revived," and the entity "may sue or defend all causes of action, regardless of whether such causes of action arose before or during the time period of forfeiture." *G. Richard Goins Constr. Co., Inc. v. S.B. McLaughlin Assoc., Inc.*, 930 S.W.2d 124, 128 (Tex. App.—Tyler 1996). Indeed, "the reinstatement of its charter will relate back and revive whatever rights the corporation had at the time the suit was filed." *Marshall Feature Recognition*, 2015 WL 5912672, at * 2 (citing *M & M Constr. Co., Inc. v. Great Am. Ins. Co.*, 747 S.W.3d 552, 555 (Tex. App. 1998)); *see also NexBank SSB v. Bank Midwest, N.A.*, No. 3:12-CV-1882, 2012 WL 4321750, at *2 (N.D. Tex. Sept. 21, 2012) ("But even taking judicial notice of the fact that Bank Midwest was not in good standing as of the date it filed its counterclaims, this does not demonstrate that Bank Midwest currently is not in good standing[ ] [b]ecause a corporation's rights can be reinstated, and because the reinstatement of rights is retroactive[.]") (emphasis in original). Thus, when Highline recovered its charter, its right to sue related back to April 20, 2021—the date Highline forfeited its corporate privileges. Accordingly, the Court finds that Highline does not lack capacity to litigate this matter.

K. Veil Piercing

In re Taasera Licensing LLC Patent Litigation, No. 2:22-MD-03042-JRG, No. 2:22-CV-00314-JRG, 2023 WL 2917650 (E.D. Tex. Mar. 15, 2023).

In an action filed in New York and transferred to the Eastern District of Texas, the court granted a motion to dismiss for lack of personal jurisdiction. Exercise of personal jurisdiction over the LLC depended on whether the contacts of the LLC's parent with New York could be imputed to the LLC on the basis of the alter-ego doctrine under New York law. The court concluded that a majority of the relevant factors did not support a finding that the parent exercised complete domination over its LLC subsidiary. In addition, even assuming complete domination, the court concluded there was no showing that the domination was used to commit a fraud or wrong. Thus, the requisites for applying the alter-ego doctrine under New York law were not satisfied, and the LLC and its parent were not alter egos.

Transportes Zima Real S.A. de C.V. v. Benitez, No. 14-22-00388-CV, 2023 WL 2026767 (Tex. App.—Houston [14th Dist.] Feb. 15, 2023, no pet. h.) (mem. op.).

The evidence was insufficient to support the trial court's implied finding that a Texas LLC was the alter ego of a Mexican corporation for purposes of the court's exercise of general jurisdiction over the Mexican corporation.

Transportes Zima Real S.A. de C.V. ("Transportes"), a corporation organized and located in Mexico, appealed the trial court's denial of a special appearance. After concluding that the trial court lacked specific jurisdiction over Transportes, the court of appeals discussed Transportes' challenge to the trial court's implied finding that Transportes was subject to general jurisdiction on the basis that Transportes and Zima Real Bus Lines, LLC ("ZIMA Real"), a Texas limited liability company, were alter egos that should be treated as one entity for jurisdictional purposes.

The court of appeals described the test for piercing the veil between a parent and subsidiary for jurisdictional purposes as follows:

> To "fuse" the parent company and its subsidiary for jurisdictional purposes, the plaintiff must prove the parent controls the internal business operations and affairs of the subsidiary. *BMC Software*, 83 S.W.3d at 799 (citing *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 418-19 (Tex. App.—Houston [14th Dist.] 1997, no writ)). 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. *See id.* (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983)). To determine whether an alter ego relationship exists for jurisdictional purposes between an individual and his corporation, courts look to the total dealings of the corporation and the individual, including the degree to which corporate and individual property have been kept separate, the amount of financial interest, ownership, and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes. *Wilmington Tr., Nat'l Ass'n v. Hsin-Chi-Su*, 573 S.W.3d 845, 855 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The court concluded that there was no evidence in the record to support an implied finding by the trial court that Zima Real was the alter ego of Transportes such that general jurisdiction would exist over Transportes. Despite the plaintiffs' contention, there was no evidence that the two companies shared revenue. Although there was evidence that the individual who was the CEO/president of Transportes was also the president of Zima Real, the court stated that it was insufficient to establish that the two companies "ceased to be separate so that the corporate fiction should be disregarded." The court also stated that the residence of Transportes' employees in Texas and the registration of Transportes' property in Harris County were not dispositive in determining if Transportes exercised atypical control over the day-to-day internal operations of Zima Real. Finally, contrary to the plaintiffs' argument, the court said that Transportes adhered to corporate boundaries and corporate formalities. The court added that, "[i]n any event, evidence of a lack of observance of corporate formalities does not compel an alter ego finding."

AHBP LLC v. Lynd Company, __ F. Supp. 3d __, 2023 WL 139149 (W.D. Tex. 2023).

The court concluded that the plaintiff had sufficiently alleged that an affiliated company could be liable for an LLC's conduct as the alter ego of an LLC and that Fed. R. Civ. P. 9(b)'s heightened pleading requirement for fraud did not apply to the "fraud" requirement of veil piercing.

The plaintiff negotiated with defendants The Lynd Company ("Lynd") and Bio Supplies LLC ("Bio Supplies) (collectively "the Lynd defendants") for the exclusive license to market and well a surface disinfectant cleaner. The plaintiff alleged that the Lynd defendants made false representations about the quality of the product, including that it was effective against the virus that causes COVID-19 and that it would meet certain governmental standards required to sell the product in Argentina. The plaintiff alleged that owners of Lynd (Adam Lynd and Matthew Merritt) formed Bio Supplies as "a shell company to insulate The Lynd Company from any and all liability arising from the Product." The Lynd defendants had substantial overlap in ownership, management, officers, and employees, including Adam Lynd and Matthew Merritt, and the plaintiff alleged that there was overlap in the day-to-day operations, such as the owners, directors, and employees of both entities using Lynd email addresses to conduct business purportedly on behalf of Bio Supplies, Bio Supplies using Lynd's office to conduct business, and Lynd using its own assets, resources, and finances to operate Bio Supplies while collecting its profits. The plaintiff also alleged that during its negotiations with Bio Supplies, Bio Supplies held itself out to the plaintiff as being one with Lynd. Eventually, the plaintiff entered into an exclusive license agreement with Bio Supplies to sell the product in Argentina. The plaintiff asserted that it was unable to sell the product in Argentina and suffered over $90 million in damages due to the fraudulent scheme of the defendants. The plaintiffs asserted causes of action for fraudulent inducement, fraud, negligent misrepresentation, Lanham Act violations, business disparagement, and breach of contract, and the defendants sought dismissal of all of the claims. With respect to claims against Lynd premised on Bio Supplies' conduct, Lynd sought dismissal on the basis that the factual allegations in the complaint were insufficient to justify disregarding the corporate form.

The court began its analysis of the veil-piercing claim by stating that Texas law would determine whether Lynd could be responsible for the alleged acts of Bio Supplies because Lynd was formed in Texas. The court identified three categories of corporate disregard: (1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate fraud. The court stated that whether a plaintiff may pierce an entity's veil pursuant to either the alter-ego theory or sham-to-perpetrate-a-fraud theory depends on whether the plaintiff's claims sound in tort or contract. The court explained that "[w]hereas a tort claimant may freely pierce the veil under either of these theories, a contract claimant may only pierce the veil if the defendant has also committed an actual fraud against the plaintiff for the defendant's direct personal benefit. ... That is, the contract claimant must show 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.' TEX. BUS. ORGS. CODE § 21.223(b)."

The court said that alter ego comes into play under Texas law "'where a corporation is organized and operated as a mere tool or conduit of another corporation.'" The court stated that entities are not liable merely because they are part of a single business enterprise; both the relationship between the entities and whether the entities' use of limited liability was illegitimate must be considered.

The court stated that the plaintiff adequately alleged that Bio Supplies was organized and operated as a mere tool or business conduit of Lynd based on allegations that Bio Supplies was created mere weeks before negotiating with the plaintiff to insulate Lynd from liability while the revenues would go directly to Lynd. The court also pointed to overlap in ownership, management, and operations. Stating that these allegations were sufficient to allege a single business enterprise, the court turned to the plaintiff's allegations of "actual fraud." The court distinguished "fraud" in the veil-piercing context from the common-law tort of fraud and concluded that the plaintiff had sufficiently alleged fraud for purposes of its veil-piercing claim generally alleging Lynd's dishonest purpose or deceitful intent with respect to Bio Supplies and its transactions.

> "'Actual fraud' is defined as 'involv[ing] dishonesty of purpose or intent to deceive.' " *See Spring St. Partners–IV, L.P. v. Lam*, 730 F.3d 427, 442 (5th Cir. 2013). (quoting *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, writ dism'd)). Importantly, "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.). Indeed, "the requirements for showing actual fraud are *less burdensome* than those for establishing fraud." *Weston Grp., Inc. v. Sw. Home Health Care, LP*, No. 3:12-CV-1964-G, 2014 WL 940329, at *2 (N.D. Tex. Mar. 11, 2014) (emphasis added).
>
> "Since actual fraud requires showing 'dishonesty of purpose or intent to deceive,' " *see Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964), establishing actual fraud is controlled by 9(b)'s guideline that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b) (emphasis added). In practice, Courts may deduce fraudulent intent from all of the facts and circumstances of a given case. *See Matter of Chastant*, 873 F.2d 89, 91 (5th Cir. 1989); *Weston Grp.*, 2014 WL 940329, at *2 ("[C]ourts generally look at the totality of a shareholder's actions to determine whether he committed actual fraud."); *see,*

e.g., Spring St. Partners, 730 F.3d at 445 (finding actual fraud where the defendant created an LLC to shift assets and allowed the company's charter to lapse after litigation began); *In re Arnette*, 454 B.R. 663, 694–95 (Bankr. N.D. Tex. 2011) (holding that a party committed actual fraud by making material misrepresentations, failing to disclose important information, and never intending to comply with the terms of the parties' agreement); *Latham*, 320 S.W.3d at 610 ("A rational juror could also have decided Latham's conduct in dissolving the corporation in the face of Burgher's claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.").

Without ever defining the term, the Lynd Defendants appear to view the "actual fraud" showing not as an independent evidentiary requirement for piercing the corporate veil but as an additional element to be superimposed onto a claim for common-law fraud. ECF No. 27 at 14–16 (suggesting that Plaintiff has failed to allege "actual fraud" because the allegations of fraud in the SAC do not satisfy Rule 9(b)'s heightened pleading requirements). In other words, the Lynd Defendants interpret "actual fraud" as a more demanding showing than "fraud." There are multiple reasons to doubt the Lynd Defendants' reading of the veil-piercing requirements.

First, the Lynd Defendant's focus on common-law fraud is misplaced because the appropriate counterpart to "actual fraud" is not "fraud" but "constructive fraud." *See Archer*, 390 S.W.2d at 740. "Actual fraud" involves "dishonesty of purpose or intent to deceive, whereas 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*.

Second, as a practical matter, Rule 9(b)'s heightened pleading requirements is at odds with the totality-of-the-circumstances approach courts have taken in assessing "actual fraud"—a plaintiff would be required to lay out the "the who, what, when, and where" with respect to each "circumstance" bearing on the defendant's state of mind. *Weston Grp*., 2014 WL 940329, at *2; *Williams*, 112 F.3d at 177. Even then, it is very unlikely that the actions showing an individual's "intent to deceive" would independently support a claim for common-law fraud. Indeed, much of the relevant conduct would amount to routine business matters—forming and dissolving entities, transferring funds and ownership interests, executing contracts, sending invoices, marketing products—that, absent "dishonesty of purpose or intent to deceive," would not amount to wrongdoing at all. *See Spring St. Partners*, 730 F.3d at 445 (creation of LLC was evidence of actual fraud); *Latham*, 320 S.W.3d at 610 (dissolution of corporation was sufficient to establish actual fraud). The very purpose of the intent inquiry is to determine whether the defendant used otherwise legitimate corporate structures and procedures to achieve dishonest ends.

Finally, the Lynd Defendants' proposed interpretation of actual fraud would seem to obviate the need for veil-piercing under most circumstances. That is, if every contract claimant seeking to pierce the corporate veil must come armed with an independently actionable claim for fraud against the targeted shareholder, why bother with veil-piercing in the first place? After all, the fraud claim would open the door to punitive damages unavailable in a purely contractual dispute. *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986) ("Punitive damages are not recoverable for breach of contract. The party seeking punitive damages must obtain at least one finding of an independent tort with accompanying actual damages.") (citations omitted).

In short, the Court is unpersuaded by the Lynd Defendants' characterization of the "actual fraud" showing required to disregard the corporate form in breach-of-contract cases. All that is required at the pleading stage is a general allegation of Lynd's dishonest purpose or deceitful intent with respect to Bio Supplies and its transactions. *See Archer*, 390 S.W.2d at 740; FED. R. CIV. P. 9(b). Here, Plaintiff easily meets that standard. Plaintiff asserts that Lynd owners created Bio Supplies as a shell company for the sole purpose of selling a "sham Product," simultaneously allowing Lynd to collect all of the revenue from Product sale and insulating Lynd from any liability. ECF No. 25 ¶¶ 13–14. Plaintiff further alleges that Lynd abused the corporate form by suggesting in some circumstances—e.g., the Press Release announcing Lynd's use of the Product—that the entities were unrelated third parties and in others—e.g., in negotiations with Plaintiff—that Lynd and Bio Supplies were a single enterprise. *Id*. ¶¶ 14, 16–19. Finally, Plaintiff asserts that Lynd intended to deceive Plaintiff as to the quality of the Product—both its ability to meet ANMAT standards and its ability to destroy the virus that causes COVID-19. *See id*. ¶¶ 23, 38.

In sum, the Court concludes that Plaintiff has sufficiently alleged that Bio Supplies is Lynd's alter ego. *Weston Grp*., 2014 WL 940329, at *2 (misrepresentations by defendants regarding contractual obligations sufficient to allege alter ego liability because fraud allegations that "go beyond a mere 'conclusory description' of wrongdoing" are such that a "jury could infer actual fraud" and should not be dismissed). While the Lynd Defendants appear to dispute many allegations offered in support of Plaintiff's claims for alter ego liability, those factual disputes must be resolved at the summary judgment stage or at trial.

Kraemer v. RCLoft, LLC, No. 3:22-cv-00157, 2022 WL 17811964 (S.D. Tex. Dec. 19, 2022).

The court dismissed a veil-piercing claim against the individual principal of an LLC that was the sole member of a Nebraska LLC, finding that the plaintiff failed to adequately state an alter-ego claim under Nebraska law.

The plaintiff, Carol Kraemer, purchased a home from RCLoft, LLC ("RCLoft"), a Nebraska LLC. After the purchase, the plaintiff discovered numerous defects in the home and filed suit asserting claims for breach of contract, breach of implied warranties, fraud, negligence, and DTPA violations. The plaintiff also sued Cassandra Lapaseotes, the manager of RCLoft and principal and CEO of Calco, LLC, the sole member of RCLoft. The plaintiff sought to pierce the corporate veil and hold Lapaseotes responsible for RCLoft's liability, asserting in her complaint: "RCLoft, LLC and Calco, LLC are alter egos of Cassandra A. Lapaseotes. Cassandra A. Lapaseotes owns and/or controls RCLoft, LLC and Calco, LLC. Cassandra A. Lapaseotes used RCLoft, LLC and Calco, LLC to defraud Ms. Kraemer. Ms. Kraemer is informed and believes that the limited liability companies lack sufficient capitalization and Cassandra A. Lapaseotes operated RCLoft, LLC and Calco, LLC as a single business enterprise." Lapaseotes sought dismissal of the alter-ego claim based on Fed. R. Civ. P. 9(b) and 12(b)(6).

The court first pointed out that the parties agreed that Nebraska law governed the alter-ego analysis because RCLoft was organized under Nebraska law. Although Nebraska, like other jurisdictions, recognizes that individual members and managers of an LLC are not generally liable for a debt, obligation, or liability of the company, "[a] court applying Nebraska law will disregard a limited liability 'company's identity only where the company has been used to [1] commit fraud, [2] violate a legal duty, or [3] perpetrate a dishonest or unjust act in contravention of the rights of another.'" The court pointed out that Kraemer's petition contained only one sentence addressing the topic of fraud. The court stated that the allegation of fraudulent conduct was subject to the heightened pleading requirement of Rule 9(b), which requires pleading with particularity with respect to allegations of fraud. Kraemer's allegation was "woefully inadequate." The court stated that Nebraska courts look at the following factors when determining whether to disregard the corporate entity on the basis of fraud: "(1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity." The court stated that the plaintiff did "not even attempt to apply any of these four factors that Nebraska courts use when determining whether to apply the alter ego doctrine on the basis of fraud."

The court also concluded that the plaintiff's alter-ego claim failed to comply with the less stringent Rule 12(b)(6) standard of pleading. Separate and apart from the fraud allegations, the plaintiff argued that she sufficiently stated an alter-ego claim against Lapaseotes on the grounds that RCLoft was used to "perpetrate a dishonest or unjust act in contravention of the rights of another." The court, however, found no allegations in the petition that Lapaseotes committed a dishonest or unjust act in contravention of the rights of another. The plaintiff argued in her briefing opposing the motion to dismiss that "Lapaseotes regularly signed documents as the 'Seller' of the [Texas City home] in her individual capacity during the time she transacted with Ms. Kraemer, effectively blurring the lines between herself and her corporate shells, Calco and RCLoft," but the court stated that it should not consider these allegations that appeared for the first time in the plaintiff's opposition briefing when assessing the legal sufficiency of the complaint. Furthermore, the court stated that the new allegations did not get the plaintiff very far even if the court considered them.

> Kraemer suggests that there is something improper with Lapaseotes signing such documents. That is absurd. “[T]he only way in which a corporation can act is through the individuals who act on its behalf.” *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). The front page of the real estate contract for the property at issue expressly states that the contract is between Kraemer and RCLoft. Simply because RCLoft’s Manager, Lapaseotes, signed the amendments to the contract does not automatically mean that she was signing in her individual capacity. To the contrary, the only way the real estate contract could be amended was by having someone sign the amendments who had the authority to act on behalf of RCLoft. In short, Kraemer’s alter ego claim based on a dishonest or unjust act in contravention of the rights of another fails under Rule 12(b)(6) because Kraemer has failed to plead factual content that allows me to draw the reasonable inference that RCLoft has been used to commit a dishonest or unjust act.

Finally, the court declined to allow the plaintiff to amend her lawsuit to remedy any pleading deficiencies. The plaintiff had been given numerous opportunities to amend her complaint, and she repeatedly refused to exercise that right. The court thus dismissed the alter-ego claim.

Weller v. Keyes, No. 03-21-00302-CV, 2022 WL 3638204 (Tex. App.—Austin Aug. 24, 2022, pet. filed).

The court of appeals reversed the trial court’s grant of summary judgment on the plaintiff’s fraud claims. The court concluded that the lower court had incorrectly determined that § 21.223 of the TBOC (which addresses veil-piercing liability) barred claims asserting direct tortious liability against an LLC’s agents.

David Weller was the president and sole member of IntegriTech Advisors, LLC, through which he provided consulting services to buyers, sellers, and brokers of airplanes and airplane parts. MonoCoque Diversified Interests LLC (“MDI”) bought and sold airplane parts and was wholly owned by appellees Mary Alice Keyes and Sean Leo Nadeau.

In September 2017, appellees and Weller began discussing a potential business relationship between Weller, IntegriTech Advisors, and MDI. After several months of negotiations, appellees offered Weller several forms of specified compensation if he agreed to full-time employment with MDI and to provide MDI with training services. Weller began working for MDI but disputes arose over whether he was entitled to particular payments. He ultimately sued appellees and MDI and asserted various actions, including several types of fraud claims. Weller alleged that appellees were directly liable for their own fraudulent and tortious conduct notwithstanding that they were acting as agents of MDI.

Appellees and MDI filed a motion for partial summary judgment. Appellees moved for summary judgment on “all of Weller’s claims asserted against them in their individual capacities because every act and omission complained of by Weller were performed in their capacities as authorized agents of MDI. Section 21.223(a)(2) of the Texas Business Organizations Code bars all of Weller’s claims for relief against Defendants Keyes and Nadeau.” The trial court granted appellees’ partial-summary-judgment motion as to appellants’ fraud claims without specifying the grounds.

On appeal, Weller asserted that the trial court erred in granting appellees’ summary judgment because the only ground raised by appellees to support such relief (that § 21.223(a)(2) of the TBOC barred Weller’s claims) failed as a matter of law. The court of appeals agreed with Weller and distinguished vicarious veil-piercing liability from direct tortious liability:

> Disposition of this issue hinges on whether Section 21.223 abolishes the long-established common-law rule of agent direct liability in Texas. That rule provides that individuals are always directly liable for their own tortious conduct—even if committed in the course and scope of their employment—independently of whether a plaintiff alleges the individuals’ liability under a veil-piercing or similar theory. As discussed below, we hold that appellants’ fraud claims against appellees in their individual capacities are not barred as a matter of law by Section 21.223.
>
> “Texas has long had two methods for holding individual corporate agents or officers personally liable when they are acting within the course and scope of their employment or role as corporate agents—piercing the corporate veil or direct individual liability.” *Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 669–70 (W.D. Tex. 2019) (collecting cases and permitting plaintiff to pursue common-law tort claims against corporate agent “individually

based on his own personal tortious conduct"). As for the first method—"piercing the corporate veil" or "disregarding the corporate fiction"—in 1989 the legislature curtailed plaintiffs' use of it by enacting the predecessor of Section 21.223. *See Willis v. Donnelly*, 199 S.W.3d 262, 271–72 (Tex. 2006) (noting that legislature narrowly prescribed circumstances under which shareholder can be held liable for corporate debts by enacting Texas Business Corporations Act article 2.21). While the legislature later amended the statute to "establish a clear legislative standard under which the liability of a shareholder for the obligations of a corporation is to be determined in the context of contractual obligations and all matters relating thereto," *id.* at 272 n.12, the statute remains applicable only to liability (1) for the company's contractual obligations and matters relating to or arising therefrom (2) that is based on a veil-piercing type of theory, *Bates*, 361 F.Supp. 3d at 666–67 (noting that some recent Texas cases have "muddled the distinction" between veil-piercing claims, which are governed by Section 21.223, and direct individual-liability tort claims, which are still governed by common law).

The second longstanding method of holding corporate agents personally liable for actions performed within the course and scope of their employment or role as corporate agents—direct individual liability for tortious conduct—remains alive and well under the common law. The supreme court recently reaffirmed this longstanding rule, albeit without mentioning Section 21.223. *See Transcor Astra Grp. S.A. v. Petrobas Am., Inc.*, ––– S.W. 3d ––––, No. 20-0932, 2022 WL 1275238, at *11 (Tex. Apr. 29, 2022) ("the fact that an individual was acting in a corporate capacity does not prevent the individual from being held personally—or 'individually'—liable for the harm caused by those [tortious] acts"); *see Miller*, 90 S.W.3d at 717 (same); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (same).

Moreover, this Court has specifically held that—despite the provisions in the Business Organizations Code limiting corporate agents' liability, and absent "clear direction from the Supreme Court holding that the legislature" has "abrogated longstanding common law recognizing that corporate agents are liable for their own tortious conduct"—LLC members are individually liable for their own tortious conduct in participating and directing wrongdoing, separate and apart from any veil-piercing or similar doctrines. *Key v. Richards*, No. 03-14-00116-CV, 2016 WL 240773, at *3 & n.4 (Tex. App.—Austin Jan. 13, 2016, no pet.) (mem. op.) (holding so even while recognizing that in Business Organizations Code legislature has "broadly insulated LLC members from liability" for LLC's obligations). The majority of appellate courts specifically addressing this issue have agreed with this Court.

Following our own precedent, we agree with *Bates* that Section 21.223 is "aimed [solely] at traditional veil piercing theories, which seek to hold shareholders and beneficial owners liable merely based on their status as an owner or shareholder" and is not to be used as a mechanism to "shield a corporate officer or agent who commits tortious conduct merely because the officer or agent also possesses an ownership interest in the corporation." *Bates*, 361 F. Supp. 3d at 667 (determining that common-law rule is not "superseded by § 21.223 [even] when the tort claim is related to a contractual obligation of the corporation or LLC"). Therefore, we hold that the trial court erred in granting appellees summary judgment on appellants' fraud claims against appellees because of our legal determination that Section 21.223 does not abolish the common-law rule that corporate agents are directly and personally liable for their own tortious conduct even when committed in the course and scope of their employment or in their role as corporate agents.

L. Creditor's Remedies: Charging Order, Turnover Order

Edgefield Holdings, LLC v. Willowbrook Imaging LLC, No. 3:17-CV-00017-K, 2022 WL 7719761 (N.D. Tex. Sept. 15, 2022), report and recommendation adopted, No. 3:17-CV-00017-K, 2022 WL 7035096 (N.D. Tex. Oct. 11, 2022).

The magistrate judge recommended the entry of a charging order because all of the requirements for a charging order under the TBOC were met. (See below for the related opinion involving the denial of a turnover order.)

Plaintiff Branch Banking and Trust Company ("BB&T") received a default judgment against Dr. Harcharan Singh Narang and other guarantors. After four years of failing to recover any of the judgment debt, BB&T assigned the judgment to Edgefield Holdings, LLC. After researching Dr. Narang's assets, Edgefield uncovered information that Dr. Narang was the sole owner and member of Grip LLC, a Texas limited liability company. Edgefield asked the court to grant a charging order with respect to Dr. Narang's interest in Grip LLC to satisfy the outstanding judgment.

