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

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## TABLE OF CONTENTS

| I. Introduction | ........................................................................ | 1 |
| II. Recent Texas Cases Involving Partnerships | ............................................... | 1 |
| A. Creation/Existence of General Partnership | ................................................................ | 1 |
| B. Partner’s Personal Liability for Obligations of Partnership | .................................. | 11 |
| C. Authority and Power of Partner or Other Agent to Bind Partnership | .. | 12 |
| D. Fiduciary Duties of Partners and Affiliates | ........................................ | 15 |
| E. Partnership Property and Partnership Interest | ........................................ | 28 |
| F. Interpretation and Enforcement of Partnership Agreement | .................................. | 41 |
| 1. Attorney’s Fees | ........................................ | 41 |
| 2. Indemnification | ........................................ | 41 |
| 3. Injunctive Relief | ........................................ | 44 |
| 4. Arbitration | ........................................ | 45 |
| 5. Statute of Frauds | ........................................ | 47 |
| G. Admission of Partner | ........................................ | 53 |
| H. Assignment or Transfer of Interest | ........................................ | 57 |
| I. Dissolution/Winding Up | ........................................ | 62 |
| J. Death, Withdrawal, or Expulsion of Partner | ........................................ | 65 |
| K. Veil Piercing | ........................................ | 71 |
| L. Creditor’s Remedies: Charging Order, Turnover Order, Receivership | ................. | 80 |
| M. Attorney’s Fees | ........................................ | 87 |
| N. Standing or Capacity to Sue | ........................................ | 88 |
| O. Derivative Litigation | ........................................ | 91 |
| P. Diversity Jurisdiction | ........................................ | 97 |
| Q. Bankruptcy | ........................................ | 100 |
| R. Securities Laws | ........................................ | 104 |
| S. Service of Process | ........................................ | 106 |
| T. Pro Se Representation | ........................................ | 107 |
| III. Recent Texas Cases Involving Limited Liability Companies | .................................. | 107 |
| A. Nature of Limited Liability Company | ........................................ | 107 |
| B. Limited Liability of Member or Manager; Personal Liability of Member or Manager Under Agency or Other Law | ....................................... | 107 |
| C. Authority of Member, Manager, Officer or Other Agent | .................................. | 114 |
| D. Fiduciary Duties | ........................................ | 116 |
| E. LLC Property and LLC Membership Interest | ........................................ | 124 |
| F. Interpretation and Enforcement of Membership Agreement | .................................. | 127 |
| 1. Contractual Modification of Fiduciary Duties | .................................. | 127 |
| 2. Admission of Member | ........................................ | 131 |
| 3. Capital Contributions | ........................................ | 134 |
| 4. Capital Calls | ........................................ | 137 |
| 5. Redemption; Valuation of Membership Interest | .................................. | 142 |
| 6. Statute of Frauds | ........................................ | 145 |
| G. Access to Books and Records | ........................................ | 147 |
| H. Distributions | ........................................ | 147 |
| I. Merger, Conversion | ........................................ | 147 |
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


The court affirmed a judgment based on jury findings that three individuals created a partnership and that two of the individuals failed to comply with the agreement to form the partnership and committed fraud.

In early 2020, Cruickshank, Ogbonna, and Ekworomadu discussed creating a new business venture to supply a growing demand for personal protective equipment (PPE). They never memorialized their agreement in a formal writing. In order to get the business up and running quickly, the parties began by using an existing bank account of Olimax Group, Inc., a company owned by Ogbonna. The parties also incorporated Olimax Manufacturing as part of their PPE business. The business was referred to at times as Olimax Medical Supplies, and Cruickshank was referred to as CEO. The business made millions in profits in just a few months, but disputes began to arise regarding the nature of the business relationship between Cruickshank, Ogbonna, and Ekworomadu. Cruickshank sued in October 2020, asserting claims for breach of an agreement to form a partnership, fraud, fraud by nondisclosure, and breaches of fiduciary duties. At trial, Cruickshank asserted that she, Ogbonna, and Ekworomadu had agreed to form a partnership to sell PPE equipment and that she was entitled to an equal partnership share in the business. Ogbonna and Ekworomadu insisted that the two of them had started a PPE business and invited Cruickshank to participate on the basis of her receiving only a share of the profits she generated and not the profits of the business as a whole and not an equal partnership share.

The jury answered “yes” to a question asking whether Cruickshank, Ogbonna, and Ekworomadu had an agreement to form a partnership to sell PPE. The jury question included several instructions and a list of factors indicating the creation of a partnership. The jury also answered yes to a question asking whether Olimax Manufacturing was property of the partnership. The jury found that Ogbonna and Ekworomadu failed to comply with the agreement, and the jury did not find that any defenses or excuses for noncompliance applied. The jury found damages in the amount of $5,130,673 for the failure to comply with the agreement. The jury found that Ogbonna and Ekworomadu complied with their fiduciary duties but committed fraud against Cruickshank. The jury found the damages for fraud were $525,000. The trial court entered a judgment stating that the parties formed a partnership to sell PPE and that Cruickshank’s interest terminated no later than November 16, 2020, and awarding damages for breach of the agreement and fraud plus attorney’s fees. Ogbonna and Ekworomadu appealed.

Ogbonna and Ekworomadu argued on appeal that the business at issue could not have been a partnership because the evidence conclusively established that it was created as a corporation, relying on Tex. Bus. Orgs. Code § 152.051(c). The appellants pointed to evidence that the business temporarily used preexisting assets when it first started up (including a bank account) of Olimax Group, Inc., a corporation owned by Ogbonna. The court of appeals did not view the evidence as conclusively establishing that the new business was created as a corporation and not a partnership, stating that there was other evidence, including Cruickshank’s testimony, supporting the conclusion that the parties agreed to form a partnership, not a corporation. A concurring justice elaborated on this point, stating that the appellants cited no case to support that use of a corporate bank account would somehow transform their partnership to a corporation. The concurring opinion pointed out that the corporation pre-existed the partnership.
and did not include Cruickshank, and the concurrence went on to discuss why the evidence in this case distinguished it from the case relied on by the appellants, *Lentz Eng’g L.C. v. Brown*, No. 14-10-00610-CV, 2011 WL 4449655, at *3–4 (Tex. App.—Houston [14th Dist.] Sept. 27, 2011, no pet.), which dealt with a written agreement between the parties creating an LLC.

The appellants’ next argument was that the trial court erred in submitting questions on breach and damages and should have considered the case as a termination of partnership case governed by statutory termination rules rather than as a failure to comply with an agreement to form a partnership. The court of appeals held that the appellants failed to preserve this argument by failing to raise it in the trial court.

The court of appeals next concluded that the evidence was sufficient to support the jury’s finding of fraud and that the award of damages for fraud did not duplicate the award for breach of the agreement to form a partnership. Based on the evidence, the court said that the jury could have reasonably determined Ogbonna and Ekworomadu promised Cruickshank an equal share of equity in the business and then concealed from her their withdrawal of some of the equity that had been built up by giving themselves employment contracts, salaries, and guaranteed bonuses. The court said that the equity disbursed in this way was not included in the damages awarded for breach of the agreement to form a partnership, which was based on the fair market value of Cruickshank’s interest in the partnership as of the date her interest in the partnership terminated. In response to the appellants’ argument that there was no evidence they intended to induce Cruickshank into any action by failing to disclose the contracts, salaries, and guaranteed bonuses, the court pointed out that the jury could have reasonably inferred from the evidence that by concealing the contracts, salaries, and guaranteed bonuses paid to themselves, Ogbonna and Ekworomadu intended to induce Cruickshank into continuing to work on behalf of the business in a CEO capacity without compensation (such as a salary or guaranteed bonus) but with the expectation that she ultimately would receive an equal share of the business’s equity.

Next, the court rejected the appellant’s argument that Cruickshank’s theory of fraud by nondisclosure of salaries and bonuses was dealt with in the jury submission on breach of fiduciary duty, which stated that “[a] partner does not violate a duty or obligation merely because the partner’s conduct furthers the partner’s own interest.” The court responded that Cruickshank’s theory was not limited to the fact that the alleged conduct furthered Ogbonna’s and Ekworomadu’s own interests; it was based on the assertion the conduct deprived Cruickshank of her share of the equity in the business.


Applying the statutory factors that are considered to determine whether a partnership is formed, the court concluded that the plaintiff had not adequately alleged that a partnership was formed; therefore, the court dismissed the plaintiff’s claim for breach of partnership agreement. Because the plaintiff failed to adequately allege formation of a partnership and did not allege another type of fiduciary relationship, the court also dismissed the plaintiff’s claim for breach of fiduciary duty.

Alex Peykoff hired Game Changer Publishing (“GCP”), whose CEO was Charrissa Cawley, to promote a book written by Peykoff. While discussing publishing and promotion of the book, Peykoff and Cawley also considered hosting an entrepreneurial event called Mastermind to further promote Peykoff’s book and, more generally, the brand of an organization run by Peykoff, Satisfied Life Foundation, Inc. (“SLF”). According to Peykoff and SLF, Cawley represented that she had a long track record of hosting successful events and that Mastermind would produce profits of at least $200,000. Peykoff and SLF alleged that a partnership was formed and that Peykoff and SLF provided significant funding, client contacts, and their valuable business reputation to help make Mastermind a success. Mastermind was unsuccessful and resulted in a financial loss of $216,000. The entire loss, which Peykoff and SLF believed should have been borne jointly with Cawley and GCP, was shouldered by Peykoff and SLF without reimbursement, and Peykoff and SLF sued Cawley and GCP, alleging various causes of action, including breach of partnership agreement and breach of fiduciary duty. The defendants sought dismissal for failure to state a claim.

The plaintiffs’ primary claim was that the parties formed a partnership to put on the Mastermind event. No written partnership agreement was produced by either party, and the defendants argued that the plaintiffs’ claim of a partnership was “impermissibly vague and unsupportable in light of the circumstances of this case.” The court agreed with the defendants.
Under Texas law, a partnership is defined as “an association of two or more persons to carry on a business for profit as owners.” TEX. BUS. ORG. CODE § 152.051(b). To determine whether a partnership was formed, courts consider five factors: (1) receipt of right to receive a share of profits of the business; (2) expression of an intent to be business partners; (3) participation or right to participate in control of the business; (4) agreement to share, or sharing, any losses of the business or any liability for claims by third parties against the business; and (5) agreement to contribute, or contributing, money or property to the business. TEX. BUS. ORG. CODE §§ 152.052(a)(1)–(5).

Applying these factors here, Plaintiffs have not demonstrated that a partnership was formed. Nearly all of Plaintiffs’ allegations are either conclusory in nature or threadbare recitals of the five partnership factors. For instance, Plaintiffs merely allege that “any profits, as well as any losses, would be split between the partners,” but do not include any specific facts regarding how the profits or the losses would be split, such as details about the particular division of profits and losses as well as how Peykoff’s initial advancement of funds would be reimbursed in the event of a revenue shortfall. Simply stating that profits and losses would be shared is nothing more than reciting the first and fourth partnership factors. Likewise, Plaintiffs contend that the parties expressed a mutual intent “to partner together to host a multi-day entrepreneurial event” in Mexico and jointly participate in control of this venture. Yet Plaintiffs supply no facts about how this intent to be partners was expressed or what activities indicate this mutual intention. Such facts are critical for assessing the formation of this alleged partnership in the absence of a written agreement. Without any supporting facts, these allegations amount to nothing more than legal conclusions that simply recite the first, second, and fourth factors, which the Court is not bound to accept as true. Iqbal, 556 U.S. at 678–79.

The First Amended Complaint also lacks specific allegations that, when taken as true, would satisfy factors three and five. While Plaintiffs allege that Peykoff fronted the costs of Mastermind, they only contend that Defendants were required to later reimburse these costs if Mastermind produced “a shortfall in revenue” and leverage client contacts to drive attendance at the event. Plaintiffs supply no further details about how the parties would each contribute funds or property to the partnership. Relatedly, Plaintiffs do not allege how the parties participated (or contained the right to participate) in the control of the partnership. From the First Amended Complaint, it appears that Defendants lacked any control whatsoever. This is the most fatal flaw in Plaintiffs’ breach of partnership claim. Plaintiffs identify no specific responsibilities, roles, or obligations carried out by Defendants beyond helping generate attendance at Mastermind. Without more, the Court cannot determine that Defendants’ were anything more than hired consultants. While detailed factual allegations are not required, the First Amended Complaint must still contain specific, well-pleaded facts about contribution and control for the Court to conclude that factors three and five are met. See Guidry, 954 F.2d at 281. Such facts are particularly important in light of Plaintiffs’ admission that Defendants initially provided services—publication and promotion of Peykoff’s book—that are consistent with hiring Defendants for [sic] to serve as consultants rather than partners. Something more is needed at this stage to show that the parties’ relationship transformed into a partnership.

The court thus dismissed the plaintiffs’ claim for breach of partnership agreement.

The next addressed the plaintiffs’ claim for breach of fiduciary duty. The plaintiffs alleged that, as partners, the parties owed each other fiduciary duties of loyalty, fairness, honesty, good faith, and refraining from competition that were breached by the defendants by not reimbursing Peykoff for advances made on behalf of the partnership and sending false correspondence and taking other actions to drive business away from SLF and to GCP. The defendants argued that the claim for breach of fiduciary duty was based on an “imaginary partnership,” and the court agreed.

The elements of a breach of fiduciary duty claims under Texas law are: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in injury to the plaintiff.”
or benefit to the defendant.” *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007) (citing *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied)). “A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship.” *Stephanz v. Laird*, 846 S.W.2d 895, 901 (Tex. App.—Houston [1st Dist.] 1993, writ denied). “[A] fiduciary relationship is an extraordinary one and will not be lightly created.” *Am. Med. Int’l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex. App.—Houston [14th Dist.] 1991, no writ). “[T]he mere fact that one subjectively trusts another does not, alone, indicate that he placed confidence in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required.” *Id.* (citation omitted).

Applied here, the facts at this stage do not show that Defendants owed a fiduciary duty to Plaintiffs. The Court already concluded that the facts in the First Amended Complaint do not sufficiently show that a partnership was formed. As a result, there can be no fiduciary duties on account of the parties’ relationship as alleged partners. Although fiduciary duties are not limited just to partnerships, the First Amended Complaint only alleges that the parties owed a fiduciary duty to each other as business partners.[footnote omitted] *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (“Fiduciary duties arise as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.”). And Plaintiffs do not allege another type of fiduciary relationship. Because a fiduciary relationship is “extraordinary” and “will not be lightly created,” the Court lacks facts to otherwise determine that another formal fiduciary relationship existed. *Am. Med. Int’l, Inc.*, 821 S.W.2d at 339.

Likewise, there are insufficient facts for the Court to infer that an informal fiduciary relationship exists. Plaintiffs only allege that fiduciary obligations arose on account of the parties’ partnership.[footnote omitted] But even setting that formal relationship aside, Plaintiffs still have not supplied facts to show “that the dealings between the parties continued for such a time that one party is justified in relying on the other to act in his best interest.” *Stephanz*, 846 S.W.2d at 902. There must be “some independent basis” beyond the “arms-length business transaction” to establish an informal fiduciary relationship. *Id.* The parties’ relationship centered around a single event related to the business transaction for Defendants to publish and promote Peykoff’s book.[footnote omitted] There is no suggestion in the First Amended Complaint that the parties had a long-term relationship giving rise to informal fiduciary obligations. The mere fact that Plaintiffs subjectively trusted Defendants by relying on representations about expertise and past success are not enough to indicate that a fiduciary relationship existed for a single event.[footnote omitted]

That is because “something apart from the transaction between the parties is required” to sustain a breach of fiduciary duty claim based on an informal partnership. *Am. Med. Int’l, Inc.*, 821 S.W.2d at 339. Given the “narrow application of fiduciary duties arising from informal relationships, it would not be appropriate to extend any fiduciary duty” here. *Stephanz*, 846 S.W.2d at 902.

The court thus dismissed the claim for breach of fiduciary duty.


The court of appeals concluded that summary judgment was proper on David Cromwell’s claims against Anadarko for breach of fiduciary duty and accounting under the partnership statute because the parties were co-tenants and not partners.

In 2009, Cromwell executed two oil and gas leases in Loving County with Carmen Ferrer and the Tantalo trust. Ferrer and the Tantalo trust each owned small fractional interests in the acreage, so Cromwell acquired a minority working interest.

Anadarko owned substantial working interests in the same land. Before Cromwell obtained his two leases, Anadarko had executed joint operating agreements among other working interest owners (not including Cromwell) who collectively agreed to “explore and develop” the leases contributed by the parties to the agreements. Anadarko was named as operator under all joint operating agreements and was thus the designated party to do the actual drilling for the other parties. After Cromwell acquired the Ferrer and Tantalo leases, he submitted his leases to Anadarko and asked for a joint operating agreement to participate in the wells Anadarko had drilled or planned to
drill on the land. Cromwell followed up on his request to participate in Anadarko’s wells multiple times, but Anadarko never responded.

Before Cromwell obtained his leases, Anadarko drilled three vertical wells as operator under the joint operating agreements: the Hughes & Talbot 75-23-1 Well; the Hughes & Talbot 75-25-1 Well; and the Hughes & Talbot 75-26-1 Well. These wells were all on land located within the boundaries of Cromwell’s leases. The 75-26-1 well reached payout in August 2009, and Anadarko accordingly began sending Cromwell joint interest invoice summaries (also called joint interest billings or “JIBs”) reflecting the share of operating expenses for the well chargeable to his gross working interest and checks from the well’s revenues corresponding to his net working interest. Cromwell paid all joint interest invoices Anadarko sent, which included charges for a variety of operational costs, including equipment, labor, and environmental remediation. Anadarko later started netting the amount Cromwell owed for the well’s costs each month against his share of production proceeds, such that some months Cromwell paid Anadarko and others he received a revenue check.

Anadarko also sent Cromwell an authorization for expenditure in June 2011. The authorization was addressed to a “working interest owner” and listed Cromwell as a “Working Interest Owner” on the signature page. Rather than an invoice for incurred operating expenses, the authorization for expenditure “propose[d]” to replace the 75-26-1 well’s existing compressor for an estimated total cost of $108,000. It asked Cromwell to “indicate[ ] [his] election to participate in the installation” of the compressor “[p]ursuant to the terms of the governing Operating Agreement[.]” Cromwell signed the authorization and paid the requested amount. However, Anadarko later claimed it sent Cromwell this authorization for expenditure in error, as he “should not [have] be[en] sent AFEs as a non-committed co-tenant” and did not have a signed joint operating agreement with Anadarko.

The primary terms of the Ferrer and Tantalo leases passed in February 2012 and March 2014 respectively. Under the secondary term of each agreement, Cromwell’s leases would continue only if production were occurring. Though Cromwell had not drilled a well, pooled his leases with a producing lease, or entered into a joint operating agreement with Anadarko, Anadarko continued sending Cromwell joint interest invoices and cutting him revenue checks. It also continued communicating with Cromwell as if his leases were still effective. For example, Anadarko sent Cromwell a letter about revenue netting in April 2014, referring to him as an “owner,” and sent him a division order in October 2015, asking him to certify his ownership interest in production in several properties. In 2016, it also listed Cromwell as a working interest owner on an exhibit to a joint operating agreement, and its internal records listed one of Cromwell’s leases as “held by production.”

Anadarko claimed that this too was a mistake. It contended that when it was identifying working interest owners for the since-drilled 75-24-2H well in 2016, it realized that Cromwell’s leases had terminated at the end of their primary terms. Still, Anadarko did not share that realization with Cromwell, and it continued to pay him for his purportedly expired interest in the 75-26-1 well, although it excluded him from revenue checks for other producing wells on the acreage.

Working under its belief that Cromwell’s leases had expired, Anadarko then took leases from his lessors, Ferrer and the Tantalo Trust, in January 2017. Only in March 2018, in response to Cromwell’s email following up on his request for information about his interest in the 75-24-2H well, did Anadarko inform him that “[d]ue to the passage of time,” and because Anadarko “never received from [Cromwell] an executed well election/[authorization for expenditure] or [joint operating agreement] for any of the subject wells,” his leases “expired” and had been “leased to [third] parties thereafter”—the third parties being Anadarko.

Cromwell sued Anadarko. As part of his claims, he alleged that he and Anadarko had formed a partnership under which Anadarko breached its fiduciary duties to him. Anadarko filed traditional and no-evidence motions for summary judgment, contending (among other arguments) that the parties never formed a partnership. The trial court granted Anadarko’s motions without stating the grounds for its decision.

On appeal, Cromwell claimed that there was evidence indicating that a partnership existed under the Texas Business Organizations Code and that his partnership-based claims should therefore be remanded for trial. The court of appeals began by observing that the Texas Business Organizations Code defines a partnership as “an association of two or more persons to carry on a business for profit as owners,” regardless of whether they intended to create a partnership or call their association a partnership or joint venture. The statute outlines a list of factors indicating that individuals have formed a partnership, including: (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.
According to the court, a partnership may exist even without proof of all of the listed factors, as courts consider whether a partnership exists under the statute through a totality-of-the-circumstances test. These factors “serve as a proxy for the common law requirement of intent to form a partnership by identifying conduct that logically suggests a collaboration of a business’s purpose and resources to make a profit as partners.” The statute also provides that co-ownership of property by itself does not indicate that a person is a partner in the business, even if the ownership is “combined with sharing of profits from the property.”

Applying this framework, the court of appeals concluded that Cromwell and Anadarko were simply co-tenants and not partners:

Cromwell argues there is evidence of at least four of the partnership factors and thus a fact issue exists for trial. First, he claims he has “receive[d] a share of profits[,]” pointing to Anadarko’s repeated revenue payments. See id. § 152.052(a)(1). That Cromwell received revenue checks from the 75-26-1 well is undisputed.

Next, Cromwell contends he and Anadarko expressed their “intent to be partners in the business,” pointing to different communications and invoices he received from Anadarko. Certain documents were titled “Partner Account Statement” and included a “Partner Number,” labeling Cromwell’s interest with a unique identifier that included the letters “JV,” for joint venture, which Cromwell also included on the memo line of his checks to Anadarko. When determining whether these examples indicate an intent to be partners in the legal sense, “[w]e must look to the words used, the context in which the statement was made, and the identity of the speaker to determine if such a statement constitutes legally significant evidence of an expression of intent.” “Evidence of expressions of intent could include, for example, the parties’ statements that they are partners, one party holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement.” “[M]erely referring to another person as ‘partner’ in a situation where the recipient of the message would not expect the declarant to make a statement of legal significance is not enough.”

Simply including the word “partner” on invoices or identifying [Cromwell’s] account with a “JV” number is not enough to constitute legally significant evidence of Anadarko’s expression of intent to be business partners with Cromwell because including those terms on invoices is not a situation in which any recipient would expect a statement of legal significance. This is particularly true when viewed in the larger context of the parties’ relationship, as Anadarko never assented to Cromwell’s multiple requests to participate in the wells Anadarko drilled and planned to drill over the course of his leases. Looking to the words used in context, there is no evidence of the parties’ expression of their intent to be business partners.

Third, Cromwell claims he shared in the losses of the business because Anadarko’s joint interest billing statements included line items reflecting his proportionate cost for damages and environmental remediation. He also argues he shared in liabilities because he accepted Anadarko’s authorization for expenditure to replace a compressor and thus accepted the risk his investment would prove to be a loss. However, the payments Cromwell points to are operating expenses associated with the 75-26-1 well, as discussed above. “[S]haring specific expenses is not evidence of sharing losses or liabilities.” Westside Wrecker Serv., Inc. v. Skaff, 361 S.W.3d 153, 172 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (citing Ingram v. Deere, 288 S.W.3d 886, 902 (Tex. 2009)). There is no evidence demonstrating the parties shared losses or liability.

Lastly, Cromwell similarly contends he contributed money and real property (i.e., his working interest in the minerals) to the business. However, as above, his evidence of cash contributions reflect his proportional share of various costs associated with the 75-26-1 well. “[S]haring in expenses does not necessarily constitute contributing money or property to a partnership.” Id. While the sharing of expenses is consistent with a partnership between parties, it is equally consistent with the possibility that Cromwell and Anadarko agreed as cotenants to share operating costs with the 75-26-1 well, in which Cromwell contributed his proportionate interest to expenses. See id. (citing examples). Indeed, Cromwell paid Anadarko—not to an alleged partnership entity. See id. at 172–73. Further, any real property contribution to the purported
partnership fails as a matter of law because “[t]he law is clear that an interest in real estate cannot become a partnership asset unless the agreement concerning the property is in writing the same as any other contract concerning the sale of land.”

In sum, the only evidence Cromwell has raised of his alleged partnership with Anadarko is the first statutory factor: that he received a share of profits through the 75-26-1 well’s revenue checks. But we agree with Anadarko that this is equally consistent with Anadarko accounting to Cromwell as a cotenant. Because cotenants sharing profits from a property, without more, does not indicate a partnership, Cromwell has raised no evidence of a partnership with Anadarko.

Further, even assuming Cromwell had raised evidence supporting the existence of a partnership, that evidence cannot overcome the statute of frauds. What Cromwell points to as evidence of the purported partnership reflects one business purpose: the exploring, drilling, or producing of hydrocarbons in his leased land. In other words, Cromwell contends even though he has no signed joint operating agreement with Anadarko, the two parties created a partnership with the same effect. But a joint operating agreement or joint venture is subject to the statute of frauds. Absent a writing to satisfy the statute of frauds, there is no evidence of the parties’ intent to create a partnership for any business purpose other than one unenforceable under the statute of frauds—i.e., to develop the mineral acreage.

Cromwell and Anadarko were cotenants—not partners—and thus did not owe one another fiduciary duties. Summary judgment on Cromwell’s claims for breach of fiduciary duty and accounting under the partnership statute was therefore proper.

Hawkins v. Horton, No. 04-22-00307-CV, 2023 WL 5603194 (Tex. App.—San Antonio Aug. 30, 2023, no pet.) (mem. op.) (“A denial of the execution of a written instrument and a denial of a partnership[] must be raised by verified pleadings. TEX. R. CIV. P. 93(5), (7). Without a verified denial, a written instrument is received into evidence as fully proved, and a partnership’s existence cannot be controverted at trial. See id. R. 93(7); GR Fab’n, LLC v. Swan, No. 02-19-00242-CV, 2020 WL 2202325, at *3 n.3 (Tex. App.—Fort Worth May 7, 2020, no pet.) (mem. op.).”).


The court of appeals examined apparently contradictory jury findings and ultimately concluded that no partnership existed between the parties because the jury’s determination that the parties “did not create a statutory partnership” also precluded a finding of a common-law partnership. A related breach-of-contract claim, however, was upheld.

Judith Casey filed suit against Betty Ligon and alleged that “[f]rom around July of 2005 to August of 2013, [she] and Ligon were partners” in a company called MedPerm Permanent Placement, Inc. doing business as Therapy Consultants (“MedPerm”). According to Casey, MedPerm was a “medical placement firm” that recruited and placed speech therapists with various school districts. Because of school scheduling and contract needs, Casey and Ligon performed “[e]ssentially all” of their work in the spring and summer prior to the school year in which the speech pathologists began working under their contracts. Casey alleged that she and Ligon would “make their profits based on what they billed to the school districts for the hours worked” by the speech therapists. They “agreed to” a fifty-fifty “split” of MedPerm’s net profits, which “were calculated by adding up the amount billed to the school districts for each therapist they placed and subtracting business expenses.”

In August 2013, “without Casey’s knowledge,” Ligon sold MedPerm under a “Stock Purchase Agreement” to Robert and Rebecca Strobel (collectively “the Strobels”). According to Casey, based on her partnership with Ligon, “as established through the[ir] course of dealings” for the previous eight years, she was “entitled to [fifty percent] of the proceeds from the sale, the cash, and the accounts receivable.” Further, Casey alleged that “[a]fter the sale” of MedPerm to the Strobels, MedPerm earned “at least $2,178,221 in revenue” during the “2013-2014 school year based on contracts secured by Casey” in spring 2013. Yet, “MedPerm did not pay Casey” the share of “profits [that] she was entitled to.”

Casey brought claims against Ligon “for breach of common-law partnership and statutory partnership under the Texas Business Organizations Code.” She alleged that she and Ligon had agreed that both “would work together
in MedPerm and would split the profits equally.” Further, they “had a community of interest in MedPerm” and “a mutual right to manage MedPerm.”

The court of appeals extensively recounted the evidence that was presented to the jury. At the conclusion of the trial, the jury found, in part, the following:

- In response to Question No. 1, that Casey and Ligon had “agree[d] to create a partnership for the purpose of placing speech therapists in school districts” (the “agreement”).
- In response to Question No. 2a, that Ligon had “fail[ed] to comply with” the agreement by failing to split MedPerm’s profits “[fifty-fifty] [b]efore the [s]ale.”
- In response to Question No. 2b, that Ligon did not fail to comply with the agreement by failing to split the proceeds from the sale of MedPerm.
- In response to Question No. 5, that Casey, in the exercise of reasonable diligence, should have discovered Ligon’s breach of the agreement by not splitting MedPerm’s profits fifty-fifty before the sale by August 1, 2007.
- In response to Question No. 6, that Casey and Ligon did not create a statutory partnership.

The court of appeals began by attempting to resolve the apparently conflicting jury findings. According to the court, the jury’s findings were fatal to any partnership claim asserted by Casey:

The parties dispute the legal significance of the jury’s findings about whether they had a partnership. In her fourth amended petition, Casey asserted claims for breach of both a common-law partnership and a statutory partnership under the Texas Business Organizations Code. In response to Questions Nos. 1 and 2, the jury found that Casey and Ligon agreed to create a partnership “for the purpose of placing speech therapists in school districts” and that Ligon failed to comply with the agreement by failing to split MedPerm’s profits fifty-fifty before the sale but not by failing to split the proceeds from the sale of MedPerm. In response to Question No. 6, the jury found that Casey and Ligon did not create a statutory partnership.

The jury did not receive any instructions in either Question No. 1 or Question No. 2 as to the elements required to form a common-law partnership. In contrast, Question No. 6 provided the jury with the statutory definition of a general partnership and listed the factors “indicating that persons have created a partnership.” See TEX. BUS. ORGS. CODE ANN. §§ 152.051(b), 152.052(a). Those factors include the person’s: (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). Unlike a common-law partnership, the Texas Business Organizations Code does not require proof of all five of these factors to establish the existence of a statutory partnership. See Ingram v. Deere, 288 S.W.3d 886, 895–96 (Tex. 2009) (“The common law require[s] proof of all five factors [listed in section 152.052(a)] to establish the existence of a partnership.”). A statutory partnership arises from “a less formalistic and more practical approach to recognizing the formation of a partnership” than the common law. Id. at 895.

Because the jury found that Casey and Ligon did not form a statutory partnership while considering the five factors contained in Texas Business Organizations Code section 152.052(a), it necessarily could not have found the existence of a common-law partnership, and in response to Question No. 2, it could not have found that Ligon failed to comply with a common-law partnership agreement, as this would have required an affirmative finding as to all five factors listed in the Texas Business Organizations Code. See TEX. BUS. ORGS CODE ANN. § 152.052(a); Ingram, 288 S.W.3d at 895–96. Nevertheless, we conclude that the jury’s finding in response to Question No. 6 and its findings in response to Questions Nos. 1 and 2 do not address the same material fact. According to the jury’s responses to Questions Nos. 1 and 2, Ligon and Casey had an agreement to split MedPerm’s profits fifty-fifty before the sale of MedPerm and
Ligon breached that agreement by failing to do so (the “profit-sharing agreement”). Those findings do not support the existence of a common-law partnership, but they do support the breach-of-contract claim brought by Casey in her live pleading.

Because the court of appeals concluded that no partnership existed between Casey and Ligon, it also determined that “neither Ligon nor Casey owed any fiduciary duties to each other as partners.”

With respect to the breach-of-contract claim, the court concluded that “Ligon did not satisfy her burden to conclusively establish that the statute of limitations wholly barred Casey’s breach-of-contract claim based on the underpayments of profits due under the profit-sharing agreement that occurred within the limitations period.” Moreover, “[b]ecause the jury found that Ligon had failed to comply with the agreement with Casey, Casey was entitled to recover for any underpayment of periodic payments owed within the limitations period, even though the initial breach, as found by the jury in response to Question No. 5, occurred outside the limitations period.” The court affirmed the trial court’s award of damages and attorney’s fees to Casey on her breach-of-contract claim.

Wascom v. Leverett, No. 05-22-01100-CV, 2023 WL 4361099 (Tex. App.—Dallas July 6, 2023, no pet.) (mem. op.).

The court of appeals concluded that a claim for breach of a partnership agreement was not defeated simply because the alleged partners formed a single-member LLC to apparently conduct the business. The court reversed a grant of summary judgment in favor of the appellees and rejected their statute of limitations, lack of damages, and waiver arguments.

In November 2014, Kevin Wascom and Stacy Leverett began discussing a real estate development company that she and Dan Leverett were forming. When Stacy asked Wascom if he would be interested in joining them, they “began brainstorming what it was each one of us wanted in our general partnership.” Ideas included retail developments, apartment complexes, master planned communities, office buildings, medical office buildings, hotels, government facilities, and industrial properties.

They agreed that Wascom’s contribution to the partnership would be to “go to the capital markets [and] bring financing for the projects we were going to be developing,” but he would not be required to make any financial contribution. Stacy’s contribution was the “ability to conceptualize ideas to a development stage, to supervise the construction of these projects and to supervise the startup and operations and occupancy of these projects” and networking. Dan was going to bring the same skill set as Stacy did, but Stacy and Dan would work on separate projects. In early 2015, both Dan and Stacy had full-time employment while Wascom was unemployed and looking for a new position. Wascom’s declaration stated that once the parties agreed to form the partnership, he ceased looking for other employment.

Wascom testified that he and Stacy agreed in November 2014 to form a general partnership, “that it would be one-third, one-third, one-third on everything, and that we would get started.” In February 2015, Wascom met with Dan and “shook hands on forming our three-person general partnership.” After the February 2015 meeting, the next step to bring their plans to fruition was to start a project. Between February 2015 and November 2016, Wascom provided financing advice for at least five potential projects the partners considered. Although they agreed that the partnership should be properly documented, they decided to wait to do so until they secured their first project. The partnership was never documented.

On December 7, 2015, Dan filed a certificate of formation with the Texas Secretary of State and created Place, LLC. Dan was the sole member of Place. Dan averred that Wascom never had an ownership interest in Place, was not an employee of Place, did not make any capital contributions to Place, and did not receive an IRS Form K-1 from Place. Dan indicated that Wascom, however, provided services to Place as an independent consultant, and Place issued IRS Form 1099s to record Wascom’s consulting income. Dan further averred that Place had no income through 2019 and that he did not receive any profit from Place before 2020.

Wascom ultimately sued Dan, Stacy, and Place (collectively the appellees) and asserted several claims, including “breach of partnership agreement/redemption of partnership interest.” Dan, Stacy, and Place filed a traditional motion for summary judgment on all claims, which the trial court granted.

On appeal, Wascom sought reversal of the order granting summary judgment on his claim for breach of the partnership agreement. Wascom’s first amended petition alleged that (a) he was a member of a general partnership with Dan and Stacy, (b) Dan and Stacy wrongfully expelled him from that partnership, and (c) he did not receive the fair value of his partnership interest. In response, appellees asserted, among other arguments, that (1) the statute
of limitations barred Wascom’s claim; (2) Place was not a partnership and did not have any partners; and (3) Wascom’s partnership interest did not have value.

With respect to the statute of limitations, the court noted that Wascom’s claim for breach of contract was subject to a four-year statute of limitations. According to the court, a cause of action accrues and the limitations period begins to run “when facts come into existence that authorize a party to seek a judicial remedy.” Statute of limitations is an affirmative defense, see TEX. R. CIV. P. 94, and appellees bore the burden to conclusively establish it.

Appellees’ motion for summary judgment asserted that Wascom’s breach of partnership claim accrued on December 7, 2015 when Dan filed the certificate of formation creating Place and listing Dan as its sole member. Wascom did not sue until April 2020—more than four years later. The court observed that “[i]mplicit in appellees’ argument is that the partnership Wascom alleges he formed with Dan and Stacy could not exist contemporaneously with Place and the existence of Place forecloses the existence of the alleged partnership.” The court disagreed with that implicit premise:

It is undisputed the parties never signed a document containing the terms of the alleged partnership. However, Wascom testified he, Dan, and Stacy agreed to form a partnership in February 2015, and they agreed they would be equal partners with each owning a one-third share of the partnership. They agreed not to immediately document their agreement. Similar factual statements appear in Wascom’s declaration. Wascom’s testimony is some evidence the parties agreed to form a partnership with each person owning an equal share, and there is no evidence that partnership must be Place.

Appellees have not cited any authority to support their implicit argument that Dan’s formation of Place breached the alleged oral agreement between Wascom, Dan, and Stacy to form a three-person partnership. Place and the alleged partnership could coexist; appellees cite no authority indicating the existence of Place forecloses the existence of the alleged partnership. Accordingly, we conclude appellees failed to meet their summary judgment burden to prove the filing of the certificate of formation for Place caused the accrual of Wascom’s breach of partnership claim.

Appellees’ motion for summary judgment also asserted that Wascom’s partnership interest was worthless because, in the years when Wascom worked for Place, the company operated at a loss. The court of appeals interpreted that argument as appellees seeking to show their entitlement to summary judgment by negating the damages element of Wascom’s claim. Once again, the court disagreed with the appellees’ position:

Appellees contend Place had no income through 2019 and operated at a loss until 2020, and they provided evidence to support this proposition. However, appellees provided no evidence that the alleged three-person partnership operated at a loss. Assuming their argument that an ownership interest is worthless if the entity operated at a loss is meritorious, their argument and evidence do not address whether the alleged partnership operated at a loss. Accordingly, they presented no evidence that the alleged partnership operated at a loss at all relevant times and, accordingly, was worthless. Additionally, appellees point to no authority supporting their implicit argument that ownership in an entity that posts losses for several years is “worthless” and, accordingly, there can be no damages when the partnership agreement is breached. We also have found none. Because the premise of appellees’ argument is without legal authority and they presented no evidence to support their argument, we conclude appellees did not meet their summary judgment burden to negate the damages element of Wascom’s claim.

Finally, appellees argued that Wascom waived his breach of partnership claim because he knew in 2015 that Place was formed as an LLC with Dan as its sole member, but Wascom remained silent and “failed to pay a third of the capital contributions or account for a third of the losses.” The court noted that appellees’ argument did not address Wascom’s breach of partnership claim: “Appellees’ arguments assume the existence of Place and the alleged three-person partnership are mutually exclusive when no evidence supports this assumption. Dan’s
formation of Place does not show Wascom waived his claim for breach of the alleged partnership because the two entities may be separate.

B. Partner’s Personal Liability for Obligations of Partnership


A general partner of a limited partnership argued that it was not liable for attorney’s fees in a breach-of-contract suit because there was no contract with the general partner and the only contract at issue was between the partnership and the City of Corpus Christi. The court stated:

“General partners are jointly and severally liable with each other and with the limited partnership for the partnership’s obligations. See TEX. BUS. ORGS. CODE ANN. § 153.152(b); Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd., 349 S.W.3d 258, 273 (Tex. App.—Dallas 2011, pet. denied); Shaw v. Kennedy, Ltd., 879 S.W.2d 240, 247 (Tex. App.—Amarillo 1994). It is undisputed that S&S is a general partner of SCT, and “a general partner of a limited partnership is liable for the debts of that limited partnership.” Forney 921 Lot Dev. Partners I, L.P., 349 S.W.3d at 272.”


The court discussed the rule that a debt imputed to a debtor under state partnership law based on the false pretenses, false representations, or fraud of a partner of the debtor is non-dischargeable under Section 523(a)(2)(A). The court concluded that the same reasoning was applicable to a debt for embezzlement under Section 523(a)(4). The court held that fact issues as to whether the debtor had agents or partners who committed fraud or embezzlement precluded summary judgment on the issue of the non-dischargeability of the debts in issue.

The court in this case addressed a creditor’s motion for summary judgment on the debtor’s nondischargeable liability for claims of fraud and embezzlement. In the course of its analysis, the court pointed out that Section 523(a)(2)(A) non-dischargeable liability can extend to fraud that a debtor did not personally commit. The court summarized the facts and holding in the United States Supreme Court decision of Bartenwerfer v. Buckley, in which the Supreme Court held that the debtor’s vicarious liability for the fraud of her boyfriend/business partner was non-dischargeable. The bankruptcy court relied on the concurrence in Bartenwerfer and prior Fifth Circuit precedent to require an agency or partnership relationship that under state law imposes on the debtor vicarious liability for the debt described in Section 523(a)(2)(A).

The debtor in this case disputed allegations that she had the requisite intent under Section 523(a)(2)(A) or even made any representations to the plaintiff creditor, but the court stated that her argument was incomplete in light of Bartenwerfer.

No longer is personal involvement always a necessary prerequisite for finding nondischargeability under § 523(a)(2)(A). And yet, even if Defendant had no personal involvement in the alleged fraud, genuine issues of fact exist whether she had agents or partners, and if so whether they acted in the scope of their authority under Texas law to commit false pretenses, false representations, or actual fraud under § 523(a)(2)(A) as Plaintiff argues.

With respect to the creditor’s claim that it was entitled to summary judgment on its claim against the debtor for the non-dischargeable debt of embezzlement, the court concluded that the debtor could be liable for the embezzlement of a partner or agent under state law under the same type of reasoning employed in Bartenwerfer, but there were fact issues precluding summary judgment on this claim as well.

The holding in Winkler was that “if a debt arises from fraud and the debtor is liable for that debt under state partnership law, the debt is nondischargeable under § 523(a)(2)(A).” Winkler, 239 F.3d at 751 (5th Cir. 2001). The Fifth Circuit, regarding this holding, stated that “[t]he same reasoning is relevant to determining the scope of § 523(a)(4).” Cowin, 864 F.3d at 351. This means that there are “no further criteria or qualifications” beyond the elemental requirements for finding
embezzlement or larceny under § 523(a)(4).” Id. Cowin was decided before Bartenwerfer, but their combined reasoning indicates that under § 523(a)(4) a debtor may be held liable for the embezzlement or larceny of a conspirator, partner, or agent as determined under state law. Any cause of action alleging embezzlement or larceny under § 523(a)(4) would fail if no required conspiracy, partnership, or agency under state law exists, or if evidence is insufficient of the actions of Defendant’s conspirator, agent, or partner.

The summary judgment evidence submitted, read in the light most favorable to Defendant, is insufficient for a finding of embezzlement under § 523(a)(4). It is also insufficient to find that Defendant had a conspirator, partner, or agent under state law who committed embezzlement under § 523(a)(4). The Court finds genuine issues of fact remain in this case regarding Plaintiff’s embezzlement cause of action.

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

Willow Tree Consulting Group, LLC, Tr. of TH Liquidating Tr. v. Perkins Coie LLP, No. 05-23-00264-CV, 2024 WL 575263 (Tex. App.—Dallas Feb. 13, 2024, pet. filed) (mem. op.).

The court refused to equate a partner of a law firm with the law firm for purposes of applying the doctrine of adverse domination, and the court held that claims against the law firm for conspiracy and aiding and abetting failed due to the absence of an underlying tort.

The bankruptcy trustee (“Willow Tree”) of a healthcare company (“True Health”) to which a partner of Perkins Coie provided legal counsel sued Perkins Coie for legal malpractice, breach of fiduciary duty, and other claims. Willow Tree appealed the trial court’s summary judgment in favor of Perkins Coie. On appeal, one of the issues addressed was whether the statute of limitations on the claims against Perkins Coie was tolled based on the adverse domination of True Health by wrongdoers. Perkins Coie argued that the adverse domination doctrine was inapplicable as a matter of law because it only applies to claims against those who dominated the corporation. Willow Tree argued that Perkins Coie was not an outsider because its partner, Osterhoff, was an insider and thus “Osterhoff is Perkins.” The court responded as follows:

We decline to equate the partner of a law firm with a law firm for three reasons. First, Willow Tree did not make this argument to the trial court and cannot make it for the first time on appeal. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). Second, Willow Tree cites to no authority for this novel proposition of law. TEX. R. APP. P. 38.1(i). Third, limited liability companies and partnerships are legally distinct from their members. Rieder v. Woods, 603 S.W.3d 86, 98 (Tex. 2020) (limited liability companies); Am. Star Energy & Mins. Corp. v. Stowers, 457 S.W.3d 427, 429 (Tex. 2015) (citing Tex. Bus. Orgs. Code § 152.056) (partnerships).

While we acknowledge Willow Tree’s argument that the adverse domination doctrine has been expanded by some courts to include outsiders,[footnote omitted] we also recognize that despite the passage of more than 30 years, Willow Tree has cited no decision expanding this doctrine under Texas law, and we have found none. TEX. R. APP. P. 38.1(i). Under the circumstances, we conclude that Perkins Coie met its burden to negate the application of the adverse domination doctrine because True Health was dominated by its own officers and directors and Texas’ application of the doctrine has not been expanded beyond insiders. Therefore, the trial court did not reversibly err when it followed Texas precedent concerning the adverse domination doctrine.

The court of appeals also held that the trial court did not err in granting summary judgment in favor of Perkins Coie on Willow Tree’s claims for conspiracy and aiding and abetting. The court pointed out that civil conspiracy is a theory of derivative liability and that knowing participation and aiding and abetting are similar theories of liability as opposed to independent causes of action. The court said that Willow Tree’s theories of participatory liability were dependent on its claim for breach of fiduciary duty, a claim on which the trial court granted summary judgment. The court of appeals held that the trial court’s summary judgment was not reversible because receipt by Perkins Coie of legal fees was not alone an improper benefit sufficient to constitute a breach of fiduciary duty. Willow Tree responded that Osterhoff obtained an improper benefit by representing True Health,
but the court stated that this argument focused on an improper benefit to an individual rather than Perkins Coie as a law firm. Without an underlying tort, there could be no participatory liability by Perkins Coie for civil conspiracy or aiding and abetting.


Defendants/Counter-Plaintiffs Horseshoe, LLC (“Horseshoe”) and Halter Companies, LLC (“Halter”) filed a motion to compel arbitration on the ground that the President of a limited partnership (who was also the President of the general partner) had the apparent authority to enter into a contract for a sale of the limited partnership’s sole asset—a contract that included an arbitration clause. The court granted the motion after concluding that the President did have the requisite apparent authority.

In 2005, a group of doctors organized Intermed for the exclusive purpose of jointly building and managing a medical office building (the “Property”). Intermed consisted of two entities: Intermed LP was a Texas limited partnership, and Intermed Services, Inc. (“Intermed Inc.”) was its general partner. The Intermed doctors were simultaneously limited partners in Intermed LP, directors of Intermed Inc., and tenants of the Property (which was owned by Intermed LP). Importantly, the Property was Intermed LP’s sole asset, and the parties did not dispute that the unanimous written consent of all of the partners was a prerequisite to the Property’s transfer.

Dr. Robert Lenington became President of both Intermed entities in 2019. In November 2020, Intermed’s real estate broker, David English, forwarded Lenington a Letter of Intent (“LOI”) from Benjamin Efrais, acting as Principal of Horseshoe. The LOI was nonbinding, proposed general terms of purchase of the Property, and provided that, upon signing, the parties would “endeavor to negotiate” an agreement “reflect[ing] the terms and conditions contained [t]herein.” Lenington presented the LOI to the other Limited Partners and they voted 7 to 2 to sign it.

Lenington ultimately signed a contract (the “Contract”) for the sale of the Property as the “Managing Partner” of Intermed. A severe winter storm in February 2021 subsequently caused extensive damage to the Property, and Lenington signed five amendments to accommodate ongoing repairs. The final amendments extended the closing date to January 26, 2022 and accepted a significant price reduction. Lenington asserted (a) that all of the partners knew that he was signing the Contract, (b) that he communicated about the amendments to the extent that he could contact each partner, and (c) that no one ever opposed his actions. Further, Efrais claimed that he contacted the Limited Partners and that none of them expressed any concerns about the validity of the transaction. The Intermed doctors, however, contended that they either expressed disagreement with the proposed price reduction or lacked knowledge of the Contract all together until a year after its signing.

The sale of the Property definitively came to light in November 2021 when Lenington emailed a copy of the Contract for the first time. Shortly thereafter, Lenington stepped down from his role as President, the partners voted unanimously to repudiate the Contract, and Horseshoe assigned its rights under the Contract and its amendments to Halter. Intermed LP then filed an action for declaratory relief in state court. In response, defendants filed their own action in federal court and removed Intermed LP’s state court lawsuit. Defendants then demanded that arbitration be ordered pursuant to the Contract’s dispute resolution provisions.

The court began by discussing general principles of agency law and apparent authority:

> It is well-established that one individual’s actions may bind another if the principal’s actions lead a third party to reasonably believe that the agent has authority to act on the principal’s behalf. In assessing apparent authority, the agent’s representations are largely immaterial; the relevant considerations are the actions taken by the principal toward the agent, and the state of mind of the person who observes or otherwise learns of and relies on the principal’s conduct.

> A principal may manifest assent to an agent’s authority by either (1) knowingly permitting an agent to hold himself out with authority or (2) acting without “such ordinary care as to clothe an agent with the indicia of authority.” “Silence may constitute a manifestation when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence.” RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. b. Voluntary manifestations are effective even if “made negligently or [ ] otherwise in error.” Id. § 1.03 cmt. d.

> The permissibility of a third party’s assumptions about authority turn on whether “a reasonably prudent person” would have concluded the same from the principal’s conduct. “A
principal’s conduct does not occur in a vacuum.” RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c. “[G]eneral business custom as well as usage that is particular to the principal’s industry” inform the reasonableness of the third party’s belief. Id. And though the standard compares the third party to a reasonable person “using diligence and discretion to ascertain the agent’s authority,” “absent circumstances that should raise questions in the mind of a reasonable party, as a general matter there is no requirement that the third party inquire into the scope of an agent’s authority.” A third party need only investigate acts of “an unusual or extraordinary nature.”

Texas case law is mixed on the extent to which apparent authority applies in real estate transactions. In Goode v. Westside Developers, Inc., a Texas appellate court held that “the doctrine of apparent authority of an agent to bind his principal ordinarily has no application to transactions involving the sale or conveyance of land.” 258 S.W.2d 844, 848 (Tex. Civ. App.—Waco 1953, writ ref’d n.r.e.). Key to the court’s rationale was that real estate agents and brokers are special agents of limited authority and lack the power to consummate a sale. The court in Bugh v. Word followed Goode, held that “the creation of an ostensible or apparent agent should not be permitted in real estate transactions,” but again emphasizing the rationale that “one dealing with a real estate broker has a duty to inquire into his authority.” 424 S.W.2d 274, 279 (Tex. Civ. App.—Austin 1968, writ ref’d n.r.e.). The court in Huginnie v. Loyd then read Goode and Bugh to extend beyond real estate agents and brokers due to the lack of any explicit limitation. 483 S.W.2d 696, 702 (Tex. Civ. App.—Tyler 1972, writ ref’d n.r.e.). The court in Cherokee Water Co. v. Forderhause followed Huginnie, 727 S.W.2d 605, 613 (Tex. App.—Texarkana 1987), rev’d on other grounds, 741 S.W.2d 377 (Tex. 1987)), but the court in Matthews v. AmWest Savings Association declined to apply it, citing the distinction between special and general agents. 825 S.W.2d 552, 554 (Tex. App.—Beaumont 1992, pet. denied).

Importantly, all but Matthews involved a human agent acting on behalf of human principals. Corporations and partnerships are not natural persons, and they inherently must act through their officers or others authorized as agents. Furthermore, “apparent authority is an essential adjunct to actual authority in enabling third parties to deal effectively with organizations,” as “creating actual authority to act on behalf of an organization” tends to be “cumbersome.” RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. c.

None of the aforementioned Texas appellate court decisions is binding over the others, and neither the Texas Supreme Court nor the Fifth Circuit have spoken on the matter. Thus, this Court is free to follow Matthews, at least on these facts. Where the question is whether an individual acted as a general agent of an organizational principal, apparent authority is not foreclosed.

After setting forth this legal framework, the court concluded that Lennington, as President of Intermed LP and Intermed Inc., had the apparent authority to sign the Contract (with an arbitration clause) for the sale of the Property:

First, corporate titles may create apparent authority in some contexts, as “situating people within a hierarchy of positions with defined responsibilities” conveys information to third parties. RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. c. “If an individual occupies a position that customarily carries specific authority,” it is proper for a third party “who knows of the individual’s position” to “infer that the principal consents to the individual’s exercise of such authority.” Id. Principals cannot automatically escape liability by “carv[ing] out elements of the customary authority,” as third parties may justifiably be unaware of the limitation. Id. Here, Intermed’s partners elected Lenington as President, and the organization’s explicit purpose is the buying and selling of real estate. Though under Texas law a “president has no inherent authority by virtue of his office,” several decisions suggest that presidents typically have “at least the authority to make routine decisions” in the ordinary course of business. 20A TEX. PRAC., BUS. ORGS. § 35:9(2), n.25 Authority from position (3d ed.) (collecting cases).

Additionally, Efraim spoke with at least some of the Intermed doctors directly, who may be charged with knowing of him via Lenington’s circulation of the LOI and the subsequent vote. At no point did any limited partner dissuade Efraim of Lenington’s authority to facilitate a sale,
even when Efraim introduced himself explicitly as the buyer of the building and initiated discussions about the future of their leases.

. . . . Reliance must be considered in light of industry customs, and Efraim asserts that, in his experience with over 100 sales, evidence of corporate resolution or partner consent is not typically obtained prior to closing. Instead, he contends that certification of authority is a matter handled by the seller and the title insurance company, without the involvement of the buyer. By Efraim’s account, the circumstances of the transaction in comparison to his nearly-40 years of experience gave him no reason to doubt Lenington’s authority; according to Efraim, it is typical to rely on a “reputable commercial real estate agent office” where a property is located, and English did not express any limitations on Lenington’s authority as the “seller” other than that Lenington had partners.

Sales of real property can be outside the scope of ordinary business, which puts a buyer on inquiry as to whether they are interacting with an authorized person. However, according to Efraim, it has never been the case that owners of [a] selling company claimed the president did not have authority. And Intermed LP’s explicit purpose, outlined in its governing documents, was to buy and sell real estate. Further, while Efraim could not rely on Lenington’s title alone, other limited partners knew of the transaction in some form, yet failed to clarify the situation in their interactions with Efraim.

The Court finds that Intermed LP manifested Lenington’s authority to sell the Property on its behalf, and Efraim reasonably relied on Intermed LP’s manifestations. At [a] minimum, the amendments signed following Efraim’s initial phone calls to the Intermed doctors created a valid agreement . . . .

The parties entered a valid agreement containing an arbitration provision. Whether conditions precedent to its enforcement have been satisfied is a question to be resolved by an arbitrator. Accordingly, the Court grants the motion to compel arbitration . . . .

D. Fiduciary Duties of Partners and Affiliates


The court of appeals affirmed a summary judgment in favor of investors in a limited partnership for violation of the Texas Securities Act and breach of fiduciary duty against an individual who was the managing member and president of the LLC general partner of the limited partnership. The court determined that the evidence established that the individual was primarily liable as a “seller” under the Texas Securities Act and that the individual was liable for breach of fiduciary duty to the limited partners of the limited partnership because he knowingly participated in a breach of fiduciary duty owed by the LLC general partner to the limited partners.

Michael O’Donnell was the managing member and president of Pepperwood Fund II GP, LLC (“Pepperwood II GP”), the general partner of Pepperwood Fund II, LP (“Pepperwood II”), a limited partnership which was formed as a vehicle to raise cash from investors for a controlling interest in Behavioral Recognition Systems, Inc. (“BRS”) through the purchase of Ray and Debi Davis’s BRS stock. O’Donnell solicited investments in Pepperwood II from the appellees (two individuals (Brunnemer and Gregg) and an investment entity (RooInvestment) owned by them) and represented to them that their investments would be used so that Pepperwood II could purchase the controlling preferred and common stock in BRS from the Davises and then cause BRS to issue Series A stock to Pepperwood II’s investors. Based on these representations, the appellees became limited partners of Pepperwood II in exchange for capital contributions from the individuals and a loan from their entity.

In 2020, the appellees sued O’Donnell and Pepperwood II claiming that they had violated the Texas Securities Act (TSA) by selling securities to the appellees while omitting and misrepresenting material facts surrounding their investments in Pepperwood II, i.e., by representing that the investment funds would be used to purchase the Davises’ stock without disclosing that O’Donnell had already purchased the Davises’ stock and by failing to disclose the existence of a referral agreement under which O’Donnell received payment for soliciting the appellees’ investments. The appellees also sought to hold O’Donnell liable for breach of fiduciary duty and various fraud-based claims. The appellees asserted in their petition that after they became limited partners in Pepperwood II, and without informing them until afterwards, O’Donnell executed a document on behalf of BRS to transfer all
of its intellectual property assets to Pepperwood II, then executed a second document to transfer those same assets from Pepperwood II to Omni AI, Inc. ("Omni"), an entity controlled by O'Donnell. Through Pepperwood II’s general partner Pepperwood II GP, O'Donnell offered appellees the options to either exchange their limited partnership interests in Pepperwood II for shares in Omni or to withdraw from Pepperwood II and receive their capital contribution with ten percent interest. Brunnemer and RoInvestment opted not to sign either an exchange or a withdrawal agreement, and Gregg signed both (half of his interest to be exchanged for Omni shares and the remaining interest to be withdrawn in exchange for return of capital plus interest). Gregg received no payment despite his demands for payment from O'Donnell. Eventually the trial court granted summary judgment in favor of the appellees on their claims for breach of the TSA and breach of fiduciary duty. O'Donnell appealed.

After concluding that the summary-judgment evidence supported summary judgment against O'Donnell on the appellees’ claim for violation of the TSA, the court reviewed the summary-judgment evidence relating to O’Donnell’s liability for breach of fiduciary duty in connection with the transfer of the IP assets out of Pepperwood II to Omni, an entity in which O'Donnell had an interest. O'Donnell acknowledged that a general partner in a limited partnership owes fiduciary duties to limited partners and that Pepperwood II GP, as the general partner of Pepperwood II, owed fiduciary duties to the appellees. However, O'Donnell argued that he—as managing member of Pepperwood II GP, an LLC—owed a fiduciary duty to Pepperwood II GP, but not to the limited partners of Pepperwood II. The court concluded that the law and the summary-judgment evidence supported O'Donnell’s liability for breach of fiduciary duty based on the following analysis:

Generally, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. See First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 220 (Tex. 2017). As the movants, appellees had to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. See TEX. R. CIV. P. 166a(c).

Two types of relationships give rise to fiduciary duties: formal and informal. See Cardwell v. Gurley, No. 05-09-01068-CV, 2018 WL 3454800, at *4 (Tex. App.—Dallas July 18, 2018, pet. denied) (mem. op.) (citing Meyer v. Cathey, 167 S.W.3d 327, 330–31 (Tex. 2005)). Fiduciary duties are owed as a matter of law in formal relationships, which include relationships between partners, principals and agents, and attorneys and clients. See id. (citing Meyer, 167 S.W.3d at 330; McAfee, Inc. v. Agilysis, Inc., 316 S.W.3d 820, 829 (Tex. App.—Dallas 2010, no pet.). An informal relationship also may give rise to a fiduciary duty when one person trusts and relies on another, whether the relationship is moral, social, domestic, or purely personal. See id. (citing Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp., 823 S.W.2d 591, 593–94 (Tex. 1992), superseded by statute on other grounds as noted in Subaru of Am., Inc., v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225–26 (Tex. 2002)).

As O’Donnell concedes, a general partner in a limited partnership owes fiduciary duties to the limited partners they serve because of its control over the entity. See Graham Mortg. Corp. v. Hall, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.). Here, Pepperwood II GP was the general partner of Pepperwood II and thus owed fiduciary duties to appellees as limited partners. Among his admissions attached as support for appellees’ motion for summary judgment, are statements that O’Donnell was the president and manager Pepperwood II GP. We have previously held that applicable Texas statutes “presume the existence of fiduciary duties” owed by a manager or member of a limited liability company. See Cardwell, 2018 WL 3454800, at *5.

Moreover, we have held that when a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeasor and is liable as such. See Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) (citing Kinzbach Tool Co. v. Corbett–Wallace Corp., 160 S.W.2d 509, 513–14 (Tex. 1942); Brewer & Pritchard, P.C. v. Johnson, 7 S.W.3d 862, 867 (Tex. App.—Houston [1st Dist.] 1999) aff’d on other grounds, 73 S.W.3d 193 (2002)). A claim that a defendant knowingly participated in a breach-of-fiduciary duty by a third party necessarily hinges on the existence of a fiduciary duty owed by the third party to the plaintiff. CBIF Ltd. P’ship v. TGI Friday’s Inc., No. 05-15-00157-CV, 2017 WL 1455407, at *16 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.) (citing Cox Tex. Newspapers, L.P. v. Wooten, 59 S.W.3d 717, 722 (Tex. App.—Austin 2001,
In addition to the existence of a fiduciary duty, the plaintiff must show the defendant knew of the fiduciary relationship and was aware of his participation in the third party’s breach of its duty. *Id.* (citing *Wooten*, 59 S.W.3d at 722).

In support of their motion for summary judgment, appellees attached their declarations, which included their claims for O’Donnell’s actions constituting either breach or knowing participation in breach of fiduciary duty. According to these declarations, after appellees agreed to invest and had become limited partners in Pepperwood II, O’Donnell caused Pepperwood II to transfer “all of BRS’s patents and intellectual property rights to Omni.” Those declarations further noted that BRS was then known as Giant Gray, Inc. In support of their declarations, appellees attached an assignment of intellectual property rights agreement dated February 1, 2017, whereby Pepperwood II assigned its intellectual property rights in Gray Giant to Omni, O’Donnell signed that agreement as manager of Pepperwood II GP and as president of Omni. The declarations went on to allege that O’Donnell informed appellees of the transfer of intellectual property rights and stated his intention to exchange their limited partnership interests in Pepperwood II for shares in Omni AI, Inc. According to all appellees’ declarations, O’Donnell offered that they each sign an exchange agreement, which would exchange the limited partner’s respective interest for shares in Omni, or a withdrawal agreement, which would permit the limited partner to withdraw from Pepperwood II and receive a return of that partner’s capital contribution plus ten percent within ninety days of the date of the withdrawal agreement. According to their declarations, neither RoolInvestment nor Brunnemer signed either the exchange or withdrawal agreement and did not receive a return on or reimbursement of its or his investment. According to his declaration, Gregg signed the exchange agreement, consenting to exchange half of his investment in Pepperwood II for shares in Omni, and the withdrawal agreement, seeking the return of the remainder of his investment. Gregg declared he had not received a return on or reimbursement of his investment.

We conclude the foregoing is sufficient evidence that O’Donnell participated in a breach of duty. The record evidence establishes that he was aware of the fiduciary relationship between Pepperwood II GP and appellees. The evidence also establishes that O’Donnell signed the agreements that transferred the IP assets out of Pepperwood II to Omni, an entity he had some control over and only afterwards disclosed to appellees the transfer and offered to exchange their interests in Pepperwood II for shares in Omni, or else return their capital contribution with interest. As a general partner in a limited partnership, Pepperwood II GP owed fiduciary duties to the limited partners it served because of its control over Pepperwood II. *See Graham Mortg.*, 307 S.W.3d at 479. Such a fiduciary duty includes a duty to disclose material facts. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019). Accordingly, we conclude appellees presented evidence establishing O’Donnell engaged in self-dealing and failed to disclose material information to appellees thereby participating in breaches of a fiduciary duty to appellees.

In light of the conclusion reached above based on the transfer of the IP assets, the court noted in a footnote that it was not necessary to address acts that took place prior to the appellees’ becoming limited partners, at a time at which O’Donnell argued that he owed them no fiduciary duty, i.e., whether O’Donnell breached any fiduciary duty or duty to disclose by failing to disclose that the BRS stock had already been sold or the existence of the referral agreement.


In this adversary proceeding, the bankruptcy court concluded that a state court’s findings of fact were sufficient to support nondischargeability under Sections 523(a)(2)(A) (false representation) and (a)(4) (fraud or defalcation in a fiduciary capacity) of the debt represented by the judgment in the state court litigation and that collateral estoppel applied to establish those exceptions to discharge.

Brandon Howley, the grandson of Chuck and Nancy Howley, was found liable to his grandparents and a family limited partnership, in state court litigation that preceded Brandon’s Chapter 7 bankruptcy. In this adversary proceeding, the court analyzed whether the judgment against Brandon was nondischargeable pursuant to § 523(a)(2)(A) and (a)(4) of the Bankruptcy Code. Significant damages were awarded against Brandon based on
wrongful conduct. The state court made specific findings that Brandon engaged in fraudulent behavior, including while acting as a fiduciary. After a thorough discussion of the relevant exceptions to discharge and the state court’s findings, the bankruptcy court concluded that the exceptions to discharge were supported by the findings and that collateral estoppel was appropriate.

The context in which Brandon’s actions were taken resulted from Chuck Howley transferring a ranch known as Happy Hollow Ranch into a limited partnership, Happy Hollow Ranch, L.P. (“Ranch L.P.”) as part of his and Nancy’s estate planning.

The partnership was structured such that a trust established for Chuck (the CLH Trust, of which Chuck was beneficiary) owned a 49.99% limited partnership interest, a trust established for Nancy (the NTH Trust, of which Nancy was the beneficiary) owned a 49.99% limited partnership interest, and an entity known as Happy Hollow Management, LLC (“Ranch LLC”) held a .02% general partnership interest.[footnote omitted] Ranch LLC, in turn, was owned 50% by Chuck and 50% by Nancy (i.e., Chuck and Nancy were the sole members).[footnote omitted] Ranch LLC was member-managed and Chuck handled all the business and financial transactions for it. Eventually, Chuck’s and Nancy’s respective 50% membership interests in Ranch LLC were placed into the separate Howley Family Trust.[footnote omitted] In fact, all of Chuck’s and Nancy’s personal property assets were put into the Howley Family Trust, including the cattle and livestock of the Happy Hollow Ranch and various trademarks.[footnote omitted]

In 2016, Chuck was diagnosed with a form of dementia and soon required 24-hour care. In 2018, Nancy’s own cognitive abilities became impaired. As a result of all this, in 2018, Brandon was hired as a manager of the Howley’s ranching operation.[footnote omitted]

Brandon soon committed several wrongful acts (some apparently in collusion with his father Scott Howley) in what appeared to the State Court to not only be mismanagement, but also a complex fraudulent scheme to first gain control of the ranch, and then misappropriate significant value and assets.[footnote omitted] As for Defendant’s mismanagement of Happy Hollow Ranch, it included the starvation and neglect of the Howleys’ cattle, “causing a high death rate in the herd, a low reproduction rate, and a low growth rate among the calves and yearlings that were born.”[footnote omitted] Brandon apparently also falsified cattle certifications harming Happy Hollow Ranch’s good name and reputation, and alienated personnel who had worked for the ranch for decades.[footnote omitted] As for misappropriation, Brandon sold large numbers of cattle and kept the sales proceeds for himself.[footnote omitted] And, through a series of unauthorized documents in years 2019–2020, he, among other things, fraudulently obtained control over Ranch LLC and Ranch LP and also registered certain trademarks that rightfully belonged to the Howley Family Trust.[footnote omitted]

Pursuant to detailed findings of fact and conclusions of law, the state court entered a judgment for equitable relief and significant monetary damages against Brandon based on breach of fiduciary duties to the limited partnership and its limited partners.

The court reviewed the elements for evaluating a § 523(a)(2)(A) claim of nondischargeability of a debt obtained by false pretenses, a false representation, or actual fraud, and examined the facts found in the state court proceeding and concluded that all of the elements were fully and finally determined in the state court proceeding with respect to false representations based on fraudulently filed false documents with the Texas Secretary of State (executing and filing a fraudulent certificate of amendment to the certificate of formation of Ranch LLC changing the entity from a member-managed LLC with Chuck and Nancy as the sole members to a manager-managed LLC with Brandon as one of the managers) and numerous false representations to the partnership and Chuck and Nancy Howley.

Next the court analyzed whether the state court’s judgment was supported by findings that a qualifying fiduciary duty existed and was breached through fraud or defalcation within the meaning of § 523(a)(4). The court explained that fraud as a fiduciary in this context does not require the same common-law elements as “actual fraud” outside a fiduciary relationship. Fiduciary fraud is satisfied by constructive fraud, which does not require dishonesty
of purpose or intent to deceive. The court stated that “defalcation” as a fiduciary is an offense with a lower bar than fiduciary fraud. The court cited the Fifth Circuit definition of defalcation as “willful neglect of duty, even if not accompanied by fraud or embezzlement,” adjudicated “essentially [using] a recklessness standard.” Explaining how the recklessness standard “unfold[s] in real time,” the court explained that “judgment debts arising from duty of care violations, which are generally judged on a gross negligence standard in Texas, would not be considered defalcation for § 523(a)(4) purposes so long as they do not involve willful or reckless conduct.” The court stated that “debts arising from duty of loyalty violations, which tend to involve willful conduct in dealing with a business and its counterparts, would be considered defalcation, assuming reckless, knowing, or willful conduct was involved.”

The court also explained that the fiduciary duty in the § 523(a)(4) context must stem from a “technical” or “express” trust, which is a fiduciary relationship that existed before any wrongdoing occurred and arises to a certain “level” of duty. The court acknowledged that the jurisprudence addressing the technical trust requirement is confusing and complicated insofar as the “level” or type of fiduciary duty is concerned. Certain “traditional fiduciary relationships,” such as “trustee-beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and principals and agents” were listed by the court as often satisfying the technical trust requirement. The court stated that it was unclear whether an informal fiduciary relationship meets the technical trust requirement, and the court concluded that it is necessary for there to be an express or formal fiduciary duty imposed by statute or pursuant to traditional common law to satisfy the technical trust requirement of § 523(a)(4). The court analyzed the fiduciary duty that the state court found was breached by Ranch LLC, through Brandon, to the plaintiffs/limited partners and found the duty was adequate for purposes of § 523(a)(4).

First, the [findings of fact and conclusions of law] included a finding that Brandon was hired for the Happy Hollow Ranch in the position of manager.[footnote omitted] If Defendant had been a corporate officer or director, he would have owed traditional fiduciary duties imposed by the Texas Business Organizations Code that would pass muster under § 523(a)(4). See Moreno, 892 F.2d at 421.[footnote omitted] The State Court’s findings do not expressly state anything this formal—they merely state that Defendant “was hired to work for HH in the position of manager.” This alone may be adequate here, since, if Defendant was a manager of Happy Hollow Ranch, this created an agency relationship.[footnote omitted] And Texas courts have stated that “[a]gency is a type of special relationship that gives rise to a formal fiduciary duty.” Dipprey v. Double Diamond, Inc., 637 S.W.3d 784, 804 (Tex. App.—Eastland 2021, no pet.). The State Court findings reflect that: (a) Defendant had the managerial authority as agent to control ranch property and exercised that authority to fraudulently divert and procure ranch assets; (b) Defendant knew said property was for the benefit of Chuck and Nancy Howley (i.e., they, through their family trusts, were the 99.98% limited partners of Ranch LP which owned the ranch assets);[footnote omitted] and (c) Defendant knew that his mentally incapacitated grandparents placed him in a special position of trust and confidence—at a minimum, as the agent/manager of Ranch LP. Again, at a minimum, Defendant was in an agency relationship with Plaintiffs when he was hired as a manager of the ranch. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949) (“Directors and managers, if not technically trustees, occupy positions of a fiduciary nature ....”). This traditional fiduciary relationship meets the federal standard.