The court cited the law related to charging orders in Texas and concluded that the requirements for granting a charging order had been met:

> Texas law permits judgment creditors to seek a charging order of a member's LLC interest under section 101.112 of the Texas Business Organizations Code. A charging order "constitutes a lien on the judgment debtor's membership interest." Tex. Bus. Orgs. Code § 101.112(c); *see Pajooh v. Royal W. Invs. LLC, Series E*, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] 2017, no pet.). "On application by a judgment creditor of a member of a limited liability company . . . , a court having jurisdiction may charge the membership interest of the judgment debtor to satisfy the judgment." Tex. Bus. Orgs. Code § 101.112(a). This permits judgment creditors to satisfy their judgment to "receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest." Tex. Bus. Orgs Code § 101.112(b). Thus, to grant a charging order, an application must be brought (i) by a judgment creditor, (ii) of a member of a limited liability company, (iii) in a court with jurisdiction.
>
> Here, the Court should find that all the requirements for a charging order under the Texas statute are met. Edgefield is the judgment creditor of Dr. Narang as shown in assignment documents. Dr. Narang has a membership interest in Grip LLC, a Texas limited liability company. And this Court has jurisdiction over Edgefield's Application. Therefore, the Court should grant Edgefield's Application.

Edgefield Holdings, LLC v. Willowbrook Imaging LLC, Case No. 3:17-CV-00017-K, 2022 WL 4118522 (N.D. Tex. Aug. 29, 2022), report and recommendation adopted, No. 3:17-CV-00017-K, 2022 WL 4125097 (N.D. Tex. Sept. 9, 2022).

The magistrate judge recommended against the entry of a turnover order because it would conflict with the exclusivity of the charging order remedy. (See above for the related opinion involving the granting of a charging order.)

Plaintiff Branch Banking and Trust Company ("BB&T") received a default judgment against Dr. Harcharan Singh Narang and other guarantors. After four years of failing to recover any of the judgment debt, BB&T assigned the judgment to Edgefield Holdings, LLC. After researching Dr. Narang's assets, Edgefield uncovered information that Dr. Narang was the sole owner and member of Grip LLC, a Texas limited liability company. Edgefield asked the court to order Dr. Narang to turnover his interest in Grip LLC to satisfy the outstanding judgment. Further, Edgefield asked the court to appoint a receiver to conduct a judicial sale and turnover any proceeds to Edgefield.

The court cited the law related to turnover orders in Texas and concluded that such an order would conflict with the exclusivity of the charging order remedy:

> Texas law permits judgment creditors to seek judicial aid "through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property . . . that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities." 2 Tex. Civ. Prac. & Rem. Code § 31.002(a). This procedural device gives judgment creditors assistance in satisfying judgment debts and "authorizes a court to aid a judgment creditor . . . by 'ordering the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control.' " *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 581 (Tex. 2018) (per curiam).
>
> However, a turnover order in this case appears to violate section 101.112 of the Texas Business Organizations Code, which provides that "[t]he entry of a charging order is the *exclusive remedy* by which a judgment creditor of a member [of a LLC] . . . may satisfy a judgment out of the judgment debtor's membership interest." Tex. Bus. Orgs. Code § 101.112(d) (emphasis added);

see Pajooh v. Royal W. Invs. LLC, Series E, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet.) (finding that a receivership order extending to a membership interest in an LLC was erroneous). Some Texas courts have found exceptions to the exclusivity of charging orders and granted turnover orders for LLC interests. *See Heckert v. Heckert*, 2017 WL 5184840, at *7-9 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.); *Gillet v. ZUPT, LLC*, 523 S.W.3d 749, 757-58 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also Jiao v. Xu*, 28 F.4th 591, 600 (5th Cir. 2022) (noting Texas intermediate courts have found exceptions to the exclusivity of charging orders). However, Edgefield has not demonstrated that the facts in this case fall under an exception to section 101.112(d). Without such a showing, the Court cannot be certain that a turnover order is appropriate under the circumstances. Therefore, the Court should deny Edgefield's Application without prejudice to seeking a charging order or refiling its Application with additional argument and evidence demonstrating the applicability of an exception to the charging statute.

M. Attorney's Fees

American Midstream (Alabama Intrastate), LLC v. Rainbow Energy Marketing Corporation, __ S.W.3d __, 2023 WL 2920282 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

"This Court has previously held that Civil Practice and Remedies Code section 38.001 as it existed when this suit was filed does not authorize the recovery of attorney's fees in a breach-of-contract action against a limited liability company. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 188 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Under the plain language of section 38.001, a trial court cannot order limited liability partnerships (L.L.P.), limited liability companies (L.L.C.), or limited partnerships (L.P.) to pay attorneys' fees."); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). We decline Rainbow's request that we overrule this precedent."

In re Pearl Resources LLC, 643 B.R. 436 (Bankr. S.D. Tex. 2022).

"Second, [Pearl Resources LLC] argues that the [General Land Office's] request for attorney's fees under § 38.001 must be dismissed because attorney's fees are not available against limited-liability companies under § 38.001. Section 38.001(b)(8) states that:

> a person may recover reasonable 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, in addition to the amount of a valid claim and costs, if the claim is for an oral or written contract.

Pursuant to Tex. Civ. Prac. & Rem. Code § 1.002, '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.

Here, Pearl is a limited liability company. Since a limited liability company is one of the enumerated categories in the definition of organization, Pearl is a proper defendant to seek attorney's fees from in a claim under § 38.001(b)(8). Therefore, the GLO properly pled its request [for] attorney's fees resulting from its counterclaim in reply for breach of contract under § 38.001 and Pearl's argument fails."

See also Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) **summarized above under heading "Access to Books and Records" and below under heading "Derivative Litigation."**

N. Standing or Capacity to Sue

Specialty Associates of West Houston, PLLC v. Adams, No. 01-21-00092-CV, 2022 WL 3452329 (Tex. App.—Houston [1st Dist.] Aug. 18, 2022, pet. ref'd) (mem. op.).

"Dr. Adams asserted that Specialty Associates [of West Houston, PLLC] could not sue her for breach of contract because she did not have a contractual relationship with Specialty Associates. . . . Specialty Associates alleged that it had standing to sue Dr. Adams for breach of the Physician Employment Agreement because the agreement had been assigned to it.

In the trial court, Dr. Adams claimed that she never signed the Physician Employment Agreement with [BHS Physicians Network, Inc.] and asserted that her signature was forged. However, whether the Physician Employment Agreement was a valid contract pertains to whether Specialty Associates can prevail on the merits of its breach-of-contract claim and does not pertain to the issue of standing. A plaintiff does not lack standing 'in its proper, jurisdictional sense simply because [it] cannot prevail on the merits of [its] claim[.]' *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 777 (Tex. 2020) (internal quotation marks omitted). And, in any event, Dr. Adams offered no evidence to support her assertion that she did not sign the Physician Employment Agreement. In contrast, Specialty Associates offered a 'true and correct copy' of the Physician Employment Agreement as an attachment to [Carla] Norman's declaration. The agreement reflected that it was entered into between Dr. Adams and BHS and bore the signatures of BHS's president and 'Ola Adams, M.D.'

Specialty Associates also offered evidence showing that it was assigned the Physician Employment Agreement. Specifically, Norman testified that, as part of a transaction between Specialty Associates and its affiliated entities and BHS and its affiliates, the Physician Employment Agreement was assigned to Specialty Associates. . . .

In her dismissal motion, Dr. Adams further asserted that Specialty Associates did not have standing to sue her because she was employed by Elite Family Health and Wellness Center, not BHS or Specialty Associates. She offered evidence showing that she had worked at Elite Family. She also offered evidence—specifically, documents from the Texas Secretary of State's Office—indicating that Elite Family was 'not an assumed name or affiliated with' either BHS or Specialty Associates. For these reasons, she asserted that Specialty Associates did not have authority to sue on behalf of Elite Family.

Specialty [Associates] offered responsive evidence showing that Elite Family was not Dr. Adams's employer, rather it was the practice where she worked pursuant to the Physician Employment Agreement. The agreement identified BHS as her 'Employer.' It provided that Dr. Adams would work at a practice located 'at 2200 Southwest Freeway, Suite 333, Houston, Texas 77098 or at such other clinic sites in the Area as Employer may designate (collectively 'Practice Sites').' (Emphasis added.) As discussed, the evidence showed that, after it was executed, the Physician Employment Agreement was assigned to Specialty Associates as part of the asset-purchase transaction between entities affiliated with BHS and entities affiliated with Specialty Associates. Elite Family was a facility—specifically, a physicians' office—listed as an asset in the Asset Purchase Agreement and was purchased as part of the asset-purchase transaction. Dr. Adams began working for Specialty Associates at Elite Family after the Physician Employment Agreement was assigned to Specialty Associates and after the practice was purchased pursuant to the Asset Purchase Agreement.

Dr. Adams further asserted that Specialty Associates should not be permitted to file suit against her because it had not filed an assumed name certificate for Elite Family. See TEX. BUS. & COM. CODE § 71.101(1) (providing that entities, including limited liability companies, regularly rendering professional services in Texas must file assumed name certificate). Specialty Associates acknowledged that an assumed name certificate was not filed for Elite Family. Norman testified that, when Elite Family was purchased as part of the asset transfer, Specialty Associates was not aware that an assumed name certificate was not on file.

As support for her assertion that it was proper to dismiss the suit for non-compliance with the assumed-name filing requirements, Dr. Adams cites Business and Commerce Code section 71.201(a), which provides,

> A person's failure to comply with this [Assumed Business or Professional Name] chapter does not impair the validity of any contract . . . or prevent the person . . . proceeding in any court of this state, but the person may not maintain in a court of this state an action or proceeding arising out

> of a contract or act in which an assumed name was used until an original, new, or renewed certificate has been filed as required by this chapter.

Id. § 71.201(a). Specialty Associates asserts that section 71.201(a) does not apply to the Physician Employment Agreement because Elite Family was not a party to the agreement. However, regardless of whether section 71.201 applies here, 'non-compliance with the assumed name certificate requirements raises an issue of capacity, not standing.' *Ad-Wear & Specialty of Tex., Inc. v. Honeycomb Farms, LLC*, No. 01-18-00997-CV, 2020 WL 1680051, at *4 (Tex. App.—Houston [1st Dist.] Apr. 7, 2020, no pet.) (mem. op.); *see Eckman v. Northgate Terrace Apts., LLC*, No. 03-18-00254-CV, 2018 WL 3150845, at *2 (Tex. App.—Austin June 28, 2018, pet. denied) (mem. op.) ('While the Assumed Business or Professional Name Act prohibits the maintaining of a lawsuit until an assumed-name certificate has been filed or renewed, *see* [TEX. BUS. & COM. CODE § 71.201], a plaintiff's failure to have a valid certificate on file is not a jurisdictional issue but, rather, a capacity issue that is properly raised in a plea in abatement so that the cause may be suspended while the defect is corrected.'). Thus, non-compliance with the assumed-name requirements does not provide a basis to support the trial court's dismissal of Specialty Associates's breach-of-contract claim for lack of standing.

Dr. Adams also suggested that Specialty Associates could not sue her for breach of contract because Elite Family held itself out as a professional association when its status as a professional association had been voluntarily terminated. Regardless of the legal propriety of such an assertion, the evidence relied on by Dr. Adams did not show that Elite Family had held itself out as a professional association.

Taking as true all evidence favorable to Specialty Associates and indulging every reasonable inference doubts in its favor, we conclude that Dr. Adams failed to meet her initial burden to show, as a matter of law, that Specialty Associates lacked standing and thus deprived the trial court of subject-matter jurisdiction. And, even if we assume that Dr. Adams met her burden, Specialty Associates offered evidence showing there is a material fact question regarding the jurisdictional issue. We hold that the trial court erred by granting Dr. Adams's motion to dismiss, which operated as a plea to the jurisdiction."

Highline Innovation Investments Partnership, LLC v. Biolert, Ltd., Civ. A. No. 4:21-CV-00615, 2022 WL 3354775 (E.D. Tex. Aug. 12, 2022).

The court denied a 12(b)(6) motion to dismiss on lack of capacity grounds. The court concluded that an LLC's forfeited charter had been reinstated by the Secretary of State, which resulted in a revival of the LLC's right to sue at the time that it filed its lawsuit.

Highline Innovation Investments Partnership, LLC sued various defendants for fraud and other actions. The defendants filed numerous motions in response, including a 12(b)(6) motion premised on Highline's lack of capacity to sue because its "corporate privileges were forfeited at the time this suit was filed."

The court began by discussing the legal standards related to capacity and forfeiture:

> As noted, Defendants' first argument for dismissal under Rule 12(b)(6) asserts that when this lawsuit was initiated on November 16, 2021, Highline lacked the capacity to sue. Defendants claim that Highline forfeited its corporate privileges on or around April 20, 2021, for failure to pay the Texas state franchise tax. Defendants also offer evidence showing that on August 20, 2021, the Texas Secretary of State (the "SOS") forfeited Highline's corporate charter.
>
> "The capacity of a corporation to bring suit is determined by the law of the state where it is organized." *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *see also* FED. R. CIV. P. 17(b)(3) (providing that for all parties that are not individuals or corporations, the "capacity to sue or be sued is determined . . . by the law of the state where the court is located."). Accordingly, the Court will look to Texas law to determine whether Highline had capacity to sue. *Id.* The Texas Tax Code states that a "taxable entity"—which includes limited liability companies—forfeits its right to sue if the entity fails to pay its state franchise taxes. See TEX. TAX CODE §§ 171.252(2), 171.0002 (including "limited liability company" under the definition of "taxable entity"). "If the corporate privileges of a corporation are forfeited . . . the corporation shall be denied the right to sue or defend in a court of this state." *Id.* at § 171.252(1).
>
> Texas law also provides for the revival of corporate privileges. How revival occurs depends on when the entity remedied the condition that caused it to forfeit its corporate privileges.

> If the entity "pays any tax, penalty, or interest due" before the forfeiture of its charter, the Texas Comptroller "shall revive" its corporate privileges. TEX. TAX CODE at § 171.258; *see also, generally, YHR Mason Road Partners, LP v. 7-7 Cleaners, Inc.*, No. 01-18-00849-CV, 2020 WL 716732, at *5–6 (Tex. App.—Houston [1st Dist.] Feb. 13, 2020) (discussing the differences between forfeiture of corporate privileges and forfeiture of a charter). But if the entity fails to "revive its forfeited privileges within 120 days after the date that the privileges were forfeited," the SOS may forfeit the entity's corporate charter. TEX. TAX CODE § 171.309 (emphasis added). "The SOS effects a forfeiture by inscribing on the corporation's record the words 'Charter Forfeited,' the date on which this inscription is made, and a citation to" the Texas Tax Code. *YHR Mason*, 2020 WL 716732, at *5–6 (citing TEX. TAX CODE § 171.311).
>
> Once an entity's corporate charter has been forfeited by the SOS, the entity may be "entitled to have its charter revived, and to have its corporate privileges revived, if:
>
>> (1) the corporation files each report that is required by this chapter and that is delinquent;
>> (2) the corporation pays the tax, penalty, and interest that is imposed by this chapter and that is due at the time the request under Section 171.313 of this code to set aside forfeiture is made; and
>> (3) the forfeiture of the corporation's charter or certificate is set aside in a proceeding under Section 171.313 of this code.
>
> *Id.* (citing TEX. TAX CODE § 171.312). If these conditions are satisfied, the SOS "shall set aside" the forfeiture of the corporation's charter. *Id.* If the SOS sets aside the forfeiture of the charter, the Comptroller "shall revive" the corporate privileges of the corporation. TEX. TAX CODE § 171.314. "Once the corporation pays the delinquent taxes and is reinstated, the payment relates back and revives the corporate rights that were forfeited." *Flameout Design and Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 839 (Tex. App.—Houston [1st Dist.] 1999, no pet.). This same revival process applies to limited liability companies. *Marshall Feature Recognition, LLC v. Pepsi-Cola Co.*, No. 6:12-CV-00956, 2015 WL 5912672, at *1 (E.D. Tex. Sept. 28, 2015).

Based on these standards, the court concluded that Highline had capacity to sue when it filed its lawsuit. As a result, the defendants' 12(b)(6) motion on lack of capacity grounds was denied:

> The Court finds that when this suit was filed on November 16, 2021, Highline had capacity to sue. Highline's charter was forfeited by the SOS. However, neither party disputes that Highline's charter—and thus its authority to transact business in Texas—was reinstated by the SOS on December 1, 2021. And under Texas law, once an entity recovers its charter by paying its delinquent taxes, the entity's "right to sue or defend is revived," and the entity "may sue or defend all causes of action, regardless of whether such causes of action arose before or during the time period of forfeiture." *G. Richard Goins Constr. Co., Inc. v. S.B. McLaughlin Assoc., Inc.*, 930 S.W.2d 124, 128 (Tex. App.—Tyler 1996). Indeed, "the reinstatement of its charter will relate back and revive whatever rights the corporation had at the time the suit was filed." *Marshall Feature Recognition*, 2015 WL 5912672, at * 2 (citing *M & M Constr. Co., Inc. v. Great Am. Ins. Co.*, 747 S.W.3d 552, 555 (Tex. App. 1998)); *see also NexBank SSB v. Bank Midwest, N.A.*, No. 3:12-CV-1882, 2012 WL 4321750, at *2 (N.D. Tex. Sept. 21, 2012) ("But even taking judicial notice of the fact that Bank Midwest was not in good standing as of the date it filed its counterclaims, this does not demonstrate that Bank Midwest currently is not in good standing[ ] [b]ecause a corporation's rights can be reinstated, and because the reinstatement of rights is retroactive[.]") (emphasis in original). Thus, when Highline recovered its charter, its right to sue related back to April 20, 2021—the date Highline forfeited its corporate privileges. Accordingly, the Court finds that Highline does not lack capacity to litigate this matter.

See also Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.); ***In re Neighbors Legacy Holdings, Inc.***, 645 B.R. 864 (Bankr. S.D. Tex. 2022) **summarized below under "Derivative Litigation."**

O. Derivative Litigation

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff, who was a manager of LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal." Upon her release, she hired a lawyer and sought books and records of the entity defendants. Eventually, she brought a lawsuit asserting numerous claims, including claims for breach of fiduciary duty (direct and derivative). The jury found in the plaintiff's favor on her claims, but the court of appeals reversed on one derivative claim based on her lack of standing because she was not an owner of the LLC on whose behalf she brought that claim. The court of appeals reversed as to another derivative claim for breach of fiduciary duty brought on behalf of a limited partnership because the plaintiff did not show that the individual who allegedly breached his fiduciary duty to the limited partnership exercised the requisite control over the general partner to owe a fiduciary duty to the limited partnership. The court of appeals affirmed a claim for breach of fiduciary duty against the general partner of the limited partnership based on the limited partnership's payment of personal legal fees incurred by individual defendants. The trial court awarded the plaintiff a direct share of the damages on one of the derivative claims as well as attorney's fees. The court of appeals reversed as to the award of damages directly and also held that attorney's fees for prosecution of the derivative claims must be paid from the recovery based on the "common fund" doctrine.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board,

and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

On appeal, the individual and entity defendants both challenged Lisa's standing to bring derivative claims on behalf of SignAd GP, LLC. The court addressed this issue at the beginning of its opinion because standing is a necessary component of subject matter jurisdiction. The individual and entity defendants argued that all relief granted by the trial court based on the derivative claim Lisa asserted on behalf of SignAd GP, LLC for breach of fiduciary duty against Wes Jr., Lee, and Stacey should be reversed because Lisa had no ownership interest in SignAd GP, LLC and thus lacked standing to bring derivative claims on its behalf. With respect to this claim, the jury found that Wes Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC by (1) failing to maintain internal controls on employee fringe benefits and (2) selling company vehicles for less than fair market value. The jury awarded more than $500,000 in damages for this claim, and the trial court awarded Lisa one-sixth of the damage award under Section 153.405 of the Texas Business Organizations Code (TBOC). The court analyzed this issue and concluded that Lisa lacked standing to assert the derivative claim on behalf of SignAd GP, LLC due to her lack of an ownership interest in that entity, stating:

> Standing is a constitutional prerequisite to maintaining suit. *Sneed v. Webre*, 465 S.W.3d 169, 179–80 (Tex. 2015); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Generally, unless standing is conferred by statute, "a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Sneed*, 465 S.W.3d at 180 (quoting *Williams v. Lara*, 52 S.W.3d 171, 178–79 (Tex. 2001)). "The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (citation omitted). "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.' " *Tex. Ass'n of Bus*., 852 S.W.2d at 446 (quoting *Bd. of Water Eng'rs v. City of San Antonio*, 155 Tex. 111, 283 S.W.2d 722, 724 (1955)). A party's lack of standing deprives a court of subject matter jurisdiction and renders any trial court action void. *Phillips v. Phillips*, 244 S.W.3d 433, 434–35 (Tex. App.—Houston [1st. Dist.] 2007, no pet.).
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> Lisa acknowledges that she does not have an ownership interest in SignAd GP, LLC. Indeed, SignAd GP, LLC is "a single member limited liability company owned by [Stacey Gilbreath] Powell." Despite her lack of an ownership interest in SignAd GP, LLC, Lisa argues she has standing to file suit on its behalf because she is a beneficial owner of one-sixth of the entire "SignAd Enterprise," of which SignAd GP, LLC is a part, and she is also a permanent member of SignAd GP, LLC's Board of Managers. Lisa's argument hinges on her theory that the SignAd entities, all of which undisputedly are distinct and separate legal entities, constitute a single "integrated business." Lisa's argument is unavailing.
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> Lisa never pleaded an enterprise theory or obtained findings that would allow us to disregard the fact that SignAd GP, LLC, on whose behalf Lisa sued, and SignAd, Ltd., the entity in which Lisa has an ownership interest, are two separate entities. *See Docudata Records Mgmt. Servs., Inc. v. Wieser*, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (stating that under Texas law, "the separate identity of corporations will be observed by the courts, even in instances where one may dominate or control the other, or may even treat it as a mere department, instrumentality or agency of the other") (quoting *Pulaski Bank & Trust Co. v. Tex. Am. Bank, N.A.*, 759 S.W.2d 723, 731 (Tex. App.—Dallas 1988, writ denied)).
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> Moreover, the TBOC, which sets forth the parameters for derivative proceedings for limited liability companies, states that a "member" of a closely held limited liability company may bring a derivative suit on behalf of the LLC, and further identifies when such derivative actions are permitted. *See* TEX. BUS. ORGS. CODE §§ 101.452, .463. Under the TBOC, Lisa's status as a board member of SignAd GP, LLC does not confer standing on her to bring a derivative suit on behalf of the entity. Stacey, as the single member of SignAd GP, LLC, is the person who has standing to assert a derivative claim on behalf of the LLC; Lisa does not.

> Lisa argues that because Section 101.463 of the TBOC does not state that derivative standing is strictly limited to owner-members of an LLC, she can establish standing. Without argument or explanation, she then cites to *Neff v. Brady*, 527 S.W.3d 511 (Tex. App.—Houston [1st Dist.] 2017, no pet.) adding a parenthetical stating that double-derivative standing is recognized where the "plaintiff is a beneficial owner of the entity harmed by [the] breach of fiduciary duty to an affiliate." To the extent Lisa argues *Neff* supports her argument that she has standing to assert a claim on behalf of SignAd GP, LLC, we reject her argument. [In a footnote, the court explained that "[a] double derivate [sic] suit is a 'vehicle for bringing a derivate [sic] suit across a second degree of separation.' ... and that it "'[t]ypically ... takes the form of a suit brough [sic] by shareholders of a parent company to assert the rights of a subsidiary.'"]
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> *Neff* analyzes standing under the laws of Bermuda and Switzerland and does not address whether Lisa, as a non-member of an LLC, can assert a derivative claim on behalf of SignAd GP, LLC. Furthermore, *Neff* confirms that when, as here, standing has been conferred through statute, "the statute itself serves as the proper framework for the analysis." *Id*. at 522. The "proper analysis is to determine whether the claimant falls within the category of claimants upon whom the Legislature conferred standing." [citations omitted] Because Lisa is not a member of SignAd GP, LLC, she does not "fall within the category of claimants upon whom the Legislature [has] conferred standing" under the TBOC. *See Nephrology Leaders*, 573 S.W.3d at 916; TEX. BUS. ORGS. CODE § 101.463. [In a footnote, the court refuted Lisa's contention that, even if she lacked standing to sue on behalf of SignAd GP, LLC, the jury question "'mistakenly (but harmlessly) presented the issue to the jury in terms of a fiduciary obligation to SignAd GP instead of to SignAd, Ltd.'" The court stated that "SignAd, Ltd. and SignAd GP, LLC are distinct legal entities and any duties Wes, Jr., Lee, and Stacey may owe to SignAd, Ltd. are not necessarily the same as any duties they may owe to SignAd GP, LLC." The court emphasized that the jury question asked about duties owed to SignAd GP, LLC, not SignAd, Ltd., and the court stated that it could not simply substitute another entity for SignAd GP, LLC as Lisa suggested. The court stated that "[t]he question presented is one of standing," and Lisa lacked standing to bring a derivative claim on behalf of SignAd GP, LLC.] [footnotes omitted]

Thus, the court sustained the defendants' challenge to Lisa's standing and reversed the trial court's judgment with respect to Lisa's derivative claim for breach of fiduciary duty filed on behalf of SignAd GP, LLC due to lack of subject matter jurisdiction.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim against Wes Jr. on behalf of SignAd, Ltd. asserting that Wes Jr. had engaged in self-dealing transactions with his side business ProIce Solutions, LLC" ("ProIce"). The jury was instructed that "[b]ecause Wesley Gilbreath, Jr. was President of SignAd, Ltd., he owed SignAd, Ltd. a fiduciary duty." The jury found that Wes Jr. failed to "comply with his fiduciary duty to SignAd, Ltd. with regard to the transactions with [ProIce]." The court pointed out that Wes Jr. was not in fact the president of SignAd, Ltd. but was the president of SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court discussed Texas case law under which a person who controls a general partner of a limited partnership has been deemed to owe a fiduciary duty to the limited partnership and its limited partners and concluded that Wes Jr. did not have the requisite control over SignAd GP, LLC, SignAd, Ltd.'s General Partner. The court thus reversed the trial court's judgment in favor of Lisa on her derivative claim for breach of fiduciary duty against Wes Jr. based on his transactions with ProIce.

Another derivative claim for breach of fiduciary duty asserted by Lisa was a claim for breach of fiduciary duty on behalf of SignAd, Ltd. against its General Partner, SignAd GP, LLC. The jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes Jr., Stacey, Lee, and Mark. The jury also found that Wes Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each. The trial court's judgment awarded Lisa a share of the awarded damages in proportion to her one-sixth ownership interest in SignAd, Ltd. The entity defendants argued that the award should be reversed on several grounds.

The entity defendants argued that the jury's finding that SignAd GP, LLC breached its duty was based solely on Enriquez's testimony that payments of legal fees for Wes Jr., Lee, Stacey, and Mark were personal expenses improperly paid by SignAd, Ltd. Enriquez opined that the payments did not conform with SignAd, Ltd.'s governing documents and could potentially put the partnership's S-corporation status "at risk" and subject it to a tax problem in the future. The entity defendants argued that Enriquez's opinions were unsupported personal opinions, improper legal conclusions, and speculation. They argued that Enriquez's testimony was not evidence because (1) she relied solely on a line in SignAd, Ltd.'s accounts payable record describing the payments as "guardianship and trust issues," (2) the individual defendants were entitled to indemnity, and (3) Enriquez only speculated about a risk to SignAd, Ltd.'s S-corporation status. Enriquez testified that she relied not only on the accounts payable record but also on deposition testimony of SignAd, Ltd.'s controller as well as deposition testimony of Wes Jr. and Stacey, in concluding that $384,366 in company funds were used improperly to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark to investigate a guardianship over Lisa, for serving as trustees, or defending against Lisa's malicious prosecution claim (against Wes Jr., Lee, and Stacey) and defamation claims (against Wes Jr. and Mark), none of which were related to SignAd, Ltd.'s business. According to Enriquez, the controller testified that SignAd, Ltd. paid attorney's fees for those individuals in their capacity as individuals because the Special Litigation Committee (created over Lisa's objection) had provided Wes Jr. the right to decide to pay the fees. Enriquez also testified that SignAd, Ltd.'s accounts payable records corroborated other evidence indicating that the partnership paid legal fees incurred by the individual defendants in their individual capacities. The court concluded that there was some evidence supporting the jury's finding that SignAd, Ltd. paid $375,000 for personal legal fees unrelated to SignAd, Ltd.

The entity defendants also argued that Enriquez's testimony that the payment of attorney's fees was not allowed by SignAd's governing documents was an improper legal opinion based on assumed facts that varied materially from the actual facts. The court of appeals stated that the entity defendants inaccurately characterized Enriquez's testimony, in which the court stated that Enriquez agreed that the governing documents allowed for the payment of attorney's fees incurred with respect to claims against SignAd GP, LLC, SignAd, Ltd., and managers, officers, employees, and agents of these companies when acting in their official capacity.

The entity defendants argued that Wes Jr., Lee, Stacey, and Mark were entitled to recover their legal fees under both an express provision in SignAd GP, LLC's regulations allowing such expenditures and indemnity provisions in SignAd, Ltd.'s and SignAd GP, LLC's governing documents. Specifically, they argued that SignAd, GP, LLC amended its regulations in early 2014 to establish a Litigation Committee and passed a resolution allowing Wes Jr. and other officers to make legal expenditures they considered necessary. The court quoted the meeting minutes as stating that SignAd GP, LLC's Board of Managers authorized the creation of a Litigation Committee "to address the lawsuit filed by Lisa Horan against the company [SignAd GP, LLC]." The court said the resolution also reflected that the Litigation Committee was created for the "purpose of addressing all matters on behalf of [SignAd GP, LLC] and [SignAd, Ltd.] with regard to" Lisa's lawsuit. The court did not read this resolution as suggesting that payment of personal legal fees was approved for legal fees incurred by Wes Jr., Lee, Stacey, and Mark in their individual capacities.

The court also rejected the defendants' arguments that the indemnity provisions allowed payment of the individual defendants' legal fees. The court quoted the indemnity provision in the SignAd, Ltd. Partnership Agreement as stating that the "General Partner shall be indemnified and held harmless by the Partnership ... from and against any and all claims ... arising out of the General Partner's management of the Partnership affairs ...." including attorney's fees "incurred in settling or defending any claims, threatened action, or finally adjudicated legal proceedings." The term "General Partner" was defined as SignAd GP, LLC. Because Wes Jr. testified that SignAd, Ltd. was paying his, Lee's, Stacey's and Mark's legal fees with respect to Lisa's claims against them in their individual capacities, the legal fees at issue were incurred by them personally, and not by SignAd GP, LLC to settle or defend "any claims, threatened action, or finally adjudicated legal proceedings." SignAd GP, LLC's regulations similarly permitted indemnity for "[m]anagers, officers, employees, and agents" acting in their official capacities. Because Lee, Stacey, and Wes Jr. were not acting in their official capacity as an officer or manager of SignAd GP, LLC when they had Lisa involuntarily committed or pursued the possibility of establishing a guardianship over Lisa, they were not acting in their official capacities as a manager, officer, employee, or agent of SignAd GP, LLC when they allegedly defamed Lisa. The court noted in a footnote that the entity defendants also argued that the breach-of-fiduciary-duty issue should not have been submitted to the jury because of the limitation-of-liability provision in the Limited Partnership Agreement. The court stated that it concluded that "the issues set forth in Section 12.3 of the SignAd, Ltd. Partnership Agreement for gross negligence, bad faith, willful breach, and willful misconduct were properly pleaded and submitted to the jury who found in favor of Lisa in connection with her claim that Wes, Jr., Lee, and Stacey breached their duties to SignAd, Ltd." The court further stated that the entity defendants provided no elaboration or analysis for their argument that there was no evidence to support those findings of the jury, and the court stated that it was not the court's role to search the voluminous record of a four-to-five-week-long jury trial to support a party's appellate argument.

The entity defendants also argued that pleading deficiencies by Lisa precluded the submission of the jury questions associated with this breach-of-fiduciary-duty claim because Lisa did not adequately address the allegedly wrongful fee payments and never alleged that the individual defendants "knowingly participated" in any alleged breach. Because Texas follows a "fair notice" standard of pleading, the court rejected these arguments given the wrongful conduct she alleged.

The entity defendants argued there was insufficient evidence of damages because Enriquez's testimony that SignAd, Ltd. could be subject to potential tax penalties due to SignAd GP, LLC's alleged breach of its fiduciary duty was speculative and thus irrelevant. Enriquez explained her concern that the payment of personal legal fees by SignAd, Ltd. put SignAd, Ltd.'s S-corporation status at risk if the payments were found to be dividends that were disproportionately paid in violation of S-corporation requirements. The entity defendants argued that this was only a "theoretical possibility" because the Internal Revenue Service had not made any inquiries and no penalties had been assessed or paid. Lisa countered that the misapplication of funds of SignAd, Ltd. by paying personal legal fees of the individuals was a breach of fiduciary duty by the general partner in any event, and the court agreed. The court stated that "[w]hether or not SignAd GP, LLC's breach of its fiduciary duty risked SignAd, Ltd.'s status as an S-Corporation, the evidence established SignAd GP, LLC damaged SignAd, Ltd. because SignAd GP, LLC authorized the payment of legal fees incurred by Wes, Jr., Lee, Stacey, and Mark for matters unrelated to SignAd, Ltd." The court thus concluded that the jury's finding on damages was supported by the evidence.

The entity defendants also argued that the trial court's judgment improperly awarded money damages directly to Lisa under Section 153.405 of the TBOC (as in effect prior to September 1, 2019) on her derivative claim filed on behalf of SignAd, Ltd. (The Legislature significantly amended the provisions of Chapter 153 on derivative proceedings involving limited partnerships in 2019, but the pre-amendment provisions applied in this case.) The defendants argued that an individual stakeholder in a legal entity does not have the right to recover personally for harms done to the legal entity and that Section 153.405 did not authorize the direct distribution of damages recovered in a derivative claim brought on behalf of a limited partnership to a single limited partner. When the trial court entered judgment, Section 153.405 of the TBOC, entitled "Expenses of Plaintiff," stated: "If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff." The court held that the plain language of Section 153.405 only permitted Lisa to recover her "reasonable expenses, including reasonable attorney's fees" and that Lisa was not entitled to a direct distribution of the damages awarded for her derivative claim.

Lisa relied on *Beach Capital Partnership, L.P. v. DeepRock Venture Partners L.P.*, 442 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2014, no pet.) in arguing that the court had discretion under Section 153.405 of the TBOC to award a share of the recovered damages directly to a limited partner in proportion to her ownership interest in a derivative action brought on behalf of a closely held limited partnership, but the court found her reliance was misplaced. The court said that it held in that case that the trial court had not erred in awarding a portion of a derivative damage award directly to a limited partner under Section 153.405 because "the judgment dissolved Playa and ordered Playa's receiver to distribute all remaining assets to DeepRock." Because this part of the judgment was not challenged by the parties in that case, the court held that the direct award to DeepRock was "entirely consistent with a payment of $500,000 to Playa and its simultaneous distribution to Playa's partners," especially "in light of the unchallenged judgment that all of [the dissolved partnership's] remaining assets be distributed immediately to [the limited partner]." The court said that the holding in *Beach Capital Partnership* had no application in this case since SignAd, Ltd. had not been dissolved and the trial court did not direct a receiver to distribute the remaining assets of the partnership to the limited partners. Lisa thus was not entitled to a direct distribution of damages for the derivative claim she filed on behalf of SignAd, Ltd., and the court reversed the portion of the judgment awarding Lisa direct damages for the derivative claim she asserted on behalf of SignAd, Ltd.

The trial court awarded Lisa $1,844,347 in attorney's fees and expenses in connection with her three derivative claims to be paid by SignAd, Ltd. pursuant to Sections 101.461(b)(1) and 153.405 of the TBOC. The entity defendants argued that the trial court abused its discretion because the plain language of Section 153.405

authorizes an award of fees and expenses to the derivative plaintiff out of any proceeds recovered by the plaintiff rather than as a separate award of fees and expenses in addition to the damages awarded. The entity defendants also argued that Lisa was not entitled to recover her fees and expenses under Section 101.461(b)(1) because that section applies only to derivative claims brought on behalf of an LLC. The jury found for Lisa on three derivative claims, but the court reversed as two of them, and the only remaining derivative claim was Lisa's claim filed on behalf of SignAd, Ltd. for payment of personal legal fees. Thus, the court reversed the portion of the judgment awarding Lisa attorney's fees on the other two derivative claims.

As to the remaining derivative claim on behalf of SignAd, Ltd. based on payment of personal legal fees, the court agreed that Section 101.461(b)(1)(which states that "[o]n termination of a derivative proceeding, the court may order ... the limited liability company to pay expenses the plaintiff incurred in the proceeding if the court finds the proceeding has resulted in a substantial benefit to the limited liability company"), applies only to derivative proceedings initiated on behalf of LLCs. Thus, the court said the only basis for Lisa to recover attorney's fees for her remaining derivative claim was Section 153.405 of the TBOC. Section 153.405 as it was in effect at the time of this lawsuit (the derivative suit provisions of Chapter 153 having been amended in 2019) provided:

> If a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or claim constituting a part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff.

Tex. Bus. Orgs. Code § 153.405.

The court of appeals discussed case law in Texas and other jurisdictions and concluded that recovery of fees under Section 153.405 must come from the recovery obtained for the entity under the so-called "common fund" doctrine, and fees are not separately recoverable in addition to the recovery.

> In *CBIF Limited Partnership v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.), the Dallas Court of Appeals addressed whether Section 153.405 provides an independent basis for the award of attorney's fees. The court stated:
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> > Section 153.405 of the business organizations code does not provide an independent basis for an award of attorney's fees to the [plaintiff] as against [the defendants]. TEX. BUS. ORG. CODE ANN. § 153.405 (West 2012). Section 153.405 provides, "[i]f a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or a claim constituting part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff. *Id.* This statutory allocation of attorney's fees in derivative actions is analogous to the common-fund doctrine. *See, e.g., Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (the common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses); *see also Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied) (attorney's fees are allowed in shareholder derivative suits where it is shown the suit has conferred substantial benefits on the corporation and its shareholders).
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> *Id*. at *6 n.7. We have not found any other Texas cases directly addressing this issue.
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> Courts in other jurisdictions have addressed the issue with respect to similar statutes and reached differing conclusions. ... [The court discussed a Virginia case and a Nebraska case.]
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> We consider *Little* [a Virginia case] and *CBIF Limited Partnership* to be more persuasive and consistent with Texas jurisprudence. The Texas Supreme Court has adopted the common fund doctrine, an equitable exception to the American Rule which provides that each litigant must bear

> his own attorney's fees, absent a statutory or contractual basis for an award of attorney's fees. *See Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974); *see also Martin–Simon v. Womack*, 68 S.W.3d 793, 798 n.3 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("The Texas Supreme Court has adopted a 'common fund' equitable exception to the general rule prohibiting recovery of attorney's fees absent contractual agreement or statute."). Under the common fund doctrine, a trial court may award reasonable attorney's fees to a plaintiff "who at his own expense has maintained a suit which creates a fund benefitting other parties as well as himself." *City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (citing *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1881); Knebel, 518 S.W.2d at 799–801). Any attorney's fees or expenses awarded must be paid from the common fund. City of Dallas, 762 S.W.2d at 954 (citing Greenough, 105 U.S. at 532–37; Knebel, 518 S.W.2d at 799). This is consistent with the common fund doctrine's underlying principle namely "that those receiving the benefits of the suit should bear their fair share of the expenses." *City of Dallas*, 762 S.W.2d at 954 (citing *Greenough*, 105 U.S. at 532–37; *Knebel*, 518 S.W.2d at 799). Although the common fund doctrine is often applied in class actions, Texas courts have also analyzed the equitable doctrine in derivative claims brought on behalf of corporations. *See Bayliss v. Cernock*, 773 S.W.2d 384, 386–87 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (discussing requirements for application of common fund doctrine for derivative claim on behalf of corporation).
>
> Our holding is also consistent with the express language of Section 153.405 providing that "the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the *remainder of the proceeds* received by the plaintiff." TEX. BUS. ORG. CODE § 153.405 (emphasis added). This suggests that an award of expenses under Section 153.405 must be paid out of recovered proceeds. Had the Legislature intended for a derivative plaintiff to recover expenses as a separate award under Section 153.405 it could have stated so. It did not.
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> We thus hold that expenses and attorney's fees are not recoverable in addition to the damages awarded to the partnership under Section 153.405. Any award of "reasonable expenses, including reasonable attorney's fees" to Lisa under Section 153.405 must be paid out of the proceeds she recovered on behalf of SignAd, Ltd. [footnotes omitted]

The court thus reversed the award of attorney's fees for Lisa's derivative claim stemming from the improper payment of personal legal fees for Wes Jr., Stacey, Lee, and Mark and remanded for a new trial on the issue of attorney's fees and expenses with respect to this claim consistent with Section 153.405 and the court's opinion.

The entity defendants argued they were entitled to recover their attorney's fees under Section 101.461(b)(2) of the TBOC, which at the time of this lawsuit provided (and similarly provides under the current provision) that on termination of a derivative proceeding brought on behalf of an LLC, "the court may order ... the plaintiff to pay the expenses the ... limited liability company or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose." Tex. Bus. Orgs. Code § 101.461(b)(2).

The jury found for Lisa with respect to the sole derivative claim she asserted on behalf of an LLC, SignAd GP, LLC, and the trial court rendered judgment in her favor based on the jury's verdict, but the court of appeals in this opinion reversed based on Lisa's lack of standing to assert the derivative claim on behalf of SignAd GP, LLC. The court thus remanded to the trial court to determine whether SignAd GP, LLC was entitled to recover its expenses incurred in investigating and defending against Lisa's derivative claim under Section 101.461(b)(1) of the TBOC.

The entity defendants further argued that they were entitled to recover their attorney's fees under Section 153.404(e) of the TBOC because Lisa's derivative claims were not supportable. Under the version then in effect, Section 153.404(e) stated: "The court, on final judgment for a defendant and on a finding that [a derivative suit] was brought [on behalf of a limited partnership] without reasonable cause against the defendant, may require the plaintiff to pay reasonable expenses, including reasonable attorney's fees, to the defendant, regardless of whether security has been required." Tex. Bus. Orgs. Code § 153.404(e). Because Lisa prevailed on her derivative claim on behalf of SignAd, Ltd. asserting SignAd GP, LLC improperly directed SignAd, Ltd. to pay for the personal legal fees of Wes Jr., Lee, Stacey, and Mark, and the court of appeals affirmed as to this claim, the court of appeals held that SignAd GP, LLC was not entitled to attorney's fees under Section 153.404(e).

Condon v. Kadakia, 661 S.W.3d 443 (Tex. App.—Houston [14th Dist.] 2023, pet. filed).

Applying Delaware law, the court of appeals held that an LLC member's claims against the other member for breach of the company agreement, failure to disclose competitive ventures, possessing LLC property and assigning rights in the property, and breach of fiduciary duty were derivative, and the member asserting the claims failed to adequately allege demand futility by failing to allege particularized facts satisfying the requirements for demand futility.

Robert Condon ("Condon") and Alpesh Kadakia ("Alpesh") were the managers and voting members (each holding 45% of Class A voting membership interests while a third individual held the remaining 10% nonvoting Class B interest) of CKC Partners, LLC ("CKC"), a Delaware LLC formed to invest in startup opportunities. Condon sued Alpesh Kadakia ("Alpesh") directly and derivatively, claiming that Alpesh and others enriched themselves by breaching a royalty agreement between CKC and two entities in which Alpesh was also involved. Condon did not make a pre-litigation demand on the LLC, alleging that demand would have been futile. The defendants filed special exceptions on the basis that Condon's claims were derivative and that he failed to adequately plead demand futility as required to excuse demand under Delaware law. The trial court granted the special exceptions, and Condon appealed.

The court of appeals explained that Texas law provides (subject to certain exceptions not relevant in this case) that the provisions of the Texas Business Organizations Code on derivative suits in the right of a foreign LLC are governed by the laws of the jurisdiction of the foreign LLC. Tex. Bus. Orgs. Code § 101.462. The parties in this case agreed that Delaware's substantive law on derivative lawsuits controlled the analysis relating to Condon's derivative claims, including the issue of the sufficiency of Condon's pleadings regarding the demand requirements if Condon's claims were derivative. The parties disagreed, however, as to whether Condon asserted direct claims in addition to derivative claims. Thus, the court began by determining whether any of Condon's claims were direct rather than derivative in nature, and thus presumably subject only to Texas's fair notice pleading standard. Alpesh asserted that this question was governed by Delaware law as well. *See* Tex. Bus. Orgs. Code § 1.102 (law of the state where entity is formed governs the internal affairs of the entity). Condon did not dispute Alpesh's assertion that this question was governed by Delaware law, and the court accordingly applied Delaware law to determine whether Condon's claims were direct or derivative.

To determine whether a claim must be asserted derivatively under Delaware law, courts consider (1) whether the company or the members suffered the harm, and (2) whether the company or the members would receive the benefit of any recovery. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). The court analyzed Condon's claims against Alpesh for breach of the CKC company agreement and for breach of fiduciary duty and concluded that they were derivative. Condon alleged that Alpesh breached various provisions of the CKC company agreement by: (1) disclosing CKC's confidential information; (2) failing to disclose his competitive ventures with CKC; and (3) possessing CKC's property and assigning rights in that property. The court stated that all these claims were derivative because they derived from contractual duties that Alpesh allegedly owed (if at all) to CKC, not to Condon. Under the *Tooley* test, the alleged breaches of the CKC company agreement would harm CKC because it was CKC's confidential information, CKC's property, and Alpesh's duty of loyalty allegedly owed to CKC that were at issue. Any remedy for these breaches would accrue to CKC, and Condon could not demonstrate that any duty breached was owed to him or that he could prevail on any of these claims without showing an injury to CKC. Whether or not the company agreement entitled Condon to indemnification for the breach of the agreement by Alpesh, the court concluded that the claims were derivative. As for the claim for breach of fiduciary duty, applying *Tooley*, the court also concluded that the alleged duties were owed to CKC and any damages flowing from the alleged actions belonged to CKC. The claims were thus derivative.

Turning to whether Condon sufficiently pled demand futility, the court explained the demand requirement and futility exception under Delaware law. "For a member to divest the managers' authority and bring a derivative action on behalf of the company, the member must (1) make a demand on the company's decision-making body or (2) show that demand would be futile." The court described the development of Delaware case law on the futility exception and the judicial analysis required to determine whether a plaintiff has met the pleading burden to satisfy the demand futility exception. Under current Delaware case law in the context of this two-manager LLC, Condon could satisfy the pleading requirements of demand futility only if he alleged with factual particularity that Alpesh:

(1) received a material personal benefit from his alleged misconduct that is the subject of the litigation; (2) faces a substantial likelihood of liability on any of Condon's claims; or (3) lacks independence from someone who received a material personal benefit from the alleged misconduct or who faces a substantial likelihood of liability on any of Condon's claims. *See United Food & Commercial Workers Union & Participating Food Indus. Emp'rs Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034,1059 (Del. 2021). Condon focused his demand-futility argument only on the first *Zuckerberg* prong—that Alpesh received a material personal benefit from alleged self-dealing. The appellees agreed that *Zuckerberg's* first prong applies to allegations of manager self-dealing but disputed that Condon's pleading described self-dealing by Alpesh. According to the appellees, *Zuckerberg's* second prong applied because Condon complained of actions taken by Alpesh outside of his role as a CKC manager or member. The court declined to resolve this disagreement because Condon explicitly limited his argument to *Zuckerberg's* first prong. The court thus limited its analysis to whether Condon alleged with factual particularity that Alpesh received a material personal benefit from his alleged misconduct that is the subject of the litigation.

The court discussed at length the allegations in Condon's petition and the Delaware case law bearing on the first prong of the *Zuckerberg* test and concluded that the allegations did not satisfy the first *Zuckerberg* prong. The court stated that Condon's petition did not contain sufficient factual particularity describing how Alpesh personally benefitted from the alleged breach of the royalty agreement by receiving a salary from Manticore Fuels, LLC ("Manticore"), one of the entities that was a party to the royalty agreement. Condon emphasized that Alpesh received a salary of $500,000 from Manticore in 2019 and that Manticore ceased to pay monthly $15,000 management payments to CKA in 2019. The court stated that Condon failed to allege how Manticore's failure to pay a management fee from 2019 forward breached the royalty agreement, which did not impose on Manticore an obligation to pay for managerial services. Condon contended that by accepting a salary from Manticore, Alpesh personally benefitted by breaching his duty of loyalty. But the court stated that Manticore was entitled to have a president and to pay that president a salary, and Manticore was not competing with CKC. Thus, it was unclear from Condon's allegations how Manticore's payment of a salary to Alpesh constituted a personal benefit flowing from the alleged misconduct. Additionally, assuming that the salary received by Alpesh was a personal benefit resulting from the alleged misconduct, the court said that Condon did not plead any particularized facts showing that Alpesh's salary was "material" to Alpesh."Significantly, Condon does not allege that any personal benefit Alpesh has received from the alleged misconduct is of such subjective material significance to him—taking into account his overall economic circumstances—that it is reasonable to question whether he could have objectively considered a litigation demand by Condon." The court also noted that allegations that managers cannot be expected to sue themselves are insufficient to plead demand futility under Delaware case law.

Another category of alleged misconduct by Condon was the appellees' competitive activity against Manticore. Condon alleged that Alpesh's creation of a new entity ("CORE"), which essentially took Manticore's customers, violated Alpesh's duty of loyalty to CKC. The court stated that these allegations were too vague and conclusory to satisfy the factual particularity pleading requirement. The court distinguished Delaware case law (*Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, C.A. Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681 (Del. Ch. Nov. 12, 2009) and *Beneville v. York*, 769 A.2d 80 (Del. Ch. 2000)) relied upon by Condon to support his argument that these allegations satisfied his pleading burden. According to the court, "none of the details present in *Lola* or *Beneville* are present in today's case. Instead, Condon asserts in a conclusory manner that Alpesh's actions have reduced both the royalty payments that CKC was to receive from Manticore and the value of CKC's interest in Manticore, without providing any particularized facts showing what Manticore's royalty payments were or what its valuation was before Alpesh allegedly took these actions. In fact, he has not provided any details regarding the ownership interest, if any, that CKC allegedly had in Manticore. ... Delaware courts routinely reject a plaintiff's 'invitation to play inferential hopscotch' when considering whether the plaintiff has met the 'stringent requirements of factual particularity.'"

Finally, the court addressed Condon's contentions that Alpesh violated the CKC company agreement and his fiduciary duties by disclosing CKC's confidential information to two individuals involved in one of the entities that was a party to the royalty agreement with CKC and by assigning CKC's financial interest under the royalty agreement. With respect to this contention, the court stated that "[t]he petition, however, does not describe with any factual particularity the content of any alleged confidential information that was shared, when it was shared, to whom, and how Alpesh received a material personal benefit. The allegations are also conclusory as to Alpesh's supposed "assignment" of CKC rights. The petition contains no identification of any assignment executed by Alpesh."