Most importantly, the State Court expressly held that Ranch LLC (which Defendant fraudulently controlled) breached its fiduciary duties (as a general partner) under the Texas Business Organizations Code §§ 152.204–152.206.[footnote omitted] This is a statutorily imposed fiduciary duty adequate for § 523(a)(4). On this point, Defendant placed himself in a qualifying fiduciary position by his own hand—he cannot wash himself clean now. Defendant fraudulently amended the Ranch LLC’s certificate of formation, appointing himself as a manager of Ranch LLC. Again, Ranch LLC was the general partner of Ranch LP.[footnote omitted] And managers of Texas LLCs owe fiduciary duties to the LLC’s members, which were Chuck and Nancy by way of beneficial ownership.[footnote omitted] Furthermore, a limited partnership is managed by its general partners.[footnote omitted] And general partners of Texas limited partnerships owe formal fiduciary duties to the limited partners—the latter of which, again, were ultimately Chuck and Nancy.[footnote omitted]
Finally, the doctrine of “unclean hands” judicially estops Defendant from now claiming that he owed no fiduciary duty—or that any duty was null and void, because the duty arose from a fraudulent amendment to Ranch LLC’s certificate of formation. See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 807, 814–15 (1945) (describing the “unclean hands” doctrine, which precludes a litigant from asserting defenses when that party acted fraudulently or deceitful as to the controversy, such that his “willful act[s] concerning the cause of action ... can be said to transgress equitable standards of conduct”).[footnote omitted]

Defendant has contended that the State Court’s constructive trust remedy cannot trigger a fiduciary duty for purposes of § 523(a)(4). Taken in isolation, this statement is correct. But the constructive trust that the State Court happened to impose, due to Defendant’s unjust enrichment here, was not the sole source of Defendant’s fiduciary duties. The facts here present a mix of statutory imposed duties and a common law agency and special relationship driven duty. This forms a robust foundation for § 523(a)(4)’s technical trust demands. Accordingly, this Court holds that Defendant’s fiduciary duty meets § 523(a)(4)’s requirements. And Defendant’s fraudulent registration of trademarks in breach of fiduciary duty serves as a singularly acceptable ground to constitute fraud in a fiduciary capacity within the meaning of § 523(a)(4).

But Plaintiffs’ § 523(a)(4) claim does not end there: defalcation as a fiduciary also occurred. With respect to defalcation, the Fifth Circuit observed in the Bennett case, cited earlier, that Texas courts have held that a general partner in control of a limited partnership “stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust.” 989 F.2d at 787 (quoting Watson v. Ltd. Partners of WCKT, Ltd., 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.)).[footnote omitted] The Bennett defendant caused improper charges to accrue to the limited partners instead of to the defendant, and those charges amounted to defalcation.[footnote omitted]

This Court sees Defendant’s diversion of revenue properly meant for Ranch LP’s limited partners the same way as Bennett did. As acknowledged previously, Ranch LP’s general partner was Ranch LLC.[footnote omitted] The State Court held that Defendant’s diversion of revenue and improper accession to the ranch’s income through Ranch LLC was a breach of fiduciary duty to the partnership.[footnote omitted] Critically, even absent any findings of fraud in the State Court Litigation, because Defendant committed willful acts in breach of fiduciary duty, the recklessness standard from Bennett is met as to whether a breach of duty rises to the level of defalcation. A willful breach of fiduciary duty sits within the common nucleus of a willful neglect of fiduciary duty under Bennett. The Court accordingly holds that this breach of fiduciary duty constitutes defalcation in a fiduciary capacity sufficient for a § 523(a)(4) claim. This is a major buttress for Plaintiffs’ position because no fraud finding is required.

Having found the elements of the plaintiffs’ § 523(a) claims to be present in the state court’s findings, the court next concluded that the state court’s record was sufficiently detailed as to trigger collateral estoppel, and no policy reasons existed to preclude its application.


Applying the statutory factors that are considered to determine whether a partnership is formed, the court concluded that the plaintiff had not adequately alleged that a partnership was formed; therefore, the court dismissed the plaintiff’s claim for breach of partnership agreement. Because the plaintiff failed to adequately allege formation of a partnership and did not allege another type of fiduciary relationship, the court also dismissed the plaintiff’s claim for breach of fiduciary duty.

Alex Peykoff hired Game Changer Publishing (“GCP”), whose CEO was Charrissa Cawley, to promote a book written by Peykoff. While discussing publishing and promotion of the book, Peykoff and Cawley also considered hosting an entrepreneurial event called Mastermind to further promote Peykoff’s book and, more generally, the brand of an organization run by Peykoff, Satisfied Life Foundation, Inc. (“SLF”). According to Peykoff and SLF, Cawley represented that she had a long track record of hosting successful events and that Mastermind would produce profits of at least $200,000. Peykoff and SLF alleged that a partnership was formed and that Peykoff and SLF provided significant funding, client contacts, and their valuable business reputation to help
make Mastermind a success. Mastermind was unsuccessful and resulted in a financial loss of $216,000. The entire loss, which Peykoff and SLF believed should have been borne jointly with Cawley and GCP, was shouldered by Peykoff and SLF without reimbursement, and Peykoff and SLF sued Cawley and GCP, alleging various causes of action, including breach of partnership agreement and breach of fiduciary duty. The defendants sought dismissal for failure to state a claim.

The plaintiffs’ primary claim was that the parties formed a partnership to put on the Mastermind event. No written partnership agreement was produced by either party, and the defendants argued that the plaintiffs’ claim of a partnership was “impermissibly vague and unsupported in light of the circumstances of this case.” The court agreed with the defendants.

Under Texas law, a partnership is defined as “an association of two or more persons to carry on a business for profit as owners.” TEX. BUS. ORG. CODE § 152.051(b). To determine whether a partnership was formed, courts consider five factors: (1) receipt of right to receive a share of profits of the business; (2) expression of an intent to be business partners; (3) participation or right to participate in control of the business; (4) agreement to share, or sharing, any losses of the business or any liability for claims by third parties against the business; and (5) agreement to contribute, or contributing, money or property to the business. TEX. BUS. ORG. CODE §§ 152.052(a)(1)–(5).

Applying these factors here, Plaintiffs have not demonstrated that a partnership was formed. Nearly all of Plaintiffs’ allegations are either conclusory in nature or threadbare recitals of the five partnership factors. . . .

The court thus dismissed the plaintiffs’ claim for breach of partnership agreement.

The court next addressed the plaintiffs’ claim for breach of fiduciary duty. The plaintiffs alleged that, as partners, the parties owed each other fiduciary duties of loyalty, fairness, honesty, good faith, and refraining from competition that were breached by the defendants by not reimbursing Peykoff for advances made on behalf of the partnership and sending false correspondence and taking other actions to drive business away from SLF and to GCP. The defendants argued that the claim for breach of fiduciary duty was based on an “imaginary partnership,” and the court agreed.

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The elements of a breach of fiduciary duty claims under Texas law are: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in injury to the plaintiff or benefit to the defendant.” Navigant Consulting, Inc. v. Wilkinson, 508 F.3d 277, 283 (5th Cir. 2007) (citing Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied)). “A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship.” Stephanz v. Laird, 846 S.W.2d 895, 901 (Tex. App.—Houston [1st Dist.] 1993, writ den). “[A] fiduciary relationship is an extraordinary one and will not be lightly created.” Am. Med. Int’l, Inc. v. Giurintano, 821 S.W.2d 331, 339 (Tex. App.—Houston [14th Dist.] 1991, no writ). “[T]he mere fact that one subjectively trusts another does not, alone, indicate that he placed confidence in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required.” Id. (citation omitted).

Applied here, the facts at this stage do not show that Defendants owed a fiduciary duty to Plaintiffs. The Court already concluded that the facts in the First Amended Complaint do not sufficiently show that a partnership was formed. As a result, there can be no fiduciary duties on account of the parties’ relationship as alleged partners. Although fiduciary duties are not limited just to partnerships, the First Amended Complaint only alleges the parties owed a fiduciary duty to each other as business partners. [Footnote omitted] See Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 674 (Tex. 1998) (“Fiduciary duties arise as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships.”). And Plaintiffs do not allege another type of fiduciary relationship. Because a fiduciary relationship is “extraordinary” and “will
not be lightly created,” the Court lacks facts to otherwise determine that another formal fiduciary relationship existed. *Am. Med. Int’l, Inc.*, 821 S.W.2d at 339.

Likewise, there are insufficient facts for the Court to infer that an informal fiduciary relationship exists. Plaintiffs only allege that fiduciary obligations arose on account of the parties’ partnership.[footnote omitted] But even setting that formal relationship aside, Plaintiffs still have not supplied facts to show “that the dealings between the parties continued for such a time that one party is justified in relying on the other to act in his best interest.” *Stephanz*, 846 S.W.2d at 902. There must be “some independent basis” beyond the “arms-length business transaction” to establish an informal fiduciary relationship. *Id.* The parties’ relationship centered around a single event related to the business transaction for Defendants to publish and promote Peykoff’s book.[footnote omitted] There is no suggestion in the First Amended Complaint that the parties had a long-term relationship giving rise to informal fiduciary obligations. The mere fact that Plaintiffs subjectively trusted Defendants by relying on representations about expertise and past success are not enough to indicate that a fiduciary relationship existed for a single event.[footnote omitted] That is because “something apart from the transaction between the parties is required” to sustain a breach of fiduciary duty claim based on an informal partnership. *Am. Med. Int’l, Inc.*, 821 S.W.2d at 339. Given the “narrow application of fiduciary duties arising from informal relationships, it would not be appropriate to extend any fiduciary duty” here. *Stephanz*, 846 S.W.2d at 902.

The court thus dismissed the claim for breach of fiduciary duty.


In this dispute between two companies over the ownership of a trademark and copyrighted materials developed in the course of an informal partnership to promote a comedy tour, the magistrate court concluded that the plaintiff sufficiently alleged that it was the exclusive owner of the copyrighted material by virtue of an assignment from the author of the materials, but the court agreed with the defendant that the trademark was partnership property and that neither party obtained exclusive ownership of the trademark upon dissolution of the partnership. The court concluded that claims for breach of fiduciary duty and tortious interference with prospective relations should be dismissed only to the extent the claims were based on confidential information and thus preempted by the Texas Uniform Trade Secrets Act. The court analyzed veil-piercing allegations and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.

BMN Entertainment, LLC (“BMN”) filed this action against Je’Caryous Johnson Entertainment (“JJE”) and Je’Caryous Johnson (“Johnson”) asserting claims of copyright infringement, declaratory judgment of trademark ownership, and other causes of action relating to a dispute over the ownership and use of a trademark and copyrighted materials in the aftermath of the breakup of an informal partnership between BMN and JJE for the promotion of a comedy tour. BMN additionally alleged that liability should extend to Johnson for each claim against JJE based on corporate veil piercing.

BMN and JJE were companies involved in planning, promoting, and booking talent for events. The parties were introduced in 2018 and started discussing partnering in a comedy tour in 2020. In 2021, they agreed to partner in a comedy tour and to split the profits equally. The first comedy tour that the Parties booked and promoted through their partnership was called the NO CAP COMEDY TOUR (the “Tour”), which occurred between February and May 2022. BMN claimed that it alone created the NO CAP COMEDY TOUR trademark (the “Mark”) and retained Maximus Graphics to create the logos and promotional materials (the “Copyrighted Material”). BMN also claimed to solely own the Copyrighted Material created for the Tour by Fernando Cordero at Maximus Graphics. Defendants disputed these claims. Maximus Graphics transferred the Copyrighted Material to BMN, and BMN successfully registered for the copyrights.

After the Tour, BMN independently sought to commence its own tour (the “BMN Tour”) from September to December 2022. BMN attempted to promote the BMN Tour with the Mark but claimed that they re-branded the BMN Tour due to the defendants outbidding BMN. BMN claims that the defendants were privy to significant “confidential and sensitive business information” and that the parties dissolved their joint business venture and the at-will de facto partnership after a conversation between the owners of BMN and JJE on May 21, 2022. The profits from the Tour were being accounted for so that it could be distributed between each party.
In June 2022, JJE’s counsel sent a letter to entertainment venues stating that JJE had a pending trademark for “No Cap Comedy Tour” and that the venues could not use that trademark in connection with services or goods that did not originate with JJE. BMN asserted that several entertainment venues indicated that they would not allow any use of the Mark because they were concerned about potential liability. On June 6, 2022, JJE filed a trademark application for “NO CAP COMEDY TOUR” and on July 5, 2022, JJE filed three trademark applications for “NO CAP COMEDY,” “NO CAP NO CAP COMEDY TOUR,” and “NO CAP COMEDY TOUR.”

The defendants sought dismissal on the basis that BMN failed to state a claim for relief for reasons including the following: (1) BMN did not provide sufficient allegations to demonstrate partnership property is now owed exclusively by BMN, and consequently, failed to allege a plausible claim for damages; (2) BMN failed to provide factual allegations that would support piercing the corporate veil under Texas law; and (3) BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations were preempted by the Texas Uniform Trade Secrets Act.

The court first concluded that BMN sufficiently alleged that it was the exclusive owner of the Copyrighted Material based on its allegations that the author of the Copyrighted Materials was Fernando Cordero of Maximus Graphics (because he “created substantially all of the artwork/marketing materials”) and that the ownership of the Copyrighted Materials was transferred to BMN via “Corrective Nunc Pro Tunc Copyright Assignment Agreement” signed by both Fernando Cordero on behalf of Maximus Graphics and one of BMN’s owners on behalf of BMN. The court stated that the defendants mistakenly grouped together the Copyrighted Materials and the Mark in determining ownership by referring to both as “intellectual property” and asserted without authority that the Copyrighted Material and the Mark “are bound together ... and BMN has no right to use the [Copyrighted Material] independently unless it can establish a right to use the Mark also.”

With respect to the Mark, the defendants argued that the partnership owned the Mark because it was first used in commerce by the partnership. BMN argued that it owned the Mark exclusively because it controlled the quality of services under the Mark. The Court agreed with the defendants as to the ownership of the Mark by the partnership and further addressed the effect of the break-up or dissolution of the partnership on the ownership of the Mark, concluding that neither party obtained the exclusive ownership of the Mark upon dissolution.

The defendants argued that BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations should be dismissed to the extent the claims were based upon the use of confidential information because the claims are preempted by the Texas Uniform Trade Secrets Act (TUTSA). BMN asserted that the claims for breach of fiduciary duty and tortious interference with prospective relations were not preempted by TUTSA, arguing that the defendants relied upon an inaccurate premise that BMN alleged that compensation information constitutes a trade secret. The court addressed the preemption issue as follows, concluding that the claims should be dismissed only to the extent the claims were based on confidential information and thus preempted:

According to TEX. CIV. PRAC. & REM. CODE § 134A.007(a), “this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.” However, “[I]his chapter does not affect: (1) contractual remedies, whether or not based upon misappropriation of a trade secret; (2) other civil remedies that are not based upon misappropriation of a trade secret; or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.” TEX. CIV. PRAC. & REM. CODE § 134A.007(b). “TUTSA’s preemption clause applies to a breach of fiduciary duty claim that is based solely upon taking confidential information.” Embarcadero Techs., Inc. v. Redgate Software, Inc., No. 1:17-CV-444-RP, 2018 WL 315753, at *3 (W.D. Tex. Jan. 5, 2018); ScaleFactor, Inc. v. Process Pro Consulting, LLC, 394 F. Supp. 3d 680, 684 (W.D. Tex. 2019) (“[F]aced previously with the question of whether TUTSA preempts claims based on the unauthorized use of confidential information that was not a trade secret, this Court held that it does.”). “However, because TUTSA’s preemption provision applies only to conflicting common law remedies, a common law claim is not preempted by TUTSA if it addresses harm separate from the trade secret misappropriation.” Title Source, Inc. v. HouseCanary, Inc., 612 S.W.3d 517, 532-33 (Tex. App.—San Antonio 2020, pet. denied).

Here, BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations are not wholly preempted by TUTSA because the claims are not solely premised upon
the improper utilization of confidential information. (Dkt. No. 40 at ¶¶ 96-118, 144-58.) BMN bases each of these claims on both Defendants’ utilization of confidential information and Defendants communications to venues holding themselves out as exclusive owners of the intellectual property. (Id. at ¶¶ 102-05, 156-57.) The claim for breach of fiduciary duty is preempted only insofar as it relies on allegations that Defendants “breached their fiduciary obligations when they utilized confidential information regarding the compensation that BMN pays specific comedians” and the claim for tortious interference with prospective relations is preempted only insofar as it relies on allegations that Defendants “misused confidential and sensitive business information relating to compensation paid to comedians in order to gain an unfair advantage and be able to outbid BMN.” (Id. at ¶¶ 105, 157); see ScaleFactor, Inc., 394 F. Supp. 3d at 686. As such, the Court recommends the Motion to Dismiss as to BMN’s claims of breach of fiduciary duty and tortious interference with prospective relations be granted in part, to the extent it is preempted.

Defendants argued that BMN failed to state a claim for relief as to Johnson “individually because it fails to provide factual allegations that would support piercing the corporate veil under Texas law.” The court analyzed the veil-piercing allegations and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.


The court concluded that (a) an impermissible double recovery for breach of contract and equitable disgorgement for breach of fiduciary duty did not occur; (b) the evidence was sufficient to support the equitable remedy of disgorgement of employment compensation and profits; and (c) appellants were not entitled to attorney’s fees as “prevailing parties” under the partnership agreement.

Appellee East Texas Precast Company, Ltd. (“ETP”) was a precast concrete business whose primary job was creating precast concrete, the majority of which was used to build parking garages. ETP was controlled by two general partners, Harlow Management, LLC (owned and controlled by appellant Robert Diakiw) and Stites Management, LLC (owned and controlled by appellee Dale Stites). Harlow Management and Stites Management each owned a 1% general partner interest in ETP. Harlow Management also owned a 29% limited partner interest in ETP, and Stites Management owned a 69% limited partner interest. Diakiw eventually became President/CEO of ETP.

ETP was managed pursuant to an Agreement of Limited Partnership of East Texas Precast Co., Ltd., a Texas Limited Partnership (the “Partnership Agreement”). The Partnership Agreement gave the general partners “full, exclusive, and complete authority and discretion to manage, control, and direct” ETP. By January 2007, Diakiw had taken over the day-to-day operations of ETP, describing his role as having “complete oversight.” Dale Stites lived in Missouri and generally did not engage in day-to-day operations of ETP. According to Mike Stites, Dale’s son, Stites transferred his interest in ETP to his four children on January 11, 2012.

In early 2013, Diakiw along with appellants Richard Schultz, Tom Haines, Hussein Sinjari, Pat Cooledge, Jeronimo Trejo, and Helen Huereca (collectively, “the Employees”) left ETP for a new precast concrete company created by Diakiw called Legacy Precast (“Legacy”). The Employees comprised senior management at ETP. Richard Schultz was the plant operations manager; Tom Haines was the sales manager; Hussein Sinjari was the project manager; Pat Cooledge was the controller; Jeronimo Trejo was the production supervisor; and Helen Huereca was the human resources manager.

Appellees eventually filed claims against appellants for breach of contract, breach of fiduciary duty, and violation of the Texas Theft Liability Act. After a lengthy trial, the jury found that appellants Diakiw and Harlow (the former owner of Harlow Management) breached the Partnership Agreement. The jury further found that all appellants breached their fiduciary duties to ETP. The trial court signed a final judgment ordering (1) disgorgement of Diakiw and the Employees’ salaries, bonuses, and profits received as a result of their breach of fiduciary duties; and (2) disgorgement of Legacy’s profits received as a result of its breach of fiduciary duty. The trial court also awarded $120,000 in breach-of-contract damages and $450,000 in attorneys’ fees in connection with the breach-of-contract claim. Finally, the trial court awarded appellee 4-S Manufacturing (the successor to ETP) attorneys’ fees in connection with its claims for breach of contract and violation of the Theft Liability Act.

24
In appellants’ first issue, they asserted that the trial court erred in improperly awarding 4-S Manufacturing a double recovery, including damages for breach of contract and equitable disgorgement for breach of fiduciary duty. Appellants asserted that by awarding 4-S Manufacturing its breach of contract damages in addition to equitable disgorgement, the trial court violated the one-satisfaction rule because the claims were based on the same injury. The court disagreed, noting that “Appellants’ argument fails because equitable forfeiture is distinguishable from an award of actual damages, in that it serves a separate function of protecting fiduciary relationships.” According to the court, “[e]ven if a fiduciary does not obtain a benefit by violating his duty, he still may be required to forfeit the right to compensation for his work.” As the court explained, the one-satisfaction rule does not preclude the recovery of both actual damages and the equitable remedy of disgorgement, as those remedies are intended to address separate and distinct injuries. The trial court, therefore, did not abuse its discretion in awarding damages for breach of contract and ordering disgorgement for breach of fiduciary duty.

The court then turned its attention to whether there was sufficient evidence to support the trial court’s award of equitable relief. The court began by discussing equitable remedies in general such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty:

Courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of a fiduciary duty. The primary purpose of disgorgement as an equitable remedy is not to compensate the injured principal, but to protect relationships of trust by discouraging disloyalty. Disgorgement is not justified in every instance in which a fiduciary violates a legal duty because some violations are inadvertent or do not significantly harm the principal. The remedy of disgorgement is available for “clear and serious” violations of a fiduciary duty.

Once the factual disputes have been resolved, the trial court must determine whether the fiduciary’s conduct was a clear and serious breach of duty to the principal, whether disgorgement should be awarded, and if so, what the amount should be. In determining whether a breach of fiduciary duty was “clear and serious,” the trial court should consider factors such as the gravity and timing of the breach, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the scope of the fiduciary relationship, any other threatened or actual harm to the principal, the adequacy of other remedies, and whether disgorgement “fit[s] the circumstances and work[s] to serve the ultimate goal of protecting relationships of trust.”

The court then addressed basic fiduciary duty principles involving the employer-employee relationship:

When a fiduciary relationship of agency exists between employee and employer, the employee has a duty to act primarily for the benefit of the employer in matters connected with his agency. Among the agent’s fiduciary duties to his principal are the duty not to compete with the principal on his own account in matters relating to the subject matter of the agency and the duty to deal fairly with the principal in all transactions between them. The employee has a duty to deal openly with the employer and to fully disclose to the employer information about matters affecting the company’s business. If an agent, while employed by a principal, uses his or her position to gain a business opportunity belonging to the employer, such conduct constitutes an actionable wrong.

To be sure, once employees resign, they may actively compete with their former employer. The right to prepare to compete notwithstanding, if the nature of a party’s preparation to compete is significant, it may give rise to a cause of action for breach of fiduciary duty. “This is particularly true if a supervisor-manager acts as a ‘corporate pied piper’ and lures all of his employer’s personnel away, thus destroying the business.”

Employees may use their general knowledge, skill, and experience acquired in the former employment to compete. However, there are recognized limitations on the conduct of an employee who plans to compete with a former employer. The employee may not (1) appropriate the company’s trade secrets; (2) solicit the employer’s customers while still working for the employer; (3) solicit the departure of other employees while still working for the employer; or (4) carry away confidential information, such as customer lists.
With this background, the court examined the evidence to determine if it supported the factors of intent, gravity and timing, centrality of breach, and harm to ETP. Given the egregiousness of Diakiw and the Employees’ breaches, the court had no problem determining that the evidence did support the trial court’s findings. As illustrations, the record reflected that Diakiw and the Employees appropriated trade secrets through downloading proprietary estimating software, solicited customers while still working for ETP, solicited the departure of other employees, and accessed customer information in the form of actual bids for business. In addition, the record reflected that Diakiw and the Employees stole physical equipment and supplies from ETP and took it to Legacy. The court noted that Diakiw and the Employees’ breaches went to the core of ETP’s business: “They admitted using ETP’s funds to purchase items for Legacy; they took inflated salaries from ETP while actively working to obtain business for Legacy; and they took equipment from ETP to be used by Legacy. We conclude the evidence supports the trial court’s findings on intent, gravity and timing, centrality of breach, and harm to ETP.”

Appellants’ next argued that 4-S Manufacturing was not entitled to equitable relief because the jury failed to award it more than $120,000 in damages. The court rejected the argument: “The main purpose of a disgorgement remedy, however, is not to compensate the fiduciary; it is to protect the fiduciary relationship. It is for situations such as the one here—where traditional legal remedies do not adequately compensate for the loss of trust in the fiduciary relationship—that disgorgement ‘may be considered for that purpose.’ The trial court, not the jury, is charged with fulfilling this purpose by deciding the expediency, necessity, and propriety of equitable relief. The breaches of fiduciary duty in this case cannot be described as ‘inadvertent.’ The fact that the jury awarded a nominal amount in damages is not fatal to the trial court’s award of an equitable remedy. The purpose of disgorgement is not to compensate appellees for financial loss related to the attempted closure of ETP—it is to protect the fiduciary relationship. Reviewing the record under the appropriate standards of review, we cannot say the trial court abused its discretion in awarding equitable relief to 4-S Manufacturing.”

The appellants then asserted that the remedy of disgorgement of Legacy’s profits was not warranted by the evidence. Once again, the court rejected their argument:

Appellants first assert that because Legacy was a third-party non-fiduciary, disgorgement of Legacy’s profits is not permitted. To the contrary, Texas common law has long held that if a third party knowingly participates in a defendant’s breach of a fiduciary duty owed to a plaintiff, the third party is jointly liable with the defendant for damages to the plaintiff proximately caused by this breach of fiduciary duty, and the plaintiff has the same equitable remedies against the defendant and the third party based upon this breach.

In this case, the jury found that Legacy knowingly participated in Diakiw and the Employees’ breaches of fiduciary duties. Appellants have not challenged that finding. Therefore, the trial court did not abuse its discretion in ordering disgorgement of Legacy’s profits as a third-party non-fiduciary.

Appellants next assert that disgorgement should be limited to profits of Legacy during the time of Diakiw and the Employees’ breaches. Appellees presented evidence in the form of financial statements, which showed profits of Legacy were $179,233 in 2013, $4,361,165 in 2014, $2,205,306 in 2015, $2,381,968 in 2016, and $1,327,430 in 2017. These gross profits of Legacy add up to more than $10 million. The trial court ordered less than half these amounts be disgorged. Appellants assert that because the trial court found the breaches occurred from June 2012 through April 2013, disgorgement is limited to Legacy’s profits during that time.

The obligation to avoid using trade secret information acquired during the employment relationship survives the termination of employment. As noted above, the record reflects that Diakiw and the Employees actively engaged in use of ETP’s proprietary software used to bid on projects in addition to obtaining inside information about ETP’s bids on the same projects on which Legacy was bidding. The trial court could have inferred from this evidence that Legacy profited as a result of appellants’ breaches long after they left the employment of ETP.

Appellants further contend that disgorgement of Legacy’s profits is improper because “it is nothing more than 4-S’ alleged lost profits” that were excluded from consideration by the trial court. Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity. We again note the distinction between damages, as for lost profits, and disgorgement as
a remedy for breach of fiduciary duty. The purpose of disgorgement is not to compensate appellees for financial loss such as lost profits, it is to protect the fiduciary relationship. Therefore, the trial court’s order requiring disgorgement of $5 million in profits was not an award of damages for lost profits, but a remedy designed to protect the fiduciary relationship. . . .

Finally, appellants assert the trial court abused its discretion in ordering disgorgement of Legacy’s profits because there is legally and factually insufficient evidence of actual loss sustained by ETP. We reiterate, however, that the purpose of disgorgement is not to compensate an injured principal but to protect relationships of trust by discouraging agents’ disloyalty. In Kinzbach Tool Co., [160 S.W.2d 509, 514 (Tex. 1942),] the Texas Supreme Court addressed, and disposed of, arguments similar to those presented by appellants:

It is beside the point . . . to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

In this case, as in Kinzbach, there is no requirement under Texas law that appellees prove ETP sustained a loss through their misconduct. The jury found that appellants betrayed ETP’s trust and ETP is entitled to recover disgorgement as a remedy for the betrayal of that trust.

Given the nature of the breaches in this case and the evidence presented to the trial court we cannot say the court abused its discretion in ordering disgorgement of $5 million in Legacy’s profits.

As a final issue, the appellants had moved for directed verdict at trial on Stites’ claim for breach of the Partnership Agreement and breach of fiduciary duty because, by the time of trial, Stites had transferred his ownership interest in ETP to his children. At trial, Stites did not oppose the motion for directed verdict on his claims. By virtue of that directed verdict, the Diakiw parties asserted that they were “prevailing parties” under the Partnership Agreement and entitled to attorney’s fees for successfully defending Stites’ breach of contract action. The court disagreed:

The Diakiw Parties rely on the following portion of the Partnership Agreement:

18.5 Attorneys’ Fees. In the event any proceeding is brought by the Partnership or a Partner against another Partner to enforce or for the breach of any of the provisions of this Agreement, the prevailing party shall be entitled in such proceeding to recover his reasonable attorneys’ fees together with the costs incurred in such proceeding.

The trial court, in its judgment, awarded attorneys’ fees to 4-S Manufacturing in connection with its claim for breach of the Partnership Agreement. The Diakiw Parties assert they are also entitled to attorneys’ fees as prevailing parties because Stites dismissed his claim for breach of the Partnership Agreement.

The Partnership Agreement does not define “prevailing party,” so we assume the parties used the phrase in its ordinary sense. As we explained when construing an attorney-fee provision similar to the one in this case, the “contractual provision entitling a ‘prevailing party’ to recover attorneys’ fees does not distinguish between successful prosecution and successful defense of a claim.” A defendant is the prevailing party if it successfully defends the case, typically by “obtaining a take-nothing judgment on the main issue or issues in the case.”

On the “main issues” in this case—breach of the Partnership Agreement and breach of fiduciary duty—the record reflects that 4-S Manufacturing was the “prevailing party.” The clear
focus at trial, as it has been in the appeal, was on appellees’ claims for breach of contract and breach of fiduciary duty. These intermingled claims were the bases for the vast majority of the testimony and were the primary basis for appellees’ claims that they were entitled to damages for breach of the Partnership Agreement and disgorgement of profits and salaries. The jury found in appellees’ favor on claims for breach of the Partnership Agreement. Under these circumstances, by obtaining a directed verdict on Stites’s claims under the Partnership Agreement, but receiving an adverse judgment on Diakiw’s breach of the Partnership Agreement, the Diakiw Parties cannot be said to have obtained a take-nothing judgment on the main issue or issues in the case. The Diakiw Parties, therefore, were not “prevailing parties” under the Partnership Agreement.

_S. Cent. Jurisdictional Conf. of United Methodist Church v. S. Methodist Univ._, 674 S.W.3d 334 (Tex. App.—Dallas 2023, pet. filed) (“Fiduciary duties arise as a matter of law in certain formal relationships, such as attorney–client, principal–agent, partnership, and trustee relationships.”).

E. Partnership Property and Partnership Interest


The court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. The court of appeals reversed a trial court’s judgment dismissing a case based on a settlement purportedly entered into by a receiver on behalf of a limited partnership because the trial court did not determine whether the receiver had authority to act on behalf of the limited partnership, and the record did not support an implied finding that the receiver had authority to act for the limited partnership in settling the lawsuit and seeking dismissal.

Appellant WC 4th and Rio Grande, LP (“Rio Grande, LP”) sued Appellee La Zona Rio, LLC (“La Zona Rio”) in Travis County seeking to avoid foreclosure on a building in downtown Austin (the “Building”) owned by Rio Grande, LP (the “La ZonaRio Lawsuit”). Local real estate developer Natin Paul signed the promissory note secured by the Building on behalf of Rio Grande, LP as the president of WC 4th and Rio Grande GP, LLC—Rio Grande, LP’s general partner. After Rio Grande, LP defaulted on the note, La Zona Rio initiated foreclosure proceedings. Rio Grande, LP attempted to pay off the amount owed on the note, but La Zona Rio rebuffed its attempts. Rio Grande, LP then filed this lawsuit, i.e., the La Zona Rio Lawsuit, claiming La Zona Rio was in breach of contract and seeking a declaratory judgment regarding its right to pay off the note under the parties’ loan agreement.

While the La Zona Rio Lawsuit was pending, a Harris County district court appointed attorney Seth Kretzer to collect on a judgment owed by World Class Capital Group, LLC (“WCCG”) and Great Value Storage, LLC (“GVS”) to Princeton Capital Corporation (“Princeton”) in an unrelated lawsuit (the “Princeton Lawsuit”). The order (the “Receivership Order”) gave Kretzer broad powers to assist Princeton in its collection efforts, such as directing WCCG “to identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” The Receivership Order also authorized Kretzer “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.” Relying on this authority, Kretzer then entered an appearance in the La Zona Rio Lawsuit stating he was “appear[ing] as counsel of record” for WCCG and its “subsidiary.” Rio Grande, LP, and purporting to replace prior counsel of record for Rio Grande, LP. Kretzer then entered into a settlement agreement with La Zona Rio that ultimately allowed Kretzer to deed the building to La Zona Rio in lieu of foreclosure for the sum of $10. That same day, La Zona Rio’s attorney and Kretzer, again purporting to act on behalf of Rio Grande, LP, filed a joint motion to dismiss the La Zona Rio Lawsuit with prejudice pursuant to the agreement.

Rio Grande, LP, through its retained attorney, Brian Elliott, filed a motion objecting to Kretzer’s authority. In its motion, Rio Grande, LP conceded that Kretzer had been appointed as a receiver in the Princeton Lawsuit and attached a copy of the Receivership Order, but Rio Grande, LP contested Kretzer’s authority to intervene in the lawsuit. First, Rio Grande, LP pointed out that Kretzer claimed to have authority to act as Rio Grande, LP’s attorney based on the allegation that Rio Grande LP was a “subsidiary” of WCCG, yet Kretzer provided no evidence regarding Rio Grande LP’s status as such a “subsidiary.” Rio Grande, LP denied that it was a subsidiary of WCCG.
and asserted that it was a separate legal entity that was neither owned nor managed by WCCG. Second, Rio Grande, LP acknowledged that the Receivership Order ostensibly allowed Kretzer to seize the membership interest of any limited liability company or limited partnership in which WCCG was a member and to sell, manage, and operate any such limited liability company in which WCCG was a member as the receiver deemed appropriate, but Rio Grande, LP asserted that Kretzer failed to establish that WCCG in fact had any such interest in either the LLC serving as the general partner or in Rio Grande, LP itself. In addition, Rio Grande, LP argued that even if WCCG had an interest in Rio Grande, LP, Kretzer would not be permitted to seize any assets belonging to Rio Grande, LP because under Texas law, partnership assets belong to the partnership, and a charging order is the exclusive remedy by which to collect on a judgment debtor’s interest in a partnership or limited liability company. (The court explained in a footnote that a charging order charges the partnership interest of the judgment debtor to satisfy the judgment by giving the judgment creditor the right to receive any distribution to which the judgment debtor would otherwise be entitled. The court pointed out that, while the charging order constitutes a lien on judgment debtor’s interest, it does not entitle the judgment creditor to participate in the partnership or compel distributions. The court commented, however, that a Chapter 31 turnover order and receivership order may be used to monitor partnership distributions and effectuate a charging order.)

The trial court granted the joint motion to dismiss without ruling on Rio Grande, LP’s objection. Rio Grande, LP appealed, again arguing that Kretzer lacked the authority to act on its behalf.

In the course of concluding that Rio Grande, LP had the right to challenge Kretzer’s authority to enforce the Receivership Order against it in the La Zona Rio Lawsuit, the court of appeals discussed the significance of the separate existence of Rio Grande, LP as distinguished from the entities that were parties in the Princeton Lawsuit in which the Receivership Order was entered.

As explained below, we conclude that Rio Grande, LP was a third-party stranger to the Princeton Litigation and therefore, the trial court in the La Zona Rio Lawsuit was required to determine Rio Grande, LP’s substantive rights before allowing Kretzer to enforce the Receivership Order against it.

In reaching this conclusion, we emphasize that WCCG and Great Value Storage were the only two defendants in the Princeton Lawsuit and the only two named parties in the Receivership Order. And although La Zona Rio at times seeks to treat WCCG and its affiliated World Class entities formed by Natin Paul as one and the same, the only evidence in the record demonstrates otherwise. As indicated above, Rio Grande, LP submitted unrebutted evidence in the trial court indicating it was formed as a limited partnership in accordance with the Texas Business Organizations Code. And it is well established that a business entity, such as a limited partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members. See *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020) (recognizing that a business organization is a “separate and independent entity”); *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 431 (Tex. 2015) (recognizing the “Legislature ‘unequivocally embrace[d] the entity theory of partnership’ when it enacted the Texas Revised Partnership Act (TRPA), since codified in the Texas Business Organizations Code”); see also *Mims Bros. v. N. A. James, Inc.*, 174 S.W.2d 276, 278 (Tex. App.—Austin 1943, writ ref’d) (court is required to treat a partnership as a separate legal entity, “at least to the extent of obtaining and enforcing a judgment by or against it”). Similarly, the evidence demonstrated that Rio Grande, LP’s general partner, WC 4th and Rio Grande, GP, LLC, was a limited liability company, which is also a distinct legal entity, separate and apart from its members—even when there is only one member in the LLC. See *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing that a limited liability company is a legal entity separate from its sole member); see also *Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 752 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (limited partner who also was president of the corporation serving as general partner of the limited partnership was an entity distinct from the corporate general partner).

Moreover, we note that Kretzer sought to enforce the Receivership Order against Rio Grande, LP, claiming that Rio Grande, LP was a “subsidiary” of WCCG but providing no proof of such. But even if Rio Grande, LP or its general partner could be considered subsidiaries of WCCG, this would not rob either entity of its status as a separate and distinct legal entity apart
from WCCG. To the contrary, it is well-established that subsidiary and parent companies are “separate and distinct” entities as a matter of law, and the separate nature of such entities “will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency.” R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.) (citing SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (recognizing that the “[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace”); see generally BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 798 (Tex. 2002) (recognizing that “Texas law presumes that two separate corporations are indeed distinct entities”).

In addition, “[a] parent company and its subsidiary maintain their independence even though the same persons are directors or managers of both corporations.” Neff v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 376 (Tex. 1984)). “The same is true even though most or all the capital stock of a subsidiary corporation is owned by its parent corporation.” Id. (citing Docudata Records Mgmt. Services, Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). Thus, as the Texas Supreme Court has stated, it has “never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances.” R&M Mixed Beverage, 578 S.W.3d at 229–30 (citing SSP Partners, 275 S.W.3d at 455).

We recognize that in certain situations, a court may disregard a company’s business structure and treat a subsidiary company as being an “alter ego” of its parent, such as when there is evidence of “abuse, or ... injustice and inequity.” See id. at 230 (citing SSP Partners, 275 S.W.3d at 451 (recognizing that the limitation on liability afforded by the corporate structure can be ignored only “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result”)); but see Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy, 508 S.W.3d 569, 585 (Tex. App.—El Paso 2016, no pet.) (recognizing that “[a] subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders”).

Here neither La Zona Rio nor Kretzer produced any evidence in the trial court that would have allowed the court to conclude that WCCG used Rio Grande, LP or its general partner as its alter ego. Stated otherwise, there is no evidence in the record to support the conclusion that either Rio Grande, LP or its general partner were not legally distinct from WCCG. Nor does La Zona Rio attempt to assert as much in its appellate briefing. At best, it alleges that the various World Class entities are “affiliates” of WCCG and that Natin Paul does business through these various entities.[footnote omitted] However, as set forth above, regardless of these affiliations, the evidence in the record reflects that Rio Grande, LP and its general partner are separate legal entities, and as such, they had the right to have their substantive rights adjudicated in the trial court before Kretzer could be allowed to enforce the Receivership Order against them.

Next the court of appeals examined whether the trial court could have impliedly found that Kretzer properly exercised his authority in enforcing the Receivership Order against Rio Grande, LP, and the court concluded that the evidence was not sufficient to support such an implied finding. La Zona Rio pointed to three provisions in the Receivership Order that it contended support such a finding, and the court addressed each of them and concluded that they did not support such a finding.

A. The provision requiring WCCG to turn over any “interests” it had in any partnership or limited liability company

First, La Zona Rio points to the provision in the Receivership Order directing WCCG—as the judgment debtor—to “identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” Even assuming WCCG had an “interest” in Rio Grande, LP or its general partner—a fact that neither Kretzer nor La Zona Rio established on this record—under Texas law, WCCG’s only “interest” in the
partnership or the LLC would be limited to its share of the profits and its right to receive distributions. See *Pajooh*, 518 S.W.3d at 562 (recognizing that an individual partner has no ownership interest in the specific property belonging to the partnership and that its interests are limited to his share of profits and losses or similar items and the right to receive distributions); *see also* TEXT. BUS. ORGS. CODE ANN. § 152.101 (partnership property is “not property of the partners,” and a partner “does not have an interest in partnership property”); *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, 531 S.W.3d 829, 846 (Tex. App.—Corpus Christi 2017, no pet.) (recognizing that a member of a limited liability company or his assignee does not have an interest in any specific property of the company) (citing TEXT. BUS. ORGS. CODE ANN. § 101.106(b) (“A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company.”)).

Thus, this provision of the Receivership Order would have, at most, authorized Kretzer to collect on WCCG’s “interest” in receiving profits or distributions from either the partnership or the LLC. And as Rio Grande, LP points out, the Texas Business Organizations Code provides that the exclusive remedy by which to obtain a judgment debtor’s interest in either a partnership or an LLC is by the entry of a charging order attaching the distributions owed to either a partner or LLC member, which Kretzer admittedly failed to obtain.[footnotemark] See *Pajooh*, 518 S.W.3d at 562, 565 (citing TEXT. 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.”)) and TEXT. BUS. ORGS. CODE ANN. § 101.112(d) (“The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.”)); *see also* *In re Prodigy Servs., LLC*, No. 14-14-00248-CV, 2014 WL 2936928, at *5 (Tex. App.—Houston [14th Dist.] June 26, 2014, orig. proceeding) (mem. op.) (recognizing same).

La Zona Rio counters that in certain circumstances, courts have allowed a judgment creditor to collect on assets held by either a partnership or an LLC without a charging order, citing to our sister court’s opinion in *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.).[footnotemark] In *Heckert*, the Fort Worth Court of Appeals opined that “the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.” *Heckert*, 2017 WL 5184840, at *7–9 (citing Michael C. Riddle, et al., *Choice of Business Entity in Texas*, 4 Hous. Bus. & Tax 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.”)). And the court held that the purpose of requiring a charging order was not served in a personal injury case in which an ex-wife had received a judgment against her ex-husband, where the ex-husband had created a non-operating LLC and partnership, of which he was the sole member and partner, and placed assets into those entities with the apparent intent of sheltering the assets from his ex-wife’s collection efforts. *Id.* at *7–9. The court found that under those circumstances, the trial court could properly order the ex-husband to turn over those assets to his ex-wife to satisfy the judgment, as doing so would cause no disruption to an operating business or cause harm to any other parties. *Id.* at *9.

Relying on the reasoning in *Heckert*, La Zona Rio contends that a charging order was unnecessary to allow Kretzer to collect on the assets held by Rio Grande, LP because Rio Grande, LP was admittedly a “single purpose entity holding commercial property,” and its business would therefore not be disrupted by ordering a turnover of the property. But Rio Grande, LP points out that unlike the situation in *Heckert*, the evidence reflected that the partnership was an operating business which had been leasing its building space to tenants, and the partnership had three limited partners whose interests were at stake in the La Zona Rio Lawsuit—in addition to the general partner that La Zona Rio claims was affiliated with WCCG. Therefore, the partnership’s business was disrupted by Kretzer’s actions in utilizing the Receivership Order to allow the partnership’s only asset to be alienated to La Zona Rio. And, unlike the situation in *Heckert*, the record before
us contains no evidence that WCCG created Rio Grande, LP as a “shell” entity for the purpose of sheltering assets from collection.

Accordingly, we conclude that the provision in the Receivership Order requiring WCCG to turn over any interests it had in a partnership or LLC at most gave Kretzer the right to collect on any distributions or profits to which WCCG was entitled by virtue of any such interest and did not give him the right to take possession of the partnership’s assets, which he effectively did by taking control of Rio Grande, LP’s lawsuit. See Pajooh, 518 S.W.3d at 565 (citing 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’’)).

B. The provision allowing Kretzer to sell, manage and operate an LLC in which WCCG is a “member”

Second, La Zona Rio points to the provision in the Receivership Order that authorized Kretzer “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 [Kretzer] shall think appropriate.” La Zona Rio contends there was sufficient evidence in the record from which the trial court could have impliedly found that WCCG had a “membership interest” in WC 4th and Rio Grande, GP, LLC—Rio Grande, LP’s general partner. And in turn, La Zona Rio argues that Kretzer had the right under the Receivership Order to take over the operation and management of the LLC and sell its assets. We conclude, however, that there are at least two missing steps in this analysis.

The first missing step is the failure of either Kretzer or La Zona Rio to point to any evidence in the record to establish that WCCG was in fact a “member” of the LLC. The Texas Business Organizations Code provides that an LLC must have at least one member. See TEX. BUS. ORGS. CODE ANN. § 101.101 (a) (“A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.”) However, there is nothing in this record to demonstrate that WCCG was in fact a “member” in WC 4th and Rio Grande, GP, LLC. As set forth above, while La Zona Rio may be correct that WCCG is affiliated with the LLC or may even be a parent company, given the lack of any evidence that WCCG was a “member” in the LLC, we cannot say that the trial court could have impliedly found that Kretzer had the authority under the Receivership Order to seize control of the LLC.

Even if WCCG had a membership interest in the LLC, the second missing step is the lack of evidence that Kretzer did in fact seize control of WCCG’s interest in the LLC or that he sought to operate or manage the LLC on WCCG’s behalf. Instead, the only evidence in the record demonstrates that Kretzer simply filed a “notice” with the trial court stating that he had substituted himself as counsel of record for Rio Grande, LP in the La Zona Rio Lawsuit. There is nothing to suggest that he did so as part of his management and operation of the LLC. And in fact, the record does not contain the LLC’s governing documents, or otherwise support an implied finding that Kretzer would have had the right, as part of any assumed management duties in operating the LLC, to unilaterally terminate the La Zona Rio Lawsuit on Rio Grande, LP’s behalf and enter into a settlement agreement with La Zona Rio that included deeding the building to La Zona Rio.

Again, the fallacy in La Zona Rio’s argument lies in its attempts to blur the distinction between the various World Class entities and treat them as one and the same as WCCG in the absence of evidence to support that position.

C. The provision allowing Kretzer to take possession of the judgment debtor’s assets

Finally, La Zona Rio points to a third provision in the Receivership Order giving Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See
Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell causes of action and real property belonging to the “judgment debtor,” i.e., WCCG. It did not extend Kretzer’s authority to seize such property from any of WCCG’s subsidiaries or affiliated entities. And once again, we find no evidence in the record to support a finding that WCCG and its affiliated World Class entities can be considered one and the same, or alter egos of each other, such that Kretzer had the authority to collect on assets owned or controlled by either Rio Grande, LP or its general partner to satisfy WCCG’s debt. See United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281, 282–83 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that judgment creditor could not collect on assets owned by two corporations that it claimed were alter egos of the judgment debtors without establishing that the corporations were in fact alter egos in a separate proceeding) (citing Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955) (recognizing that “[c]ourts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, avoid personal liability, to avoid the effect of a statute, or in a few other exceptional situations”)); see also Maiz v. Virani, 311 F.3d 334, 336 (5th Cir. 2002) (recognizing that under Texas law, a judgment creditor cannot use the turnover statute to reach the assets of corporations which are allegedly alter-egos of the Judgment Debtors without a separate hearing to “pierce[] their corporate veils”); Plaza Court, Ltd. v. West, 879 S.W.2d 271, 276–77 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that “[t]he turnover statute does not support a proceeding against an entity who is not a judgment debtor, until a judgment creditor succeeds in piercing the corporate veil”). And without such evidence, the trial court could not have impliedly found that Kretzer had this right. To the contrary, as our sister court has recognized, a judgment creditor (or in this case a receiver) may not simply “announce its belief” that a judgment debtor and a third party are in essence one and the same without proof of such, and in effect, skip a trial on the merits, and “declare itself the winner.” United Bank Metro, 670 S.W.2d at 283.

By way of footnotes, the court pointed out two recent cases reaching the conclusion that a charging order is the exclusive remedy by which a judgment creditor of a member or other owner of an LLC may satisfy a judgment out of the judgment debtor’s membership interest, and the court stated that there appear to be cases refuting the contention by La Zona Rio that the exclusivity of the charging order remedy only applies to judgment creditors and not to court appointed receivers.

Because the record did not support an implied finding that Kretzer had the authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit, and because the record did not reflect that the trial court gave Rio Grande, LP the opportunity to have its substantive rights adjudicated before allowing Kretzer to enforce the Receivership Order against it, the court of appeals concluded that the trial court abused its discretion in granting the motion to dismiss the La Zona Rio Lawsuit, and the court reversed and remanded for further proceedings to give Rio Grande, LP that opportunity.

[The court of appeals in its companion opinion summarized above succinctly summarized its conclusions in this case as follows: “[W]e concluded that because Rio Grande, LP and its general partner were not parties to the Princeton lawsuit, Rio Grande, LP had the right, as a stranger to that judgment, to challenge Kretzer’s enforcement of the Receivership Order against it in the La Zona Rio Lawsuit, and it was not a collateral attack on the order. But we concluded that the trial court had not properly considered Rio Grande, LP’s challenge to Kretzer’s authority, and questions remained regarding whether he had any such authority under the Receivership Order. We therefore remanded the matter to the trial court to give it the opportunity to consider the issue.

As we explained in that opinion, while the record reflected that WCCG; Rio Grande, LP; and WC4th and Rio Grande, GP, LLC were related or affiliated entities, the only evidence in the record demonstrated that the three companies were separate and distinct legal entities, entitling them to the protections afforded under the Texas Business Organizations Code. We further found that the record did not support a finding that WCCG was a member
of Rio Grande, LP’s general partner—WC4th and Rio Grande, GP, LLC—which would have allowed Kretzer to take over management of the LLC to reach the partnership’s assets.”]

Richman Trusts v. Time, No. 05-22-00445-CV, 2024 WL 510339 (Tex. App.—Dallas Feb. 9, 2024, no pet. h.) (mem. op.).

In this dispute involving a family general partnership, the court addressed whether three parcels of real property were acquired by the partnership or by family members in their individual capacities, whether the heirs of one of the original partners were admitted as partners, and, if the heirs were not admitted as partners, whether the jury’s finding of the redemption price owed to the heirs for the deceased partner’s partnership interest, i.e., the “fair value” of the interest, was supported by the evidence. The court concluded that the evidence was sufficient to support the jury’s finding that the parcels of real property at issue were not acquired with property of the partnership and were not intended by the parties to be partnership properties. The court concluded that there was an issue of material fact as to whether the heirs of the deceased partner were admitted as partners such that the trial court’s summary judgment on that issue was erroneous. Recognizing that the outcome on remand might render the issue of the redemption price irrelevant (i.e, if the heirs were admitted as partners, no redemption was triggered by the death of the partner), the court addressed the jury’s finding on the amount of the redemption price in the interest of judicial economy, and the court concluded that the evidence was sufficient to support the jury’s finding.

Victor Richman and his wife, Maryon, had three children: Judith, Harvey, and Marc. In 1955, they created two trusts for each child. Each of the six trusts terminated when the beneficiary turned thirty, and the trusts’ assets were distributed to that child, individually. Judith turned thirty in 1968, Harvey in 1969, and Marc in 1975. At some point Victor created Richman Trusts, a Texas general partnership (“RTP”), which had no written partnership agreement, but it was undisputed that Judith, Harvey, and Marc were RTP’s general partners, each with an equal one-third partnership interest. Victor was not a partner, but he managed and controlled RTP, which included managing all the Richman family properties.

Victor and Maryon purchased numerous real properties in Dallas (RTP Partnership Properties) through the years. Whether they used their individual funds to purchase three specific properties at issue in this case or gifted funds to RTP that RTP subsequently used to purchase the properties was disputed at trial and now on appeal. The specific properties at issue in this case (the Properties in Dispute) were: (1) the Record Street Properties, purchased on October 31, 1967, in the names of the six trusts established by Victor and Maryon for their children (each trust receiving an undivided 1/6th interest); (2) the Greenville Avenue Property, purchased on March 4, 1969, in the name of the Harvey Richman Trusts No. 1 and 2, the Marc Richman Trusts No. 1 and 2, and Judith, individually, because she had already turned thirty; and (3) the Richmond Avenue Property, purchased on October 9, 1972, also in the names of the four trusts and Judith, individually.

Marc, who was also an attorney, became RTP’s managing partner when Victor’s health began to decline in 1985.

Judith died in 2008, leaving three children: Ralph, Robin, and Brenda. Ralph had no children. Brenda had three children. Robin had two children. Before her death, Judith created the 2008 Richman Revocable Trust (the 2008 Trust) and upon her death, her Estate bequeathed all of her property, which included her “33.333% general partner interest in [RTP]” to the 2008 Trust. The 2008 Trust identified Ralph as trustee. The 2008 Trust identified the beneficiaries as Ralph, in trust, and each of the children of Brenda and Robin, in trust. In administering the Estate, Ralph as trustee of the 2008 Trust, assigned Judith’s one-third interest in RTP to the beneficiaries of the 2008 Trust (the “Heirs”). The “Assignment of Partnership Interest” (Assignment) was executed on January 6, 2010, but made effective as of August 1, 2009. Marc signed the Assignment as general partner under the notation, “NOTICE RECEIVED AND TRANSFER ACCEPTED.”

For about ten years, Ralph, Brenda, and Robin received what they believed were RTP partnership distributions and IRS Schedule K-1’s. The distributions were always equal to Marc’s and Harvey’s distributions. Marc asserted that he never believed the Heirs were RTP partners and did not believe the Assignment made them partners. Although he kept the Heirs informed, he described his updates related to the properties as “trying to do right” by his sister’s children. He believed Judith’s death resulted in her withdrawal from RTP leaving the Heirs with only a creditor’s redemption interest in RTP.

In September 2018, Marc sent the Heirs a “Redemption Letter” for their “Creditors’ interest in the Richman Trusts.” The letter included an expert valuation of the fair market value of Judith’s one-third interest in RTP at the time of her death. The valuation totaled $509,200.
Upon realizing there was a difference of opinion regarding the Heirs’ status with respect to RTP, the Heirs investigated the Assignment and Properties in Dispute. The deeds to the Properties in Dispute revealed the properties had been deeded to Judith, Harvey, and Marc in individual one-third interests and not to RTP. Despite the individuals’ names being on the deeds, Marc believed RTP owned the three properties. The Heirs believed Judith, Harvey, and Marc owned them as tenants-in-common before Judith’s death.

The Heirs also disagreed with the valuation of Judith’s redemption interest. The redemption letter gave the Heirs one year to accept the valuation or file suit to challenge the valuation, and the Heirs filed suit.

The Heirs sought determinations that they are partners in RTP and owners of an undivided one-third interest in the Properties in Dispute. Alternatively, they sought a determination of the redemption price of Judith’s one-third partnership interest in RTP on the date of her death. RTP filed a motion for partial summary judgment on the Heirs’ request to be declared RTP partners. The trial court granted the motion, concluding that Judith’s death was an event of withdrawal pursuant to the Texas Business Organizations Code and that the Heirs were never RTP partners. The remainder of the case proceeded to trial before a six-person jury. At the conclusion of testimony, the jury was asked three questions: (1) “Do you find that the Properties in Dispute were acquired with RTP property?”; (2) “Do you find that the intent of the partners of RTP was that the Properties in Dispute were owned by RTP rather than by the individual partners?”; and (3) “What is the redemption price for Judith Richman’s one-third (1/3) partnership interest in the Richman Trust Partnership?” The jury answered “No” to questions 1 and 2 and determined Judith’s redemption price for her one-third interest was $228,426.67. The trial court entered judgment on the verdict. Both parties appealed.

The court of appeals first determined that the trial court’s summary-judgment determination that the Heirs did not become partners after Judith’s death was erroneous because there was more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

The court next addressed the sufficiency of the evidence to support the jury’s findings that the Properties in Dispute were not acquired with RTP property and that the partners did not intend the Properties in Dispute to be partnership property.

Regarding the sufficiency of the evidence supporting the jury’s finding that the Properties in Dispute were not acquired with RTP property, the court concluded that it was within the jury’s province to weigh and credit or discredit the conflicting evidence regarding whose funds were used to purchase the Properties in Dispute, and there was sufficient evidence to support the jury’s finding that the Properties in Dispute were not acquired with RTP property. The court explained as follows:

Texas Business Organizations Code section 152.102 provides for the classification of partnership property:

(a) Property is partnership property if acquired in the name of:
   (1) the partnership; or
   (2) one or more partners, regardless of whether the name of the partnership is indicated, if the instrument transferring title to the property indicates:
      (A) the person’s capacity as a partner; or
      (B) the existence of a partnership.
   (b) Property is presumed to be partnership property if acquired with partnership property, regardless of whether the property is acquired as provided by Subsection (a).
   (c) Property acquired in the name of one or more partners is presumed to be the partner’s property, regardless of whether the property is used for partnership purposes, if the instrument transferring title to the property does not indicate the person’s capacity as a partner or the existence of a partnership, and if the property is not acquired with partnership property.

TEX. BUS. ORGS. CODE ANN. § 152.102(a)-(d). The deeds to the Properties in Dispute do not indicate Judith, Harvey, and Marc’s capacity as partners or the existence of a partnership. Thus, appellants challenge the sufficiency of the evidence to support subsection (b) because the “unequivocal” testimony from Marc and Jerry Candy, the long-time family accountant, established Victor and Maryon gifted funds to RTP; those funds were deposited into RTP’s Mercantile Bank
account; and RTP then used those funds to purchase the Properties in Dispute. As explained below, the jury heard evidence other than Marc’s and Candy’s “unequivocal” testimony that supports the jury’s finding.

It is undisputed no documents exist establishing the source of funds for the initial acquisition of the Properties in Dispute. Therefore, the jury only heard witness testimony about the source of funds for the purchases.

Robin testified, “It was always clear with my grandparents they were creating a legacy.” Although Robin admitted she did not know where the funds to purchase the Properties in Dispute originated, she knew Victor and Maryon purchased the properties based on “talking to my grandparents and seeing legal paperwork that detailed it all.”

The jury was read a portion of Harvey’s deposition in which he said Victor and “probably mother too” purchased the Properties in Dispute. Similarly, Marc testified during his deposition that “I’m sure it was my parents’ funds” that purchased the properties. “My parents, it was their money that purchased the property.”

Despite Marc’s deposition testimony, he explained during trial that he never denied his parents used their money, but he believed they “used the vehicle of the partnership to do it.” He testified Victor gifted the funds to the partnership and then RTP used the gifted funds to buy the Properties in Dispute. Marc claimed Victor filed a gift tax return supporting his position; however, this document was never produced in discovery or admitted into evidence.

In an email dated January 7, 2015, Marc stated, “When Pop bought 304 and 306 in 1967 he put the title in Judy Richman Trust #1 and #2, HAR Trusts #1 and #2, and MHR Trusts #1 and #2.” Nothing in the email indicated Victor bought the Properties in Dispute for RTP with RTP property or that Marc’s reference to “Pop” meant RTP. Marc dismissed the language he used in the email because, “I didn’t do a lawyer statement because I was talking to my nieces and nephews;” therefore, he did not include the details regarding Victor’s gift to the partnership.

Marc also testified that Candy, the family’s long-time accountant, told him about the gift to RTP to purchase the Properties in Dispute. Candy knew the Richman family his entire life and started bookkeeping for Victor in the late 1960s. By 1974, he was doing all Victor’s accounting work.

Candy testified the Properties in Dispute were purchased with funds from RTP’s bank account at Mercantile Bank. He had personal knowledge of the transaction by “doing the books ... and posting the cash receipts and disbursement journal to the general ledger.” Despite not preparing his first tax return for the family until 1974, he testified he looked at the tax returns for prior years because he received copies. He also claimed he “randomly asked” to see the gift tax return from 1967 (the year the Record Street Properties were purchased), despite not working for the family at that time. Candy did not share his recollection of the gift tax return with RTP’s counsel until one week before trial. Despite being confident in his recollection of the 1967 gift tax return, he could not answer questions about the costs of the Properties in Dispute, when the Greenville Property was acquired, or who were the grantees of the properties. The last time Candy recalled looking at any other tax returns was “probably ten years ago.”

Finally, George Love testified as an expert and explained that in the early sixties and seventies, it was industry standard for partnership property titles to be placed in the name of individual partners to avoid taxation at the partnership level (the higher rate). However, he also acknowledged it was an “accepted practice” for general partnerships in the sixties to purchase property in the name of the partnership.

“Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony.” City of Keller, 168 S.W.3d at 819. This includes the testimony of experts. See Thota v. Young, 366 S.W.3d 678, 695–96 (Tex. 2012). Love’s expert testimony did not conclusively prove the Properties in Dispute were acquired with RTP property based on industry standards at the time of purchase, particularly because he admitted he had no personal knowledge about RTP or the family trusts. And, the jury did not have to believe Love’s conflicting statements about the “industry standard.”
In summary, the jury could reasonably discredit Marc’s trial testimony about the purchase of the Properties in Dispute and instead believe Marc’s and Harvey’s deposition testimony in which they said their parents bought the properties. It was within the jury’s province to assess the credibility of both Marc and Candy. Neither had any documentation to support who funded the properties, and the first mention of the alleged gift tax return was shortly before trial. The jury was free to disbelieve Candy’s memory particularly in light of the other details he could not recall about the Richman family business. In circumstances such as this when a reasonable jury could resolve evidence either way, we presume the jury did so in favor of the prevailing party. City of Keller, 168 S.W.3d at 821 (“Courts reviewing all the evidence in a light favorable to the verdict thus assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it.”).

Accordingly, applying the legal sufficiency standard of review and crediting evidence favoring the verdict if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not, we conclude more than a scintilla of competent evidence supports the jury’s finding the Properties in Dispute were not acquired with RTP property. Gharda USA, Inc., 464 S.W.3d at 347; City of Keller, 168 S.W.3d at 827 (“The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.”). After considering and weighing all the evidence, we likewise conclude the jury’s finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. See Cain, 709 S.W.2d at 176; see also CExchange, LLC, 2019 WL 3986299, at *6. Thus, the evidence is legally and factually sufficient to support the trial court’s judgment. City of Keller, 168 S.W.3d at 827. We overrule RTP’s first issue.

Having concluded that the evidence was sufficient to support the jury’s finding that the Properties in Dispute were not acquired with RTP property, the court turned to the sufficiency of the evidence to support the jury’s finding that the partners did not intend the Properties in Dispute to be RTP properties.

We now consider whether the evidence is legally and factually sufficient to support the jury’s finding that Judith, Harvey, and Marc did not intend for the Properties in Dispute to be owned by RTP. The jury was instructed as follows:

*It is presumed that the Properties in Dispute are not RTP Properties because you found in Question number 1 that the Properties in Dispute were not acquired with partnership property.* That presumption can be overcome if Defendants prove, by a preponderance of the evidence, that RTP’s partners intended the Properties in Dispute to be RTP’s property. (emphasis added)

In determining whether the Properties in Dispute are partnership assets, the fact that the property is in the name of the partners is not conclusive but rather the intent of the partners controls. Mere use of the property in a partnership operation does not make it an asset of the partnership. Instead, whether property used in the partnership’s operation is owned by the partnership is [a] question of intent.

Circumstances that may be considered in determining whether RTP’s partners intended the Properties in Dispute to be RTP’s property include:

- The partnership representing to taxing authorities it was partnership property;
- The partnership paying the taxes and insurance on the property;
- The partnership paying for repairs and renovations to the property;
- The partnership not paying rent to the partners for use of property;
- Sworn statements by partners that the property is partnership property;
- The partnership reporting income as partnership income;
- The partnership’s books of accounts, records, cancelled checks, financial statements, and tax returns showing the land and improvements to be partnership property; and
- The individual partners did not pay for the property.

It is well-settled “the fact the deed was taken in [the partners’] name is not conclusive in determining whether the land was a partnership asset.” King v. Evans, 791 S.W.2d 531, 533 (Tex.
App.—San Antonio 1990, writ denied); see also Etheridge v. Opitz, 580 S.W.2d 167, 178 (Tex. App.—Tyler 2019, pet. dism’d). “Whether or not land taken in the name of one or more partners is in fact partnership property always depends upon the intent of the parties and the understanding and design under which they acted.” Logan v. Logan, 156 S.W.2d 507, 512 (Tex. 1941).

First, we reject RTP’s argument that the intent of the partners was established because the Properties in Dispute were purchased with gifted funds from RTP’s bank account. As explained above, the evidence is sufficient to support the jury’s contrary finding.

Next, RTP acknowledges the deeds to the Properties in Dispute were in the names of the individual partners but also implies the jury could not give any consideration to this fact when determining intent. We disagree. While we recognize land deeded in the name of an individual partner is not conclusive to determining whether the land is a partnership asset, the jury was free to consider the fact that the deeds remained in the names of the individual partners without any written conveyance transferring the Properties in Dispute to RTP as a lack of intent for the Properties in Dispute to be RTP properties.

The jury also heard testimony regarding two additional properties—Posen and PK Plano—that were incorrectly included in the umbrella of RTP Partnership Properties; however, Marc corrected this error by drafting deeds conveying one to Judith and the other to Marc, Harvey, and the Heirs. Accordingly, the jury could reasonably infer that Marc, as an attorney, knew how to draft deeds and transfer property to its rightful owners. The lack of any conveyance of the Properties in Dispute from the individual partners to RTP could be seen as an indication the partners never intended the Properties in Dispute to be RTP properties.

The evidence confirms RTP consistently included the income from all Richman Trust Properties on its federal tax returns, including income from the Properties in Dispute. However, RTP also mistakenly included properties on its tax returns (Posen and PK Plano) that RTP later deeded to others. The jury also heard that RTP sent K-1’s to Ralph, Robin, and Michele for years, yet despite these IRS filings, Marc denied the documents indicated they were partners. The jury, in assessing Marc’s credibility and the inconsistency in which RTP filed IRS tax documents regarding RTP Properties, could reasonably discount RTP’s representations to taxing authorities as showing any intent by the partners that RTP owned the Properties in Dispute. Similarly, because of the fluid nature with which RTP identified and handled its partnership properties, including the Properties in Dispute, the jury could reasonably discount that paying taxes on the Properties in Dispute from the partnership bank account showed intent of ownership. [Footnote omitted]

There is no evidence the individual partners paid for insurance, repairs, renovations, or other expenses. Instead, RTP made such payments. Although that evidence could indicate the partners intended the Properties in Dispute to be RTP property, it is insufficient to overcome the presumption the Properties in Dispute are not RTP Properties, a presumption that was RTP’s burden to overcome by a preponderance of the evidence. On this record, the evidence is sufficient for a reasonable and fair-minded jury to rationally conclude the partners did not intend for the Properties in Dispute to be owned by RTP. See City of Keller, 168 S.W.3d at 823 (evidence legally insufficient to support verdict when there is “no evidence” supporting it). And although there is some evidence supporting an intent otherwise, jury verdicts are sacrosanct and appellate courts should be reluctant to disturb verdicts unless required by law. See Del Bosque v. Barbosa, No. 05-22-00230-CV, 2023 WL 1097556, at *4 (Tex. App.—Dallas Jan. 30, 2023, no pet.) (mem. op.) (citing Herbert v. Herbert, 754 S.W.2d 141, 143 (Tex. 1988)). Here, the jury’s finding is not so weak or against the great weight and preponderance of the evidence as to be clearly wrong and unjust. See Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001). Accordingly, the evidence is both legally and factually sufficient to support the trial court’s judgment. City of Keller, 168 S.W.3d at 827.

The court of appeals acknowledged that the issue of the redemption price would be moot if it was determined on remand that the Heirs were admitted as partners after Judith’s death, but the court of appeals proceeded to address the sufficiency of the evidence to support the jury’s finding on the amount of the redemption

38
price, i.e., the fair value of Judith’s partnership interest at Judith’s death, in the interest of judicial economy. The court concluded that the evidence was sufficient to support the jury’s finding in that regard.


In this dispute between two companies over the ownership of a trademark and copyrighted materials developed in the course of an informal partnership to promote a comedy tour, the magistrate court concluded that the plaintiff sufficiently alleged that it was the exclusive owner of the copyrighted material by virtue of an assignment from the author of the materials, but the court agreed with the defendant that the trademark was partnership property and that neither party obtained exclusive ownership of the trademark upon dissolution of the partnership.

BMN and JJE were companies involved in planning, promoting, and booking talent for events. The parties were introduced in 2018 and started discussing partnering in a comedy tour in 2020. In 2021, they agreed to partner in a comedy tour and to split the profits equally. The first comedy tour that the Parties booked and promoted through their partnership was called the NO CAP COMEDY TOUR (the “Tour”), which occurred between February and May 2022. BMN claimed that it alone created the NO CAP COMEDY TOUR trademark (the “Mark”) and retained Maximus Graphics to create the logos and promotional materials (the “Copyrighted Material”). BMN also claimed to solely own the Copyrighted Material created for the Tour by Fernando Cordero at Maximus Graphics. Defendants disputed these claims. Maximus Graphics transferred the Copyrighted Material to BMN, and BMN successfully registered for the copyrights.

After the Tour, BMN independently sought to commence its own tour (the “BMN Tour”) from September to December 2022. BMN attempted to promote the BMN Tour with the Mark but claimed that they re-branded the BMN Tour due to defendants outbidding BMN. BMN claims that the defendants were privy to significant “confidential and sensitive business information” and that the parties dissolved their joint business venture and the at-will de facto partnership after a conversation between the owners of BMN and JJE on May 21, 2022. The profits from the Tour were being accounted for so that it could be distributed between each party.

In June 2022, JJE’s counsel sent a letter to entertainment venues stating that JJE had a pending trademark for “No Cap Comedy Tour” and that the venues could not use that trademark in connection with services or goods that did not originate with JJE. BMN asserted that several entertainment venues indicated that they would not allow any use of the Mark because they were concerned about potential liability. On June 6, 2022, JJE filed a trademark application for “NO CAP COMEDY TOUR” and on July 5, 2022, JJE filed three trademark applications for “NO CAP COMEDY,” “NO CAP NO CAP COMEDY TOUR,” and “NO CAP COMEDY TOUR.”

The defendants sought dismissal on the basis that BMN failed to state a claim for relief for reasons including the following: (1) BMN did not provide sufficient allegations to demonstrate partnership property is now owed exclusively by BMN, and consequently, failed to allege a plausible claim for damages; (2) BMN failed to provide factual allegations that would support piercing the corporate veil under Texas law; and (3) BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations were preempted by the Texas Uniform Trade Secrets Act.

The court first concluded that BMN sufficiently alleged that it was the exclusive owner of the Copyrighted Material based on its allegations that the author of the Copyrighted Materials was Fernando Cordero of Maximus Graphics (because he “created substantially all of the artwork/marketing materials”) and that the ownership of the Copyrighted Materials was transferred to BMN via “Corrective Nunc Pro Tunc Copyright Assignment Agreement” signed by both Fernando Cordero on behalf of Maximus Graphics and one of BMN’s owners on behalf of BMN. The court stated that the defendants mistakenly grouped together the Copyrighted Materials and the Mark in determining ownership by referring to both as “intellectual property” and asserted without authority that the Copyrighted Material and the Mark “are bound together… and BMN has no right to use the [Copyrighted Material] independently unless it can establish a right to use the Mark also.”
With respect to the Mark, the defendants argued that the partnership owned the Mark because it was first used in commerce by the partnership. BMN argued that it owned the Mark exclusively because it controlled the quality of services under the Mark. The Court agreed with the defendants as to the ownership of the Mark by the partnership and further addressed the effect of the break-up or dissolution of the partnership on the ownership of the Mark.

If there is evidence of a joint venture or de facto partnership in which each partner contributes substantially to the partnership’s efforts and reputation, the trademark is best treated as an asset of a de facto partnership absent a contractual agreement. *Lunatrex, LLC v. Cafasso*, 674 F. Supp. 2d 1060, 1073 (S.D. Ind. 2009). Here, while there was no written partnership agreement, the Parties agreed to partner in the Tour, split profits, and promote the Tour. (Dkt. No. 40 at ¶ ¶ 12-17; Dkt. No. 47 at 8.) In addition to promoting the Tour, both BMN and Defendants played a substantial role because Defendants handled the routing of the tour and BMN booked the comedic talent to perform. (Dkt. No. 40 at ¶ 17.) The Parties agreed to the NO CAP COMEDY TOUR name and “booked and promoted jointly through their partnership ... between February and May, 2022.” *(Id. at ¶ 25.)* BMN has not presented any evidence that it first used the Mark in commerce independent of the partnership, but rather the Parties first used the Mark in the Tour. *(Id. at ¶¶ 25-27.)* As such, BMN has failed to establish that it is the exclusive owner of the Mark.

Next, Defendants argue that BMN has not sufficiently alleged that the partnership was terminated and wound up and thus, the BMN never became the exclusive owner of the Mark. (Dkt. No. 44 at 16-19.) Defendants also argue that the Mark can only be used on behalf of the partnership because the partnership has not been terminated and wound up. *(Id. at 17-19.)* Conversely, BMN claims that the partnership was dissolved and the rights in the Mark became sole property of BMN. (Dkt. No. 47 at 16-20.)

“[C]ourts have treated ... informal cooperative efforts as joint ventures or de facto partnerships or associations and held that the rights may be exercised only by the group as a whole.” *Lunatrex, LLC*, 674 F. Supp. 2d at 1073 (citing *Durango Herald, Inc. v. Riddle*, 719 F.Supp. 941, 951–52 (D.Colo.1988)) (holding that neither party in dissolved joint venture was entitled to use trademarks without consent of the other). Where each partner has made significant contributions to the partnership, the creation of the mark’s value, and protected status, awarding control of the mark to one partner would ignore the contributions the other partners made. *(Id. at 1074.)* Without a showing of “special prominence and individual rights to the trademark,” the trademark belongs to each partner and none of the partners may use the mark to the exclusion of the other partners. *(Id.)* The policy in preventing all the partners from using the mark without the consent of all the other partners is to prevent confusion in the public. *(Id. at 1075.)* “Typically, when a partnership breaks up, the assets are distributed among the partners ... however [a trademark] is not divisible.” *(Id.)*

Here, BMN has sufficiency [sic] alleged that the partnership was dissolved when BMN withdrew from the partnership via oral communication of withdrawal. TEX. BUS. ORG. CODE § 152.501(b) (stating that a “person ceases to be a partner on the occurrence of an event of withdrawal” and that an event of withdrawal of a partner occurs on “receipt by the partnership of notice of the partner’s express will to withdraw as a partner”); *Leal v. Mokhabery*, 360 B.R. 231, 240 n.6 (Tex. S. Bank. Ct. Jan. 9, 2007) (“[T]he withdrawal of Leal, one of All American’s two partners, effectively dissolved the partnership.”). However, when a partnership dissolves or permanently breaks up, the trademark can neither be divided between the Parties nor given exclusive ownership to one partner unless each partner consents. *See Lunatrex, LLC*, 674 F. Supp. 2d at 1075; *Durango Herald, Inc.*, 719 F.Supp. at 951-52. As such, neither BMN nor Defendants have the exclusive ownership of the Mark upon dissolution and use of the Mark by either Party must be accompanied by consent of the other Party.

Next, Defendants argue that BMN cannot sufficiently allege that it suffered any damages because the Mark is partnership property that can only be used on behalf of the partnership. (Dkt. No. 44 at 17.) BMN argues that it has been harmed by JJE holding itself out as the sole owner of the Mark, even if the partnership owns the rights in the Mark. (Dkt. No. 47 at 20-22.) When a de
facto partnership or joint venture owns a mark, “each team member is harmed when an entity other than the entire team uses the mark.” *Lunatrex, LLC*, 674 F. Supp. 2d at 1072. As such, BMN has sufficiently alleged that it was harmed by Defendants holding themselves out as sole owner of the Mark.

F. Interpretation and Enforcement of Partnership Agreement

1. Attorney’s Fees


“When appellees filed their original counterclaim, Dale Stites joined as a counterclaimant for breach of the Partnership Agreement and breach of fiduciary duty. By the time of trial Dale Stites had transferred his ownership interest in ETP [a limited partnership] to his children. At trial, appellants moved for directed verdict on Stites’s claims of breach of fiduciary duty and breach of the Partnership Agreement. Stites did not oppose the motion because he had sold his interest in the partnership at the relevant times. The trial court granted appellants’ motion . . . .

By virtue of the trial court’s directed verdict, the Diakiw Parties assert they are ‘prevailing parties’ and entitled to attorneys’ fees for successfully defending Stites’s breach of contract action. The Diakiw Parties rely on the following portion of the Partnership Agreement:

18.5 Attorneys’ Fees. In the event any proceeding is brought by the Partnership or a Partner against another Partner to enforce or for the breach of any of the provisions of this Agreement, the prevailing party shall be entitled in such proceeding to recover his reasonable attorneys’ fees together with the costs incurred in such proceeding.

The trial court, in its judgment, awarded attorneys’ fees to 4-S Manufacturing in connection with its claim for breach of the Partnership Agreement. The Diakiw Parties assert they are also entitled to attorneys’ fees as prevailing parties because Stites dismissed his claim for breach of the Partnership Agreement.

The Partnership Agreement does not define ‘prevailing party,’ so we assume the parties used the phrase in its ordinary sense. As we explained when construing an attorney-fee provision similar to the one in this case, the ‘contractual provision entitled a ‘prevailing party’ to recover attorneys’ fees does not distinguish between successful prosecution and successful defense of a claim.’ A defendant is the prevailing party if it successfully defends the case, typically by ‘obtaining a take-nothing judgment on the main issue or issues in the case.’

On the ‘main issues’ in this case—breach of the Partnership Agreement and breach of fiduciary duty—the record reflects that 4-S Manufacturing was the ‘prevailing party.’ The clear focus at trial, as it has been in the appeal, was on appellees’ claims for breach of contract and breach of fiduciary duty. These intermingled claims were the bases for the vast majority of the testimony and were the primary basis for appellees’ claims that they were entitled to damages for breach of the Partnership Agreement and disgorgement of profits and salaries. The jury found in appellees’ favor on claims for breach of the Partnership Agreement. Under these circumstances, by obtaining a directed verdict on Stites’s claims under the Partnership Agreement, but receiving an adverse judgment on Diakiw’s breach of the Partnership Agreement, the Diakiw Parties cannot be said to have obtained a take-nothing judgment on the main issue or issues in the case. The Diakiw Parties, therefore, were not ‘prevailing parties’ under the Partnership Agreement.”

2. Indemnification

*Rudnicki v. Thompson Petroleum Corp.*, No. 05-23-00125-CV, 2024 WL 1189947 (Tex. App.—Dallas Mar. 20, 2024, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court’s summary judgment against a former officer of a limited partnership’s general partner on the former officer’s indemnification claim because the limited partnership agreement required indemnification for legal fees incurred “as a General Partner” or “in performing the obligations of the General Partner,” and the former officer’s fees were incurred years after he ceased working for the general
partner and thus could not have been incurred in performing any obligations of the general partner. The court distinguished the indemnification provision at issue in this case from provisions using language such as “arise out of” or “related to” at issue in cases relied upon by the officer.

Appellant Rudnicki was a former officer of appellees Thompson Petroleum Corporation (“TPC”) and J. Cleo Thompson Petroleum Management, LLC (“Petroleum Management”). Petroleum Management was the general partner of appellee J. Cleo Thompson and James Cleo Thompson, Jr., L.P. (the “Partnership”). TPC oversaw and managed other entities owned by the Thompson family and supplied employees to the Partnership. Clarke, a former officer of TPC, brought suit against appellees TPC and the Partnership for failing to pay him a $10 million bonus he alleged he was promised by TPC, specifically Rudnicki, for work that he did for the Partnership. Both Clarke’s and Rudnicki’s employment with appellees ended prior to the lawsuit. TPC and the Partnership subpoenaed Rudnicki to take a deposition as a non-party, and Rudnicki notified the companies of his right to indemnification and advancement of costs in having to defend and respond to the deposition notice. The companies did not respond. Clarke later added Rudnicki as a defendant in the lawsuit. Rudnicki filed cross-claims against TPC and the Partnership and a third-party petition against Petroleum Management seeking indemnification and advancement of costs from appellees for his expenses, including attorney’s fees, in defending against the suit. TPC and the Partnership settled their suit with Clarke leaving Rudnicki’s indemnification claim as the only claim before the court. Rudnicki moved for partial summary judgment on his indemnification and advancement claim, and appellees filed a cross-motion. The trial court granted appellees’ motion for summary judgment and denied Rudnicki’s motion for partial summary judgment. The trial court entered a final judgment that Rudnicki take nothing on his indemnification claim, Rudnicki appealed.

Rudnicki contended that he was entitled to indemnification from the Partnership and from Petroleum Management under Section 5.13 of the limited partnership agreement. Section 5.13 of the limited partnership agreement provided:

**5.13 Indemnification of General Partner.** To the fullest extent permitted by law, and subject to the procedures in Article 11 of the Partnership Act, on request by the Person indemnified the Partnership shall indemnify each General Partner and its Affiliates and their respective officers, directors, partners, employees, and agents and hold them harmless from and against all losses, costs, liabilities, damages, and expenses (including, without limitation, fees and disbursements of counsel) any of them may incur as a General Partner in the Partnership or in performing the obligations of the General Partner with respect to the Partnership, SPECIFICALLY INCLUDING THE INDEMNIFIED PERSON’S SOLE, PARTIAL, OR CONCURRENT NEGLIGENCE, but excluding any such items incurred as a result of something for which the General Partner is liable under Section 5.8, and on request by the Person indemnified the Partnership shall advance expenses associated with the defense of any related action.

“General Partner” was defined as Petroleum Management or “any other Person admitted pursuant to this Agreement in the capacity of general partner in the Partnership.”

Rudnicki argued that he was one of the people to be indemnified under section 5.13, as he was an officer of both Petroleum Management (the General Partner) and TPC (an affiliate of the General Partner). Rudnicki also asserted that he was acting on behalf of the General Partner, Petroleum Management, which managed the Partnership, with regard to the allegations made by Clarke concerning his bonus compensation for work he did on behalf of the Partnership. Rudnicki emphasized that TPC conducted no business of its own except to supply employees to the Partnership and that appellees had consistently disregarded formal corporate distinctions between the entities.

The appellees argued that Rudnicki’s expenses did not fall within the parameters of the indemnification provision because “[h]is legal fees defending against [ Clarke’s claims were neither incurred as a General Partner nor in performing the obligations of the General Partner” because “they were incurred years after Rudnicki ceased working for” appellees and “could not have been incurred ‘as a General Partner,’ nor ‘in performing any obligations of the General Partner.’” The appellees emphasized that Section 5.13 did not contain broad indemnification language such as “arise out of” or “are related to” as was at issue in the cases relied on by Rudnicki. Rudnicki responded that indemnity would be an empty promise if it did not extend to former employees for actions arising
during their employment, especially if an employer could simply terminate an employee to avoid its contractual obligation to indemnify.

Rudnicki also argued he was entitled to indemnification from TPC under Article Eleven of the articles of incorporation, which provided:

The corporation may indemnify any director, officer or employee, or former director, officer or employee of the corporation, or any person who may have served at its request as a director, officer or employee of another corporation in which it owns shares of stock, or of which it is a creditor, against expenses actually and necessarily incurred by him and any amount paid in satisfaction of judgments in connection with any action, suit or proceeding, whether civil or criminal in nature, and which he is made a party by reason of being or having been such a director, employee or officer (whether or not a director, employee, or officer at the time such costs or expenses are incurred by or imposed by him[)]. The corporation may also reimburse to any director, officer or employee the reasonable costs of settlement of any such action, suit or proceeding. Such rights of indemnification and reimbursement shall not be deemed exclusive of any other rights to which such director, officer or employee may be entitled by law or under any by-law, agreement, vote of shareholders, or otherwise.

Rudnicki acknowledged that the language in Article Eleven was permissive but asserted that public policy favored the broad application of indemnification and reimbursement provisions. Rudnicki also argued that the last sentence of Article Eleven authorized his rights of indemnification and reimbursement through other avenues such as section 8.052(a) of the Texas Business Organizations Code, which provides that a court may order an enterprise to indemnify a person “to the extent the court determines that the person is fairly and reasonably entitled to indemnification in view of all the relevant circumstances.”

Rudnicki relied on several cases for the proposition that indemnification provisions should be applied broadly and that he was not precluded from being indemnified simply because he was sued individually or no longer an officer or employee of the Thompson companies when he was brought into the lawsuit. The court stated that its disposition turned on the following language in Section 5.13 of the limited partnership agreement: “all losses, costs, liabilities, damages, and expenses ... any of them may incur as a General Partner in the Partnership or in performing the obligations of the General Partner with respect to the Partnership” (emphasis added). Specifically, the court focused on the words “incur as” and “incur ... in.” The court distinguished the cases on which Rudnicki relied because the provisions at issue in those cases contained broad language such as “by reason of,” “arising out of,” or “relating to,” and did not address language like that contained in Section 5.13. The court stated that it had not found a case in which a court has construed the phrase at issue here. The court acknowledged that indemnification provisions may generally be drafted broadly as in the cases cited by Rudnicki, but the provision at issue in this case was not.

Rudnicki argued that to construe “incur” as suggested by the appellees “would completely nullify the purpose of agreeing to indemnify Rudnicki ‘to the fullest extent permitted by law’ as it is difficult to imagine a scenario when a General Partner or affiliate would ever incur attorneys’ fees while simultaneously ... performing duties as a General Partner.” The court responded as follows:

But the meaning of the word “incur” by itself is not what is at issue here; the meaning of “incur as” or “incur in performing” is. Rudnicki’s attempt to substitute the American Heritage Dictionary’s definition in the place of “incur,” which includes the additional words “as a result of one’s actions,” broadens the provision in the partnership agreement because it essentially adds in the words that are missing, like “relates to,” “arises out of,” or “by reason of.” We decline Rudnicki’s invitation to add words to the agreement under the guise of applying a dictionary definition to construe the phrase’s common meaning. . . .

By the time he began participating and defending himself in the suit, he was no longer employed by the Thompson entities and, thus, was no longer performing the obligations of Petroleum Management. Had the language in section 5.13 provided for broad indemnification such as for expenses incurred by reason of performing the obligations of the General Partner, or for expenses incurred arising out of the person’s role as director or officer of the General Partner, or
for expenses based on the person’s performance of the obligations of the General Partner, our analysis might be different. But that is not the language before us, and we cannot write in that language in construing the word “incur.” To do so, would expand the partnership agreement’s limited indemnification provision to one that is much broader. Therefore, we conclude that Rudnicki was not entitled to indemnification under section 5.13.

The court next addressed Rudnicki’s argument that he was entitled to be indemnified pursuant to TPC’s articles of incorporation. Although Article Eleven contained broad indemnification language—“by reason of being or having been such a director, employee or officer (whether or not a director, employee, or officer at the time such costs or expenses are incurred by or imposed by him[)]”—Article Eleven also expressly provided that the corporation “may indemnify any director, officer or employee, or former director, officer or employee of the corporation.” The court stated that “[t]he word ‘may’ in this context is permissive, not mandatory. ... Thus, TPC was permitted under its articles of incorporation to indemnify Rudnicki, but it was not required to.”

The court also rejected Rudnicki’s argument that Section 8.052 of the Texas Business Organizations Code entitled him to indemnification because it also contains permissive language. The court concluded by explaining:

In reaching this conclusion, we acknowledge the cases interpreting “may” as mandatory in certain contexts. For example, when the language provides that a party “may recover” attorney’s fees, “may” is not discretionary, just as when the language provides the party “shall be awarded” or “is entitled to” fees. Bocquet v. Herring, 972 S.W.2d 19, 20 (Tex. 1998). However, the difference in the context of this and similar language is that the language relates back to the party seeking or requesting the benefit or right (“the party may recover”), not the party from whom the benefit or right is being sought, such as the corporation or trial court here (“the corporation may indemnify” or “the court may order”). Here, “may” is used as permissive, or discretionary language. See id.

We are also mindful of Rudnicki’s position that the broad policy goal of indemnification is to protect officers and directors from litigation expenses resulting from their duties as officer or directors. See In re DeMattia, 644 S.W.3d at 230 (“Indemnification encourages corporate service by protecting an official’s personal financial resources from depletion by the expenses incurred during litigation that results from the official’s service.”). However, we are required to construe and enforce the language before us, not interpret the provision by rewriting it to fit public policy. Id. at 234.

3. **Injunctive Relief**


The court held that injunctive relief prohibiting a removed general partner from resuming its position and prohibiting the former general partner and other parties from interfering with the new general partner’s duties as managing partner was improper because the status quo that is to be preserved by injunctive relief cannot be a relationship as it exists after being altered by an action that is contested.

Smith, individually and as trustee of a trust for his children’s benefit, purported to remove JCS Money Maker, LLC (“JCS”) as managing partner of two limited partnerships (“Marrs” and “RSR”) and install himself, individually, in JCS’s place pursuant to various terms of the partnership agreements of Marrs and RSR. Upon removal of JCS and installation of Smith, Smith sued for declaratory judgment (recognizing the removal of JCS and installation of Smith) and interim injunctive relief. The trial court granted a temporary injunction that effectively enjoined JCS, Smith’s children, and others from acting as general partner or impeding Smith’s operations of Marrs and RSR. JCS appealed.

The court of appeals reversed and dissolved the temporary injunction because it did not preserve the status quo, explaining:

No one disputes that JCS was the formal managing partner of both Marrs and RSR until April of 2023.[footnote omitted] That is when Smith endeavored to remove or oust it from the
Removing JCS then “create[d] an Event of Withdrawal of [JCS] as General Partner of” each limited partnership, according to the trial court. The court continued by finding that with JCS gone, the limited partners then “voted to install Rickey Smith as [their] General Partner and Managing Partner.” At that point, Smith sued to recognize the ouster and appointment. Then came its request for injunctive relief 1) prohibiting JCS from resuming its managerial position, 2) placing Smith in that position, and 3) enjoining JCS and Smith’s children from interfering with Smith’s duties as managing partner. That resulted in the trial court ordering JCS and Smith’s children to refrain from taking 1) “any action or performing any function as Managing Partner and/or General Partner of Marrs or [RSR] ...” and 2) “any action inconsistent with Rickey Smith’s duties, obligations, and rights as Managing Partner and General Partner of Marrs and [RSR] ....”

The foregoing scenario falls squarely into the framework described in *Mendoza, Frey, Hyde, Universal*, and by several other courts of appeals. An act of one party (Smith) altered the relationship between JCS and Smith, Marrs, and RSR. JCS then contested the action, but Smith arrived at the courthouse first. Thus, the status quo “cannot be the relationship as it exists after the” acts of Smith, that relationship being the ouster of JCS and installation of Smith. Yet, that is the very status the trial court protected by enjoining JCS from both acting as managing partner of Marrs and RSR and impeding Smith from performing duties as the new managing partner.

### 4. Arbitration

*Dang v. Van Tran*, No. 05-22-00518-CV, 2023 WL 3772809 (Tex. App.—Dallas June 2, 2023, no pet.) (mem. op.).

The court of appeals affirmed the trial court’s denial of a motion to compel arbitration. The court concluded that the evidence presented in support of the motion was not authenticated and, therefore, constituted no evidence to support the relief requested.

Huan Dang owned and operated various restaurants in the DFW Metroplex. Between October 10, 2017 and December 2, 2018, appellee Hung Van Tran provided four capital contributions totaling $500,000 to fund two of those restaurants: B Bahn Café and Bistro B. According to Tran’s live pleading, he loaned the money to Dang and Dang promised to pay Tran back in full according to payment schedules set out in four partnership agreements. Tran further maintained that Dang promised to give Tran ownership interests in each restaurant. According to Tran, he “made partnership loans” to Dang to fund B Bahn Café and Bistro B and “entered into” partnership agreements with Dang for each of the four loans.

In the underlying proceeding, Tran asserted that Dang failed to repay the full amount of the loans, failed to issue Tran the promised partnership interests, and used the loan money in other ventures and for Dang’s personal use. Tran brought claims against Dang, B Bahn Café, and Bistro B for breach of contract, breach of fiduciary duty, quantum meruit, common law fraud, statutory fraud, joint enterprise, unjust enrichment, alter ego, and money had and received.

According to Tran’s live pleading, he “entered into” four agreements with Dang. Tran did not attach copies of the partnership agreements to his original petition or his first amended petition, which was his live pleading. He did, however, describe each agreement. Tran pleaded that, on October 10, 2017, he “entered into an initial loan agreement” with Dang “to be partners in B Bahn Café” (the “Café Agreement”). In the Café Agreement, Tran agreed to loan Dang $100,000 to fund B Bahn Café. After Dang and Tran entered into the Café Agreement, Dang sought additional funding for what Tran described as Dang’s “Bistro B business venture.” According to Tran’s live pleading, he agreed to loan Dang $400,000 for the Bistro B business venture between January 2018 and December 2018. Tran and Dang entered into three partnership agreements (collectively the “Bistro B Agreements”) “that correspond to” the three additional loans Tran made to Dang. Tran pleaded that the Bistro B Agreements were signed January 25, 2018, June 21, 2018, and December 2, 2018.

On May 13, 2022, Dang filed a motion to compel arbitration in which he sought to compel Tran’s claims against Dang and the corporate defendants to arbitration. According to Dang, the Café Agreement and the January Bistro B Agreement included valid and enforceable arbitration provisions, and the June and December Bistro B Agreements “contemplate an arbitration award.” Dang argued that Tran’s claims against Dang and the corporate defendants were related to the partnership agreements and, therefore, subject to arbitration. Dang asserted that “the
events made basis to this litigation are within the scope of the arbitration agreement” because those events involved disputes between Dang and Tran “as a result of” the agreements.

The only evidence submitted by Dang in support of the motion were the four partnership agreements. The motion to compel was not certified, and Dang did not authenticate the partnership agreements. The motion stated that he was not acknowledging or authenticating the Café Agreement or the January Bistro B Agreement. Moreover, Dang did not state that the exhibits were true and correct copies of the partnership agreements. In response, Tran asserted that Dang had not proven the existence of an arbitration agreement or the scope of the purported arbitration provisions. Tran also stated that “no arbitration agreement Exists [sic] and the claims at issue do not fall within the Arbitration Clause.”

The trial court denied Dang’s motion to compel arbitration. On appeal, Dang argued that the trial court had abused its discretion in denying the motion, but the court of appeals disagreed:

After reviewing the record, we conclude the trial court did not abuse its discretion by denying Dang’s motion to compel arbitration. As a matter of law, Dang’s attachment of unauthenticated exhibits to his motion, without more, was insufficient to meet his initial evidentiary burden to prove the existence of a valid, enforceable arbitration agreement. . . .

“As a threshold matter, a party seeking to compel arbitration must establish the existence of a valid arbitration agreement and the existence of a dispute within the scope of the agreement.” Dang was required to put forth competent, prima facie evidence of the arbitration agreement itself. Dang’s only evidence in support of the motion to compel arbitration was unsworn and unauthenticated copies of the four partnership agreements. Dang does not discuss on appeal how he met this burden in the trial court. For the reasons discussed below, we conclude that he failed to meet this initial evidentiary burden. . . .

Arbitration agreements are creatures of contract. When a party seeks to compel arbitration, the party must first establish its right to that contract remedy. The burden of establishing an arbitration agreement’s existence is generally evidentiary. “It is axiomatic that a party seeking to prove its right to enforce a contractual remedy of arbitration must submit competent, prima facie evidence of the arbitration agreement itself.”

A party can satisfy its evidentiary burden to prove an arbitration agreement’s existence by submitting authenticated copies of an agreement containing an arbitration clause. To satisfy the authentication requirement, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. TEX. R. EVID. 901(a). The testimony of a witness with knowledge is one way to prove authenticity. Thus, in a summary proceeding, “[a] properly sworn affidavit stating that the attached documents are true and correct copies of the original authenticates the copies so they may be considered as evidence.”

Here, Dang attached the purported partnership agreements as exhibits to his motion to compel arbitration. But he did not submit any affidavits from a witness to authenticate any of his exhibits. He did not even assert in the motion that the attached copies were “true and correct.” “Simply attaching a document to a motion does not make the document admissible as evidence, dispense with proper foundational evidentiary requirements, or relieve a litigant of complying with other admissibility requirements.” We conclude that, as a matter of law, Dang’s mere attachment of the agreements as exhibits to his motion, without more, submitted no evidence of a valid arbitration agreement to the trial court. . . .

The record does not show that Tran objected in the trial court to Dang’s copies of the agreements on the basis that they were not authenticated. And there is no ruling in the record on any such objection. However, Tran did argue in his response to the motion to compel that Dang had not proven the existence of an arbitration agreement or the scope of the purported arbitration provisions. Tran also stated in his response to the motion to compel that “no arbitration agreement Exists [sic] and the claims at issue do not fall within the Arbitration Clause.” Although Tran did not use the term “authentication” when making his arguments, we conclude his arguments raised that issue sufficiently to provide Dang fair notice of the challenge to authentication.
Regardless, Tran was not required to preserve this objection in the trial court. The complete absence of authentication, as in this case, is a substantive defect that can be raised for the first time on appeal by a party or sua sponte by the reviewing court.

Because Dang did not authenticate the partnership agreements attached to its motion to compel arbitration, there is no competent evidence of an agreement to arbitrate. Accordingly, we conclude the trial court did not abuse its discretion in denying Dang’s motion to compel arbitration because Dang failed to meet his burden to establish the existence of an arbitration agreement.

5. Statute of Frauds


The district court concluded that a jury finding of an oral partnership was unenforceable because of the statute of frauds. The court found that the contract-performed-within-one-year exception and the partial-performance exception to the statute of frauds did not apply.

Plaintiff Beau Galyean was a nationally renowned cutting horse trainer with an equally distinguished record competing in the Western sport of cutting. Defendant Thomas Guinn was a successful Mississippi businessman who entered into the world of cutting horses upon his retirement.

Galyean first met Guinn in early 2015 when Guinn brought some horses to Galyean’s father. At Galyean’s recommendation, Guinn purchased two cutting horses, Metallic Rebel in 2015 and Rollz Royce in 2017. Metallic Rebel and Rollz Royce (collectively the “Stallions”) were the subject of an oral partnership between Galyean and Guinn. The partnership was formed with the purpose of “build[ing] a brand of horses that would be capable of earning high breeding fees.” The terms of the oral partnership were that “Galyean would manage and care for the Stallions, contribute money and property and incur losses for their care, ride the horses professionally, and in return Galyean received reimbursement for some costs, 50% of the prize money from competitions, and 25% of operational profits.” This partnership was successful by all possible metrics and continued until July 2021 when Guinn removed the Stallions from Galyean’s ranch.

On October 7, 2021, Galyean filed his Original Petition against Guinn in the 67th District Court, Tarrant County, Texas. Guinn removed the case, based on diversity jurisdiction. At trial, a verdict was rendered by the jury—in favor of Galyean—which found that the above-mentioned oral partnership existed. In post-trial briefing, Guinn argued that the statute of frauds barred the enforcement of the oral partnership found by the jury.

The court began by discussing the basics of the statute of frauds and its contract-performed-within-one-year exception:

The purpose of the statute of frauds is to “remove uncertainty, prevent fraudulent claims, and reduce litigation” by requiring that certain agreements be in writing and signed by the parties. The statute of frauds is an affirmative defense in a breach of contract suit and renders a contract that falls within its purview legally unenforceable. Tex. Bus. & Com. Code § 26.01(a). Whether a contract falls within the statute of frauds is a question of law.

As relevant here, to prove the statute of frauds defense, a defendant must show that a contract does not specify the time of performance and that it cannot, by its terms or by the nature of the required acts, be performed within one year from the date of the agreement. Tex. Bus. & Com. Code § 26.01(b)(6).

If the oral agreement is capable of being performed within one year, it is not precluded by the statute of frauds. However, the theoretical possibility that the contract could terminate within one year because of death or some other fortuitous event does not remove an oral agreement from the statute of frauds. When considering whether an oral agreement falls within the statute of frauds, the Court must determine whether the parties intended to complete the agreement within a year. To make such a determination, the Court looks to the intended performance, not the defeat, of the agreement. The duration of the agreement “may properly be implied from extrinsic evidence.” If the evidence conclusively proves the alleged oral agreement cannot be completed within one year, the agreement violates the statute as a matter of law.
Applying these principles, the court first rejected Galyean’s argument that the statute of frauds was inapplicable because the Stallions could have been sold within one year:

Again, when evaluating whether full performance could be achieved within a year, the Court must look at the terms of the contract and the nature of the required acts. Tex. Bus. & Com. Code § 26.01(b)(6). To make such a determination, the Court looks to the terms and the intended performance, not the defeat, of the agreement. . . .

Based on the above, the Court must first determine whether the agreement contained a provision regarding the sale of the Stallions. In this case, the jury found that the parties formed an oral partnership with the goal of “cultivat[ing] a brand . . . that would in turn yield high breeding fees [from the Stallions].” The jury also found that the terms of the oral partnership were that Galyean would receive 50% of the prize money from competitions and 25% of the operational profits. Galyean now argues that he established, at trial, that the oral agreement also included a provision regarding the sale of the Stallions. While Galyean did argue this alleged term, he also alleged that the agreement included a term that Guinn “would never sell [the Stallions].” While there is no corroborative evidence—other than Galyean’s own testimony—in the record to support Galyean’s alleged sale provision, there is ample evidence in the record to support his assertion that Guinn agreed to never sell the Stallions. (See ECF 306 at 162–64 (Guinn testifying multiple times that the Stallions “were not for sale” and that he would never sell them)). Nevertheless, the jury did not find either of these provisions to be a part of the oral agreement. These conflicting terms—both of which were alleged by Galyean—are a perfect example of why the statute of frauds is necessary and why courts cannot consider every alleged term to be a part of an oral agreement. Therefore, the Court finds that the evidence establishes that the oral agreement is silent as to the sale of the Stallions.

Thus, the Court must now determine whether the sale of the Stallions was contemplated at the time of the partnership’s formation. At the hearing, to emphasize that the sale could have occurred within a year, Galyean pointed to Guinn’s testimony that he “just wanted to own a good horse, and [ ] to win the Futurity, and the good Lord blessed me with some of the other stuff, but I was not interested in the breeding business or owning a stallion.” Galyean argued that if the Stallions had not been successful, then this testimony shows that Guinn would have sold them, and, thus, the partnership could have concluded within a year. As discussed above, the partnership was formed to build a brand of Stallions capable of yielding high stud fees. The testimony cited by Galyean is in complete contrast with that stated purpose and, accordingly, is either proof that the partnership did not exist or is irrelevant to the Court’s determination of whether the potential sale of the Stallions was contemplated by the parties at the time of the partnership’s formation. Furthermore, Guinn’s statement does not reference selling the Stallions, and it is speculative at best for the Court to conclude that the Stallions winning events was Guinn’s test for what makes “good horse[s],” such that their failure to win immediately would lead to their sale. It is even more speculative considering both Galyean’s and Guinn’s trial testimony that the Stallions would never be sold. Accordingly, while Galyean’s reliance on this testimony makes the Court question whether there was truly a meeting of the minds regarding the partnership, it does not persuade the Court that the sale of the Stallions was contemplated by the parties at the time of formation.

Therefore, because the Court must look at the terms of the agreement and the nature of the required acts to determine whether full performance was possible within a year, the potential sale of the Stallions carries no weight in the Court’s determination as it was not a term of the partnership and the evidence does not show that it was contemplated by the parties at the time of the agreement.

The court then proceeded to consider more broadly whether it was possible that the parties could have “cultivate[d] a brand . . . that would in turn yield high breeding fees” within a year. It rejected the possibility:

Here, as discussed supra, Galyean asserts that Metallic Cat—another horse previously trained and shown by Galyean—is proof that it was possible to achieve the aim of the partnership
within a year. In support, Galyean points to Alvin Fults (“Fults”)’s testimony that Metallic Cat won one of the biggest events in cutting in December 2008 and began standing stud four months later in March 2009. In response, Guinn argues that Metallic Cat is actually an example of how the aim of the partnership could not have been achieved within a year. Specifically, Guinn points to Fults’ testimony that: (1) “100 percent of the mares the first year, that was in 2009, were bred free, at no charge;” (2) in the 2010 breeding season, Metallic Cat’s initial fee was $5,000; and (3) Metallic Cat’s fee was “$5,000 for two or three years, and then we jumped to $7,500, and then we jumped to $10,000 per mare, and it was all because [Galyean] laid the foundation.”

Furthermore, Fults testified that Galyean’s approach to building Metallic Cat’s breeding reputation by comping the first year of breeding fees was “100 percent” the manner, means, and method in which to implement a profitable breeding program. In fact, Galyean took the same approach to breeding the Stallions and comped or discounted their first year of breeding fees. Fults’ testimony is consistent with other . . . evidence presented at trial, providing that for a stallion to yield high stud fees, he must show well at events and then, subsequently, gain a good breeding reputation through producing successful offspring. (See ECF 307 at 20 (Galyean testifying that to accomplish the type of success they agreed to “it would take three to five years” after “you get past the horse being a prospect”); see also ECF 306 at 83 (Fults testifying that it would take four to five years to make high stud fees on a horse); ECF 306 at 51 (Fults testifying that for a Stallion to receive high stud fees, he must produce “money winning foals”); ECF 306 at 82–83 (Fults testifying that to produce money winning foals it requires four to five years because: (1) horses have an eleven-month gestational period; (2) the foals do not begin their training until they are two years old; and (3) they do not begin competing until they are three years old).

While the parties did not define “high stud fees” in their agreement, the Court concludes that the testimony related to Metallic Cat shows that it was not possible to achieve those high fees within a year. Fults testified that after a year of comped breedings, Metallic Cat—a stallion that won the biggest event in cutting, is in the cutting hall of fame, and was featured in the television show Yellowstone—had a breeding fee of $5,000 for two or three years. Metallic Cat’s breeding fee then jumped to $7,500 and then eventually to $10,000. Metallic Cat’s timeline is consistent with the testimony presented at trial that for a stallion to receive high stud fees, he must produce money-winning foals, which takes three to five years. Thus, even assuming that Fults and Galyean could have charged the $5,000 breeding fee without comping the first year of breedings, Metallic Cat’s fee increased 100% ($5,000 to $10,000) after producing money-winning foals. Because it is impossible to produce money-winning foals within a year, it was impossible—even for one of the most famous cutting horses of all time in Metallic Cat—to achieve high stud fees within a year. Therefore, because the evidence shows that the Stallions could not have charged high breeding fees the first year they stood stud, the Court finds that it was not possible for the partnership to “cultivate a brand . . . that would in turn yield high breeding fees” for the Stallions, within a year. Accordingly, the Court concludes that full performance of the agreement could not be achieved within a year, and, thus, the statute of frauds applies.

Galyean attempted to argue that the partial-performance exception to the statute of frauds applied because (1) Guinn provided him with 25% of the stud fees earned by the Stallions; (2) Galyean built a breeding facility on his ranch; and (3) Galyean took an aggressive strategy by discounting and comping breedings to build the Stallions’ brands. Galyean asserted that these actions could only be explained by the existence of the oral partnership and that they could not be evidence of any other arrangement between the parties. In response, Guinn argued that the partial-performance exception could not be applied in the case because Galyean only sought contract damages. Even if the exception could be applied, Guinn asserted that none of the above-referenced acts unequivocally referred “to the existence of the partnership . . . as opposed to some other business relationship between the parties.” Once again, the court agreed with Guinn:

Partial performance applies only “if denial of performance would amount to a virtual fraud,” which requires “strong evidence establishing the existence of an agreement and its terms, [that] the party acting in reliance on the contract has suffered a substantial detriment for which he
has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit.” “Partial performance removes an oral agreement from the statute of frauds only if the performance is unequivocally referable to the agreement and corroborative of the fact that the contract was made.” “The performance a party relies on to remove an oral agreement from the statute of frauds ‘must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced.’” “If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable.”

The partial-performance exception requires that the party acting in reliance on the agreement suffer a substantial detriment for which there is no adequate remedy. See, e.g., Sullivan v. Leor Energy, LLC, 600 F.3d 542, 549 (5th Cir. 2010). Thus, a party that proves that the partial-performance exception applies is only entitled to reliance damages and not contract damages. Id. (citing Exxon Corp. v. Breezevale Ltd., 82 S.W.3d 429, 441 (Tex. App.—Dallas 2002)) (holding that because Breezevale was awarded $1 million on its contract law claim, it had an adequate remedy as a matter of law, and, thus, could not assert the partial-performance exception).

In this case, the jury awarded Galyean damages for “lost profits,” and Galyean argues that applying the statute of frauds would deprive him of the benefit of his bargain. Reliance damages are an alternative theory of recovery—meaning that a party can ultimately recover his lost profits (benefit of the bargain damages) or reliance damages, but not both. Therefore, because Galyean only sought benefit-of-the-bargain damages—and, similar to the plaintiff in Breezevale, was awarded damages on his contract law claim—he cannot show that he suffered substantial detriment for which there is no adequate remedy. Thus, Galyean is not entitled to recovery under the partial-performance exception to the statute of frauds.

Moreover, even if Galyean could assert the partial-performance exception, the three acts that he points to are not such that they could only be evidence of the partnership.

First, Galyean argues that the fact that Guinn paid him 25% of the stud fees earned by the Stallions can only be explained by the partnership because such a payment scheme is “unheard of in the cutting horse industry.” . . .

. . . . The evidence presented at trial shows that Guinn had little to no experience with the industry customs of the horse business. In fact, regarding this specific issue, Guinn testified that, when it came time to breed Metallic Rebel in 2017, he offered Galyean a 10% commission to handle the breedings because “[t]hat’s a sales commission you give to any salesman,” and that it was eventually negotiated up to 25%. Therefore, while the 25% commission payments may be unheard of in the horse industry, given the facts of this case, the Court finds that it is reasonably plausible that Guinn offered the commission because it was what he was used to and because he thought it was fair compensation for Galyean handling everything related to the breeding of the Stallions. Accordingly, the Court concludes that the 25% commission checks could be reasonably explained by some other agreement besides the partnership and, thus, it cannot be used to establish partial performance.

Second, Galyean argues that the fact that he constructed and equipped a breeding facility on his ranch can only be explained by the existence of the partnership. However, as Guinn points out in his reply, Galyean testified at trial that the breeding facility “was a separate—it didn’t have anything to do with mine and [Guinn]’s partnership.” Galyean now inexplicably asks the Court to find that the construction of the breeding facility—that he testified had nothing to do with the partnership—can only be explained by the existence of the partnership. The Court declines to do so and, thus, finds that the construction of the breeding facility is not such that it can only be explained by the partnership. Accordingly, Galyean has failed to establish partial performance through the construction of the breeding facility.

Finally, Galyean argues that his aggressive program of discounted and comped breedings can only be explained by the partnership because, otherwise, it would make no sense for him to give up commission on a year’s worth of stud fees. . . . Given the overwhelming evidence that stallions must prove themselves as stallions before mare owners want to breed their mares with.
them and pay the higher fees, it is axiomatic that the mid- and longterm profits that Galyean would receive far outweigh the commissions that he would lose by comping the first year of breedings. Considering the business sense associated with comping the first year of breedings, paired with the evidence that it would have been difficult for Galyean to get mare owners to pay anything during that year, the Court finds that Galyean’s decision to comp the Stallions’ first year of breedings cannot only be explained by the existence of the partnership. Therefore, Galyean has failed to establish partial performance through the comping of the Stallions’ first year of breeding fees. Accordingly, the Court concludes that even if Galyean could assert the partial-performance exception, he has failed to do so.

Guinn also argued that the doctrine of quasi-estoppel should prevent Galyean from asserting a position (the existence of an oral partnership) that is inconsistent with positions Galyean had previously taken. The court agreed that Galyean acted inconsistently with the existence of a partnership in the filing of his taxes (where he did not represent that a partnership existed), but it ultimately concluded that quasi-estoppel was inapplicable because Guinn was not unjustly disadvantaged by Galyean’s tax filings.


“Further, even assuming Cromwell had raised evidence supporting the existence of a partnership, that evidence cannot overcome the statute of frauds. What Cromwell points to as evidence of the purported partnership reflects one business purpose: the exploring, drilling, or producing of hydrocarbons in his leased land. In other words, Cromwell contends even though he has no signed joint operating agreement with Anadarko, the two parties created a partnership with the same effect. But a joint operating agreement or joint venture is subject to the statute of frauds. Absent a writing to satisfy the statute of frauds, there is no evidence of the parties’ intent to create a partnership for any business purpose other than one unenforceable under the statute of frauds—i.e., to develop the mineral acreage.”

**Wascom v. Leverett**, No. 05-22-01100-CV, 2023 WL 4361099 (Tex. App.—Dallas July 6, 2023, no pet.) (mem. op.).

The court of appeals concluded that a claim for breach of a partnership agreement was not barred by the statute of frauds because there was some evidence that the purpose of the partnership could have been performed within one year. In addition, a fact issue was raised regarding whether the plaintiff/appellant partially performed the agreement.

In November 2014, Kevin Wascom and Stacy Leverett began discussing a real estate development company that she and Dan Leverett were forming. When Stacy asked Wascom if he would be interested in joining them, they “began brainstorming what it was each one of us wanted in our general partnership.” Ideas included retail developments, apartment complexes, master planned communities, office buildings, medical office buildings, hotels, government facilities, and industrial properties.

They agreed that Wascom’s contribution to the partnership would be to “go to the capital markets [and] bring financing for the projects we were going to be developing,” but he would not be required to make any financial contribution. Stacy’s contribution was the “ability to conceptualize ideas to a development stage, to supervise the construction of these projects and to supervise the startup and operations and occupancy of these projects” and networking. Dan was going to bring the same skill set as Stacy did, but Stacy and Dan would work on separate projects. In early 2015, both Dan and Stacy had full-time employment while Wascom was unemployed and looking for a new position. Wascom’s declaration stated that once the parties agreed to form the partnership, he ceased looking for other employment.

Wascom testified that he and Stacy agreed in November 2014 to form a general partnership, “that it would be one-third, one-third, one-third on everything, and that we would get started.” In February 2015, Wascom met with Dan and “shook hands on forming our three-person general partnership….” After the February 2015 meeting, the next step to bring their plans to fruition was to start a project. Between February 2015 and November 2016, Wascom provided financing advice for at least five potential projects the partners considered. Although they agreed that the partnership should be properly documented, they decided to wait to do so until they secured their first project. The partnership was never documented.
On December 7, 2015, Dan filed a certificate of formation with the Texas Secretary of State and created Place, LLC. Dan was the sole member of Place. Dan averred that Wascom never had an ownership interest in Place, was not an employee of Place, did not make any capital contributions to Place, and did not receive an IRS Form K-1 from Place. Dan indicated that Wascom, however, provided services to Place as an independent consultant, and Place issued IRS Form 1099s to record Wascom’s consulting income. Dan further averred that Place had no income through 2019 and that he did not receive any profit from Place before 2020.

Wascom ultimately sued Dan, Stacy, and Place (collectively the appellees) and asserted several claims, including “breach of partnership agreement/redemption of partnership interest.” Dan, Stacy, and Place filed a traditional motion for summary judgment on all claims, which the trial court granted.

On appeal, Wascom sought reversal of the order granting summary judgment on his claim for breach of the partnership agreement. Appellees had moved for summary judgment on several grounds, including that the alleged partnership agreement was barred by the statute of frauds because it was not in writing and could not be completed within one year. In response, Wascom argued that, at the time of formation, the oral partnership agreement was able to be performed within one year and, separately, his partial performance of the contract was an exception to the statute of frauds. The court agreed with Wascom:

An “agreement which is not to be performed within one year from the making of the agreement” is not enforceable unless it is in writing and signed by the person to be charged with the agreement. TEX. BUS. & COM. CODE § 26.01(a), (b)(6). The statute of frauds is an affirmative defense in a breach of contract suit and renders a contract that falls within its purview unenforceable.

Once a defendant conclusively establishes its statute of frauds defense, the burden shifts to the plaintiff to establish an exception that would take the oral agreement out of the statute of frauds. Whether an exception to the statute of frauds applies is generally a question of fact.

“Under the partial performance exception to the statute of frauds, contracts that have been partly performed, but do not meet the requirements of the statute of frauds, may be enforced in equity if denial of enforcement would amount to a virtual fraud.” The performance a party relies on to remove an oral agreement from the statute of frauds “must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced.” Otherwise, the acts of performance relied upon to take an oral agreement out of the statute of frauds “do not tend to prove the existence of the parol agreement relied upon by the plaintiff.” “If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable.”

The parties agree there is no written partnership agreement between them. Wascom’s testimony shows the purpose of the partnership was to develop commercial real estate. While appellees provided evidence that the real estate development projects could not be completed within one year and, therefore, any unwritten agreement violates the statute of frauds, Wascom provided evidence to the contrary. Wascom’s declaration states the partnership “would prospect any suitable commercial real estate development projects, including those that could be completed in under one year.” He also stated that, over the course of his career, he has arranged financing for many real estate development projects that were completed in under one year. He listed more than twenty projects that he worked on during his career that went “from conception to completion in less than a year.” Wascom’s statements are some evidence that the purpose of the partnership, to develop commercial real estate, could have been performed within one year. Accordingly, appellees did not meet their burden to conclusively establish their statute of frauds affirmative defense.

However, even if appellees had met their burden to prove the statute of frauds applies to the alleged oral partnership agreement, Wascom presented evidence to raise a fact issue about whether he partially performed the agreement. When Wascom met with Stacy in November 2014, he was seeking an employment opportunity. In February 2015, he entered into a handshake deal with Stacy and Dan to form a real estate development partnership with each person owning a one-third interest. Once the parties agreed to form the partnership, Wascom stopped looking for
other employment and began working full time to launch the new venture. Wascom’s declaration states:

When I began working with Stacy and Dan in September 2015, all parties agreed to pay their own expenses—such as mileage, cell phone, things like that—and not take a draw or other compensation for as long as possible. I worked for free until 2018, when I had exhausted my liquid savings and needed a monthly draw to pay my bills. Dan Leverett and Stacy Gray Leverett agreed to pay me a monthly stipend of $2,000 per month. My total compensation in 2019 was $63,000 and from January through April 2019 was $12,000, both well below market value for a person of my experience in real estate finance. Had I known that Dan Leverett and Stacy Gray Leverett would take the position that I was merely a consultant and not an equal partner, I would not have worked for free in 2015, 2016, and 2017, nor would I have worked at [a] below market rate in 2018 and 2019. I only did this because it was necessary to keep the partnership going.

Wascom testified that between February 2015 and November 2016, he provided financing advice for a half dozen projects they worked on. Wascom explained the partnership did not receive any significant revenue until December 2017, the venture was funded “[o]ut of each of our pockets,” and he did not receive any income from this business or another venture from February 2015 until December 2017.

The evidence Wascom presented raises a fact issue regarding whether he partially performed the partnership agreement and whether the work he did between 2015 and 2019 was unequivocally referable to the partnership agreement. Wascom’s evidence shows he worked on behalf of the partnership for several years either without compensation or at below-market compensation in order to fulfill the purposes of and his obligations under the parties’ alleged partnership agreement. We conclude Wascom raised a fact issue as to the applicability of the partial performance exception to the statute of frauds, and, therefore, the statute of frauds cannot be the basis upon which to affirm the trial court’s summary judgment.

G. Admission of Partner

Richman Trusts v. Time, No. 05-22-00445-CV, 2024 WL 510339 (Tex. App.—Dallas Feb. 9, 2024, no pet. h.) (mem. op.).

In this dispute involving a family general partnership, the court addressed whether three parcels of real property were acquired by the partnership or by family members in their individual capacities, whether the heirs of one of the original partners were admitted as partners, and, if the heirs were not admitted as partners, whether the jury’s finding of the redemption price owed to the heirs for the deceased partner’s partnership interest, i.e., the “fair value” of the interest, was supported by the evidence. The court concluded that the evidence was sufficient to support the jury’s finding that the parcels of real property at issue were not acquired with property of the partnership and were not intended by the partners to be partnership properties. The court concluded that there was an issue of material fact as to whether the heirs of the deceased partner were admitted as partners such that the trial court’s summary judgment on that issue was erroneous. Recognizing that the outcome on remand might render the issue of the redemption price irrelevant (i.e, if the heirs were admitted as partners, no redemption was triggered by the death of the partner), the court addressed the jury’s finding on the amount of the redemption price in the interest of judicial economy, and the court concluded that the evidence was sufficient to support the jury’s finding.

Victor Richman and his wife, Maryon, had three children: Judith, Harvey, and Marc. In 1955, they created two trusts for each child. Each of the six trusts terminated when the beneficiary turned thirty, and the trusts’ assets were distributed to that child, individually. Judith turned thirty in 1968, Harvey in 1969, and Marc in 1975. At some point Victor created Richman Trusts, a Texas general partnership (“RTP”), which had no written partnership agreement, but it was undisputed that Judith, Harvey, and Marc were RTP’s general partners, each with an equal one-third partnership interest. Victor was not a partner, but he managed and controlled RTP, which included managing all the Richman family properties.

Victor and Maryon purchased numerous real properties in Dallas (RTP Partnership Properties) through the years. Whether they used their individual funds to purchase three specific properties at issue in this case or gifted

53
funds to RTP that RTP subsequently used to purchase the properties was disputed at trial and now on appeal. The specific properties at issue in this case (the Properties in Dispute) were: (1) the Record Street Properties, purchased on October 31, 1967, in the names of the six trusts established by Victor and Maryon for their children (each trust receiving an undivided 1/6th interest); (2) the Greenville Avenue Property, purchased on March 4, 1969, in the name of the Harvey Richman Trusts No. 1 and 2, the Marc Richman Trusts No. 1 and 2, and Judith, individually, because she had already turned thirty; and (3) the Richmond Avenue Property, purchased on October 9, 1972, also in the names of the four trusts and Judith, individually.

Marc, who was also an attorney, became RTP’s managing partner when Victor’s health began to decline in 1985. Judith died in 2008, leaving three children: Ralph, Robin, and Brenda. Ralph had no children. Brenda had three children. Robin had two children. Before her death, Judith created the 2008 Richman Revocable Trust (the 2008 Trust) and upon her death, her Estate bequeathed all of her property, which included her “33.333% general partner interest in [RTP]” to the 2008 Trust. The 2008 Trust identified Ralph as trustee. The 2008 Trust identified the beneficiaries as Ralph, in trust, and each of the children of Brenda and Robin, in trust. In administering the Estate, Ralph as trustee of the 2008 Trust, assigned Judith’s one-third interest in RTP to the beneficiaries of the 2008 Trust (the “Heirs”). The “Assignment of Partnership Interest” (Assignment) was executed on January 6, 2010, but made effective as of August 1, 2009. Marc signed the Assignment as general partner under the notation, “NOTICE RECEIVED AND TRANSFER ACCEPTED.”

For about ten years, Ralph, Brenda, and Robin received what they believed were RTP partnership distributions and IRS Schedule K-1’s. The distributions were always equal to Marc’s and Harvey’s distributions. Marc asserted that he never believed the Heirs were RTP partners and did not believe the Assignment made them partners. Although he kept the Heirs informed, he described his updates related to the properties as “trying to do right” by his sister’s children. He believed Judith’s death resulted in her withdrawal from RTP leaving the Heirs with only a creditor’s redemption interest in RTP.

In September 2018, Marc sent the Heirs a “Redemption Letter” for their “Creditors’ interest in the Richman Trusts.” The letter included an expert valuation of the fair market value of Judith’s one-third interest in RTP at the time of her death. The valuation totaled $509,200.

Upon realizing there was a difference of opinion regarding the Heirs’ status with respect to RTP, the Heirs investigated the Assignment and Properties in Dispute. The deeds to the Properties in Dispute revealed the properties had been deeded to Judith, Harvey, and Marc in individual one-third interests and not to RTP. Despite the individuals’ names being on the deeds, Marc believed RTP owned the three properties. The Heirs believed Judith, Harvey, and Marc owned them as tenants-in-common before Judith’s death.

The Heirs also disagreed with the valuation of Judith’s redemption interest. The redemption letter gave the Heirs one year to accept the valuation or file suit to challenge the valuation, and the Heirs filed suit.

The Heirs sought determinations that they are partners in RTP and owners of an undivided one-third interest in the Properties in Dispute. Alternatively, they sought a determination of the redemption price of Judith’s one-third partnership interest in RTP on the date of her death. RTP filed a motion for partial summary judgment on the Heirs’ request to be declared RTP partners. The trial court granted the motion, concluding that Judith’s death was an event of withdrawal pursuant to the Texas Business Organizations Code and that the Heirs were never RTP partners. The remainder of the case proceeded to trial before a six-person jury.

On appeal, the court first determined that the trial court’s summary-judgment determination that the Heirs did not become partners after Judith’s death was erroneous because there was more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

It is undisputed RTP never had a written partnership agreement; therefore, it is a general partnership under Texas law and governed by the Texas Business Organizations Code. See TEX. BUS. ORGS. CODE ANN. § 152.002(a). The parties agree that Marc and Harvey, as the remaining partners after Judith’s death, both needed to consent for the Heirs to become partners. See id. § 152.201. It is also undisputed the Assignment is valid and enforceable; however, the parties dispute the effect of the Assignment with regard to Judith’s one-third RTP interest.
Section 152.501(a) of the Texas Business Organizations Code provides that a “person ceases to be a partner on the occurrence of an event of withdrawal.” Id. § 152.501(a). An “event of withdrawal of a partner occurs” upon “the partner’s death.” Id. § 152.501(b)(7)(a).

Section 152.406, provides, in relevant part, the following regarding the “Effect of Death” on “Partnership Interest”:

(a) For purposes of this code: ...
(2) on the death of a partner:
   (A) if the partnership interest of the deceased is subject to redemption under Subchapter H, the partner’s surviving spouse, if any, and an heir, devisee, personal representative, or other successor of the partner, to the extent of their representative right to the redemption price, are creditors of the partnership until the redemption price is paid.

RTP argues Judith’s death resulted in her withdrawal from the partnership, leaving her Estate and the 2008 Trust a redemption interest in RTP, not a partnership interest. See id. §§ 152.501(a), (b)(7)(A), 152.406(a)(2)(A). This interpretation presupposes that the transformation of Judith’s general partnership interest to a redemption interest was not only automatic upon her death, but also unalterable by the parties. Section 152.406(c) of the business and organizations code states otherwise: “This chapter does not impair an agreement for the purchase or sale of a partnership interest at any time, including on the death or divorce of an owner of the partnership.” Id. § 152.406(c).

According to the statute, Judith’s partnership interest was subject to a redemption upon her death. However, the statute allows the parties to enter into an agreement for the purchase or sale of the partnership interest at any time, “including on the death” of the partnership interest owner. Id. Thus, we begin by considering whether the Assignment created an agreement for the purchase or sale of Judith’s partnership interest, regardless of her death.

When construing a written assignment, we apply the rules of interpretation and construction applicable to contracts. Elness Swenson Graham Architects, Inc. v. RLJIII-C Austin Air, LP, 520 S.W.3d 145, 154 (Tex. App.—Austin 2017, pet. denied). Our primary goal is to ascertain the intent of the parties as expressed in the written assignment. Id. To accomplish that objective, we examine and consider the entire writing in an effort “to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.” Id.

Here, the title of the document is “Assignment of Partnership Interest.” The Assignment acknowledged, “Judith Sharon Richman owned a 33.3333% general partner interest in the Richman Trust Investments, a Texas general partnership, (the “Partnership”) at the time of her death.” It further recognized that “pursuant to the terms of her Last Will and Testament,” all of her interest in the Partnership passed to the Richman 2008 Trust, which then, pursuant to the Trust terms, distributed the 33.3333% interest in the Partnership to the various Heirs. [footnote omitted] Ralph, in his capacity as the independent executor of the Estate and in his capacity as trustee of the 2008 Trust, “instruct[ed] the General Partner of the Partnership, in writing, of Assignor’s and Assignee’s desire that Assignor assign to Assignee Assignor’s 33.3333% Partnership Interest (the “Assigned Partnership Interest”) in the Partnership as set forth above.” The Assignment states the “Assignor does hereby grant, sell, assign, transfer, and convey the Assigned Partnership Interest unto each Assignee ....”

Marc signed the Assignment on behalf of RTP as general partner. Directly above his signature, the Assignment specified, “NOTICE RECEIVED AND TRANSFER ACCEPTED.” According to the Heirs, their partnership status went unquestioned for ten years before Marc suddenly claimed Judith’s death resulted in a complete withdrawal of her partnership interest regardless of the Assignment. Moreover, the Assignment is titled “Assignment of Partnership Interest” and repeatedly identifies Judith’s 33.3333% partnership interest in RTP as the interest being assigned through her Will and the 2008 Trust, which Marc “received” and “accepted” by signing the document as RTP’s general partner.
Contrary to RTP’s position, Judith’s death did not foreclose the possibility of transferring her partnership interest. RTP provides no authority, and we have found none, to support its argument that section 152.406(c) is only a prospective provision allowing a partner to contract for the sale of a partnership interest before the event of withdrawal. Thus, the Assignment does not establish, as a matter of law, that the Heirs were entitled to only a redemption interest in RTP. In fact, the Assignment never uses the term “redemption interest,” but instead refers to the “partnership interest” eight times.\footnote{omitted}

RTP contends that regardless of whether the Assignment could transfer a partnership interest, summary judgment was still appropriate because there is no evidence Harvey and Marc consented to the transfer. We disagree and, as explained below, conclude the Heirs presented more than a scintilla of evidence raising a fact issue as to whether Marc and Harvey consented. Section 152.201 states, “A person may become a partner only with the consent of all partners.” TEX. BUS. ORGS. CODE ANN. § 152.201. Importantly, this section does not require consent in writing. Marc’s signature, as RTP’s general partner, bound RTP to the Assignment through his “accept[ance]” of the “transfer.” \textit{See id.} § 152.302 (“an act of a partner, including the execution of an instrument in the partnership name, binds the partnership”). Moreover, Marc did not argue in appellants’ motion for partial summary judgment that his signature on the Assignment was no evidence of his consent, but rather that his signature “fails to provide definitive proof of consent.” The Heirs did not need to provide definitive proof to overcome summary judgment. Instead, they only needed to present more than a scintilla of evidence creating a fact issue. \textit{Ridgeway,} 135 S.W.3d at 600–01.

The summary judgment record demonstrates Marc and Harvey discussed “major” decisions affecting RTP. Harvey explained during his deposition that Marc would talk to him, he would tell Marc whether he agreed or disagreed, and “Marc signs whatever we both agree to.” Marc likewise testified that when he needed Harvey’s consent for RTP matters, they conferred, and then he signed on behalf of the partnership as managing general partner. While section 152.201 requires the consent of all partners before another person may become a partner, it does not require such consent in writing. \textit{See TEX. BUS. ORGS. CODE ANN.} § 152.201. Thus, Marc’s and Harvey’s testimony provides more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc executed the Assignment as managing general partner of RTP and on behalf of Harvey because they had discussed and Harvey had consented to the admission of the Heirs as partners.

The record also contains disputed testimony about conversations between family members regarding Judith’s RTP interest. Marc testified he told the Heirs in the hospital chapel before Judith died, they would not become partners. Marc testified he never believed they were partners, never said they were partners, never accepted them as partners, and never wanted them to be partners. He also stated the Heirs agreed in writing on several occasions they were only creditors with a redemption interest, and they admitted consulting an attorney who told them the same. Marc explained he executed the Assignment with an understanding that “Judy’s estate’s interest, their redemptive interest, was transferred to these people and that I was to pay them. And I said, okay, I’ll do that. And I did do that.”

Ralph, however, testified Marc and Harvey treated the Heirs as partners prior to the Assignment. “They provided consent shortly after my mom passed away in 2008.” He testified the Assignment was backdated with the effective date of August 1, 2009, because that was the date they agreed the Heirs were admitted into the partnership. Ralph explained,

\textit{There was never any question at the time for years. We simply thought and acted as partners. We received partnership draws. We had meetings and talked about property maintenance. We eventually had property together. I received IRS documents and tax filings that claimed me as a partner. I paid taxes on my partnership income, it referenced my losses, my partnership losses in [RTP]. Finally, the Heirs produced more than a scintilla of evidence that Marc and Harvey consented to the Heirs becoming partners through post-Assignment conduct. The Heirs produced years of K-1’s indicating their alleged partnership income. A CPA told Ralph the K-1’s indicated}
they were RTP partners “in the eyes of the IRS.” Marc’s explanation that the Heirs received K-1’s because his CPA decided the IRS needed documentation to account for the money the Heirs were receiving as creditors merely highlights a disputed fact issue as to why the Heirs received tax documents generally provided only to partners. The Heirs also produced years of checks in which the Heirs received “draws,” or partnership distributions signed by Marc, in equal one-third amounts. To the extent Marc explained the “draws” were merely payments toward the Heirs as redemption creditors, this again creates a fact issue regarding post-Assignment conduct evidencing whether Marc and Harvey consented to the Heirs becoming RTP partners.

Viewing the Assignment and the summary judgment evidence of the parties’ conduct in the light most favorable to the Heirs, there is more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

The court next addressed the sufficiency of the evidence to support the jury’s findings that the Properties in Dispute were not acquired with RTP property and that the partners did not intend the Properties in Dispute to be partnership property. The court concluded that the evidence was sufficient to support the jury’s finding that the Properties in Dispute were not acquired with RTP property as well as the jury’s finding that the partners did not intend the Properties in Dispute to be RTP properties.

The court of appeals acknowledged that the issue of the redemption price would be moot if it was determined on remand that the Heirs were admitted as partners after Judith’s death, but the court of appeals also addressed the sufficiency of the evidence to support the jury’s finding on the amount of the redemption price, i.e., the fair value of Judith’s partnership interest at Judith’s death, in the interest of judicial economy. The court concluded the evidence was sufficient to support the jury’s finding in that regard.

H. Assignment or Transfer of Interest

Richman Trusts v. Time, No. 05-22-00445-CV, 2024 WL 510339 (Tex. App.—Dallas Feb. 9, 2024, no pet. h.) (mem. op.).

In this dispute involving a family general partnership, the court addressed whether three parcels of real property were acquired by the partnership or by family members in their individual capacities, whether the heirs of one of the original partners were admitted as partners, and, if the heirs were not admitted as partners, whether the jury’s finding of the redemption price owed to the heirs for the deceased partner’s partnership interest, i.e., the “fair value” of the interest, was supported by the evidence. The court concluded that the evidence was sufficient to support the jury’s finding that the parcels of real property at issue were not acquired with property of the partnership and were not intended by the partners to be partnership properties. The court concluded that there was an issue of material fact as to whether the heirs of the deceased partner were admitted as partners such that the trial court’s summary judgment on that issue was erroneous. Recognizing that the outcome on remand might render the issue of the redemption price irrelevant (i.e., if the heirs were admitted as partners, no redemption was triggered by the death of the partner), the court addressed the jury’s finding on the amount of the redemption price in the interest of judicial economy, and the court concluded that the evidence was sufficient to support the jury’s finding.

Victor Richman and his wife, Maryon, had three children: Judith, Harvey, and Marc. In 1955, they created two trusts for each child. Each of the six trusts terminated when the beneficiary turned thirty, and the trusts’ assets were distributed to that child, individually. Judith turned thirty in 1968, Harvey in 1969, and Marc in 1975. At some point Victor created Richman Trusts, a Texas general partnership (“RTP”), which had no written partnership agreement, but it was undisputed that Judith, Harvey, and Marc were RTP’s general partners, each with an equal one-third partnership interest. Victor was not a partner, but he managed and controlled RTP, which included managing all the Richman family properties.

Victor and Maryon purchased numerous real properties in Dallas (RTP Partnership Properties) through the years. Whether they used their individual funds to purchase three specific properties at issue in this case or gifted funds to RTP that RTP subsequently used to purchase the properties was disputed at trial and now on appeal. The specific properties at issue in this case (the Properties in Dispute) were: (1) the Record Street Properties, purchased on October 31, 1967, in the names of the six trusts established by Victor and Maryon for their children (each trust receiving an undivided 1/6th interest); (2) the Greenville Avenue Property, purchased on March 4, 1969, in the
name of the Harvey Richman Trusts No. 1 and 2, the Marc Richman Trusts No. 1 and 2, and Judith, individually, because she had already turned thirty; and (3) the Richmond Avenue Property, purchased on October 9, 1972, also in the names of the four trusts and Judith, individually.

Marc, who was also an attorney, became RTP’s managing partner when Victor’s health began to decline in 1985.

Judith died in 2008, leaving three children: Ralph, Robin, and Brenda. Ralph had no children. Brenda had three children. Robin had two children. Before her death, Judith created the 2008 Richman Revocable Trust (the 2008 Trust) and upon her death, her Estate bequeathed all of her property, which included her “33.333% general partner interest in [RTP]” to the 2008 Trust. The 2008 Trust identified Ralph as trustee. The 2008 Trust identified the beneficiaries as Ralph, in trust, and each of the children of Brenda and Robin, in trust. In administering the Estate, Ralph as trustee of the 2008 Trust, assigned Judith’s one-third interest in RTP to the beneficiaries of the 2008 Trust (the “Heirs”). The “Assignment of Partnership Interest” (Assignment) was executed on January 6, 2010, but made effective as of August 1, 2009. Marc signed the Assignment as general partner under the notation, “NOTICE RECEIVED AND TRANSFER ACCEPTED.”

For about ten years, Ralph, Brenda, and Robin received what they believed were RTP partnership distributions and IRS Schedule K-1’s. The distributions were always equal to Marc’s and Harvey’s distributions. Marc asserted that he never believed the Heirs were RTP partners and did not believe the Assignment made them partners. Although he kept the Heirs informed, he described his updates related to the properties as “trying to do right” by his sister’s children. He believed Judith’s death resulted in her withdrawal from RTP leaving the Heirs with only a creditor’s redemption interest in RTP.

In September 2018, Marc sent the Heirs a “Redemption Letter” for their “Creditors’ interest in the Richman Trusts.” The letter included an expert valuation of the fair market value of Judith’s one-third interest in RTP at the time of her death. The valuation totaled $509,200.

Upon realizing there was a difference of opinion regarding the Heirs’ status with respect to RTP, the Heirs investigated the Assignment and Properties in Dispute. The deeds to the Properties in Dispute revealed the properties had been deeded to Judith, Harvey, and Marc in individual one-third interests and not to RTP. Despite the individuals’ names being on the deeds, Marc believed RTP owned the three properties. The Heirs believed Judith, Harvey, and Marc owned them as tenants-in-common before Judith’s death.

The Heirs also disagreed with the valuation of Judith’s redemption interest. The redemption letter gave the Heirs one year to accept the valuation or file suit to challenge the valuation, and the Heirs filed suit.

The Heirs sought determinations that they are partners in RTP and owners of an undivided one-third interest in the Properties in Dispute. Alternatively, they sought a determination of the redemption price of Judith’s one-third partnership interest in RTP on the date of her death. RTP filed a motion for partial summary judgment on the Heirs’ request to be declared RTP partners. The trial court granted the motion, concluding that Judith’s death was an event of withdrawal pursuant to the Texas Business Organizations Code and that the Heirs were never RTP partners. The remainder of the case proceeded to trial before a six-person jury.

On appeal, the court first determined that the trial court’s summary-judgment determination that the Heirs did not become partners after Judith’s death was erroneous because there was more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

It is undisputed RTP never had a written partnership agreement; therefore, it is a general partnership under Texas law and governed by the Texas Business Organizations Code. See TEX. BUS. ORGS. CODE ANN. § 152.002(a). The parties agree that Marc and Harvey, as the remaining partners after Judith’s death, both needed to consent for the Heirs to become partners. See id. § 152.201. It is also undisputed the Assignment is valid and enforceable; however, the parties dispute the effect of the Assignment with regard to Judith’s one-third RTP interest.

Section 152.501(a) of the Texas Business Organizations Code provides that a “person ceases to be a partner on the occurrence of an event of withdrawal.” Id. § 152.501(a). An “event of withdrawal of a partner occurs” upon “the partner’s death.” Id. § 152.501(b)(7)(a).

Section 152.406, provides, in relevant part, the following regarding the “Effect of Death” on “Partnership Interest”:

(a) For purposes of this code: ...
on the death of a partner:

(A) if the partnership interest of the deceased is subject to redemption under Subchapter H, the partner’s surviving spouse, if any, and an heir, devisee, personal representative, or other successor of the partner, to the extent of their representative right to the redemption price, are creditors of the partnership until the redemption price is paid.

Id. § 152.406(a)(2)(A).

RTP argues Judith’s death resulted in her withdrawal from the partnership, leaving her Estate and the 2008 Trust a redemption interest in RTP, not a partnership interest. See id. §§ 152.501(a), (b)(7)(A), 152.406(a)(2)(A). This interpretation presupposes that the transformation of Judith’s general partnership interest to a redemption interest was not only automatic upon her death, but also unalterable by the parties. Section 152.406(c) of the business and organizations code states otherwise: “This chapter does not impair an agreement for the purchase or sale of a partnership interest at any time, including on the death or divorce of an owner of the partnership.” Id. § 152.406(c).

According to the statute, Judith’s partnership interest was subject to a redemption upon her death. However, the statute allows the parties to enter into an agreement for the purchase or sale of the partnership interest at any time, “including on the death” of the partnership interest owner. Id. Thus, we begin by considering whether the Assignment created an agreement for the purchase or sale of Judith’s partnership interest, regardless of her death.

When construing a written assignment, we apply the rules of interpretation and construction applicable to contracts. Elness Swenson Graham Architects, Inc. v. RLJI-C Austin Air, LP, 520 S.W.3d 145, 154 (Tex. App.—Austin 2017, pet. denied). Our primary goal is to ascertain the intent of the parties as expressed in the written assignment. Id. To accomplish that objective, we examine and consider the entire writing in an effort “to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.” Id.

Here, the title of the document is “Assignment of Partnership Interest.” The Assignment acknowledged, “Judith Sharon Richman owned a 33.3333% general partner interest in the Richman Trust Investments, a Texas general partnership, (the “Partnership”) at the time of her death.” It further recognized that “pursuant to the terms of her Last Will and Testament,” all of her interest in the Partnership passed to the Richman 2008 Trust, which then, pursuant to the Trust terms, distributed the 33.3333% interest in the Partnership to the various Heirs.[footnote omitted] Ralph, in his capacity as the independent executor of the Estate and in his capacity as trustee of the 2008 Trust, “instruct[ed] the General Partner of the Partnership, in writing, of Assignor’s and Assignee’s desire that Assignor assign to Assignee Assignor’s 33.3333% Partnership Interest (the “Assigned Partnership Interest”) in the Partnership as set forth above.” The Assignment states the “Assignor does hereby grant, sell, assign, transfer, and convey the Assigned Partnership Interest unto each Assignee ....”

Marc signed the Assignment on behalf of RTP as general partner. Directly above his signature, the Assignment specified, “NOTICE RECEIVED AND TRANSFER ACCEPTED.” According to the Heirs, their partnership status went unquestioned for ten years before Marc suddenly claimed Judith’s death resulted in a complete withdrawal of her partnership interest regardless of the Assignment. Moreover, the Assignment is titled “Assignment of Partnership Interest” and repeatedly identifies Judith’s 33.3333% partnership interest in RTP as the interest being assigned through her Will and the 2008 Trust, which Marc “received” and “accepted” by signing the document as RTP’s general partner.