According to the court, "Although Condon weaves a lengthy story of opportunities allegedly stolen from Manticore that had a rather nebulous impact on CKC and that he suggests benefited Alpesh, Condon simply has not pleaded the particular facts necessary to show that pre-suit demand would have been futile." Thus, the court held that Condon had failed to allege with factual particularity that Alpesh received a material personal benefit from the alleged misconduct and did not satisfy *Zuckerberg's* first prong. Thus, the court concluded that the trial court did not abuse its discretion by granting appellees' special exceptions and dismissing Condon's claims.

A dissenting justice discussed Delaware law as it bore on the issues in this case and argued that the majority conflated Delaware pleading standards of "particularized facts" and "materiality" as required in challenging director independence with the standards required to establish interested-director status (a director with a self-dealing conflict). In doing so, the dissenting justice asserted that the majority placed a burden not anticipated or required under applicable Delaware law. The dissenting justice would have held that the petition met the first prong of *Zuckerberg* based on alleged credible facts sufficient to support personal benefit from the alleged misconduct. Thus, in the view of the dissenting justice, Condon "plead with particularity sufficient factual allegations to support the proposition Appellees' business judgment, as related to the litigation demand, was compromised to the point that demand upon Appellee, Alpesh Kadakia was futile."

Texas REIT, LLC v. Mokaram-Latif West Loop, Ltd., No. 14-22-00014-CV, 2022 WL 17421518 (Tex. App.—Houston [14th Dist.] Dec. 6, 2022, pet. filed) (mem. op.).

The court of appeals affirmed the trial court's order confirming an arbitration award on derivative claims brought by a 15% owner of an LLC against the LLC's 65% owner/sole manager of the LLC and certain affiliates. The court found that arbitration clauses in loan documents between the LLC and its lender encompassed the claims and the parties and that the arbitrators' award of damages to the 15% owner directly did not exceed the power of the arbitrators because the LLC statute authorizes damages on derivative claims to be awarded directly to a member and such an award does not change the arbitrability of derivative claims.

The appellants, Texas REIT, LLC ("Texas REIT"), Ali Choudri, Dalio Holdings I, LLC ("Dalio I"), and Dalio Holdings II, LLC ("Dalio II") appealed the trial court's order confirming an arbitration award and denying their motion to vacate the award.

The court of appeals presented the facts as found by the arbitrators. Texas REIT was formed for the purpose of buying and selling real estate and executed a promissory note in favor of International Bank of Commerce in the amount of $8,640,000 (the "Note"). The Note was secured by a deed of trust on commercial property owned by Texas REIT (the "Deed of Trust"), and Ali Choudri signed a guaranty (the "Guaranty"). All three documents contained similar arbitration clauses, and because Choudhri signed the Guaranty he was individually subject to arbitration. Choudhri owned a 65% interest in Texas REIT and was the sole manager of Texas REIT. Mokaram's 30% interest was transferred via two different written agreements, each of which assigned a 15% interest in Texas REIT to Mokaram.

Ten years later, Dalio I acquired the Note and Deed of Trust for $6,334,189.88, the full amount due and owing under the Note at the time. Dalio I foreclosed on the property, and Choudhri admitted that he was the true owner of Dalio I and Dalio II (collectively, the Dalio Entities), and had installed his girlfriend as a "front" to hide his ownership in Dalio I. Mokaram asserted claims, individually, and on behalf of Texas REIT, alleging Choudhri, through the Dalio Entities and other entities, breached the Texas REIT agreement, wrongfully foreclosed on the property, conspired to wrongfully foreclose, and breached fiduciary duties owed to Texas REIT. Choudri and the Dalio Entities moved to compel arbitration, and the trial court ordered Mokaram's claims to arbitration. The arbitrators found that Choudri, through the Dalio Entities, conducted a wrongful foreclosure and breached fiduciary duties owed to Texas REIT. The arbitrators concluded that if they awarded damages to Texas REIT, Choudhri was "likely to take whatever steps he can, lawful or not, to deprive Mokaram of the benefits of his ownership interest in [Texas REIT], which means causing damage and harm to [Texas REIT]." The arbitrators concluded that Mokaram could recover individually on all claims including the derivative claims. The arbitrators also concluded that Mokaram was entitled to recover attorney's fees.

On appeal, the appellants challenged the trial court's confirmation of the arbitration award on several grounds, including that (1) the arbitration agreement did not include Mokaram as a party to the agreement; (2) the scope of the agreement did not include the claims asserted; (3) the arbitrators exceeded their authority; and (4) the arbitrators committed material errors of law.

After analyzing the arbitration clauses and concluding that the confirmation of the award was governed by the Federal Arbitration Act rather than the Texas Arbitration Act, the court rejected the appellants' contention that the arbitrators exceeded their authority because the arbitration agreements did not include Mokaram, the Dalio Entities, or the claims asserted. The court stated that the Dalio Entities waived any complaint that they were not bound by the agreement or that the claims were not arbitrable by moving to compel arbitration. As for Mokaram, the court stated that the appellants conceded that derivative claims on behalf of Texas REIT were arbitrable. The appellants asserted that Mokaram was not a "member" who could bring a derivative claim, but the court said that the issue of Mokaram's membership in Texas REIT was a matter of contract interpretation that was an issue for the arbitrators, and they decided that Mokaram owned a 30% interest in Texas REIT and was a member of Texas REIT.

The court also rejected the appellants' argument that the claims did not fall within the scope of arbitrable claims under the loan documents. The arbitration agreement provided that arbitrable disputes included "any and all controversies or claims between the parties of whatever type or manner." The court responded to the appellants' contention that Mokaram's disputes did not fall within the scope of the agreement because Mokaram was awarded damages directly rather than derivatively as follows:

> Appellants' argument that Mokaram's disputes did not fall within the scope of the agreement because he received damages directly rather than derivatively is based on a false premise. Acknowledging that the derivative claims were within the scope of the agreement, appellants contend that the arbitrators nevertheless exceeded their powers because the award required appellants to pay Mokaram directly, rather than awarding relief to Texas REIT.
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> The record reflects that Mokaram brought his claims derivatively on behalf of Texas REIT. The arbitrators concluded that Mokaram could recover individually on all claims including the derivative claims because they anticipated Choudhri, as manager of Texas REIT, would take steps to deprive Mokaram of the benefits of his ownership interest in Texas REIT and would damage Texas REIT in the process. Texas law allows such an award "if justice requires." Tex. Bus. Orgs. Code § 101.463 ("a recovery in a direct or derivative proceeding by a member may be paid directly to the plaintiff or to the limited liability company if necessary to protect the interests of creditors or other members of the limited liability company."). A court's decision to treat an action as a direct action so as to allow recovery to be paid directly to a shareholder plaintiff, as opposed to the corporation, does not mean that the action is no longer a derivative proceeding. *Sneed v. Webre*, 465 S.W.3d 169, 188 (Tex. 2015). Therefore, the arbitrators' award of damages directly to Mokaram did not change the arbitrability of the derivative claims. Mokaram's derivative claims fell within the scope of the arbitration agreement.

In re Neighbors Legacy Holdings, Inc., 645 B.R. 864 (Bankr. S.D. Tex. 2022).

The bankruptcy court (1) dismissed a derivative claim for breach of fiduciary duty on the ground that the plaintiff did not have standing to bring the claim and (2) upheld a derivative claim for breach of contract on the ground that the TBOC did not require the plaintiff to make a pre-suit demand.

In 2008, a group of emergency room doctors founded the Neighbors Health Network to operate freestanding emergency centers throughout Texas. That group included various officers and directors, including Dr. Paul Alleyne, Dr. Cyril Gillman, Dr. Michael Change, Dr. Andy Chang, Dr. Quang Henderson, Dr. Setul Patel, Dr. Hitesh Patel, and Dr. Dharmesh Patel (collectively, the "Neighbors O&Ds," who were officers and directors of Neighbors Health Systems, Inc. ("Neighbors Health")). In 2011, the Neighbors Network began expanding its operations at the direction of the Neighbors O&Ds. To facilitate this expansion, the Neighbors Network established a web of corporate entities to own and operate a Texas-wide network of freestanding emergency centers.

Generally, each freestanding emergency center was organized as a separate limited partnership. Neighbors GP, LLC acted as each emergency center's general partner and separate, emergency-center-specific limited liability companies acted as limited partners. The Neighbors O&Ds owned a portion of each emergency-center-specific LLC and outside investors owned the remaining interest in each specific entity. The Neighbors Network, acting at the direction of the Neighbors O&Ds, also established entities to provide management and administrative services to each freestanding emergency center. A series of written agreements enumerated the rights and duties that each entity had with respect to other Neighbors Network entities.

Dr. Samara Bowen and her husband, Jermaine Bowen, formed Infinity Emergency Management Group, LLC in mid-2014. The Bowens did so after two of the Neighbors O&Ds, Dr. Setul Patel and Dr. Alleyne, solicited the Bowens' investment in the Neighbors Network. Ultimately, the Bowens, along with other emergency physicians in the area, invested in two emergency-center specific LLCs: Series 114–Eastside, LLC and Series 115–Zaragoza, LLC (together, the "Series LLCs"). Infinity purchased a 65%, non-voting interest in each of the two Series LLCs. The brick-and-mortar emergency centers associated with the Series LLCs were NEC Eastside Emergency Center, LP and NEC Zaragoza Emergency Center, LP (together, the "Center LPs"). In line with the Neighbors Network's typical corporate structure, Neighbors GP held a 1% interest in the two LPs and NHS LLC held the remaining 99% interest. NHS LLC established the Series LLCs to operate the two Center LPs. Infinity, as a Series LLC owner, was charged with providing physicians to staff the two Center LPs. Neighbors Health (the manager of NHS LLC), through five subsidiaries, was responsible for the two Center LPs' "management and corporate functions."

Under the agreements that defined Infinity's relationship with the Neighbors Network, Infinity's investment entitled it to share in the two Center LPs' profits and losses. Essentially, the Center LPs would bill patients for services rendered, Center LP expenses would be deducted from that revenue, and the net proceeds would be transferred to NHS LLC. Once NHS LLC received the Center LPs' net profits, NHS LLC would allocate those profits to the appropriate Series LLCs. These profits were purportedly reserved for the Series LLC owners (including Infinity). Neighbors Health, through its managerial subsidiaries, was charged with ensuring that profits reserved for the Series LLC owners made it from the Center LPs to the Series LLCs.

Infinity alleged that the Neighbors O&Ds fraudulently induced Infinity into investing in the two Series LLCs and then failed to uphold the contractual and fiduciary duties owed to Infinity. Infinity also levied its allegations against Tensie Axton, the Trustee of the NLH Liquidating Trust, because the Liquidating Trustee was the "successor-in-interest to [Neighbors Health] and [NHS LLC]." Infinity asserted both direct and derivative claims based on its allegations. Its derivative claims were asserted on behalf of the two Series LLCs in which Infinity held ownership interests. Infinity's derivative claims included actions for breach of fiduciary duty against Neighbors Health and the Neighbors O&Ds for causing Series LLC property to be withheld from the Series LLCs, causing physicians' fees to be withheld from the Series LLCs' net profits calculation, and "causing confusion over the ownership of limited partnership interests" in the Center LPs. A derivative breach of contract claim was also asserted based on Neighbors Health's breach of its Management Agreement with the Series LLCs.

The Neighbors O&Ds filed motions to dismiss Infinity's complaint. The court began its analysis by considering Infinity's derivative claim for "Breach of Fiduciary Duty, Negligent and Gross Mismanagement, and Abuse of Control." The court concluded that the claim should be dismissed under Rule 12(b)(6) because Infinity lacked standing:

> Defendants base their standing arguments on Infinity's assertion of derivative claims that, according to Defendants, belong to debtor entities. Claims for corporate injuries must be brought, directly or derivatively, by the entity suffering the injury. Hence, an entity's shareholder or owner does not have direct standing to assert a claim based on an injury suffered by the entity itself. In bankruptcy, claims arising from injuries suffered by debtor entities belong to those debtors' estates. An estate's ownership of claims arising from direct harm to the debtor entity precludes shareholders from asserting derivative claims on the debtor entity's behalf.
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> Defendants argue that Infinity's derivative claims arise from harm suffered by the two Center LPs or NHS LLC, both debtor entities. But Infinity only has standing to assert derivative claims based on harm suffered by the two non-debtor Series LLCs. Infinity alleges that Neighbors Health and the Neighbors O&Ds breached their fiduciary and contractual duties to prudently manage the assets and business of the Series LLCs by: (1) causing the "Series Property" of the Series LLCs "to be withheld and not distributed to" the Series LLCs; (2) causing income generated by Infinity's physicians to be billed by Neighbors Health "but not included in the net profits calculation forming the basis of the Series Property"; and (3) "causing confusion over the ownership of limited partnership interests" of the Center LPs by filing misleading tax returns. These allegations can only sustain Infinity's fiduciary-breach-based derivative claim if the allegations identify "harm inflicted by the Series LLCs' managers on Series Property."
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> As it did before, Infinity's standing turns on the capacity in which Neighbors Health and the Neighbors O&Ds were acting when they allegedly engaged in wrongful conduct. Infinity's

allegations that Defendants withheld Series Property from the two Series LLCs unequivocally accuses Neighbors Health and the Neighbors O&Ds of wrongful conduct[] carried out as NHS LLC's managers, not the Series LLCs'. Under its Operating Agreement, NHS LLC, through its manager Neighbors Health, was charged with "allocat[ing] or attribut[ing] to [the Series LLCs] the profits, losses, distributions, and allocations associated with such [Center LP] interests." Following their allocation or attribution, the profits, once "determined or received," became the Series Property of the Series LLC to which the profits were allocated or attributed. Series Property allocated or attributed to a specific Series LLC "belong[ed] to that Series [LLC] for all purposes and to no other Series [LLC]." However, identifying the attributed or allocated profits as "Series Property" belonging to a specific Series LLC does not mean that such Series Property was within the Series LLC's control.

NHS LLC's Operating Agreement makes clear that NHS LLC could, at least temporarily, retain Series Property already attributed or allocated to a Series LLC. For instance, the Operating Agreement prohibits NHS LLC from "com[m]ingl[ing] the assets of one Series with the assets of any other Series." This prohibition implies that NHS LLC could simultaneously hold profits allocated or attributed to multiple series entities (i.e., the "Series Property" of multiple series entities). The Operating Agreement also distinguishes between Series Property that had simply been "allocate[d] or attribute[d]" and "belong[ed]" to a specific series entity and Series Property that was actually "held by" a specific series entity. This possessory distinction further cements NHS LLC's ability to retain Series Property even though such property belonged to a specific Series LLC. Finally, the Operating Agreement makes clear that Series Property retained by NHS LLC was "held by [NHS LLC] and [Neighbors Health] in trust for the benefit of the Series Members."

Against this backdrop, Infinity's allegation that Neighbors Health and the Neighbors O&Ds, in their managerial capacities, impeded distributions of Series Property to the Series LLCs identifies harm caused by mismanagement of NHS LLC. A claim for harm to NHS LLC caused by NHS LLC's managers belongs to NHS LLC—or, in this case, NHS LLC's estate. If, as Infinity alleges, Neighbors Health's and the Neighbors O&Ds' mismanagement of NHS LLC prevented the Series LLCs from receiving distributions to which they were entitled, it is entirely plausible that Defendants' mismanagement prevented other series entities from realizing their distributions. Allowing Infinity, through a derivative action, to prioritize its right to recover for Defendants' mismanagement over similarly situated creditors would subvert bankruptcy's established priority scheme. The Creditor Trustee, not Infinity, has standing to pursue claims based on Neighbors Health's and the Neighbors O&Ds' fiduciary breaches that caused NHS LLC to withhold profits from the Series LLCs.

Similarly, Infinity fails to plead its standing to assert a fiduciary breach claim based on Defendants' failure to include physician services fees billed by Neighbors Health in the Series LLCs' "net profits calculation forming the basis of the Series Property." NHS LLC's Operating Agreement unequivocally obligated NHS LLC to "allocate or attribute to [the Series LLCs] the profits, losses, distributions, and allocations associated with [the Center LPs]." These allocations made up the "basis" of the Series Property. Infinity's allegations identify negligence at the NHS LLC level, not at the Series LLC level, that caused deficiencies in the Series LLCs' net profits calculations. Consequently, NHS LLC (specifically, NHS LLC's estate) is the appropriate party to seek redress for Neighbors Health's and the Neighbors O&Ds' failure to properly allocate physician services fees among the Neighbors series entities.

Finally, Infinity's pleading insufficiently alleges standing to assert a derivative fiduciary breach claim based on confusion caused by Defendants' preparation of tax returns for certain Neighbors Network entities. Specifically, Infinity alleges that Defendants prepared tax returns erroneously indicating that the Series LLCs, rather than NHS LLC, held 99% limited partnership interests in the Center LPs. The Series LLCs', the Center LPs', and NHS LLC's Management Agreements charged Neighbors Health with the "supervis[ion] and manage[ment of] all accounting, including tax compliance and tax return preparation." Hence, Neighbors Health prepared tax returns for the Center LPs, the Series LLCs, and NHS LLC. However, Infinity's

> Complaint does not identify which entity's tax returns contained incorrect information about the Center LPs' ownership. To sustain its derivative claim, Infinity had to allege Neighbors Health (or the Neighbors O&Ds) incorrectly prepared the Series LLCs' tax returns while acting as the Series LLCs' manager. In contrast, Infinity could not sustain a derivative claim based on the NHS LLC's or the Center LPs' tax returns containing erroneous or confusing information, since NHS LLC and the Center LPs are debtor entities. Infinity fails to state a plausible derivative claim for relief based on erroneous tax returns.
>
> Infinity's derivative claim for "Breach of Fiduciary Duty, Negligent and Gross Mismanagement, and Abuse of Control" is dismissed under Rule 12(b)(6).

The court then proceeded to consider Infinity's derivative breach of contract claim. It first concluded that the Series LLCs were plausibly harmed by the failure of Neighbors Health to carry out its obligations to properly manage the Series LLCs' finances. Based on TBOC § 101.453, the court then rejected the argument that Infinity was required to make a pre-suit demand:

> Infinity's standing to pursue its derivative breach of contract claim depends on Infinity's exception from the general obligation to make a pre-suit demand on the Series LLCs. Section 101.453(a) of the Texas Business Organizations Code imposes this pre-suit demand requirement on shareholders seeking to assert derivative causes of action. TEX. BUS. ORGS. CODE. ANN. § 101.453(a) (West 2019). However, section 101.463(b) excuses members of closely held LLCs from compliance with section 101.453(a)'s demand requirement. § 101.463(a), (b). To avail itself of section 101.463(b)'s procedural benefits, Infinity had to assert its claims "against a governing person, member, or officer." § 101.463(b).
>
> The Neighbors O&Ds offer no argument establishing that Infinity cannot avail itself of section 101.463(b)'s procedural benefits. Nevertheless, section 101.463(b) offers procedural benefits only in actions asserted . . . "against a governing person, member, or officer." BUS. ORGS. § 101.463(b). Infinity no longer asserts its derivative contractual breach claim against a "governing person, member, or officer." Neither side offered authority addressing whether Defendants' change in status divested Infinity of derivative standing based on section 101.463(b).
>
> Unlike derivative standing itself, Texas's pre-suit demand requirement is not based on historical or equitable practices. The presuit "demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.'" By excusing members of closely held companies from the demand requirement, the Texas Legislature authorized members "to pursue corporate causes of action derivatively without interference from the board of directors."
>
> This relief from corporate interference extends to a member's continued prosecution of corporate causes of action following a change in management or installation of independent directors. Section 101.463(b) also relieves members of closely held LLCs from section 101.458, which requires the mandatory dismissal of a derivative action based on an independent director's assessment that the action's continuation is not in the LLC's "best interests." BUS. ORGS. § 101.458(a); *see also* § 101.454 (identifying "independent and disinterested governing persons" as the appropriate persons to assess a member's pre-suit demand). By making section 101.458(a) inapplicable, section 101.463(b) effectively removed an LLC's ability to derail a member's derivative action through the appointment of new management. Under section 101.463(b), once a closely held LLC's member initiates a derivative action (consistent with section 101.463), the LLC is effectively powerless to stop the action on standing grounds.
>
> If the Series LLCs wanted to prevent Infinity from initiating a derivative action, the Series LLCs should have initiated their own action against Neighbors Health. The Series LLCs did not, so Infinity initiated its own action against the Series LLCs' "governing person[s], member[s], or officer[s]." BUS. ORGS. § 101.463(b). Infinity had standing to assert its breach of contract claim without serving a pre-suit demand on the Series LLC[s]. BUS. ORGS. § 101.463(b). And section 101.463(b) protects Infinity's ability to continue its derivative breach of contract claim.

In re Mijares, Case No. 19-33121-HDH7, 2022 WL 2020344 (Bankr. N.D. Tex. June 1, 2022).

The bankruptcy court did not technically reach the issue of whether a manager and 50% member of an LLC owed a fiduciary duty to the other manager and 50% member. Nevertheless, it did make observations strongly suggesting that a fiduciary duty would be found and that a breach of fiduciary duty claim was properly raised in a direct action.

Plaintiff Jordan Pastorek, M.D. claimed that defendant Daniel Wilfred Mijares, M.D. defrauded him and breached fiduciary duties owed to him by charging improper, excessive, and unauthorized expenses to their medical practice (MD Request, PLLC), which caused Pastorek's distributions from the practice to be reduced during the roughly six years that they practiced medicine together. Pastorek and Mijares each owned 50% of the membership interests of MD Request, and each was appointed as a manager of MD Request in the company agreement. Pastorek sought a declaration that his claims for fraud and breach of fiduciary duty were nondischargeable pursuant to sections 523(a)(2)(A) and (a)(4) of the Bankruptcy Code.

Ultimately, the bankruptcy court did not reach the issue of whether Pastorek held a claim for breach of fiduciary duty against Mijares. Nevertheless, the court made the following observations with respect to the fiduciary duty claim:

> In addition to the claim for fraud, the Plaintiff also asserted a claim against the Defendant for breach of fiduciary duty. Under Texas law, to prevail on a breach of fiduciary duty claim, a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant, (2) that the defendant breached his fiduciary duty to the plaintiff, and (3) that the defendant's breach resulted in injury to the plaintiff or benefit to the defendant.
>
> It is not clear whether there was a fiduciary relationship directly between the Plaintiff and the Defendant. Courts generally hold that a managing member of a limited liability company does not necessarily owe fiduciary duties to other members. Although "the Texas statute governing limited liability companies implies that certain duties may be owed, it does not define any such duties, but rather allows the contracting parties to specify the breadth of those duties in the company agreement."
>
> Per the Company Agreement, both the Plaintiff and the Defendant served as Manager-Members. Article VIII of the Company Agreement provides various rights, duties, and powers of the Managers. Per this section, the Managers "shall have the full, sole, exclusive and complete discretion in the management and control of the business, operations and affairs of the Company; shall make all decisions that are necessary to carry out the business of the Company . . ." The same section goes on to require that "[a]ll decisions and actions by the Managers shall be made in the best interests of the Company." Thus, the Company Agreement makes it clear that the Defendant owed a fiduciary duty to MD Request but does not resolve the issue of whether the members owed fiduciary duties to each other because it neither disclaims nor expressly imposes such duties.
>
> Nevertheless, Texas law recognizes that an informal fiduciary relationship, "may arise where one person trusts in and relies upon another, whether the relationship is a moral, social, domestic, or purely personal one." The existence of a fiduciary duty is a fact-specific inquiry that takes into account the contract governing the relationship as well as the particularities of the relationships between the parties. Some courts have taken into account the "unequal" positions of power of members in a limited liability company, such as when one member exercises superior control over the company.
>
> Both parties testified during trial that the Defendant almost exclusively handled the finances for MD Request. The Defendant did the calculations and remitted payments to the Plaintiff. Through an established course of dealing for the better part of six years, the Plaintiff placed a special confidence in the Defendant to compensate the Plaintiff accurately and honestly for his revenue, which was to be measured as his monthly collections less his half of the shared expenses.
>
> Based on these facts, the Court believes there is a reasonable argument that the Defendant owed fiduciary duties directly to the Plaintiff, but the Court need not make that determination since

> the Court has already determined the Plaintiff has a claim for fraud, and the damages for breach of fiduciary duty would be the same as those previously identified for fraud.

In the course of its fiduciary duty analysis, the bankruptcy court also addressed the direct/derivative distinction. Even though "the Court [did] not reach the issue of whether the Plaintiff also holds a claim for breach of fiduciary duty against the Defendant," it strongly suggested that the claim was properly asserted as a direct action:

> The Defendant's argument that the Plaintiff lacks standing to bring the claims in the Complaint is a bit more complicated. The Defendant contends that the Plaintiff's allegations against the Defendant involve wrongs and injuries committed by the Defendant only against MD Request and that the Plaintiff sustained no direct injuries or damages from the Defendant's alleged misconduct. Therefore, the Defendant contends, any claims belong to MD Request, and the Plaintiff lacks standing to assert the claims or to object to their discharge in this lawsuit. The Court disagrees.
>
> While section 101.463 of the Texas Business Organizations Code allows courts to treat a derivative proceeding brought by a member of a closely held limited liability company as a direct action brought by the member for the member's own benefit if justice so requires—and the Court would find that justice so requires in this case—it is not necessary to do so because the claim in this case is a direct claim.
>
> The injury suffered by the Plaintiff was particular to him and not suffered by the other members, there being only one other member, who benefited from these transactions rather than suffered. In addition, the injury did not merely result in the depreciation of the value of the Plaintiff's interest in MD Request. Rather, the Defendant's actions directly affected the Plaintiff's regular distributions by altering their calculation, and the Plaintiff was the only one harmed.

P. Receivership

Gilbreath v. Horan, __ S.W.3d __, 2023 WL 3011614 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.).

In this lengthy opinion (approximately 75 pages plus an additional 25 pages of West headnotes), the court of appeals addressed dozens of issues raised by individuals and entities against whom a judgment had been entered in a dispute involving a family business. The plaintiff in the suit was a sibling of the individual defendants and an owner and/or governing person of the entity defendants. In the course of the contentious events leading up to the lawsuit, the plaintiff was involuntarily committed by her siblings and subsequently released upon a determination that she was "normal."

The plaintiff, who was a manager of the LLC general partners of numerous limited partnerships as well as trustee of a trust that was a limited partner in the limited partnerships, sued the limited partnerships, LLC general partners, and her siblings who were fellow managers of the LLC general partners and trustees of trusts that were limited partners. The plaintiff alleged claims based on violation of her right to access books and records of the entities, breach of fiduciary duty (direct and derivative), unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, statutory oppression, malicious prosecution, dissolution, and constructive trust. The defendants asserted counterclaims for equitable or judicial expulsion of the plaintiff from the limited partnerships. The trial court entered a judgment in favor of the plaintiff for actual and punitive damages as well as declaratory and injunctive relief on a number of her claims.

On appeal, the court of appeals: (1) held that the plaintiff lacked standing to bring her derivative claim on behalf of an LLC general partner because she lacked an ownership interest in the LLC; (2) found sufficient evidence to support a judgment for actual and exemplary damages against several of the plaintiff's siblings for malicious prosecution of (and conspiracy to maliciously prosecute) the plaintiff based on their actions in having the plaintiff involuntarily committed; (3) sustained a challenge to the award of damages for mental anguish in favor of the plaintiff on her defamation claim; (4) held that one of the plaintiff's siblings did not exercise sufficient control over an LLC general partner to owe a fiduciary duty to the limited partnership and thus reversed the judgment against that sibling on the plaintiff's derivative claim for breach of fiduciary duty; (5) overruled a challenge by one of the plaintiff's siblings to the portions of the judgment based on the jury's finding that he breached an informal fiduciary duty to the plaintiff; (6) overruled a challenge to the judgment in favor of the plaintiff on her books and records claims, holding that the plaintiff was entitled to declaratory relief and that exculpation clauses in the limited partnership agreements did not preclude findings of wrongdoing on the part of the general partners; (7) held that there was sufficient evidence supporting the jury's findings of breach of fiduciary duty and damages on a derivative claim of the plaintiff on behalf of one of the limited partnerships based on the partnership's payment of personal legal fees of the plaintiff's siblings but held that the plaintiff was not entitled to recover directly a pro rata portion of the damages on the derivative claim; (8) concluded that the plaintiff did not establish statutory oppression on the part of her siblings and reversed the appointment of a rehabilitative receiver; (9) held that portions of a permanent injunction granted in favor of the plaintiff against the general partners, limited partnerships, and individual defendants were overly broad and vague and prohibited lawful conduct; (10) remanded for additional consideration of the defendants' request for expulsion of the plaintiff from the limited partnerships; (11) remanded for a new trial on the award of attorney's fees under various statutory provisions of the Business Organizations Code relating to books-and-records claims and derivative claims.

In 1964, Wesley Gilbreath, Sr. ("Wes Sr."), the patriarch of the Gilbreath family, founded an advertising company focused on constructing, owning, and leasing billboards throughout Texas and parts of Louisiana. The company was originally a sole proprietorship and was later incorporated as SignAd, Inc., and then converted in 2000 into a limited partnership known as SignAd, Ltd. At the time of this conversion, SignAd GP, LLC, a Texas LLC, was formed to act as the general partner of SignAd, Ltd.

Over the years, Wes Sr. transferred his original ownership interests in the business in equal parts to his children—Lisa Gilbreath Horan ("Lisa"), Wesley Gilbreath, Jr. ("Wes Jr."), Elliott Gilbreath ("Lee"), Stacey Gilbreath Powell ("Stacey"), and Brett Gilbreath ("Brett")—through similar irrevocable trusts. Although Wes Sr. also initially transferred an equal interest in the business to his daughter Sheree, he repurchased Sheree's interest and placed the proceeds in a trust for her benefit after she was diagnosed with paranoid schizophrenia in her twenties. Wes Sr. then sold that interest to a separate trust he established for the benefit of his grandchildren ("Grandchildren's Trust"). Wes Jr., Lee, Brett, and Mark Ritter ("Mark") served as trustees of the Grandchildren's Trust.

At the time of the suit, the Gilbreath family business consisted of nine Texas limited partnerships (the "Limited Partnerships"), each with a general partner organized as a Texas LLC (the "General Partners"). The General Partners were managed by their respective Boards of Managers consisting of Wes Jr., Lee, Lisa, and Stacey, each serving a lifetime appointment. The parties referred to the Limited Partnerships and General Partners collectively in their briefs as "SignAd Outdoor," and the court sometimes referred to the entities together as "SignAd Outdoor" for purposes of its opinion.

The Grandchildren's Trust, along with Lisa and her siblings, as trustees of their respective irrevocable trusts, comprised the limited partners in the Limited Partnerships, with each owning an equal one-sixth interest in the partnerships. The Limited Partnerships were all S-corporations for federal tax purposes, and SignAd, Ltd. distributed profits to the limited partners in equal shares each year in an amount determined in advance by SignAd GP, LLC's Board of Managers.

Wes Jr. started helping his father at SignAd, Inc. when he was as a child and returned to the family business after attending college. In the 1980s, by the age of 25, he was the president of the company, and he became the President of SignAd GP, LLC in 2000, when that entity was created. Other siblings also served as corporate officers for the entity defendants. Unfortunately, the siblings did not always work well together. Wes Jr. and Brett had a contentious relationship, and Brett was eventually fired and locked out by Wes Jr. and subsequently resigned from the Boards of the General Partners. After Wes Sr.'s health deteriorated, he resigned from SignAd GP, LLC's Board, and his departure had a negative effect on Lisa's voice in the business because she and Brett usually voted with Wes Sr.

Tensions escalated among the siblings after Wes Sr. died, and Lisa accused her siblings of breaching their fiduciary duties. Demands and accusations were exchanged among the siblings, and acrimony increased as a March 2013 Board meeting approached at which Lisa proposed that numerous issues and concerns be discussed. Lisa hired a police officer (Officer Stevens) to attend the Board meeting with her. The Board meeting was very contentious, and Lisa's siblings testified to having concerns about Lisa's behavior due to a history of mental illness in the family (Lisa's mother and sister Sheree). A few days after the Board meeting, Wes Jr., with the blessing of Lee and Stacey, filed an application for temporary mental health services in which Wes swore that Lisa was mentally ill, likely to cause serious physical harm to herself and others, suffered from abnormal mental, emotional, or physical distress, and presented a substantial risk of serious physical harm if not immediately restrained. Although Wes Jr. testified that Officer Stevens represented to him that she had expertise in mental health issues, that Lisa was mentally ill, and that Wes Jr. and his siblings should "take precautions," Officer Stevens denied saying that she had a background or expertise in mental health or that her comments could have been reasonably understood as a warning about potential security for Wes Jr. and others at the business.

Based on Wes Jr.'s commitment application, the probate court issued an emergency warrant, and Lisa was taken into custody and brought to the Harris County Psychiatric Hospital for an involuntary psychiatric evaluation. Although an examining doctor initially signed a certificate diagnosing Lisa as mentally ill and a danger to herself and others, Lisa was released from the hospital the next day with no restrictions, and the multidisciplinary discharge document specified that she was "normal," that her condition had not changed since the previous day when she was admitted, and that she had been admitted due to a family dispute, possibly inappropriately.

The day Lisa was discharged, she hired lawyers and a forensic accountant (Sheila Enriquez) to conduct a forensic audit of SignAd, Ltd. and numerous related entities. Lisa was concerned about personal expenses being run through the company, excessive charges to company credit cards, and significant giveaways of billboard space. Enriquez identified the records she needed to conduct her audit and worked with Lisa and her lawyers, who made the requests for the accounting documents. Lisa's requests for information, like previous requests, were resisted by Wes Jr. and the entities. The parties entered into a confidentiality agreement and SignAd Outdoor eventually began producing information to Lisa's attorneys in June 2013. Wes Jr. testified that Lisa violated the confidentiality agreement. In December 2013, Lisa sued her siblings, the Limited Partnerships, the General Partners, and others asserting claims based on violation of her right to access and copy the books and records of the business, unjust enrichment, defamation, false imprisonment, conspiracy, breach of contract, declaratory judgment, breach of fiduciary duty (both direct and derivative), statutory oppression, malicious prosecution, dissolution, and constructive trust. The individual and entity defendants asserted counterclaims against Lisa, including claims for equitable or judicial expulsion of Lisa's interest from the Limited Partnerships.

The jury returned a unanimous verdict finding that (1) Wes Jr. had maliciously prosecuted the involuntary commitment proceeding against Lisa; (2) Lee and Stacey had conspired in the malicious prosecution of Lisa; (3) Wes Jr. and Mark had defamed Lisa; (4) Wes Jr. had breached his fiduciary duties to SignAd, Ltd.; (5) SignAd GP, LLC, Wes Jr., Lee, Stacey, and Mark had breached their fiduciary duties to SignAd, Ltd.; (6) Wes Jr., Lee, and Stacey had breached their fiduciary duties to SignAd GP, LLC; (7) the General Partners had improperly denied Lisa access to the books and records of the company; (8) the governing persons of the Limited Partnerships and two of the General Partners had engaged in oppressive conduct; (9) Brett, Lee, and Mark were in a relationship of trust and confidence with Lisa; (10) Lee had breached his fiduciary duties to Lisa; (11) Lisa had engaged in conduct relating to the partnership business of the Limited Partnerships "that [made] it not reasonably practicable to carry on the business in partnership" with her; and (12) Wes Jr., Stacey, Lee, SignAd GP, LLC, and other General Partners had not engaged in such conduct. The jury awarded Lisa actual damages on her claims for malicious prosecution, defamation, and breach of fiduciary duty as well as punitive damages on her claims for malicious prosecution and defamation. The parties tried all issues relating to attorney's fees to the bench through written submissions. The trial court entered a final judgment based on the jury verdict and its own findings on attorney's fees and in equity. The trial court reduced the punitive damage award against Wes Jr. for malicious prosecution to comply with the applicable statutory cap but otherwise awarded judgment in favor of Lisa for the actual and punitive damages found by the jury on the malicious prosecution claim. The final judgment also awarded Lisa declaratory relief, injunctive relief, the appointment of a rehabilitative receiver, and attorney's fees.

The individual defendants and entity defendants asserted many issues on appeal. The court of appeals affirmed in part, reversed and rendered in part, and reversed and remanded in part.

On appeal, the entity defendants raised numerous challenges to the jury's finding of oppression. After a lengthy discussion of the current state of Texas law regarding oppression and the evidence in this case, the court sustained the entity defendants' challenge to the sufficiency of the evidence to support the jury's finding of oppression.

The court began its discussion by pointing out that Section 11.404 of the Texas Business Organizations Code (TBOC) authorizes a Texas court to appoint a receiver to rehabilitate a domestic entity under certain circumstances, including when it is established in an action brought by an owner or member of the entity "that ... the actions of the governing persons of the entity are illegal, oppressive, or fraudulent." Tex. Bus. Orgs. Code § 11.404(a)(1)(C). The term "oppressive" is not defined in the statute, and the Texas Supreme Court, in *Ritchie v.*

Rupe, 443 S.W.3d 856 (Tex. 2014), has pronounced that an entity's directors or managers engage in oppressive action "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]." The Texas Supreme Court said that the Legislature signaled that the term "oppressive" should be construed to include acts that are as serious as illegal or fraudulent acts.

The court acknowledged that it is within the jury's province to determine whether certain acts occurred, but the court stated that it was not obligated to give deference to the trial court's conclusion that such acts constituted oppression, which is a question of law for the court.

The question of oppression was presented to the jury by posing the following question for each of the nine Limited Partnerships as well as two of the General Partners: "Do you find that the actions of the governing persons of the entities listed below were oppressive?" The jury was instructed that:

> An entity's directors or managers engage in oppressive actions when they abuse their authority over the entity with the intent to harm the interests of one or more of the partners or member[s], in a manner that does not comport with the honest exercise of their business judgment, and by doing so they create a serious risk of harm to the entity.
> Oppressive actions include acts that have the following characteristics:
> • They are severe and create exigent circumstances;
> • They involve an unjust exercise or abuse of power that harms the rights or interests of persons subject to the governing persons' authority and disserves the purpose for which the power is authorized; and
> • They are inconsistent with the governing person's duty to exercise their honest business judgment for the benefit of the entities.

The jury answered "yes" to this question for all nine of the Limited Partnerships as well as for the two indicated General Partners. The trial court granted injunctive relief and appointed a rehabilitative receiver based in part on the jury's findings of oppression.

The jury question defined the term "governing person" as follows: "A person is a governing person of an entity if he is the person or is among the group of persons who are entitled to manage and direct the affairs of an entity. An officer is not a governing person." The question did not identify any individual by name, and the jury was not asked to respond as to any named individual. Because Lisa fell within the definition of a "governing person" as a member of the Board of Managers, the court acknowledged that the jury's finding of oppression could have been based on Lisa's own conduct (consistent with the jury's finding pursuant to another question that Lisa engaged in conduct relating to the partnership business of each of the nine Limited Partnerships that made "it not reasonably practicable to carry on the business in partnership with [her]," especially given that the jury found that Wes Jr., Lee, Stacey, SignAd GP, LLC, and the other General Partners had not engaged in such conduct). However, the court said that the fact that the oppression finding could have been based on Lisa's own conduct, did not mean that the jury's findings of oppression should be disregarded.

Lisa argued that Wes Jr., Lee, and Stacey, as a controlling majority abused their power to marginalize her by withholding information, refusing her requests for more transparency, and effectively excluding her from the family business. After years of stonewalling Lisa on her requests for additional financial information, Lisa had to resort to hiring a lawyer and eventually litigation to obtain information necessary to conduct a forensic audit. When the requested information was finally provided, Lisa claimed it revealed irregularities, improper use of company funds, and accounting deficiencies that threatened the S-corporation status of SignAd, Ltd. Lisa also pointed to the highly contentious March 2013 board meeting at which her siblings took actions that effectively excluded Lisa from management or, at a minimum, greatly diminished her role. Lisa further pointed to the action taken to involuntarily commit her to a mental hospital. According to Lisa, the sum of these actions were sufficient evidence to establish "abuse of power by Wes, Jr., Lee and Stacey as control persons of the SignAd entities that harmed both Lisa and the company, created exigent circumstances, and were completely inconsistent with the honest exercise of business judgment."

The court stated that Lisa cited no authority to support her argument that the alleged conduct constituted oppression as a matter of law. The entity defendants responded that the alleged actions did not constitute oppression because as a limited partner, Lisa was not allowed to take part in the management of the partnership and that the Board on which she served acts by majority vote. The defendants argued that outvoting Lisa on her request for audits, not appointing her to the Executive Committee, and reducing the frequency of Board meetings was not oppression. Finally, the entity defendants argued that once Lisa received the financial information she requested, she did not find evidence of fraud, but only "hypothetical potential tax penalties unlikely to ever be assessed." More significantly, they argued that none of the findings described any "act taken directly against Lisa, as is required for 'oppressive conduct.'"

The court agreed with the defendants that the conduct Lisa described did not amount to oppression as a matter of law.

> While the sum of Lisa's complained-of conduct certainly impacted Lisa negatively, and some of the conduct was found by the jury to be improper, such as the failure to provide Lisa with the financial records to which she was entitled, we cannot say that Wes, Jr., Lee, or Stacey abused their authority over any of the Company Appellants by engaging in such conduct in a manner that did not comport with the honest exercise of their business judgment thereby creating a serious risk of harm to the business. *See Ritchie*, 443 S.W.3d at 871 (holding directors or managers engage in oppressive actions "when they abuse their authority over the [entity] with the intent to harm the interests of one or more of the [partners or members], in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the [entity]").
>
> Lisa points to the fact that once she received the Company Appellants' financial information, her accountant, Enriquez, discovered evidence of self-dealing transactions by Wes, Jr., such as failures to maintain internal controls, improper use of company funds and assets, and accounting deficiencies Enriquez believed could result in substantial IRS penalties and the loss of SignAd, Ltd.'s S-Corporation status. The jury found that Wes, Jr. breached his fiduciary duties to SignAd, Ltd. in self-dealing transactions with ProIce which caused a loss of $750 for the fair market value of services provided to ProIce in the past, plus $300 per month for the value of services that, in reasonable probability, will be provided to ProIce in the future. The jury also found that Wes, Jr., Lee, and Stacey breached their fiduciary duties to SignAd GP, LLC, causing a loss of $461,193 for "lack of internal controls regarding fringe benefits," and $40,000 for selling company vehicles for less than fair market value. And the jury found that SignAd GP, LLC breached its fiduciary duties to SignAd, Ltd. by causing SignAd, Ltd. to pay $375,000 in non-business-related legal fees for Wes, Jr., Lee, Mark, and Stacey. The jury further found that Wes, Jr., Lee, Stacey, and Mark knowingly participated in SignAd GP, LLC's breach of fiduciary duty and assigned a percentage of responsibility to each.
>
> Even if wrongful and detrimental to Lisa, we cannot, on the record before us, conclude that the alleged actions "created a serious risk of harm" to the entities or were "severe and create[d] exigent circumstances" for the Company Appellants as to constitute oppression. *See Ritchie*, 443 S.W.3d at 867, 870–71 (defining what constitutes oppression and further holding that to qualify as type of "oppressive" conduct that justifies appointment of receiver, purported conduct must "create exigent circumstances for the corporation"). While there is some evidence to support the alleged conduct on which Lisa relies, the conduct itself does not constitute oppression as a matter of law. *See id.* at 870–71 (defining oppression and holding that directors' refusal to meet with minority shareholder's potential buyers did not constitute oppression); *see also Argo Data Res. Corp.*, 380 S.W.3d at 265 (stating courts must exercise caution in determining what actions constitute oppressive conduct). [footnotes omitted]

The court thus sustained the entity defendants' challenge to the sufficiency of the evidence supporting the jury's affirmative finding of oppression.

Having reversed as to the finding of oppression, the court addressed whether there were nevertheless grounds to support the trial court's appointment of a rehabilitative receiver. The trial court appointed a rehabilitative receiver "to oversee the equitable buyout of Lisa Horan, Trustee's interests in the Limited Partnerships and General Partners in which she holds an interest," finding that such appointment "would avoid further damage to Lisa ... and conserve the property and business of the entities." The trial court appointed the rehabilitative receiver based on the jury's finding that (1) Lee breached his fiduciary duty to Lisa, and (2) nine of the Limited Partnerships and two General Partners engaged in oppression.

The court explained the nature and purpose of a receiver and noted that appointment of a receiver is a "harsh, drastic, and extraordinary remedy" that should be exercised "cautiously" and only if there is no other lesser legal or equitable remedy. The court set forth the provisions of Section 11.404 of the TBOC, under which a court may appoint a receiver for an entity's property and business if it is established in an action by an owner that any of several grounds exist, including that "the actions of the governing persons of the entity are illegal, oppressive, or fraudulent " or "the property of the entity is being misapplied or wasted." Even in such cases, the court must also determine "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(a), (b).

As discussed above, the court held that there was no evidence to support the jury's finding of oppression, which the court said was "particularly significant because the only remedy for oppression is the appointment of a rehabilitative receiver." *See Ritchie*, 443 S.W.3d at 877. Lisa contended that a receivership was nevertheless appropriate based on the jury's findings that (1) Wes Jr. misused billboard space for his side business ProIce, (2) SignAd GP, LLC misused SignAd, Ltd.'s funds to pay for personal legal fees, and (3) SignAd GP, LLC breached its fiduciary duty to SignAd, Ltd. because it failed to maintain internal controls on fringe benefits and sold company vehicles below market value. However, the court pointed out that it was reversing as to the claims in nos. (1) and (3), and the trial court did not base its appointment of a receiver on any of those three causes of action. The trial court appointed a receiver based on only two grounds: (1) "the governing persons of the General Partners and the Limited Partnerships engaged in oppressive conduct," and (2) Lee breached his informal fiduciary duty to Lisa. Because the court reversed as to the finding of oppression, the only remaining basis to support the trial court's appointment of a rehabilitative receiver was the jury's finding that Lee breached his informal fiduciary duty to Lisa, and the court found no authority that such a breach of fiduciary duty authorizes a trial court, without more, to appoint a rehabilitative receiver. Because there are several remedies available for a breach of fiduciary duty, and Lisa already obtained injunctive relief based in part on Lee's breach of fiduciary duty, the court concluded that a receiver was not warranted.

1st & Trinity Super Majority, LLC v. Milligan, 657 S.W.3d 349 (Tex. App.—El Paso 2022, no pet. h.).

The court of appeals rejected a breach of fiduciary duty claim against a court-appointed receiver of two limited partnerships on the ground that the receiver was entitled to immunity. Claims against the receiver for conversion and breach of contract were also rejected.

Nate Paul was a real estate investor who did business through a network of entities which used "World Class" or "WC" in their names. One such entity was the "World Class Capital Group," but he also owned and controlled two other entities, known as "WC 1st and Trinity, LP" and "WC 3rd and Congress, LP" (collectively, the Limited Partnerships). These two limited partnerships each owned properties in downtown Austin at the locations suggested by their names: "WC 1st and Trinity, LP" owned property at the corner of First and Trinity Streets, and "WC 3rd and Congress, LP" owned property at the corner of Third Street and Congress Avenue.

The Limited Partnerships designated the World Class Capital Group as their limited partner and named the general partners and the majority interest holders as two limited liability companies with almost the same name as the partnerships themselves: "WC 1st and Trinity GP, LLC" and "WC 3rd and Congress GP, LLC" (collectively, the World Class General Partners). Nate Paul also owned and controlled these two entities. In accordance with the limited partnership agreements, each general partner owned a controlling interest in its respective limited partnership and had sole authority to manage the respective limited partnership's affairs.

In 2011, Appellee, the Roy F. & Joann Cole Mitte Foundation (Mitte), a nonprofit organization that provided community grants and scholarships, invested a portion of its endowment with the Limited Partnerships. It acquired approximately 16% of the Trinity Limited Partnership and approximately 6% of the Congress Limited Partnership. Mitte signed agreements in which it acknowledged that the World Class General Partners would retain the sole authority to manage the partnerships.

A dispute between Mitte and the several World Class entities began in 2018 when the World Class General Partners allegedly refused Mitte's request to review financial information about the Limited Partnerships. Mitte sued in the 126th District Court of Travis County, naming as defendants the World Class General Partners and the Limited Partnerships (collectively, the World Class Entities).

Mitte eventually petitioned the court to appoint a receiver over the Limited Partnerships and the partnership properties under section 64.001 of the Civil Practice and Remedies Code. The court issued an order appointing Gregory Milligan as receiver over the Limited Partnerships and all of their properties (the Appointment Order). The Appointment Order not only granted Milligan all powers to control the Limited Partnerships' assets, but also granted Milligan the same authority to manage the Limited Partnerships that the general partners themselves possessed under the respective partnership agreements. (In an earlier opinion, the court of appeals also expressly affirmed the broad authority that the district court's receivership order gave to Milligan. The court of appeals recognized that the order gave Milligan full authority to manage not only the properties at issue, but also to control the affairs of the Limited Partnerships.)

On April 21, 2020, Nate Paul created two Delaware corporate entities, which were the Appellants in this case: "1st and Trinity Super Majority, LLC" and "3rd and Congress Super Majority, LLC" (collectively, the Super Majority Entities). Also on April 21, the World Class General Partners transferred their interest in the Limited Partnerships to the Super Majority Entities. Nate Paul executed the documents on behalf of both transferor and transferee.

On July 8, 2020, the Super Majority Entities filed their original petition in the current proceeding, in which they sought a declaratory judgment over the lawfulness of the Appointment Order and further requested a declaration on the scope of Milligan's authority. The suit also alleged, among other claims, that Milligan (1) breached fiduciary duties owed to the Super Majority Entities; (2) converted assets to his own use or the use of Mitte; and (3) breached the original limited partnership agreements. The trial court dismissed the lawsuit and the Super Majority Entities appealed.

With respect to the breach of fiduciary duty claim, the Super Majority Entities contended that Milligan, as receiver, owed them a fiduciary duty to act in their best interest while serving as the receiver over the Limited Partnerships. They alleged that Milligan breached this duty by "(i) holding himself out as having the ability to control the affairs of the Limited Partnerships; (ii) supporting a clandestine effort by Mitte to purchase a loan securing one of the properties in order to manufacture a sham default and move precipitously to foreclose; (iii) conspiring to loot the Limited Partnerships of valuable assets; (iv) interfering with the Limited Partnerships' other business relationships; and (v) otherwise encumbering the Limited Partnerships with unnecessary litigation, expenses, and other obligations, including this lawsuit."