Contrary to RTP’s position, Judith’s death did not foreclose the possibility of transferring her partnership interest. RTP provides no authority, and we have found none, to support its argument that section 152.406(c) is only a prospective provision allowing a partner to contract for the sale of a partnership interest before the event of withdrawal. Thus, the Assignment does not establish, as a matter of law, that the Heirs were entitled to only a redemption interest in RTP. In fact, the Assignment never uses the term “redemption interest,” but instead refers to the “partnership interest” eight times.[footnote omitted]
RTP contends that regardless of whether the Assignment could transfer a partnership interest, summary judgment was still appropriate because there is no evidence Harvey and Marc consented to the transfer. We disagree and, as explained below, conclude the Heirs presented more than a scintilla of evidence raising a fact issue as to whether Marc and Harvey consented.

Section 152.201 states, “A person may become a partner only with the consent of all partners.” TEX. BUS. ORGS. CODE ANN. § 152.201. Importantly, this section does not require consent in writing. Marc’s signature, as RTP’s general partner, bound RTP to the Assignment through his “accept[ance]” of the “transfer.” See id. § 152.302 (“an act of a partner, including the execution of an instrument in the partnership name, binds the partnership”). Moreover, Marc did not argue in appellants’ motion for partial summary judgment that his signature on the Assignment was no evidence of his consent, but rather that his signature “fails to provide definitive proof of consent.” The Heirs did not need to provide definitive proof to overcome summary judgment. Instead, they only needed to present more than a scintilla of evidence creating a fact issue. Ridgeway, 135 S.W.3d at 600–01.

The summary judgment record demonstrates Marc and Harvey discussed “major” decisions affecting RTP. Harvey explained during his deposition that Marc would talk to him, he would tell Marc whether he agreed or disagreed, and “Marc signs whatever we both agree to.” Marc likewise testified that when he needed Harvey’s consent for RTP matters, they conferred, and then he signed on behalf of the partnership as managing general partner. While section 152.201 requires the consent of all partners before another person may become a partner, it does not require such consent in writing. See TEX. BUS. ORGS. CODE ANN. § 152.201. Thus, Marc’s and Harvey’s testimony provides more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc executed the Assignment as managing general partner of RTP and on behalf of Harvey because they had discussed and Harvey had consented to the admission of the Heirs as partners.

The record also contains disputed testimony about conversations between family members regarding Judith’s RTP interest. Marc testified he told the Heirs in the hospital chapel before Judith died, they would not become partners. Marc testified he never believed they were partners, never said they were partners, never accepted them as partners, and never wanted them to be partners. He also stated the Heirs agreed in writing on several occasions they were only creditors with a redemption interest, and they admitted consulting an attorney who told them the same. Marc explained he executed the Assignment with an understanding that “Judy’s estate’s interest, their redemptive interest, was transferred to these people and that I was to pay them. And I said, okay, I’ll do that. And I did do that.”

Ralph, however, testified Marc and Harvey treated the Heirs as partners prior to the Assignment. “They provided consent shortly after my mom passed away in 2008.” He testified the Assignment was backdated with the effective date of August 1, 2009, because that was the date they agreed the Heirs were admitted into the partnership. Ralph explained,

There was never any question at the time for years. We simply thought and acted as partners. We received partnership draws. We had meetings and talked about property maintenance. We eventually had property together. I received IRS documents and tax filings that claimed me as a partner. I paid taxes on my partnership income, it referenced my losses, my partnership losses in [RTP].

Finally, the Heirs produced more than a scintilla of evidence that Marc and Harvey consented to the Heirs becoming partners through post-Assignment conduct. The Heirs produced years of K-1’s indicating their alleged partnership income. A CPA told Ralph the K-1’s indicated they were RTP partners “in the eyes of the IRS.” Marc’s explanation that the Heirs received K-1’s because his CPA decided the IRS needed documentation to account for the money the Heirs were receiving as creditors merely highlights a disputed fact issue as to why the Heirs received tax documents generally provided only to partners. The Heirs also produced years of checks in which the Heirs received “draws,” or partnership distributions signed by Marc, in equal one-third amounts. To the extent Marc explained the “draws” were merely payments toward the Heirs as
redemption creditors, this again creates a fact issue regarding post-Assignment conduct evidencing whether Marc and Harvey consented to the Heirs becoming RTP partners.

Viewing the Assignment and the summary judgment evidence of the parties’ conduct in the light most favorable to the Heirs, there is more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

The court next addressed the sufficiency of the evidence to support the jury’s findings that the Properties in Dispute were not acquired with RTP property and that the partners did not intend the Properties in Dispute to be partnership property. The court concluded that the evidence was sufficient to support the jury’s finding that the Properties in Dispute were not acquired with RTP property as well as the jury’s finding that the partners did not intend the Properties in Dispute to be RTP properties.

The court of appeals acknowledged that the issue of the redemption price would be moot if it was determined on remand that the Heirs were admitted as partners after Judith’s death, but the court of appeals also addressed the sufficiency of the evidence to support the jury’s finding on the amount of the redemption price, i.e., the fair value of Judith’s partnership interest at Judith’s death, in the interest of judicial economy.

The court of appeals acknowledged that the issue of the redemption price would be moot if it was determined on remand that the Heirs were admitted as partners after Judith’s death, but the court of appeals proceeded to address the sufficiency of the evidence to support the jury’s finding on the amount of the redemption price, i.e., the fair value of Judith’s partnership interest at Judith’s death, in the interest of judicial economy.

RTP next contends the evidence is legally and factually insufficient to support the $228,426.67 redemption price finding because the jury was asked only to determine the redemption price at Judith’s death rather than the amount the Heirs were entitled to at the time of trial, which would include past redemption payments. The Heirs respond the evidence is sufficient because RTP’s payments after Judith’s death were not redemption payments, and the jury was not required to apply the fifty-five percent discount because the discount was unsupported by expert testimony.

Question No. 3 asked:
What is the redemption price for Judith Richman’s one-third (1/3) partnership interest in the Richman Trust Partnership?
The redemption price is the fair value of Judith Richman’s partnership interest on the date of her withdrawal from the partnership.
Answer in dollars and cents.
Answer: $228,426.67

To the extent RTP challenges the amount because it paid the Heirs more than $780,000.00 over several decades, meaning, the jury should have awarded zero, we reject this argument in light of our disposition reversing RTP’s motion for partial summary judgment.[footnote omitted] If the Heirs are ultimately determined to be RTP partners, then those payments, which were distributed to Marc and Harvey in the exact same amounts, were not redemption payments but partnership distributions.[footnote omitted] This question remains undecided. However, if it is determined on remand that the Heirs received a redemption interest upon Judith’s death, as explained below, we conclude the evidence is legally and factually sufficient to support the jury’s redemption price in response to Question No. 3.[footnote omitted]

The only evidence before the jury about the “fair value” of the redemption price was in the September 21, 2018 letter Marc sent to the Heirs, which included an independent expert valuation of the fair market value of Judith’s one-third partnership interest as of August 28, 2008, the date of her death and withdrawal. After the expert applied a fifty-five percent discount for lack of control and lack of marketability, the valuation totaled $509,200.00.

The Heirs do not dispute the fair-market values of the RTP Properties per the expert’s valuation; instead, they dispute the fifty-five percent discount because RTP did not explain the discount. They contend the redemption value totals the “net asset value of percentage general partnership interest,” which equaled $969,867.00, per the expert’s valuation before applying the discount.
RTP argues the Heirs provided no expert testimony or evidence of an alternative redemption value and “without any contrary evidence regarding ‘fair value’ for the redemption price, the jury’s finding cannot be sustained.” Essentially, RTP asserts the jury was bound by the expert’s valuation.

Because RTP is attacking the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, it must demonstrate there is no evidence to support the finding. *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014). It is not necessary to have expert testimony from both parties. *City of Keller*, 168 S.W.3d at 819–20. “Even uncontested expert testimony does not bind jurors unless the subject matter is one for experts alone.” *Id.* at 820. However, jurors are not free to disbelieve testimony that is conclusively negated by undisputed facts. *Id.* “But whenever reasonable jurors could decide what testimony to discard, a reviewing court must assume they did so in favor of their verdict, and discard it in the course of legal sufficiency review.” *Id.*

As a general rule, the jury has broad discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for its calculation. *Examination Mgmt. Servs., Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 844 (Tex. App.—Dallas 2012, no pet.). The jury’s findings will not be disregarded merely because its reasoning in arriving at its figures may be unclear, and the fact that there is nothing in the record to show how the jury arrived at a specific amount is not necessarily fatal to the verdict. *Id.* Instead, when the evidence supports a range of awards, an award of damages within that range may be an appropriate exercise of the jury’s discretion. *Id.*

Here, despite RTP’s assertion “there is no rational basis for the calculation,” the jury appears to have used the information in the Redemption Letter. The jury subtracted the market value of the Properties in Dispute (because it determined they were not RTP properties in Question No. 1) from the “Gross Value of Total Partnership Assets” and then divided that value by three as follows: $2,925,280.00 – ($1,250,000.00 + $495,000.00 + $495,000.00)8 / 3 = $228,426.67. Because RTP did not offer evidence explaining why its expert discounted Judith’s one-third interest for lack of control and lack of marketability, the jury acted within its province to ignore the fifty-five percent discount. *See, e.g., Fort Worth Morg. Corp. v. Abercrombie*, 835 S.W.2d 262, 267 (Tex. App.—Houston [14th Dist.] 1992, no writ) (concluding jury’s failure to deduct insurance premiums from award was not erroneous when appellant offered no evidence regarding the discount and did not request a jury instruction on a discounted rate). The record contains more than a scintilla of evidence supporting the award; therefore, the jury’s finding is legally sufficient to support the trial court’s judgment. *City of Keller*, 168 S.W.3d at 827; *Cazarex*, 937 S.W.2d at 450. Likewise, the record is factually sufficient to support the trial court’s judgment because the finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176.

I. Dissolution/Winding Up


The court held that the issue of a limited partnership’s ability to assert claims against the defendant management company for breach of a management agreement of property owned by the limited partnership was an issue of the limited partnership’s capacity to sue rather than standing, and failure of the defendant to file a verified denial of the limited partnership’s capacity waived its right to complain of the lack of capacity. The defendant asserted that the limited partnership was required to wind up upon the withdrawal of the partnership’s LLC general partner, which occurred as a result of forfeiture of the LLC’s right to transact business due to failure to pay franchise tax. *See Tex. Tax Code § 171.2515; Tex. Bus. Orgs. Code §§ 11.051(4), 153.501(b)(2).* The defendant’s assertion that the limited partnership no longer existed, due to an event requiring winding up under the statute and dissolution under its partnership agreement after cessation of the general partner’s status as general partner and failure of the limited partnership to appoint a successor general partner, was a complaint about the limited partnership’s capacity to bring claims, not its standing. The court explained that standing, which is required.
for subject-matter jurisdiction and cannot be waived, requires (1) “a real controversy between the parties,” that (2) “will be actually determined by the judicial declaration sought.” In contrast, when a party has a justiciable interest in a controversy but lacks legal authority to sue, the issue is a lack of capacity, which must be raised by a verified pleading and is waived by the failure to do so.


In this dispute between two companies over the ownership of a trademark and copyrighted materials developed in the course of an informal partnership to promote a comedy tour, the magistrate court concluded that the plaintiff sufficiently alleged that it was the exclusive owner of the copyrighted material by virtue of an assignment from the author of the materials, but the court agreed with the defendant that the trademark was partnership property and that neither party obtained exclusive ownership of the trademark upon dissolution of the partnership. The court concluded that claims for breach of fiduciary duty and tortious interference with prospective relations should be dismissed only to the extent the claims were based on confidential information and thus preempted by the Texas Uniform Trade Secrets Act. The court analyzed veil-piercing allegations and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.

BMN Entertainment, LLC (“BMN”) filed this action against Je’Caryous Johnson Entertainment (“JJE”) and Je’Caryous Johnson (“Johnson”) asserting claims of copyright infringement, declaratory judgment of trademark ownership, and other causes of action relating to a dispute over the ownership and use of a trademark and copyrighted materials in the aftermath of the breakup of an informal partnership between BMN and JJE for the promotion of a comedy tour. BMN additionally alleged that liability should extend to Johnson for each claim against JJE based on corporate veil piercing.

BMN and JJE were companies involved in planning, promoting, and booking talent for events. The parties were introduced in 2018 and started discussing partnering in a comedy tour in 2020. In 2021, they agreed to partner in a comedy tour and to split the profits equally. The first comedy tour that the Parties booked and promoted through their partnership was called the NO CAP COMEDY TOUR (the “Tour”), which occurred between February and May 2022. BMN claimed that it alone created the NO CAP COMEDY TOUR trademark (the “Mark”) and retained Maximus Graphics to create the logos and promotional materials (the “Copyrighted Material”). BMN also claimed to solely own the Copyrighted Material created for the Tour by Fernando Cordero at Maximus Graphics. Defendants disputed these claims. Maximus Graphics transferred the Copyrighted Material to BMN, and BMN successfully registered for the copyrights.

After the Tour, BMN independently sought to commence its own tour (the “BMN Tour”) from September to December 2022. BMN attempted to promote the BMN Tour with the Mark but claimed that they re-branded the BMN Tour due to the defendants outbidding BMN. BMN claims that the defendants were privy to significant “confidential and sensitive business information” and that the parties dissolved their joint business venture and the at-will de facto partnership after a conversation between the owners of BMN and JJE on May 21, 2022. The profits from the Tour were being accounted for so that it could be distributed between each party.

In June 2022, JJE’s counsel sent a letter to entertainment venues stating that JJE had a pending trademark for “No Cap Comedy Tour” and that the venues could not use that trademark in connection with services or goods that did not originate with JJE. BMN asserted that several entertainment venues indicated that they would not allow any use of the Mark because they were concerned about potential liability. On June 6, 2022, JJE filed a trademark application for “NO CAP COMEDY TOUR” and on July 5, 2022, JJE filed three trademark applications for “NO CAP COMEDY,” “NO CAP NO CAP COMEDY TOUR,” and “NO CAP COMEDY TOUR.”

The defendants sought dismissal on the basis that BMN failed to state a claim for relief for reasons including the following: (1) BMN did not provide sufficient allegations to demonstrate partnership property is now owed exclusively by BMN, and consequently, failed to allege a plausible claim for damages; (2) BMN failed to provide factual allegations that would support piercing the corporate veil under Texas law; and (3) BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations were preempted by the Texas Uniform Trade Secrets Act.

The court first concluded that BMN sufficiently alleged that it was the exclusive owner of the Copyrighted Material based on its allegations that the author of the Copyrighted Materials was Fernando Cordero of Maximus Graphics (because he “created substantially all of the artwork/marketing materials”) and that the ownership of the Copyrighted Materials was transferred to BMN via “Corrective Nunc Pro Tunc Copyright Assignment Agreement”
signed by both Fernando Cordero on behalf of Maximus Graphics and one of BMN’s owners on behalf of BMN. The court stated that the defendants mistakenly grouped together the Copyrighted Materials and the Mark in determining ownership by referring to both as “intellectual property” and asserted without authority that the Copyrighted Material and the Mark “are bound together ... and BMN has no right to use the [Copyrighted Material] independently unless it can establish a right to use the Mark also.”

With respect to the Mark, the defendants argued that the partnership owned the Mark because it was first used in commerce by the partnership. BMN argued that it owned the Mark exclusively because it controlled the quality of services under the Mark. The Court agreed with the defendants as to the ownership of the Mark by the partnership and further addressed the effect of the break-up or dissolution of the partnership on the ownership of the Mark.

If there is evidence of a joint venture or de facto partnership in which each partner contributes substantially to the partnership’s efforts and reputation, the trademark is best treated as an asset of a de facto partnership absent a contractual agreement. Lunatrex, LLC v. Cafasso, 674 F. Supp. 2d 1060, 1073 (S.D. Ind. 2009). Here, while there was no written partnership agreement, the Parties agreed to partner in the Tour, split profits, and promote the Tour. (Dkt. No. 40 at ¶¶ 12-17; Dkt. No. 47 at 8.) In addition to promoting the Tour, both BMN and Defendants played a substantial role because Defendants handled the routing of the tour and BMN booked the comedic talent to perform. (Dkt. No. 40 at ¶ 17.) The Parties agreed to the NO CAP COMEDY TOUR name and “booked and promoted jointly through their partnership ... between February and May, 2022.” (Id. at ¶ 25.) BMN has not presented any evidence that it first used the Mark in commerce independent of the partnership, but rather the Parties first used the Mark in the Tour. (Id. at ¶¶ 25-27.) As such, BMN has failed to establish that it is the exclusive owner of the Mark.

Next, Defendants argue that BMN has not sufficiently alleged that the partnership was terminated and wound up and thus, the BMN never became the exclusive owner of the Mark. (Dkt. No. 44 at 16-19.) Defendants also argue that the Mark can only be used on behalf of the partnership because the partnership has not been terminated and wound up. (Id. at 17-19.) Conversely, BMN claims that the partnership was dissolved and the rights in the Mark became sole property of BMN. (Dkt. No. 47 at 16-20.)

“[C]ourts have treated ... informal cooperative efforts as joint ventures or de facto partnerships or associations and held that the rights may be exercised only by the group as a whole.” Lunatrex, LLC, 674 F. Supp. 2d at 1073 (citing Durango Herald, Inc. v. Riddle, 719 F.Supp. 941, 951–52 (D.Colo.1988)) (holding that neither party in dissolved joint venture was entitled to use trademarks without consent of the other). Where each partner has made significant contributions to the partnership, the creation of the mark’s value, and protected status, awarding control of the mark to one partner would ignore the contributions the other partners made. Id. at 1074. Without a showing of “special prominence and individual rights to the trademark,” the trademark belongs to each partner and none of the partners may use the mark to the exclusion of the other partners. Id. The policy in preventing all the partners from using the mark without the consent of all the other partners is to prevent confusion in the public. Id. at 1075. “Typically, when a partnership breaks up, the assets are distributed among the partners ... however [a trademark] is not divisible.” Id.

Here, BMN has sufficiency [sic] alleged that the partnership was dissolved when BMN withdrew from the partnership via oral communication of withdrawal. TEX. BUS. ORG. CODE § 152.501(b) (stating that a “person ceases to be a partner on the occurrence of an event of withdrawal” and that an event of withdrawal of a partner occurs on “receipt by the partnership of notice of the partner’s express will to withdraw as a partner”); Leal v. Mokhabery, 360 B.R. 231, 240 n.6 (Tex. S. Bank. Ct. Jan. 9, 2007) (“[T]he withdrawal of Leal, one of All American’s two partners, effectively dissolved the partnership.”). However, when a partnership dissolves or permanently breaks up, the trademark can neither be divided between the Parties nor given exclusive ownership to one partner unless each partner consents. See Lunatrex, LLC, 674 F. Supp. 2d at 1075; Durango Herald, Inc., 719 F.Supp. at 951-52. As such, neither BMN nor Defendants
have the exclusive ownership of the Mark upon dissolution and use of the Mark by either Party must be accompanied by consent of the other Party.

Next, Defendants argue that BMN cannot sufficiently allege that it suffered any damages because the Mark is partnership property that can only be used on behalf of the partnership. (Dkt. No. 44 at 17.) BMN argues that it has been harmed by JJE holding itself out as the sole owner of the Mark, even if the partnership owns the rights in the Mark. (Dkt. No. 47 at 20-22.) When a de facto partnership or joint venture owns a mark, “each team member is harmed when an entity other than the entire team uses the mark.” Lunatrex, LLC, 674 F. Supp. 2d at 1072. As such, BMN has sufficiently alleged that it was harmed by Defendants holding themselves out as sole owner of the Mark.

The defendants argued that BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations should be dismissed to the extent the claims were based upon the use of confidential information because the claims were preempted by the Texas Uniform Trade Secrets Act (TUTSA). BMN asserted that the claims for breach of fiduciary duty and tortious interference with prospective relations were not preempted by TUTSA, arguing that the defendants relied upon an inaccurate premise that BMN alleged that compensation information constitutes a trade secret. The court addressed the preemption issue as follows, concluding that the claims should be dismissed only to the extent the claims were based on confidential information and thus preempted.

 Defendants argued that BMN failed to state a claim for relief as to Johnson “individually because it fails to provide factual allegations that would support piercing the corporate veil under Texas law.” The court analyzed the veil-piercing allegations and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.

J. Death, Withdrawal, or Expulsion of Partner


The court held that injunctive relief prohibiting a removed general partner from resuming its position and prohibiting the former general partner and other parties from interfering with the new general partner’s duties as managing partner was improper because the status quo that is to be preserved by injunctive relief cannot be a relationship as it exists after being altered by an action that is contested.

Smith, individually and as trustee of a trust for his children’s benefit, purported to remove JCS Money Maker, LLC (“JCS”) as managing partner of two limited partnerships (“Marrs” and “RSR”) and install himself, individually, in JCS’s place pursuant to various terms of the partnership agreements of Marrs and RSR. Upon removal of JCS and installation of Smith, Smith sued for declaratory judgment (recognizing the removal of JCS and installation of Smith) and interim injunctive relief. The trial court granted a temporary injunction that effectively enjoined JCS, Smith’s children, and others from acting as general partner or impeding Smith’s operations of Marrs and RSR. JCS appealed.

The court of appeals reversed and dissolved the temporary injunction because it did not preserve the status quo, explaining:

No one disputes that JCS was the formal managing partner of both Marrs and RSR until April of 2023.[footnote omitted] That is when Smith endeavored to remove or oust it from the position. Removing JCS then “create[ed] an Event of Withdrawal of [JCS] as General Partner of” each limited partnership, according to the trial court. The court continued by finding that with JCS gone, the limited partners then “voted to install Rickey Smith as [their] General Partner and Managing Partner.” At that point, Smith sued to recognize the ouster and appointment. Then came its request for injunctive relief 1) prohibiting JCS from resuming its managerial position, 2) placing Smith in that position, and 3) enjoining JCS and Smith’s children from interfering with Smith’s duties as managing partner. That resulted in the trial court ordering JCS and Smith’s children to refrain from taking 1) “any action or performing any function as Managing Partner and/or General
Partner of Marrs or [RSR] ...” and 2) “any action inconsistent with Rickey Smith’s duties, obligations, and rights as Managing Partner and General Partner of Marrs and [RSR] ....”

The foregoing scenario falls squarely into the framework described in Mendoza, Frey, Hyde, Universal, and by several other courts of appeals. An act of one party (Smith) altered the relationship between JCS and Smith, Marrs, and RSR. JCS then contested the action, but Smith arrived at the courthouse first. Thus, the status quo “cannot be the relationship as it exists after the” acts of Smith, that relationship being the ouster of JCS and installation of Smith. Yet, that is the very status the trial court protected by enjoining JCS from both acting as managing partner of Marrs and RSR and impeding Smith from performing duties as the new managing partner.

Richman Trusts v. Time, No. 05-22-00445-CV, 2024 WL 510339 (Tex. App.—Dallas Feb. 9, 2024, no pet. h.) (mem. op.).

In this dispute involving a family general partnership, the court addressed whether three parcels of real property were acquired by the partnership or by family members in their individual capacities, whether the heirs of one of the original partners were admitted as partners, and, if the heirs were not admitted as partners, whether the jury’s finding of the redemption price owed to the heirs for the deceased partner’s partnership interest, i.e., the “fair value” of the interest, was supported by the evidence. The court concluded that the evidence was sufficient to support the jury’s finding that the parcels of real property at issue were not acquired with property of the partnership and were not intended by the partners to be partnership properties. The court concluded that there was an issue of material fact as to whether the heirs of the deceased partner were admitted as partners such that the trial court’s summary judgment on that issue was erroneous. Recognizing that the outcome on remand might render the issue of the redemption price irrelevant (i.e, if the heirs were admitted as partners, no redemption was triggered by the death of the partner), the court addressed the jury’s finding on the amount of the redemption price in the interest of judicial economy, and the court concluded that the evidence was sufficient to support the jury’s finding.

Victor Richman and his wife, Maryon, had three children: Judith, Harvey, and Marc. In 1955, they created two trusts for each child. Each of the six trusts terminated when the beneficiary turned thirty, and the trusts’ assets were distributed to that child, individually. Judith turned thirty in 1968, Harvey in 1969, and Marc in 1975. At some point Victor created Richman Trusts, a Texas general partnership (“RTP”), which had no written partnership agreement, but it was undisputed that Judith, Harvey, and Marc were RTP’s general partners, each with an equal one-third partnership interest. Victor was not a partner, but he managed and controlled RTP, which included managing all the Richman family properties.

Victor and Maryon purchased numerous real properties in Dallas (RTP Partnership Properties) through the years. Whether they used their individual funds to purchase three specific properties at issue in this case or gifted funds to RTP that RTP subsequently used to purchase the properties was disputed at trial and now on appeal. The specific properties at issue in this case (the Properties in Dispute) were: (1) the Record Street Properties, purchased on October 31, 1967, in the names of the six trusts established by Victor and Maryon for their children (each trust receiving an undivided 1/6th interest); (2) the Greenville Avenue Property, purchased on March 4, 1969, in the name of the Harvey Richman Trusts No. 1 and 2, the Marc Richman Trusts No. 1 and 2, and Judith, individually, because she had already turned thirty; and (3) the Richmond Avenue Property, purchased on October 9, 1972, also in the names of the four trusts and Judith, individually.

Marc, who was also an attorney, became RTP’s managing partner when Victor’s health began to decline in 1985.

Judith died in 2008, leaving three children: Ralph, Robin, and Brenda. Ralph had no children. Brenda had three children. Robin had two children. Before her death, Judith created the 2008 Richman Revocable Trust (the 2008 Trust) and upon her death, her Estate bequeathed all of her property, which included her “33.333% general partner interest in [RTP]” to the 2008 Trust. The 2008 Trust identified Ralph as trustee. The 2008 Trust identified the beneficiaries as Ralph, in trust, and each of the children of Brenda and Robin, in trust. In administering the Estate, Ralph as trustee of the 2008 Trust, assigned Judith’s one-third interest in RTP to the beneficiaries of the 2008 Trust (the “Heirs”). The “Assignment of Partnership Interest” (Assignment) was executed on January 6, 2010, but made effective as of August 1, 2009. Marc signed the Assignment as general partner under the notation, “NOTICE RECEIVED AND TRANSFER ACCEPTED.”

For about ten years, Ralph, Brenda, and Robin received what they believed were RTP partnership distributions and IRS Schedule K-1’s. The distributions were always equal to Marc’s and Harvey’s distributions.
Marc asserted that he never believed the Heirs were RTP partners and did not believe the Assignment made them partners. Although he kept the Heirs informed, he described his updates related to the properties as “trying to do right” by his sister’s children. He believed Judith’s death resulted in her withdrawal from RTP leaving the Heirs with only a creditor’s redemption interest in RTP.

In September 2018, Marc sent the Heirs a “Redemption Letter” for their “Creditors’ interest in the Richman Trusts.” The letter included an expert valuation of the fair market value of Judith’s one-third interest in RTP at the time of her death. The valuation totaled $509,200.

Upon realizing there was a difference of opinion regarding the Heirs’ status with respect to RTP, the Heirs investigated the Assignment and Properties in Dispute. The deeds to the Properties in Dispute revealed the properties had been deeded to Judith, Harvey, and Marc in individual one-third interests and not to RTP. Despite the individuals’ names being on the deeds, Marc believed RTP owned the three properties. The Heirs believed Judith, Harvey, and Marc owned them as tenants-in-common before Judith’s death.

The Heirs also disagreed with the valuation of Judith’s redemption interest. The redemption letter gave the Heirs one year to accept the valuation or file suit to challenge the valuation, and the Heirs filed suit.

The Heirs sought determinations that they are partners in RTP and owners of an undivided one-third interest in the Properties in Dispute. Alternatively, they sought a determination of the redemption price of Judith’s one-third partnership interest in RTP on the date of her death. RTP filed a motion for partial summary judgment on the Heirs’ request to be declared RTP partners. The trial court granted the motion, concluding that Judith’s death was an event of withdrawal pursuant to the Texas Business Organizations Code and that the Heirs were never RTP partners. The remainder of the case proceeded to trial before a six-person jury. At the conclusion of testimony, the jury was asked three questions: (1) “Do you find that the Properties in Dispute were acquired with RTP property?”; (2) “Do you find that the intent of the partners of RTP was that the Properties in Dispute were owned by RTP rather than by the individual partners?”; and (3) “What is the redemption price for Judith Richman’s one-third (1/3) partnership interest in the Richman Trust Partnership?” The jury answered “No” to questions 1 and 2 and determined Judith’s redemption price for her one-third interest was $228,426.67. The trial court entered judgment on the verdict. Both parties appealed.

The court of appeals first determined that the trial court’s summary-judgment determination that the Heirs did not become partners after Judith’s death was erroneous because there was more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

It is undisputed RTP never had a written partnership agreement; therefore, it is a general partnership under Texas law and governed by the Texas Business Organizations Code. See TEX. BUS. ORGS. CODE ANN. § 152.002(a). The parties agree that Marc and Harvey, as the remaining partners after Judith’s death, both needed to consent for the Heirs to become partners. See id. § 152.201. It is also undisputed the Assignment is valid and enforceable; however, the parties dispute the effect of the Assignment with regard to Judith’s one-third RTP interest.

Section 152.501(a) of the Texas Business Organizations Code provides that a “person ceases to be a partner on the occurrence of an event of withdrawal.” Id. § 152.501(a). An “event of withdrawal of a partner occurs” upon “the partner’s death.” Id. § 152.501(b)(7)(a).

Section 152.406, provides, in relevant part, the following regarding the “Effect of Death” on “Partnership Interest”:

(a) For purposes of this code: ... 
(2) on the death of a partner: 
(A) if the partnership interest of the deceased is subject to redemption under Subchapter H, the partner’s surviving spouse, if any, and an heir, devisee, personal representative, or other successor of the partner, to the extent of their representative right to the redemption price, are creditors of the partnership until the redemption price is paid.

Id. § 152.406(a)(2)(A).

RTP argues Judith’s death resulted in her withdrawal from the partnership, leaving her Estate and the 2008 Trust a redemption interest in RTP, not a partnership interest. See id. §§ 152.501(a), (b)(7)(A), 152.406(a)(2)(A). This interpretation presupposes that the transformation
of Judith’s general partnership interest to a redemption interest was not only automatic upon her
death, but also unalterable by the parties. Section 152.406(c) of the business and organizations
code states otherwise: “This chapter does not impair an agreement for the purchase or sale of a
partnership interest at any time, including on the death or divorce of an owner of the partnership.”
Id. § 152.406(c).

According to the statute, Judith’s partnership interest was subject to a redemption upon
her death. However, the statute allows the parties to enter into an agreement for the purchase or
sale of the partnership interest at any time, “including on the death” of the partnership interest
owner. Id. Thus, we begin by considering whether the Assignment created an agreement for the
purchase or sale of Judith’s partnership interest, regardless of her death.

When construing a written assignment, we apply the rules of interpretation and
construction applicable to contracts. Elness Swenson Graham Architects, Inc. v. RLJII-C Austin
Air, LP, 520 S.W.3d 145, 154 (Tex. App.—Austin 2017, pet. denied). Our primary goal is to
ascertain the intent of the parties as expressed in the written assignment. Id. To accomplish that
objective, we examine and consider the entire writing in an effort “to harmonize and give effect
to all the provisions of the contract so that none will be rendered meaningless.” Id.

Here, the title of the document is “Assignment of Partnership Interest.” The Assignment
acknowledged, “Judith Sharon Richman owned a 33.3333% general partner interest in the Richman
Trust Investments, a Texas general partnership, (the “Partnership”) at the time of her death.” It
further recognized that “pursuant to the terms of her Last Will and Testament,” all of her interest
in the Partnership passed to the Richman 2008 Trust, which then, pursuant to the Trust terms,
distributed the 33.3333% interest in the Partnership to the various Heirs.[footnote omitted] Ralph,
in his capacity as the independent executor of the Estate and in his capacity as trustee of the 2008
Trust, “instruct[ed] the General Partner of the Partnership, in writing, of Assignor’s and Assignee’s
desire that Assignor assign to Assignee Assignor’s 33.3333% Partnership Interest (the “Assigned
Partnership Interest”) in the Partnership as set forth above.” The Assignment states the “Assignor
does hereby grant, sell, assign, transfer, and convey the Assigned Partnership Interest unto each
Assignee ....”

Marc signed the Assignment on behalf of RTP as general partner. Directly above his
signature, the Assignment specified, “NOTICE RECEIVED AND TRANSFER ACCEPTED.”
According to the Heirs, their partnership status went unquestioned for ten years before Marc
suddenly claimed Judith’s death resulted in a complete withdrawal of her partnership interest
regardless of the Assignment. Moreover, the Assignment is titled “Assignment of Partnership
Interest” and repeatedly identifies Judith’s 33.3333% partnership interest in RTP as the interest
being assigned through her Will and the 2008 Trust, which Marc “received” and “accepted” by
signing the document as RTP’s general partner.

Contrary to RTP’s position, Judith’s death did not foreclose the possibility of transferring
her partnership interest. RTP provides no authority, and we have found none, to support its
argument that section 152.406(c) is only a prospective provision allowing a partner to contract for
the sale of a partnership interest before the event of withdrawal. Thus, the Assignment does not
establish, as a matter of law, that the Heirs were entitled to only a redemption interest in RTP. In
fact, the Assignment never uses the term “redemption interest,” but instead refers to the
“partnership interest” eight times.[footnote omitted]

RTP contends that regardless of whether the Assignment could transfer a partnership
interest, summary judgment was still appropriate because there is no evidence Harvey and Marc
consented to the transfer. We disagree and, as explained below, conclude the Heirs presented more
than a scintilla of evidence raising a fact issue as to whether Marc and Harvey consented.

Section 152.201 states, “A person may become a partner only with the consent of all
partners.” TEX. BUS. ORGS. CODE ANN. § 152.201. Importantly, this section does not require
consent in writing. Marc’s signature, as RTP’s general partner, bound RTP to the Assignment
through his “accept[ance]” of the “transfer.” See id. § 152.302 (“an act of a partner, including the
execution of an instrument in the partnership name, binds the partnership”). Moreover, Marc did
not argue in appellants’ motion for partial summary judgment that his signature on the Assignment
was no evidence of his consent, but rather that his signature “fails to provide definitive proof of consent.” The Heirs did not need to provide definitive proof to overcome summary judgment. Instead, they only needed to present more than a scintilla of evidence creating a fact issue. *Ridgeway*, 135 S.W.3d at 600–01.

The summary judgment record demonstrates Marc and Harvey discussed “major” decisions affecting RTP. Harvey explained during his deposition that Marc would talk to him, he would tell Marc whether he agreed or disagreed, and “Marc signs whatever we both agree to.” Marc likewise testified that when he needed Harvey’s consent for RTP matters, they conferred, and then he signed on behalf of the partnership as managing general partner. While section 152.201 requires the consent of all partners before another person may become a partner, it does not require such consent in writing. See TEX. BUS. ORGS. CODE ANN. § 152.201. Thus, Marc’s and Harvey’s testimony provides more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc executed the Assignment as managing general partner of RTP and on behalf of Harvey because they had discussed and Harvey had consented to the admission of the Heirs as partners.

The record also contains disputed testimony about conversations between family members regarding Judith’s RTP interest. Marc testified he told the Heirs in the hospital chapel before Judith died, they would not become partners. Marc testified he never believed they were partners, never said they were partners, never accepted them as partners, and never wanted them to be partners. He also stated the Heirs agreed in writing on several occasions they were only creditors with a redemption interest, and they admitted consulting an attorney who told them the same. Marc explained he executed the Assignment with an understanding that “Judy’s estate’s interest, their redemptive interest, was transferred to these people and that I was to pay them. And I said, okay, I’ll do that. And I did do that.”

Ralph, however, testified Marc and Harvey treated the Heirs as partners prior to the Assignment. “They provided consent shortly after my mom passed away in 2008.” He testified the Assignment was backdated with the effective date of August 1, 2009, because that was the date they agreed the Heirs were admitted into the partnership. Ralph explained,

> There was never any question at the time for years. We simply thought and acted as partners. We received partnership draws. We had meetings and talked about property maintenance. We eventually had property together. I received IRS documents and tax filings that claimed me as a partner. I paid taxes on my partnership income, it referenced my losses, my partnership losses in [RTP].

Finally, the Heirs produced more than a scintilla of evidence that Marc and Harvey consented to the Heirs becoming partners through post-Assignment conduct. The Heirs produced years of K-1’s indicating their alleged partnership income. A CPA told Ralph the K-1’s indicated they were RTP partners “in the eyes of the IRS.” Marc’s explanation that the Heirs received K-1’s because his CPA decided the IRS needed documentation to account for the money the Heirs were receiving as creditors merely highlights a disputed fact issue as to why the Heirs received tax documents generally provided only to partners. The Heirs also produced years of checks in which the Heirs received “draws,” or partnership distributions signed by Marc, in equal one-third amounts. To the extent Marc explained the “draws” were merely payments toward the Heirs as redemption creditors, this again creates a fact issue regarding post-Assignment conduct evidencing whether Marc and Harvey consented to the Heirs becoming RTP partners.

Viewing the Assignment and the summary judgment evidence of the parties’ conduct in the light most favorable to the Heirs, there is more than a scintilla of evidence raising a genuine issue of material fact as to whether Marc and Harvey consented to the Heirs becoming RTP partners.

The court next addressed the sufficiency of the evidence to support the jury’s findings that the Properties in Dispute were not acquired with RTP property and that the partners did not intend the Properties in Dispute to be partnership property. The court concluded that the evidence was sufficient to support the jury’s finding that the
Properties in Dispute were not acquired with RTP property as well as the jury’s finding that the partners did not intend the Properties in Dispute to be RTP properties.

The court of appeals acknowledged that the issue of the redemption price would be moot if it was determined on remand that the Heirs were admitted as partners after Judith’s death, but the court of appeals proceeded to address the sufficiency of the evidence to support the jury’s finding on the amount of the redemption price, i.e., the fair value of Judith’s partnership interest at Judith’s death, in the interest of judicial economy.

RTP next contends the evidence is legally and factually insufficient to support the $228,426.67 redemption price finding because the jury was asked only to determine the redemption price at Judith’s death rather than the amount the Heirs were entitled to at the time of trial, which would include past redemption payments. The Heirs respond the evidence is sufficient because RTP’s payments after Judith’s death were not redemption payments, and the jury was not required to apply the fifty-five percent discount because the discount was unsupported by expert testimony.

Question No. 3 asked:
What is the redemption price for Judith Richman’s one-third (1/3) partnership interest in the Richman Trust Partnership?
The redemption price is the fair value of Judith Richman’s partnership interest on the date of her withdrawal from the partnership.
Answer in dollars and cents.
Answer: $228,426.67

To the extent RTP challenges the amount because it paid the Heirs more than $780,000.00 over several decades, meaning, the jury should have awarded zero, we reject this argument in light of our disposition reversing RTP’s motion for partial summary judgment.[footnote omitted] If the Heirs are ultimately determined to be RTP partners, then those payments, which were distributed to Marc and Harvey in the exact same amounts, were not redemption payments but partnership distributions.[footnote omitted] This question remains undecided. However, if it is determined on remand that the Heirs received a redemption interest upon Judith’s death, as explained below, we conclude the evidence is legally and factually sufficient to support the jury’s redemption price in response to Question No. 3.[footnote omitted]

The only evidence before the jury about the “fair value” of the redemption price was in the September 21, 2018 letter Marc sent to the Heirs, which included an independent expert valuation of the fair market value of Judith’s one-third partnership interest as of August 28, 2008, the date of her death and withdrawal. After the expert applied a fifty-five percent discount for lack of control and lack of marketability, the valuation totaled $509,200.00.

The Heirs do not dispute the fair-market values of the RTP Properties per the expert’s valuation; instead, they dispute the fifty-five percent discount because RTP did not explain the discount. They contend the redemption value totals the “net asset value of percentage general partnership interest,” which equaled $969,867.00, per the expert’s valuation before applying the discount.

RTP argues the Heirs provided no expert testimony or evidence of an alternative redemption value and “without any contrary evidence regarding ‘fair value’ for the redemption price, the jury’s finding cannot be sustained.” Essentially, RTP asserts the jury was bound by the expert’s valuation.

Because RTP is attacking the legal sufficiency of an adverse finding on which it did not have the burden of proof at trial, it must demonstrate there is no evidence to support the finding. *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014). It is not necessary to have expert testimony from both parties. *City of Keller*, 168 S.W.3d at 819–20. “Even uncontroverted expert testimony does not bind jurors unless the subject matter is one for experts alone.” *Id.* at 820. However, jurors are not free to disbelieve testimony that is conclusively negated by undisputed facts. *Id.* “But whenever reasonable jurors could decide what testimony to discard, a reviewing court must assume they did so in favor of their verdict, and discard it in the course of legal sufficiency review.” *Id.*
As a general rule, the jury has broad discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for its calculation. *Examination Mgmt. Servs., Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 844 (Tex. App.—Dallas 2012, no pet.). The jury’s findings will not be disregarded merely because its reasoning in arriving at its figures may be unclear, and the fact that there is nothing in the record to show how the jury arrived at a specific amount is not necessarily fatal to the verdict. Id. Instead, when the evidence supports a range of awards, an award of damages within that range may be an appropriate exercise of the jury’s discretion. Id.

Here, despite RTP’s assertion “there is no rational basis for the calculation,” the jury appears to have used the information in the Redemption Letter. The jury subtracted the market value of the Properties in Dispute (because it determined they were not RTP properties in Question No. 1) from the “Gross Value of Total Partnership Assets” and then divided that value by three as follows: $2,925,280.00 – ($1,250,000.00 + $495,000.00 + $495,000.00)/3 = $228,426.67. Because RTP did not offer evidence explaining why its expert discounted Judith’s one-third interest for lack of control and lack of marketability, the jury acted within its province to ignore the fifty-five percent discount. See, e.g., *Fort Worth Morg. Corp. v. Abercrombie*, 835 S.W.2d 262, 267 (Tex. App.—Houston [14th Dist.] 1992, no writ) (concluding jury’s failure to deduct insurance premiums from award was not erroneous when appellant offered no evidence regarding the discount and did not request a jury instruction on a discounted rate). The record contains more than a scintilla of evidence supporting the award; therefore, the jury’s finding is legally sufficient to support the trial court’s judgment. *City of Keller*, 168 S.W.3d at 827; *Cazarex*, 937 S.W.2d at 450. Likewise, the record is factually sufficient to support the trial court’s judgment because the finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176.


The court held that the issue of a limited partnership’s ability to assert claims against the defendant management company for breach of a management agreement of property owned by the limited partnership was an issue of the limited partnership’s capacity to sue rather than standing, and failure of the defendant to file a verified denial of the limited partnership’s capacity waived its right to complain of the lack of capacity. The defendant asserted that the limited partnership was required to wind up upon the withdrawal of the partnership’s LLC general partner, which occurred as a result of forfeiture of the LLC’s right to transact business due to failure to pay franchise tax. See Tex. Tax Code § 171.2515; Tex. Bus. Orgs. Code §§ 11.051(4), 153.501(b)(2). The defendant’s assertion that the limited partnership no longer existed, due to an event requiring winding up under the statute and dissolution under its partnership agreement after cessation of the general partner’s status as general partner and failure of the limited partnership to appoint a successor general partner, was a complaint about the limited partnership’s capacity to bring claims, not its standing. The court explained that standing, which is required for subject-matter jurisdiction and cannot be waived, requires (1) “a real controversy between the parties,” that (2) “will be actually determined by the judicial declaration sought.” In contrast, when a party has a justiciable interest in a controversy but lacks legal authority to sue, the issue is a lack of capacity, which must be raised by a verified pleading and is waived by the failure to do so.

**K. Veil Piercing**


The court held that the government’s evidence was sufficient to establish that various entities—including partnerships, trusts, and LLCs—were the alter egos and nominees of individual taxpayers so as to allow the government to reach property of the business entities to satisfy income-tax liabilities of the individual taxpayers. The government sought to enforce tax liens against certain real properties held by entities owned or controlled by Richard and Kay Ohendalski. The Ohendalskis owed significant amounts of federal income taxes and civil penalties, and the government asserted that Hodge-Ross Co., LLC, West Hill Investments LLC, West Hill Park Office Ltd. Co., Stephens Associates Trust, Swan Point Trust, Crystal Flyers Trust, and Wilson Heirs Trust
through their trustee, Richard Ohendalski, HIS Partners, HIS Joint Venturers, Crystal Flyers, LLC, Fidelis Texas, JSC, and Karpos Company (the “Ohendalski Entities”) were alter egos and/or nominees of the Ohendalskis. The court found in favor of the government.

With regard to the government’s alter-ego argument, the court stated that the evidence established that the Ohendalski Entities are “an intricately intertwined web of entities that serve primarily as an extension of the Ohendalskis’ personal interest and financial dealings.” As an example, the court pointed to HIS Partners, a Texas partnership, stating that the partnership “serves as a conduit for income and expenses for the Ohendalskis” and “Richard serves as the sole operator and controller of its financial transactions. He has exclusive authority over HIS Partners’ bank accounts and the use of the entity’s funds.” The court also pointed to a similar situation with respect to Hodge-Ross Company, LLC (“HRC”), “which holds the Ohendalskis’ residential property and is managed solely by Richard. Kay is the sole beneficiary of the Stephens Associates Trust, which in turn holds a mortgage on the HRC’s property. Their involvement, as such, establishes a seamless relationship between the entities and the Ohendalskis.” The court stated that further evidence established that “the Stephens Associates Trust (“SAT”) initially created with office equipment as its assets, has evolved into a vehicle that is used by Richard to manage financial affairs of other properties,” stating that Richard’s “role as trustee and SAT’s own indebtedness to the IRS, coupled with Richard’s refusal to address question regarding ownership, leads the Court to conclude that SAT is also an alter ego of the Ohendalskis.”

The Court reached the same conclusion with respect to the other Ohendalski Entities. The court concluded its alter-ego discussion by stating:

The alter ego doctrine applies when an individual utilizes a corporate entity as an instrumentality to circumvent legal obligations. Fifth Circuit case law emphasized that the assets of an alter ego can be levied upon to satisfy the debts of an individual when corporate boundaries are disregarded. See Zahra Spiritual Trust v. United States, 910 F.2d 240, 244-245 (5th Cir. 1990). Boundaries have been disregarded when there is commingling of funds, a failure to observe corporate formalities, and where control over an entity’s affairs are in the hands of an individual who uses the entities for personal particularly financial gain. See Century Hotels v. United States, 952 F.2d 107, 110 (5th Cir. 1992). Without doubt, the evidence establishes Richard and Kay’s extensive control over these entities, including ownership, management, and the intermingling of the finances of the entities for their personal use.

The court also concluded that the government was entitled to summary judgment on its claim that the Ohendalski Entities functioned as nominees for their personal enrichment.

An examination of the evidence also reveals a compelling narrative that the entities including HIS Joint Venturers, Crystal Flyers LLC, Crystal Flyers Trust, Swan Point Trust, Fidelis Texas JSC, Karpos Company, and Wilson Heirs Trust, are nominees of the Ohendalskis. Through a detailed analysis of their structure, transactions, and interactions, the government has demonstrated that these Ohendalski Entities serve as mere facades, lacking genuine independence or substance. Case law has set out factors to assist in discerning the true beneficial owner of an entity. See Oxford Capital Corp. v. United States, 211 F.3d 280, 284 (5th Cir. 2000) (citing Towe Antique Ford Foundation v. Internal Revenue Service, 791 F. Supp. 1450, 1454 (D. Mont. 1992). A fact finder determines whether there is an absence or inadequacy of consideration paid by the nominee for services rendered, whether here is an intimate relationship between a taxpayer and the nominee, and whether there is the retention of control or possession by a taxpayer, among others. Id at 284.

In this case, a pattern of behavior is revealed by the Ohendalskis that demonstrates that they have shielded themselves from accountability; that they have refused to provide crucial information that would establish or not the government’s allegations.
In his capacity as the receiver, Kretzer entered an appearance in a lawsuit pending in a Travis County district court (the “La Zona Rio Lawsuit”) in which WC 4th and Rio Grande, LP (“Rio Grande, LP”) had sued Appellee La Zona Rio, LLC (“La Zona Rio”) to stop La Zona Rio from foreclosing on a building owned by Rio Grande, LP. In his notice, Kretzer stated that he was replacing the attorney for Rio Grande, LP, which he asserted was a “subsidiary” of WCCG; however, he filed no evidence supporting that contention.

Rio Grande, LP filed a motion challenging Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, arguing it was neither a subsidiary of WCCG nor an entity owned or managed by WCCG, but instead a separate legal entity. The trial court did not rule on the motion, but impliedly found that Kretzer had the authority to act on Rio Grande, LP’s behalf and granted a joint motion to dismiss the lawsuit based on representations made by Kretzer and La Zona Rio’s attorney that the parties had resolved their claims against each other.

Rio Grande, LP, through its retained counsel, Burford Perry, filed this second lawsuit against La Zona Rio in Travis County, bringing claims of quiet title and trespass to try title, and further seeking a declaration that it was the true owner of the property. In its petition, which was assigned to a different Travis County judge, Rio Grande, LP again challenged Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, to enter into the settlement agreement with La Zona Rio, and to sign a deed in lieu of foreclosure on its behalf pursuant to that agreement.

Kretzer then filed a notice of nonsuit, purporting to act in his capacity as the “court appointed Receiver for World Class Capital Group, LLC, Manager of WC 4th and Rio Grande, LP, Plaintiff.” Rio Grande, LP, through its retained attorney, filed a withdrawal of notice of nonsuit, contending that Kretzer was not authorized to act on its behalf in the lawsuit and that the notice was filed without Rio Grande, LP’s permission. Rio Grande, LP also filed a motion to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure, challenging Kretzer’s authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit as well as his authority to act on its behalf in the second lawsuit. In his opposition to the Rule 12 motion, Kretzer included various “company agreements” setting forth the relationships between WCCG, Rio Grande, LP and various other World Class entities, as follows:

1. Natin Paul is the president, sole member, and manager of World Class Capital Group, LLC.
2. World Class Capital Group, LLC is the sole member and manager of World Class Real Estate, LLC.
3. World Class Real Estate, LLC is the sole member of WC 4th and Rio Grande GP, LLC.
4. WC 4th and Rio Grande, LP was created as a partnership between WC 4th and Rio Grande GP, LLC, as the general partner and three other limited partners.

Kretzer argued that these agreements demonstrated a sufficient relationship between Natin Paul; WCCG; Rio Grande, LP; and its general partner, WC4th and Rio Grande, GP, LLC to allow Kretzer to seize control of the La Zona Rio Lawsuit pursuant to his authority under the Receivership Order.

Ultimately, the trial court denied Rio Grande, LP’s motion and granted Kretzer’s motion for entry of order of dismissal and ordered the case dismissed with prejudice. Rio Grande, LP appealed the order of dismissal, and the court of appeals addressed the appeal of this second lawsuit in this opinion.

In this second lawsuit, Rio Grande, LP continued to assert Kretzer lacked the authority to act on its behalf in the La Zona Rio Lawsuit, but Rio Grande, LP also challenged Kretzer’s authority to act on its behalf in this second lawsuit, specifically, to file a nonsuit of its case in his capacity as the receiver appointed in the Princeton Lawsuit. The court of appeals stated that its focus here was the challenge to Kretzer’s authority to file the nonsuit in this second lawsuit, as the filing of the nonsuit led to the trial court’s dismissal order, which in turn was the subject of Rio Grande, LP’s appeal. The court concluded that the record did not support the trial court’s implied
finding that Kretzer had authority to nonsuit this second lawsuit brought by Rio Grande, LP against La Zona Rio or the trial court’s dismissal pursuant to the filing of the nonsuit.

As set forth above, the Receivership Order gave Kretzer the authority to seize control of assets, including causes of action, belonging to judgment debtor WCCG. But as we explained in our first opinion, to the extent Rio Grande, LP is considered a separate legal entity entitled to the Texas Business Organizations Code protections, the Receivership Order did not give Kretzer the authority to seize its partnership property or its causes of action. And in the present case, while Kretzer has provided more evidence to establish that WCCG and Rio Grande, LP are related—and that they may even have a parent-subsidiary relationship—he has still not provided any evidence that would have allowed the trial court to conclude that WCCG treated Rio Grande, LP as alter egos. Similarly, there is no evidence in the record before us that would have otherwise allowed the trial court to disregard the separate business structure of each entity and treat them as one and the same as WCCG.

In addition, although Kretzer relied heavily on the provision in the Receivership Order giving him the authority to take over the management and operation of any LLC in which WCCG is a member, he has still not produced evidence to establish that WCCG was in fact a member of Rio Grande, GP, LLC such that he would have been entitled to control Rio Grande, LP’s lawsuits by taking over management of the LLC. Instead, the evidence that Kretzer himself produced demonstrates that the only member in Rio Grande, GP, LLC is World Class Real Estate, LLC, which is two steps removed from WCCG in his organizational chart. And again, Kretzer produced no evidence to support a finding that we should disregard the separate business structures of the various entities to allow Kretzer to treat them as one and the same for purposes of his collection efforts.

Thus, the court reversed the trial court’s decision to dismiss this second lawsuit and remanded to the trial court to reconsider its decision consistent with the factors set forth in this opinion and its companion opinion (summarized below).


The court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. The court of appeals reversed a trial court’s judgment dismissing a case based on a settlement purportedly entered into by a receiver on behalf of a limited partnership because the trial court did not determine whether the receiver had authority to act on behalf of the limited partnership, and the record did not support an implied finding that the receiver had authority to act for the limited partnership in settling the lawsuit and seeking dismissal.

Appellant WC 4th and Rio Grande, LP (“Rio Grande, LP”) sued Appellee La Zona Rio, LLC (“La Zona Rio”) in Travis County seeking to avoid foreclosure on a building in downtown Austin (the “Building”) owned by Rio Grande, LP (the “La Zona Rio Lawsuit”). Local real estate developer Natin Paul signed the promissory note secured by the Building on behalf of Rio Grande, LP as the president of WC 4th and Rio Grande GP, LLC—Rio Grande, LP’s general partner. After Rio Grande, LP defaulted on the note, La Zona Rio initiated foreclosure proceedings. Rio Grande, LP attempted to pay off the amount owed on the note, but La Zona Rio rebuffed its attempts. Rio Grande, LP then filed this lawsuit, i.e., the La Zona Rio Lawsuit, claiming La Zona Rio was in breach of contract and seeking a declaratory judgment regarding its right to pay off the note under the parties’ loan agreement.

While the La Zona Rio Lawsuit was pending, a Harris County district court appointed attorney Seth Kretzer to collect on a judgment owed by World Class Capital Group, LLC (“WCCG”) and Great Value Storage, LLC (“GVS”) to Princeton Capital Corporation (“Princeton”) in an unrelated lawsuit (the “Princeton Lawsuit”). The order (the “Receivership Order”) gave Kretzer broad powers to assist Princeton in its collection efforts, such as directing WCCG “to identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” The Receivership Order also authorized Kretzer “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.” Relying on this authority, Kretzer then entered an appearance in the La Zona Rio Lawsuit stating he was “appear[ing] as counsel of record” for WCCG and its “subsidiary,” Rio Grande, LP, and purporting to replace prior counsel of record for Rio Grande, LP. Kretzer then entered into a settlement agreement with La Zona Rio that ultimately allowed Kretzer to deed the building to La Zona Rio in lieu of foreclosure for the sum of $10. That same day, La Zona Rio’s attorney and Kretzer, again purporting to act on behalf of Rio Grande, LP, filed a joint motion to dismiss the La Zona Rio Lawsuit with prejudice pursuant to the agreement.

Rio Grande, LP, through its retained attorney, Brian Elliott, filed a motion objecting to Kretzer’s authority. In its motion, Rio Grande, LP conceded that Kretzer had been appointed as a receiver in the Princeton Lawsuit and attached a copy of the Receivership Order, but Rio Grande, LP contested Kretzer’s authority to intervene in the lawsuit. First, Rio Grande, LP pointed out that Kretzer claimed to have authority to act as Rio Grande, LP’s attorney based on the allegation that Rio Grande LP was a “subsidiary” of WCCG, yet Kretzer provided no evidence regarding Rio Grande LP’s status as such a “subsidiary.” Rio Grande, LP denied that it was a subsidiary of WCCG and asserted that it was a separate legal entity that was neither owned nor managed by WCCG. Second, Rio Grande, LP acknowledged that the Receivership Order ostensibly allowed Kretzer to seize the membership interest of any limited liability company or limited partnership in which WCCG was a member and to sell, manage, and operate any such limited liability company in which WCCG was a member as the receiver deemed appropriate, but Rio Grande, LP asserted that Kretzer failed to establish that WCCG in fact had any such interest in either the LLC serving as the general partner or in Rio Grande, LP itself. In addition, Rio Grande, LP argued that even if WCCG had an interest in Rio Grande, LP, Kretzer would not be permitted to seize any assets belonging to Rio Grande, LP because under Texas law, partnership assets belong to the partnership, and a charging order is the exclusive remedy by which to collect on a judgment debtor’s interest in a partnership or limited liability company. (The court explained in a footnote that a charging order charges the partnership interest of the judgment debtor to satisfy the judgment by giving the judgment creditor the right to receive any distribution to which the judgment debtor would otherwise be entitled. The court pointed out that, while the charging order constitutes a lien on judgment debtor’s interest, it does not entitle the judgment creditor to participate in the partnership or compel distributions. The court commented, however, that a Chapter 31 turnover order and receivership order may be used to monitor partnership distributions and effectuate a charging order.)

The trial court granted the joint motion to dismiss without ruling on Rio Grande, LP’s objection. Rio Grande, LP appealed, again arguing that Kretzer lacked the authority to act on its behalf.

In the course of concluding that Rio Grande, LP had the right to challenge Kretzer’s authority to enforce the Receivership Order against it in the La Zona Rio Lawsuit, the court of appeals discussed the significance of the separate existence of Rio Grande, LP as distinguished from the entities that were parties in the Princeton Lawsuit in which the Receivership Order was entered.

As explained below, we conclude that Rio Grande, LP was a third-party stranger to the Princeton Litigation and therefore, the trial court in the La Zona Rio Lawsuit was required to determine Rio Grande, LP’s substantive rights before allowing Kretzer to enforce the Receivership Order against it.

In reaching this conclusion, we emphasize that WCCG and Great Value Storage were the only two defendants in the Princeton Lawsuit and the only two named parties in the Receivership Order. And although La Zona Rio at times seeks to treat WCCG and its affiliated World Class entities formed by Natin Paul as one and the same, the only evidence in the record demonstrates otherwise. As indicated above, Rio Grande, LP submitted unrebutted evidence in the trial court indicating it was formed as a limited partnership in accordance with the Texas Business Organizations Code. And it is well established that a business entity, such as a limited partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members. See Pike v. Texas EMC Mgmt., LLC, 610 S.W.3d 763, 778 (Tex. 2020) (recognizing that a business organization is a “separate and independent entity”); Am. Star Energy & Minerals Corp. v. Stowers, 457 S.W.3d 427, 431 (Tex. 2015) (recognizing the “Legislature ‘unequivocally embrace[d] the entity theory of partnership’ when it enacted the Texas Revised Partnership Act (TRPA), since codified in the Texas Business Organizations Code”); see also Mims Bros. v. N. A. James, Inc., 174 S.W.2d 276, 278 (Tex. App.—Austin 1943, writ ref’d) (court is required to treat
a partnership as a separate legal entity, “at least to the extent of obtaining and enforcing a judgment by or against it”). Similarly, the evidence demonstrated that Rio Grande, LP’s general partner, WC 4th and Rio Grande, GP, LLC, was a limited liability company, which is also a distinct legal entity, separate and apart from its members—even when there is only one member in the LLC. See Sherman v. Boston, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing that a limited liability company is a legal entity separate from its sole member); see also Daniels v. Empty Eye, Inc., 368 S.W.3d 743, 752 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (limited partner who also was president of the corporation serving as general partner of the limited partnership was an entity distinct from the corporate general partner).

Moreover, we note that Kretzer sought to enforce the Receivership Order against Rio Grande, LP, claiming that Rio Grande, LP was a “subsidiary” of WCCG but providing no proof of such. But even if Rio Grande, LP or its general partner could be considered subsidiaries of WCCG, this would not rob either entity of its status as a separate and distinct legal entity apart from WCCG. To the contrary, it is well-established that subsidiary and parent companies are “separate and distinct” entities as a matter of law, and the separate nature of such entities “will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency.” R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.) (citing SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (recognizing that the “[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace”)); see generally BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 798 (Tex. 2002) (recognizing that “Texas law presumes that two separate corporations are indeed distinct entities”).

In addition, “[a] parent company and its subsidiary maintain their independence even though the same persons are directors or managers of both corporations.” Neff v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 376 (Tex. 1984)). “The same is true even though most or all the capital stock of a subsidiary corporation is owned by its parent corporation.” Id. (citing Docudata Records Mgmt. Services, Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). Thus, as the Texas Supreme Court has stated, it has “never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances.” R&M Mixed Beverage, 578 S.W.3d at 229–30 (citing SSP Partners, 275 S.W.3d at 455).

We recognize that in certain situations, a court may disregard a company’s business structure and treat a subsidiary company as being an “alter ego” of its parent, such as when there is evidence of “abuse, or ... injustice and inequity.” See id. at 230 (citing SSP Partners, 275 S.W.3d at 451 (recognizing that the limitation on liability afforded by the corporate structure can be ignored only “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result”)); but see Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy, 508 S.W.3d 569, 585 (Tex. App.—El Paso 2016, no pet.) (recognizing that “[a] subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders”).

Here neither La Zona Rio nor Kretzer produced any evidence in the trial court that would have allowed the court to conclude that WCCG used Rio Grande, LP or its general partner as its alter ego. Stated otherwise, there is no evidence in the record to support the conclusion that either Rio Grande, LP or its general partner were not legally distinct from WCCG. Nor does La Zona Rio attempt to assert as much in its appellate briefing. At best, it alleges that the various World Class entities are “affiliates” of WCCG and that Natin Paul does business through these various entities.[footnote omitted] However, as set forth above, regardless of these affiliations, the evidence in the record reflects that Rio Grande, LP and its general partner are separate legal entities, and as such, they had the right to have their substantive rights adjudicated in the trial court before Kretzer could be allowed to enforce the Receivership Order against them.
Next the court of appeals examined whether the trial court could have impliedly found that Kretzer properly exercised his authority in enforcing the Receivership Order against Rio Grande, LP, and the court concluded that the evidence was not sufficient to support such an implied finding. La Zona Rio pointed to three provisions in the Receivership Order that it contended support such a finding, and the court addressed each of them and concluded that they did not support such a finding.

A. The provision requiring WCCG to turn over any “interests” it had in any partnership or limited liability company

First, La Zona Rio points to the provision in the Receivership Order directing WCCG—as the judgment debtor—to “identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” Even assuming WCCG had an “interest” in Rio Grande, LP or its general partner—a fact that neither Kretzer nor La Zona Rio established on this record—under Texas law, WCCG’s only “interest” in the partnership or the LLC would be limited to its share of the profits and its right to receive distributions. See Pajooh, 518 S.W.3d at 562 (recognizing that an individual partner has no ownership interest in the specific property belonging to the partnership and that its interests are limited to his share of profits and losses or similar items and the right to receive distributions); see also TEX. BUS. ORGS. CODE ANN. § 152.101 (partnership property is “not property of the partners,” and a partner “does not have an interest in partnership property”); Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829, 846 (Tex. App.—Corpus Christi 2017, no pet.) (recognizing that a member of a limited liability company or his assignee does not have an interest in any specific property of the company) (citing TEX. BUS. ORGS. CODE ANN. § 101.106(b) (“A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company.”)).

Thus, this provision of the Receivership Order would have, at most, authorized Kretzer to collect on WCCG’s “interest” in receiving profits or distributions from either the partnership or the LLC. And as Rio Grande, LP points out, the Texas Business Organizations Code provides that the exclusive remedy by which to obtain a judgment debtor’s interest in either a partnership or an LLC is by the entry of a charging order attaching the distributions owed to either a partner or LLC member, which Kretzer admittedly failed to obtain.[footnote omitted] See Pajooh, 518 S.W.3d at 562, 565 (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.”) and TEX. BUS. ORGS. CODE ANN. § 101.112(d) (“The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.”)); see also In re Prodigy Servs., LLC, No. 14-14-00248-CV, 2014 WL 2936928, at *5 (Tex. App.—Houston [14th Dist.] June 26, 2014, orig. proceeding) (mem. op.) (recognizing same).

La Zona Rio counters that in certain circumstances, courts have allowed a judgment creditor to collect on assets held by either a partnership or an LLC without a charging order, citing to our sister court’s opinion in 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.).[footnote omitted] In Heckert, the Fort Worth Court of Appeals opined that “the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.” Heckert, 2017 WL 5184840, at *7–9 (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.”)). And the court held that the purpose of requiring a charging order was not served in a personal injury case in which an ex-wife had received a judgment against her ex-husband, where the ex-husband had created a non-operating LLC and partnership, of which he was the sole member and partner, and placed assets into those entities with the apparent intent of sheltering the assets from his ex-wife’s collection efforts. Id. at *7–9. The court found that under those
circumstances, the trial court could properly order the ex-husband to turn over those assets to his ex-wife to satisfy the judgment, as doing so would cause no disruption to an operating business or cause harm to any other parties. *Id.* at *9.

Relying on the reasoning in *Heckert*, La Zona Rio contends that a charging order was unnecessary to allow Kretzer to collect on the assets held by Rio Grande, LP because Rio Grande, LP was admittedly a “single purpose entity holding commercial property,” and its business would therefore not be disrupted by ordering a turnover of the property. But Rio Grande, LP points out that unlike the situation in *Heckert*, the evidence reflected that the partnership was an operating business which had been leasing its building space to tenants, and the partnership had three limited partners whose interests were at stake in the *La Zona Rio* Lawsuit—in addition to the general partner that La Zona Rio claims was affiliated with WCCG. Therefore, the partnership’s business was disrupted by Kretzer’s actions in utilizing the Receivership Order to allow the partnership’s only asset to be alienated to La Zona Rio. And, unlike the situation in *Heckert*, the record before us contains no evidence that WCCG created Rio Grande, LP as a “shell” entity for the purpose of sheltering assets from collection.

Accordingly, we conclude that the provision in the Receivership Order requiring WCCG to turn over any interests it had in a partnership or LLC at most gave Kretzer the right to collect on any distributions or profits to which WCCG was entitled by virtue of any such interest and did not give him the right to take possession of the partnership’s assets, which he effectively did by taking control of Rio Grande, LP’s lawsuit. *See Pajooh*, 518 S.W.3d at 565 (citing 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”)).

B. The provision allowing Kretzer to sell, manage and operate an LLC in which WCCG is a “member”

Second, La Zona Rio points to the provision in the Receivership Order that authorized Kretzer “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 [Kretzer] shall think appropriate.” *La Zona Rio* contends there was sufficient evidence in the record from which the trial court could have impliedly found that WCCG had a “membership interest” in WC 4th and Rio Grande, GP, LLC—Rio Grande, LP’s general partner. And in turn, La Zona Rio argues that Kretzer had the right under the Receivership Order to take over the operation and management of the LLC and sell its assets. We conclude, however, that there are at least two missing steps in this analysis.

The first missing step is the failure of either Kretzer or La Zona Rio to point to any evidence in the record to establish that WCCG was in fact a “member” of the LLC. The Texas Business Organizations Code provides that an LLC must have at least one member. *See* TEX. BUS. ORGS. CODE ANN. § 101.101 (a) (“A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.”) However, there is nothing in this record to demonstrate that WCCG was in fact a “member” in WC 4th and Rio Grande, GP, LLC.[footnote omitted] As set forth above, while La Zona Rio may be correct that WCCG is affiliated with the LLC or may even be a parent company, given the lack of any evidence that WCCG was a “member” in the LLC, we cannot say that the trial court could have impliedly found that Kretzer had the authority under the Receivership Order to seize control of the LLC.

Even if WCCG had a membership interest in the LLC, the second missing step is the lack of evidence that Kretzer did in fact seize control of WCCG’s interest in the LLC or that he sought to operate or manage the LLC on WCCG’s behalf. Instead, the only evidence in the record demonstrates that Kretzer simply filed a “notice” with the trial court stating that he had substituted himself as counsel of record for Rio Grande, LP in the La Zona Rio Lawsuit. There is nothing to suggest that he did so as part of his management and operation of the LLC. And in fact, the record does not contain the LLC’s governing documents, or otherwise support an implied finding that Kretzer would have had the right, as part of any assumed management duties in operating the LLC,
to unilaterally terminate the La Zona Rio Lawsuit on Rio Grande, LP’s behalf and enter into a settlement agreement with La Zona Rio that included deeding the building to La Zona Rio.

Again, the fallacy in La Zona Rio’s argument lies in its attempts to blur the distinction between the various World Class entities and treat them as one and the same as WCCG in the absence of evidence to support that position.

C. The provision allowing Kretzer to take possession of the judgment debtor’s assets

Finally, La Zona Rio points to a third provision in the Receivership Order giving Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell causes of action and real property belonging to the “judgment debtor,” i.e., WCCG. It did not extend Kretzer’s authority to seize such property from any of WCCG’s subsidiaries or affiliated entities. And once again, we find no evidence in the record to support a finding that WCCG and its affiliated World Class entities can be considered one and the same, or alter egos of each other, such that Kretzer had the authority to collect on assets owned or controlled by either Rio Grande, LP or its general partner to satisfy WCCG’s debt. See United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281, 282–83 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that judgment creditor could not collect on assets owned by two corporations that it claimed were alter egos of the judgment debtors without establishing that the corporations were in fact alter egos in a separate proceeding) (citing Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955) (recognizing that “[c]ourts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, avoid personal liability, to avoid the effect of a statute, or in a few other exceptional situations”)); see also Maiz v. Virani, 311 F.3d 334, 336 (5th Cir. 2002) (recognizing that under Texas law, a judgment creditor cannot use the turnover statute to reach the assets of corporations which are allegedly alter-egos of the Judgment Debtors without a separate hearing to “pierce[ ] their corporate veils”); Plaza Court, Ltd. v. West, 879 S.W.2d 271, 276–77 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that “[t]he turnover statute does not support a proceeding against an entity who is not a judgment debtor, until a judgment creditor succeeds in piercing the corporate veil”). And without such evidence, the trial court could not have impliedly found that Kretzer had this right. To the contrary, as our sister court has recognized, a judgment creditor (or in this case a receiver) may not simply “announce its belief” that a judgment debtor and a third party are in essence one and the same without proof of such, and in effect, skip a trial on the merits, and “declare itself the winner.” United Bank Metro, 670 S.W.2d at 283.

By way of footnotes, the court pointed out two recent cases reaching the conclusion that a charging order is the exclusive remedy by which a judgment creditor of a member or other owner of an LLC may satisfy a judgment out of the judgment debtor’s membership interest, and the court stated that there appear to be cases refuting the contention by La Zona Rio that the exclusivity of the charging order remedy only applies to judgment creditors and not to court appointed receivers.

Because the record did not support an implied finding that Kretzer had the authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit, and because the record did not reflect that the trial court gave Rio Grande, LP the opportunity to have its substantive rights adjudicated before allowing Kretzer to enforce the Receivership Order against it, the court of appeals concluded that the trial court abused its discretion in granting the motion to
dismiss the La Zona Rio Lawsuit, and the court reversed and remanded for further proceedings to give Rio Grande, LP that opportunity.

[The court of appeals in its companion opinion summarized above succinctly summarized its conclusions in this case as follows: “[W]e concluded that because Rio Grande, LP and its general partner were not parties to the Princeton lawsuit, Rio Grande, LP had the right, as a stranger to that judgment, to challenge Kretzer’s enforcement of the Receivership Order against it in the La Zona Rio Lawsuit, and it was not a collateral attack on the order. But we concluded that the trial court had not properly considered Rio Grande, LP’s challenge to Kretzer’s authority, and questions remained regarding whether he had any such authority under the Receivership Order. We therefore remanded the matter to the trial court to give it the opportunity to consider the issue.

As we explained in that opinion, while the record reflected that WCCG; Rio Grande, LP; and WC4th and Rio Grande, GP, LLC were related or affiliated entities, the only evidence in the record demonstrated that the three companies were separate and distinct legal entities, entitling them to the protections afforded under the Texas Business Organizations Code. We further found that the record did not support a finding that WCCG was a member of Rio Grande, LP’s general partner—WC4th and Rio Grande, GP, LLC—which would have allowed Kretzer to take over management of the LLC to reach the partnership’s assets.”]

L. Creditor’s Remedies: Charging Order, Turnover Order, Receivership


In this companion opinion to the opinion summarized below, the court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. Because the court of appeals concluded that there was not evidentiary support for an implied finding by the trial court that a receiver had authority to nonsuit a limited partnership’s lawsuit, the trial court reversed the trial court’s decision to dismiss the limited partnership’s suit and remanded for further proceedings.

In another lawsuit (the “Princeton Lawsuit”), a Harris County district court entered an order (the “Receivership Order”) appointing attorney Seth Kretzer as a receiver to collect on a judgment owed by World Class Capital Group (“WCCG”) and Great Value Storage to Princeton Capital Corporation. The Receivership Order, inter alia, (1) directed WCCG to turn over any “interests” it had in any partnership or limited liability company; (2) gave Kretzer the authority to sell, manage, and operate any limited liability company in which WCCG is a “member”; and (3) authorized Kretzer to take possession of WCCG’s assets, including “causes of action.”

In his capacity as the receiver, Kretzer entered an appearance in a lawsuit pending in a Travis County district court (the “La Zona Rio Lawsuit”) in which WC 4th and Rio Grande, LP (“Rio Grande, LP”) had sued Appellee La Zona Rio, LLC (“La Zona Rio”) to stop La Zona Rio from foreclosing on a building owned by Rio Grande, LP. In his notice, Kretzer stated that he was replacing the attorney for Rio Grande, LP, which he asserted was a “subsidiary” of WCCG; however, he filed no evidence supporting that contention.

Rio Grande, LP filed a motion challenging Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, arguing it was neither a subsidiary of WCCG nor an entity owned or managed by WCCG, but instead a separate legal entity. The trial court did not rule on the motion, but impliedly found that Kretzer had the authority to act on Rio Grande, LP’s behalf and granted a joint motion to dismiss the lawsuit based on representations made by Kretzer and La Zona Rio’s attorney that the parties had resolved their claims against each other.

Rio Grande, LP, through its retained counsel, Burford Perry, filed this second lawsuit against La Zona Rio in Travis County, bringing claims of quiet title and trespass to try title, and further seeking a declaration that it was the true owner of the property. In its petition, which was assigned to a different Travis County judge, Rio Grande, LP again challenged Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, to enter into the settlement agreement with La Zona Rio, and to sign a deed in lieu of foreclosure on its behalf pursuant to that agreement.

Kretzer then filed a notice of nonsuit, purporting to act in his capacity as the “court appointed Receiver for World Class Capital Group, LLC, Manager of WC 4th and Rio Grande, LP, Plaintiff.” Rio Grande, LP, through its retained attorney, filed a withdrawal of notice of nonsuit, contending that Kretzer was not authorized to act on its behalf in the lawsuit and that the notice was filed without Rio Grande, LP’s permission. Rio Grande, LP also filed a motion to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure, challenging Kretzer’s authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit as well as his authority to act on its behalf in the second
lawsuit. In his opposition to the Rule 12 motion, Kretzer included various “company agreements” setting forth the relationships between WCCG, Rio Grande, LP and various other World Class entities, as follows:

1. Natin Paul is the president, sole member, and manager of World Class Capital Group, LLC.
2. World Class Capital Group, LLC is the sole member and manager of World Class Real Estate, LLC.
3. World Class Real Estate, LLC is the sole member of WC 4th and Rio Grande GP, LLC.
4. WC 4th and Rio Grande, LP was created as a partnership between WC 4th and Rio Grande GP, LLC, as the general partner and three other limited partners.

Kretzer argued that these agreements demonstrated a sufficient relationship between Natin Paul; WCCG; Rio Grande, LP; and its general partner, WC4th and Rio Grande, GP, LLC to allow Kretzer to seize control of the La Zona Rio Lawsuit pursuant to his authority under the Receivership Order.

Ultimately, the trial court denied Rio Grande, LP’s motion and granted Kretzer’s motion for entry of order of dismissal and ordered the case dismissed with prejudice. Rio Grande, LP appealed the order of dismissal, and the court of appeals addressed the appeal of this second lawsuit in this opinion.

In this second lawsuit, Rio Grande, LP continued to assert Kretzer lacked the authority to act on its behalf in the La Zona Rio Lawsuit, but Rio Grande, LP also challenged Kretzer’s authority to act on its behalf in this second lawsuit, specifically, to file a nonsuit of its case in his capacity as the receiver appointed in the Princeton Lawsuit. The court of appeals stated that its focus here was the challenge to Kretzer’s authority to file the nonsuit in this second lawsuit, as the filing of the nonsuit led to the trial court’s dismissal order, which in turn was the subject of Rio Grande, LP’s appeal. The court concluded that the record did not support the trial court’s implied finding that Kretzer had authority to nonsuit this second lawsuit brought by Rio Grande, LP against La Zona Rio or the trial court’s dismissal pursuant to the filing of the nonsuit.

As set forth above, the Receivership Order gave Kretzer the authority to seize control of assets, including causes of action, belonging to judgment debtor WCCG. But as we explained in our first opinion, to the extent Rio Grande, LP is considered a separate legal entity entitled to the Texas Business Organizations Code protections, the Receivership Order did not give Kretzer the authority to seize its partnership property or its causes of action. And in the present case, while Kretzer has provided more evidence to establish that WCCG and Rio Grande, LP are related—and that they may even have a parent-subsidiary relationship—he has still not provided any evidence that would have allowed the trial court to conclude that WCCG treated Rio Grande, LP or its general partner (Rio Grande, GP, LLC) as alter egos. Similarly, there is no evidence in the record before us that would have otherwise allowed the trial court to disregard the separate business structure of each entity and treat them as one and the same as WCCG.

In addition, although Kretzer relied heavily on the provision in the Receivership Order giving him the authority to take over the management and operation of any LLC in which WCCG is a member, he has still not produced evidence to establish that WCCG was in fact a member of Rio Grande, GP, LLC such that he would have been entitled to control Rio Grande, LP’s lawsuits by taking over management of the LLC. Instead, the evidence that Kretzer himself produced demonstrates that the only member in Rio Grande, GP, LLC is World Class Real Estate, LLC, which is two steps removed from WCCG in his organizational chart. And again, Kretzer produced no evidence to support a finding that we should disregard the separate business structures of the various entities to allow Kretzer to treat them as one and the same for purposes of his collection efforts.

Thus, the court reversed the trial court’s decision to dismiss this second lawsuit and remanded to the trial court to reconsider its decision consistent with the factors set forth in this opinion and its companion opinion (summarized below).


The court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. The court of appeals reversed a trial court’s judgment dismissing a case based on a settlement purportedly entered into by a receiver on behalf of a limited partnership because the trial court did not
determine whether the receiver had authority to act on behalf of the limited partnership, and the record did not support an implied finding that the receiver had authority to act for the limited partnership in settling the lawsuit and seeking dismissal.

Appellant WC 4th and Rio Grande, LP ("Rio Grande, LP") sued Appellee La Zona Rio, LLC ("La Zona Rio") in Travis County seeking to avoid foreclosure on a building in downtown Austin (the "Building") owned by Rio Grande, LP (the "La Zona Rio Lawsuit"). Local real estate developer Natin Paul signed the promissory note secured by the Building on behalf of Rio Grande, LP as the president of WC 4th and Rio Grande GP, LLC—Rio Grande, LP’s general partner. After Rio Grande, LP defaulted on the note, La Zona Rio initiated foreclosure proceedings. Rio Grande, LP attempted to pay off the amount owed on the note, but La Zona Rio rebuffed its attempts. Rio Grande, LP then filed this lawsuit, i.e., the La Zona Rio Lawsuit, claiming La Zona Rio was in breach of contract and seeking a declaratory judgment regarding its right to pay off the note under the parties’ loan agreement.

While the La Zona Rio Lawsuit was pending, a Harris County district court appointed attorney Seth Kretzer to collect on a judgment owed by World Class Capital Group, LLC (“WCCG”) and Great Value Storage, LLC (“GVS”) to Princeton Capital Corporation (“Princeton”) in an unrelated lawsuit (the “Princeton Lawsuit”). The order (the “Receivership Order”) gave Kretzer broad powers to assist Princeton in its collection efforts, such as directing WCCG “to identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” The Receivership Order also authorized Kretzer “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.” Relying on this authority, Kretzer then entered an appearance in the La Zona Rio Lawsuit stating he was “appear[ing] as counsel of record” for WCCG and its “subsidiary,” Rio Grande, LP, and purporting to replace prior counsel of record for Rio Grande, LP. Kretzer then entered into a settlement agreement with La Zona Rio that ultimately allowed Kretzer to deed the building to La Zona Rio in lieu of foreclosure for the sum of $10. That same day, La Zona Rio’s attorney and Kretzer, again purporting to act on behalf of Rio Grande, LP, filed a joint motion to dismiss the La Zona Rio Lawsuit with prejudice pursuant to the agreement.

Rio Grande, LP, through its retained attorney, Brian Elliott, filed a motion objecting to Kretzer’s authority. In its motion, Rio Grande, LP conceded that Kretzer had been appointed as a receiver in the Princeton Lawsuit and attached a copy of the Receivership Order, but Rio Grande, LP contested Kretzer’s authority to intervene in the lawsuit. First, Rio Grande, LP pointed out that Kretzer claimed to have authority to act as Rio Grande, LP’s attorney based on the allegation that Rio Grande LP was a “subsidiary” of WCCG, yet Kretzer provided no evidence regarding Rio Grande LP’s status as such a “subsidiary.” Rio Grande, LP denied that it was a subsidiary of WCCG and asserted that it was a separate legal entity that was neither owned nor managed by WCCG. Second, Rio Grande, LP acknowledged that the Receivership Order ostensibly allowed Kretzer to seize the membership interest of any limited liability company or limited partnership in which WCCG was a member and to sell, manage, and operate any such limited liability company in which WCCG was a member as the receiver deemed appropriate, but Rio Grande, LP asserted that Kretzer failed to establish that WCCG in fact had any such interest in either the LLC serving as the general partner or in Rio Grande, LP itself. In addition, Rio Grande, LP argued that even if WCCG had an interest in Rio Grande, LP, Kretzer would not be permitted to seize any assets belonging to Rio Grande, LP because under Texas law, partnership assets belong to the partnership, and a charging order is the exclusive remedy by which to collect on a judgment debtor’s interest in a partnership or limited liability company. (The court explained in a footnote that a charging order charges the partnership interest of the judgment debtor to satisfy the judgment by giving the judgment creditor the right to receive any distribution to which the judgment debtor would otherwise be entitled. The court pointed out that, while the charging order constitutes a lien on judgment debtor’s interest, it does not entitle the judgment creditor to participate in the partnership or compel distributions. The court commented, however, that a Chapter 31 turnover order and receivership order may be used to monitor partnership distributions and effectuate a charging order.)

The trial court granted the joint motion to dismiss without ruling on Rio Grande, LP’s objection. Rio Grande, LP appealed, again arguing that Kretzer lacked the authority to act on its behalf. In the course of concluding that Rio Grande, LP had the right to challenge Kretzer’s authority to enforce the Receivership Order against it in the La Zona Rio Lawsuit, the court of appeals discussed the significance of the separate existence of Rio Grande, LP as distinguished from the entities that were parties in the Princeton Lawsuit in which the Receivership Order was entered.
As explained below, we conclude that Rio Grande, LP was a third-party stranger to the Princeton Litigation and therefore, the trial court in the La Zona Rio Lawsuit was required to determine Rio Grande, LP’s substantive rights before allowing Kretzer to enforce the Receivership Order against it.

In reaching this conclusion, we emphasize that WCCG and Great Value Storage were the only two defendants in the Princeton Lawsuit and the only two named parties in the Receivership Order. And although La Zona Rio at times seeks to treat WCCG and its affiliated World Class entities formed by Natin Paul as one and the same, the only evidence in the record demonstrates otherwise. As indicated above, Rio Grande, LP submitted unrebutted evidence in the trial court indicating it was formed as a limited partnership in accordance with the Texas Business Organizations Code. And it is well established that a business entity, such as a limited partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members. See *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020) (recognizing that a business organization is a “separate and independent entity”); *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 431 (Tex. 2015) (recognizing the “Legislature ‘unequivocally embrace[d] the entity theory of partnership’ when it enacted the Texas Revised Partnership Act (TRPA), since codified in the Texas Business Organizations Code”); see also *Mims Bros. v. N. A. James, Inc.*, 174 S.W.2d 276, 278 (Tex. App.—Austin 1943, writ ref’d) (court is required to treat a partnership as a separate legal entity, “at least to the extent of obtaining and enforcing a judgment by or against it”). Similarly, the evidence demonstrated that Rio Grande, LP’s general partner, WC 4th and Rio Grande, GP, LLC, was a limited liability company, which is also a distinct legal entity, separate and apart from its members—even when there is only one member in the LLC. See *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing that a limited liability company is a legal entity separate from its sole member); see also *Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 752 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (limited partner who also was president of the corporation serving as general partner of the limited partnership was an entity distinct from the corporate general partner).

Moreover, we note that Kretzer sought to enforce the Receivership Order against Rio Grande, LP, claiming that Rio Grande, LP was a “subsidiary” of WCCG but providing no proof of such. But even if Rio Grande, LP or its general partner could be considered subsidiaries of WCCG, this would not rob either entity of its status as a separate and distinct legal entity apart from WCCG. To the contrary, it is well-established that subsidiary and parent companies are “separate and distinct” entities as a matter of law, and the separate nature of such entities “will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency.” *R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.) (citing *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (recognizing that the “[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace”)); see generally *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2002) (recognizing that “Texas law presumes that two separate corporations are indeed distinct entities”).

In addition, “[a] parent company and its subsidiary maintain their independence even though the same persons are directors or managers of both corporations.” *Neff v. Brady*, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372, 376 (Tex. 1984)). “The same is true even though most or all the capital stock of a subsidiary corporation is owned by its parent corporation.” Id. (citing *Docudata Records Mgmt. Services, Inc. v. Wieser*, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). Thus, as the Texas Supreme Court has stated, it has “never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances.” *R&M Mixed Beverage*, 578 S.W.3d at 229–30 (citing *SSP Partners*, 275 S.W.3d at 455).

We recognize that in certain situations, a court may disregard a company’s business structure and treat a subsidiary company as being an “alter ego” of its parent, such as when there is evidence of “abuse, or ... injustice and inequity.” See *id.* at 230 (citing *SSP Partners*, 275 S.W.3d...
at 451 (recognizing that the limitation on liability afforded by the corporate structure can be ignored only “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result”); but see Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy, 508 S.W.3d 569, 585 (Tex. App.—El Paso 2016, no pet.) (recognizing that “[a] subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders”).

Here neither La Zona Rio nor Kretzer produced any evidence in the trial court that would have allowed the court to conclude that WCCG used Rio Grande, LP or its general partner as its alter ego. Stated otherwise, there is no evidence in the record to support the conclusion that either Rio Grande, LP or its general partner were not legally distinct from WCCG. Nor does La Zona Rio attempt to assert as much in its appellate briefing. At best, it alleges that the various World Class entities are “affiliates” of WCCG and that Natin Paul does business through these various entities.[footnote omitted] However, as set forth above, regardless of these affiliations, the evidence in the record reflects that Rio Grande, LP and its general partner are separate legal entities, and as such, they had the right to have their substantive rights adjudicated in the trial court before Kretzer could be allowed to enforce the Receivership Order against them.

Next the court of appeals examined whether the trial court could have impliedly found that Kretzer properly exercised his authority in enforcing the Receivership Order against Rio Grande, LP, and the court concluded that the evidence was not sufficient to support such an implied finding. La Zona Rio pointed to three provisions in the Receivership Order that it contended support such a finding, and the court addressed each of them and concluded that they did not support such a finding.

A. The provision requiring WCCG to turn over any “interests” it had in any partnership or limited liability company

First, La Zona Rio points to the provision in the Receivership Order directing WCCG—as the judgment debtor—to “identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” Even assuming WCCG had an “interest” in Rio Grande, LP or its general partner—a fact that neither Kretzer nor La Zona Rio established on this record—under Texas law, WCCG’s only “interest” in the partnership or the LLC would be limited to its share of the profits and its right to receive distributions. See Pajooh, 518 S.W.3d at 562 (recognizing that an individual partner has no ownership interest in the specific property belonging to the partnership and that its interests are limited to his share of profits and losses or similar items and the right to receive distributions); see also TEX. BUS. ORGS. CODE ANN. § 152.101 (partnership property is “not property of the partners,” and a partner “does not have an interest in partnership property”); Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829, 846 (Tex. App.—Corpus Christi 2017, no pet.) (recognizing that a member of a limited liability company or his assignee does not have an interest in any specific property of the company) (citing TEX. BUS. ORGS. CODE ANN. § 101.106(b) (“A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company.”)).

Thus, this provision of the Receivership Order would have, at most, authorized Kretzer to collect on WCCG’s “interest” in receiving profits or distributions from either the partnership or the LLC. And as Rio Grande, LP points out, the Texas Business Organizations Code provides that the exclusive remedy by which to obtain a judgment debtor’s interest in either a partnership or an LLC is by the entry of a charging order attaching the distributions owed to either a partner or LLC member, which Kretzer admittedly failed to obtain. [footnote omitted] See Pajooh, 518 S.W.3d at 562, 565 (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.”)) and TEX. BUS. ORGS. CODE ANN. § 101.112(d) (“The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest
may satisfy a judgment out of the judgment debtor’s membership interest.”)); see also In re Prodigy Servs., LLC, No. 14-14-00248-CV, 2014 WL 2936928, at *5 (Tex. App.—Houston [14th Dist.] June 26, 2014, orig. proceeding) (mem. op.) (recognizing same).

La Zona Rio counters that in certain circumstances, courts have allowed a judgment creditor to collect on assets held by either a partnership or an LLC without a charging order, citing to our sister court’s opinion in 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.).[footnote omitted] In Heckert, the Fort Worth Court of Appeals opined that “the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.” Heckert, 2017 WL 5184840, at *7–9 (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.”)). And the court held that the purpose of requiring a charging order was not served in a personal injury case in which an ex-wife had received a judgment against her ex-husband, where the ex-husband had created a non-operating LLC and partnership, of which he was the sole member and partner, and placed assets into those entities with the apparent intent of sheltering the assets from his ex-wife’s collection efforts. Id. at *7–9. The court found that under those circumstances, the trial court could properly order the ex-husband to turn over those assets to his ex-wife to satisfy the judgment, as doing so would cause no disruption to an operating business or cause harm to any other parties. Id. at *9.

Relying on the reasoning in Heckert, La Zona Rio contends that a charging order was unnecessary to allow Kretzer to collect on the assets held by Rio Grande, LP because Rio Grande, LP was admittedly a “single purpose entity holding commercial property,” and its business would therefore not be disrupted by ordering a turnover of the property. But Rio Grande, LP points out that unlike the situation in Heckert, the evidence reflected that the partnership was an operating business which had been leasing its building space to tenants, and the partnership had three limited partners whose interests were at stake in the La Zona Rio Lawsuit—in addition to the general partner that La Zona Rio claims was affiliated with WCCG. Therefore, the partnership’s business was disrupted by Kretzer’s actions in utilizing the Receivership Order to allow the partnership’s only asset to be alienated to La Zona Rio. And, unlike the situation in Heckert, the record before us contains no evidence that WCCG created Rio Grande, LP as a “shell” entity for the purpose of sheltering assets from collection.

Accordingly, we conclude that the provision in the Receivership Order requiring WCCG to turn over any interests it had in a partnership or LLC at most gave Kretzer the right to collect on any distributions or profits to which WCCG was entitled by virtue of any such interest and did not give him the right to take possession of the partnership’s assets, which he effectively did by taking control of Rio Grande, LP’s lawsuit. See Pajooh, 518 S.W.3d at 565 (citing 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”)).

**B. The provision allowing Kretzer to sell, manage and operate an LLC in which WCCG is a “member”**

Second, La Zona Rio points to the provision in the Receivership Order that authorized Kretzer “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 [Kretzer] shall think appropriate.” La Zona Rio contends there was sufficient evidence in the record from which the trial court could have impliedly found that WCCG had a “membership interest” in WC 4th and Rio Grande, GP, LLC—Rio Grande, LP’s general partner. And in turn, La Zona Rio argues that Kretzer had the right under the Receivership Order to take over the operation and management of the LLC and sell its assets. We conclude, however, that there are at least two missing steps in this analysis.
The first missing step is the failure of either Kretzer or La Zona Rio to point to any evidence in the record to establish that WCCG was in fact a “member” of the LLC. The Texas Business Organizations Code provides that an LLC must have at least one member. See TEX. BUS. ORGS. CODE ANN. § 101.101 (a) (“A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.”) However, there is nothing in this record to demonstrate that WCCG was in fact a “member” in WC 4th and Rio Grande, GP, LLC. As set forth above, while La Zona Rio may be correct that WCCG is affiliated with the LLC or may even be a parent company, given the lack of any evidence that WCCG was a “member” in the LLC, we cannot say that the trial court could have impliedly found that Kretzer had the authority under the Receivership Order to seize control of the LLC.

Even if WCCG had a membership interest in the LLC, the second missing step is the lack of evidence that Kretzer did in fact seize control of WCCG’s interest in the LLC or that he sought to operate or manage the LLC on WCCG’s behalf. Instead, the only evidence in the record demonstrates that Kretzer simply filed a “notice” with the trial court stating that he had substituted himself as counsel of record for Rio Grande, LP in the La Zona Rio Lawsuit. There is nothing to suggest that he did so as part of his management and operation of the LLC. And in fact, the record does not contain the LLC’s governing documents, or otherwise support an implied finding that Kretzer would have had the right, as part of any assumed management duties in operating the LLC, to unilaterally terminate the La Zona Rio Lawsuit on Rio Grande, LP’s behalf and enter into a settlement agreement with La Zona Rio that included deeding the building to La Zona Rio.

Again, the fallacy in La Zona Rio’s argument lies in its attempts to blur the distinction between the various World Class entities and treat them as one and the same as WCCG in the absence of evidence to support that position.

C. The provision allowing Kretzer to take possession of the judgment debtor’s assets

Finally, La Zona Rio points to a third provision in the Receivership Order giving Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell causes of action and real property belonging to the “judgment debtor,” i.e., WCCG. It did not extend Kretzer’s authority to seize such property from any of WCCG’s subsidiaries or affiliated entities. And once again, we find no evidence in the record to support a finding that WCCG and its affiliated World Class entities can be considered one and the same, or alter egos of each other, such that Kretzer had the authority to collect on assets owned or controlled by either Rio Grande, LP or its general partner to satisfy WCCG’s debt. See United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281, 282–83 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that judgment creditor could not collect on assets owned by two corporations that it claimed were alter egos of the judgment debtors without establishing that the corporations were in fact alter egos in a separate proceeding) (citing Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955) (recognizing that “[c]ourts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, avoid personal liability, to avoid the effect of a statute, or in a few other exceptional situations”)); see also Maiz v. Virani, 311 F.3d 334, 336 (5th Cir. 2002) (recognizing that under Texas law, a judgment creditor cannot use the turnover statute to reach the assets of corporations which are allegedly alter-egos
of the Judgment Debtors without a separate hearing to “pierce[ ] their corporate veils”); Plaza Court, Ltd. v. West, 879 S.W.2d 271, 276–77 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that “[t]he turnover statute does not support a proceeding against an entity who is not a judgment debtor, until a judgment creditor succeeds in piercing the corporate veil”). And without such evidence, the trial court could not have impliedly found that Kretzer had this right. To the contrary, as our sister court has recognized, a judgment creditor (or in this case a receiver) may not simply “announce its belief” that a judgment debtor and a third party are in essence one and the same without proof of such, and in effect, skip a trial on the merits, and “declare itself the winner.” United Bank Metro, 670 S.W.2d at 283.

By way of footnotes, the court pointed out two recent cases reaching the conclusion that a charging order is the exclusive remedy by which a judgment creditor of a member or other owner of an LLC may satisfy a judgment out of the judgment debtor’s membership interest, and the court stated that there appear to be cases refuting the contention by La Zona Rio that the exclusivity of the charging order remedy only applies to judgment creditors and not to court appointed receivers.

Because the record did not support an implied finding that Kretzer had the authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit, and because the record did not reflect that the trial court gave Rio Grande, LP the opportunity to have its substantive rights adjudicated before allowing Kretzer to enforce the Receivership Order against it, the court of appeals concluded that the trial court abused its discretion in granting the motion to dismiss the La Zona Rio Lawsuit, and the court reversed and remanded for further proceedings to give Rio Grande, LP that opportunity.

[The court of appeals in its companion opinion summarized above succinctly summarized its conclusions in this case as follows: “[W]e concluded that because Rio Grande, LP and its general partner were not parties to the Princeton lawsuit, Rio Grande, LP had the right, as a stranger to that judgment, to challenge Kretzer’s enforcement of the Receivership Order against it in the La Zona Rio Lawsuit, and it was not a collateral attack on the order. But we concluded that the trial court had not properly considered Rio Grande, LP’s challenge to Kretzer’s authority, and questions remained regarding whether he had any such authority under the Receivership Order. We therefore remanded the matter to the trial court to give it the opportunity to consider the issue.

As we explained in that opinion, while the record reflected that WCCG; Rio Grande, LP; and WC4th and Rio Grande, GP, LLC were related or affiliated entities, the only evidence in the record demonstrated that the three companies were separate and distinct legal entities, entitling them to the protections afforded under the Texas Business Organizations Code. We further found that the record did not support a finding that WCCG was a member of Rio Grande, LP’s general partner—WC4th and Rio Grande, GP, LLC—which would have allowed Kretzer to take over management of the LLC to reach the partnership’s assets.”]

M. Attorney’s Fees


The court held that the general partner of a limited partnership was liable for attorney’s fees under Section 38.001 of the Texas Civil Practice and Remedies Code.

Salinas and Sons, Inc. (“S&S”) was a general partner of Salinas Construction Technologies, Ltd. (“SCT”), which was in the business of street and underground utilities construction. SCT and S&S became involved in litigation with the City of Corpus Christi over a contract for the construction of street, drainage, and utility improvements. The City prevailed on its breach-of-contract claim, and the trial court awarded the City attorney’s fees in addition to damages. SCT and S&S appealed on various issues.

One issue on appeal was whether the City was entitled to recover attorney’s fees from S&S. The court affirmed the trial court’s award of attorney’s fees, stating in part:

B. S&S & § 38.001 of the Texas Civil Practice & Remedies Code

First, Salinas argues that the City cannot recover attorney’s fees from S&S because “there was no contract between the City and S&S” and the “only contract at issue in this appeal is the contract between SCT and the City.”[footnote omitted]
Section 38.001(8) allows a prevailing party to recover its “reasonable attorney’s fees ... in addition to the amount of a valid claim and costs,” pursuant to a written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(b)(8). To recovery [sic] attorney’s fees under this section, “the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party.” Richard Gill Co. v. Jackson’s Landing Owners ‘Ass’n, 758 S.W.2d 921, 927 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied). “The purpose of presentment is to make the opposing party aware that a claim is asserted against him, and to allow him an opportunity to pay the claim or to perform as required and to thereby avoid incurring an obligation for attorney’s fees.” Id. at 927. General partners are jointly and severally liable with each other and with the limited partnership for the partnership’s obligations. See TEX. BUS. ORGS. CODE ANN. § 153.152(b); Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd., 349 S.W.3d 258, 273 (Tex. App.—Dallas 2011, pet. denied); Shaw v. Kennedy, Ltd., 879 S.W.2d 240, 247 (Tex. App.—Amarillo 1994).

It is undisputed that S&S is a general partner of SCT, and “a general partner of a limited partnership is liable for the debts of that limited partnership.” Forney 921 Lot Dev. Partners I, L.P., 349 S.W.3d at 272. Therefore, S&S is liable for the debts of SCT. See id. S&S further “challenges [the City’s] claim for attorney’s fees against it because the City did not timely present any attorney fee claim to it,” and as a matter of law, the City failed to provide notice of the claim. However, there was evidence that on November 28, 2016, Edmonds sent SCT a letter demanding payment of $716,148 for reasonable and necessary costs to complete the project pursuant to the contract. Additionally, on August 6, 2019, the City again demanded payment from S&S’s counsel for damages in the amount of $706,221. “No particular form or manner of presentment is required.” Richard Gill, 758 S.W.2d at 927. This is sufficient evidence that demand was made against Salinas for the amounts claimed in the present suit. See id. Therefore, we reject Salinas’s argument that the City may not recover attorney’s fees from S&S.

N. Standing or Capacity to Sue


The court of appeals held that the trial court erred in granting a Rule 91a motion dismissing a limited partner’s derivative claims based on lack of capacity.

John Parker, a limited partner in Kendall County Development Company, Ltd. (“KCDC”) sued Ohio Development, LLC (“Ohio Development”), which held a note secured by a parcel of land owned by KCDC. During the course of the litigation, Parker discovered that Ohio Development was a shell company controlled by Michael Shalit, the general partner of KCDC, and that Shalit and Ohio Development had schemed to deprive KCDC of the purchase price it would have received for the property at a fair auction and allowed Shalit to acquire the property below fair market value. In his fifth amended petition, Parker, derivatively on behalf of KCDC, asserted claims for common law fraud and civil conspiracy against Ohio Development. Parker alleged derivative standing as a limited partner on the basis that KCDC’s general partner, Shalit, would not bring claims on behalf of KCDC against himself and his shell company, Ohio Development, and the court-appointed receiver had stated to Parker’s counsel that she would rather not bring the claims. The trial court dismissed Parker’s derivative claims against Ohio Development as having no basis in law. Parker appealed.

The court of appeals explained that Rule 91a of the Texas Rules of Civil Procedure provides parties a procedural vehicle to dismiss baseless causes of action. Tex. R. Civ. P. 91a.1. Although a claim may be dismissed pursuant to Rule 91a if the claim is either factually or legally baseless, the only issue in this appeal was whether Parker’s claims had no basis in law.

After reviewing the specifics of Parker’s common law fraud and conspiracy claims and determining that Parker had sufficiently alleged the elements of those claims, the court next concluded that Ohio Development failed to demonstrate that the application of the statute of limitations rendered the claims legally baseless. The court then turned to a discussion of Ohio Development’s capacity argument.
After disposing of a contention by Parker that the trial court erred in considering evidence attached to the motion relevant to Ohio Capacity’s capacity affirmative defense, the court turned to the merits of Ohio Development’s capacity argument.

The court of appeals characterized Ohio Development’s motion as attacking Parker’s individual capacity on the basis that the receivership order awarded exclusive authority to pursue claims. However, the court stated that Parker’s fifth amended petition did not assert claims individually; the claims were instead brought derivatively on behalf of KCDC. The court quoted portions of Parker’s fifth amended petition that alleged how Ohio Development and Shalit conspired to defraud KCDC and further quoted the following allegations in the petition regarding the derivative nature of the claims:

Parker was a limited partner at all times relevant to this lawsuit in KCDC. Pursuant to Texas Business Organizations Code § 153.402, **Parker has standing to bring derivative claims on behalf of KCDC.** Pursuant to TEX. BUS. ORG. CODE § 153.401, it is unlikely the general partner of KCDC, being Mr. Shalit, would bring these claims since he is named as being liable for this **conspiracy against KCDC.** Additionally, the Court appointed Successor Receiver has indicated to the undersigned she would rather not bring these claims. Thus, **the derivative action on behalf of KCDC is the only way Parker is able to redress the partnership’s claims** against Shalit and Ohio Development. TEX. BUS. ORG. CODE § 153.403. [Emphasis added [by court] throughout.]

The court explained that Ohio Development chose to stand on its existing motion seeking dismissal of Parker’s individual allegations in the fourth amended petition after Parker filed his fifth amended petition in which he first classified his claims as derivative. Thus, the court concluded: “To the extent the trial court dismissed Parker’s derivative claims based on a lack of capacity, it was inappropriate under Rule 91a because the motion was directed only to individual claims, but Parker only alleged his claims derivatively on behalf of KCDC.” The court went on to say that even if Ohio Development had amended its motion to address the claims derivatively, given the factual allegations, the trial court would have erred in dismissing Parker’s derivative claims under Rule 91a on the basis of lack of capacity.

A lengthy dissenting opinion argued that the majority erred in (1) exempting Parker’s failure to preserve error by failing to object to Ohio Development’s attaching its answer to its Rule 91a motion, (2) narrowly construing Ohio Development’s motion to encompass only claims in Parker’s individual capacity, and (3) ignoring Ohio Development’s contention that the receivership order deprived Parker of any capacity (individual or derivative) to maintain claims on KCDC’s behalf.


The court held that the issue of a limited partnership’s ability to assert claims against the defendant management company for breach of a management agreement of property owned by the limited partnership was an issue of the limited partnership’s capacity to sue rather than standing, and failure of the defendant to file a verified denial of the limited partnership’s capacity waived its right to complain of the lack of capacity. The defendant asserted that the limited partnership was required to wind up upon the withdrawal of the partnership’s LLC general partner, which occurred as a result of forfeiture of the LLC’s right to transact business due to failure to pay franchise tax. See Tex. Tax Code § 171.2515; Tex. Bus. Orgs. Code §§ 11.051(4), 153.501(b)(2). The defendant’s assertion that the limited partnership no longer existed, due to an event requiring winding up under the statute and dissolution under its partnership agreement after cessation of the general partner’s status as general partner and failure of the limited partnership to appoint a successor general partner, was a complaint about the limited partnership’s capacity to bring claims, not its standing. The court explained that standing, which is required for subject-matter jurisdiction and cannot be waived, requires (1) “a real controversy between the parties,” that (2) “will be actually determined by the judicial declaration sought.” In contrast, when a party has a justiciable interest in a controversy but lacks legal authority to sue, the issue is a lack of capacity, which must be raised by a verified pleading and is waived by the failure to do so.

In the context of a motion to remand due to lack of diversity jurisdiction, the court concluded that the defendants had not met the heavy burden of showing improper joinder of a partnership on whose behalf the plaintiff, a partner, brought derivative claims, and the court thus remanded the case due to lack of diversity jurisdiction.

Plaintiff Malek, as co-trustee of a marital trust (“Malek Trust”), brought a derivative cause of action in state court on behalf of Hudson River Partners, LLP, (“HRP”) and Thayer Leader Development Group, Inc. (“TLDG”), asserting various mismanagement claims against Defendants Minicozzi, Murdy, and Tyson, who were co-founders and board members of HRP (of which the Malek Trust was 19% owner) and TLDG. Defendant Minicozzi was a Texas resident, and Defendants Murdy and Tyson were Connecticut residents. Plaintiff Malek was a Virginia resident, and TLDG was a Texas corporation with its principal place of business in New York. Because HRP’s citizenship for diversity purposes was determined by the citizenship of each of its partners (i.e., Minicozzi, Murdy, Tyson, and Malek), HRP was a citizen of Texas, Connecticut, and Virginia. Defendants removed the case and alleged that HRP was dispensable and improperly joined.

Murdy and Tyson sought to have the court “realign in its diversity analysis ... [HRP] with the Defendants who control it” and then to use the court’s power under Rule 21 to dismiss Hudson River as a Rule 19(b) dispensable party. Malek argued that HRP was not a dispensable party because the claims were brought on HRP’s behalf, the harm alleged was harm to HRP, and any relief would directly inure to HRP. Malek further argued that the partnership’s presence was indispensable because all the partners were not parties to the action. The court stated that it was aware of no precedent excluding a party from the diversity analysis “at the threshold removal stage based on the inapposite standards for an ‘indispensable’ party under Rule 19(b).” The court noted in a footnote:

The case relied on by Murdy and Tyson for their argument that HRP is dispensable and should be dismissed for the purposes of the Court’s diversity analysis is Moss v. Princip, 913 F.3d 508 (5th Cir. 2019). However, Moss did not involve a remand motion in response to a removal notice, as here. In Moss the defendants removed to federal court and “[n]o one challenged removal.” Id. at 512-13. Only after the federal-court jury found the defendants liable for damages did the defendants who had originally removed the action then move to dismiss for lack of subject-matter jurisdiction, claiming that the inclusion of the parties’ partnership as a defendant created a lack of complete diversity. Id. at 513. In that context, the court granted the plaintiffs’ Rule 21 motion to dismiss the partnership as a dispensable non-diverse party, against whom the plaintiffs did not seek relief or entry of judgment. Id.

The court next rejected the defendants’ improper joinder argument:

Rather than claim that there has been “actual fraud in the pleading of jurisdictional facts,” Murdy and Tyson argue that Malek cannot establish a cause of action against HRP. Dkt. 12, at 19. Murdy and Tyson’s argument requires them to first re-urge alignment of HRP with them on the Defendants’ side of the dispute since improper joinder under 28 U.S.C. § 1441(b)(2) queries [sic] the propriety of a joined defendant. See 28 U.S.C. § 1441(b)(2). Accordingly, Murdy and Tyson’s improper joinder argument is that once “the parties are properly aligned,” so that Malek is on one side and HRP is on the other with Murdy and Tyson, diversity does not exist because HRP takes on Malek’s Virginia citizenship. Dkt. 12, at 7.[footnote omitted] Once HRP is hypothetically aligned with HRP, Murdy and Tyson argue that Malek has “stated no claims against [HRP].” Id. at 20. Specifically, Murdy and Tyson argue that Malek’s claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty unjust enrichment, tortious interference against Minicozzi, Murdy, and Tyson, don’t implicate HRP, and thus fail as to HRP. Id. at 20. Murdy and Tyson further state “[t]here are no allegations that Hudson River has been enriched” and “no allegations that Hudson River has interfered with any business.” Id. Without “claims or relief alleged against HRP itself,” HRP has been allegedly improperly joined. Id.
Murdy and Tyson concede that for Malek to make claims against HRP does not “make much sense” because, essentially, claims against the partnership are really claims against those who control the actions of the partnership. *Id.* at 19. Practically speaking, however, it would not have made much sense for Malek to assert claims against HRP because Malek brings claims on behalf of HRP for injury caused to HRP by Defendants. *See, e.g.*, Dkts. 12, at 11 (Murdy and Tyson referencing the “derivative nature” of Malek’s claims); 1-3, at 15 (Malek’s petition describing Minicozzi’s actions to the “detriment of [HRP]”). Murdy and Tyson’s argument that the Court should rewrite Malek’s petition such that HRP is aligned with Defendants, and that once realigned, Malek has stated no claims against HRP, is illogical.

Even if the Court did re-align HRP with Defendants such that arguments concerning the insufficiency of Malek’s claims against HRP might be cogent, Murdy and Tyson’s improper joinder argument still fails. Murdy and Tyson have not provided any arguments as to whether Malek does not have a “reasonable basis for recovery under state law” by doing “a Rule 12(b)(6) type analysis” of Malek’s petition, as required for the improper joinder framework. *Smallwood*, 385 F.3d at 573. In arguing that HRP should be aligned with Defendants and then that HRP has been improperly joined as a defendant because Malek has not made claims implicating HRP, Murdy and Tyson have not met the heavy burden on defendants claiming improper joinder. Because Murdy and Tyson have not met their burden, they have failed to show the existence of an exception to the requirement of complete diversity. Accordingly, the Court lacks subject matter jurisdiction and Malek’s motion to remand, Dkt. 11, should be granted. This action should be remanded to the Travis County District Court from which it originated.

In a footnote, the court noted:

Murdy and Tyson’s argument for realignment is that HRP (and TLDG) oppose Malek’s suit, so the partnerships are adverse to Malek and thus should be aligned as Defendants. Dkt. 12, at 8-9. The positions attributed to TLDG and HRP are evidenced in the record by a declaration from Tyson that he, Murdy, and Minicozzi are part of a majority of the Board of Directors and his statement that “the majority of the [TLG] Board of Directors is opposed to Malek’s demands and the allegations in this lawsuit because they are premised on erroneous information and the lawsuit is damaging to [TLDG]’s interest.” Dkt. 1-1, at 3. Tyson states that “[f]or the same reasons [HRP] is also opposed to Malek’s demands and this litigation.” *Id.; see also* Dkt. 1-2, at 2-3 (Declaration of Murdy stating the same). The urged realignment, while necessary for Murdy and Tyson’s improper joinder argument, does not address the intractable problem that no matter which side of the caption HRP is positioned, complete diversity does not exist owing to HRP’s common citizenship with Malek on one side and Tyson and Murdy on the other.

O. Derivative Litigation


The court of appeals held that the trial court erred in granting a Rule 91a motion dismissing a limited partner’s derivative claims based on lack of capacity.

John Parker, a limited partner in Kendall County Development Company, Ltd. (“KCDC”) sued Ohio Development, LLC (“Ohio Development”), which held a note secured by a parcel of land owned by KCDC. During the course of the litigation, Parker discovered that Ohio Development was a shell company controlled by Michael Shalit, the general partner of KCDC, and that Shalit and Ohio Development had schemed to deprive KCDC of the purchase price it would have received for the property at a fair auction and allowed Shalit to acquire the property below fair market value. In his fifth amended petition, Parker, derivatively on behalf of KCDC, asserted claims for common law fraud and civil conspiracy against Ohio Development. Parker alleged derivative standing as a limited partner on the basis that KCDC’s general partner, Shalit, would not bring claims on behalf of KCDC against himself and his shell company, Ohio Development, and the court-appointed receiver had stated to Parker’s counsel that she
would rather not bring the claims. The trial court dismissed Parker’s derivative claims against Ohio Development as having no basis in law. Parker appealed.

The court of appeals explained that Rule 91a of the Texas Rules of Civil Procedure provides parties a procedural vehicle to dismiss baseless causes of action. Tex. R. Civ. P. 91a.1. Although a claim may be dismissed pursuant to Rule 91a if the claim is either factually or legally baseless, the only issue in this appeal was whether Parker’s claims had no basis in law.

After reviewing the specifics of Parker’s common law fraud and conspiracy claims and determining that Parker had sufficiently alleged the elements of those claims, the court next concluded that Ohio Development failed to demonstrate that the application of the statute of limitations rendered the claims legally baseless. The court then turned to a discussion of Ohio Development’s capacity argument.

After disposing of a contention by Parker that the trial court erred in considering evidence attached to the motion relevant to Ohio Capacity’s capacity affirmative defense, the court turned to the merits of Ohio Development’s capacity argument.

The court of appeals characterized Ohio Development’s motion as attacking Parker’s *individual* capacity on the basis that the receivership order awarded exclusive authority to pursue claims. However, the court stated that Parker’s fifth amended petition did not assert claims individually; the claims were instead brought derivatively on behalf of KCDC. The court quoted portions of Parker’s fifth amended petition that alleged how Ohio Development and Shalit conspired to defraud KCDC and further quoted the following allegations in the petition regarding the derivative nature of the claims:

>Parker was a limited partner at all times relevant to this lawsuit in KCDC. Pursuant to Texas Business Organizations Code § 153.402, **Parker has standing to bring derivative claims on behalf of KCDC.** Pursuant to TEX. BUS. ORG. CODE § 153.401, it is unlikely the general partner of KCDC, being Mr. Shalit, would bring these claims since he is named as being liable for this *conspiracy against KCDC.* Additionally, the Court appointed Successor Receiver has indicated to the undersigned she would rather not bring these claims. Thus, **the derivative action on behalf of KCDC is the only way Parker is able to redress the partnership’s claims** against Shalit and Ohio Development. TEX. BUS. ORG. CODE § 153.403. [Emphasis added [by court] throughout.]

The court explained that Ohio Development chose to stand on its existing motion seeking dismissal of Parker’s individual allegations in the fourth amended petition after Parker filed his fifth amended petition in which he first classified his claims as derivative. Thus, the court concluded: “To the extent the trial court dismissed Parker’s derivative claims based on a lack of capacity, it was inappropriate under Rule 91a because the motion was directed only to individual claims, but Parker only alleged his claims derivatively on behalf of KCDC.” The court went on to say that even if Ohio Development had amended its motion to address the claims derivatively, given the factual allegations, the trial court would have erred in dismissing Parker’s derivative claims under Rule 91a on the basis of lack of capacity.

A lengthy dissenting opinion argued that the majority erred in (1) exempting Parker’s failure to preserve error by failing to object to Ohio Development’s attaching its answer to its Rule 91a motion, (2) narrowly construing Ohio Development’s motion to encompass only claims in Parker’s individual capacity, and (3) ignoring Ohio Development’s contention that the receivership order deprived Parker of any capacity (individual or derivative) to maintain claims on KCDC’s behalf.


In the context of a motion to remand due to lack of diversity jurisdiction, the court concluded that the defendants had not met the heavy burden of showing improper joinder of a partnership on whose behalf the plaintiff, a partner, brought derivative claims, and the court thus remanded the case due to lack of diversity jurisdiction.

Plaintiff Malek, as co-trustee of a marital trust (“Malek Trust”), brought a derivative cause of action in state court on behalf of Hudson River Partners, LLP, (“HRP”) and Thayer Leader Development Group, Inc. (“TLDG”),
asserting various mismanagement claims against Defendants Minicozzi, Murdy, and Tyson, who were co-founders and board members of HRP (of which the Malek Trust was 19% owner) and TLDG. Defendant Minicozzi was a Texas resident, and Defendants Murdy and Tyson were Connecticut residents. Plaintiff Malek was a Virginia resident, and TLDG was a Texas corporation with its principal place of business in New York. Because HRP’s citizenship for diversity purposes was determined by the citizenship of each of its partners (i.e., Minicozzi, Murdy, Tyson, and Malek), HRP was a citizen of Texas, Connecticut, and Virginia. Defendants removed the case and alleged that HRP was dispensable and improperly joined.

Murdy and Tyson sought to have the court “realign in its diversity analysis … [HRP] with the Defendants who control it” and then to use the court’s power under Rule 21 to dismiss Hudson River as a Rule 19(b) dispensable party. Malek argued that HRP was not a dispensable party because the claims were brought on HRP’s behalf, the harm alleged was harm to HRP, and any relief would directly inure to HRP. Malek further argued that the partnership’s presence was indispensable because all the partners were not parties to the action. The court stated that it was aware of no precedent excluding a party from the diversity analysis “at the threshold removal stage based on the inapposite standards for an ‘indispensable’ party under Rule 19(b).” The court noted in a footnote:

The case relied on by Murdy and Tyson for their argument that HRP is dispensable and should be dismissed for the purposes of the Court’s diversity analysis is Moss v. Princip, 913 F.3d 508 (5th Cir. 2019). However, Moss did not involve a remand motion in response to a removal notice, as here. In Moss the defendants removed to federal court and “[n]o one challenged removal.” Id. at 512-13. Only after the federal-court jury found the defendants liable for damages did the defendants who had originally removed the action then move to dismiss for lack of subject-matter jurisdiction, claiming that the inclusion of the parties’ partnership as a defendant created a lack of complete diversity. Id. at 513. In that context, the court granted the plaintiffs’ Rule 21 motion to dismiss the partnership as a dispensable non-diverse party, against whom the plaintiffs did not seek relief or entry of judgment. Id.

The court next rejected the defendants’ improper joinder argument:

Rather than claim that there has been “actual fraud in the pleading of jurisdictional facts,” Murdy and Tyson argue that Malek cannot establish a cause of action against HRP. Dkt. 12, at 19. Murdy and Tyson’s argument requires them to first re-urge alignment of HRP with them on the Defendants’ side of the dispute since improper joinder under 28 U.S.C. § 1441(b)(2) queries [sic] the propriety of a joined defendant. See 28 U.S.C. § 1441(b)(2). Accordingly, Murdy and Tyson’s improper joinder argument is that once “the parties are properly aligned,” so that Malek is on one side and HRP is on the other with Murdy and Tyson, diversity does not exist because HRP takes on Malek’s Virginia citizenship. Dkt. 12, at 7.[footnote omitted] Once HRP is hypothetically aligned with HRP, Murdy and Tyson argue that Malek has “stated no claims against [HRP].” Id. at 20. Specifically, Murdy and Tyson argue that Malek’s claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty unjust enrichment, tortious interference against Minicozzi, Murdy, and Tyson, don’t implicate HRP, and thus fail as to HRP. Id. at 20. Murdy and Tyson further state “[t]here are no allegations that Hudson River has been enriched” and “no allegations that Hudson River has interfered with any business.” Id. Without “claims or relief alleged against HRP itself,” HRP has been allegedly improperly joined. Id.

Murdy and Tyson concede that for Malek to make claims against HRP does not “make much sense” because, essentially, claims against the partnership are really claims against those who control the actions of the partnership. Id. at 19. Practically speaking, however, it would not have made much sense for Malek to assert claims against HRP because Malek brings claims on behalf of HRP for injury caused to HRP by Defendants. See, e.g., Dkts. 12, at 11 (Murdy and Tyson referencing the “derivative nature” of Malek’s claims); 1-3, at 15 (Malek’s petition describing Minicozzi’s actions to the “detriment of [HRP]”). Murdy and Tyson’s argument that the Court should rewrite Malek’s petition such that HRP is aligned with Defendants, and that once realigned, Malek has stated no claims against HRP, is illogical.
Even if the Court did re-align HRP with Defendants such that arguments concerning the insufficiency of Malek’s claims against HRP might be cogent, Murdy and Tyson’s improper joinder argument still fails. Murdy and Tyson have not provided any arguments as to whether Malek does not have a “reasonable basis for recovery under state law” by doing “a Rule 12(b)(6) type analysis” of Malek’s petition, as required for the improper joinder framework. *Smallwood*, 385 F.3d at 573. In arguing that HRP should be aligned with Defendants and then that HRP has been improperly joined as a defendant because Malek has not made claims implicating HRP, Murdy and Tyson have not met the heavy burden on defendants claiming improper joinder. Because Murdy and Tyson have not met their burden, they have failed to show the existence of an exception to the requirement of complete diversity. Accordingly, the Court lacks subject matter jurisdiction and Malek’s motion to remand, Dkt. 11, should be granted. This action should be remanded to the Travis County District Court from which it originated.

In a footnote, the court noted:

Murdy and Tyson’s argument for realignment is that HRP (and TLDG) oppose Malek’s suit, so the partnerships are adverse to Malek and thus should be aligned as Defendants. Dkt. 12, at 8-9. The positions attributed to TLDG and HRP are evidenced in the record by a declaration from Tyson that he, Murdy, and Minicozzi are part of a majority of the Board of Directors and his statement that “the majority of the [TLDG] Board of Directors is opposed to Malek’s demands and the allegations in this lawsuit because they are premised on erroneous information and the lawsuit is damaging to [TLDG]’s interest.” Dkt. 1-1, at 3. Tyson states that “[f]or the same reasons [HRP] is also opposed to Malek’s demands and this litigation.” *Id.*; see also Dkt. 1-2, at 2-3 (Declaration of Murdy stating the same). The urged realignment, while necessary for Murdy and Tyson’s improper joinder argument, does not address the intractable problem that no matter which side of the caption HRP is positioned, complete diversity does not exist owing to HRP’s common citizenship with Malek on one side and Tyson and Murdy on the other.


Plaintiff members of an LLC sufficiently pleaded direct RICO claims in their individual capacities against the defendant members and an entity controlled by them but failed to sufficiently plead derivative RICO claims because they did not plead that they had made a pre-suit written demand. The plaintiff members sufficiently pleaded direct claims against the defendant members for breach of fiduciary duties owed to the plaintiffs.

In 2016, the plaintiffs formed Allied Lab Solutions, LLC (“Allied”) to provide medical lab services to rural hospitals, entering into a company agreement and becoming members of Allied. Around the same time, defendant Nichols formed Medical Management Professionals (“MMP”), also with the purpose of providing lab services to rural hospitals. The plaintiffs then formed Allied Lab Solutions Management, LLC (“Allied Management”) for the sole purpose of distributing money from MMP to Allied. Defendant Ellis was the member-manager of Allied Management and Allied from November 2016 to April 2017, and defendant Forage was the member-manager of Allied Management and Allied from May 2017 to April 2019.

In April 2017, Allied and MMP entered into a Service Agreement in which they agreed to perform lab services for several rural hospitals (“Participating Rural Hospitals”). The plaintiffs alleged that the defendants repeatedly misrepresented to the plaintiffs the income that MMP was receiving from the Participating Rural Hospitals from December 2016 to April 2019 and that Ellis and Forage knew that the reports were falsified and that the amount of money going to each member was incorrect. According to the plaintiffs, Ellis deposited some of MMP’s unreported money in a bank account for another one of his companies located in Colorado, and Ellis and Forage sent Allied’s members annual tax forms confirming the amounts they received from their membership shares that falsely understated amounts from MMP’s financial reports. The plaintiffs allege that the defendants committed both wire fraud and money laundering in carrying out this scheme. From May 2019 to June 2020, MMP failed to make any payments to Allied Management, Allied, or the plaintiffs. Defendants Nichols, Ellis, and Forage allegedly claimed that MMP had not received any monies from Participating Rural Hospitals since April 2018 although the CEO of one of the Participating Rural Hospitals stated that MMP received $2,425,725 between May 2019 and June 2020 from his hospital alone.
In October 2020, Forage, acting as Allied’s manager, terminated Allied and Allied Management by filing documents with the Texas Secretary of State. The plaintiffs alleged that he did so without the consent of Allied’s members in order to cover up the defendants’ scheme to skim money from MMP’s income.

In this lawsuit, the plaintiffs’ causes of action included direct RICO claims in the plaintiffs’ individual capacities, derivative RICO claims on behalf of Allied and MMP, and direct claims for breach of fiduciary duty against Ellis and Forage. The defendants sought to dismiss all of these claims.

The defendants contended that the plaintiffs individually lacked standing or capacity to bring RICO claims. (The court explained that the Fifth Circuit uses the terms “standing” and “capacity” in relation to RICO claims brought in an individual capacity, but the Texas Supreme Court has stated that “[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.”) Recognizing that Allied, Allied Management, and MMP were all LLCs rather than corporations or partnerships, the court applied the same three-part test used by the Fifth Circuit to determine whether shareholders or partners may bring RICO claims individually. The test is: (1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of action accrues in the corporation. The defendants argued that the plaintiffs failed all three parts of the test, but the court disagreed.

The court agreed with the defendants that the plaintiffs did not sufficiently plead that their injuries were not derived from, and thus distinct from, Allied’s injuries. Only because of the plaintiffs’ relationship with Allied as its members did they receive less profit than they would have if not for the defendants’ alleged racketeering activity. The court determined, however, that the plaintiffs sufficiently pleaded that the defendants’ racketeering activity was directed at the members individually rather than solely at Allied and that Texas law could allow for the individual members to have a cause of action separate from the LLCs. The plaintiffs alleged that they acted in reliance on the defendants’ false statements by trusting that the monthly financial reports and checks from MMP and Allied were correct. According to the court, if the plaintiffs did not allege that Allied’s managers knew of and actively participated in the scheme, then the defendants would be correct in stating that only Allied was targeted and not its individual members, but the court said that the plaintiffs had sufficiently shown at this stage that the defendants targeted their activities not only at Allied but also at its individual members. The court acknowledged that “Texas courts generally have held that a member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company,” but the court relied on Texas cases (Saden v. Smith, 415 S.W.3d 450, 463 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652, at *7 (W.D. Tex. Aug. 27, 2018)), in support of its conclusion that Texas courts sometimes allow for individual members to assert a separate cause of action from the LLC where members of an LLC “used their status as members of an LLC to benefit themselves to the detriment of the other members.” The court thus declined to dismiss the RICO claims brought by the plaintiffs in their individual capacities.

With respect to the RICO claims brought by the plaintiffs derivatively, the court relied on the statutory provisions of the Texas Business Organizations Code applicable to LLC derivative proceedings to conclude that the claims should be dismissed. The court first noted that Federal Rule of Civil Procedure 23.1 requires a shareholder derivative complaint to state with particularity “any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members” and “the reasons for not obtaining the action or not making the effort,” but the court then stated that “the particularity of a plaintiff’s pleadings is governed by the standards of the state of incorporation.” Because Allied and MMP were both Texas LLCs, the court turned to a discussion of the provisions of the Texas Business Organizations Code. The court concluded that the plaintiffs sufficiently pleaded that they fairly and adequately represented the interests of the LLC, but they failed to plead that they had made a written pre-suit demand. [The plaintiffs apparently did not attempt to rely on the provisions of the Texas Business Organizations Code that exclude the fair representation and demand requirements in the context of a derivative claim against members, managers, or officers of a closely held LLC, i.e., an LLC with fewer than 35 members and no membership interests listed on an exchange.]

The Texas Business Code sets forth standing requirements for members of LLCs who wish to bring claims in a derivative capacity, or on behalf of the LLC itself. Section 101.452 states that a member must have been a member of the LLC at the time of the act or omission complained of and must fairly and adequately represent the interests of the LLC in enforcing the right of the LLC. Section
101.453 states that a member “may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the limited liability company stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the limited liability company take suitable action” (emphasis added).

Defendants argue that Plaintiffs have failed to plead that they fairly and adequately represent the interests of the LLC and that they made a written demand for the LLC to take action and were rejected. (Mot., Dkt. 15, at 10–11). Defendants also contend that Plaintiffs have not pleaded enough facts to show that the RICO claims are not collusive ones pleaded just to confer jurisdiction on the federal court. (Id. at 11 (citing Fed. R. Civ. P. 23.1(b)(2))). As discussed above, the Court finds that Plaintiffs have sufficiently pleaded a RICO claim in their individual capacities and therefore the Court does not believe there is sufficient evidence that Plaintiffs only pleaded a RICO claim to get into federal court at this time. Further, the Court finds that Plaintiffs, as several members of Allied who benefit from Allied’s success, have pleaded enough facts to show that they fairly and adequately represent the interests of the LLC. However, the Court agrees with Defendants that Plaintiffs have failed to plead that they filed a written demand with Allied or MMP that stated the act or omission that is the subject of this suit and demanded action. While Plaintiffs did plead that they made two requests to Defendant Forage to bring a suit on behalf of Allied, (Am. Comp., Dkt. 14, at 41), they fail to allege that these demands were written.

In their response, Plaintiffs simply reiterate the statements from their amended complaint: that they made two demands to Defendant Forage to bring an action on the basis of the alleged fraudulent activities through an attorney acting on their behalf and that Defendant Forage rejected both demands. (Resp., Dkt. 20, at 10–11). The Court notes that Plaintiffs seem to have strategically eliminated the word “written” when providing a quote from Section 101.453. (See id.). Because Plaintiffs have failed to allege that they have met the conditions to bring a derivative claim on behalf of Allied required Texas law, the Court finds that Plaintiffs’ claims, to the extent they are brought in a derivative capacity, are dismissed.

The defendants also sought dismissal of the plaintiffs’ breach-of-fiduciary-duty claims against defendants Forage and Ellis, arguing that Forage and Ellis “owed fiduciary duties only to Allied, and not to the Plaintiffs as individual members of Allied.” Relying on Texas case law that has recognized fiduciary duties may be owed by member-managers to other members in some situations, the court concluded that the plaintiffs’ allegations were sufficient to allow them to proceed with their breach-of-fiduciary-duty claims against Ellis and Forage.

Defendants are correct that Texas courts have generally held that fiduciary duties of a corporate director “run to the corporation, not to the individual shareholders.” Straehla v. AL Glob. Servs., LLC, 619 S.W.3d 795, 805 (Tex. App.—San Antonio 2020, pet. denied). However, “[n]either the Texas Limited Liability Company Act ... nor the subsequently-enacted limited liability company provisions of the Texas Business Organizations Code ... directly address the duties owed by managers and/or members of limited liability companies.” Cardwell v. Gurley, No. 05-09-01068-CV, 2018 WL 3454800 (Tex. App.—Dallas July 18, 2018, pet. denied) (citing Tex. Bus. Orgs. Code Ann. § 101.401). “Both, however, presume the existence of fiduciary duties, providing that a limited liability company may ‘expand or restrict’ any duties (including fiduciary duties) of a member, manager, officer, or other person.” Id. The Texas courts have recognized a fiduciary duty between a manager member of an LLC and an individual member of an LLC in certain contexts. In Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 392–93 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the court found that a “sole member-manager” of an LLC who had “a high degree of control” over the LLC’s day-to-day operations was more analogous to a general partner in a limited partnership than a director or majority shareholder in a corporation. Thus, because “a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity,” id. at 391, and because the member manager “[had] a legal right of control and exercise[d] that control by virtue of his status,” id. at 395, the court concluded that there was a formal fiduciary relationship between the member-manager and the individual members in the specific context of purchasing a minority
member’s interest, id. at 396. Similarly, in Cardwell v. Gurley, No. 4-10-CV-706, 2011 WL 6338813, at *9 (E.D. Tex. Dec. 19, 2011), aff’d sub nom. In re Cardwell, 487 Fed. Appx. 183 (5th Cir. 2012), a federal district court upheld a Texas trial court’s finding that a member-manager of an LLC owed another member “direct fiduciary duties of loyalty, due care, and full disclosure as a matter of law.” The court noted that the Fifth Circuit has held that “persons exercising control of a business owe trust-type obligations to partners and shareholders that do not control the business.” Id. at *8.

The Court finds these cases to be illuminating as to whether member-managers of an LLC can ever be held to owe a fiduciary duty to the individual members of the LLC and not just the LLC itself.[In footnote 4, the court noted that the plaintiffs suggested some sort of informal duty might exist between the plaintiffs and Ellis and Forage based on a pre-existing relationship but stated the plaintiffs did not allege any facts supporting the existence of informal fiduciary duties and sufficiently pleaded the existence of fiduciary duties owed by Ellis and Forage to the plaintiffs based on their control over Allied, not because of any informal, pre-existing relationships.] Plaintiffs alleged that both Defendants Ellis and Forage actively worked to mislead Plaintiffs as to how much money they were entitled to through their membership shares of Allied. (Am. Compl., Dkt. 14, at 4). Plaintiffs also alleged that Defendants Ellis and Forage ran the day-to-day operations of Allied as the managing members, which allowed them to mislead Plaintiffs. (Id. at 15). Adding to the alleged authority of Ellis and Forage to oversee Allied is the fact that Ellis and Forage were also the member-managers of Allied Management, which was also a member-manager of Allied. (Id. at 15–16). Thus, Plaintiffs ... may proceed with their breach of fiduciary claims against Defendants Ellis and Forage.[footnote omitted]


“HMIT acknowledges that the Reorganized Debtor, Highland Capital Management, L.P., is a Delaware limited liability partnership governed by the Delaware Limited Partnership Act, 6 Del. C. § 17-101, et seq. To bring ‘a derivative action’ on behalf of a limited partnership, ‘the plaintiff must be a partner or an assignee of a partnership interest’ continuously from ‘the time of the transaction of which the plaintiff complains’ through ‘the time of bringing the action.’

HMIT is not a partner, general or limited, of the Reorganized Debtor limited partnership. HMIT was a limited partner in the original debtor (specifically, a holder of Class B/C Limited Partnership interests in Highland), but that limited partnership interest was extinguished on August 11, 2021 (the Effective Date of the Plan) per the terms of the Plan, and HMIT does not own any partnership interest in the newly created Reorganized Debtor limited partnership. Because HMIT would not hold a partnership interest in the Reorganized Debtor at ‘the time of bringing the action,’ it ‘lacks derivative standing’ to bring claims ‘on the partnership’s behalf.’ HMIT likewise cannot satisfy ‘the continuous ownership requirement’; when HMIT’s limited partnership interest in the original Debtor was cancelled on the Plan’s Effective Date, HMIT ‘los[t] standing to continue a derivative suit’ on behalf of the Debtor. Finally, to the extent HMIT seeks to bring a ‘double derivative’ action on behalf of the Claimant Trust based on claims purportedly held by its wholly owned subsidiary, the Reorganized Debtor, HMIT lacks standing. A ‘double derivative’ action is a suit ‘brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled.’ And, under Delaware law, ‘parent level standing is required to enforce a subsidiary’s claim derivatively.’ Because HMIT would lack derivative standing to bring claims on behalf of the parent Claimant Trust, it also would lack standing to bring a double derivative action.”

P. 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 district court opinions applying this principle are too numerous to include in this paper, but recent opinions
of the Fifth Circuit Court of Appeals as well as district court opinions addressing somewhat novel situations or unsettled issues in this context are included below.


The court rejected the attempt of defendant Lane Bryant Brands OpCo, LLC (“Lane Bryant”) to allege its citizenship “upon information and belief.” Lane Bryant submitted a letter to the court alleging that “[u]pon information and belief, the partners of [the two limited partnerships that comprise Ascena GP LLC] are citizens of Ohio.” In a footnote, the court stated: “Based on the letter and Lane Bryant’s Amended Notice of Removal, Ascena GP LLC is a member of LB Group L.P., which is a member of LB Topco Holdco LLC, which is the sole member of LB Guarantor LLC, which is the sole member of LB Buyco LLC, which is the sole member of Lane Bryant Brands OpCo, LLC.” The court concluded that the defendant had yet to satisfy its burden of establishing subject matter jurisdiction, explaining:

> [E]very single case that Lane Bryant cites for the proposition that it can allege its own citizenship upon information and belief is a case in which a court permitted “a party [to] plead the citizenship of an opposing party ‘upon information and belief.’” [footnote omitted]


In the context of a motion to remand due to lack of diversity jurisdiction, the court concluded that the defendants had not met the heavy burden of showing improper joinder of a partnership on whose behalf the plaintiff, a partner, brought derivative claims, and the court thus remanded the case due to lack of diversity jurisdiction.

Plaintiff Malek, as co-trustee of a marital trust (“Malek Trust”), brought a derivative cause of action in state court on behalf of Hudson River Partners, LLP, (“HRP”) and Thayer Leader Development Group, Inc. (“TLDG”), asserting various mismanagement claims against Defendants Minicozzi, Murdy, and Tyson, who were co-founders and board members of HRP (of which the Malek Trust was 19% owner) and TLDG. Defendant Minicozzi was a Texas resident, and Defendants Murdy and Tyson were Connecticut residents. Plaintiff Malek was a Virginia resident, and TLDG was a Texas corporation with its principal place of business in New York. Because HRP’s citizenship for diversity purposes was determined by the citizenship of each of its partners (i.e., Minicozzi, Murdy, Tyson, and Malek), HRP was a citizen of Texas, Connecticut, and Virginia. Defendants removed the case and alleged that HRP was dispensable and improperly joined.

Murdy and Tyson sought to have the court “realign in its diversity analysis ... [HRP] with the Defendants who control it” and then to use the court’s power under Rule 21 to dismiss Hudson River as a Rule 19(b) dispensable party. Malek argued that HRP was not a dispensable party because the claims were brought on HRP’s behalf, the harm alleged was harm to HRP, and any relief would directly inure to HRP. Malek further argued that the partnership’s presence was indispensable because all the partners were not parties to the action. The court stated that it was aware of no precedent excluding a party from the diversity analysis “at the threshold removal stage based on the inapposite standards for an ‘indispensable’ party under Rule 19(b).” The court noted in a footnote:

> The case relied on by Murdy and Tyson for their argument that HRP is dispensable and should be dismissed for the purposes of the Court’s diversity analysis is *Moss v. Princip*, 913 F.3d 508 (5th Cir. 2019). However, Moss did not involve a remand motion in response to a removal notice, as here. In *Moss* the defendants removed to federal court and “[n]o one challenged removal.” Id. at 512-13. Only after the federal-court jury found the defendants liable for damages did the defendants who had originally removed the action then move to dismiss for lack of subject-matter jurisdiction, claiming that the inclusion of the parties’ partnership as a defendant created a lack of
complete diversity. Id. at 513. In that context, the court granted the plaintiffs’ Rule 21 motion to dismiss the partnership as a dispensable non-diverse party, against whom the plaintiffs did not seek relief or entry of judgment. Id.

The court next rejected the defendants’ improper joinder argument:

Rather than claim that there has been “actual fraud in the pleading of jurisdictional facts,” Murdy and Tyson argue that Malek cannot establish a cause of action against HRP. Dkt. 12, at 19. Murdy and Tyson’s argument requires them to first re-urge alignment of HRP with them on the Defendants’ side of the dispute since improper joinder under 28 U.S.C. § 1441(b)(2) queries [sic] the propriety of a joined defendant. See 28 U.S.C. § 1441(b)(2). Accordingly, Murdy and Tyson’s improper joinder argument is that once “the parties are properly aligned,” so that Malek is on one side and HRP is on the other with Murdy and Tyson, diversity does not exist because HRP takes on Malek’s Virginia citizenship. Dkt. 12, at 7.[footnote omitted] Once HRP is hypothetically aligned with HRP, Murdy and Tyson argue that Malek has “stated no claims against [HRP].” Id. at 20. Specifically, Murdy and Tyson argue that Malek’s claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty unjust enrichment, tortious interference against Minicozzi, Murdy, and Tyson, don’t implicate HRP, and thus fail as to HRP. Id. at 20. Murdy and Tyson further state “[t]here are no allegations that Hudson River has been enriched” and “no allegations that Hudson River has interfered with any business.” Id. Without “claims or relief alleged against HRP itself,” HRP has been allegedly improperly joined. Id.

Murdy and Tyson concede that for Malek to make claims against HRP does not “make much sense” because, essentially, claims against the partnership are really claims against those who control the actions of the partnership. Id. at 19. Practically speaking, however, it would not have made much sense for Malek to assert claims against HRP because Malek brings claims on behalf of HRP for injury caused to HRP by Defendants. See, e.g., Dkts. 12, at 11 (Murdy and Tyson referencing the “derivative nature” of Malek’s claims); 1-3, at 15 (Malek’s petition describing Minicozzi’s actions to the “detriment of [HRP]”). Murdy and Tyson’s argument that the Court should rewrite Malek’s petition such that HRP is aligned with Defendants, and that once realigned, Malek has stated no claims against HRP, is illogical.

Even if the Court did re-align HRP with Defendants such that arguments concerning the insufficiency of Malek’s claims against HRP might be cogent, Murdy and Tyson’s improper joinder argument still fails. Murdy and Tyson have not provided any arguments as to whether Malek does not have a “reasonable basis for recovery under state law” by doing “a Rule 12(b)(6) type analysis” of Malek’s petition, as required for the improper joinder framework. Smallwood, 385 F.3d at 573. In arguing that HRP should be aligned with Defendants and then that HRP has been improperly joined as a defendant because Malek has not made claims implicating HRP, Murdy and Tyson have not met the heavy burden on defendants claiming improper joinder. Because Murdy and Tyson have not met their burden, they have failed to show the existence of an exception to the requirement of complete diversity. Accordingly, the Court lacks subject matter jurisdiction and Malek’s motion to remand, Dkt. 11, should be granted. This action should be remanded to the Travis County District Court from which it originated.

Murdy and Tyson’s argument for realignment is that HRP (and TLDG) oppose Malek’s suit, so the partnerships are adverse to Malek and thus should be aligned as Defendants. Dkt. 12, at 8-9. The positions attributed to TLDG and HRP are evidenced in the record by a declaration from Tyson that he, Murdy, and Minicozzi are part of a majority of the Board of Directors and his statement that “the majority of the [TLG] Board of Directors is opposed to Malek’s demands and the allegations in this lawsuit because they are premised on erroneous information and the lawsuit is damaging to [TLDG]’s interest.” Dkt. 1-1, at 3. Tyson states that “[t]he same reasons [HRP] is also opposed to Malek’s demands and this litigation.” Id.; see also Dkt. 1-2, at 2-3 (Declaration
of Murdy stating the same). The urged realignment, while necessary for Murdy and Tyson’s improper joinder argument, does not address the intractable problem that no matter which side of the caption HRP is positioned, complete diversity does not exist owing to HRP’s common citizenship with Malek on one side and Tyson and Murdy on the other.