In addressing the fiduciary duty claim, the court of appeals began by observing that court-appointed receivers are generally entitled to immunity:

> Certain court-appointees, including court-appointed receivers who act as agents of the court, are generally entitled to quasi-judicial immunity (also known as derived judicial immunity) for actions taken in the course and scope of performing their duties. *See, e.g., Wilkinson v. USAA Fed. Sav. Bank Tr. Services*, No. 14-13-00111-CV, 2014 WL 3002400, at *9 (Tex.App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op) (a court-appointed receiver acting within the scope of his authority is entitled to derived judicial immunity); *Davis*, 317 S.W.3d at 307 (recognizing that a court-appointed receiver acts as an arm of the court and is therefore immune from liability for actions grounded in his conduct as receiver), *citing Rehabworks, LLC v. Flanagan*, No. 03-07-00552-CV, 2009 WL 483207 (Tex.App.—Austin Feb. 26, 2009, pet. denied) (mem. op.); *see generally Hawkins v. Walvoord*, 25 S.W.3d 882, 891 (Tex.App.--El Paso 2000, pet. denied) (recognizing that in Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as court-appointed receivers and trustees). In effect, this immunity derives from the absolute immunity to which judges are entitled when they act in their official judicial capacity, which serves to protect the interest of the judge as well as the public's interest in an independent judiciary. So when a judge appoints an individual to perform services for the court, the same absolute immunity attaches to the appointee as well. As our sister court has recognized, the policy underlying derived judicial immunity "guarantee[s] an independent, disinterested decision-making process" and "prevent[s] the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion." *Alpert v. Gerstner*, 232 S.W.3d 117, 125-26 (Tex.App.—Houston [1st Dist.] 2006, pet. denied).

> It is also generally recognized that a court-appointed receiver is entitled to immunity from civil claims, including claims for breach of fiduciary duty, poor performance of duties, and wrongful, dishonest, or even fraudulent conduct in performance. *See Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at *4-5 (Tex.App.—Fort Worth June 9, 2016, no pet.) (mem. op.) (receiver who was given broad authority to take control of the parties' property in a divorce proceeding had derived judicial immunity where wife sued him for breach of fiduciary duty, fraud, negligence, and gross negligence in performing his duties), *citing Ramirez v. Burnside & Rishebarger, LLC*, No. 04-04-00160-CV, 2005 WL 1812595, at *2 (Tex.App.—San Antonio Aug. 3, 2005, no pet.) (mem. op.) (receiver was entitled to derived judicial immunity from plaintiff's claim that he made false representations while performing his duties); *see also Wilkinson*, 2014 WL 3002400, at *8 (receiver was entitled to derived judicial immunity where plaintiff alleged claims for defamation, fraud, breach of fiduciary duty, and DTPA violations that he allegedly committed while performing his duties); *Davis*, 317 S.W.3d at 307 (once a court appointee is "cloaked" with derived judicial immunity, every action he takes in performing his assigned duties—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit).

The Super Majority Entities argued, however, that their pleadings left open the question of whether Milligan was in fact acting within the scope of his assigned duties in conducting the affairs of the Limited Partnerships, which in turn raised a question of whether he lost his entitlement to derived judicial immunity. According to the court, a receiver may lose immunity while committing acts without jurisdiction and outside the scope of his authority. Moreover, a receiver is not entitled to derived judicial immunity even if he is fulfilling tasks assigned by the court if those tasks cannot properly be categorized as those belonging to a receiver. The court of appeals noted that it must take a "functional approach" in determining whether a person is entitled to derived judicial immunity. It should not just look at the label or title given to a court-appointee, but must instead consider their assigned duties and whether they are in fact operating as an "arm of the court" in performing those duties. Under these standards, the court concluded that Milligan acted within his authority and with appropriate duties:

> Parsing out the Super Majority Entities' allegations in their pleadings, however, we find nothing in their claims that would support a finding that the trial court assigned any duties to Milligan outside his role as a receiver, or that Milligan exceeded his authority in performing his duties. First, the Third Court of Appeals has already recognized the duties that the trial court assigned to Milligan—to control the assets and affairs of the Limited Partnerships—were within the prescribed duties of a receiver in accordance with Chapter 11 of the Texas Business and Organizations Code. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *12, *citing* TEX.BUS.ORGS.CODE § 11.404(a)(1)(A), (C). Moreover, the actions about which the Super Majority Entities complain were all actions Milligan took in performing those duties. Given his express right to conduct the affairs of the Limited Partnerships, Milligan was entitled to "hold himself out" as having that authority when meeting with third parties, including third parties doing business with the Limited Partnerships. As well, given Milligan's express right to control the Limited Partnerships' assets, the Super Majority Entities' complaint that he mishandled those assets still relates solely to actions that fell within the scope of his authority. And finally, although the Super Majority Entities complain that Milligan subjected the Limited Partnerships to "unnecessary litigation, expenses, and other obligations, including this lawsuit," a receiver in Milligan's position is expressly authorized by statute to conduct and participate in litigation. TEX.BUS.ORGS.CODE ANN. § 11.406(a)(3) (a receiver appointed under this section may "sue and be sued in the receiver's name in any court"). Thus, the Super Majority Entities have failed to allege any conduct that exceeded Milligan's authority, and he was entitled to derived judicial immunity as a matter of law. For these reasons, the trial court properly dismissed the Super Majority Entities' claim against Milligan for breach of fiduciary duty under Rule 91a as having no basis in law or fact.

The court also held that Milligan's attorneys were "entitled to immunity under the doctrine of attorney immunity for claims brought against them by non-clients."

The court of appeals then concluded that the conversion and breach of contract claims against Milligan failed as well:

> The [conversion] claim fails for two reasons. First, both Milligan and the attorney-defendants would have a right to immunity against this claim, as Milligan's actions were all taken in his capacity as the receiver, and there is no allegation that the attorney-defendants acted outside the scope of representing their clients. Second, the conversion claim fails as a matter of law, as the Super Majority Entities have failed to plead any facts that could support all the elements of the claim. To establish a claim for conversion of personal property, a plaintiff must allege and prove that: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. The Super Majority Entities' pleading fails to allege facts to support all these elements.
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> The Super Majority Entities have failed to allege any facts to support a finding that Milligan acted "unlawfully" in exercising "control" or "dominion" over the Limited Partnerships' assets, or in tendering his proposed liquidation plan to the court. To the contrary, the trial court expressly authorized Milligan to engage in those actions. Moreover, Milligan's proposed liquidation plan was just that, a plan, and could not be acted upon without court approval. . . .
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> The Super Majority Entities seek to establish the necessary privity between Milligan—who did not sign the underlying limited partnership agreements—and the other signatories by alleging that Milligan, "in his capacity as putative receiver or in the guise of a putative receiver," stepped into the "shoes" of the World Class Entities as for their obligations under the agreements. The Super Majority Entities, however, cite no authority suggesting that a receiver appointed to take control of a partnership's assets somehow becomes a signatory to the partnership's contracts. To the contrary, a receiver is appointed to serve as an independent arm of the court in performing assigned duties and does not step into the shoes of any of the parties involved in the receivership, or otherwise take on their contractual duties. *See generally Davis*, 317 S.W.3d at 307 (a court-appointed receiver acts as an arm of the court). We thus conclude that there was no basis in law or fact for holding Milligan liable on a claim for breach of contract.

Q. Bankruptcy

In re Highland Capital Management, L.P., Case No. 19-34054-sgj-11, 2023 WL 3185266 (Bankr. N.D. Tex. Apr. 28, 2023).

The bankruptcy court sustained the debtor's objection to a claim for reformation and rescission of a company agreement of a Delaware LLC of which the debtor and the claimant were members. The court rejected the claimant's argument that the company agreement reflected any precise mistake or that it was based on a mistaken assumption, and the court also concluded that the company agreement was not an executory contract that was deemed rejected under the terms of the plan of reorganization.

Highland Capital Management, L.P. ("Highland" or the "debtor") objected to a proof of claim filed by HCRE Partner, LLC ("HCRE") relating to the allocation of equity in SE Multifamily Holdings, LLC ("SE Multifamily"), a Delaware LLC. Highland and HCRE entered into the original LLC agreement. Schedule A of the original agreement set forth capital contributions of $51 by HCRE and $49 by Highland and allocated 51% of SE Multifamily's membership interests to HCRE and 49% to Highland. Mr. Dondero signed the agreement on behalf of both members. Mr. McGraner, a minority owner and vice president and secretary of HCRE, testified that the original agreement did not contain any mistakes in the allocation of the membership interests and that the agreement did not fail to reflect the intent of the parties. The agreement gave HCRE the right to appoint the manager of SE Multifamily, and the agreement identified Mr. Dondero (as an officer of HCRE) the initial manager of SE Multifamily with exclusive and unfettered control over the business.

In connection with obtaining a loan to finance the acquisition of real estate, BH Equities, LLC ("BH Equities") worked with Highland and HCRE in anticipation of BH Equities becoming a member. Before a formal agreement was in place, BH Equities contributed approximately $21 million in capital to SE Multifamily to fund expenses and acquisition of real estate by SE Multifamily. Following the closing of the loan transaction, Highland and BH Equities continued negotiating the terms on which BH Equities would become a member of SE Multifamily. Six months after the loan transaction closed, Highland, HCRE, and BH Equities executed a First Amended and Restated Limited Liability Company Agreement for SE Multifamily. An updated Schedule A set forth the amount of each of the parties' capital contributions as follows: $291,146,036 for HCRE, $49,000 for Highland, and $21,213,721 for BH Equities. Schedule A showed their respective percentage interests as 47.94% for HCRE, 46.06% for Highland, and 6% for BH Equities. (Another entity obtained 100% of newly issued preferred interests in exchange for a capital contribution of $5,808,603.) Although HCRE filed a proof of claim in Highland's bankruptcy proceeding seeking reformation or rescission of the agreement to reallocate the equity based on mistake, testimony of Mr. Dondero, Mr. McGraner, and a representative of BH Equities, as well as other evidence, indicated that all of them understood and agreed that the percentages in Schedule A were the agreed percentage interests, and various allocation and distribution provisions of the amended LLC agreement tracked these percentages. Ultimately, Mr. McGraner contended on cross examination that the mistake in the agreement was that the amended agreement should have provided HCRE with the ability to amend the agreement as the transaction unfolded and assets were sold. The court pointed out, however, that the amended agreement contained an amendment provision that gave HCRE and the manager of SE Multifamily the ability to amend the agreement. The amendment provision differed from the original agreement in that the amended agreement provided for its amendment upon the consent of the manager and HCRE in contrast to the original agreement, which required the consent of the manager and all members. Mr. McGraner acknowledged that Mr. Dondero was in control of both Highland and HCRE and that HCRE made no effort to amend the agreement either before or after Highland's bankruptcy filing. According to the court, "Mr. McGraner confirmed that '[a]t no time in the history of the world did HCRE ever try to amend the restated LLC agreement' and that he 'never instructed anyone to draft an amendment [to the agreement].'" He "also admitted (after being impeached by his prior deposition testimony) that nobody acting on behalf of HCRE ever told BH Equities that there was a mistake in the Amended LLC Agreement or that HCRE wanted to amend it to reflect a different allocation of membership interests for Highland and HCRE and that '[t]he reason HCRE made no effort to amend the agreement is because [it] hoped that the issues that caused the bankruptcy filing would resolve themselves.'"

The court explained that HCRE failed to meet its burden of proof under Delaware law regarding its claim to reallocate the equity of SE Multifamily in accordance with the capital contributions of the members. As to its claim for reformation, the court stated that a plaintiff must show, by clear and convincing evidence, the "precise mistake" and "a specific meeting of the minds regarding a term that was not accurately reflected in the final, written agreement." The court stated that HCRE did not produce any evidence that the parties to the amended LLC agreement had come to a specific understanding, prior to its execution, that the allocation of percentage membership interests in SE Multifamily was different from the percentage allocations contained in the amended agreement. Thus, HCRE was not entitled to reformation of the amended LLC agreement to reallocate the members' membership percentages in accordance with the stated capital contributions of the respective members (or to reformation of any provision of the amended LLC agreement).

As to HCRE's claim for rescission, the court explained that HCRE's claim for reallocation of the equity interests really amounted to a claim for reformation rather than rescission, but the court stated that a claim for rescission in these circumstances failed in any event. Although the court characterized the concepts of rescission and reformation as similar in many ways, the court explained that there are some important differences. "Rescission, under Delaware law, involves an attempt to 'unmake' an agreement and 'return the parties to the *status quo [ante]*' while 'reformation entails an attempt to 'correct[ ] an enforceable agreement's written embodiment to reflect the parties' true agreement.'" While mistaken assumptions or failure of the agreement to reflect a prior understanding of the parties underlie both reformation claims and rescission claims, "'one substantive and relevant difference between the two claims ... is that ... while a failure to read prevents a plaintiff from proceeding with [a rescission] claim as a prima facie matter, a failure to read bars a reformation claim only if '[the plaintiff's] fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.'" Here there was testimony by Mr. Dondero that he did not read the amended agreement prior to signing it. Further, even if his failure to read the agreement did not bar a rescission claim, HCRE failed to present any evidence of the other elements of a rescission claim: that the parties were mistaken as to a basic assumption on which the amended agreement was made and that the mistake had a material effect on the agreed-upon exchange of performances.

Finally, the court addressed HCRE's belated argument that the amended LLC agreement was an executory contract that was deemed rejected under the plan of reorganization. After two and one-half years of litigating the debtor's objection to HCRE's proof of claim, HCRE argued that it was entitled to allowance of its proof of claim and reformation of the amended LLC agreement to reallocate the membership interests in SE Multifamily in proportion to each member's capital contribution because the amended agreement was an executory contract that was rejected by the debtor, who was thus no longer a member of SE Multifamily, but only had an "economic interest" in SE Multifamily. Although HCRE did not cite any legal authority to support its position that the amended LLC agreement was an executory contract that had been rejected by Highland under the terms of the plan, the debtor provided legal analysis and authority to support its contention that the amended LLC agreement was not an executory contract under Section 365 of the Bankruptcy Code, and the court chose to address the argument. The court explained that the Bankruptcy Code does not define the term "executory contract," but the Fifth Circuit has adopted the "Countryman test" (a definition articulated by Professor Vern Countryman) pursuant to which "a contract is executory if 'performance remains due to some extent on both sides' and if 'at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.'" There is no per se rule governing whether a limited liability company operating agreement is an executory contract. The status of a particular operating agreement depends on the facts and circumstances. Relevant factors include whether the operating agreement imposes remote or hypothetical duties, requires ongoing capital contributions, and the level of managerial responsibility imposed on the debtor.

In this case, Highland did not have any material unperformed obligations under the amended LLC agreement as of the petition date, and the court thus concluded that the amended LLC agreement was not an executory contract under Bankruptcy Code § 365 that would have been deemed rejected upon confirmation of the plan. The agreement vested exclusive control of SE Multifamily in Mr. Dondero and HCRE, and Highland was a passive investor with no right to manage or control SE Multifamily and no obligations as a member. For example, members were permitted, but not required, to make future capital contributions to SE Multifamily, and Mr. Dondero testified that there was no expectation that any of the members would put in any additional capital after the agreement was amended. HCRE's counsel pointed to several provisions in the amended LLC agreement that HCRE contended imposed material, affirmative obligations on the debtor as of the petition date, but the debtor systematically refuted these contentions, and HCRE chose not to address the debtor's arguments. Considering the facts and circumstances surrounding the amended LLC agreement, the court concluded that it was not an executory contract under Bankruptcy Code § 365 that was subject to being rejected or assumed under the terms of the plan.

In re Roberson Cartridge Co., LLC, No. 22-20192-rlj, 2023 WL 2393809 (Bankr. N.D. Tex. Mar. 7, 2023).

The court concluded that the sole manager of an LLC had authority to file the LLC debtor's bankruptcy petition, and a blocking provision in the company agreement that required approval of a non-member creditor for the LLC's bankruptcy petition was void as a matter of public policy.

The debtor in this bankruptcy proceeding was Roberson Cartridge Co., LLC ("Roberson Cartridge"), a Texas limited liability company that manufactured cartridges for ammunition. Jeff Roberson supplied Roberson Cartridge's initial capital and received Class A Units in Roberson Cartridge. An amended and restated company agreement listed another individual as a member, but Roberson Cartridge and its creditor Matador Brass Partners, LLC ("Matador Brass") referred to Roberson as the "100% owner" of Roberson Cartridge. Assuming the other individual named as a member held 6,000 Class A Units, Roberson had 94,000 Class A Units and was the sole manager of Roberson Cartridge.

Matador Brass was created to provide financing to Roberson Cartridge, and its loan agreement with Roberson Cartridge required Roberson Cartridge to execute an amended and restated company agreement that required Roberson Cartridge to obtain Matador Brass's written consent before Roberson Cartridge could take "any action that results in a liquidation or dissolution of the Company[.]" The amended and restated company agreement also stated that "[u]ntil Matador's acquisition of Class B Units, Matador shall not be a Member of the Company but shall be a third-party beneficiary of this Agreement with a right to enforce the provisions of this Agreement applicable to Matador."

Roberson Cartridge later defaulted on its loan from Matador Brass and Roberson, without Matador Brass's consent, adopted a resolution in his capacity as manager of Roberson Cartridge to file a Chapter 7 bankruptcy petition for Roberson Cartridge. Matador Brass sought to dismiss the bankruptcy petition on the basis it was filed without proper authority or, alternatively, to convert the bankruptcy to a Chapter 11 case.

The court first discussed Matador Brass's argument that the bankruptcy should be dismissed on the basis that it was not filed with proper authority. Matador Brass relied on three points for dismissal: (1) the effect of Roberson Cartridge's default on the loan was to strip Roberson, the presumptive sole member of Roberson Cartridge, of his right to vote his interests to authorize the filing of a bankruptcy petition, and the resolution he signed authorizing the filing was ineffective, (2) under the amended company agreement, Roberson Cartridge was required to obtain the permission of Matador Brass before filing its Chapter 7 petition, thus rendering the filing ineffective, and (3) Roberson Cartridge filed the case in bad faith.

The court stated that the issue of authority is determined by state law, and the court rejected Matador Brass's argument that Roberson had no right to issue a board resolution authorizing Roberson Cartridge's Chapter 7 filing. The court reasoned as follows that Roberson had authority as the sole manager to authorize the bankruptcy filing regardless of the impact of the default on his rights to vote as a member:

> 6. Matador Brass cites *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010) (Lynn, J.), to support the proposition that voting rights are stripped when those rights are pledged pursuant to a loan agreement and the debtor defaults. Judge Lynn did not expressly state whether the voting rights of the debtor were immediately divested; rather, there he found that the lender acquiesced to the debtor's continued control. *Id*. at 404. The debtor continued to control the company after default, while the lender did not object to the control. *Id*. But "[m]ost tellingly, ... [the lender] commenced involuntary chapter 11 cases against [the debtors]." *Id*. In that case, the lenders did not dispute the debtor's authority to file; however, Judge Lynn did indicate that a pledge of voting rights may strip the pledgor upon default of the underlying loan.
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> 7. Matador Brass concedes that Texas Business Organizations Code § 101.108 may prevent it from managing the company; however, it argues that Roberson's voting rights were relinquished immediately upon default so he lacked authority to file Roberson Cartridge's petition. The question at first blush is whether Roberson lost all voting rights immediately upon default. But the controlling issue is whether Roberson, as sole manager, had authority to execute a board resolution authorizing Roberson Cartridge to file a bankruptcy petition.
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> 8. The Court has noted that
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>> [M]embership units in an LLC may be assigned, but the assignment does not entitle the assignee to participate in management, to become a member, or to exercise the rights of a member. *See* Tex. Bus. Orgs. Code Ann. § 101.108 (West 2014). The assignee is entitled to an allocation of the economic attributes—income, gain, loss, distributions, etc.—but only to the extent that such benefits have been assigned. *Id*. § 101.109. An assignee may become a member on approval of all members. *Id*.
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> *In re Wilson*, No. 11-50396, 2014 WL 3700634, at *6 (Bankr. N.D. Tex. July 24, 2014).
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> 9. Turning to the Amended Company Agreement, "no Member, in its capacity as a Member, shall have the power to act for or on behalf of, or to bind, the Company." Matador Brass Ex. 1G at 22. The members within Roberson Cartridge "have the right to attend meetings of the Members and speak at such meetings. An annual meeting of Members to elect the Managers and transact such other business as is brought before the meeting may be held as determined by the Managers." *Id*. Accordingly, the voting rights of members are limited to electing managers and voting on other matters brought by the managers. [In a footnote, the court pointed out provisions of the company agreement under which the members had authority to elect to wind up Roberson Cartridge or the managers could trigger a winding up by disposing of all or substantially all of Roberson Cartridge's assets.]
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> 10. Under Texas Business Organizations Code § 101.251, "[t]he governing authority of a limited liability company consists of: ... the managers of the company, if the company agreement provides that the company is managed by one or more managers[.]" Per the Amended Company Agreement, the board of managers manages, operates, and controls the business and affairs of the company. Matador Brass Ex. 1G at 28. Roberson Cartridge's managers have the authority to act on behalf of the company pursuant to a board resolution. *Id*. As confirmed by Greer's [Matador Brass's president and manager] testimony, Roberson was the sole manager at the time the bankruptcy was

filed. In Roberson's capacity as sole manager of Roberson Cartridge, the board entered a resolution to authorize the filing of Roberson Cartridge's chapter 7 petition. Debtor Ex. 1.

11. Roberson did not use his voting rights as a member to authorize the filing of the bankruptcy petition, so even if his member voting rights were immediately divested, his authority as sole manager was unaffected. The board resolution thereby effectively authorized Roberson Cartridge to file its petition. This conclusion is also supported by the Texas Business Organizations Code. Section 101.356 requires the affirmative vote of a majority of all members for an LLC to act outside the ordinary course of business; however, section 101.552 states that "[a] majority vote of all of the members of a limited liability company or, if the limited liability company has no members, a majority of all of the managers of the company is required to approve (1) a voluntary winding up of the company[.]" There is conflicting evidence on whether another member exists, but, in their briefing, both parties state that Roberson is the sole owner. If Roberson was the sole member, and if he lost his membership interest upon default, then no member existed to vote. Under § 101.552, the manager had authority to approve the winding-up of the business.

The court next addressed Matador Brass's argument that the bankruptcy filing was not authorized because the amended company agreement required the consent of Matador Brass, which was not obtained. In the absence of Fifth Circuit case law directly on point, the court relied on case law in other jurisdictions to conclude that the provision requiring the consent of Matador Brass, a creditor who was not a member (but did have the right under its convertible loan to become a member), was void as against public policy. The court analyzed the so-called "blocking provision" as follows:

13. Texas law states that "[t]he governing authority of a limited liability company shall manage the business and affairs of the company as provided by: (1) the company agreement[.]" Tex. Bus. Orgs. Code § 101.252. The Amended Company Agreement requires that Roberson Cartridge obtain Matador Brass's written consent before it takes "any action that results in a liquidation or dissolution of the Company[.]" Matador Brass Ex. 1G at 20. The issue is whether this provision of the Amended Company Agreement limited or blocked the debtor's ability to file a chapter 7 petition.

14. The provision is a form of a blocking provision. *See Franchise Servs. of N. Am.*, 891 F.3d at 205 ("Courts appear to use the term 'blocking provision' as a catch-all to refer to various contractual provisions through which a creditor reserves a right to prevent a debtor from filing for bankruptcy."); see generally 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09 (2022). "In general, the enforceability of blocking provisions depends on who has them. If it is creditors, they are generally unenforceable. If it is equity interest holders, they are generally *enforceable*." 1 COLLIER LENDING INSTITUTIONS & BANKRUPTCY CODE ¶ 2.09[3] (2022) (emphasis added). *Compare In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (A chapter 11 case was dismissed because the LLC's operating agreement required the consent of all members for the LLC to file for bankruptcy relief, and the petitioner—holding a 90% interest in the LLC—did not receive consent from the other member who held the remaining 10% interest.), *with In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (A debtor LLC amended its operating agreement, wherein it granted a creditor the right to approve or disapprove of filing bankruptcy petitions. There, the court held the provision was void as against public policy.).

15. The Fifth Circuit has not directly addressed the issue of pre-petition waivers of the right to file bankruptcy. *See Franchise Servs. of N. Am.*, 891 F.3d at 207 ("Several courts of appeals—though not this one—have opined that a pre-petition waiver of the benefits of bankruptcy is contrary to federal law and therefore void .... As this case is framed, we can assume without deciding that such a waiver is invalid. We leave the resolution of that issue for another case, one in which it is squarely presented.").

16. In *Franchise Services of North America*, the Fifth Circuit held "[f]ederal law does not prevent a *bona fide shareholder* from exercising its right to vote against a bankruptcy petition just because

it is also an unsecured creditor." 891 F.3d at 203 (emphasis added). The court acknowledged its holding was limited:

> As we note later in this opinion, our holding goes no further. This case involves a bona fide shareholder. The equity investment made by the shareholder at issue here was $15 million and the debt just $3 million. We are not confronted with a case where a creditor has somehow contracted for the right to prevent a bankruptcy or where the equity interest is just a ruse.

Franchise Servs. of N. Am., 891 F.3d at 203 n.1.

17. *Unlike Franchise Services of North America*, the Court is presented with a case where a creditor holds a convertible loan, not yet converted into a membership interest, and the creditor conditioned the debtor's ability to file bankruptcy on the creditor's approval.

18. Courts have found blocking provisions are void on public policy grounds when a creditor, without an ownership interest, retains the ability to block the filing of a petition. *See In re Lake Mich. Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016) (Amendments to an LLC's operating agreement that required a creditor's approval before the LLC could file bankruptcy was void as against public policy). A court has gone so far as to hold that public policy voids blocking provisions even when the creditor has an ownership interest but the ownership interest is nominal. *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016) (The operating agreement was amended to include the creditor as the holder of one common unit and required approval of all members holding common units to approve before filing a voluntary bankruptcy petition. The court held the agreement was void as against public policy because the nature and substance of the agreement was to contract away the LLC's right to a discharge in bankruptcy.).

19. "It is a well settled principal [sic] that an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy." *In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983). "[S]ince bankruptcy is designed to produce a system of reorganization and distribution different from what [one] would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply." *Bank of Am. v. N. LaSalle St. Ltd. P'ship (In re 203 N. Lasalle St. P'ship.)*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000). "This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002).

20. The Amended Company Agreement required that Roberson Cartridge obtain Matador Brass's approval before taking action to liquidate the company.