Q. Bankruptcy


The court discussed the rule that a debt imputed to a debtor under state partnership law based on the false pretenses, false representations, or fraud of a partner of the debtor is non-dischargeable under Section 523(a)(2)(A). The court concluded that the same reasoning was applicable to a debt for embezzlement under Section 523(a)(4). The court held that fact issues as to whether the debtor had agents or partners who committed fraud or embezzlement precluded summary judgment on the issue of the non-dischargeability of the debts in issue.

The court in this case addressed a creditor’s motion for summary judgment on the debtor’s nondischargeable liability for claims of fraud and embezzlement. In the course of its analysis, the court pointed out that Section 523(a)(2)(A) non-dischargeable liability can extend to fraud that a debtor did not personally commit. The court summarized the facts and holding in the United States Supreme Court decision of _Bartenwerfer v. Buckley_, in which the Supreme Court held that the debtor’s vicarious liability for the fraud of her boyfriend/business partner was non-dischargeable. The bankruptcy court relied on the concurrence in _Bartenwerfer_ and prior Fifth Circuit precedent to require an agency or partnership relationship that under state law imposes on the debtor vicarious liability for the debt described in Section 523(a)(2)(A).

The debtor in this case disputed allegations that she had the requisite intent under Section 523(a)(2)(A) or even made any representations to the plaintiff creditor, but the court stated that her argument was incomplete in light of _Bartenwerfer_.

No longer is personal involvement always a necessary prerequisite for finding nondischargeability under § 523(a)(2)(A). And yet, even if Defendant had no personal involvement in the alleged fraud, genuine issues of fact exist whether she had agents or partners, and if so whether they acted in the scope of their authority under Texas law to commit false pretenses, false representations, or actual fraud under § 523(a)(2)(A) as Plaintiff argues.

With respect to the creditor’s claim that it was entitled to summary judgment on its claim against the debtor for the non-dischargeable debt of embezzlement, the court concluded that the debtor could be liable for the embezzlement of a partner or agent under state law under the same type of reasoning employed in _Bartenwerfer_, but there were fact issues precluding summary judgment on this claim as well.

The holding in _Winkler_ was that “if a debt arises from fraud and the debtor is liable for that debt under state partnership law, the debt is nondischargeable under § 523(a)(2)(A).” _Winkler_, 239 F.3d at 751 (5th Cir. 2001). The Fifth Circuit, regarding this holding, stated that “[t]he same reasoning is relevant to determining the scope of § 523(a)(4).” _Cowin_, 864 F.3d at 351. This means that there are “no further criteria or qualifications” beyond the elemental requirements for finding embezzlement or larceny under § 523(a)(4). _Id. Cowin_ was decided before _Bartenwerfer_, but their combined reasoning indicates that under § 523(a)(4) a debtor may be held liable for the embezzlement or larceny of a conspirator, partner, or agent as determined under state law. Any cause of action alleging embezzlement or larceny under § 523(a)(4) would fail if no required conspiracy, partnership, or agency under state law exists, or if evidence is insufficient of the actions of Defendant’s conspirator, agent, or partner.

The summary judgment evidence submitted, read in the light most favorable to Defendant, is insufficient for a finding of embezzlement under § 523(a)(4). It is also insufficient to find that Defendant had a conspirator, partner, or agent under state law who committed embezzlement under § 523(a)(4). The Court finds genuine issues of fact remain in this case regarding Plaintiff’s embezzlement cause of action.

In this adversary proceeding, the bankruptcy court concluded that a state court’s findings of fact were sufficient to support nondischargeability under Sections 523(a)(2)(A) (false representation) and (a)(4) (fraud or defalcation in a fiduciary capacity) of the debt represented by the judgment in the state court litigation and that collateral estoppel applied to establish those exceptions to discharge.

Brandon Howley, the grandson of Chuck and Nancy Howley, was found liable to his grandparents and a family limited partnership, in state court litigation that preceded Brandon’s Chapter 7 bankruptcy. In this adversary proceeding, the court analyzed whether the judgment against Brandon was nondischargeable pursuant to § 523(a)(2)(A) and (a)(4) of the Bankruptcy Code. Significant damages were awarded against Brandon based on wrongful conduct. The state court made specific findings that Brandon engaged in fraudulent behavior, including while acting as a fiduciary. After a thorough discussion of the relevant exceptions to discharge and the state court’s findings, the bankruptcy court concluded that the exceptions to discharge were supported by the findings and that collateral estoppel was appropriate.

The context in which Brandon’s actions were taken resulted from Chuck Howley transferring a ranch known as Happy Hollow Ranch into a limited partnership, Happy Hollow Ranch, L.P. (“Ranch L.P.”) as part of his and Nancy’s estate planning.

The partnership was structured such that a trust established for Chuck (the CLH Trust, of which Chuck was beneficiary) owned a 49.99% limited partnership interest, a trust established for Nancy (the NTH Trust, of which Nancy was the beneficiary) owned a 49.99% limited partnership interest, and an entity known as Happy Hollow Management, LLC (“Ranch LLC”) held a .02% general partnership interest. Ranch LLC, in turn, was owned 50% by Chuck and 50% by Nancy (i.e., Chuck and Nancy were the sole members). Ranch LLC was member-managed and Chuck handled all the business and financial transactions for it. Eventually, Chuck’s and Nancy’s respective 50% membership interests in Ranch LLC were placed into the separate Howley Family Trust. In fact, all of Chuck’s and Nancy’s personal property assets were put into the Howley Family Trust, including the cattle and livestock of the Happy Hollow Ranch and various trademarks.

In 2016, Chuck was diagnosed with a form of dementia and soon required 24-hour care. In 2018, Nancy’s own cognitive abilities became impaired. As a result of all this, in 2018, Brandon was hired as a manager of the Howley’s ranching operation.

Brandon soon committed several wrongful acts (some apparently in collusion with his father Scott Howley) in what appeared to the State Court to not only be mismanagement, but also a complex fraudulent scheme to first gain control of the ranch, and then misappropriate significant value and assets. As for Defendant’s mismanagement of Happy Hollow Ranch, it included the starvation and neglect of the Howleys’ cattle, “causing a high death rate in the herd, a low reproduction rate, and a low growth rate among the calves and yearlings that were born.” Brandon apparently also falsified cattle certifications harming Happy Hollow Ranch’s good name and reputation, and alienated personnel who had worked for the ranch for decades. And, through a series of unauthorized documents in years 2019–2020, he, among other things, fraudulently obtained control over Ranch LLC and Ranch LP and also registered certain trademarks that rightfully belonged to the Howley Family Trust.

Pursuant to detailed findings of fact and conclusions of law, the state court entered a judgment for equitable relief and significant monetary damages against Brandon based on breach of fiduciary duties to the limited partnership and its limited partners.

The court reviewed the elements for evaluating a § 523(a)(2)(A) claim of nondischargeability of a debt obtained by false pretenses, a false representation, or actual fraud, and examined the facts found in the state court proceeding and concluded that all of the elements were fully and finally determined in the state court proceeding...
with respect to false representations based on fraudulently filed false documents with the Texas Secretary of State (executing and filing a fraudulent certificate of amendment to the certificate of formation of Ranch LLC changing the entity from a member-managed LLC with Chuck and Nancy as the sole members to a manager-managed LLC with Brandon as one of the managers) and numerous false representations to the partnership and Chuck and Nancy Howley.

Next the court analyzed whether the state court’s judgment was supported by findings that a qualifying fiduciary duty existed and was breached through fraud or defalcation within the meaning of § 523(a)(4). The court explained that fraud as a fiduciary in this context does not require the same common-law elements as “actual fraud” outside a fiduciary relationship. Fiduciary fraud is satisfied by constructive fraud, which does not require dishonesty of purpose or intent to deceive. The court stated that “defalcation” as a fiduciary is an offense with a lower bar than fiduciary fraud. The court cited the Fifth Circuit definition of defalcation as “willful neglect of duty, even if not accompanied by fraud or embezzlement,” adjudicated “essentially [using] a recklessness standard.” Explaining how the recklessness standard “unfold[s] in real time,” the court explained that “judgment debts arising from duty of care violations, which are generally judged on a gross negligence standard in Texas, would not be considered defalcation for § 523(a)(4) purposes so long as they do not involve willful or reckless conduct.” The court stated that “debts arising from duty of loyalty violations, which tend to involve willful conduct in dealing with a business and its counterparties, would be considered defalcation, assuming reckless, knowing, or willful conduct was involved.”

The court also explained that the fiduciary duty in the § 523(a)(4) context must stem from a “technical” or “express” trust, which is a fiduciary relationship that existed before any wrongdoing occurred and arises to a certain “level” of duty. The court acknowledged that the jurisprudence addressing the technical trust requirement is confusing and complicated insofar as the “level” or type of fiduciary duty is concerned. Certain “traditional fiduciary relationships,” such as “trustee-beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and principals and agents” were listed by the court as often satisfying the technical trust requirement. The court stated that it was unclear whether an informal fiduciary relationship meets the technical trust requirement, and the court concluded that it is necessary for there to be an express or formal fiduciary duty imposed by statute or pursuant to traditional common law to satisfy the technical trust requirement of § 523(a)(4). The court analyzed the fiduciary duty that the state court found was breached by Ranch LLC, through Brandon, to the plaintiffs/limited partners and found the duty was adequate for purposes of § 523(a)(4).

First, the [findings of fact and conclusions of law] included a finding that Brandon was hired for the Happy Hollow Ranch in the position of manager.[footnote omitted] If Defendant had been a corporate officer or director, he would have owed traditional fiduciary duties imposed by the Texas Business Organizations Code that would pass muster under § 523(a)(4). See Moreno, 892 F.2d at 421.[footnote omitted] The State Court’s findings do not expressly state anything this formal—they merely state that Defendant “was hired to work for HH in the position of manager.” This alone may be adequate here, since, if Defendant was a manager of Happy Hollow Ranch, this created an agency relationship.[footnote omitted] And Texas courts have stated that “[a]gency is a type of special relationship that gives rise to a formal fiduciary duty.” Dipprey v. Double Diamond, Inc., 637 S.W.3d 784, 804 (Tex. App.—Eastland 2021, no pet.). The State Court findings reflect that: (a) Defendant had the managerial authority as agent to control ranch property and exercised that authority to fraudulently divert and procure ranch assets; (b) Defendant knew said property was for the benefit of Chuck and Nancy Howley (i.e., they, through their family trusts, were the 99.98% limited partners of Ranch LP which owned the ranch assets);[footnote omitted] and (c) Defendant knew that his mentally incapacitated grandparents placed him in a special position of trust and confidence—at a minimum, as the agent/manager of Ranch LP. Again, at a minimum, Defendant was in an agency relationship with Plaintiffs when he was hired as a manager of the ranch. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949) (“Directors and managers, if not technically trustees, occupy positions of a fiduciary nature ....”). This traditional fiduciary relationship meets the federal standard.

Most importantly, the State Court expressly held that Ranch LLC (which Defendant fraudulently controlled) breached its fiduciary duties (as a general partner) under the Texas
Business Organizations Code §§ 152.204–152.206.[footnote omitted] This is a statutorily imposed fiduciary duty adequate for § 523(a)(4). On this point, Defendant placed himself in a qualifying fiduciary position by his own hand—he cannot wash himself clean now. Defendant fraudulently amended the Ranch LLC’s certificate of formation, appointing himself as a manager of Ranch LLC. Again, Ranch LLC was the general partner of Ranch LP.[footnote omitted] And managers of Texas LLCs owe fiduciary duties to the LLC’s members, which were Chuck and Nancy by way of beneficial ownership.[footnote omitted] Furthermore, a limited partnership is managed by its general partners.[footnote omitted] And general partners of Texas limited partnerships owe formal fiduciary duties to the limited partners—the latter of which, again, were ultimately Chuck and Nancy.[footnote omitted]

Finally, the doctrine of “unclean hands” judicially estops Defendant from now claiming that he owed no fiduciary duty—or that any duty was null and void, because the duty arose from a fraudulent amendment to Ranch LLC’s certificate of formation. See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 807, 814–15 (1945) (describing the “unclean hands” doctrine, which precludes a litigant from asserting defenses when that party acted fraudulently or deceitful as to the controversy, such that his “willful act[s] concerning the cause of action ... can be said to transgress equitable standards of conduct”).[footnote omitted]

Defendant has contended that the State Court’s constructive trust remedy cannot trigger a fiduciary duty for purposes of § 523(a)(4). Taken in isolation, this statement is correct. But the constructive trust that the State Court happened to impose, due to Defendant’s unjust enrichment here, was not the sole source of Defendant’s fiduciary duties. The facts here present a mix of statutorily imposed duties and a common law agency and special relationship driven duty. This forms a robust foundation for § 523(a)(4)’s technical trust demands. Accordingly, this Court holds that Defendant’s fiduciary duty meets § 523(a)(4)’s requirements. And Defendant’s fraudulent registration of trademarks in breach of fiduciary duty serves as a singularly acceptable ground to constitute fraud in a fiduciary capacity within the meaning of § 523(a)(4).

But Plaintiffs’ § 523(a)(4) claim does not end there; defalcation as a fiduciary also occurred. With respect to defalcation, the Fifth Circuit observed in the Bennett case, cited earlier, that Texas courts have held that a general partner in control of a limited partnership “stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust.” 989 F.2d at 787 (quoting Watson v. Ltd. Partners of WCKT, Ltd., 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.)).[footnote omitted] The Bennett defendant caused improper charges to accrue to the limited partners instead of to the defendant, and those charges amounted to defalcation.[footnote omitted]

This Court sees Defendant’s diversion of revenue properly meant for Ranch LP’s limited partners the same way as Bennett did. As acknowledged previously, Ranch LP’s general partner was Ranch LLC.[footnote omitted] The State Court held that Defendant’s diversion of revenue and improper accession to the ranch’s income through Ranch LLC was a breach of fiduciary duty to the partnership.[footnote omitted] Critically, even absent any findings of fraud in the State Court Litigation, because Defendant committed willful acts in breach of fiduciary duty, the recklessness standard from Bennett is met as to whether a breach of duty rises to the level of defalcation. A willful breach of fiduciary duty sits within the common nucleus of a willful neglect of fiduciary duty under Bennett. The Court accordingly holds that this breach of fiduciary duty constitutes defalcation in a fiduciary capacity sufficient for a § 523(a)(4) claim. This is a major buttress for Plaintiffs’ position because no fraud finding is required.

Having found the elements of the plaintiffs’ § 523(a) claims to be present in the state court’s findings, the court next concluded that the state court’s record was sufficiently detailed as to trigger collateral estoppel, and no policy reasons existed to preclude its application.
R. Securities Laws


The court of appeals affirmed a summary judgment in favor of investors in a limited partnership for violation of the Texas Securities Act and breach of fiduciary duty against an individual who was the managing member and president of the LLC general partner of the limited partnership. The court determined that the evidence established that the individual was primarily liable as a “seller” under the Texas Securities Act and that the individual was liable for breach of fiduciary duty to the limited partners of the limited partnership because he knowingly participated in a breach of fiduciary duty owed by the LLC general partner to the limited partners.

Michael O’Donnell was the managing member and president of Pepperwood Fund II GP, LLC (“Pepperwood II GP”), the general partner of Pepperwood Fund II, LP (“Pepperwood II”), a limited partnership which was formed as a vehicle to raise cash from investors for a controlling interest in Behavioral Recognition Systems, Inc. (“BRS”) through the purchase of Ray and Debi Davis’s BRS stock. O’Donnell solicited investments in Pepperwood II from the appellees (two individuals and an investment entity owned by them) and represented to them that their investments would be used so that Pepperwood II could purchase the controlling preferred and common stock in BRS from the Davises and then cause BRS to issue Series A stock to Pepperwood II’s investors. Based on these representations, the appellees became limited partners of Pepperwood II in exchange for capital contributions from the individuals and a loan from their entity.

In 2020, the appellees sued O’Donnell and Pepperwood II claiming that they had violated the Texas Securities Act (TSA) by selling securities to the appellees while omitting and misrepresenting material facts surrounding their investments in Pepperwood II, i.e., by representing that the investment funds would be used to purchase the Davises’ stock without disclosing that O’Donnell had already purchased the Davises’ stock and by failing to disclose the existence of a referral agreement under which O’Donnell received payment for soliciting the appellees’ investments. The appellees also sought to hold O’Donnell liable for breach of fiduciary duty and various fraud-based claims. The appellees asserted in their petition that after they became limited partners in Pepperwood II, and without informing them until afterwards, O’Donnell executed a document on behalf of BRS to transfer all of its intellectual property assets to Pepperwood II, then executed a second document to transfer those same assets from Pepperwood II to Omni AI, Inc. (“Omni”), an entity controlled by O’Donnell. Through Pepperwood II’s general partner Pepperwood II GP, O’Donnell offered appellees the options to either exchange their limited partnership interests in Pepperwood II for shares in Omni or to withdraw from Pepperwood II and receive their capital contribution with ten percent interest. One of the individual appellees along with their investment entity opted not to sign either an exchange or a withdrawal agreement, and the other individual appellee signed both (half of his interest to be exchanged for Omni shares and the remaining interest to be withdrawn in exchange for return of capital plus interest). He received no payment despite his demands for payment from O’Donnell. Eventually the trial court granted summary judgment in favor of the appellees on their claims for breach of the TSA and breach of fiduciary duty. O’Donnell appealed.

On appeal, O’Donnell argued that the trial court erred because the evidence did not conclusively establish that O’Donnell was a “seller” under the TSA. The court of appeals explained that the TSA provides for both primary and secondary liability for violations of the Act.

Primary liability arises when a person “offers or sells a security … by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.” See id. (quoting TEX. REV. CIV. STAT. art. 581–33A(2)).[recodified in the Texas Government Code effective Jan. 1, 2022] Secondary liability is derivative liability for another person’s securities violation; it can attach to either a control person, defined as “[a] person who directly or indirectly controls a seller, buyer, or issuer of a security,” or to an aider, defined as one “who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security.” Id. (quoting REV. CIV. art. 581–33F(1)–(2)).[footnote omitted]
O’Donnell argued that he acted only in a representative capacity in the transactions at issue, but the appellees argued that the definition of a “seller” in the TSA is broader than the issuer of the security. The court provided the following analysis in concluding that the evidence was sufficient to characterize O’Donnell as a “seller”:

Appellees respond that the definition of “seller” under the TSA imposes liability on a “person who offers or sells a security” and that “person” is broader than the company issuing the security but includes a corporation, a person, a company, and other business entities. While appellees rely on the current version of the TSA, the version in effect when this suit was filed similarly defined “person” and “company” to include “a corporation, person, joint stock company, partnership, limited partnership, association, company, firm, syndicate, trust, incorporated or unincorporated, heretofore or hereafter formed under the laws of this or any other state, country, sovereignty or political subdivision thereof, and shall include a government, or a political subdivision or agency thereof.” Compare GOVT. § 4001.064 with REV. CIV. art. 581-4(B). Appellees agree that federal cases may be used to interpret the TSA and urge that “the range of persons potentially liable under [the federal securities act] is not limited to persons who pass title.” See Pinter, 486 U.S. at 643. Appellees also point to evidence of O’Donnell’s financial interest being the referral agreement, under which O’Donnell admitted his company Pepperwood I, LLC received a $5 million finder’s fee.

In their motion for summary judgment, appellees asserted O’Donnell was liable as a seller because he offered and sold securities in Pepperwood II to them by means of an untrue statement or omission of material fact. Appellees urged that O’Donnell misrepresented in the partnership agreement (dated June 12, 2015), first amendment (dated November 19, 2015), and supplemental private placement memorandum (dated September 2015) that appellees’ investments would be used to acquire stock from the Davises in BRS when O’Donnell had already signed a sale agreement with the Davises for that same stock (dated July 28, 2015). As support for their motion, appellees relied on admissions by O’Donnell, signed and dated copies of the agreements and private placement memorandum, and declarations from each appellee. [footnote omitted] And, as appellees argue, the summary-judgment evidence includes the referral fee pursuant to which Pepperwood I was paid $5 million for soliciting investors to purchase the Davises’ stock, as well as O’Donnell’s admissions that Pepperwood I received that fee under that agreement and that he signed the referral agreement as manager of Pepperwood I.

We conclude the foregoing is sufficient to establish O’Donnell was liable as a “seller” under the TSA because the evidence established O’Donnell “offer[ed] or [sold] a security ... by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.” See REV. CIV. art. 581–33A(2). In discussing who may be liable as a “seller” under the federal securities act, the Supreme Court held that liability extends to persons other than the person who passes title, thus we conclude appellees need not have established O’Donnell passed any title. See Pinter, 486 U.S. at 643. As for O’Donnell’s argument that appellees needed to have established his financial interest in the transaction, we note that the Supreme Court further held that liability under the federal securities act extends to a person “motivated at least in part by a desire to serve his own financial interest or those of the securities owner,” see id. at 647, and that at least one Texas court has applied that requirement to “seller” under the TSA. See Highland Cap. Mgmt., L.P. v. Ryder Scott Co., 402 S.W.3d 719, 742 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

Even assuming, without deciding, the TSA’s definition of “seller” required evidence of O’Donnell’s financial interest in this transaction, we conclude the foregoing evidence is sufficient. In Pinter, the Supreme Court discussed whether liability under the federal securities act should extend to brokers and others who solicit offers to purchase securities and concluded it should, noting that “[t]he solicitation of a buyer is perhaps the most critical stage of the selling transaction” and that “brokers and other solicitors are well positioned to control the flow of information to a potential purchaser ... and, in fact, such persons are the participants in the selling transaction who
most often disseminate material information to investors.” See Pinter, 486 U.S. at 646. Thus, O’Donnell’s arguments that any financial interest was that of an LLC of which he was a member and that he only acted in an agent capacity on behalf of Pepperwood II GP and Pepperwood II are unavailing.

O’Donnell also argued on appeal that the appellees failed to conclusively establish that he was secondarily liable as a “control person” under the TSA, but the court of appeals found it unnecessary to address this argument since the court had already concluded that the appellees proffered sufficient summary-judgment evidence to support O’Donnell’s primary liability as a “seller” under the TSA.

The court also reviewed the summary-judgment evidence relating to O’Donnell’s liability for breach of fiduciary duty in connection with the transfer of the IP assets out of Pepperwood II to Omni, an entity in which O’Donnell had an interest. The court concluded that O’Donnell owed a fiduciary duty directly to the limited partners by reason of his controlling position as president and manager of Pepperwood II GP, the general partner of Pepperwood II. Moreover, because Pepperwood II GP owed a fiduciary duty to the limited partners, the court found the evidence sufficient to establish O’Donnell’s liability for knowing participation in breach of fiduciary duty by signing the agreements that transferred the IP assets out of Pepperwood II to Omni without prior disclosure to the appellees.

S. Service of Process


The court of appeals concluded that the record failed to show strict compliance with the rules governing service on a limited partnership. As a result, the trial court lacked jurisdiction to render a default judgment against the limited partnership.

On August 26, 2022, appellee David DeGroot filed suit against appellant Buc-ee’s Ltd. alleging a negligence cause of action after he broke his dental crown when he bit down on roasted almonds purchased at a Buc-ee’s convenience store in Bastrop County. The petition identified Buc-ee’s as the defendant, “a domestic corporation in the state of Texas [which] may be served through its attorney of record, H. Tracy Johnson, III, at 11200 Broadway, Suite 2332, Pearland, Texas 77584.”

Citation was issued via certified mail to “BUC-EE’S LTD., ATTORNEY OF RECORD: H. TRACY JOHNSON III” at 11200 Broadway, Suite 2332, Pearland, Texas on September 2, 2022. The signed civil processor’s return filed with the Hidalgo County Clerk on October 12, 2022, contained the following notation: “green return card was never returned.”

Nearly two months later, appellee moved for entry of default judgment. On January 26, 2023, the trial court signed an order granting default judgment and awarding appellee $70,000 plus post-judgment interest and attorney’s fees. On February 27, 2023, appellant filed a restricted appeal and argued that the appellee failed to comply with service requirements.

The court of appeals noted that “[t]here are no presumptions in favor of valid issuance, service, and return of citation in the face of a [direct] attack on a default judgment.” If the record does not show strict compliance with the rules governing citation and return of service, then service is invalid and in personam jurisdiction cannot be established. Even actual notice to a defendant is insufficient to convey jurisdiction on the trial court and will not cure defective service.

According to the court, “[S]ervice on a limited partnership may be made on its general partner or registered agent.” “Service on a limited partnership, unlike a corporation, is not authorized to be made through an officer.” Moreover, return of service rules require that “[w]hen the citation was served by registered or certified mail, . . . the return by the officer or authorized person must also contain the return receipt with the addressee’s signature.” TEX. R. CIV. P. 107(c). Rule 107 requires a showing of the connection between the person signing for the process and the actual addressee.

Based on these legal standards, the court concluded that service was defective:

Here, the face of the record shows that appellee filed suit against “Buc-ee’s Ltd.”, and the return of service states that “ATTORNEY OF RECORD: H. TRACY JOHNSON III” was served.
via certified mail. However, the civil processor’s return does not indicate Johnson’s capacity to receive service on behalf of appellant—that is, whether Johnson was an authorized agent of the addressee for service of process—or that Johnson was, in fact, the recipient of the mailed service. This alone renders service defective.

Moreover, a return receipt, i.e., “green card” does not appear in the record, and a postal tracking document attached to appellee’s motion for default judgment indicates only that an “item was delivered to the front desk, reception area, or mail room at 2:39 pm on September 2, 2022[,] in PEARLAND, TX 77584”—making no mention of precisely who the individual recipient was and containing no recipient signature. In other words, on its face, the record shows that the return receipt was not signed by the intended addressee or by a registered agent.

We conclude the face of the record fails to show strict compliance with the rules governing return of service. See TEX. BUS. ORGS. CODE ANN. §§ 5.201(b)(1), 5.255(2); TEX. R. CIV. P. 107(c). Thus, the trial court lacked jurisdiction to render a default judgment against appellant.

T. Pro Se Representation

Johnston v. Johnston, No. 6:23-CV-00413-JDK-KNM, 2024 WL 2097158 (E.D. Tex. Apr. 19, 2024), report and recommendation adopted, No. 6:23-CV-413-JDK, 2024 WL 2094650 (E.D. Tex. May 9, 2024) (“Courts have noted that ‘[t]he failure by a limited liability company, corporation, or partnership to comply with a court order that it appear through counsel constitutes a failure to defend a civil action, and a court should direct the clerk of the court to enter a default in such cases.’”).

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

AVS Builders, LLC v. Galpin, No. 03-22-00457-CV, 2023 WL 5058042 (Tex. App.—Austin Aug. 9, 2023, no pet.) (mem. op.).

“AVS Builders, LLC (the LLC) contends by its first issue that the trial court erred by finding it in breach of contract because it was not party to the contract. Despite being listed as [Armando] Vela’s ‘dba’ in the style of the petition, the LLC is named in the main text as a defendant alongside Vela. The petition contains allegations that ‘Defendants’ entered the contract attached as Exhibit A to the petition and breached it, damaging the homeowners. But the contract attached as Exhibit A to the petition lists as the contractor ‘Armando Vela (AVS Builders).’ It does not name the LLC. Vela signed the contract without stating a representative capacity for the LLC. It is a ‘well-established legal principle’ that limited liability companies and their obligations are legally distinct from their members and managers. Because the contract attached to the petition does not show that the LLC is party to the contract sued upon, it does not support the default judgment against the LLC. The petition and documents in the record do not, however, prove as a matter of law that the LLC did not form and breach a contract with the homeowners; accordingly, we decline the LLC’s request that we render a take-nothing judgment on this claim. The appropriate remedy is reversal and remand of the cause.”

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


The court of appeals rejected a criminal defendant’s argument that he could not be held liable for criminal theft of services because his “personal limited liability company” shielded him from criminal responsibility. The court pointed out that the Business Organizations Code does not recognize a personal limited liability company as a type of business entity.

Cardenas was convicted of theft of services after a jury found him guilty of hiring, without ever intending to pay, a limousine service to provide transportation services associated with a sporting event called the “Showcase Bowl.” On appeal, Cardenas contended that he could not be held criminally responsible for the acts of his business
because he “‘did not work for a corporation or association, but rather for a personal limited liability company, namely: Showcase Athletics, PLLC....’” The court of appeals rejected Cardenas’s argument as follows:

We agree with the State that Cardenas’s argument that his company, Showcase Athletics, PLLC, shields him from criminal responsibility lacks merit. Cardenas’s reference to his company as a personal limited liability company is misplaced. Chapter Five of the Texas Business Organizations Code does not recognize a personal limited liability company as a type of business entity. See generally TEX. BUS. ORGS. CODE ANN. §§ 5.001–5.065. A “PLLC” indicates a “professional limited liability company.” Id. § 5.059. Showcase Athletics, PLLC is not a professional limited liability company either, as a professional entity requires necessary state licensure of the individuals providing professional services. See id. § 301.003(4), (6), (8).[footnote setting forth definition of “professional limited liability company” omitted] Therefore, Cardenas’s company does not protect his actions from criminal responsibility.


The court rejected an individual’s argument that she could not be held liable for defamatory statements as an owner of a limited liability company absent a basis to pierce the “corporate veil” of the LLC because the allegations against the individual were sufficient to allege that the individual herself engaged in tortious conduct by making defamatory statements.

Alfieri, an individual, moved to dismiss a video game developer’s defamation claims asserted against her in a dispute between the video game developer (“Conradical”) and a video game publisher arising out of Conradical’s termination of a licensing agreement with the video game publisher. The video game publisher was a limited liability company, and Alfieri argued that she could not be sued directly as the owner of a limited liability company unless Conradical pierced the corporate veil. Alfieri argued that the allegations did not show “her personal engagement in the defamatory conduct or a basis to support piercing the corporate veil.” The court rejected Alfieri’s arguments as follows:

Under Texas law, owners of limited liability companies are not liable for the torts of the entity, unless the plaintiff can allege some basis for piercing the corporate veil. See Hong v. Havey, 551 S.W.3d 875, 885 (Tex. App.—Houston [14th Dist.] 2018, no pet.); Bates Energy Oil & Gas v. Complete Oilfield Svcs., 361 F. Supp. 3d 633, 665 (W.D. Tex. 2019). However, a corporate agent or employee is “personally liable for tortious acts which he directs or participates in during his employment.” Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 375 (Tex. 1985) (recognizing rule and holding employee individually liable for penning a libelous letter in the course and scope of his employment); see also Miller v. Keyser, 90 S.W.3d 712, 717 (Tex. 2002) (noting Texas’s longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts); Kingston v. Helm, 82 S.W.3d 755, 759 (Tex. App.—Corpus Christi 2002, pet. denied) (“The law is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of a representative of the corporation.”).

Here, Conradical alleges that the defamatory statements were made by Alfieri herself. Dkt. 21, at 57 (Conradical’s Second Amended Answer and Counterclaims stating: “Ms. Alfieri made these false and defamatory statements with malice or intentionally or, alternatively, by negligently failing to ascertain or state the truth.”). Alfieri does not deny making the statements. Dkt. 24, at 7 (Alfieri’s Motion to Dismiss stating: “in the video, Ms. Alfieri made statements, including....”) Conradical, therefore, sufficiently alleges that Alfieri herself engaged in allegedly tortious conduct such that she can be held individually liable.


The court of appeals affirmed the trial court’s summary judgment against an individual holding him personally liable on a credit card agreement issued to the individual and his limited liability company.
David Patrick appealed a judgment against him for the unpaid balance owing on an American Express credit card. The trial court granted summary judgment against Patrick, but Patrick argued that American Express failed to meet its initial summary-judgment burden to establish a valid contract with him individually and that he breached its terms. Patrick asserted that the credit card agreement governed a business credit card to be used for business expenses and that he was merely acting as a member of the LLC in obtaining and using the credit from American Express. He relied on Section 101.114 of the Texas Business Organizations Code and asserted that the LLC operating agreement specified that he was not obligated for the debts of the LLC. He also asserted that an American Express representative “confirmed that [he] would not be personally responsible for the debt accrued on this account,” and he “never agreed verbally or in writing to be personally liable for the debt(s) of [the LLC].”

The Cardmember Agreement at issue showed that American Express issued a “Business Platinum Card” to “Company Name: E Solutions Tech Svc” and “Cardmember Name: David Patrick.” The court provided the following excerpts from the agreement:

Basic Cardmember means the person who applied for this account or to whom we address billing statements. Company means the business for which the Account is established. You and your mean the Basic Cardmember and the Company. You agree, jointly and severally, to be bound by the terms of this Agreement.

(Emphasis added.) And, “[w]hen you ... use the Account (or sign or keep a card), you agree to the terms of the Agreement.”

... • “You may use the card to make purchases. You may also use the card at an ATM to get cash from a checking account you designate.”

• “Each Cardmember acknowledges and agrees that cards are intended to be used for the Company’s commercial or business purposes.”

• “We decide whether to approve a charge based on how you spend and pay on this Account and other accounts you have with us and our Affiliates. We also consider your credit history and your personal resources that we know about.”

• “You promise to pay all charges ....”

• Upon closing the account, the “Basic Cardmember and Company remain jointly and severally liable for all Charges made on the Account.”

(Emphasis added.) ... And the Agreement states that it is the “final expression of the agreement governing the Account” and that it “may not be contradicted by any alleged oral agreement.”

The court explained the law regarding the liability of an LLC member as follows:

Generally, the “statutory protections afforded to members and managers of an LLC give way only when a plaintiff can show that the LLC was used for the purpose of perpetrating, and did perpetrate, an actual fraud for the member or the manager’s direct personal benefit.” Fin & Feather Club v. Leander, 415 S.W.3d 548, 556 (Tex. App.—Texarkana 2013, pet. denied) (citing Shook v. Walden, 368 S.W.3d 604, 621 (Tex. App.—Austin 2012, pet. denied)).[footnote omitted] This protection stems from the premise that a limited liability company is a separate legal entity from its members. See Julka v. U.S. Bank Nat’l Ass’n., 516 S.W.3d 84, 88 (Tex. App.—Houston [1st Dist.] 2017, no pet.); Sherman v. Boston, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

But, Texas law does not protect members of a limited liability company from their own obligations. In re White-Robinson, 777 F.3d 792, 799 (5th Cir. 2015) (distinguishing TEX. BUS. ORGS. CODE § 101.114). Under the Business Organizations Code, a member may have individual liability if he “expressly assumes, guarantees, or agrees to be personally liable to the obligee for the obligation.” TEX. BUS. ORGS. CODE § 21.225(1); see Willis v. Donnelly, 199 S.W.3d 262, 272 (Tex. 2006); see also TEX. BUS. ORGS. CODE § 101.002(a) (“Subject to Section 101.114,” Section 21.225 applies to limited liability companies and their members).

“Agency law is based on the same premise—an agent is not personally liable on contracts made for a disclosed principal, in the absence of an express agreement to be bound.” Neel v. Tenet
Thus, an agent is not precluded from binding himself if he has pledged his own responsibility in addition to that of his principal. Id.


The court next compared this case to Dominguez v. American Express Bank, FSB, No. 14-17-00157-CV, 2020 WL 2832075, at *1 (Tex. App.—Houston [14th Dist.] May 29, 2020, pet. denied) (mem. op.), in which the court held an LLC member liable on two American Express cardmember agreements based on the language of the agreements. The court explained that the court in Dominguez held the individual member liable for his own breach of contract.

Similarly here, the pleadings, record, and judgment reflect that the trial court held Patrick liable for his own breach of the contract—the Cardmember Agreement—to which he was a party. Under its unambiguous language, the Agreement states that “You” and “Your” mean the “Basic Cardmember and the Company.” It defines “Cardmember” as Patrick and provides that the parties agree American Express will, in deciding whether to approve specific charges, consider “personal resources.” And it plainly states that “You agree, jointly and severally, to be bound by the terms of the Agreement,” and that, upon closing the account, the “Basic Cardmember and Company remain jointly and severally liable for all Charges made on the Account.”

Thus, we need not determine whether Patrick, as the sole member of the LLC, has shown himself entitled to the general statutory protection he asserts. Similar to Dominguez, construing the plain language of the Agreement in this case negates a legal conclusion that Patrick was acting solely as agent of the LLC and that he did not agree to be bound by the terms of the Agreement.[citations omitted]

Because American Express established its right to summary judgment against Patrick individually, the burden shifted to Patrick to present evidence raising a genuine issue of material fact. Patrick presented the LLC’s certificate of formation and certificate of filing with the Office of the Secretary of State, his formation agreement, and his credit report, but the court stated that this evidence did not raise any genuine issue of material fact precluding summary judgment because Patrick was sued and found liable individually, not merely as a member of the LLC.

Chow v. McIntyre, No. 01-21-00658-CV, 2023 WL 7778602 (Tex. App.—Houston [1st Dist.] Nov. 16, 2023, no pet.) (mem. op.).

“Absent a contrary provision in the company agreement, a member of a limited liability company is not liable for a company debt, obligation, or liability. TEX. BUS. ORGS. CODE § 101.114. The company agreements for AMDT and AMDT II, both of which are limited liability companies, were admitted in evidence at trial. Neither one of these company agreements includes a provision that purports to make members liable for company debts, obligations, or liabilities. Therefore, Nehls and McIntyre are liable on company loans solely to the extent that they personally guaranteed these loans. See, e.g., Julka v. U.S. Bank Nat’l Ass’n, 516 S.W.3d 84, 88 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (indicating that Texas law, like law of other jurisdictions, protects member of limited liability company from liability on note except to extent member personally guaranteed payment).”

Plan B Holdings, LLC v. RSLLP, 681 S.W.3d 443 (Tex. App.—Austin 2023, no pet.).

The trial court concluded that the owner of two LLCs was jointly and severally liable with the companies for breach of contract. The court of appeals reversed, as it concluded that the owner had properly signed the contracts only in a representative capacity.
RSLLP, a law firm, sued Plan B Holdings, LLC and CIPE Real Estate Solutions, LLC, as well as the owner of those two companies, Cheryl Cox, for unpaid attorney’s fees. After a non-jury trial, the trial court rendered judgment that RSLLP recover from all defendants, jointly and severally, actual damages for the unpaid fees in the amount of $83,509.63, attorney’s fees and expenses in the amount of $117,689.64, and post-judgment interest.

Cox appealed on several grounds, including that she was not personally liable for damages on a breach of contract claim because she was not individually a client of RSLLP. The engagement letters signed with RSLLP included the following language:

**CLIENT AND SCOPE OF REPRESENTATION.** In this engagement, our representation is solely of CIPE Real Estate Solutions, LLC. Our engagement is limited to the matter described above and if we agree to perform additional legal services, this letter will apply to such services. Unless specifically agreed to by us in a letter like this one, we will not be representing other related persons or entities, including any subsidiaries, affiliates or shareholders. In addition, we will provide only legal advice and services, and not financial, accounting, business or other advisory services. [An identical letter was made out for Plan B Holdings, LLC.]

Cox signed both of these engagement letters in the following manner:

/s/ Cheryl Cox  
CIPE Real Estate Solutions, LLC  
By: Cheryl Cox

/s/ Cheryl Cox  
Plan B Holdings, LLC  
By: Cheryl Cox

Cox contended that she signed the engagement letters solely as a representative of CIPE and Plan B. As a consequence, she argued that she could not be held liable in her individual capacity. The court agreed:

In the present case, the signature blocks in the engagement letters—each containing the name of the company and “By Cheryl Cox”—indicate that Cox was signing as the representative of, and on behalf of, the named company . . . .

The engagement letters, quoted above, expressly provide that “[i]n this engagement, our representation is solely of CIPE Real Estate Solutions, LLC [or Plan B Holdings, LLC].” That same paragraph in each agreement goes on to state that “[u]nless specifically agreed to by us in a letter like this one, we will not be representing other related persons or entities, including any subsidiaries, affiliates or shareholders.” It is undisputed that Cox was the sole owner and shareholder of CIPE and Plan B.

The Firm argues that Cox was a party to the engagement-letter contracts because, notwithstanding the portions quoted above, they were sent by email to “Cheryl Cox, Plan B Holdings, LLC” (or Cheryl Cox, CIPE Real Estate Solutions, LLC) and were addressed “Dear Ms. Cox.” In addition, the engagement letters frequently referred to “you” in the body of the agreements. . . .

In deciding whether an agent is personally liable on a contract the agent signed, both the signature and the body of the contract should be considered. Indeed, the body of the contract may be controlling. Texas courts have long held that a signatory will not be held personally liable where the body of the contract indicates that the signature was in a representative capacity . . . .

The foregoing Texas cases are consistent with the Restatement (Second) of Agency § 156, which states:

In the absence of a manifestation to the contrary therein, an unsealed written instrument is interpreted as the instrument of the principal and not of the agent if,
in the signature or description of the parties, the name of the principal and agent both appear, the agent indicating his agency.

Restatement (Second) of Agency § 156 (Am. L. Inst. 1958). Comment a to Section 156 seeks to elucidate this rule by stating that the principal’s name followed by the agent’s name preceded by a preposition such as “by” or “per” will, “in the absence of a contrary manifestation in the document,” create an inference that the principal and not the agent is a party. Id. at cmt. a. According to this Comment, the signatory’s name preceded by a word such as “By” will create only an inference of agency. Even if the “inference” standard contained in Comment a embodies Texas law, however, the express terms of Section 156 dictates that such a standard applies only “in the absence of a manifestation to the contrary therein.”

Section 320 of the same Restatement provides that an agent who signs for a disclosed principal is not a party to the agreement unless the agent expressly agrees to become a party: “Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.” Restatement (Second) of Agency § 320 (Am. L. Inst. 1958). Comment a to section 320 explains as follows:

One who purports to contract on behalf of a designated person does not manifest by this that he is making a contract on his own account, and only where he so manifests does the agent become a party to a contract which he makes for the principal. In the absence of other facts, the inference is that the parties have agreed that the principal is, and the agent is not, a party. This is true although the agent uses such an expression as, “I will sell.”

Id. at cmt. a. Comment a explains that this section creates an inference that the agent is not a party to the contract. As with section 156, however, this rule of “inference” only applies “in the absence of other facts.” Here, “other facts” exist within the contracts showing a clear intent.

Texas cases have consistently followed these standards in holding that a person who signs a contract on behalf of a disclosed principal is not a party to the contract and is generally not liable under it.

In the present case, the signature box alone provides strong, if not controlling, proof that Cox signed only in a representative capacity. And the engagement letters not only show that the companies—CIPE and Plan B—were the only named parties to the contract, they expressly state that they were the only parties to it: “In this engagement, our representation is solely of CIPE Real Estate Solutions, LLC [or Plan B Holdings, LLC].” Even more, the engagement letters expressly list who are not parties to the agreement: “Unless specifically agreed to by us in a letter like this one, we will not be representing other related persons or entities, including any subsidiaries, affiliates or shareholders.” It is undisputed that Cox was the sole owner and shareholder of CIPE and Plan B.

That the engagement letters were addressed “Dear Ms. Cox” is no evidence that she was intended to be a party to the agreement. It is to be expected that a proposed contract will be addressed to an individual, and Cox, as the owner of the companies, was the logical recipient. Nor do we believe the engagement letters’ boilerplate use of the term “you” overcomes the explicit recitations of who is and is not a party to the agreements. The Firm concedes that the engagement letters were “standard form engagement agreements” drafted by the Firm.

Considering the signature blocks and the bodies of the agreements together convinces us that, under long-established Texas law, the record contains no more than a scintilla of evidence that the parties intended for Cox to be individually liable under the engagement letters. For the foregoing reasons, we hold that the Firm could not recover from Cox under a breach-of-contract theory, and we sustain Appellants’ complaint as to that claim.
The court denied the defendants’ summary judgment motion on the ground that a statutory claim for direct liability did not have to meet the requirements of the piercing statute under TBOC § 21.223.

Plaintiff Bill Ringer was the trustee of the Sonny Howard Living Trust. The Trust owned certain real property in Austin, Texas. In May 2018, on behalf of the Trust, Plaintiff entered into a contract with Masters Touch Custom Homes, Inc. (“MTCH, Inc.”) to serve as general contractor for the construction of a single-family residence at the property. Shortly thereafter, in July 2018, the contract was assigned by mutual assent from MTCH, Inc. to Masters Touch Custom Homes, LLC (“MTCH, LLC”). At all relevant times, defendants Matthew Bailey and Michael Gotcher were the owners, principal officers, and managing members of both MTCH, Inc. and MTCH, LLC.

Plaintiff asserted a claim against all defendants, including Bailey and Gotcher, for misapplying construction trust funds in violation of Texas Property Code § 162, commonly known as the “Texas Construction Trust Fund Act” (the “CTFA”). In support of that claim, plaintiff alleged that defendants violated the CTFA because, as owners and governing officers of the general contractor, they exercised control or direction over trust funds paid by plaintiff and that they “intentionally, knowingly and/or with intent to defraud, directly or indirectly retained, used, disbursed and/or otherwise diverted trust funds without first fully paying all current and/or past due obligations to its subcontractors and/or materialmen.”

Defendants Bailey and Gotcher filed a motion for summary judgment. They contended that they were entitled to summary judgment as a matter of law because Texas corporation law shielded them from individual liability under the CTFA. The court disagreed:

In support of their motion for summary judgment, Defendants rely solely on the proposition that individual owners and officers are generally shielded from a corporation’s obligations, absent exceptional circumstances that justify “piercing” the corporate veil.

Section 21.223 of the Texas Business Organizations Code (“TBOC”) is the Texas corporate veil piercing statute. Under that statute, corporate owners are shielded from “any contractual obligation of the corporation or any matter relating to or arising from the obligation” unless a plaintiff can first show: (1) the individual used the corporate form to “perpetrate actual fraud,” and (2) the fraud was perpetrated “primarily for the [individual’s] direct personal benefit.” Tex. Bus. Orgs. Code § 21.223(a)-(b). The same protections apply to managers and members of a limited liability company. Tex. Bus. Orgs. Code § 101.002.

As Defendants point out, TBOC provides that this statutory protection for corporate owners “is exclusive and preempts any other liability imposed for that obligation under common law or otherwise,” including against claims of corporate “fraud or any similar theory.” And, because a claim for misappropriating trust funds under the CTFA sounds in fraud, Defendants argue that any basis for individual liability under the CTFA is “preempted” by the protections set out in the TBOC. On this basis, Defendants assert that, as a prerequisite to a finding of liability under the CTFA, Plaintiff must first establish grounds to pierce MTCH LLC’s and MTCH Inc.’s corporate veil under TBOC § 21.223. And, because Plaintiff hasn’t alleged or presented evidence that either Brailey or Gotcher committed an “actual fraud” that was primarily for their own “direct personal benefit,” Defendants argue the claims against them fail as a matter of law.

The Court rejects the argument that Plaintiff must pierce the corporate veils of the MTCH defendants to prevail on his claims against Bailey or Gotcher. Defendants are correct that a corporation’s owners and officers (or an LLC’s managers and members) are usually shielded from individual liability on the entity’s debts absent a finding that they used the corporate form to perpetrate an “actual fraud . . . primarily for [their own] direct personal benefit.” Tex. Bus. Orgs. Code § 21.223(b). But this protection does not apply to causes of action brought under statutes that specifically provide for individual liability based on corporate acts. The TBOC itself forecloses Defendants’ argument by stating that Section 21.223 “does not limit the obligation” of a corporate entity’s owner “if that person . . . is otherwise liable to the obligee for the obligation under this code or other applicable statute.” Id. § 21.225 (emphases added).

In other words, if a separate statutory basis exists to hold a corporate officer or owner liable for the company’s acts, the corporate veil-piercing requirements set forth in Section 21.223
are inapplicable. The CTFA is such a statute. It specifically provides for the individual liability of a company’s officers and directors, as those persons are independently charged with duties of a trustee. The Act expressly defines “trustee” to include a “contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds.” Tex. Prop. Code § 162.002 (emphasis added). Defendants cite no authority for the proposition that a plaintiff is required to satisfy the corporate veil-piercing statute before prevailing on a claim against a trustee’s individual officers under the CTFA. To the contrary, courts have routinely held that “[a]ny officer or director who has control or direction over the funds is also a trustee of the funds and is, therefore, personally liable” for their misapplication.

Here, Bailey and Gotcher do not dispute that: (1) they “were the Managing Members, Governing Persons, and owners” of both MTCH entities; (2) that Plaintiff contracted with MTCH Inc. to act as general contractor for the project before assigning that contract to MTCH, LLC; and (3) that MTCH, LLC received and directed the use of funds paid by Plaintiff in connection with the project. Defendants cite no evidence in the record disproving Plaintiff’s contention that they had control or direction over the trust funds. Thus, Defendants have not conclusively disproven that they are each an “owner or an officer . . . of a contractor . . . who receives trust funds or who has control or direction of trust funds,” and thus susceptible to direct liability under the CTFA.

In sum, the Court finds Defendants’ legal argument to be without merit, and Defendants have not otherwise demonstrated any lack of factual dispute that would entitle them to judgment as to Plaintiff’s CTFA claims. Accordingly, those claims should proceed to trial.

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


This case is summarized in more detail above under the heading “Fiduciary Duties of Partners and Affiliates.” In the course of the bankruptcy court’s analysis of the exception to discharge provided by Section 523(a)(4) of the Bankruptcy Code (fraud or defalcation in a fiduciary capacity), the court stated that an individual who was the manager of an LLC that was the general partner of a limited partnership owed fiduciary duties to the LLC’s members, relying on the status of the manager as an agent of the LLC.

Again, Ranch LLC was the general partner of Ranch LP.[footnote omitted] And managers of Texas LLCs owe fiduciary duties to the LLC’s members, which were Chuck and Nancy by way of beneficial ownership. “[Footnote 91: Managers of manager-managed LLCs and members of member-managed LLCs that are vested with actual or apparent authority by the managers or members, as applicable, are agents of the LLC. See Tex. Bus. Orgs. Code §§ 101.251, 101.254(a).]


The court of appeals held that the evidence was sufficient to support an implied finding that an individual who was not an owner of an LLC had apparent authority to bind the LLC to an oral agreement with another individual that the second individual was to acquire an ownership interest in the LLC based on the first individual’s having held himself out as an owner and agent of the LLC with the willing participation of an actual owner of the LLC.

Jay Icet and Chad Gatlin entered into an oral agreement to start a construction business. The agreement was to share in the profits and losses of the business equally. Chad represented to Icet that he owned a trucking company called TCB Elite Fleet, LLC and they would use that entity to start their construction business. Icet understood that he was acquiring a fifty percent interest in TCB. Icet testified that his agreement was only with Chad and that Icet understood that Tabitha Gatlin would keep the company’s books but that she would not be an owner. The Gatlins had business cards for TCB printed and listed Icet as an owner. The first construction work done by TCB began in 2016. After a couple of years Icet suspected that he was not being paid fifty percent of the profits and requested an accounting from Chad. Chad refused the accounting, but Icet eventually obtained a forensic analysis that was admitted into evidence without objection. At the conclusion of testimony, the trial court stated on the record that
there was a “meeting of the minds” between Icet and Chad to form a partnership and split profits evenly. The final judgment stated that Icet was entitled to recover against “Defendants for breach of contract.” The term “Defendants” included Chad, Tabitha, and TCB. The judgment awarded damages to be recovered jointly and severally from the “Defendants.”

On appeal, the court of appeals concluded that there was no meeting of the minds between Icet and Tabitha and that Icet did not plead or obtain a finding on ratification by Tabitha; therefore, Tabitha could not be held jointly and severally liable. As for TCB, Icet argued that Chad had apparent authority to bind TCB to the oral agreement. The court of appeals concluded that the trial court’s finding that Chad had apparent authority to bind TCB was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Apparent authority is based on estoppel and arises either (1) from a principal knowingly permitting an agent to hold himself or herself out as having authority, or (2) by a principal’s actions that lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he or she purports to exercise. Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007). The principal’s full knowledge of all material facts is essential to establish a claim of apparent authority. Id. Only the conduct of the principal is relevant. Id. The standard is that of a reasonably prudent person using diligence and discretion to ascertain the agent’s authority. Id. at 182–83. “Thus, to determine an agent’s apparent authority we examine the conduct of the principal and the reasonableness of the third party’s assumptions about authority.” Id. at 183; Amerigroup Tex., Inc. v. True View Surgery Ctr., L.P., 490 S.W.3d 562, 566 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

The trial court found that “Chad Gatlin and Tabitha Gatlin represented to Plaintiff, and others in the community, that Plaintiff was an owner of TCB Elite Fleet, LLC.” We conclude the evidence is not legally or factually insufficient to support this finding.

Icet testified that he and Chad entered into an agreement to create a construction company using TCB, a company Chad represented he owned. Chad represented to Icet that he and his father operated a trucking company under the name TCB Elite Fleet, LLC. When Icet asked Chad what portion of the company Chad’s father owned, Chad responded that he owned the company. At that time Icet did not know that Tabitha had any ownership in TCB. Icet later learned that at the time he and Chad agreed to start a business, Chad had zero ownership in TCB. Tabitha and her mother owned TCB until May 2017 when Tabitha’s mother gave her portion of TCB to Chad. In 2016, when Icet and Chad agreed to start the construction company, Chad owned no interest in TCB.

The record further supports the trial court’s finding that Tabitha represented to others in the community that Icet was an owner of TCB but did not inform Icet that Chad lacked authority to bind TCB. Tabitha permitted Chad to represent to Icet that he owned TCB. Tabitha had business cards printed with both Icet and Chad’s names listed as owners of TCB.

Viewing the above evidence in the light most favorable to the trial court’s findings, the record reflects that Chad held himself out as an owner and agent of TCB at the time he and Icet entered into a contract. The evidence further supports that Tabitha willingly participated in allowing Icet to believe that Chad was an owner of TCB. Icet could have formed a reasonable belief that Chad had authority to represent TCB as a party to the contract. Accordingly, when viewed cumulatively and in the light most favorable to Icet, the evidence at trial is legally sufficient to support the trial court’s implied finding that Chad had apparent authority to enter into a contract on behalf of TCB.


The court granted summary judgment in favor an investor in an LLC on the investor’s claim for securities fraud under Section 10(b) of the Securities Exchange Act and Rule 10b-5, concluding that the shares purchased in the LLC were “securities,” that officers of the LLC mistated and omitted material facts, and that the officers acted with scienter. The court also granted summary judgment in favor of the investor on his claim for fraud in a transaction involving real estate or stock under Section 27.01 of the Texas Business and Commerce Code as well as the investor’s claim for common-law fraud.
Dr. Campos, a physician-investor in a hospital organized as a limited liability company, purchased five Class B shares in the hospital for $250,000. Before making the investment, Dr. Campos was provided financial information by two officers of the hospital. After those officers left and the new CEO provided new financial information showing that the hospital had incurred large losses instead of profits as reflected on the previous financial statements, Dr. Campos sued the hospital for fraud. After responding to the court’s request for more specific allegations meeting the heightened pleading standard for fraud, the hospital did not rebut the facts but merely informed the court that it had “ceased operations” and instructed its counsel to cease work on the case. In this opinion, the court granted Dr. Campos summary judgment on his claims for securities fraud under Section 10(b) of the Securities Exchange Act, fraud in a transaction involving stock or real estate under Section 27.01 of the Texas Business and Commerce Code, and common law fraud.

In connection with the claim under Section 10(b) of the Securities Exchange Act, the court stated that the purchase of five Class B Shares in the hospital for $250,000 was the purchase of an “investment contract” as that term is used in the statutory definition of a “security.” As defined by the Supreme Court in S.E.C. v. W.J. Howey Co., an investment contract is a “contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party ....” According to the court, the hospital was “a ‘common enterprise’ he shared with the other shareholders and the organization’s leadership. Moreover, Dr. Campos was a passive investor and received assurance that his investment would grow, at approximately 6%, without any effort of his own. ... Therefore, the Class B shares Dr. Campos purchased constitute ‘securities’ under the definition of the Securities Exchange Act.” The court described how the statements made by two officers of the hospital misstated material facts, noting that the hospital was bound to the officers’ actions because “each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for the purposes of carrying out the company’s business.” Tex. Bus. Orgs. Code §101.254. The court also described unrebutted facts showing that the statements made by the officers were intentionally deceptive or made with severe recklessness, thus satisfying the scienter requirement of the federal securities fraud claim.

The court next addressed Dr. Campos’s claim for “fraud in a transaction involving real estate or stock” under Section 27.01 of the Texas Business and Commerce Code. Under this statute, the plaintiff must show that the defendant had (1) fraudulent intent (made a false representation of a past or existing material fact for the purpose of inducing the plaintiff to enter into a contract) and (2) the plaintiff relied on the false representation to enter into the contract. The court found that Dr. Campos met the elements to prevail on this claim and that the hospital did not rebut any of his factual allegations, thus entitling him to summary judgment on this claim.

Finally, the court concluded that Dr. Campos was entitled to summary judgment on his claim of common law fraud under Texas law, which requires that the plaintiff prove (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act on it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. Because Dr. Campos provided facts to meet the elements of fraud, and the hospital did not rebut any of those facts, the court found that Dr. Campos was entitled to summary judgment on this claim.

D. Fiduciary Duties

O’Donnell v. Roo Inv. Fund II, LLC, No. 05-23-00238-CV, 2024 WL 469558 (Tex. App.—Dallas Feb. 7, 2024, no pet. h.) (mem. op.) (“We have previously held that applicable Texas statutes ‘presume the existence of fiduciary duties’ owed by a manager or member of a limited liability company. See Cardwell, 2018 WL 3454800, at *5.”)


This case is summarized in more detail above under the heading “Fiduciary Duties of Partners and Affiliates.” In the course of the bankruptcy court’s analysis of the exception to discharge provided by Section 523(a)(4) of the Bankruptcy Code (fraud or defalcation in a fiduciary capacity), the court stated that an individual who was the manager of an LLC that was the general partner of a limited partnership owed fiduciary duties to the LLC’s members, relying on the status of the manager as an agent of the LLC.
Again, Ranch LLC was the general partner of Ranch LP.[footnote omitted] And managers of Texas LLCs owe fiduciary duties to the LLC’s members, which were Chuck and Nancy by way of beneficial ownership.”[Footnote 91: Managers of manager-managed LLCs and members of member-managed LLCs that are vested with actual or apparent authority by the managers or members, as applicable, are agents of the LLC. See Tex. Bus. Orgs. Code §§ 101.251, 101.254(a).]


The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

Lonestar Logo & Signs, LLC (“Lonestar Logo”) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (“Quorum Media”) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. The contract provided, contingent upon TxDOT’s approval, an opportunity for an extended five-year term that would run from December 31, 2011 to December 31, 2016. Lonestar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). Lonestar Logo managed the logo program, but Lonestar Logo itself was not the “vendor” and had no contract with TxDOT. Lonestar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after Lonestar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in Lonestar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of Lonestar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of Lonestar Logo.

After Dunster obtained its ownership interest in Lonestar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of Lonestar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate in day-to-day running of the logo program and failing to provide assistance to Lonestar Logo’s business in general. The members and managers other than Dunster formed a new company named Lonestar Logos Management Company, LLC (“Lonestar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As provided by the terms of the company agreement, Lonestar Logo was set to terminate at the end of the 2007–2016 contract.

In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and Lonestar Management, and Lonestar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. Lonestar Logo informed Dunster of these financial issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to Lonestar Logo.

The managers agreed at a meeting that Lonestar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s
required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in granting summary judgment against Dunster on its derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement, (2) the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:

**3.03 Failure to Contribute.** If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. *If such additional Capital Contributions are not received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member.* The redemption option may be exercised by the action of any single Manager, without the need for a vote. *The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall*
be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated. (emphasis added [by the court]).

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement. With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. See LoneStar Logo, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the Zauber exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. See Zauber v. Murray Sav. Ass’n, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref’d n.r.e.), 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. Id.

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed to meet its burden in proving that the Zauber exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the Zauber exception, it ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. See LoneStar Logo, 552 S.W.3d at 350. We overrule Dunster’s first issue.

Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade
the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the *Zauber* exception). Because we have already concluded Dunster failed to prove the first element of the *Zauber* exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive. The court of appeals [in an analysis that conflated case law, statutes, and terminology in the corporate and LLC contexts] provided the following explanation:


A breach of fiduciary duty necessarily requires the existence of the duty itself. The issue here is therefore whether any fiduciary duty between the members of LoneStar Logo existed. Dunster argues that the unanimity provision in Section 5.01(b)(iii) of the Agreement creates a fiduciary duty upon all parties, and that appellees, in bidding for the 2017–2026 contract, violated said duties. This unanimity provision states in relevant part:

The Managers may not cause the Company to do any of the following unless there is unanimous agreement among the Managers: ... (iii) take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.

Appellees respond that Texas law does not recognize fiduciary duties between members of a closely-held corporation, or, in the alternative, no fiduciary duties existed in the first place because the Agreement, which was voted through majority agreement of the members, intentionally foreclosed any fiduciary duty that the members owed each other. We agree with appellees.

The Texas Supreme Court has held that members of an LLC owe a fiduciary duty to the LLC, but not to the individual members themselves. *Ritchie*, 443 S.W.3d 856, 890 n. 62 (“We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”). The *Richey* [sic] court held that, “[a]bsent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation’s business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.” *Id.* at 888–89 (footnote omitted). Recently, the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the corporation for that shareholder’s benefit. *See In re Estate of Poe*, 648 S.W.3d 277, 287 (Tex. 2022). Accordingly, as members of the closely-held corporation, appellees did not owe either a formal or informal fiduciary duty to Dunster and therefore appellees could not have violated such duties when they formed LoneStar Management without Dunster.\footnote{12} [footnote 12 discussed *Allen v.*}
Devon Energy Holdings, LLC, characterizing it as recognizing an “informal fiduciary duty to a fellow member only when ‘the alleged fiduciary has a legal right of control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC’” and declining to further address the application of Allen because LoneStar Logo’s company agreement “foreclosed the possibility of a fiduciary duty owed towards fellow members.”]

Notwithstanding our above conclusion, the Richey [sic] court noted that disputes in closely-held corporations may be prevented and resolved through shareholders’ agreements and that the Legislature granted corporate founders and owners “broad freedom to dictate for themselves the rights, duties, and procedures that govern their relationship with each other and with the corporation.” Ritchie, 443 S.W.3d at 881; see also Tex. Bus. Orgs. Code §§ 7.001(d)(3) (providing that, in limited liability corporation, liability of governing person may be limited or eliminated by its certificate of formation or company agreement), 101.401 (providing that limited liability company agreement may expand or restrict any duties, including fiduciary duties, and related responsibilities that member, manager, officer, or other person has to company or to member or manager of company); Strebel v. Wimberly, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that fiduciary duty claim was foreclosed by operation of contractual disclaimer within limited partnership agreement). Here, as permitted by both Sections 7.001(d)(3) and 101.401 of the Business Organizations Code, the members voted by majority agreement to eliminate any prohibition on the members’ outside business ventures. This decision was reflected in the Agreement as follows:

5.07 Conflicts of Interest. Each Manager, Member and officer of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including ones in competition with the Company, with no obligation to offer to the company or any other Member, Manager or officer the right to participate.

The evidence is uncontroverted that LoneStar Logo was formed for the sole purpose of operating the 2007–2016 contract. Because of this, appellees claim, the 2017–2026 contract would fall within the phrase “other business ventures” in Section 5.07. We agree. And importantly, nothing precluded Dunster from bidding on the 2017–2016 logo program itself, as the Agreement provided that “[t]he Managers may not cause the Company to take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.” Accordingly, even viewing the evidence in the light most favorable to Dunster, see Ford Motor Co., 135 S.W.3d at 601, we conclude appellees did not violate a fiduciary duty to Dunster because, under both Texas law and the parties’ Agreement, none existed.


Plaintiff members of an LLC sufficiently pleaded direct RICO claims in their individual capacities against the defendant members and an entity controlled by them but failed to sufficiently plead derivative RICO claims because they did not plead that they had made a pre-suit written demand. The plaintiff members sufficiently pleaded direct claims against the defendant members for breach of fiduciary duties owed to the plaintiffs.

In 2016, the plaintiffs formed Allied Lab Solutions, LLC (“Allied”) to provide medical lab services to rural hospitals, entering into a company agreement and becoming members of Allied. Around the same time, defendant Nichols formed Medical Management Professionals (“MMP”), also with the purpose of providing lab services to rural hospitals. The plaintiffs then formed Allied Lab Solutions Management, LLC (“Allied Management”) for the sole purpose of distributing money from MMP to Allied. Defendant Ellis was the manager-manager of Allied Management and Allied from November 2016 to April 2017, and defendant Forage was the member-manager of Allied Management and Allied from May 2017 to April 2019.

In April 2017, Allied and MMP entered into a Service Agreement in which they agreed to perform lab services for several rural hospitals (“Participating Rural Hospitals”). The plaintiffs alleged that the defendants repeatedly misreported to the plaintiffs the income that MMP was receiving from the Participating Rural Hospitals
from December 2016 to April 2019 and that Ellis and Forage knew that the reports were falsified and that the amount of money going to each member was incorrect. According to the plaintiffs, Ellis deposited some of MMP’s unreported money in a bank account for another one of his companies located in Colorado, and Ellis and Forage sent Allied’s members annual tax forms confirming the amounts they received from their membership shares that falsely understated amounts from MMP’s financial reports. The plaintiffs allege that the defendants committed both wire fraud and money laundering in carrying out this scheme. From May 2019 to June 2020, MMP failed to make any payments to Allied Management, Allied, or the plaintiffs. Defendants Nichols, Ellis, and Forage allegedly claimed that MMP had not received any monies from Participating Rural Hospitals since April 2018 although the CEO of one of the Participating Rural Hospitals stated that MMP received $2,425,725 between May 2019 and June 2020 from his hospital alone.

In October 2020, Forage, acting as Allied’s manager, terminated Allied and Allied Management by filing documents with the Texas Secretary of State. The plaintiffs alleged that he did so without the consent of Allied’s members in order to cover up the defendants’ scheme to skim money from MMP’s income.

In this lawsuit, the plaintiffs’ causes of action included direct RICO claims in the plaintiffs’ individual capacities, derivative RICO claims on behalf of Allied and MMP, and direct claims for breach of fiduciary duty against Ellis and Forage. The defendants sought to dismiss all of these claims.

The defendants contended that the plaintiffs individually lacked standing or capacity to bring RICO claims. (The court explained that the Fifth Circuit uses the terms “standing” and “capacity” in relation to RICO claims brought in an individual capacity, but the Texas Supreme Court has stated that “[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.”) Recognizing that Allied, Allied Management, and MMP were all LLCs rather than corporations or partnerships, the court applied the same three-part test used by the Fifth Circuit to determine whether shareholders or partners may bring RICO claims individually. The test is: (1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of action accrues in the corporation. The defendants argued that the plaintiffs failed all three parts of the test, but the court disagreed.

The court agreed with the defendants that the plaintiffs did not sufficiently plead that their injuries were not derived from, and thus distinct from, Allied’s injuries. Only because of the plaintiffs’ relationship with Allied as its members did they receive less profit than they would have if not for the defendants’ alleged racketeering activity. The court determined, however, that the plaintiffs sufficiently pleaded that the defendants’ racketeering activity was directed at the members individually rather than solely at Allied and that Texas law could allow for the individual members to have a cause of action separate from the LLCs. The plaintiffs alleged that they acted in reliance on the defendants’ false statements by trusting that the monthly financial reports and checks from MMP and Allied were correct. According to the court, if the plaintiffs did not allege that Allied’s managers knew of and actively participated in the scheme, then the defendants would be correct in stating that only Allied was targeted and not its individual members, but the court said that the plaintiffs had sufficiently shown at this stage that the defendants targeted their activities not only at Allied but also at its individual members. The court acknowledged that “Texas courts generally have held that a member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company,” but the court relied on Texas cases (Sadén v. Smith, 415 S.W.3d 450, 463 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652, at *7 (W.D. Tex. Aug. 27, 2018)), in support of its conclusion that Texas courts sometimes allow for individual members to assert a separate cause of action from the LLC where members of an LLC “used their status as members of an LLC to benefit themselves to the detriment of the other members.” The court thus declined to dismiss the RICO claims brought by the plaintiffs in their individual capacities.

With respect to the RICO claims brought by the plaintiffs derivatively, the court relied on the statutory provisions of the Texas Business Organizations Code applicable to LLC derivative proceedings to conclude that the claims should be dismissed. The court first noted that Federal Rule of Civil Procedure 23.1 requires a shareholder derivative complaint to state with particularity “any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members” and “the reasons for not obtaining the action or not making the effort,” but the court then stated that “the particularity of a plaintiff’s pleadings is governed by the standards of the state of incorporation.” Because Allied and MMP were both Texas LLCs, the court turned to a discussion of the provisions of the Texas Business Organizations Code. The court
concluded that the plaintiffs sufficiently pleaded that they fairly and adequately represented the interests of the LLC, but they failed to plead that they had made a written pre-suit demand. [The plaintiffs apparently did not attempt to rely on the provisions of the Texas Business Organizations Code that exclude the fair representation and demand requirements in the context of a derivative claim against members, managers, or officers of a closely held LLC, i.e., an LLC with fewer than 35 members and no membership interests listed on an exchange.]

The Texas Business Code sets forth standing requirements for members of LLCs who wish to bring claims in a derivative capacity, or on behalf of the LLC itself. Section 101.452 states that a member must have been a member of the LLC at the time of the act or omission complained of and must fairly and adequately represent the interests of the LLC in enforcing the right of the LLC. Section 101.453 states that a member “may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the limited liability company stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the limited liability company take suitable action” (emphasis added).

Defendants argue that Plaintiffs have failed to plead that they fairly and adequately represent the interests of the LLC and that they made a written demand for the LLC to take action and were rejected. (Mot., Dkt. 15, at 10–11). Defendants also contend that Plaintiffs have not pleaded enough facts to show that the RICO claims are not collusive ones pleaded just to confer jurisdiction on the federal court. (Id. at 11 (citing Fed. R. Civ. P. 23.1(b)(2))). As discussed above, the Court finds that Plaintiffs have sufficiently pleaded a RICO claim in their individual capacities and therefore the Court does not believe there is sufficient evidence that Plaintiffs only pleaded a RICO claim to get into federal court at this time. Further, the Court finds that Plaintiffs, as several members of Allied who benefit from Allied’s success, have pleaded enough facts to show that they fairly and adequately represent the interests of the LLC. However, the Court agrees with Defendants that Plaintiffs have failed to plead that they filed a written demand with Allied or MMP that stated the act or omission that is the subject of this suit and demanded action. While Plaintiffs did plead that they made two requests to Defendant Forage to bring a suit on behalf of Allied, (Am. Comp., Dkt. 14, at 41), they fail to allege that these demands were written.

In their response, Plaintiffs simply reiterate the statements from their amended complaint: that they made two demands to Defendant Forage to bring an action on the basis of the alleged fraudulent activities through an attorney acting on their behalf and that Defendant Forage rejected both demands. (Resp., Dkt 20, at 10–11). The Court notes that Plaintiffs seem to have strategically eliminated the word “written” when providing a quote from Section 101.453. (See id.). Because Plaintiffs have failed to allege that they have met the conditions to bring a derivative claim on behalf of Allied required Texas law, the Court finds that Plaintiffs’ claims, to the extent they are brought in a derivative capacity, are dismissed.[footnote omitted]

The defendants also sought dismissal of the plaintiffs’ breach-of-fiduciary-duty claims against defendants Forage and Ellis, arguing that Forage and Ellis “owed fiduciary duties only to Allied, and not to the Plaintiffs as individual members of Allied.” Relying on Texas case law that has recognized fiduciary duties may be owed by member-managers to other members in some situations, the court concluded that the plaintiffs’ allegations were sufficient to allow them to proceed with their breach-of-fiduciary-duty claims against Ellis and Forage.