21. The Amended Company Agreement and loan documents were entered on May 14, 2021. Matador Brass Ex. 1G, 1A. Matador Brass has not converted its interest as a creditor to that of a member. Matador Brass entered a relationship with Roberson Cartridge as a creditor and remains a creditor. Requiring a borrower to waive its right to file a bankruptcy petition, as Matador Brass required of Roberson Cartridge, is void as against public policy. There is no precedent for upholding a blocking provision when the blocking creditor holds no ownership interest in the debtor.

After concluding that Roberson Cartridge's bankruptcy filing was not made in bad faith, the court addressed the request of Matador Brass to convert the Chapter 7 case to a case under subchapter V of Chapter 11. The court found no authority for imposing such a decision on the debtor where the Bankruptcy Code provides that the election to proceed under subchapter V is exclusively the debtor's.

R. Arbitration

Texas REIT, LLC v. Mokaram-Latif West Loop, Ltd., No. 14-22-00014-CV, 2022 WL 17421518 (Tex. App.—Houston [14th Dist.] Dec. 6, 2022, pet. filed) (mem. op.).

The court of appeals affirmed the trial court's order confirming an arbitration award on derivative claims brought by a 15% owner of an LLC against the LLC's 65% owner/sole manager of the LLC and certain affiliates.

The court found that arbitration clauses in loan documents between the LLC and its lender encompassed the claims and the parties and that the arbitrators' award of damages to the 15% owner directly did not exceed the power of the arbitrators because the LLC statute authorizes damages on derivative claims to be awarded directly to a member and such an award does not change the arbitrability of derivative claims.

The appellants, Texas REIT, LLC ("Texas REIT"), Ali Choudri, Dalio Holdings I, LLC ("Dalio I"), and Dalio Holdings II, LLC ("Dalio II") appealed the trial court's order confirming an arbitration award and denying their motion to vacate the award.

The court of appeals presented the facts as found by the arbitrators. Texas REIT was formed for the purpose of buying and selling real estate and executed a promissory note in favor of International Bank of Commerce in the amount of $8,640,000 (the "Note"). The Note was secured by a deed of trust on commercial property owned by Texas REIT (the "Deed of Trust"), and Ali Choudri signed a guaranty (the "Guaranty"). All three documents contained similar arbitration clauses, and because Choudhri signed the Guaranty he was individually subject to arbitration. Choudhri owned a 65% interest in Texas REIT and was the sole manager of Texas REIT. Mokaram's 30% interest was transferred via two different written agreements, each of which assigned a 15% interest in Texas REIT to Mokaram.

Ten years later, Dalio I acquired the Note and Deed of Trust for $6,334,189.88, the full amount due and owing under the Note at the time. Dalio I foreclosed on the property, and Choudhri admitted that he was the true owner of Dalio I and Dalio II (collectively, the Dalio Entities), and had installed his girlfriend as a "front" to hide his ownership in Dalio I. Mokaram asserted claims, individually, and on behalf of Texas REIT, alleging Choudhri, through the Dalio Entities and other entities, breached the Texas REIT agreement, wrongfully foreclosed on the property, conspired to wrongfully foreclose, and breached fiduciary duties owed to Texas REIT. Choudri and the Dalio Entities moved to compel arbitration, and the trial court ordered Mokaram's claims to arbitration. The arbitrators found that Choudri, through the Dalio Entities, conducted a wrongful foreclosure and breached fiduciary duties owed to Texas REIT. The arbitrators concluded that if they awarded damages to Texas REIT, Choudhri was "likely to take whatever steps he can, lawful or not, to deprive Mokaram of the benefits of his ownership interest in [Texas REIT], which means causing damage and harm to [Texas REIT]." The arbitrators concluded that Mokaram could recover individually on all claims including the derivative claims. The arbitrators also concluded that Mokaram was entitled to recover attorney's fees.

On appeal, the appellants challenged the trial court's confirmation of the arbitration award on several grounds, including that (1) the arbitration agreement did not include Mokaram as a party to the agreement; (2) the scope of the agreement did not include the claims asserted; (3) the arbitrators exceeded their authority; and (4) the arbitrators committed material errors of law.

After analyzing the arbitration clauses and concluding that the confirmation of the award was governed by the Federal Arbitration Act rather than the Texas Arbitration Act, the court rejected the appellants' contention that the arbitrators exceeded their authority because the arbitration agreements did not include Mokaram, the Dalio Entities, or the claims asserted. The court stated that the Dalio Entities waived any complaint that they were not bound by the agreement or that the claims were not arbitrable by moving to compel arbitration. As for Mokaram, the court stated that the appellants conceded that derivative claims on behalf of Texas REIT were arbitrable. The appellants asserted that Mokaram was not a "member" who could bring a derivative claim, but the court said that the issue of Mokaram's membership in Texas REIT was a matter of contract interpretation that was an issue for the arbitrators, and they decided that Mokaram owned a 30% interest in Texas REIT and was a member of Texas REIT.

The court also rejected the appellants' argument that the claims did not fall within the scope of arbitrable claims under the loan documents. The arbitration agreement provided that arbitrable disputes included "any and all controversies or claims between the parties of whatever type or manner." The court responded to the appellants' contention that Mokaram's disputes did not fall within the scope of the agreement because Mokaram was awarded damages directly rather than derivatively as follows:

> Appellants' argument that Mokaram's disputes did not fall within the scope of the agreement because he received damages directly rather than derivatively is based on a false premise. Acknowledging that the derivative claims were within the scope of the agreement, appellants contend that the arbitrators nevertheless exceeded their powers because the award required appellants to pay Mokaram directly, rather than awarding relief to Texas REIT.

> The record reflects that Mokaram brought his claims derivatively on behalf of Texas REIT. The arbitrators concluded that Mokaram could recover individually on all claims including the derivative claims because they anticipated Choudhri, as manager of Texas REIT, would take steps to deprive Mokaram of the benefits of his ownership interest in Texas REIT and would damage Texas REIT in the process. Texas law allows such an award "if justice requires." Tex. Bus. Orgs. Code § 101.463 ("a recovery in a direct or derivative proceeding by a member may be paid directly to the plaintiff or to the limited liability company if necessary to protect the interests of creditors or other members of the limited liability company."). A court's decision to treat an action as a direct action so as to allow recovery to be paid directly to a shareholder plaintiff, as opposed to the corporation, does not mean that the action is no longer a derivative proceeding. *Sneed v. Webre*, 465 S.W.3d 169, 188 (Tex. 2015). Therefore, the arbitrators' award of damages directly to Mokaram did not change the arbitrability of the derivative claims. Mokaram's derivative claims fell within the scope of the arbitration agreement.

Dillard Texas South, LLC v. Bazan, No. 13-21-00301-CV, 2022 WL 4548907 (Tex. App.—Corpus Christi-Edinburg Sept. 29, 2022, no pet. h.) (mem. op.).

The court of appeals concluded that the trial court abused its discretion in denying a motion to compel arbitration. The court concluded that the plaintiff/appellee's employer, Dillard Texas South, LLC, was entitled to enforce the arbitration agreements signed by the plaintiff/appellee because the LLC was a third-party beneficiary of the agreements.

Appellee Amanda Cortez Bazan began working at the Dillard's department store in McAllen, Texas in 2008. As a condition of her employment, Bazan signed an acknowledgement confirming that she received a summary plan description ("SPD") of the Dillard Texas Operating Limited Partnership d/b/a Dillard's Inc.'s injury benefit plan for Texas employees. The injury benefit plan included a mandatory arbitration clause, wherein Bazan recognized the following:

> I also acknowledge that this SPD includes a mandatory company policy requiring that certain claims or disputes relating to an on-the-job injury (that cannot otherwise be resolved between [Dillard's] and me) must be submitted to an arbitrator, rather than a judge and jury in court. I understand that by receiving this SPD and becoming employed (or continuing my employment) with [Dillard's] at any time on or after April 14, 2004, I am accepting and agreeing to comply with these arbitration requirements.

By signing the acknowledgment, Bazan further agreed that the arbitration agreement applied to all claims against Dillard's and "its officers, directors, owners, employees, representatives, agents, subsidiaries, affiliates, successors, or assigns."

During her employment, and as a condition of remaining employed, Bazan signed additional agreements to arbitrate any legal claims in 2008, 2011, and 2016. All of the subsequent agreements set forth that the arbitration provision applied to Dillard's, Inc. and "its affiliates, subsidiaries and Limited Liability Partnerships."

On December 21, 2020, Bazan was injured while in the course and scope of her employment when, according to her, a shelf dislodged, causing several heavy boxes to fall and strike her on her head, neck, and back. Bazan claimed that her supervisor Lyon "did nothing to help [her] or get her the medical attention she needed." Dillard's is a non-subscriber to Texas's worker's compensation program, but under the SPD, Dillard's paid for Bazan's medical bills resulting from the incident.

On May 14, 2021, Bazan filed a personal injury lawsuit against Dillard's and its manager Lyon for their alleged negligence, gross negligence, and intentional infliction of emotional distress. Dillard's filed a motion to compel arbitration on July 12, 2021 and an amended motion to compel on July 15, 2021. In its amended motion, Dillard's argued that Bazan signed an arbitration agreement with Dillard's when she began her at-will employment on May 13, 2008. Dillard's included an affidavit from Jamie Dorsey, Administrative Assistant to the Vice President and General Counsel of Dillard's, with its motion to compel. In the affidavit, Dorsey testified that she administered the Dillard's arbitration program. Dorsey also testified to the following:

> Dillard's, Inc., a Delaware corporation, and its related entities, including Dillard Texas South, LLC, a Delaware limited liability company (hereinafter collectively "Dillard's") operate approximately 300 stores in 29 states[,] including the Dillard's store located at La Plaza Mall, 2200 South I-10, McAllen, TX 78501 ("Dillard's Store 727").

Bazan replied and argued that she worked for Dillard Texas South, LLC, which was not specifically mentioned in any of the agreements that she signed. She stated that the SPD mentioned "Dillard Texas Operating Limited Partnership" or "Dillard's Inc.," which were not her employers. Bazan contended that "Dillard Texas South, LLC" was not "on any tendered 'arbitration agreement'"; thus, she should not have to arbitrate her claims. The trial court agreed with Bazan, and Dillard's appealed.

The court of appeals began by observing that "[a]rbitration is a creature of contract between consenting parties." The court noted, however, that "as may be required by principles of contract law and agency, a person who has agreed to arbitrate disputes with one party may be required to arbitrate related disputes with non-parties." The court pointed out that Texas courts have articulated six scenarios where arbitration with non-signatories may be required: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary. Based on a third-party beneficiary theory, the court agreed that arbitration was required:

> We first address the contention that Dillard Texas South, LLC is a third-party beneficiary of the agreements Bazan signed with Dillard Texas Operating Limited Partnership d/b/a Dillard's, Inc. Here, Bazan contends there is no agreement to arbitrate her work injury claims with Dillard's. We disagree. Under Texas law, a non-signatory may enforce an arbitration agreement as a third-party beneficiary if it establishes that the parties to the contract: (1) intended to secure a benefit to the third-party and (2) entered into the contract directly for the third-party's benefit. The benefit to the third-party must be more than merely incidental to the contract. Demonstrating a clear intent to benefit a third-party does not require the phrase "third-party beneficiary" or any other "magic words." A third-party beneficiary may be identified in the agreement by a "class or category" of persons, all of whom may not be known to the contracting parties at the time of execution.
>
> Reviewing this issue de novo, we conclude that Bazan's agreement intended to include a certain "class or category" of entities affiliated with Dillard's, such as Dillard Texas South, LLC and its representative Lyon. The multiple agreements Bazan signed in 2008, 2011, and 2016 with Dillard's as a condition of maintaining her employment set forth that the agreement applied to Dillard's and "its affiliates, subsidiaries and Limited Liability Partnerships." Dillard Texas South, LLC, per Dorsey's affidavit, is included in this "class or category" of referenced entities. The plain language of the SPD and subsequent agreements show that Bazan and Dillard Texas Operating Limited Partnership d/b/a Dillard's Inc. intended to secure a benefit to her employer and entered into the contract for her employer's benefit. This benefit was intentional and not merely incidental.
>
> Accordingly, we hold there is an agreement to arbitrate between Bazan and Dillard's. We also hold that Bazan's injuries fall within the scope of the agreement to arbitrate as it is an "on-the-job injury" as contemplated in the SPD. The trial court thus abused its discretion in denying appellant's motion to compel. . . . We reverse the trial court's judgment and remand for proceedings consistent with this opinion.

S. 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 opinions addressing somewhat novel situations or unsettled issues in this context are included below.

CJS Solutions Group, LLC v. Clowers, No. 1:21-CV-223-RP, 2023 WL 2825849 (W.D. Tex. Jan. 4, 2023).

The plaintiff moved to dismiss without prejudice based on lack of diversity jurisdiction after having claimed throughout the suit that the court had jurisdiction based on diversity. In support of its motion to dismiss, the plaintiff alleged that a corporation that was a Texas citizen was, at the time the complaint was filed, a member of an LLC that was a member of an LLC that was a member of the plaintiff LLC. Because the citizenship of an LLC depends on the citizenship of all its members, the defendants did not dispute that the citizenship of the corporation at issue was dispositive of the issue of jurisdiction. The defendants' affidavit did not adequately establish that the principal place of business of the corporation at issue was India, and judicial estoppel (based on the plaintiff's prior assertions that diversity jurisdiction existed) could not be used to conclusively establish jurisdictional facts. The court declined to allow the defendant to engage in jurisdictional discovery, saying that "the cases Defendants provided involved jurisdictional disputes that occurred early in the case, when the parties had not had the chance to conduct extensive discovery. Here, on the eve of trial and after extensive discovery, Defendants have not provided enough evidence to convince the Court that additional jurisdictional discovery is necessary. Therefore, the Court will decline to use its discretion to order any further discovery." Because the defendants, as the parties claiming diversity jurisdiction, did not meet their burden to establish diversity, the court granted the plaintiff's motion for voluntary dismissal without prejudice.

T. Fraudulent Transfer

Valk v. DFW Design & Remodeling, LLC (In re Triplett), Case No. 19-42570, Adv. Proc. No. 21-4109, 2023 WL 2750899 (Bankr. E.D. Tex. Mar. 31, 2023).

The court held that a transfer of $25,000 by an individual debtor to his 90% owned LLC was a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act.

A claimant against the individual debtor in this bankruptcy proceeding asserted that two transfers of funds by the debtor were actually or constructively fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (TUFTA). The two allegedly fraudulent transfers by the debtor were a transfer of $225 and a transfer of $25,000. The transfer of $225 involved a transfer of funds from a personal bank account to another account held by the debtor for doing business as a sole proprietor under the name "DFW Design." These funds were used to pay obligations of the debtor. The transfer of $25,000 was made from a personal account of the debtor to the account of DFW Design, LLC, an LLC of which the debtor was the 90% owner, and the debtor then used the funds to pay debts of the LLC and the debtor.

The court explained that Section 24.005(a)(1) of the TUFTA addresses a transfer made "with actual intent to hinder, delay, or defraud any creditor of the debtor." The court listed the "badges of fraud" set forth in TUFTA, which include whether the transfer was made to an "insider" and whether the transfer was made for reasonably equivalent value. The court also pointed out that the TUFTA protects transferees who take in good faith and for a reasonably equivalent value. The court stated that transferring funds from one personal account to another, even if the account is a d/b/a account, is not a "transfer." Furthermore, to the extent the movement of funds was a "transfer," the debtor received reasonably equivalent value in the form of payment of a valid antecedent debt. As for the transfer of $25,000 by the debtor to the LLC, the court discussed numerous badges of fraud—including the fact that the LLC was an "insider," the debtor's retained control of the funds after the transfer, the net effect of the transfer on the debtor's estate, and the debtor's insolvency at the time of the transfer—and concluded that the debtor made the transfer with the actual intent to put the assets beyond the reach of his creditors. In connection with the effect of the transfer on the debtor's estate, the court stated that the LLC was winding down, as evidenced by its empty bank account, at the time of the transfer, and "[t]he Debtor's transfer of $25,000 to DFW Design LLC was not intended to and did not allow DFW Design LLC to continue in business, merge with another business, or produce any positive value or 'synergy' for the Debtor." The court stated: "The Debtor's testimony that the $25,000 was a capital injection into DFW Design LLC only serves to prove up the Valks' fraudulent transfer claim. The Debtor transferred funds to an entity (DFW Design LLC) for the alleged purpose of paying that entity's creditors at the expense of his own creditors. The transfer was not a capital contribution to DFW Design LLC. Rather, the Debtor simply moved his funds to DFW Design LLC's account, thereby preventing his creditors from reaching those funds. The Debtor then used the transferred funds to pay certain creditors while others remained unpaid."

The court next discussed whether the transfers were constructively fraudulent under §§ 24.005(a)(2) and 24.006(a) of the TUFTA. These provisions require that the debtor transferred assets without receiving reasonably equivalent value at a time when the debtor was financially vulnerable or insolvent. For the reasons stated above, the court held that the transfer of $225 was not a fraudulent transfer (assuming it was a "transfer" at all). As for the transfer of $25,000, the court held that "the Debtor did not receive reasonably equivalent value in exchange, and the transfer was made at a time he was not paying his debts as they came due. The Debtor transferred $25,000 to DFW Design LLC's account and then used that account as a personal piggy bank," and the transfer was thus a constructively fraudulent transfer. Although the LLC argued that it was working with the debtor toward a common goal of paying legitimate debts, the court described the situation as follows: "The Debtor decided to make a $25,000 transfer to DFW Design LLC from his personal account. And then the Debtor, as the 90% owner and person in control of DFW Design LLC, decided how the transfer would be spent, that is, whether to use the funds to pay personal or business creditors and which creditors to pay." Because the LLC was an insider with knowledge of the transferor's insolvency, the court said that it could not be a good faith transferee. According to the court, "Inasmuch as the Debtor owned more than 90% of DFW Design LLC, and was in control of the entity, DFW Design LLC was an insider of the Debtor. The Debtor's transfer to DFW Design LLC was not an arms-length transaction. The Debtor made the $25,000 transfer to DFW Design with the actual or constructive intent to hinder, delay or defraud his own creditors. The Debtor did not receive reasonably equivalent value in exchange, and DFW Design LLC, which the Debtor controlled, knew of the Debtor's insolvency. DFW Design LLC's good faith defense, therefore, fails."

Weiss v. Arabella Exploration Inc. (In re Arabella Petroleum Company, LLC), 647 B.R. 851 (Bankr. W.D. Tex. 2022).

The court held that distributions from the LLC debtor to its sole member after the LLC was insolvent were constructively fraudulent transfers, and certain other transfers by the LLC debtor to its sole member and a related entity were fraudulent transfers made with actual intent to hinder, delay, or defraud creditors. Because the sole member was also the sole manager and officer of the LLC, he owed the LLC a fiduciary duty, and the court concluded that the transfers made with actual intent to hinder, delay, or defraud were a breach of that fiduciary duty to the LLC. Although the company agreement expressly limited the potential liability of members and managers for breach of fiduciary duty to actions not taken in good faith, the provision did not limit liability for actions constituting fraud, gross negligence, bad faith or willful misconduct, and the court concluded that the member/manager's knowledge of the LLC's deteriorating financial condition established both bad faith and willful misconduct.

Jason Hoisager formed Arabella Petroleum Company, LLC (the "Debtor") in 2007 to buy and sell oil and gas properties in West Texas. Hoisager was the Debtor's sole member and manager, and as manager he appointed himself president, secretary, and treasurer. In 2008, Hoisager formed Arabella Exploration, LLC ("Arabella Exploration"), which began acquiring properties in the Permian Basin in 2011, and Arabella Exploration, Inc ("AEX") was formed on December 24, 2013, by the reverse merger of Arabella Exploration and a Cayman Islands corporation. According to Hoisager, he formed AEX to raise capital to develop oil and gas properties in the Permian Basin. In 2014, AEX formed Arabella Operating LLC ("Arabella Operating") to take over operating wells previously operated by the Debtor under the joint operating agreements.

Hoisager owned 100% of Arabella Exploration until the December 2013 merger, when it became a wholly owned subsidiary of AEX. Mr. Hoisager was the manager of Arabella Exploration and the chief executive officer of AEX following the merger. Arabella Operating was also a wholly owned subsidiary of AEX, and Hoisager was its sole manager. Hoisager owned 30.4% of the shares of AEX at the time of the merger, with the remainder owned by public shareholders. The parties stipulated that the Debtor became insolvent no earlier than December 31, 2013, a few days after AEX was formed.

The Trustee alleged that from 2011 to 2015, Hoisager made many fraudulent transfers from the Debtor to himself, his wife, and other entities that he owned or controlled. The alleged fraudulent transfers consisted of: (1) transfers of properties from the Debtor to AEX; (2) transfers of cash from the Debtor to AEX; (3) transfers of cash from the Debtor to Arabella Operating; and (4) transfers of cash from the Debtor to Hoisager and his wife. The Trustee also alleged that Mr. Hoisager's fraudulent transfers and self-dealing breached his fiduciary duties to the Debtor. The Trustee alleged that Hoisager owed fiduciary duties to the Debtor as its governing person (manager) and that he owed duties to creditors as a "corporate officer" at least as of the end of 2013, the date on which the Debtor became insolvent.

The Trustee relied on the books and records of the Debtor to support his position that Hoisager made many fraudulent transfers. Although substantially all the transfers to Hoisager were recorded in the Debtor's general ledger account as "Owner Distributions," Hoisager later attempted to characterize the payments as "salary & wages," "expense reimbursements," "performance bonuses," and "tax distributions." The court noted many inconsistencies between the books and records and Hoisager's explanations and concluded that Hoisager's "inconsistent, self-serving, and undocumented explanations of how the various documents and payments should be characterized" were not credible. Instead, the court relied on the contemporaneously recorded treatment of the transactions in the Debtor's books and records.

The court described each of the transfers within each of the four categories above and analyzed whether they were fraudulent transfers under the provisions of the Bankruptcy Code or the provisions of the Texas Uniform Fraudulent Transfer Act (TUFTA), which are also applicable pursuant to the Bankruptcy Code. The court provided a "primer" on fraudulent transfers in which it explained the distinction between constructively fraudulent transfers (transfers made by a debtor in exchange for less than reasonably equivalent value at a time when the debtor was either (1) insolvent (meaning the fair salable value of its assets was less than its liabilities), (2) unable to pay its debts as they came due, or (3) had an unreasonably small capital) and actual-intent fraudulent transfers (transfers made with actual intent to delay, hinder, or defraud creditors, with respect to which the intent in question is determined by circumstantial evidence, often with reference to so-called "badges of fraud"). The court also pointed out the remedies available to the Trustee ("avoidance" and "recovery") and certain principles relating to transfers made for an antecedent debt. While transfers made to satisfy antecedent debts cannot be constructively fraudulent transfers, they can be preferences or actual-intent transfers, but the Trustee did not seek to avoid any insider preferences under TUFTA and limited his Section 547 action to payments made to Hoisager.

Turning to each of the alleged fraudulent transfers, the court first analyzed transfers of certain properties from the Debtor to AEX and concluded that the trustee could not recover the properties transferred to AEX as constructively fraudulent transfers because the transfers were for an antecedent debt. The Trustee could not recover the properties transferred to AEX as actual-intent fraudulent transfers because the Trustee failed to show the value of the properties to be recovered.

Next the court analyzed transfers of property and cash made by the Debtor to AEX and transfers of cash from the Debtor to Arabella Operating and concluded that the Trustee could not recover these transfers because the Trustee failed to show that they transfers were made "to or for the benefit of" Hoisager as a "transfer beneficiary."

The court proceeded to explain the relevance of the financial condition of the Debtor to the claims for fraudulent transfer and breach of fiduciary duty. The court said that the evidence made it very clear that the combination of certain high-cost drilling activities by the Debtor and "absurdly large owner distributions" were the biggest contributors to the Debtor's insolvency at the end of 2013.

Based on the fact that the Debtor was insolvent at the end of 2013, $2,803,834 in distributions made to Hoisager after December 31, 2013 were recoverable by the Trustee as constructively fraudulent transfers. As the court pointed out, "owner distributions made while a company is insolvent are quintessential constructively fraudulent transfers." In addition, the court determined that the Trustee could recover cash payments from the Debtor to Hoisager after July 1, 2013 as actual-intent transfers. Here, the court explained and relied upon "badges of fraud" as circumstantial evidence that Hoisager had the requisite intent to "hinder, delay, or defraud" creditors. The court described the facts that indicated Hoisager's intent as follows:

> First, the Debtor made its first six-digit distribution to Mr. Hoisager in July 2013.
>
> Next, on top of distributions to Mr. Hoisager, the Debtor made large expenditures, including substantial cost overruns, on the Wolfbone I and II wells—wells in which the Debtor no longer owned a working interest—leading to the Debtor's slide into insolvency. This ship was clearly sinking in 2013, and no one would know that better than Mr. Hoisager.
>
> Next, the Debtor transferred almost 5 million dollars to AEX. These transfers were included on Exhibit 85 ...[which revealed that] beginning in July 2013 (again), the Debtor made substantial revenue payments to AEX at times when the AEX joint interest billings due to the Debtor were substantial, and mostly past due. No prudent operator would have failed to offset those revenue payments against the past due joint interest billings.
>
> Finally, there is Mr. Hoisager's audacious attempt to transition from his role as a sole proprietor, ... using the Debtor as his private checking account, to a role as the chief executive officer of a public company.

> Taking all these facts together leads to the inescapable conclusion that starting in July 2013, Mr. Hoisager knew the Debtor was foundering, and he was, at the same time, enticed by the prospect of running AEX, a public company. Preferring his new enterprise over the Debtor, Mr. Hoisager emptied the Debtor of available cash and valuable properties, and diverted it all to himself, AEX, or later, Arabella Operating. And this, at the least, constitutes an intent to delay, hinder, or defraud the creditors of the Debtor, and so the cutoff date for cash transfers to Mr. Hoisager can be moved back to July 1, 2013. Doing so adds $377,535 to the judgment.

With respect to the Trustee's claim for breach of fiduciary duty against Hoisager, the court stated that, as the sole member, manager, and officer (president, secretary, and treasurer) of the Debtor, a Texas LLC, Hoisager owed the Debtor a fiduciary duty. The court stated that "Texas law allows an LLC to limit this duty to some extent, and the Debtor's company agreement does just that, relieving Mr. Hoisager from 'any action taken (or any failure to act) by [him] in good faith on behalf of the company and reasonably believed by [him] to be authorized or within the scope of [his] authority, unless that action (or failure to act) constitutes fraud, gross negligence, bad faith or willful misconduct....'" Hoisager argued that he owed no duties to creditors unless the company stopped operating, and the court stated that the cited case law supports this notion but also affirms that the duty runs to the corporation. The court thought it likely that Texas would ultimately adopt the Delaware view that the fiduciary duties are always owed to the corporation but can be enforced by the residual stakeholders—in this case the creditors since the Debtor was hopelessly insolvent. In any event, the creditors in this case were not seeking to enforce the fiduciary duty owed to the Debtor; rather, a trustee standing in the shoes of the Debtor had the ability to sue to enforce the fiduciary duties owed to the Debtor and recover on behalf of the residual stakeholders.

The court stated that the duty imposed on Hoisager included a duty of care and a duty of loyalty, and the duty of loyalty includes a duty not to engage in self-dealing. Although Hoisager raised the defense of the business judgment rule, the court pointed out that the business judgment rule does not apply to self-dealing or interested party transactions. In such situations, the fiduciary has the burden of proving that the transaction was fair to the corporation.

The court characterized the actions taken by Hoisager to drain the Debtor of cash and properties through transfers to himself and AEX as "the very epitome of self-dealing and interested party transactions." That "he took these actions with full knowledge of the Debtor's deteriorating financial condition establishes both bad faith and willful misconduct."

In addressing the measure of damages, the court concluded that the Debtor was damaged by losing the cash transferred with the actual intent to delay, hinder, or defraud creditors, which included the amounts of cash transferred to Hoisager after July 1, 2013, as well as the non-revenue cash transferred to AEX after July 1, 2013, since those amounts, while not "for or to the benefit of" Hoisager for purposes of fraudulent conveyance law, fell "squarely within the proscription on unfair interested party transactions." Payments of revenue to AEX after July 1, 2013 were also damages for breach of fiduciary duty because those payments should have been retained and set off against the outstanding joint interest billings owed by AEX to the Debtor. Finally, Hoisager failed to carry his burden to prove fairness with respect to certain cash payments to Arabella Operating.

The Trustee requested exemplary damages under Section 41.003 of the Texas Civil Practice and Remedies Code, which permits recovery of exemplary damages when the claimant proves by clear and convincing evidence that the harm arose from fraud, malice, or gross negligence. The Trustee sought to prove that the harm arose from fraud, but the Trustee neither pleaded nor proved fraud. While the Trustee proved "actual intent to hinder, delay, or defraud" creditors, he did so by a preponderance of the evidence with reference to badges of fraud. That showing did not satisfy the elements of common-law fraud (which requires that a plaintiff justifiably rely upon and be injured by a material misrepresentation that the defendant knew was false or recklessly made without knowledge as to its truth, and with an intention that it be acted upon) by clear and convincing evidence. Therefore, the court denied the request for exemplary damages.

U. Personal Jurisdiction

In re Taasera Licensing LLC Patent Litigation, No. 2:22-MD-03042-JRG, No. 2:22-CV-00314-JRG, 2023 WL 2917650 (E.D. Tex. Mar. 15, 2023).

In an action filed in New York and transferred to the Eastern District of Texas, the court granted a motion to dismiss for lack of personal jurisdiction. Exercise of personal jurisdiction over the LLC depended on whether the contacts of the LLC's parent with New York could be imputed to the LLC on the basis of the alter-ego doctrine under New York law. The court concluded that a majority of the relevant factors did not support a finding that the parent exercised complete domination over its LLC subsidiary. In addition, even assuming complete domination, the court concluded there was no showing that the domination was used to commit a fraud or wrong. Thus, the requisites for applying the alter-ego doctrine under New York law were not satisfied, and the LLC and its parent were not alter egos.

Transportes Zima Real S.A. de C.V. v. Benitez, No. 14-22-00388-CV, 2023 WL 2026767 (Tex. App.—Houston [14th Dist.] Feb. 15, 2023, no pet. h.) (mem. op.).

The evidence was insufficient to support the trial court's implied finding that a Texas LLC was the alter ego of a Mexican corporation for purposes of the court's exercise of general jurisdiction over the Mexican corporation.

Transportes Zima Real S.A. de C.V. ("Transportes"), a corporation organized and located in Mexico, appealed the trial court's denial of a special appearance. After concluding that the trial court lacked specific jurisdiction over Transportes, the court of appeals discussed Transportes' challenge to the trial court's implied finding that Transportes was subject to general jurisdiction on the basis that Transportes and Zima Real Bus Lines, LLC ("ZIMA Real"), a Texas limited liability company, were alter egos that should be treated as one entity for jurisdictional purposes.

The court of appeals described the test for piercing the veil between a parent and subsidiary for jurisdictional purposes as follows:

> To "fuse" the parent company and its subsidiary for jurisdictional purposes, the plaintiff must prove the parent controls the internal business operations and affairs of the subsidiary. *BMC Software*, 83 S.W.3d at 799 (citing *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 418-19 (Tex. App.—Houston [14th Dist.] 1997, no writ)). 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. *See id.* (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983)). To determine whether an alter ego relationship exists for jurisdictional purposes between an individual and his corporation, courts look to the total dealings of the corporation and the individual, including the degree to which corporate and individual property have been kept separate, the amount of financial interest, ownership, and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes. *Wilmington Tr., Nat'l Ass'n v. Hsin-Chi-Su*, 573 S.W.3d 845, 855 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The court concluded that there was no evidence in the record to support an implied finding by the trial court that Zima Real was the alter ego of Transportes such that general jurisdiction would exist over Transportes. Despite the plaintiffs' contention, there was no evidence that the two companies shared revenue. Although there was evidence that the individual who was the CEO/president of Transportes was also the president of Zima Real, the court stated that it was insufficient to establish that the two companies "ceased to be separate so that the corporate fiction should be disregarded." The court also stated that the residence of Transportes' employees in Texas and the registration of Transportes' property in Harris County were not dispositive in determining if Transportes exercised atypical control over the day-to-day internal operations of Zima Real. Finally, contrary to the plaintiffs' argument, the court said that Transportes adhered to corporate boundaries and corporate formalities. The court added that, "[i]n any event, evidence of a lack of observance of corporate formalities does not compel an alter ego finding."

Holman's DNA Trucking & Construction, LLC v. National Liability & Fire Insurance Company, Civ. A. No. 3:21-CV-2653-B, 2022 WL 4843118 (N.D. Tex. Sept. 30, 2022) ("A corporation is paradigmatically 'at home' in two places: '(1) [its] state of incorporation and (2) the state where it has its principal place of business.' *Frank*, 947 F.3d at 337 (citing *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)). But '[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.' *Goodyear*, 564 U.S. at 919 (2011) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). This 'at home' analysis also applies to limited liability companies.").

V. Service of Process

Lambert v. New Era Investments 1 LLC, No. 6:22-CV-00397-ADA-DTG, 2023WL 3724793 (W.D. Tex. May 30, 2023).

The court reviewed methods of service of process under the Federal and Texas rules and noted that Chapter 5 of the Business Organizations Code addresses service on a business entity and provides that "each member of a member-managed ... limited liability company is an agent of that limited liability company" for purposes of service of process. Tex. Bus. Orgs. Code § 5.255(3). After four failed attempts to serve the registered agent of the defendant LLC at the registered office, the court authorized the following alternative methods of service of process: (1) service on the Secretary of State, (2) service by registered or certified mail, or (3) substituted service through another over the age of sixteen at the defendant's residence or another place to be found.

Cuevas v. Novoa, No. 3:21-CV-3243-C-BK, 2023 WL 2483490 (N.D. Tex. Feb. 14, 2023), report and recommendation adopted, 2023 WL 2481234 (N.D. Tex. Mar. 13, 2023).

The court concluded that the plaintiff did not properly effectuate service of process on an LLC where the record showed that the process server delivered the summons and complaint (personally and by mail) to the plaintiff, who was one of three members of the LLC.

Tex. Bus. Orgs. Code § 5.255(3) states that service of process on an LLC may be made on each member. The plaintiff, one of three members of the defendant LLC, claimed that he was thus an agent authorized by law to receive service of process on behalf of the LLC. The court stated that the case law on this issue is sparse, but the court found several out-of-state cases in the corporate context instructive and followed their rationale. Those cases concluded that service was not proper where a corporate officer or agent commenced an action against the corporation by serving himself.

Pearson v. Duncanville Senior Care, LLC, No. 05-21-00900-CV, 2022 WL 4480562 (Tex. App.—Dallas Sept. 27, 2022, no pet. h.) (mem. op.).

"We begin with the Goodlife Parties' assertion that Ms. Pearson's claims are barred by limitations. A timely filed lawsuit will not prevent limitations from running if the plaintiff does not exercise diligence in procuring service on the defendant. If the defendant affirmatively pleads limitations and shows service did not occur within the limitations period, the burden shifts to the plaintiff to prove it acted diligently in procuring service.

To satisfy this burden, the plaintiff must show it 'acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served.' This ordinarily presents a fact question, 'determined by examining the time it took to secure citation, service, or both, and the type of effort or lack of effort the plaintiff expended in procuring service.' The plaintiff's evidence must show its efforts to serve the defendant and explain every lapse in effort or period of delay. If the plaintiff's explanation fails to raise a fact question as to its diligence, then the defendant has no burden to show the plaintiff failed to act diligently. If, however, 'the plaintiff's explanation for the delay raises a material fact issue concerning the diligence of service efforts, the burden shifts back to the defendant to conclusively show why, as a matter of law the explanation is insufficient.'

Here, the parties agree the longest possible limitations period for Ms. Pearson's claims was two years from her termination. Ms. Pearson also appropriately concedes that, because the Goodlife Parties [LLCs] affirmatively pleaded limitations and demonstrated she did not serve them within the limitations period, the burden shifted to her to show she acted diligently in procuring service.

A limited liability company (LLC) is not a person capable of accepting process on its own behalf and must be served through an agent. Agents authorized by statute to accept service on behalf of an LLC include its registered agent and, depending on whether the LLC is manager-or member-managed, any manager or member of the LLC. See TEX. BUS. ORGS. CODE §§ 5.201(b), 5.255(3). A proper service return must show both the name of the person who accepted service on behalf of the LLC and that the person was authorized to do so.

After two failed attempts to serve the Goodlife Parties' registered agent before 9:00 a.m. on consecutive days, Ms. Pearson chose to serve her former supervisor, Ms. Freeman. The service returns reflect that Ms. Freeman was the Goodlife Parties' 'Regional Manager,' although Ms. Freeman's affidavit states she was the Goodlife Parties' 'Regional Operations Officer.' The distinction is of no note in this appeal. Ms. Pearson provided no evidence suggesting either that the Goodlife Parties authorized Ms. Freeman to accept service on their behalf or that Ms. Freeman was a member or manager of the LLCs as those terms are used in the business organizations code. . . .

Ms. Pearson's only explanation for failing to properly serve the Goodlife Parties through an authorized agent is that she could not find their registered agent at their registered address. But the law provides a clear and simple path for obtaining valid service in those circumstances. Under the business organizations code, if an entity 'does not maintain a registered agent,' or if 'the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity,' then the secretary of state will act as an agent 'for purposes of service of process.' See TEX. BUS. ORGS. CODE § 5.251(1). An ordinarily prudent person under these circumstances would serve the Goodlife Parties through the secretary of state.

Instead, Ms. Pearson chose to serve her former supervisor, Ms. Freeman, without providing any evidence suggesting a reasonable basis for believing Ms. Freeman had authority to accept service on the Goodlife Parties' behalf. And having served Ms. Freeman, Ms. Pearson made no other efforts to serve the Goodlife Parties in the months before their voluntary appearance. On this record, because she did not identify a reasonable basis for believing service upon Ms. Freeman was sufficient, we conclude Ms. Pearson's explanation failed to raise a genuine fact issue as to her diligence in procuring service on the Goodlife Parties after limitations expired. The trial court thus did not err by granting summary judgment on limitations grounds, and we need not reach the merits of the parties' remaining arguments."

Fuller v. CIG Financial, LLC, Civ. A. No. 3:22-CV-1289-D, 2022 WL 4227518 (N.D. Tex. Sept. 13, 2022) ("Texas law provides for service on an agent of a limited liability company, including any manager of a manager-managed company or member of a member-managed company. Tex. Bus. Orgs. Code Ann. § 5.255(3) (West 2006); *see also BLS Dev., LLC v. Lopez*, 359 S.W.3d 824, 827 (Tex. App. 2012, no pet.). Federal law likewise provides for service of a copy of the summons and complaint on 'an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. . . .' Rule 4(h)(1)(B). [Footnote 3: Although Rule 4(h) explicitly refers only to corporations, partnerships, and associations, several judges of this court have held that it applies with equal force to limited liability companies.]").

Caldera v. RMA Recovery Group LLC, No. 5:18-CV-807-DAE, 2020 WL 13609422 (W.D. Tex. Aug. 17, 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.)

The court concluded that the plaintiff did not properly serve the LLC defendant because the plaintiff did not show that service was accomplished by serving an agent authorized to receive service of process on the LLC.

The plaintiff relied upon service of process by the U.S. Marshal Service and a private process server to establish that the LLC defendant in this suit had been served. The court explained that Fed. R. Civ. P. 4(e)(1) and 4(h)(1)(A) allow service "on a corporation, or a partnership or other unincorporated association" to be accomplished by following state law. The court cited Texas case law for the proposition that a corporation is not a person capable of accepting service of process on its own behalf and thus must be served through an agent. Based on Tex. Bus. Orgs. Code §§ 5.201(a), 5.255(3), the court stated that an LLC such as the defendant may be served through its registered agent or other agents authorized to receive service such as its managers and members. Those agents may be served by either of the two methods provided by Tex. R. Civ. P. 106(a) (in person or by registered or certified mail). The court said that the plaintiff failed to demonstrate that service was proper in this case because he directed the Marshal Service to serve the company itself rather than the company's agent. The plaintiff relied on statements in a newly provided proof of service that referred to service on an individual named Ms. Smith. The court found the newly provided proof of service by a private process server to be suspicious and stated that it was unclear in any event if Ms. Smith was an officer or agent authorized to receive service of process. Thus, the court concluded that the LLC defendant should be dismissed for failure to prosecute or comply with an order of the court, stating that there was "a clear record of delay and contumacious conduct by the Plaintiff that warrants dismissal of his claims."

W. Misnomer, Misidentification

Moore v. Hooters of America, LLC, No. 11-21-00168-CV, 2023 WL 2697772 (Tex. App.—Eastland Mar. 30, 2023, no pet. h.) (mem. op.).

The court affirmed a summary judgment in favor of the defendant because the plaintiff sued the wrong entity. The plaintiff sued the parent LLC of an LLC that owned a Hooters restaurant at which the plaintiff was injured. The plaintiff failed in its attempt to substitute the subsidiary in place of the parent, and in the absence of any evidence to raise a fact question on veil piercing, the court of appeals affirmed the summary judgment granted by the trial court in favor of the defendant.

A patron of a Hooters restaurant in Odessa was injured by a security guard who was an employee of the security company hired by the restaurant. The restaurant was owned by TW Restaurant Holder, LLC (TWR), and the plaintiff sued its parent company, Hooters of America, LLC (HOA). The court began by explaining that it is common for "commercial branding with an assumed or trade name such as 'Hooters' [to be] used as a marketing tool for business enterprise." The court went on to say that "[c]orporations, including, as here, limited liability corporations [sic] (LLCs), are separate legal entities that insulate owners and/or shareholders from personal liability." The court stated that there was nothing improper about "dividing sectors of that business and/or assets and separating them into distinct corporations or businesses, even if one of the reasons for doing so is to minimize the assets at risk in the event of liability of a lawsuit. Subsidiary and parent corporations are separate and distinct 'persons' as a matter of law."

The plaintiff argued that it used diligence in suing TWR in its common name under Rule 28, which permits a suit against a business entity in its assumed or common name. Alternatively, the plaintiff argued this was a case of misnomer or misidentification. The court said this was not a case encompassed by Rule 28, nor was it a case of misnomer or misidentification. If an entity is sued under its assumed or common name, the plaintiff must amend the petition to correct the legal name of the defendant before judgment. A misnomer arises when a plaintiff sues the correct entity but misnames it in the pleadings, and a misnomer can be corrected by amendment even after the statute of limitations has expired. Misidentification occurs when two separate legal entities have similar names and the plaintiff sues the wrong one. In this case, the plaintiff never served TWR, never attempted to bring TWR into the suit, and did not amend the petition to name TWR. The plaintiff sued HOA under its actual name, and TWR and HOA did not have similar names that would cause the type of confusion leading to misidentification.

Because a parent corporation is not generally liable for the torts of a subsidiary and there was no summary judgment evidence that would allow the court to disregard the limitation on liability afforded by the corporate structure, there was no summary judgment evidence to support holding HOA liable for the torts of TWR. Further, there was no summary judgment evidence of any alleged duty of HOA to the plaintiff. Because HOA did not own, operate, or control the Hooters restaurant before or on the date of the incident, the plaintiff would have to provide evidence that HOA used the corporate form of TWR as an unfair device to achieve an inequitable result in order to hold HOA liable. There was no evidence in the record of such a use, and summary judgment in favor of HOA was properly granted.

X. Venue

I Thrive Drip Holdings, LLC v. ThrIVe Hydration, LLC, No. 1:22-CV-00872-RP, 2023 WL 3516204 (W.D. Tex. May 17, 2023), report and recommendation adopted, 2023 WL 3910259 (W.D. Tex. June 8, 2023).

Venue was proper in the Austin Division of the Western District of Texas because the defendants were all residents of the Western District. One defendant was an LLC with its principal place of business in Boerne, Texas, and the other defendant was an individual who resided in Boerne. Boerne is located in the Western District. Under 28 U.S.C. § 1391, venue is proper in a judicial district in which any defendant resides if all defendants reside in the state in which the district is located. The court said that "§ 1391 provides that a corporate defendant, such as ThrIVe

Hydration, LLC, is deemed to reside 'in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question.'" The plaintiffs filed their case in the Austin Division of the Western District, and the court said that § 1391 does not require that suit be brought in a particular division where the defendants reside. Because all defendants were residents of the Western District, suit could be brought in any division of the Western District, and venue was proper in the Austin Division.

Y. Pro Se Representation

TenPearls, LLC v. Medulla International, LLC, No. 4:22-CV-550-SDJ, 2023 WL 3292883 (E.D. Tex. May 5, 2023).

Taking into account the factors to be considered in determining whether entry of a default judgment is warranted, the court determined that the factors weighed in favor of entry of a default judgment in favor of a plaintiff in a suit against an LLC that was not represented by counsel. The court said that the plaintiff's interests were prejudiced because the defendant had filed to hire counsel to represent it as is required for a limited liability company to proceed in federal court. This failure for over ten months since the initiation of the suit had brought the litigation process to a halt. Under these circumstances, the court said that grounds for a default judgment were clearly established, and default judgment was not unusually harsh.

Innovative Sports Management, Inc. v. Maya International Bar & Grill, LLC, No. 4:21-CV-967, 2023 WL 2671386 (S.D. Tex. Mar. 28, 2023) ("As a limited liability company, Maya LLC cannot represent itself in federal court.").

Cypers v. BankCard Central, LLC, Civ. A. No. 4:21-CV-00382, 2022 WL 17170853 (E.D. Tex. Nov. 22, 2022) (stating that "limited liability companies may not proceed unrepresented in federal court").

Post Hole Ventures, LLC v. City of Kerrville, TX, No. SA-21-CV-00980-XR, 2022 WL 11455956 (W.D. Tex. Oct. 19, 2022) ("Bates is not a licensed attorney, however, and thus is not qualified to represent PHV [Post Hole Ventures, LLC] in federal court. *Stark v. Kohrs*, No. 1:19-CV-041-LY, 2020 WL 734480, at *1 (W.D. Tex. Feb. 12, 2020) (citing *Sw. Express Co. v. Interstate Com. Comm'n*, 670 F.2d 53, 54–56 (5th Cir. 1982)) ('Although an individual has the right to proceed pro se, business entities such as limited liability companies—as fictional legal persons—have no such right, and must be represented by licensed counsel.')").

Walker v. Taub, No. 01-20-00580-CV, 2022 WL 2309133 (Tex. App.—Houston [1st Dist.] June 28, 2022, no pet. h.) (mem. op.).

"A notice of appeal filed by a corporate officer or representative who is not a licensed attorney is ineffective to perfect an appeal by the corporation. *See* . . . *Amron Props., LLC v. McGown Oil Co.*, No. 14-03-01432, 2004 WL 438783, at *1 (Tex. App.—Houston [14th Dist.] Mar. 11, 2004, no pet.) (mem. op.) (limited liability companies must appear through licensed attorneys).

Likewise, a person proceeding pro se cannot file a notice of appeal on behalf of another.

Here, Walker filed his pro se notice of appeal of the trial court's judgment purportedly on behalf of himself and Rainbow [Water Removal and Drying of Houston, L.L.C., formerly doing business as Rainbow International of Houston]. The notice of appeal filed by Walker is not effective as to Rainbow, and no timely and effective notice of appeal has been filed on Rainbow's behalf. See TEX. R. APP. P. 25.1(c) ('A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal.'), 26.1 (requiring notice of appeal to be filed within thirty days after judgment is signed, or within ninety days if motion for new trial, motion to modify judgment, motion to reinstate, or certain requests for findings of fact and conclusions of law are filed). Without a timely filed notice of appeal, this Court lacks jurisdiction over Rainbow's appeal of the trial court's judgment."

Infracon USA, LLC v. On Deck Capital, Inc., No. 09-20-00058-CV, 2022 WL 2068859 (Tex. App.—Beaumont June 9, 2022, no pet. h.) (mem. op.).

"This appeal arose from a judgment that On Deck Capital, Inc. obtained against Infracon USA, LLC by default. Horacio Lopez Montes, the managing member of Infracon USA, LLC filed a notice to appeal the judgment on Infracon's behalf. After filing the notice, he also filed a brief.

On March 11, 2022, the Clerk notified Montes that the Court's records do not show that Montes is licensed as an attorney and admitted to practice in Texas. The Court ordered the brief that Montes filed on Infracon's behalf stricken from the record. Finally, we advised Montes, as Infracon's managing representative, that unless an attorney with a license and admitted to practice law in Texas appeared on Infracon's behalf and sought to extend the deadline for filing a brief by April 11, 2022, the Court would dismiss the appeal in 09-20-00058-CV for want of prosecution without further notice. [*See Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (per curiam) ('Generally a corporation may be represented only by a licensed attorney. . . .'); Sherman v. Boston, 486 S.W.3d 88, 95-96 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ('Legal entities, such as . . . . a limited liability company, generally may appear in a district or county court only through a licensed attorney.').]

On April 7, Montes sent the Court a letter representing he had asked Lone Star Legal Aid and private attorneys to represent Infracon in Infracon's appeal. He also advised no one would agree to represent Infracon in the appeal. Montes asked that the Court grant Infracon thirty additional days to obtain an attorney to appear and file a brief for Infracon in the appeal. While we did not act on Montes's request, no attorney ever notified the Court that they were appearing as counsel for Infracon USA, LLC in the appeal.

We find that Infracon USA, LLC failed to obtain counsel as required by the Court's letter. Accordingly, we dismiss the appeal."

Securities & Exchange Commission v. Jaitley, No. A-21-CV-832-LY, 2022 WL 2763154 (W.D. Tex. Mar. 9, 2022) ("As the SEC accurately notes, as a legal entity OTA [an LLC] cannot appear pro se but must instead be represented by legal counsel. A pro se plaintiff is only entitled to 'appear on behalf of one's self; one cannot represent another separate legal entity, such as another person, a corporation, or a partnership, pro se.' *Patent Group, LLC v. Johnny Ray, LLC*, 2010 WL 4287200, at *1 (E.D. Tex. Nov. 1, 2010) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (per curiam)). As fictional legal entities, corporations and partnerships cannot appear for themselves personally. Their only proper representative is a licensed attorney, 'not an unlicensed layman regardless of how close his association with the partnership or corporation.' Despite assertions to the contrary, an attorney has not entered an appearance on behalf of OTA, nor has an attorney signed or submitted any pleadings on behalf of OTA. Simply put, OTA is not represented by counsel and all pleadings submitted on its behalf should be stricken.").

Z. Right to Appointed Counsel

TenPearls, LLC v. Medulla International, LLC, No. 4:22-CV-550-SDJ, 2023 WL 2591479 (E.D. Tex. Jan. 6, 2023).

The court held that statutory authority to appoint counsel for a "person" in a civil suit (*see* 28 U.S.C. § 1915(e)(1)) is limited to natural persons and thus did not allow the court to appoint counsel for an artificial person such as an LLC. Even if the court had authority to appoint counsel for the LLC in this case, the court said it would deny the request because the authority to appoint counsel in a civil suit is typically only exercised in "exceptional circumstances," which the court said were not present here. Because an LLC cannot appear *pro se*, the LLC in this case was ordered to obtain counsel.