Defendants are correct that Texas courts have generally held that fiduciary duties of a corporate director “run to the corporation, not to the individual shareholders.” Strachela v. AL Glob. Servs., LLC, 619 S.W.3d 795, 805 (Tex. App.—San Antonio 2020, pet. denied). However, “[n]either the Texas Limited Liability Company Act ... nor the subsequently-enacted limited liability company provisions of the Texas Business Organizations Code ... directly address the duties owed by managers and/or members of limited liability companies.” Cardwell v. Gurley, No. 05-09-01068-CV, 2018 WL 3454800 (Tex. App.—Dallas July 18, 2018, pet. denied) (citing Tex. Bus. Orgs. Code Ann. § 101.401). “Both, however, presume the existence of fiduciary duties, providing that a limited liability company may ‘expand or restrict’ any duties (including fiduciary duties) of a member, manager, officer, or other person.” Id.
Texas courts have recognized a fiduciary duty between a manager member of an LLC and an individual member of an LLC in certain contexts. In *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 392–93 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the court found that a “sole member-manager” of an LLC who had “a high degree of control” over the LLC’s day-to-day operations was more analogous to a general partner in a limited partnership than a director or majority shareholder in a corporation. Thus, because “a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity,” *id.* at 391, and because the member manager “[had] a legal right of control and exercise[d] that control by virtue of his status,” *id.* at 395, the court concluded that there was a formal fiduciary relationship between the member-manager and the individual members in the specific context of purchasing a minority member’s interest, *id.* at 396. Similarly, in *Cardwell v. Gurley*, No. 4-10-CV-706, 2011 WL 6338813, at *9 (E.D. Tex. Dec. 19, 2011), aff’d sub nom. *In re Cardwell*, 487 Fed. Appx. 183 (5th Cir. 2012), a federal district court upheld a Texas trial court’s finding that a member-manager of an LLC owed another member “direct fiduciary duties of loyalty, due care, and full disclosure as a matter of law.” The court noted that the Fifth Circuit has held that “persons exercising control of a business owe trust-type obligations to partners and shareholders that do not control the business.” *Id.* at *8.

The Court finds these cases to be illuminating as to whether member-managers of an LLC can ever be held to owe a fiduciary duty to the individual members of the LLC and not just the LLC itself. [In footnote 4, the court noted that the plaintiffs suggested some sort of informal duty might exist between the plaintiffs and Ellis and Forage based on a pre-existing relationship but stated the plaintiffs did not allege any facts supporting the existence of informal fiduciary duties and sufficiently pleaded the existence of fiduciary duties owed by Ellis and Forage to the plaintiffs based on their control over Allied, not because of any informal, pre-existing relationships.]

Plaintiffs alleged that both Defendants Ellis and Forage actively worked to mislead Plaintiffs as to how much money they were entitled to through their membership shares of Allied. (Am. Compl., Dkt. 14, at 4). Plaintiffs also alleged that Defendants Ellis and Forage ran the day-to-day operations of Allied as the managing members, which allowed them to mislead Plaintiffs. (Id. at 15). Adding to the alleged authority of Ellis and Forage to oversee Allied is the fact that Ellis and Forage were also the member-managers of Allied Management, which was also a member-manager of Allied. (Id. at 15–16). Thus, Plaintiffs ... may proceed with their breach of fiduciary claims against Defendants Ellis and Forage.[footnote omitted]

### E. LLC Property and LLC Membership Interest


A debtor agreed to appointment of a receiver as requested by the debtor’s creditor, and the trial court placed not only the debtor, but two limited liability companies in which the debtor owned a membership or equitable interest, as well as other “affiliates” of the debtor, into receivership. A third-party creditor or non-managerial member of the LLCs moved to dissolve the receiverships over the LLCs, and the court of appeals held that (1) the third party had standing, as a creditor of the LLCs, to move to dissolve the receiverships; (2) the LLCs did not consent to the receiverships; (3) the LLCs were not “property” of the debtor; and (4) the LLCs were not “business” of the debtor.

G.E.T. Marketing, LLC (“GET”), a creditor of PSW Real Estate, LLC (“PSW”), petitioned for receivership over PSW based on its imminent insolvency. PSW owned a membership or equitable interest in SB Webberville Road, LLC (“Road”) and PSW Webberville LLC (“Webberville”). PSW agreed to the receivership and the order executed by the trial court, which placed PSW and 55 “affiliates” into receivership. Two of the 55 affiliates were Road and Webberville. No evidence was presented showing, nor did GET’s petition argue, that PSW, Road, or Webberville were alter egos of each other or subject to having their respective “corporate” identities disregarded. Additionally, GET did not petition for a receiver over the 55 “affiliates,” prove it was a creditor of Road or Webberville, or show that Road or Webberville were insolvent. Ovation Finance Holdings 5 LLC (“Ovation”), a creditor or member of Road and Webberville, petitioned for dissolution of the receivership, thus raising the question
of whether a creditor or non-managerial member of Road or Webberville had standing to attack the trial court’s action. The court of appeals held that the trial court should have granted Ovation’s motion to dissolve the receivership based on the distinct corporate identities involved, the definitions of “property” and “business” in the receivership statute, and settled authority regarding receiverships.

In its analysis, the court of appeals first reviewed relevant provisions of the applicable receivership statute:

Section 11.404 of the Texas Business Organizations Code authorizes courts to appoint a rehabilitative receiver to conserve the “property and business” of an entity and to avoid damage to interested parties. TEX. BUS. ORGS. CODE ANN. § 11.404(b)(1). The authority comes with caveats, though. Appointment is allowed if “all other requirements of law are complied with” and “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 ANN. § 11.404(b)(2), (3); see Ritchie v. Rupe, 443 S.W.3d 856, 863-64 (Tex. 2014) (discussing former rule). Furthermore, the legislature defined “business” to mean “a trade, occupation, profession, or other commercial activity,” TEX. BUS. ORGS. CODE ANN. § 1.002(5), and “property” to include “tangible and intangible property and an interest in that property.” TEX. BUS. ORGS. CODE ANN. § 1.002(77).

The court pointed out that the trial court’s decision to appoint a receiver is an exercise of the court’s discretion subject to the standard of abused discretion, i.e., when the trial court acts without reference to any guiding rules and principles, such as misapplying or misinterpreting the law.

Next the court discussed the principle that corporations have separate legal identities that generally must be respected, eventually noting that LLCs and their members are similarly separate and distinct from one another:

To the foregoing, we add another requirement of the law. It obligates us to recognize that corporations have separate identities, which separateness generally must be observed. Neff ex rel. Weatherford Int’l Ltd. v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (quoting Docudata Records Mgmt. Servs., Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). For example, a subsidiary corporation and its parent corporation are separate and distinct “persons” as a matter of law. ETC Tex. Pipeline, Ltd. v. Addison Expl. & Dev., LLC, 582 S.W.3d 823, 837 (Tex. App.—Eastland 2019, pet. denied), overruled in part on other grounds in Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021). Unless the corporate veil is used as a sham, it matters not that the parent dominates or controls the subsidiary or otherwise treats it as its instrumentality or agency. Id. Nor does commonality of directors or managers alone permit courts to avoid the separateness of which we speak. Id. Similarly, because of their separate identities, corporations generally are not liable for each other’s obligations. Id.


The court concluded that Ovation had standing to seek to vacate the receiverships over Road and Webberville because the Texas Supreme Court has stated that “when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court” and “are bound by the court’s orders approving claims and determining rights in and to the property or its proceeds” if they have notice of the proceedings.
The court next explained that there was no evidence that Road or Webberville consented to being placed in receivership, and neither the receiver nor GET relied on that ground in their appellate briefing. Rather, they argued that placing 55 “affiliates” of PSW in receivership was appropriate because they were the “property and business” of PSW as contemplated by the receivership statute. The court of appeals disagreed with that contention based on the following analysis:

No one disputes that PSW was a member of or otherwise owned an “equity interest” in Road and Webberville. Nor does anyone suggest the corporate veils of Road and Webberville were used as a sham in some way by PSW. Without the latter in play then, both we and the trial court must respect the distinct legal status or identity of Road and Webberville. Moreover, PSW’s membership interest likens to owning stock in a corporation. As such, the former owned an interest in the latter, and that interest constituted property of PSW. TEX. BUS. ORGS. CODE ANN. at § 101.106(a) (stating that a membership interest in a limited liability company is personal property). Owning an interest in them, though, did not make PSW, Road, or Webberville one and the same. Nor did it make the entities Road and Webberville themselves property of PSW; to hold otherwise would be to ignore the separate identities of each. That means PSW’s property subject to receivership under § 11.404(a) included its membership interest in the two other distinct entities, not the entities themselves.

As for whether Road and Webberville were PSW’s “business” under § 11.404(a), we initially say that words grouped in a list should be given related meaning when construing a statute. Ritchie, 443 S.W.3d at 869. We heed that rule of construction when looking at the statutory definition of “business” assigned in the Business Organizations Code.

After mentioning “trade,” “occupation,” and “profession,” the legislature ended the definition with the phrase “or other commercial activity.” TEX. BUS. ORGS. CODE ANN. § 1.002(5). The latter passage sets the framework within which we read the former nouns. Simply put, “or other ... activity” alludes to what the entity does or its job, so to speak. Thus, trade, occupation, and profession are to be read as alluding to the insolvent’s business and its scope.[footnote omitted] So, in permitting a trial court to “appoint a receiver for the entity’s ... business ...” TEX. BUS. ORGS. CODE ANN. § 11.404(a), the legislature merely allowed the court to place a receiver in the shoes of the insolvent entity. Once in those shoes, the receiver could then control or manage the insolvent’s job, trade, or commercial activity, as allowed by law. Simply put, the focus rests on gaining control of the insolvent’s business. The statute says nothing about placing distinct legal entities (irrespective of their financial stability) into receivership as well simply because the insolvent may have some financial interest in them. To do that would be to ignore the distinct legal status of the other entities. It would be tantamount to ignoring the expressed statutory conditions precedent to a receivership, such as insolvency, deadlocked management, illegal action by governing persons, the wasting of assets, or deadlocked shareholders. See TEX. BUS. ORGS. CODE ANN. § 11.404(a)(1)(A)-(E) (listing the conditions). And, we hesitate to read into the statute more authority than its own definitions encompass, especially when receiverships are harsh remedies, Fortenberry v. Cavanaugh, No. 03-04-00816-CV, 2005 WL 1412103, at *——— ·———, 2005 Tex. App. LEXIS 4665, at *5-6 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op), to be cautiously applied. Elliott v. Weatherman, 396 S.W.3d 224, 228-29 (Tex. App.—Austin 2013, no pet.). Here, that means the trial court could permit a receiver to step into PSW’s shoes and control the latter’s job, trade, work, vocation, or commercial activity. It does not mean the trial court could place into receivership distinct legal entities simply because PSW’s business included commercial interaction with them.

... In sum, PSW’s insolvency may have warranted the appointment of a receiver. Yet, the extent of that appointment, given our construction of § 11.404(a), was limited. The statute did not allow the trial court to exceed the definitions of “the entity’s property and business” or disregard other statute requirements. See TEX. BUS. ORGS. CODE ANN. § 11.404(a). Nor did it allow the court to disregard the distinct legal identities of other corporations or limited liability companies. So, with PSW’s being the purported insolvent “entity” at issue, the receivership could extend no
further. It could not ensnare Road or Webberville into their own receiverships merely because they may be subsidiaries of or have business dealings with PSW.

Thus, the court of appeals held that the trial court abused its discretion by placing Road and Webberville in receivership, and the court ordered that the receiverships over Road and Webberville be dissolved.

F. Interpretation and Enforcement of Company Agreement

1. Contractual Modification of Fiduciary Duties


The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

LoneStar Logo & Signs, LLC (“LoneStar Logo”) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (“Quorum Media”) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. The contract provided, contingent upon TxDOT’s approval, an opportunity for an extended five-year term that would run from December 31, 2011 to December 31, 2016. LoneStar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). LoneStar Logo managed the logo program, but LoneStar Logo itself was not the “vendor” and had no contract with TxDOT. LoneStar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after LoneStar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in LoneStar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of LoneStar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of LoneStar Logo.

After Dunster obtained its ownership interest in LoneStar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of LoneStar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate in day-to-day running of the logo program and failing to provide assistance to LoneStar Logo’s business in general. The members and managers other than Dunster formed a new company named LoneStar Logos Management Company, LLC (“LoneStar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As provided by the terms of the company agreement, LoneStar Logo was set to terminate at the end of the 2007–2016 contract.

In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and LoneStar Management, and LoneStar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. LoneStar Logo informed Dunster of these financial
issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to LoneStar Logo.

The managers agreed at a meeting that LoneStar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in granting summary judgment against Dunster on its derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement, (2) the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:

3.03 Failure to Contribute. If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. If such additional Capital Contributions are not received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member. The redemption option may be exercised by the
The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing Member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated.

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement. With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. See LoneStar Logo, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the Zauber exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. See Zauber v. Murray Sav. Ass’n, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref’d n.r.e.), 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. Id.

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed to meet its burden in proving that the Zauber exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the Zauber exception, it ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. See LoneStar Logo, 552 S.W.3d at 350. We overrule Dunster’s first issue.
Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the Zauber exception). Because we have already concluded Dunster failed to prove the first element of the Zauber exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive. The court of appeals [in an analysis that conflated case law, statutes, and terminology in the corporate and LLC contexts] provided the following explanation:

Under Texas law, the business and affairs of a corporation are managed through a board of directors.11 [footnote 11 cites Tex. Bus. Orgs. Code § 21.563 as defining “a closely-held corporation as a corporation having fewer than thirty-five shareholders and its stock is not publicly traded, and stating that “[n]either party disputes that LoneStar Logo meets this definition.”] See Tex. Bus. Orgs. Code § 21.401(a). Directors owe a fiduciary duty to their corporations in the actions they take as directors. Ritchie, 443 S.W.3d at 868. A director’s fiduciary status includes three broad duties: obedience, loyalty, and due care. See Loy v. Harter, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (citing Gearhart Indus., Inc. v. Smith Int’l, Inc., 741 F.2d 707, 719 (5th Cir. 1984)). These duties are owed to the corporation, not to individual shareholders or even to a majority of shareholders. Gearhart Indus., 741 F.2d at 721. A director’s fiduciary status also includes a duty to dedicate “uncorrupted business judgment for the sole benefit of the corporation.” Ritchie, 443 S.W.3d at 868 (quoting International Bankers Life Ins. v. Holloway, 368 S.W.2d 567, 577 (Tex. 1963)).

A breach of fiduciary duty necessarily requires the existence of the duty itself. The issue here is therefore whether any fiduciary duty between the members of LoneStar Logo existed. Dunster argues that the unanimity provision in Section 5.01(b)(iii) of the Agreement creates a fiduciary duty upon all parties, and that appellees, in bidding for the 2017–2026 contract, violated said duties. This unanimity provision states in relevant part:

The Managers may not cause the Company to do any of the following unless there is unanimous agreement among the Managers: ... (iii) take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.

Appellees respond that Texas law does not recognize fiduciary duties between members of a closely-held corporation, or, in the alternative, no fiduciary duties existed in the first place because the Agreement, which was voted through majority agreement of the members, intentionally foreclosed any fiduciary duty that the members owed each other. We agree with appellees.

The Texas Supreme Court has held that members of an LLC owe a fiduciary duty to the LLC, but not to the individual members themselves. Ritchie, 443 S.W.3d 856, 890 n. 62 (“We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”). The Richey [sic] court held that, “[a]bsent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation’s business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.” Id. at 888–89 (footnote omitted). Recently, the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the
corporation for that shareholder’s benefit. See In re Estate of Poe, 648 S.W.3d 277, 287 (Tex. 2022). Accordingly, as members of the closely-held corporation, appellees did not owe either a formal or informal fiduciary duty to Dunster and therefore appellees could not have violated such duties when they formed LoneStar Management without Dunster.\footnote{footnote 12 discussed Allen v. Devon Energy Holdings, LLC, characterizing it as recognizing an “informal fiduciary duty to a fellow member only when ‘the alleged fiduciary has a legal right of control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC’” and declining to further address the application of Allen because LoneStar Logo’s company agreement “foreclosed the possibility of a fiduciary duty owed towards fellow members.”]}

Notwithstanding our above conclusion, the Richey [sic] court noted that disputes in closely-held corporations may be prevented and resolved through shareholders’ agreements and that the Legislature granted corporate founders and owners “broad freedom to dictate for themselves the rights, duties, and procedures that govern their relationship with each other and with the corporation.” Ritchie, 443 S.W.3d at 881; see also Tex. Bus. Orgs. Code §§ 7.001(d)(3) (providing that, in limited liability corporation, liability of governing person may be limited or eliminated by its certificate of formation or company agreement), 101.401 (providing that limited liability company agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that member, manager, officer, or other person has to company or to member or manager of company); Strebel v. Wimberly, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that fiduciary duty claim was foreclosed by operation of contractual disclaimer within limited partnership agreement). Here, as permitted by both Sections 7.001(d)(3) and 101.401 of the Business Organizations Code, the members voted by majority agreement to eliminate any prohibition on the members’ outside business ventures. This decision was reflected in the Agreement as follows:

5.07 Conflicts of Interest. Each Manager, Member and officer of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including ones in competition with the Company, with no obligation to offer to the company or any other Member, Manager or officer the right to participate.

The evidence is uncontroverted that LoneStar Logo was formed for the sole purpose of operating the 2007–2016 contract. Because of this, appellees claim, the 2017–2026 contract would fall within the phrase “other business ventures” in Section 5.07. We agree. And importantly, nothing precluded Dunster from bidding on the 2017–2016 logo program itself, as the Agreement provided that “[t]he Managers may not cause the Company to] take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.” Accordingly, even viewing the evidence in the light most favorable to Dunster, see Ford Motor Co., 135 S.W.3d at 601, we conclude appellees did not violate a fiduciary duty to Dunster because, under both Texas law and the parties’ Agreement, none existed.

2. Admission of Member


The court of appeals affirmed a lower court ruling that appellant was not a member of the company under the language of the operating agreement.

Lost Pines Ventures Series LLC (“Lost Pines”) executed a contract for the purchase of undeveloped acreage near Highway 71 West in Bastrop, Texas (the “Property”). Patrick Towne and Andrei Duta signed the purchase contract as the managing members of Lost Pines. A new LLC, 823 HWY 71 W LLC (the “Company”), was then formed and Towne and Duta, on behalf of Lost Pines, executed an assignment of the purchase contract from Lost Pines to the Company.
On March 1, 2018, Duta, Towne, and Devin Black signed the original operating agreement for the Company (the “Agreement”). Relevant to this appeal, the Agreement included the following provisions regarding the initial capital contributions of the Members:

Section 3.1 Initial Capital Contributions of the Members
(a) Each Member shall contribute cash, other property, or services to the Company in the amount set forth as the Initial Capital Contribution of such Member on Schedule 1 attached hereto and hereby made a part hereof. Such cash or other property shall be the Initial Capital Contribution of each such Member and each such Member agrees to make its Initial Capital Contribution.
(b) Upon making the Initial Capital Contribution each Member shall receive its Membership Interest and its initial Sharing Ratio as set forth in Schedule 1.

Schedule 1
Investor Schedule

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Future investors will own 100% equity in the company. Profits will be split with investors receiving 10% annual interest preferred and after their capital has been returned they will receive 60% of all remaining profits and the remaining 40% profits will be split according to the Schedule 3, infra.

Schedule 3
Developer Schedule

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Section 4.1 appointed Duta, Towne, and Black as the initial board of Managers while also expressly stating that “Managers need not be Members.” Finally, under Section 11.19 (titled “Exhibits and Schedules”), the Agreement stated that “the undersigned, being the initial Managers and all of the Members of the Company have caused this Agreement to be duly adopted by the Company effective as of the date first above written.” The signatures of Duta, Towne, and Black are then listed on separate lines under the titles of both “Managers” and “Members.”

On March 6, 2018, the Company closed on the Property. Black and Duta later testified that it was expected at the time that Towne would make a monetary capital contribution in the Company to become a Member. The parties do not dispute that Towne did not make the monetary capital contribution. The day after closing, Black sent a letter to Towne, informing him that he had been removed as a Manager and Member of the Company.

Towne filed suit, contending that he was an initial member under the Company’s operating agreement. Black and Duta responded that Towne was never a member because he failed to make a required capital contribution. The trial court agreed with Black and Duta, concluding that Towne was not, and had never been, a member of the Company.

On appeal, Towne argued that the trial court should have determined that he was a member because the Agreement “unambiguously designated” him as a member. Black and Duta argued that, under the unambiguous terms of the Agreement, Towne never became a member because he did not make the required capital contribution. The court of appeals noted that the Agreement unambiguously provided that the initial membership in the Company was based on making a required capital contribution: “The Agreement defines ‘Member’ as including the ‘Persons listed as members on Schedule 1.’ Section 3.1 of the Agreement similarly provides that the Members were required
to ‘contribute cash, other property, or services . . . in the amount set forth as the Initial Capital Contribution of such Member on Schedule 1’; that ‘each such Member agrees to make its Initial Capital Contribution’; and that the Member receives their Membership Interest ‘[u]pon making the Initial Capital Contribution.’ Schedule 1 then plainly states that ‘Future investors will own 100% equity in the company’ and only lists the following Members: [Investors]. Accordingly, under the certain and definite terms of the Agreement, a person only became a Member of, and acquires a Membership Interest in, the Company after they make a capital contribution.”

The court further observed, with little analysis, that the plain and ordinary language of Schedule 1 expressly contemplated that the initial Members would make monetary capital contributions. Towne did not dispute that he never made any monetary capital contribution to the Company, either prior to closing on the Property or at any other time. According to the court, therefore, “Towne never became a Member under the unambiguous terms of the Agreement described above.”

Towne argued that he was a member because Schedule 3 listed him as a member and Schedule 1 incorporated Schedule 3. The court of appeals disagreed:

. . . . The entirety of Schedule 1’s reference to Schedule 3 is as follows:

*Future investors will own 100% equity in the company.* Profits will be split with investors receiving 10% annual interest preferred and after their capital has been returned they will receive 60% of all remaining profits and the remaining 40% profits will be split according to the Schedule 3, infra. (emphases added). Contrary to Towne’s suggestion, this clause clearly distinguishes between investors, who are expressly granted “100% equity” in the Company and are listed as the initial Members under Schedule 1, and the persons listed under Schedule 3, who only have a right to specific funds after the investors receive their distributions. Moreover, a harmonious reading of Schedule 1 and Schedule 3 demonstrates that the sharing ratios referenced under Schedule 3 plainly direct how the “remaining 40% profits will be split” amongst the persons listed in Schedule 3.

Towne also points to Schedule 3 listing his “initial capital contribution” as “substantial engineer services” as demonstrating that he was a Member through a non-monetary capital contribution of services. However, we cannot read that language in isolation but must consider it in the context of the Agreement as a whole. Both Section 3.1 and the “Members” definition expressly limit the members to those listed in Schedule 1. Schedule 1 then is titled “Investor Schedule[ ]” and specifies that the initial Members are the “investors” who make the specified monetary capital contributions. Schedule 3, in contrast, is labeled the “Developer Schedule” and is not referenced anywhere in the Agreement except for a single instance in Schedule 1; an instance, as previously discussed, expressly distinguished from the investors who are Members. The plain meaning of the Schedules as a whole therefore distinguishes between the investors (who are the initial Members of the Company) and the developers (who receive a portion of a special, separate payment after the investors’ capital has been returned). We must consider the Agreement as written because the parties could have drafted Schedule 1 to expressly list Towne, Duta, and Black as Members but chose not to in favor of the language actually included. The Agreement instead unambiguously treats developers differently than investors, and accordingly, Towne’s inclusion as one of the Schedule 3 developers has no bearing on any Membership Interest he would have been entitled to as an investor under Schedule 1.

Towne also argues that his right to receive a portion of “the remaining 40% profits” as a developer under Schedule 3 constitutes a profit interest in the Company and therefore establishes he is a partial owner, citing *Vines v. Durrett*, No. 12-14-00258-CV, 2015 WL 9591525, at *5 (Tex. App.—Tyler Dec. 30, 2015, pet. denied) (mem. op.). But Towne misreads *Vines*. There, the contract was ambiguous about whether the purchaser bought a 3% ownership interest or a 3% net profits interest. *Id.* That fact issue was submitted to the jury, and the jury ultimately determined that the sale was of an ownership interest. *Id.* *Vines* thus does not hold that a profit interest and ownership interest are the same. Rather, the opinion does the exact opposite by recognizing the contract was ambiguous because the language could be interpreted as either a profit interest or an ownership interest. *Id.* But there is no such ambiguity here. The right any Schedule 3 developer
may have is separate and distinct from the Membership Interest held by an investor pursuant to Section 3.1 and Schedule 1.

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Accordingly, based on the unambiguous terms of the Agreement, a party would only become an initial Member of the Company after making the monetary capital contribution required under Section 3.1 and Schedule 1. Since the parties do not dispute that Towne never made such a capital contribution, the trial court did not err in determining that he is not a Member of the Company as a matter of law.

Towne also argued that a later amendment of the operating agreement that removed him as a member was invalid because it required “consent of the Member affected thereby.” Similarly, he argued that he was supposed to receive notice of a meeting as a member of the company. The court disagreed, observing that “Towne was not a Member of the Company, and therefore the Amended Agreement did not ‘modify’ his membership interest or member voting rights because he did not have any under the original Agreement.” Similarly, the court noted that only members were to receive notice of meetings, and Towne at the time of the meeting was not a member.

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4. Capital Calls


The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

LoneStar Logo & Signs, LLC (“LoneStar Logo”) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (“Quorum Media”) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. The contract provided, contingent upon TxDOT’s approval, an opportunity for an extended five-year term that would run from December 31, 2011 to December 31, 2016. LoneStar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). LoneStar Logo managed the logo.
program, but LoneStar Logo itself was not the “vendor” and had no contract with TxDOT. LoneStar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after LoneStar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in LoneStar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of LoneStar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of LoneStar Logo.

After Dunster obtained its ownership interest in LoneStar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of LoneStar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate in day-to-day running of the logo program and failing to provide assistance to LoneStar Logo’s business in general. The members and managers other than Dunster formed a new company named LoneStar Logos Management Company, LLC (“LoneStar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As provided by the terms of the company agreement, LoneStar Logo was set to terminate at the end of the 2007–2016 contract.

In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and LoneStar Management, and LoneStar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. LoneStar Logo informed Dunster of these financial issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to LoneStar Logo.

The managers agreed at a meeting that LoneStar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in granting summary judgment against Dunster on its derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement,
the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:

3.03 Failure to Contribute. If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. If such additional Capital Contributions are not received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member. The redemption option may be exercised by the action of any single Manager, without the need for a vote. The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated.

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement. With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed.
with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. See LoneStar Logo, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the Zauber exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. See Zauber v. Murray Sav. Ass’n, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref’d n.r.e., 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. Id.

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed to meet its burden in proving that the Zauber exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the Zauber exception, it ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. See LoneStar Logo, 552 S.W.3d at 350. We overrule Dunster’s first issue.

Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the Zauber exception). Because we have already concluded Dunster failed to prove the first element of the Zauber exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive. The court of appeals [in an analysis that conflated case law, statutes, and terminology in the corporate and LLC contexts] provided the following explanation:

Under Texas law, the business and affairs of a corporation are managed through a board of directors.11 [footnote 11 cites Tex. Bus. Orgs. Code § 21.563 as defining “a closely-held corporation as a corporation having fewer than thirty-five shareholders and its stock is not publicly traded, and stating that “[n]either party disputes that LoneStar Logo meets this definition.”] See Tex. Bus. Orgs. Code § 21.401(a). Directors owe a fiduciary duty to their corporations in the actions they take as directors. Ritchie, 443 S.W.3d at 868. A director’s fiduciary status includes three broad duties: obedience, loyalty, and due care. See Loy v. Harter, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (citing Gearhart Indus., Inc. v. Smith Int’l, Inc., 741 F.2d 707, 719 (5th Cir. 1984)). These duties are owed to the corporation, not to individual shareholders or even to a majority of shareholders. Gearhart Indus., 741 F.2d at 721. A director’s fiduciary status also includes a duty to dedicate “uncorrupted business judgment for the sole benefit of the
corporation.” *Ritchie*, 443 S.W.3d at 868 (quoting *International Bankers Life Ins. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963)).

A breach of fiduciary duty necessarily requires the existence of the duty itself. The issue here is therefore whether any fiduciary duty between the members of LoneStar Logo existed. Dunster argues that the unanimity provision in Section 5.01(b)(iii) of the Agreement creates a fiduciary duty upon all parties, and that appellees, in bidding for the 2017–2026 contract, violated said duties. This unanimity provision states in relevant part:

The Managers may not cause the Company to do any of the following unless there is unanimous agreement among the Managers: ... (iii) take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.

Appellees respond that Texas law does not recognize fiduciary duties between members of a closely-held corporation, or, in the alternative, no fiduciary duties existed in the first place because the Agreement, which was voted through majority agreement of the members, intentionally foreclosed any fiduciary duty that the members owed each other. We agree with appellees.

The Texas Supreme Court has held that members of an LLC owe a fiduciary duty to the LLC, but not to the individual members themselves. *Ritchie*, 443 S.W.3d 856, 890 n. 62 (“We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”). The *Richey* [sic] court held that, “[a]bsent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation’s business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.” *Id.* at 888–89 (footnote omitted). Recently, the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the corporation for that shareholder’s benefit. *See In re Estate of Poe*, 648 S.W.3d 277, 287 (Tex. 2022). Accordingly, as members of the closely-held corporation, appellees did not owe either a formal or informal fiduciary duty to Dunster and therefore appellees could not have violated such duties when they formed LoneStar Management without Dunster. [footnote 12 discussed *Allen v. Devon Energy Holdings, LLC*, characterizing it as recognizing an “informal fiduciary duty to a fellow member only when ‘the alleged fiduciary has a legal right of control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC’” and declining to further address the application of *Allen* because LoneStar Logo’s company agreement “foreclosed the possibility of a fiduciary duty owed towards fellow members.”]

Notwithstanding our above conclusion, the *Richey* [sic] court noted that disputes in closely-held corporations may be prevented and resolved through shareholders’ agreements and that the Legislature granted corporate founders and owners “broad freedom to dictate for themselves the rights, duties, and procedures that govern their relationship with each other and with the corporation.” *Ritchie*, 443 S.W.3d at 881; *see also* Tex. Bus. Orgs. Code §§ 7.001(d)(3) (providing that, in limited liability corporation, liability of governing person may be limited or eliminated by its certificate of formation or company agreement), 101.401 (providing that limited liability company agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that member, manager, officer, or other person has to company or to member or manager of company); *Strebel v. Wimberly*, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that fiduciary duty claim was foreclosed by operation of contractual disclaimer within limited partnership agreement). Here, as permitted by both Sections 7.001(d)(3) and 101.401 of the Business Organizations Code, the members voted by majority agreement to eliminate any prohibition on the members’ outside business ventures. This decision was reflected in the Agreement as follows:

**5.07 Conflicts of Interest.** Each Manager, Member and officer of the Company at any time and from time to time may engage in and possess interests in other
business ventures of any and every type and description, independently or with others, including ones in competition with the Company, with no obligation to offer to the company or any other Member, Manager or officer the right to participate.

The evidence is uncontroverted that LoneStar Logo was formed for the sole purpose of operating the 2007–2016 contract. Because of this, appellees claim, the 2017–2026 contract would fall within the phrase “other business ventures” in Section 5.07. We agree. And importantly, nothing precluded Dunster from bidding on the 2017–2016 logo program itself, as the Agreement provided that “[t]he Managers may not cause the Company to] take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.” Accordingly, even viewing the evidence in the light most favorable to Dunster, see Ford Motor Co., 135 S.W.3d at 601, we conclude appellees did not violate a fiduciary duty to Dunster because, under both Texas law and the parties’ Agreement, none existed.

5. Redemption; Valuation of Membership Interest


The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

LoneStar Logo & Signs, LLC (“LoneStar Logo”) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (“Quorum Media”) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. LoneStar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). LoneStar Logo managed the logo program, but LoneStar Logo itself was not the “vendor” and had no contract with TxDOT. LoneStar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after LoneStar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in LoneStar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of LoneStar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of LoneStar Logo.

After Dunster obtained its ownership interest in LoneStar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of LoneStar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate
in day-to-day running of the logo program and failing to provide assistance to LoneStar Logo’s business in general. The members and managers other than Dunster formed a new company named LoneStar Logos Management Company, LLC (“LoneStar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As provided by the terms of the company agreement, LoneStar Logo was set to terminate at the end of the 2007–2016 contract.

In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and LoneStar Management, and LoneStar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. LoneStar Logo informed Dunster of these financial issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to LoneStar Logo.

The managers agreed at a meeting that LoneStar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in granting summary judgment against Dunster on its derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement, (2) the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:
3.03 Failure to Contribute. If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. If such additional Capital Contributions are not received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member. The redemption option may be exercised by the action of any single Manager, without the need for a vote. The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated.

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement. With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. See LoneStar Logo, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the Zauber exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. See Zauber v. Murray Sav. Ass’n, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref’d n.r.e., 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. Id.

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by
paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed to meet its burden in proving that the *Zauber* exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the *Zauber* exception, it ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. See *LoneStar Logo*, 552 S.W.3d at 350. We overrule Dunster’s first issue.

Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the *Zauber* exception). Because we have already concluded Dunster failed to prove the first element of the *Zauber* exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive.

6. Statute of Frauds

*Chase v. Hodge*, 95 F.4th 223 (5th Cir. 2024).

The court held that an alleged unwritten profit-sharing/ownership agreement of an LLC that provided litigation funding to personal injury claimants was barred by the statute of frauds because the circumstances surrounding the formation of the agreement and the subject matter of the agreement demonstrated that it contemplated an endeavor to last more than one year. Partial performance of the purported unwritten profit-sharing/ownership agreement through the LLC’s payment of money to its alleged equal owner did not remove the purported contract from the statute of frauds because the alleged equal owner was unable to show that the payments to him could not have been made except as a share of profits.

Three individuals, Chase, Hodge, and Guedri owned HMR Funding, a business that provided case-expense loans for litigants. In 2013, they decided to form a business to make pre-settlement medical advancement loans to litigants, with the loans to be secured by future proceeds of any lawsuit settlement. Chase alleged that Hodge, as attorney for both Chase and Guedri, was to form the entity, and the parties would have equal ownership interests in the business and split the profits equally. There was no written agreement among the parties. Helping Hands Capital, LLC (“Helping Hands”) was formed as a Texas limited liability company on March 28, 2013, with only Hodge listed on the certificate of formation as the managing member of the business. Hodge was also named in the initial company agreement as the sole owner of the member units. Guedri and Chase were never listed as owners in any document. In 2016, Guedri transferred any interest he had in Helping Hands back to the business, and Chase’s sworn declaration stated that after the transfer, Hodge informed him that they were 50/50 partners. Distributions were made on a 50/50 basis until early 2018. Chase began to demand financial information from Hodge, but Hodge responded that Chase held only an “economic benefit” in the LLC and no “legal ownership” and that Helping Hands was “owned 100% by a trust.” Over the course of 2018 and 2019, Chase and Hodge failed to resolve their ownership disputes although Chase alleged that Hodge confirmed on numerous occasions that they were 50/50 owners in Helping Hands. In 2020, Chase sued Hodge and Helping Hands, asserting seven causes of action related to Hodge’s assertion of sole ownership of Helping Hands and sought a declaratory judgment and the appointment of a receiver. A magistrate judge recommended dismissal of most of Chases’ claims and later recommended summary judgment against Chase on the remaining claims. The district court adopted the recommendations. On appeal, Chase argued that the district court erred in holding that (1) the statute of limitations barred his claims, (2) the statute of frauds prevents enforcement of the purported contract, and (3) the purported contract was too indefinite. Chase further asserted that he was entitled to a declaratory judgment and the appointment of a receiver. Because the appeal could be resolved solely on the issue of the applicability of the statute of frauds, that is the only issue the court addressed.
The court first explained that, under the Texas statute of frauds, one category of agreement that is not enforceable unless it is in writing and signed by the party to be bound is an agreement that is “not to be performed within one year from the date of making the agreement.” Tex. Bus. & Com. Code § 26.01(b)(6). Chase argued that the statute of frauds was inapplicable to his claims because the agreement could have been performed within one year. The court stated that “[t]he general principle is that if the terms of an agreement render it impossible to be completed within one year, the agreement is unenforceable without a signed writing.” According to the court, “[a] different but consistent articulation is ‘that, where the agreement, either by its terms or by the nature of the required acts, cannot be completed within one year, it falls within the statute and must therefore be in writing.’” The court further explained:

We have interpreted these holdings this way: “when no time for performance has been specified in the agreement, a reasonable time will be implied on the basis of all circumstances surrounding adoption of the agreement, the situation of the parties, and the subject matter of the agreement.” Mercer v. C. A. Roberts Co., 570 F.2d 1232, 1236 (5th Cir. 1978). Similarly, Texas state court opinions have occasionally relied on a finding of whether a reasonable time for performance of an oral contract would be more than one year. In Hall, the Texas Supreme Court found an oral contract for a manufacturing partner to develop sales territory that did not contain an explicit performance duration to be subject to the statute of frauds. Hall, 308 S.W.2d at 15–17. The court held that “[w]hat is a reasonable time must be determined by the circumstances in evidence surrounding the situation of the parties and the subject-matter under which the contract was executed.” Id. at 16–17 (quotation marks and citations omitted).

Chase asserts it is error to look at the “intended performance of the agreement” rather than the possibility of performance within one year. He argues all that is necessary is the possibility the agreement could have been completed within one year. The caselaw we have just discussed, however, shows there is more nuance to the analysis than Chase acknowledges.

Based on the court’s interpretation of relevant case law and the evidence in the case, the court concluded that the agreement at issue contemplated an endeavor to last more than one year.

Quite relevant is Hodge’s declaration where he explained Helping Hands’ business model:

I saw a need in the market for a litigation-funding company that provided nonrecourse funding to personal-injury claimants for living expenses, and I began discussing that opportunity with Mr. Chase and Mr. Guedri. The new potential litigation-funding company would operate in a similar fashion to HMR Funding, LLC [a business providing funding for medical expenses to personal-injury claimants], in that it would provide non-recourse funds to injured claimants, and would collect a fee (usually years later) if the claimant prevailed.

It is obvious the agreement Chase entered contemplated an endeavor that would take more than a year to perform, with expenditures and no income at first, and potential income as claims were settled or litigated. The nature of these contracts resembles exclusive franchise or distributorship agreements that “contemplate the expenditure of substantial sums of money or other investments by one of the parties preparatory to or in accordance with his performance under the contract.” Clear Lake City Water Auth., 549 S.W.2d at 391. Thus, to split the profits Helping Hands would eventually earn, performance needed to exceed one year. Id.

Chase responds to such reasoning by saying “it was expected that the agreement to start the company and share ownership equally would be completed within a matter of weeks. It certainly was expected that the agreement would be fulfilled within one year.” The formation of Helping Hands was just the beginning of the performance under the agreement. While all these first steps could be taken in less than one year, that fact hardly matters as Chase himself insists the agreement was for more than that. This suit claims unpaid profits earned by the business. Chase states the agreement was a “contract to share profits,” and the parties “entered into a contract to combine their efforts to make loans to finance litigation and split the profits that came from those efforts.” It most certainly was not just an agreement to form a company, then walk away.
Viewing the evidence in the light most favorable to Chase, the circumstances surrounding the formation of the agreement and the subject-matter of the contract establish that it was an endeavor to last more than one year.

The court next addressed Chase’s argument that partial performance removed the agreement from the statute of frauds. Partial performance is an equitable exception to the statute of frauds, rendering an agreement enforceable even without a signed writing, if the performance “could have been done with no other design than to fulfill the particular agreement sought to be enforced.” The court said that “Texas law requires precision in the evidence establishing a contract based on partial performance.” The partial performance relied upon by Chase was money paid by Helping Hands to Chase. Chase argued that the district court erroneously determined that the payments could have been for services Chase rendered to Helping Hands rather than partial performance of a profit-sharing, ownership agreement, but the court of appeals concluded that the evidence did not unequivocally support the existence of a profit-sharing contract because Hodge submitted a declaration describing Chase and Guedri as independent contractors for Helping Hands and characterizing the funds they received as payments to independent contractors. Additionally, tax documents received by Chase were those provided to independent contractors who have no ownership interest in a company. The court thus affirmed the lower court’s judgment because the statute of frauds barred Chase’s enforcement of the oral agreement.

G. Access to Books and Records

_Estate of Ewers_, 2024 WL 333334, __ S.W.3d __ (Tex. App.—Houston [1st Dist.] Jan. 30, 2024, no pet.).

Two investors asserted claims against the estate of a deceased individual, Larry Ewers (“Larry”), whom they alleged defrauded them in connection with investments relating to Larry’s LLC. In discussing whether the plaintiffs failed to exercise reasonable diligence in discovering the fraud, the court acknowledged that the investors could have inspected the records of the LLC because they held membership interests in the LLC (citing Tex. Bus. Orgs. Code § 101.109(a)(3)), but the court stated that “even though they could have, due to Larry’s fraud, they had no reason to think they needed to investigate further.” The court also explained that “appellees’ investment in Citadel was a private deal between friends; Janice [Larry’s widow and executor] has not identified any public records detailing Citadel’s financial dealings, and Larry himself was the appellees’ only source of information. But Larry was also the source of the fraud.” The court concluded that “the trial court properly found that the action they [the investors] took was reasonable and reasonable diligence would not have uncovered Larry’s fraud because he concealed it and actively misled them for years.”

H. Distributions


In this adversary proceeding to recover a distribution by a Delaware LLC under Montana fraudulent transfer law and the Bankruptcy Code, the court analyzed whether to apply the three-year statute of repose under Section 18-607(c) of the Delaware Limited Liability Company Act or the four-year statute of limitations under Montana fraudulent transfer laws. After a lengthy analysis in which the court applied a multi-factor test under Section 145 of the Restatement (Second) Conflicts of Law, the court held that all factors favored the application of Montana fraudulent transfer law rather than the Delaware provision. The court thus held that Montana fraudulent transfer law applied.

I. Merger, Conversion

_City of Houston v. Aptim Envtl. & Infrastructure, LLC_, 2024 WL 848417, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] Feb. 29, 2024, no pet. h.).

The court of appeals addressed the City of Houston’s plea to the jurisdiction in a case brought against the city for breach of a contract entered into between the city and a corporation that later converted to an LLC. An amendment to the contract was signed in the name of the corporation after the corporation had converted to an LLC, and the city argued that the amendment was not a valid contract and thus did not waive the city’s immunity. The LLC argued that it was a mere continuation of the converted corporation under the law of its home state, Louisiana,
and that the signature was a mere misnomer, but the court did not reach the merits of the argument as to whether
the second amendment was valid because the court held that the city’s argument that it was not liable on the contract
did not implicate jurisdiction. Thus, the court held that the trial court properly denied the city’s plea to the
jurisdiction. In the course of its discussion, the court noted in a footnote that the effect of a conversion under Texas
law is similar to that described by the appellee in its argument. The court stated: “The converting entity continues
10.106(1); see In re Hawthorne Townhomes, L.P., 282 S.W.3d 131, 138-39 (Tex. App.–Dallas, orig. proceeding)
(concluding arbitration agreement was ‘valid’ agreement although builder had signed the agreement as an LLC after
it had already converted to a corporation).”

Repsol Oil & Gas USA, LLC v. Matrix Petroleum, LLC, 2023 WL 8897012, __ S.W.3d __ (Tex.
App.—San Antonio 2023, no pet.).

When the plaintiff filed its lawsuit in 2014, the defendant was a corporation, but it converted to an LLC
during the course of the litigation. At the time the trial court entered its judgment against the defendant, it was an
LLC. Because the defendant was an LLC at the time the judgment was entered, the court held that attorney’s fees
were not recoverable against the defendant under the version of Section 38.001 of the Texas Civil Practice and
Remedies Code applicable to the case.

The court analyzed a claim for recovery of attorney’s fees under Section 38.001 of the Texas Civil Practice
and Remedies Code as it applied to suits filed before September 1, 2021, as follows:

When Matrix filed its lawsuit in 2014, it asserted claims against Talisman Energy USA,
Inc., a corporation. During the course of litigation, the corporation changed names and converted
into the limited liability company Repsol Oil and Gas USA, LLC (which we have defined as
“Talisman”). When the trial court entered its initial judgment and later its amended final judgment,
Talisman was a limited liability company. At that time, the version of Chapter 38 of the Texas
Civil Practice and Remedies Code in effect allowed for an award of attorneys’ fees on a breach of
contract claim against a corporation but not against a limited liability company. See Act of May
version at TEX. CIV. PRAC. & REM. CODE ANN. § 38.001); 8305 Broadway Inc. v. J & J
Martindale Ventures, LLC, No. 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San
Antonio June 28, 2017, no pet.) (mem. op.).[footnote omitted] Because Talisman was a limited
liability company when the trial court entered its judgment, the trial court denied Matrix an
attorneys’ fees award against Talisman under Chapter 38.

Matrix appeals this denial. It argues that Talisman breached the JOA when it was a
corporation and that Talisman, as a corporation, incurred a “contingent liability” for attorneys’ fees
related to the breach that Talisman remained liable for after its conversion to a limited liability
company. Texas Business Organizations Code section 10.106(3) provides: “all liabilities and
obligations of [a] converting entity continue to be liabilities and obligations of the converted entity
in the new organizational form without impairment or diminution because of the conversion.”
TEX. BUS. ORGS. CODE ANN. § 10.106(3). Pointing to this section, Matrix argues that a limited
liability company, after conversion from a corporation, can be liable for attorneys’ fees arising
from claims based on the actions of the corporation. Talisman responds that section 10.106(3) is
not applicable because Talisman had not incurred a liability or obligation related to attorneys’ fees
at the time of conversion. According to Talisman, liability for attorneys’ fees arises only after a
party prevails on an underlying claim and recovers damages.

We do not resolve the matter of whether attorneys’ fees are “contingent liabilities” which
a converted entity may be liable for after conversion under section 10.106(3) of the Business
Organizations Code because section 38.001 of the Civil Practice and Remedies Code focuses on
“recover[y]” from entities, and not liability. The statute lists the persons from whom a prevailing
party “may recover” attorneys’ fees. The applicable version provides: “A person may recover
reasonable attorney’s fees from an individual or corporation ... if the claim is for: ... an oral or
(amended 2021). Regardless of whether Talisman may be liable for attorneys’ fees under the
Business Organizations Code, the Civil Practice and Remedies Code, by its plain language, precludes Matrix’s recovery of such fees from a limited liability company on a contract claim. See 8305 Broadway, 2017 WL 2791322, at *5; see also Maxim Crane Works, L.P. v. Zurich Am. Ins. Co., 642 S.W.3d 551, 557 (Tex. 2022) (“When construing a statute, our primary objective is to determine the Legislature’s intent which, when possible, we discern from the plain meaning of the words chosen.”). Because it is undisputed that Talisman was a limited liability company when the trial court entered its judgment, we hold the trial court did not err by denying Matrix’s request for recovery of attorneys’ fees from that limited liability company under Chapter 38.


The court of appeals upheld the trial court’s grant of summary judgment on a legal malpractice claim on the grounds that (a) Texas did not recognize an “effective merger doctrine” and (b) the plaintiff was not in privity with the allegedly negligent attorney.

Appellant William Taylor was an inventor. Taylor, along with his business partner Tina Pantoja, developed a software application called SafeCell. Pantoja had a preexisting entity, W2W, LLC. Taylor and Pantoja each became fifty percent owners of W2W. Taylor and Pantoja then assigned the rights to any patent derived from the SafeCell application to W2W.

W2W, through Taylor, approached Andrews Kurth partner Douglas Rommelmann to obtain a patent on the SafeCell application. At that time, Brett Cooke was an Andrews Kurth associate who worked with Rommelmann on W2W’s patent application. These discussions led to W2W engaging Andrews Kurth to patent the SafeCell idea. Andrews Kurth ultimately submitted two patent applications, which resulted in a patent being issued (the “762 Patent”) for the SafeCell Application. W2W, however, did not pay Andrews Kurth’s bill for legal services rendered. Those bills were still not paid when Taylor and Pantoja formally terminated W2W as an entity on March 27, 2017. Taylor and Pantoja had previously assigned the 762 Patent to themselves.

More than a year after terminating W2W, Taylor and Pantoja created a new LLC, WPEM, LLC. They then assigned the 762 Patent to WPEM so that WPEM could pursue a patent infringement suit against SOTI, Inc. WPEM’s patent infringement suit failed and the federal district court assessed the defendant’s attorney’s fees against WPEM.

When the patent infringement suit failed, WPEM, Taylor, and the terminated entity W2W (collectively the appellants) filed a legal malpractice suit against Andrews Kurth, Rommelmann, and Cooke (collectively the appellees). Appellants alleged that appellees were negligent and grossly negligent in their handling of the 762 Patent application process which in turn caused appellants’ damages including lost revenues and the loss of the patent infringement lawsuit.

Appellees moved for traditional summary judgment on the entities’ claims against them. They argued, in part, that they were entitled to judgment as a matter of law on WPEM’s claims because WPEM was never their client (the client was W2W) and W2W’s attorney-client relationship and legal malpractice claim could not be transferred to WPEM. The trial court agreed and granted the motion.

On appeal, appellants claimed that W2W and WPEM “effectively merged” and therefore W2W’s malpractice claims transferred to WPEM. The court of appeals disagreed. It observed that Texas did not recognize an “effective merger doctrine” and it further noted that a plaintiff must be in privity with the allegedly negligent attorney to assert a malpractice claim:

Once again, the facts relevant to this issue are undisputed. First and foremost, WPEM was never a client of appellees. Additionally, W2W assigned the 762 Patent to Taylor and Pantoja on February 9, 2017. W2W terminated its existence more than a month later, on March 27, 2017. Then, more than a year after that, on April 4, 2018, Taylor and Pantoja formed WPEM. The 762 Patent was then assigned to WPEM so it could pursue the patent infringement lawsuit against SOTI. Finally, appellants concede there was no formal merger between W2W and WPEM.

We turn first to WPEM’s malpractice claim. The general rule in Texas is that persons who are not in privity with the attorney cannot sue the attorney for malpractice. In addition, attorney malpractice claims cannot be assigned.
WPEM seeks to avoid this result by arguing that WPEM acquired W2W’s attorney-client relationship with appellees because, in WPEM’s view, it effectively merged with W2W when the 762 Patent was transferred to WPEM. See Greene’s Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P., 178 S.W.3d 40, 44 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (“An attorney-client relationship will transfer when a merger of two corporations takes place.”). Texas, however, does not recognize “effective mergers.” Instead, a merger requires a formal process and plan that complies with the Texas Business Organizations Code. See Tex. Bus. Orgs. Code Ann. § 10.001(b) (“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.”). Texas law is clear, a disposition of assets such as the transfer of the 762 Patent, even if it was a direct transfer from W2W to WPEM, is “not a merger . . . for any purpose.” See id. at § 10.254(a); Greene’s Pressure Treating & Rentals, Inc., 178 S.W.3d at 44 (observing that a “mere transfer of assets” does not transfer an attorney-client relationship). Further, the fact that Taylor and Pantoja transferred the 762 Patent to WPEM did not also transfer or assign the attorney-client relationship. See Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1336 (Fed. Cir. 1988) (“[T]he assignment of a patent does not transfer an attorney-client relationship”). We conclude that WPEM was not a client in privity with appellees and could not sue appellees for legal malpractice.

Appellants appeal to equity to “save WPEM’s claims.” Appellants do not, however, cite any binding authority establishing an equitable exception to either the privity requirement for general malpractice claims or the non-recognition of “effective mergers.” Because Texas public policy on both the privity requirement and the non-recognition of “effective mergers” is clear, we decline appellants’ invitation to blaze such a trail.

J. Forfeiture and Involuntary Termination


The court held that the issue of a limited partnership’s ability to assert claims against the defendant management company for breach of a management agreement of property owned by the limited partnership was an issue of the limited partnership’s capacity to sue rather than standing, and failure of the defendant to file a verified denial of the limited partnership’s capacity waived its right to complain of the lack of capacity. The defendant asserted that the limited partnership was required to wind up upon the withdrawal of the partnership’s LLC general partner, which occurred as a result of forfeiture of the LLC’s right to transact business due to failure to pay franchise tax. See Tex. Tax Code § 171.2515; Tex. Bus. Orgs. Code §§ 11.051(4), 153.501(b)(2). The defendant’s assertion that the limited partnership no longer existed, due to an event requiring winding up under the statute and dissolution under its partnership agreement after cessation of the general partner’s status as general partner and failure of the limited partnership to appoint a successor general partner, was a complaint about the limited partnership’s capacity to bring claims, not its standing. The court explained that standing, which is required for subject-matter jurisdiction and cannot be waived, requires (1) “a real controversy between the parties,” that (2) “will be actually determined by the judicial declaration sought.” In contrast, when a party has a justiciable interest in a controversy but lacks legal authority to sue, the issue is a lack of capacity, which must be raised by a verified pleading and is waived by the failure to do so.


“Under the Tax Code, if the corporate privileges of a corporation or limited liability company are forfeited, each director or officer of that entity is liable for the debt of that entity that is incurred or created from the time forfeiture occurred until such time as corporate privileges are restored. Tex. Tax Code Ann. § 171.255(a). Section 171.255(a) does not specifically define when a debt is created or incurred, but caselaw analyzing the statute has concluded that it can depend on the type of claim. Generally, a debt is created or incurred on the date of the event or events that gave rise to the debt. As it relates to breach of contract claims, ‘the relevant event is when the contract
in question was executed, not when the breach occurred.’ The debt for an open account, however, is incurred when the goods or services are delivered or performed.

Galvatec’s office administrator, Gonzalo Moreno, stated in his affidavit that invoices and business records reflect that APCO [an LLC] ordered the materials at issue ‘[f]rom December 2018 to April 2019.’ . . . In the present case, it does not matter whether the debt was incurred at the time of purchase or at the time of delivery because the affidavit and the business records combined reflect that both occurred during APCO’s forfeiture period. . . .

We conclude that Galvatec met its burden of providing evidence that Habib [the principal owner and officer of APCO] was personally liable on the debts incurred by APCO between September 2018 and August 2019. Accordingly, the trial court did not err in rendering summary judgment in favor of Galvatec.”

Milligan v. Mayhew, No. 05-22-00675-CV, 2023 WL 4540274 (Tex. App.—Dallas July 14, 2023, no pet.) (mem. op.).

“In their first issue, appellants argue the trial court erred by not entering a default judgment against SSF Consulting, LLC because it was not represented by counsel and defaulted. Appellants rely on two established legal propositions: (1) a non-attorney may not appear for a limited liability company, (2) and when a defendant files an answer but does not appear at trial, the court may enter a default judgment. We disagree with both arguments.

When considering answers filed by non-attorney corporate officers, appellate courts have ‘gone to great lengths to excuse defects in answers to prevent the entry of default judgments against parties who have made some attempt, albeit deficient, unconventional, or flat out forbidden under the Rules of Civil Procedure, to acknowledge that they have received notice of the lawsuit pending against them.’ Thus, an answer filed on behalf of a corporation by a non-attorney is sufficient to prevent a default judgment.

Appellees, appearing pro se, filed a letter ‘From Defendants: Amber Mayhew, Keith Mayhew, and SSF Consulting, LLC DBA Nanny Poppinz,’ in response to ‘the papers’ served on them. They also signed the letter on behalf of all defendants. During the bench trial, the court acknowledged the letter was sufficient to prevent a default judgment against Nanny Poppinz. Accordingly, appellees attempt to answer the lawsuit, despite doing so as non-lawyers on behalf of the LLC, was sufficient to excuse any defects and prevent a default judgment.

To the extent appellants argue Nanny Poppinz was not represented at trial, they ignore the trial court’s finding that Nanny Poppinz forfeited its charter in 2019. They have not challenged this finding. . . . Appellants have presented no arguments or pointed to any evidence establishing, as a matter of law, that Nanny Poppinz’s corporate charter was not forfeited during the time of their dispute.

Appellants repeatedly acknowledged Nanny Poppinz was not a legal entity. They stated in their original petition the LLC was no longer in good standing. Counsel for appellants explained during pretrial discussions that the basis for suing appellees individually was because the corporate charter did not exist during the relevant time period. And during trial, appellants asked the trial court to take judicial notice of a printout from the Texas Secretary of State website indicating the corporate charter had been revoked at all times material to the suit. The trial court could not grant a default judgment against a ‘terminated’ legal entity. See, e.g., Donica Grp., LP v. Thompson Excavating, Inc., No. 05-19-00235-CV, 2020 WL 57340, at *3 (Tex. App.—Dallas Jan. 6, 2020, no pet.) (mem. op.) (noting corporate entity that forfeited charter was a ‘terminated entity’ that ‘no longer existed’ for purposes of defending a default judgment). Accordingly, the trial court properly denied appellant’s request for a default judgment against Nanny Poppinz.”

K. Veil Piercing


The court held that the government’s evidence was sufficient to establish that various entities—including partnerships, trusts, and LLCs—were the alter egos and nominees of individual taxpayers so as to allow the government to reach property of the business entities to satisfy income-tax liabilities of the individual taxpayers.

The government sought to enforce tax liens against certain real properties held by entities owned or controlled by Richard and Kay Ohendalski. The Ohendalskis owed significant amounts of federal income taxes and civil penalties, and the government asserted that Hodge-Ross Co., LLC, West Hill Investments LLC, West Hill Park Office Ltd. Co., Stephens Associates Trust, Swan Point Trust, Crystal Flyers Trust, and Wilson Heirs Trust through their trustee, Richard Ohendalski, HIS Partners, HIS Joint Venturers, Crystal Flyers, LLC, Fidelis Texas,
JSC, and Karpos Company (the “Ohendalski Entities”) were alter egos and/or nominees of the Ohendalskis. The court found in favor of the government.

With regard to the government’s alter-ego argument, the court stated that the evidence established that the Ohendalski Entities are “an intricately intertwined web of entities that serve primarily as an extension of the Ohendalskis’ personal interest and financial dealings.” As an example, the court pointed to HIS Partners, a Texas partnership, stating that the partnership “serves as a conduit for income and expenses for the Ohendalskis” and “Richard serves as the sole operator and controller of its financial transactions. He has exclusive authority over HIS Partners’ bank accounts and the use of the entity’s funds.” The court also pointed to a similar situation with respect to Hodge-Ross Company, LLC (“HRC”), “which holds the Ohendalskis’ residential property and is managed solely by Richard. Kay is the sole beneficiary of the Stephens Associates Trust, which in turn holds a mortgage on the HRC’s property. Their involvement, as such, establishes a seamless relationship between the entities and the Ohendalskis.” The court stated that further evidence established that “the Stephens Associates Trust (“SAT”) initially created with office equipment as its assets, has evolved into a vehicle that is used by Richard to manage financial affairs of other properties,” stating that Richard’s “role as trustee and SAT’s own indebtedness to the IRS, coupled with Richard’s refusal to address question regarding ownership, leads the Court to conclude that SAT is also an alter ego of the Ohendalskis.”

The Court reached the same conclusion with respect to the other Ohendalski Entities. The court concluded its alter-ego discussion by stating:

The alter ego doctrine applies when an individual utilizes a corporate entity as an instrumentality to circumvent legal obligations. Fifth Circuit case law emphasized that the assets of an alter ego can be levied upon to satisfy the debts of an individual when corporate boundaries are disregarded. See Zahra Spiritual Trust v. United States, 910 F.2d 240, 244-245 (5th Cir. 1990). Boundaries have been disregarded when there is commingling of funds, a failure to observe corporate formalities, and where control over an entity’s affairs are in the hands of an individual who uses the entities for personal particularly financial gain. See Century Hotels v. United States, 952 F.2d 107, 110 (5th Cir. 1992). Without doubt, the evidence establishes Richard and Kay’s extensive control over these entities, including ownership, management, and the intermingling of the finances of the entities for their personal use.

The court also concluded that the government was entitled to summary judgment on its claim that the Ohendalski Entities functioned as nominees for their personal enrichment.

An examination of the evidence also reveals a compelling narrative that the entities including HIS Joint Venturers, Crystal Flyers LLC, Crystal Flyers Trust, Swan Point Trust, Fidelis Texas JSC, Karpos Company, and Wilson Heirs Trust, are nominees of the Ohendalskis. Through a detailed analysis of their structure, transactions, and interactions, the government has demonstrated that these Ohendalski Entities serve as mere facades, lacking genuine independence or substance. Case law has set out factors to assist in discerning the true beneficial owner of an entity. See Oxford Capital Corp. v. United States, 211 F.3d 280, 284 (5th Cir. 2000) (citing Towe Antique Ford Foundation v. Internal Revenue Service, 791 F. Supp. 1450, 1454 (D. Mont. 1992). A fact finder determines whether there is an absence or inadequacy of consideration paid by the nominee for services rendered, whether there is an intimate relationship between a taxpayer and the nominee, and whether there is the retention of control or possession by a taxpayer, among others. Id at 284.

In this case, a pattern of behavior is revealed by the Ohendalskis that demonstrates that they have shielded themselves from accountability; that they have refused to provide crucial information that would establish or not the government’s allegations.

Amneal Pharm., Inc. v. Cnty. of Dallas, 2024 WL 1863472, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] Apr. 30, 2024, no pet. h.).

The court of appeals held that a non-resident LLC defendant had sufficient contacts to satisfy the “stream-of-commerce-plus” purposeful availment test for personal jurisdiction, but the LLC’s corporate parent lacked Texas
contacts of its own, and the plaintiffs failed to show that the parent was the LLC’s alter ego so as to impute the LLC’s contacts to it.

Two counties sued non-resident opioid manufacturer Amneal Pharmaceuticals, LLC (“Amneal”) and its holding company, Amneal Pharmaceuticals, Inc. (“API”) alleging claims based on public nuisance and other grounds. Amneal and API filed special appearances, which the trial court denied as to both. On appeal, the court affirmed the trial court’s denial of the special appearance of Amneal but reversed as to API and dismissed the claims against API for lack of personal jurisdiction.

After discussing the standards for determining whether a defendant has sufficient minimum contacts with a forum for the exercise of personal jurisdiction and applying the relevant factors to Amneal, the court determined that the exercise of personal jurisdiction over Amneal comported with traditional notions of fair play and substantial justice. As for API, a Delaware corporation with its principal place of business in New Jersey, that was not registered to transact business in Texas, had no regular place of business in Texas, and was a holding company that did not manufacture or sell prescription medications, the court found there was legally insufficient evidence that it had minimum contacts of its own to support personal jurisdiction. Thus, API would be subject to jurisdiction only if Amneal’s contacts could be imputed to API as Amneal’s alter ego.

The court recited the test to “fuse” a parent and subsidiary for jurisdictional purposes as requiring that “the parent must control the internal business operations and affairs of the subsidiary to a greater extent than that normally associated with common ownership and directorship” such that the evidence shows that they have “cease[d] to be separate.” The court listed the factors that may be considered in making this determination as including: “(1) the amount of the subsidiary’s stock owned by the parent corporation, (2) the existence of separate headquarters, (3) the observance of corporate formalities, and (4) the degree of the parent’s control over the general policy and administration of the subsidiary.” The court said that, “above all, there must be evidence that the parent exercises ‘abnormal’ or ‘atypical’ control over the subsidiary.”

The court analyzed evidence regarding the extent of API’s ownership, the entities’ common address, observance of corporate formalities, and extent of API’s control and concluded that it fell short of overcoming the presumption of separateness between the entities.

As for the extent of API’s ownership, API’s Form 10-K showed that its principal asset was its 49.6% interest in Amneal. The court said that this factor did not support a determination that API was Amneal’s alter ego because API held only a minority interest.

Although API and Amneal had the same address in New Jersey, the court stated that shared office space is insufficient to overcome the presumption that the companies are distinct. Although the court said that the common address could lead to an abnormal degree of control by a parent over a subsidiary, there was no indication here of whether such an abnormal degree of control was actually exercised.

The court reviewed evidence relied on by the plaintiffs to show that the parties did not appear to observe corporate formalities (relating to certain officers’ testimony showing an inability to distinguish specifically which entity was their employer and lack of knowledge as to the treatment of revenue as among the entities), but the court ultimately said that the evidence showed no more than that the names of both entities begin with “Amneal Pharmaceuticals.” A common name does not affect the jurisdictional inquiry according to the court.

As for the most important factor—the extent to which API controls Amneal—the plaintiffs relied on the Form 10-K, in which API stated: “Although [API] has a minority economic interest in Amneal, it is Amneal’s sole managing member, having the sole voting power to make all of Amneal’s business decisions and control its management.” The court pointed out that this statement addresses only the power to control Amneal’s management, not the actual exercise of control. Further, the court stated that it is not sufficient that one company exerts commercial and financial control over another if the formalities of separateness are maintained, and there was no evidence here to overcome the presumption that corporate formalities were observed.


A debtor agreed to appointment of a receiver as requested by the debtor’s creditor, and the trial court placed not only the debtor, but two limited liability companies in which the debtor owned a membership or equitable interest, as well as other “affiliates” of the debtor, into receivership. A third-party creditor or non-managerial member of the LLCs moved to dissolve the receiverships over the LLCs, and the court of appeals held that (1) the third party had standing, as a creditor of the LLCs, to move to dissolve the receiverships; (2) the LLCs did not
consent to the receiverships; (3) the LLCs were not “property” of the debtor; and (4) the LLCs were not “business” of the debtor.

G.E.T. Marketing, LLC (“GET”), a creditor of PSW Real Estate, LLC (“PSW”), petitioned for receivership over PSW based on its imminent insolvency. PSW owned a membership or equitable interest in SB Weberville Road, LLC (“Road”) and PSW Webberville LLC (“Webberville”). PSW agreed to the receivership and the order executed by the trial court, which placed PSW and 55 “affiliates” into receivership. Two of the 55 affiliates were Road and Webberville. No evidence was presented showing, nor did GET’s petition argue, that PSW, Road, or Webberville were alter egos of each other or subject to having their respective “corporate” identities disregarded. Additionally, GET did not petition for a receiver over the 55 “affiliates,” prove it was a creditor of Road or Webberville, or show that Road or Webberville were insolvent. Ovation Finance Holdings 5 LLC (“Ovation”), a creditor or member of Road and Webberville, petitioned for dissolution of the receivership, thus raising the question of whether a creditor or non-managerial member of Road or Webberville had standing to attack the trial court’s action. The court of appeals held that the trial court should have granted Ovation’s motion to dissolve the receivership based on the distinct corporate identities involved, the definitions of “property” and “business” in the receivership statute, and settled authority regarding receiverships.

In its analysis, the court of appeals first reviewed relevant provisions of the applicable receivership statute:

Section 11.404 of the Texas Business Organizations Code authorizes courts to appoint a rehabilitative receiver to conserve the “property and business” of an entity and to avoid damage to interested parties. TEX. BUS. ORGS. CODE ANN. § 11.404(b)(1). The authority comes with caveats, though. Appointment is allowed if “all other requirements of law are complied with” and “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 ANN. § 11.404(b)(2), (3); see Ritchie v. Rupe, 443 S.W.3d 856, 863-64 (Tex. 2014) (discussing former rule). Furthermore, the legislature defined “business” to mean “a trade, occupation, profession, or other commercial activity,” TEX. BUS. ORGS. CODE ANN. § 1.002(5), and “property” to include “tangible and intangible property and an interest in that property.” TEX. BUS. ORGS. CODE ANN. § 1.002(77).

The court pointed out that the trial court’s decision to appoint a receiver is an exercise of the court’s discretion subject to the standard of abused discretion, i.e., when the trial court acts without reference to any guiding rules and principles, such as misapplying or misinterpreting the law.

Next the court discussed the principle that corporations have separate legal identities that generally must be respected, eventually noting that LLCs and their members are similarly separate and distinct from one another:

To the foregoing, we add another requirement of the law. It obligates us to recognize that corporations have separate identities, which separateness generally must be observed. Neff ex rel. Weatherford Int’l. Ltd. v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (quoting Docudata Records Mgmt. Servs., Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). For example, a subsidiary corporation and its parent corporation are separate and distinct “persons” as a matter of law. ETC Tex. Pipeline, Ltd. v. Addison Expl. & Dev., LLC, 582 S.W.3d 823, 837 (Tex. App.—Eastland 2019, pet. denied), overruled in part on other grounds in Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021). Unless the corporate veil is used as a sham, it matters not that the parent dominates or controls the subsidiary or otherwise treats it as its instrumentality or agency. Id. Nor does commonality of directors or managers alone permit courts to avoid the separateness of which we speak. Id. Similarly, because of their separate identities, corporations generally are not liable for each other’s obligations. Id.

The same is true of corporations and their shareholders. They have distinct legal identities. Hicks v. State, 419 S.W.3d 555, 558 (Tex. App.—Amarillo 2013, pet. ref’d). Indeed, a shareholder simply owns an interest in the corporation. Id. It is not the corporation. This also applies to limited liability companies. They too are legal entities separate from its members. Steer Wealth Mgmt., LLC v. Denson, 537 S.W.3d 558, 567 (Tex. App.—Houston [1st Dist.] 2017, no pet.); Sherman v.

The court concluded that Ovation had standing to seek to vacate the receiverships over Road and Webberville because the Texas Supreme Court has stated that “when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court” and “are bound by the court’s orders approving claims and determining rights in and to the property or its proceeds” if they have notice of the proceedings.

The court next explained that there was no evidence that Road or Webberville consented to being placed in receivership, and neither the receiver nor GET relied on that ground in their appellate briefing. Rather, they argued that placing 55 “affiliates” of PSW in receivership was appropriate because they were the “property and business” of PSW as contemplated by the receivership statute. The court of appeals disagreed with that contention based on the following analysis:

No one disputes that PSW was a member of or otherwise owned an “equity interest” in Road and Webberville. Nor does anyone suggest the corporate veils of Road and Webberville were used as a sham in some way by PSW. Without the latter in play then, both we and the trial court must respect the distinct legal status or identity of Road and Webberville. Moreover, PSW’s membership interest likens to owning stock in a corporation. As such, the former owned an interest in the latter, and that interest constituted property of PSW. TEX. BUS. ORGS. CODE ANN. at § 101.106(a) (stating that a membership interest in a limited liability company is personal property). Owning an interest in them, though, did not make PSW, Road, or Webberville one and the same. Nor did it make the entities Road and Webberville themselves property of PSW; to hold otherwise would be to ignore the separate identities of each. That means PSW’s property subject to receivership under § 11.404(a) included its membership interest in the two other distinct entities, not the entities themselves.

As for whether Road and Webberville were PSW’s “business” under § 11.404(a), we initially say that words grouped in a list should be given related meaning when construing a statute. Ritchie, 443 S.W.3d at 869. We heed that rule of construction when looking at the statutory definition of “business” assigned in the Business Organizations Code.

After mentioning “trade,” “occupation,” and “profession,” the legislature ended the definition with the phrase “or other commercial activity.” TEX. BUS. ORGS. CODE ANN. § 1.002(5). The latter passage sets the framework within which we read the former nouns. Simply put, “or other ... activity” alludes to what the entity does or its job, so to speak. Thus, trade, occupation, and profession are to be read as alluding to the insolvent’s business and its scope.[footnote omitted] So, in permitting a trial court to “appoint a receiver for the entity’s ... business ....” TEX. BUS. ORGS. CODE ANN. § 11.404(a), the legislature merely allowed the court to place a receiver in the shoes of the insolvent entity. Once in those shoes, the receiver could then control or manage the insolvent’s job, trade, or commercial activity, as allowed by law. Simply put, the focus rests on gaining control of the insolvent’s business. The statute says nothing about placing distinct legal entities (irrespective of their financial stability) into receivership as well simply because the insolvent may have some financial interest in them. To do that would be to ignore the distinct legal status of the other entities. It would be tantamount to ignoring the expressed statutory conditions precedent to a receivership, such as insolvency, deadlocked management, illegal action by governing persons, the wasting of assets, or deadlocked shareholders. See TEX. BUS. ORGS. CODE ANN. § 11.404(a)(1)(A)-(E) (listing the conditions). And, we hesitate to read into the statute more authority than its own definitions encompass, especially when receiverships are harsh remedies, Fortenberry v. Cavanaugh, No. 03-04-00816-CV, 2005 WL 1412103, at *–– ––––, 2005 Tex. App. LEXIS 4665, at *5-6 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op), to be cautiously applied. Elliott v. Weatherman,
396 S.W.3d 224, 228-29 (Tex. App.—Austin 2013, no pet.). Here, that means the trial court could permit a receiver to step into PSW’s shoes and control the latter’s job, trade, work, vocation, or commercial activity. It does not mean the trial court could place into receivership distinct legal entities simply because PSW’s business included commercial interaction with them.

In sum, PSW’s insolvency may have warranted the appointment of a receiver. Yet, the extent of that appointment, given our construction of § 11.404(a), was limited. The statute did not allow the trial court to exceed the definitions of “the entity’s property and business” or disregard other statute requirements. See TEX. BUS. ORGS. CODE ANN. § 11.404(a). Nor did it allow the court to disregard the distinct legal identities of other corporations or limited liability companies. So, with PSW’s being the purported insolvent “entity” at issue, the receivership could extend no further. It could not ensnare Road or Webberville into their own receiverships merely because they may be subsidiaries of or have business dealings with PSW.

Thus, the court of appeals held that the trial court abused its discretion by placing Road and Webberville in receivership, and the court ordered that the receiverships over Road and Webberville be dissolved.


In this companion opinion to the opinion summarized below, the court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. Because the court of appeals concluded that there was not evidentiary support for an implied finding by the trial court that a receiver had authority to nonsuit a limited partnership’s lawsuit, the trial court reversed the trial court’s decision to dismiss the limited partnership’s suit and remanded for further proceedings.

In another lawsuit (the “Princeton Lawsuit”), a Harris County district court entered an order (the “Receivership Order”) appointing attorney Seth Kretzer as a receiver to collect on a judgment owed by World Class Capital Group (“WCCG”) and Great Value Storage to Princeton Capital Corporation. The Receivership Order, inter alia, (1) directed WCCG to turn over any “interests” it had in any partnership or limited liability company; (2) gave Kretzer the authority to sell, manage, and operate any limited liability company in which WCCG is a “member”; and (3) authorized Kretzer to take possession of WCCG’s assets, including “causes of action.”

In his capacity as the receiver, Kretzer entered an appearance in a lawsuit pending in a Travis County district court (the “La Zona Rio Lawsuit”) in which WC 4th and Rio Grande, LP (“Rio Grande, LP”) had sued Appellee La Zona Rio, LLC (“La Zona Rio”) to stop La Zona Rio from foreclosing on a building owned by Rio Grande, LP. In his notice, Kretzer stated that he was replacing the attorney for Rio Grande, LP, which he asserted was a “subsidiary” of WCCG; however, he filed no evidence supporting that contention.

Rio Grande, LP filed a motion challenging Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, arguing it was neither a subsidiary of WCCG nor an entity owned or managed by WCCG, but instead a separate legal entity. The trial court did not rule on the motion, but impliedly found that Kretzer had the authority to act on Rio Grande, LP’s behalf and granted a joint motion to dismiss the lawsuit based on representations made by Kretzer and La Zona Rio’s attorney that the parties had resolved their claims against each other.

Rio Grande, LP, through its retained counsel, Burford Perry, filed this second lawsuit against La Zona Rio in Travis County, bringing claims of quiet title and trespass to try title, and further seeking a declaration that it was the true owner of the property. In its petition, which was assigned to a different Travis County judge, Rio Grande, LP again challenged Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, to enter into the settlement agreement with La Zona Rio, and to sign a deed in lieu of foreclosure on its behalf pursuant to that agreement. Kretzer then filed a notice of nonsuit, purporting to act in his capacity as the “court appointed Receiver for World Class Capital Group, LLC, Manager of WC 4th and Rio Grande, LP, Plaintiff.” Rio Grande, LP, through its retained attorney, filed a withdrawal of notice of nonsuit, contending that Kretzer was not authorized to act on its behalf in the lawsuit and that the notice was filed without Rio Grande, LP’s permission. Rio Grande, LP also filed a motion to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure, challenging Kretzer’s authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit as well as his authority to act on its behalf in the second lawsuit. In his opposition to the Rule 12 motion, Kretzer included various “company agreements” setting forth the relationships between WCCG, Rio Grande, LP and various other World Class entities, as follows:
1. Natin Paul is the president, sole member, and manager of World Class Capital Group, LLC.
2. World Class Capital Group, LLC is the sole member and manager of World Class Real Estate, LLC.
3. World Class Real Estate, LLC is the sole member of WC 4th and Rio Grande GP, LLC.
4. WC 4th and Rio Grande, LP was created as a partnership between WC 4th and Rio Grande GP, LLC, as the general partner and three other limited partners.

Kretzer argued that these agreements demonstrated a sufficient relationship between Natin Paul; WCCG; Rio Grande, LP; and its general partner, WC4th and Rio Grande, GP, LLC to allow Kretzer to seize control of the La Zona Rio Lawsuit pursuant to his authority under the Receivership Order.

Ultimately, the trial court denied Rio Grande, LP’s motion and granted Kretzer’s motion for entry of order of dismissal and ordered the case dismissed with prejudice. Rio Grande, LP appealed the order of dismissal, and the court of appeals addressed the appeal of this second lawsuit in this opinion.

In this second lawsuit, Rio Grande, LP continued to assert Kretzer lacked the authority to act on its behalf in the La Zona Rio Lawsuit, but Rio Grande, LP also challenged Kretzer’s authority to act on its behalf in this second lawsuit, specifically, to file a nonsuit of its case in his capacity as the receiver appointed in the Princeton Lawsuit. The court of appeals stated that its focus here was the challenge to Kretzer’s authority to file the nonsuit in this second lawsuit, as the filing of the nonsuit led to the trial court’s dismissal order, which in turn was the subject of Rio Grande, LP’s appeal. The court concluded that the record did not support the trial court’s implied finding that Kretzer had authority to nonsuit this second lawsuit brought by Rio Grande, LP against La Zona Rio or the trial court’s dismissal pursuant to the filing of the nonsuit.

As set forth above, the Receivership Order gave Kretzer the authority to seize control of assets, including causes of action, belonging to judgment debtor WCCG. But as we explained in our first opinion, to the extent Rio Grande, LP is considered a separate legal entity entitled to the Texas Business Organizations Code protections, the Receivership Order did not give Kretzer the authority to seize its partnership property or its causes of action. And in the present case, while Kretzer has provided more evidence to establish that WCCG and Rio Grande, LP are related—and that they may even have a parent-subsidiary relationship—he has still not provided any evidence that would have allowed the trial court to conclude that WCCG treated Rio Grande, LP or its general partner (Rio Grande, GP, LLC) as alter egos. Similarly, there is no evidence in the record before us that would have otherwise allowed the trial court to disregard the separate business structure of each entity and treat them as one and the same as WCCG.

In addition, although Kretzer relied heavily on the provision in the Receivership Order giving him the authority to take over the management and operation of any LLC in which WCCG is a member, he has still not produced evidence to establish that WCCG was in fact a member of Rio Grande, GP, LLC such that he would have been entitled to control Rio Grande, LP’s lawsuits by taking over management of the LLC. Instead, the evidence that Kretzer himself produced demonstrates that the only member in Rio Grande, GP, LLC is World Class Real Estate, LLC, which is two steps removed from WCCG in his organizational chart. And again, Kretzer produced no evidence to support a finding that we should disregard the separate business structures of the various entities to allow Kretzer to treat them as one and the same for purposes of his collection efforts.

Thus, the court reversed the trial court’s decision to dismiss this second lawsuit and remanded to the trial court to reconsider its decision consistent with the factors set forth in this opinion and its companion opinion (summarized below).


The court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. The court of appeals reversed a trial court’s judgment dismissing a case based on a settlement purportedly entered into by a receiver on behalf of a limited partnership because the trial court did not determine whether the receiver had authority to act on behalf of the limited partnership, and the record did not
support an implied finding that the receiver had authority to act for the limited partnership in settling the lawsuit and seeking dismissal.

Appellant WC 4th and Rio Grande, LP (“Rio Grande, LP”) sued Appellee La Zona Rio, LLC (“La Zona Rio”) in Travis County seeking to avoid foreclosure on a building in downtown Austin (the “Building”) owned by Rio Grande, LP (the “La Zona Rio Lawsuit”). Local real estate developer Natin Paul signed the promissory note secured by the Building on behalf of Rio Grande, LP as the president of WC 4th and Rio Grande GP, LLC—Rio Grande, LP’s general partner. After Rio Grande, LP defaulted on the note, La Zona Rio initiated foreclosure proceedings. Rio Grande, LP attempted to pay off the amount owed on the note, but La Zona Rio rebuffed its attempts. Rio Grande, LP then filed this lawsuit, i.e., the La Zona Rio Lawsuit, claiming La Zona Rio was in breach of contract and seeking a declaratory judgment regarding its right to pay off the note under the parties’ loan agreement.

While the La Zona Rio Lawsuit was pending, a Harris County district court appointed attorney Seth Kretzer to collect on a judgment owed by World Class Capital Group, LLC (“WCCG”) and Great Value Storage, LLC (“GVS”) to Princeton Capital Corporation (“Princeton”) in an unrelated lawsuit (the “Princeton Lawsuit”). The order (the “Receivership Order”) gave Kretzer broad powers to assist Princeton in its collection efforts, such as directing WCCG “to identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” The Receivership Order also authorized Kretzer “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.” Relying on this authority, Kretzer then entered an appearance in the La Zona Rio Lawsuit stating he was “appear[ing] as counsel of record” for WCCG and its “subsidiary,” Rio Grande, LP, and purporting to replace prior counsel of record for Rio Grande, LP. Kretzer then entered into a settlement agreement with La Zona Rio that ultimately allowed Kretzer to deed the building to La Zona Rio in lieu of foreclosure for the sum of $10. That same day, La Zona Rio’s attorney and Kretzer, again purporting to act on behalf of Rio Grande, LP, filed a joint motion to dismiss the La Zona Rio Lawsuit with prejudice pursuant to the agreement.

Rio Grande, LP, through its retained attorney, Brian Elliott, filed a motion objecting to Kretzer’s authority. In its motion, Rio Grande, LP conceded that Kretzer had been appointed as a receiver in the Princeton Lawsuit and attached a copy of the Receivership Order, but Rio Grande, LP contested Kretzer’s authority to intervene in the lawsuit. First, Rio Grande, LP pointed out that Kretzer claimed to have authority to act as Rio Grande, LP’s attorney based on the allegation that Rio Grande LP was a “subsidiary” of WCCG, yet Kretzer provided no evidence regarding Rio Grande LP’s status as such a “subsidiary.” Rio Grande, LP denied that it was a subsidiary of WCCG and asserted that it was a separate legal entity that was neither owned nor managed by WCCG. Second, Rio Grande, LP acknowledged that the Receivership Order ostensibly allowed Kretzer to seize the membership interest of any limited liability company or limited partnership in which WCCG was a member and to sell, manage, and operate any such limited liability company in which WCCG was a member as the receiver deemed appropriate, but Rio Grande, LP asserted that Kretzer failed to establish that WCCG in fact had any such interest in either the LLC serving as the general partner or in Rio Grande, LP itself. In addition, Rio Grande, LP argued that even if WCCG had an interest in Rio Grande, LP, Kretzer would not be permitted to seize any assets belonging to Rio Grande, LP because under Texas law, partnership assets belong to the partnership, and a charging order is the exclusive remedy by which to collect on a judgment debtor’s interest in a partnership or limited liability company. (The court explained in a footnote that a charging order charges the partnership interest of the judgment debtor to satisfy the judgment by giving the judgment creditor the right to receive any distribution to which the judgment debtor would otherwise be entitled. The court pointed out that, while the charging order constitutes a lien on judgment debtor’s interest, it does not entitle the judgment creditor to participate in the partnership or compel distributions. The court commented, however, that a Chapter 31 turnover order and receivership order may be used to monitor partnership distributions and effectuate a charging order.)

The trial court granted the joint motion to dismiss without ruling on Rio Grande, LP’s objection. Rio Grande, LP appealed, again arguing that Kretzer lacked the authority to act on its behalf.

In the course of concluding that Rio Grande, LP had the right to challenge Kretzer’s authority to enforce the Receivership Order against it in the La Zona Rio Lawsuit, the court of appeals discussed the significance of the separate existence of Rio Grande, LP as distinguished from the entities that were parties in the Princeton Lawsuit in which the Receivership Order was entered.
As explained below, we conclude that Rio Grande, LP was a third-party stranger to the Princeton Litigation and therefore, the trial court in the La Zona Rio Lawsuit was required to determine Rio Grande, LP’s substantive rights before allowing Kretzer to enforce the Receivership Order against it.

In reaching this conclusion, we emphasize that WCCG and Great Value Storage were the only two defendants in the Princeton Lawsuit and the only two named parties in the Receivership Order. And although La Zona Rio at times seeks to treat WCCG and its affiliated World Class entities formed by Natin Paul as one and the same, the only evidence in the record demonstrates otherwise. As indicated above, Rio Grande, LP submitted unrebutted evidence in the trial court indicating it was formed as a limited partnership in accordance with the Texas Business Organizations Code. And it is well established that a business entity, such as a limited partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members. See Pike v. Texas EMC Mgmt., LLC, 610 S.W.3d 763, 778 (Tex. 2020) (recognizing that a business organization is a “separate and independent entity”); Am. Star Energy & Minerals Corp. v. Stowers, 457 S.W.3d 427, 431 (Tex. 2015) (recognizing the “Legislature ‘unequivocally embrace[d] the entity theory of partnership’ when it enacted the Texas Revised Partnership Act (TRPA), since codified in the Texas Business Organizations Code”); see also Mims Bros. v. N. A. James, Inc., 174 S.W.2d 276, 278 (Tex. App.—Austin 1943, writ ref’d) (court is required to treat a partnership as a separate legal entity, “at least to the extent of obtaining and enforcing a judgment by or against it”). Similarly, the evidence demonstrated that Rio Grande, LP’s general partner, WC 4th and Rio Grande, GP, LLC, was a limited liability company, which is also a distinct legal entity, separate and apart from its members—even when there is only one member in the LLC. See Sherman v. Boston, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing that a limited liability company is a legal entity separate from its sole member); see also Daniels v. Empty Eye, Inc., 368 S.W.3d 743, 752 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (limited partner who also was president of the corporation serving as general partner of the limited partnership was an entity distinct from the corporate general partner).

Moreover, we note that Kretzer sought to enforce the Receivership Order against Rio Grande, LP, claiming that Rio Grande, LP was a “subsidiary” of WCCG but providing no proof of such. But even if Rio Grande, LP or its general partner could be considered subsidiaries of WCCG, this would not rob either entity of its status as a separate and distinct legal entity apart from WCCG. To the contrary, it is well-established that subsidiary and parent companies are “separate and distinct” entities as a matter of law, and the separate nature of such entities “will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency.” R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.) (citing SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (recognizing that the “[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace”)); see generally BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 798 (Tex. 2002) (recognizing that “Texas law presumes that two separate corporations are indeed distinct entities”).

In addition, “[a] parent company and its subsidiary maintain their independence even though the same persons are directors or managers of both corporations.” Neff v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 376 (Tex. 1984)). “The same is true even though most or all the capital stock of a subsidiary corporation is owned by its parent corporation.” Id. (citing Docudata Records Mgmt. Services, Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). Thus, as the Texas Supreme Court has stated, it has “never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances.” R&M Mixed Beverage, 578 S.W.3d at 229–30 (citing SSP Partners, 275 S.W.3d at 455).

We recognize that in certain situations, a court may disregard a company’s business structure and treat a subsidiary company as being an “alter ego” of its parent, such as when there is evidence of “abuse, or ... injustice and inequity.” See id. at 230 (citing SSP Partners, 275 S.W.3d
at 451 (recognizing that the limitation on liability afforded by the corporate structure can be ignored only “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result”); \textit{but see} \textit{Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy}, 508 S.W.3d 569, 585 (Tex. App.—El Paso 2016, no pet.) (recognizing that “[a] subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders”).

Here neither La Zona Rio nor Kretzer produced any evidence in the trial court that would have allowed the court to conclude that WCCG used Rio Grande, LP or its general partner as its alter ego. Stated otherwise, there is no evidence in the record to support the conclusion that either Rio Grande, LP or its general partner were not legally distinct from WCCG. Nor does La Zona Rio attempt to assert as much in its appellate briefing. At best, it alleges that the various World Class entities are “affiliates” of WCCG and that Natin Paul does business through these various entities.[footnote omitted] However, as set forth above, regardless of these affiliations, the evidence in the record reflects that Rio Grande, LP and its general partner are separate legal entities, and as such, they had the right to have their substantive rights adjudicated in the trial court before Kretzer could be allowed to enforce the Receivership Order against them.

Next the court of appeals examined whether the trial court could have impliedly found that Kretzer properly exercised his authority in enforcing the Receivership Order against Rio Grande, LP, and the court concluded that the evidence was not sufficient to support such an implied finding. La Zona Rio pointed to three provisions in the Receivership Order that it contended support such a finding, and the court addressed each of them and concluded that they did not support such a finding.

\textbf{A. The provision requiring WCCG to turn over any “interests” it had in any partnership or limited liability company}

First, La Zona Rio points to the provision in the Receivership Order directing WCCG—as the judgment debtor—to “identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” Even assuming WCCG had an “interest” in Rio Grande, LP or its general partner—a fact that neither Kretzer nor La Zona Rio established on this record—under Texas law, WCCG’s only “interest” in the partnership or the LLC would be limited to its share of the profits and its right to receive distributions. \textit{See Pajooh}, 518 S.W.3d at 562 (recognizing that an individual partner has no ownership interest in the specific property belonging to the partnership and that its interests are limited to his share of profits and losses or similar items and the right to receive distributions); \textit{see also} TEX. BUS. ORGS. CODE ANN. § 152.101 (partnership property is “not property of the partners,” and a partner “does not have an interest in partnership property”); \textit{Super Starr Int’l, LLC v. Fresh Tex Produce, LLC}, 531 S.W.3d 829, 846 (Tex. App.—Corpus Christi 2017, no pet.) (recognizing that a member of a limited liability company or his assignee does not have an interest in any specific property of the company) (citing TEX. BUS. ORGS. CODE ANN. § 101.106(b) (“A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company.”)).

Thus, this provision of the Receivership Order would have, at most, authorized Kretzer to collect on WCCG’s “interest” in receiving profits or distributions from either the partnership or the LLC. And as Rio Grande, LP points out, the Texas Business Organizations Code provides that the exclusive remedy by which to obtain a judgment debtor’s interest in either a partnership or an LLC is by the entry of a charging order attaching the distributions owed to either a partner or LLC member, which Kretzer admittedly failed to obtain.[footnote omitted] \textit{See Pajooh}, 518 S.W.3d at 562, 565 (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.”)) and TEX. BUS. ORGS. CODE ANN. § 101.112(d) (“The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest
may satisfy a judgment out of the judgment debtor’s membership interest.”)); see also In re Prodigy Servs., LLC, No. 14-14-00248-CV, 2014 WL 2936928, at *5 (Tex. App.—Houston [14th Dist.] June 26, 2014, orig. proceeding) (mem. op.) (recognizing same).

La Zona Rio counters that in certain circumstances, courts have allowed a judgment creditor to collect on assets held by either a partnership or an LLC without a charging order, citing to our sister court’s opinion in 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.).[footnote omitted] In Heckert, the Fort Worth Court of Appeals opined that “the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.” Heckert, 2017 WL 5184840, at *7–9 (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.”)). And the court held that the purpose of requiring a charging order was not served in a personal injury case in which an ex-wife had received a judgment against her ex-husband, where the ex-husband had created a non-operating LLC and partnership, of which he was the sole member and partner, and placed assets into those entities with the apparent intent of sheltering the assets from his ex-wife’s collection efforts. Id. at *7–9. The court found that under those circumstances, the trial court could properly order the ex-husband to turn over those assets to his ex-wife to satisfy the judgment, as doing so would cause no disruption to an operating business or cause harm to any other parties. Id. at *9.

Relying on the reasoning in Heckert, La Zona Rio contends that a charging order was unnecessary to allow Kretzer to collect on the assets held by Rio Grande, GP because Rio Grande, GP was admittedly a “single purpose entity holding commercial property,” and its business would therefore not be disrupted by ordering a turnover of the property. But Rio Grande, GP points out that unlike the situation in Heckert, the evidence reflected that the partnership was an operating business which had been leasing its building space to tenants, and the partnership had three limited partners whose interests were at stake in the La Zona Rio Lawsuit—in addition to the general partner that La Zona Rio claims was affiliated with WCCG. Therefore, the partnership’s business was disrupted by Kretzer’s actions in utilizing the Receivership Order to allow the partnership’s only asset to be alienated to La Zona Rio. And, unlike the situation in Heckert, the record before us contains no evidence that WCCG created Rio Grande, GP as a “shell” entity for the purpose of sheltering assets from collection.

Accordingly, we conclude that the provision in the Receivership Order requiring WCCG to turn over any interests it had in a partnership or LLC at most gave Kretzer the right to collect on any distributions or profits to which WCCG was entitled by virtue of any such interest and did not give him the right to take possession of the partnership’s assets, which he effectively did by taking control of Rio Grande, GP’s lawsuit. See Pajooh, 518 S.W.3d at 565 (citing 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”)).

B. The provision allowing Kretzer to sell, manage and operate an LLC in which WCCG is a “member”

Second, La Zona Rio points to the provision in the Receivership Order that authorized Kretzer “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 [Kretzer] shall think appropriate.” La Zona Rio contends there was sufficient evidence in the record from which the trial court could have impliedly found that WCCG had a “membership interest” in WC 4th and Rio Grande, GP, LLC—Rio Grande, GP’s general partner. And in turn, La Zona Rio argues that Kretzer had the right under the Receivership Order to take over the operation and management of the LLC and sell its assets. We conclude, however, that there are at least two missing steps in this analysis.
The first missing step is the failure of either Kretzer or La Zona Rio to point to any evidence in the record to establish that WCCG was in fact a “member” of the LLC. The Texas Business Organizations Code provides that an LLC must have at least one member. See TEX. BUS. ORGS. CODE ANN. § 101.101 (a) (“A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.”)

However, there is nothing in this record to demonstrate that WCCG was in fact a “member” in WC 4th and Rio Grande, GP, LLC. As set forth above, while La Zona Rio may be correct that WCCG is affiliated with the LLC or may even be a parent company, given the lack of any evidence that WCCG was a “member” in the LLC, we cannot say that the trial court could have impliedly found that Kretzer had the authority under the Receivership Order to seize control of the LLC.

Even if WCCG had a membership interest in the LLC, the second missing step is the lack of evidence that Kretzer did in fact seize control of WCCG’s interest in the LLC or that he sought to operate or manage the LLC on WCCG’s behalf. Instead, the only evidence in the record demonstrates that Kretzer simply filed a “notice” with the trial court stating that he had substituted himself as counsel of record for Rio Grande, LP in the La Zona Rio Lawsuit. There is nothing to suggest that he did so as part of his management and operation of the LLC. And in fact, the record does not contain the LLC’s governing documents, or otherwise support an implied finding that Kretzer would have had the right, as part of any assumed management duties in operating the LLC, to unilaterally terminate the La Zona Rio Lawsuit on Rio Grande, LP’s behalf and enter into a settlement agreement with La Zona Rio that included deeding the building to La Zona Rio.

Again, the fallacy in La Zona Rio’s argument lies in its attempts to blur the distinction between the various World Class entities and treat them as one and the same as WCCG in the absence of evidence to support that position.

C. The provision allowing Kretzer to take possession of the judgment debtor’s assets

Finally, La Zona Rio points to a third provision in the Receivership Order giving Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell causes of action and real property belonging to the “judgment debtor,” i.e., WCCG. It did not extend Kretzer’s authority to seize such property from any of WCCG’s subsidiaries or affiliated entities. And once again, we find no evidence in the record to support a finding that WCCG and its affiliated World Class entities can be considered one and the same, or alter egos of each other, such that Kretzer had the authority to collect on assets owned or controlled by either Rio Grande, LP or its general partner to satisfy WCCG’s debt. See United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281, 282–83 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that judgment creditor could not collect on assets owned by two corporations that it claimed were alter egos of the judgment debtors without establishing that the corporations were in fact alter egos in a separate proceeding) (citing Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955) (recognizing that “[c]ourts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, avoid personal liability, to avoid the effect of a statute, or in a few other exceptional situations”)); see also Maiz v. Virani, 311 F.3d 334, 336 (5th Cir. 2002) (recognizing that under Texas law, a judgment creditor cannot use the turnover statute to reach the assets of corporations which are allegedly alter-egos
of the Judgment Debtors without a separate hearing to “pierce[ ] their corporate veils”); Plaza Court, Ltd. v. West, 879 S.W.2d 271, 276–77 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that “[t]he turnover statute does not support a proceeding against an entity who is not a judgment debtor, until a judgment creditor succeeds in piercing the corporate veil”). And without such evidence, the trial court could not have impliedly found that Kretzer had this right. To the contrary, as our sister court has recognized, a judgment creditor (or in this case a receiver) may not simply “announce its belief” that a judgment debtor and a third party are in essence one and the same without proof of such, and in effect, skip a trial on the merits, and “declare itself the winner.” United Bank Metro, 670 S.W.2d at 283.

By way of footnotes, the court pointed out two recent cases reaching the conclusion that a charging order is the exclusive remedy by which a judgment creditor of a member or other owner of an LLC may satisfy a judgment out of the judgment debtor’s membership interest, and the court stated that there appear to be cases refuting the contention by La Zona Rio that the exclusivity of the charging order remedy only applies to judgment creditors and not to court appointed receivers.

Because the record did not support an implied finding that Kretzer had the authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit, and because the record did not reflect that the trial court gave Rio Grande, LP the opportunity to have its substantive rights adjudicated before allowing Kretzer to enforce the Receivership Order against it, the court of appeals concluded that the trial court abused its discretion in granting the motion to dismiss the La Zona Rio Lawsuit, and the court reversed and remanded for further proceedings to give Rio Grande, LP that opportunity.

[The court of appeals in its companion opinion summarized above succinctly summarized its conclusions in this case as follows: “[W]e concluded that because Rio Grande, LP and its general partner were not parties to the Princeton lawsuit, Rio Grande, LP had the right, as a stranger to that judgment, to challenge Kretzer’s enforcement of the Receivership Order against it in the La Zona Rio Lawsuit, and it was not a collateral attack on the order. But we concluded that the trial court had not properly considered Rio Grande, LP’s challenge to Kretzer’s authority, and questions remained regarding whether he had any such authority under the Receivership Order. We therefore remanded the matter to the trial court to give it the opportunity to consider the issue.

As we explained in that opinion, while the record reflected that WCCG; Rio Grande, LP; and WC4th and Rio Grande, GP, LLC were related or affiliated entities, the only evidence in the record demonstrated that the three companies were separate and distinct legal entities, entitling them to the protections afforded under the Texas Business Organizations Code. We further found that the record did not support a finding that WCCG was a member of Rio Grande, LP’s general partner—WC4th and Rio Grande, GP, LLC—which would have allowed Kretzer to take over management of the LLC to reach the partnership’s assets.”]


The plaintiff sought to exercise personal jurisdiction over an individual non-resident defendant by applying veil-piercing theory with respect to an LLC defendant. The court concluded that there were insufficient allegations to fuse the individual with the LLC for purposes of exercising personal jurisdiction and granted the individual’s motion to dismiss for lack of personal jurisdiction.

The court explained in relevant part:

Plaintiff failed to establish that this Court has personal jurisdiction over Defendant Roland, and, as such, Roland’s 12(b)(2) motion to dismiss is hereby granted. Under Fifth Circuit law, a “corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the part seeking to pierce the corporate veil.” Bridas S.A.P.I.C. v. Gov’t of Turkmenistan, 345 F.3d 347, 359 (5th Cir. 2003) (emphasis added). However, “the alter ego test for attribution of contact, i.e., personal jurisdiction, is less stringent than that for liability.” Stuart v. Spademan, 772 F.2d 1185, 1198 n.12 (5th Cir. 1985). “[O]nly a prima facie showing is required on a jurisdiction motion.” Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1161 (5th Cir. 1983) (quoting 4 C.
Wright & A. Miller, Federal Practice and Procedure § 1068, at 250 (1969)). Thus, the Fifth Circuit finds it “appropriate[ ]” to “apply[ ] a less stringent standard for alter ego jurisdiction than alter ego liability.” Id. Under Hargrave, a court should consider whether:

(1) distinct and adequately capitalized financial units are incorporated and maintained; (2) daily operations of the two corporations are separate; (3) formal barriers between management of the two entities are erected, with each functioning in its own best interests; and (4) those with whom the corporations come in contact are apprised of their separate identity. Other factors deemed important by the commentators and Texas courts are: (1) common stock ownership; (2) the method and degree of financing of the subsidiary by the parent; (3) common directors or officers; (4) separate books and accounts; (5) common business departments; (6) extent to which contracts between parent and subsidiary favor one over the other; and (7) connection of parent’s employee, officer or director to subsidiary’s tort or contract giving rise to suit.

Hargrave, 710 F.2d at 1162–63 (quoting Miles v. Am. Tel. & Tel. Co., 703 F.2d 193 (5th Cir. 1983)).

Here, there are no allegations that Roland is owner of Konect or that he owns any stock in the company. The mere fact that he is an officer is insufficient to show that Roland exercised complete control over Konect such that this Court could exercise personal jurisdiction where it otherwise could not. The Complaint does not allege that the phishing emails were sent by Roland from Texas or that any of Roland’s conduct related to the sending of those emails occurred in Texas. It does not allege that Roland commingled funds or disregarded the corporate form in a way typically associated with alter ego liability.

In short, the allegations concerning the factors set out above do not weigh in favor of fusing Roland with the corporate form of Konect. There are no facts alleged demonstrating that Roland “exercised the nature and degree of control” over Konect “necessary to fuse... [them] for the purposes of the Texas long-arm statute.” Graduate Med. Educ. Dev., LLC v. St. George’s Univ., Ltd., No. CV H-15-2641, 2016 WL 5844707 at *7 (S.D. Tex. Oct. 6, 2016). As such, the Court cannot exercise personal jurisdiction over Roland. Roland’s motion to dismiss (Doc. No. 38) is therefore granted.


To the extent that the plaintiff intended to assert alter ego as a cause of action, the court declined to allow the plaintiff to amend to add such a claim because alter ego is a remedy to enforce a claimed substantive right and not a claim or independent cause of action. To the extent that the plaintiff sought to impose liability on the parent company of an LLC based on the alter-ego doctrine, the court concluded that the plaintiff’s allegations were insufficient to do so.

In a dispute arising out of the plaintiff’s acquisition of the business of Curative Talent, LLC (“Curative”), the plaintiff (“Proxi”) sought to hold Curative’s parent company (Doximity, Inc. or “Doximity”) liable based on alter ego. The court initially made the point that “[a]lter ego is not a claim or independent cause of action—it is a remedy to enforce a claimed substantive right.” Thus, to the extent that the plaintiff intended to assert alter ego as a cause of action rather than a basis for Doximity’s liability for Curative’s acts, the court stated that it would be futile to allow the plaintiff to amend its complaint to add such a claim.

Next, the court made the point to that, under Texas choice-of-law rules, the law of the state under which an entity is organized governs whether a corporation, LLC, or individual may be held liable pursuant a veil-piercing theory. The asset purchase agreement in this case indicated that Curative was a Texas LLC; therefore, the court applied Texas alter-ego law.

The court described the Texas alter-ego doctrine as follows:

“Under Texas law the alter ego doctrine allows the imposition of liability on a corporation for the acts of another corporation when the subject corporation is organized or operated as a mere tool or business conduit.” Gardemal v. Westin Hotel Co., 186 F.3d 588, 593 (5th Cir. 1999) (citation
omitted). “Disregarding the corporate structure involves two considerations.” *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008). The first is the relationship between the two entities. *Id.* In analyzing this prong, courts consider factors including “common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation’s employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.” *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.) (citation omitted), abrogated on other grounds by *SSP Partners*, 275 S.W.3d 444. The second is “whether the entities’ use of limited liability was illegitimate.” *SSP Partners*, 275 S.W.3d at 455. This consideration requires allegations that “the corporate form has been used as part of a basically unfair device to achieve an inequitable result,” such as to “perpetuate a fraud, evade an existing obligation, achieve or perpetuate a monopoly, circumvent a statute, protect a crime, or justify wrong.” *Al Rushaid v. Nat’l Oilwell Varco, Inc.*, 757 F.3d 416, 424 (5th Cir. 2014) (quoting *SSP Partners*, 275 S.W.3d at 451).

The court stated that Proxi alleged the following with respect to the relationship between Doximity and Proxi:

1. Doximity and Curative share certain shareholders, officers, directors, and/or employees [footnote omitted];
2. Doximity and Curative share the same three managing members;
3. Doximity provides Curative’s operating capital;
4. Doximity’s officers and directors may determine Curative’s policies;
5. Doximity and Curative have centralized accounting;
6. Doximity and Curative have a centralized human resources department;
7. Doximity employees “were integral to the negotiation and finalizing of” the Agreement;
8. Doximity pays stock options to Curative employees;
9. Curative has rendered unidentified “[s]ervices” on Doximity’s behalf;
10. Doximity leases the building out of which Curative operates; and
11. Doximity represented itself as the seller of the Dentistry Service Line on a tax form.

The court stated that these allegations “do not adequately demonstrate the degree of assimilation necessary for alter ego liability.”

In addition, the court stated that the parties did not meaningfully brief the issue of illegitimate use of limited liability even if Proxi adequately alleged that the relationship between Doximity and Curative justified holding Doximity liable.

Proxi alleges in conclusory fashion that “Curative is simply a mere business conduit for Doximity” and that “[t]he separate identities of these entities must be disregarded ... to prevent use of the corporate fiction as an unfair device to inflict an injustice on Proxi, and to avoid any responsibility for the damages sustained by Proxi herein.” Third Am. Compl. ¶ 102. The only factual allegations Proxi appears to use to support its argument are the assertions that Doximity was involved in the alleged misconduct and that Doximity filed a tax form listing itself as the seller of the Dentistry Service Line. Without more, these allegations are insufficient. Therefore, the Court concludes that Proxi has not plausibly alleged that Doximity is the alter ego of Curative, and the Court will analyze only whether Proxi’s proposed Third Amended Complaint states claims against Doximity directly.

The court proceeded to conclude that there was no privity between the plaintiff and Doximity on which to base a claim for breach of contract against Doximity because Doximity was not a party to the asset purchase agreement at issue. Because the fraudulent inducement claim was based on statements contained in the asset purchase agreement, the plaintiff also had no claim against Doximity for fraudulent inducement. Finally, the plaintiff could not maintain a claim for negligent misrepresentation against Doximity because it did not identify any misrepresentation by Doximity.
In this dispute between two companies over the ownership of a trademark and copyrighted materials developed in the course of an informal partnership to promote a comedy tour, the court analyzed veil-piercing allegations aimed at holding an individual member of an LLC liable for the LLC’s obligation and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.

BMN Entertainment, LLC (“BMN”) filed this action against Je’Caryous Johnson Entertainment (“JJE”) and Je’Caryous Johnson (“Johnson”) asserting claims of copyright infringement, declaratory judgment of trademark ownership, and other causes of action relating to a dispute over the ownership and use of a trademark and copyrighted materials in the aftermath of the breakup of an informal partnership between BMN and JJE for the promotion of a comedy tour. BMN additionally alleged that liability should extend to Johnson for each claim against JJE based on corporate veil piercing.

BMN and JJE were companies involved in planning, promoting, and booking talent for events. The parties were introduced in 2018 and started discussing partnering in a comedy tour in 2020. In 2021, they agreed to partner in a comedy tour and to split the profits equally. The first comedy tour that the Parties booked and promoted through their partnership was called the NO CAP COMEDY TOUR (the “Tour”), which occurred between February and May 2022. BMN claimed that it alone created the NO CAP COMEDY TOUR trademark (the “Mark”) and retained Maximus Graphics to create the logos and promotional materials (the “Copyrighted Material”). BMN also claimed to solely own the Copyrighted Material created for the Tour by Fernando Cordero at Maximus Graphics. Defendants disputed these claims. Maximus Graphics transferred the Copyrighted Material to BMN, and BMN successfully registered for the copyrights.

After the Tour, BMN independently sought to commence its own tour (the “BMN Tour”) from September to December 2022. BMN attempted to promote the BMN Tour with the Mark but claimed that they re-branded the BMN Tour due to the defendants outbidding BMN. BMN claims that the defendants were privy to significant “confidential and sensitive business information” and that the parties dissolved their joint business venture and the at-will de facto partnership after a conversation between the owners of BMN and JJE on May 21, 2022. The profits from the Tour were being accounted for so that it could be distributed between each party.

In June 2022, JJE’s counsel sent a letter to entertainment venues stating that JJE had a pending trademark for “No Cap Comedy Tour” and that the venues could not use that trademark in connection with services or goods that did not originate with JJE. BMN asserted that several entertainment venues indicated that they would not allow any use of the Mark because they were concerned about potential liability. On June 6, 2022, JJE filed a trademark application for “NO CAP COMEDY TOUR” and on July 5, 2022, JJE filed three trademark applications for “NO CAP COMEDY,” “NO CAP NO CAP COMEDY TOUR,” and “NO CAP COMEDY TOUR.”

The defendants sought dismissal on the basis that BMN failed to state a claim for relief for reasons including the following: (1) BMN did not provide sufficient allegations to demonstrate partnership property is now owed exclusively by BMN, and consequently, failed to allege a plausible claim for damages; (2) BMN failed to provide factual allegations that would support piercing the corporate veil under Texas law; and (3) BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations were preempted by the Texas Uniform Trade Secrets Act.

The court first concluded that BMN sufficiently alleged that it was the exclusive owner of the Copyrighted Material based on its allegations that the author of the Copyrighted Materials was Fernando Cordero of Maximus Graphics (because he “created substantially all of the artwork/marketing materials”) and that the ownership of the Copyrighted Materials was transferred to BMN via “Corrective Nunc Pro Tunc Copyright Assignment Agreement” signed by both Fernando Cordero on behalf of Maximus Graphics and one of BMN’s owners on behalf of BMN. The court stated that the defendants mistakenly grouped together the Copyrighted Material and the Mark in determining ownership by referring to both as “intellectual property” and asserted without authority that the Copyrighted Material and the Mark “are bound together ... and BMN has no right to use the [Copyrighted Material] independently unless it can establish a right to use the Mark also.”

With respect to the Mark, the defendants argued that the partnership owned the Mark because it was first used in commerce by the partnership. BMN argued that it owned the Mark exclusively because it controlled the quality of services under the Mark. The Court agreed with the defendants as to the ownership of the Mark by the partnership and further addressed the effect of the break-up or dissolution of the partnership on the ownership of the Mark.
The defendants argued that BMN’s claims for breach of fiduciary duty and tortious interference with prospective relations should be dismissed to the extent the claims were based upon the use of confidential information because the claims are preempted by the Texas Uniform Trade Secrets Act (TUTSA). BMN asserted that the claims for breach of fiduciary duty and tortious interference with prospective relations were not preempted by TUTSA, arguing that the defendants relied upon an inaccurate premise that BMN alleged that compensation information constitutes a trade secret. The court concluded that the claims should be dismissed only to the extent the claims were based on confidential information.

Defendants argued that BMN failed to state a claim for relief as to Johnson “individually because it fails to provide factual allegations that would support piercing the corporate veil under Texas law.” The court analyzed the veil-piercing allegations and concluded that the claim based on alter ego should be dismissed, but the claim based on sham to perpetrate a fraud survived.

Defendants claim that BMN’s only factual allegation to connect Johnson to piercing the corporate veil is that Johnson “is the Founder, sole owner, and Chief Executive Officer of JJE.” (Id. at 20.) However, BMN argues that it adequately supported the notion that Johnson is personally liable under the piercing the corporate veil theory because BMN alleges that Johnson: misused the corporate form to disrupt BMN’s planning and promotion of the BMN Tour, and to disrupt BMN’s relationships with venues and talent; breached his duties to BMN by misrepresenting to venues that JJE was the sole owner of rights in the Mark; and that recognizing the corporate form here would lead to inequitable result. (Dkt. No. 47 at 23.)

“Texas law starts with a presumption that an individual and a business entity are separate legal persons.” Adam v. Marcos, 620 S.W.3d 488, 502 (Tex. App.—Houston [14th Dist.] 2021, pet. denied). “Courts may disregard the corporate form if (1) the corporation is the alter ego of its owners or shareholders, (2) the corporation is used for an illegal purpose, or (3) the corporation is used as a sham to perpetrate a fraud.” Durham v. Accardi, 587 S.W.3d 179, 184 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Here, BMN asserts the alter ego theory and the sham to perpetrate fraud theory. (Dkt. No. 40 at ¶¶ 59-60.) “Whether a plaintiff may pierce an entity’s veil pursuant to either the alter ego theory or the sham to perpetrate a fraud theory depends on whether the plaintiff’s claims sound in tort or contract.” Ogbonna v. USPLabs, LLC, No. EP-13-CV-347-KC, 2014 WL 2592097, at *8 (W.D. Tex. June 10, 2014). “[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.” [footnote omitted] Id. Here, BMN is a tort claimant and is not required to prove actual fraud. (Dkt. No. 40.)

### i. Alter Ego

Veil piercing under the alter ego theory is appropriate “(1) where a corporation is organized and operated as a mere tool or business conduit of another; and (2) there is such ‘unity between corporation and individual that the separateness of the corporation has ceased’ and holding only the corporation or individual liable would result in injustice.” Richard Nugent & CAO, Inc. v. Est. of Ellickson, 543 S.W.3d 243, 266 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing Castleberry, 721 S.W.2d at 271). Factors to take into account are “the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.” Id. (citing Castleberry, 721 S.W.2d at 272). However, “[a]n individual’s role as an officer, director, or majority shareholder of an entity alone is not sufficient to support a finding of alter ego.” Id. (citing Cappuccitti v. Gulf Indus. Prods., Inc., 222 S.W.3d 468, 482 (Tex. App.—Houston [1st Dist.] 2007, no pet.)). Additionally, “[t]he corporate structure ... is not disregarded ‘merely because of centralized control, mutual purposes, and shared finances.’ ” Id. (quoting SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008)).
Here, BMN’s complaint lacks factual allegations that Johnson and JJE’s relationship rose to the level of entanglement required to establish alter ego. *Galvan v. Caviness Packing Co.*, 546 F. Supp. 2d 371, 378-79 (N.D. Tex. 2008) (holding that alter ego was not established where there was no evidence of the level of entanglement between defendant and the entities, no financial information, and no evidence that the defendant used the entities for personal purposes); *Freilich v. Green Energy Res., Inc.*, 297 F.R.D. 277, 282 (W.D. Tex. 2014) (holding that plaintiffs failed to set forth sufficient factual details to support their alter ego theory because there was no evidence that defendants used the corporation for personal purposes and merely recited conclusory allegations); *Ogbonna*, 2014 WL 2592097, at *9 (holding that plaintiff’s allegations were not sufficient to extend liability under alter ego because they only established that entities were all owned and controlled by individual defendants that engaged in a single enterprise).

BMN sets forth conclusory allegations of alter ego by stating “[t]here exits such a unity of interest and ownership between JJE and Mr. Johnson that the separate personalities of JJE and Mr. Johnson no longer exist,” that “the circumstances here are such that the adherence to the fiction of a separate corporation or limited liability company would promote injustice,” and “Mr. Johnson used JJE as a tool through which to defraud BMN.” (Dkt. No. 40 at ¶ 59.) Further, BMN alleges that Johnson is the “Founder, sole owner, and Chief Executive Officer of JJE.” (Id.) BMN’s recitation of conclusory allegations are not sufficient to extend liability under the alter ego theory without any facts that are relevant to the factors that establish alter ego under Texas law. *Ogbonna*, 2014 WL 2592097, at *9 (holding that plaintiff did not allege any facts that support the alter ego theory factors such as claiming that defendants intermingled finances or assets, exploited the limited liability corporations for personal purposes, paid or promised to pay the limited liability corporations’ debt, or that defendants were undercapitalized). BMN failed to allege facts indicating that alter ego is warranted such as overlap of corporate and individual property, financial interest, or personal interest other than Johnson’s role as founder, owner, and chief executive officer of JJE, which alone is inadequate. (Dkt. No. 40.) As such, the Court recommends that the Motion to Dismiss as to BMN’s alter ego theory underlying its tort claims against Defendants be granted.

**ii. Sham to Perpetrate Fraud**

“The sham to perpetrate a fraud theory requires the plaintiff to demonstrate that the entity to be pierced acted in a fraudulent manner.” *Ogbonna*, 2014 WL 2592097, at *10. However, courts are split in deciding whether constructive fraud under sham to perpetrate fraud requires the Rule 9(b) heightened pleading standard or the Rule 8(a) standard. See id. (“Because the theory requires some showing of fraud, the plaintiff must satisfy Federal Rule of Civil Procedure 9(b)’s heightened pleading requirements.”); but see *Sparling v. Doyle*, No. EP-13-CV-00323-DCG, 2014 WL 12489990, at *9 (W.D. Tex. Oct. 23, 2014) (“[T]he tort-based ‘sham to perpetrate fraud’ claim is not subject to ... Rule 9(b) [because it] would create a procedural requirement that would make the substantive differences between a tort-based claim under *Castleberry* and contract-based claim under Texas Business Code § 21.223 virtually meaningless.”). “[C]onstructive 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.” *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 644 (5th Cir. 1991) (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex.1964)) (internal quotations omitted).

Here, BMN sufficiently alleges that Johnson used JJE to perpetrate constructive fraud under the heightened standard of Rule 9(b). Accepting the alleged facts as true, BMN has satisfied the pleading requirements of Rule 9(b) by alleging that (1) Mr. Johnson (who); (2) “used the corporate form to achieve an inequitable result; namely, interference with BMN’s efforts to book, route, and promote the BMN Tour, and disruption and termination of BMN’s contracts with the entertainment venues” (what); (3) on or about June 2022 (when); (4) by Mr. Johnson by deceiving entertainment venues, comedic talent, agents, and prospective attendees by holding JJE out as the sole and exclusive owner of the Mark (how); and (5) through “communications from third-party entertainment venues indicating that Defendants had contacted them and indicated that Defendant JJE is the sole and exclusive owner of trademark rights in the trademark NO CAP COMEDY TOUR[,]” including a letter sent by Defendants’ counsel to entertainment venues (where). (Dkt. 168
Because BMN sufficiently alleges constructive fraud in accordance with the heightened pleading standard of Rule 9(b), it is not necessary to decide which pleading standard is required the more stringent standard has been satisfied. As such, the Court recommends that the Motion to Dismiss as to BMN’s sham to perpetrate fraud theory underlying its tort claims against Defendants be denied.

Plan B Holdings, LLC v. RSLLP, 681 S.W.3d 443 (Tex. App.—Austin 2023, no pet.). The court of appeals concluded that there was sufficient evidence to support the trial court’s finding that an owner of two LLCs was the alter ego of the companies and was personally liable on a veil-piercing theory. As part of the court’s analysis, it concluded that there was sufficient evidence to support the conclusion that the LLCs were used to perpetrate an actual fraud on the plaintiff for the owner’s direct personal benefit.

In 2012, Cheryl Cox had the idea for a product she called “TitleClose,” which was to be used in connection with e-closings of real estate transactions. In April 2012, she engaged RSLLP, a law firm, to represent Epic Real Estate Solutions (a company owned by Cox) in obtaining two trademarks and a copyright to be used in connection with the TitleClose online platform.

To get the TitleClose product running, Cox located a Missouri company, Sense Corp., to develop a real estate platform, i.e., a software package. Because she was going to be selling Epic in the near future, she had CIPE Real Estate Solutions, LLC (an LLC that she owned) enter into the contract with Sense. A billing dispute thereafter arose between CIPE and Sense. In October 2014, Sense sent a demand letter to CIPE for approximately $335,000 in unpaid invoices. RSLLP was then separately engaged to represent CIPE in the dispute. Shortly thereafter RSLLP was engaged to represent Plan B Holdings, LLC (another LLC that Cox owned) in obtaining a patent for the TitleClose product.

In December 2014, Sense sued CIPE for its unpaid invoices. Sense’s petition alleged that “[u]ntil CIPE’s obligations under the Contract are met, ownership of the Products ha[s] not vested with CIPE and Plaintiff retains all ownership and title to the Products.” Two months later, Cox registered Plan B to do business in Texas. The “Fictitious Name” (d/b/a) listed on the registration form for Plan B was “Shop TitleClose LLC.”

During 2015, RSLLP performed work on the Sense lawsuit as well as the patent, trademark, and copyright applications. In October 2015, Sense added Plan B and Epic Real Estate as defendants in the lawsuit. In December 2015, the companies settled the Sense lawsuit for $185,000. The money for the settlement was borrowed from another one of Cox’s companies.

At some point in 2015, Cox’s companies stopped paying RSLLP’s invoices, which were sent to Cox monthly. Cox testified that she first became aware of past-due invoices when, in November 2016, RSLLP sent her an email with a more urgent tone. She testified that the unpaid bills had been overlooked because she and her staff had been overwhelmed by the process of selling one or more of her companies. Nonetheless, Cox thereafter disputed some of the invoices. At this point, the TitleClose product was primarily under the control of Plan B. Shortly after learning of her companies’ past-due debt to RSLLP, Cox formed a new corporation, Yellow Frame, Inc., of which she owns 55%. Cox met with members of RSLLP in January 2017 to see if the issue of the overdue bills could be resolved. The meeting was unsuccessful, and a month later Cox registered Yellow Frame to do business in Texas. Yellow Frame later took over the use and marketing of TitleClose and by the time of trial was reaping the profits from the product.

In June 2017, RSLLP filed suit against Plan B, CIPE, and Cox for its unpaid invoices. The unpaid bills related to the work that the firm had done on the Sense lawsuit as well as the trademark, copyright, and patent applications. At the time of trial, Cox still owned the TitleClose trademark and was, through Yellow Frame, still using the TitleClose trademark and platform as her business. While Yellow Frame was making a profit from the TitleClose product, Plan B and CIPE were insolvent. After a non-jury trial, the trial court rendered judgment that RSLLP recover from all defendants, jointly and severally, actual damages for the unpaid fees in the amount of $83,509.63, attorney’s fees and expenses in the amount of $117,689.64, and post-judgment interest.

Part of the court’s rationale for holding Cox personally liable for the LLCs’ debts (Plan B and CIPE) was a veil-piercing theory—i.e., Cox was the alter ego of the LLCs. On appeal, Cox argued that the evidence was legally insufficient to support the alter ego finding. The court of appeals began by summarizing Texas law on piercing the corporate veil:

In general, an owner or officer of a corporation is not liable for corporate debts:
A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation’s contractual obligations. Avoidance of personal liability is not only sanctioned by the law; it is an essential reason that entrepreneurs like [the appellant] choose to incorporate their businesses.

In Texas, the ability of a corporate or LLC creditor to “pierce the corporate veil” and impose individual liability on an owner for a company’s contractual obligations is expressly limited by statute:

A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to:

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.

Tex. Bus. Orgs. Code § 21.223(a)(2). There is, however, a statutory exception that allows individual liability to be imposed “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result.” *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 451–52 (Tex. 2008) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)). The statutory exception reads as follows:

Subsection (a)(2) does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.

Tex. Bus. Orgs. Code § 21.223(b). Both the restriction on individual liability and the exception to it likewise apply to limited liability companies. *See id.* § 101.002(a) (“Subject to Section 101.114, Section[ ] 21.223 . . . appl[ies] to a limited liability company and the company’s members, owners, assignees, affiliates, and subscribers.”).

“[I]n the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud.” Rather, as the Texas Supreme Court stated in *Castleberry*, “[a]ctual fraud usually involves dishonesty of purpose or intent to deceive . . . .” Texas appellate courts have since coalesced around that definition of “actual fraud” for purposes of piercing the corporate veil.

The court then turned its attention to an alter-ego theory of veil piercing, which examines the relationship between the entities and whether the entities’ use of limited liability was illegitimate. According to the court, “to pierce the corporate veil and impose liability under an alter-ego theory, the plaintiff must demonstrate (1) that the entity on which it seeks to impose liability is the alter ego of the debtor, and (2) that the corporate fiction was used for an illegitimate purpose, that is, to perpetrate an actual fraud on the plaintiff for the defendant’s direct personal benefit.” The court concluded that there was sufficient evidence to support an alter ego finding:

The relationship between Cox and her various business entities can be assessed using such factors as:

- whether the entities shared a common business name, common offices, common employees, or centralized accounting;
- whether one entity paid the wages of the other entity’s employees;
- whether one entity’s employees rendered services on behalf of the other entity;
- whether one entity made undocumented transfers of funds to the other entity; and
- whether the allocation of profits and losses between the entities is unclear.
Here, it is undisputed that Cox was the sole owner of Plan B and CIPE (and others). She had complete control over her businesses. In addition, all of Cox’s companies had common employees—contract workers—using the same address, etc. (“[W]e were all in the same building.”).

It was common for money to be shifted—“loaned”—from one of Cox’s businesses to another, depending on the immediate need. . . . This was the case with the funding for the settlement of the Sense litigation—the money for the settlement ($185,000) came from another of Cox’s businesses, Epic Property Solutions. As events played out, it is a reasonable inference that CIPE and Plan B never repaid those funds to Epic Property.

Cox’s companies used a “shared resource company” to perform various tasks for all the businesses: “Generally my businesses are set up by product and then any shared type of resources, IT, human resources, accounting and so forth were under a shared resource company called Epic Management.” Bills were routed directly to the shared accounting group. Again, Cox owned and controlled all of these companies.

We conclude that the record contains more than a scintilla of evidence that Cox, as the sole owner of her businesses, was the “alter ego” of CIPE and Plan B. Nonetheless, this establishes only the first prong of the test for piercing the corporate veil. There must also be some evidence that Cox caused her companies to be used in a way that “perpetrated an actual fraud on the obligee [here, RSLLP] primarily for [Cox’s] direct personal benefit,” i.e., in a way that was “illegitimate” and “involves dishonesty of purpose or intent to deceive.” See Tex. Bus. Orgs. Code § 21.223(b).

The factors listed above in the alter-ego analysis “are almost entirely irrelevant’ to the second consideration in determining personal liability under section 21.223—whether the use of limited liability was illegitimate. . . . That determination is made ‘based on a careful evaluation of the policies supporting the principle of limited liability.’”

Here, it is a reasonable inference that Cox placed substantial value on the money-making potential of TitleClose. She had Sense do work preparing the online platform, for which Sense billed CIPE approximately $335,000. After Cox’s failure to pay that bill turned into a lawsuit, even the settlement required CIPE (through money provided by another of Cox’s entities) to pay Sense $185,000.

Epic was originally the company that was positioned to get TitleClose up and running. Epic would own the TitleClose trademark and copyrights and market the TitleClose product. But because Cox was planning to sell Epic, she had CIPE enter into the contract with Sense to produce the necessary software. CIPE was now positioned to take charge of TitleClose. Things changed, however, when Sense threatened to sue CIPE and to retain ownership of the intellectual-property rights it had been working to develop. Within a month of CIPE’s receiving Sense’s $335,000 demand letter, Cox got Plan B involved in TitleClose, signing an engagement letter with the Firm [RSLLP] to obtain a patent for Plan B relating to the TitleClose product. Soon thereafter she registered Plan B to do business in Texas with a d/b/a of “Shop TitleClose LLC.” Although the patent application ended up being in Cox’s name individually, she insisted that the owner of the patent was always intended to be Plan B. In this way, whatever profit the TitleClose product eventually produced would not go to CIPE—Sense’s contract debtor—but would instead go to Plan B. And, as discussed above, it is a reasonable inference that Cox expected TitleClose to produce substantial future profits.

This plan was submarined, however, when Plan B and Epic were added as defendants in Sense’s lawsuit in October 2015. Worse still, Sense maintained its assertion that it would retain ownership of the intellectual-property rights to TitleClose until its bills were paid in full. If Cox had walked away at this point—perhaps filing bankruptcy for Plan B and CIPE—she might have permanently lost the right to market and use TitleClose. As Cox testified, “CIPE didn’t exist without [the TitleClose] software. So to me the software was the asset.” Apparently boxed in, Cox seems to have had no choice but to settle the Sense lawsuit, which she did for $185,000, a substantial sum.
Out from under the Sense lawsuit, Cox was free to use Plan B to develop and market TitleClose. But then came the fee dispute with [RSLLP]. Cox testified that she became aware of the unpaid bills in November 2016. Approximately one month after the unsuccessful attempt in January 2017 to settle the fee dispute, Cox registered yet another company, Yellow Frame, Inc., to do business in Texas. At some point thereafter—the exact date is not in the record—Cox began using Yellow Frame to market and use TitleClose. Once again, if TitleClose had continued to be marketed by Plan B and thus produced income for Plan B, that entity might have been able to pay the Firm’s bills. But after TitleClose was effectively “moved” to Yellow Frame, Plan B had no assets. Just as Cox had stated that “CIPE didn’t exist without [the TitleClose] software[—]So to me the software was the asset,” the same could now be said about Plan B. Threatened with a lawsuit by the Firm, Plan B’s only “asset”—TitleClose—was quietly moved to Yellow Frame. Having Yellow Frame take over the use and marketing of TitleClose left Plan B insolvent. A mere two weeks after Cox’s unsuccessful meeting with the Firm regarding its unpaid bills, Plan B’s right to do business in Texas was forfeited for failure to pay franchise taxes. . . .

Because Cox was the sole owner of Plan B and the majority owner of Yellow Frame, the evidence in the record supports the trial court’s implied finding that Cox’s actions were taken primarily for her own personal benefit.

In summary, the record contains evidence that whenever the business entity that Cox intended to use and market TitleClose became threatened by creditors, she moved that company’s primary (or sole) asset—TitleClose—to a newly created or registered company. We hold that the record contains more than a scintilla of evidence that Cox “caused [Plan B] to be used for the purpose of perpetrating and did perpetrate an actual fraud on the [Firm] primarily for [Cox’s] direct personal benefit.” See Tex. Bus. Orgs. Code § 21.223(b). We overrule Appellants’ complaint as to the Firm’s piercing-the-corporate-veil claim.

Although it is not necessary as support for the foregoing holding, it is noteworthy that the Fifth Circuit has held that the actual-fraud requirement for piercing the corporate veil is satisfied if the obligee establishes that a transfer is fraudulent under the actual-fraud prong of Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–013. The present record contains evidence of fraudulent transfer under Section 24.005.


The court denied motions to dismiss filed by defendants who were owners of a corporation and an LLC. The court concluded that the defendants could be personally liable for debts of the business because actual fraud was present and the owners personally benefitted.

In 2020, Congress passed the CARES Act, which provided for the Payroll Protection Program (“PPP”)—a loan assistance program for businesses financially burdened by restrictions imposed on the country by local, state, and federal officials. The act required a comprehensive plan to disburse billions of dollars to countless businesses in a very short window of time. Because of the logistical challenges presented by approving loans for millions of American businesses, the government worked with private lenders to streamline the approval process.

To assist lenders with the approval process, the Federal Reserve Bank of the United States also instituted the Paycheck Protection Program Liquidity Facility (“PPPFL”), which advanced funds through non-recourse loans to lenders who could provide proof of approvals and disbursements of PPP loans as collateral.

Defendant Capital Plus Financial LLC (“Capital Plus”)—a wholly owned subsidiary of Defendant Crossroads Inc.—began approving loans through the process authorized by the CARES Act. In less than five months, Capital Plus approved an astonishing 472,036 PPP loans. The volume of loans approved was so numerous that Capital Plus was the second largest lender of PPP loans in 2021 by volume—assigning more loans than the combined efforts of many major financial institutions. Capital Plus—due to their massive quantity of “approved” loans—drew down nearly $7.5 billion in funding from the PPPFL program.

The plan instituted by Capital Plus and its parent company, Crossroads, paid off as they amassed $970.5 million in revenue—a 2,446% increase from the year before. One of the immediate strategies implemented with the new windfall of cash was a $238.9 million dividend that was quickly paid out after the PPP window closed. Most of the money went to insiders in the company like Defendants Alpert and Donnelly, who together owned a majority of the outstanding shares of Crossroads. This resulted in a $149,918,480 payday between the two
individuals. Donnelly was also a director and CEO of Crossroads, as well as the CEO of Capital Plus. Alpert was a director and the Chairman of the Board of Crossroads.

While income soared for Capital Plus and Crossroads, complaints from individuals approved for loans did as well. Plaintiffs alleged that funds were never disbursed to them and others. In effect, Capital Plus and Crossroads allegedly collected the fees associated with approval and interest on the $7.5 billion in PPPFL funds but never completed their obligation to countless individuals who were in dire straits financially.

Because of the alleged faults of Crossroads, Capital Plus, and its directors, a group of Plaintiffs sued under the Class Action Fairness Act seeking redress of their injuries under four theories: (1) Breach of Contract; (2) Unjust Enrichment; (3) California’s Unfair Competition Law (“UCL”); and (4) the North Carolina Unfair and Deceptive Trade Practices Act (“NCUDTPA”).

Defendants Alpert, Donnelly, and Crossroads all filed motions to dismiss on various grounds, including that, as owners of Crossroads (Alpert and Donnelly together owned 62.8% of the outstanding shares of Crossroads) and Capital Plus (Crossroads owned 100% of the membership interests of Capital Plus), the “companies’ liability shields cover them.”

The court began by discussing Alpert’s and Donnelly’s situation. It noted that, under Texas law, the shareholder or affiliate of a corporation “may not be held liable to the corporation or its obligees with respect to . . . any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.” TEX. BUS. ORGS. CODE § 21.223(a)(2). The court observed that “[a]n exception exists if the defendant ‘caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.’” Id. § 21.223(b). (The court also noted that “[a]lthough § 21.223 refers only to corporations, TEX. BUS. ORGS. CODE ANN. § 101.002(a) extends its reach to limited liability companies as well.)

Given the statutory language, the court concluded that “the liability shield does not apply to the Individual Defendants, and they must face the claims brought against them”:

Here, Donnelly and Alpert both fall into affiliate shareholder status. And because they fall into the text of the statute, the Court must address two things: (1) whether the claims against them “arise out of” or “relate to” a contractual obligation of the corporation; and (2) whether the complaint sufficiently alleges that the Individual Defendants perpetrated an actual fraud. . . .

The first issue is whether the claims against Donnelly and Alpert “arise out of” or “relate to” a contractual obligation. The terms “relating to” and “arising out of” are broad and flexible and should be construed as such.

Plaintiffs assert that because they do not make any contractual claims against the Individual Defendants, the liability shield afforded by § 21.223(a)(2) does not apply. The Court disagrees.

Plaintiff’s claims are noncontractual in nature and relate to three causes of action: unjust enrichment, the UCL, and the NCUDTPA. Plaintiffs allege that the Individual Defendants led, directed, and controlled their companies to engage in business practices leading to their unjust enrichment at the expense of the SBA and the loss of Plaintiffs. And while Plaintiffs attempt to creatively plead around the liability shield by claiming that they are only concerned with the dividend and SBA fees, it does not change the proximity of the Individual Defendants’ actions to the contractual issue. Plaintiffs’ only tie to the SBA fees at issue is their contractual relationship with Capital Plus. At bottom, the gravamen of Plaintiffs’ claims arise from the unfulfilled loans, which they assert is a breach of contract in the same complaint. Without this contractual relationship, Plaintiffs have no ground to stand on as to why the Individual Defendants were unjustly enriched or engaged in unfair business practices related to them. Thus, all of Plaintiffs’ noncontractual claims relate to or arise from the conduct surrounding the unfulfilled loan agreements—which are contractual in nature.

Plaintiffs’ claims fall under § 21.223(a)(2). And thus, for their claims against the Individual Defendants to survive, they must show that actual fraud is present. . . .
Evading limited liability requires a plaintiff to show that: “(1) the affiliate caused the corporation to be used to perpetrate and did perpetrate an actual fraud on the obligee; and (2) the fraud was primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.” *Thomas v. Hughes*, 27 F.4th 995, 1016 (5th Cir. 2022) (citing TEX. BUS. ORGS. CODE § 21.223(a)(2)).

“Actual fraud”—as required by § 21.223(a)(2)—is distinct from the tort of fraud and only requires a plaintiff to show “dishonesty of purpose or intent to deceive.” Because Rule 9(b) states that “conditions of a person’s mind may be alleged generally,” actual fraud is evaluated under Rule 12(b)(6) and not the more restrictive Rule 9 standard. *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) (Fitzwater, J.). As a result, courts “may deduce fraudulent intent from all of the facts and circumstances.” And “courts generally look at the totality of a shareholder’s actions to determine whether he committed actual fraud.” Thus, “all that is required at the pleading stage is a general allegation of [a defendant’s] dishonest purpose or deceitful intent with respect to [the company] and its transactions.”

Defendants assert that Plaintiff does not plead actual fraud with enough specificity and only relies on a conclusory statement that Alpert and Donnelly “directed” and “controlled” the companies. The Court disagrees.

Considering the full context of the complaint and all allegations in it, actual fraud is met. Plaintiffs allege that Alpert and Donnelly “controlled and directed Crossroads’s and CPF’s PPP lending activities,” including a lending scheme where the company . . . “acted intentionally, knowingly, and maliciously” to maximize SBA fees and disregard loan obligations to Plaintiffs. Indeed, despite having fewer resources than more prominent financial institutions, a modest regional LLC under Donnelly and Alpert’s control managed to process a larger volume of PPP loans than Bank of America, PNC Bank, TD Bank, and Wells Fargo combined. This resulted in the approval of “472,036 PPP loans totaling over $7.5 billion in funds” in a very short time window. And while Plaintiffs do not allege fraud in the complaint, the “overarching theme of the [Plaintiffs’] complaint, regardless of the accompanying legal labels,” is that Alpert and Donnelly led and directed CFP and Crossroads to maximize fees in order to enrich themselves and other insiders in the company. But doing so was at the detriment of those who applied for loans. Indeed, the only people enriched by the alleged scheme were insiders after issuing the dividend. And while Plaintiffs use no magic words in their complaint, “all the facts and circumstances” surrounding the conduct alleged support a finding of actual fraud.

Personal benefit requires a plaintiff to plead that “funds derived from the corporations’ allegedly fraudulent conduct were pocketed by or diverted to the individual defendant.” If funds are only used for a corporation’s benefit or are diverted to other ventures, a plaintiff’s claim fails.

Here, personal benefit is met for a hundred-million reasons. The Individual Defendants both received paydays in a quickly announced dividend—equal to nearly 80% of the outstanding share price at the time. Alpert (25%) and Donnelly (37.8%) together owned 62.8% of a company’s outstanding shares where the $238.9 million dividend was quickly upstreamed and paid out to shareholders after the PPP window closed. In the end, Alpert and Donnelly collectively pocketed $149,918,480 in cash from the special dividend. This easily meets the standard of a personal benefit. . . .

Because actual fraud is present in the context of Plaintiffs’ complaint and the Individual Defendants personally benefited from their alleged conduct, the liability shield does not apply to the Individual Defendants, and they must face the claims brought against them.

The court then applied a similar analysis to Crossroads’ situation, and it ultimately rejected Crossroads’ assertion that “it must be dismissed from the case because [it] is a member of Capital Plus and shielded under limited liability”:

Here, Crossroads is a shareholder/member, so the statute applies. So—once again—the Court must address two things: (1) whether the claims against them “arise out of” or “relate to” a
contractual obligation of the corporation; and (2) whether the complaint sufficiently alleges that the Individual Defendants perpetrated an actual fraud.

The first issue is whether the claims against Crossroads “arise out of” or “relate to” a contractual obligation. As established in the section dealing with the Individual Defendants, the claims asserted by Plaintiffs are contractual in nature.

As stated in depth before, the breach-of-contract claim is clearly contractual, and the other claims arise out of and relate to the alleged contractual relationship with Capital Plus. At issue is the conduct surrounding the unfulfilled loan agreements—which are contractual in nature.

Plaintiffs’ claims thus fall under § 21.223(a)(2). And for their claims against Crossroads to survive, they must show that actual fraud is present.

Once again, to evade limited liability a plaintiff [must] show that “(1) the affiliate caused the corporation to be used to perpetrate and did perpetrate an actual fraud on the obligee; and (2) the fraud was primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.” Thomas, 27 F.4th at 1016 (citing TEX. BUS. ORGS. CODE § 21.223(a)(2)).

Crossroads asserts that Plaintiffs do not plead actual fraud with enough specificity and that they only rely on conclusory statements of regular business activity—insufficient to pierce the corporate veil of Capital Plus. The Court disagrees.

As stated before “actual fraud” requires a plaintiff to show “dishonesty of purpose or intent to deceive.” Courts “may deduce fraudulent intent from all of the facts and circumstances.” And “all that is required at the pleading stage is a general allegation of [a defendant’s] dishonest purpose or deceitful intent with respect to [the company] and its transactions.” In a business-transaction context that might be routine in a vacuum, actual fraud can be inferred from the proximity or volume of transactions in context with other circumstances.

In Weston Group, the court found that a plaintiff’s allegations were sufficient to plead actual fraud. There the plaintiffs alleged that (1) a business promised to pay but never followed through, (2) an LLC was used to funnel money between different companies, and (3) the corporate defendant received government benefits that were supposed to go to plaintiffs but were funneled upstream to insiders instead. The court reasoned that even though the regular movement of money between companies is not enough to plead actual fraud, the movements of money alongside the other allegations and circumstances “[rose] above the level of a conclusory description.”

Like the pleadings in Weston Group, which alleged (1) unfulfilled payments, (2) upstreamed money, and (3) improperly used government benefits, here, Plaintiffs allege the same but on a grander scale. Plaintiffs allege that Crossroads exercised its control over Capital Plus and its PPP lending scheme. The primary purpose of the alleged plan was to maximize SBA fees to the detriment of loan obligations it owed to Plaintiffs. Capital Plus approved “472,036 PPP loans totaling over $7.5 billion in funds” in a short time window. Again, the “overarching theme of the [Plaintiffs’] complaint, regardless of the accompanying legal labels,” is that Crossroads saw a window to maximize fees earned at the detriment of those who applied for loans to enrich itself and other insiders in the company. An awareness of the nearly half-a-million loan agreements was often noted in Crossroads financial statements and shareholder letters. And Crossroads also often noted strategies and timelines on the company’s policy toward these loans. So this was anything but a regular business transaction or transfer between parent and subsidiary—it was a transformational plan executed with the full knowledge and control of Crossroads.

Indeed, Crossroads’s involvement in the PPP became the main event as it reported that “the Company’ received $970.5 million in total revenue of which $930 million was PPP loan fees in 2021 compared to just $27.5 million in total revenue the prior year.” The subsidiary LLCs’ profits on the back of the PPP program dwarfed those of the parent corporation. It was a modern-day gold rush as Crossroads—knowing that many of Plaintiffs’ loans remained unfunded—upstreamed hundreds of millions of dollars in PPP-related loan processing fees and PPPLF loan advances. And once the PPP window closed, Crossroads paid out a $238.9 million dividend to its insiders and kept the rest of the profit for the corporation’s benefit.

Lastly, the funds at issue were not corporate funds owned by Crossroads. These funds were earned because of Capital Plus and Crossroads engaging in an emergency government benefit
program. Plaintiffs allege that Crossroads kept fees for processing the loans and sat on PPPFL advances from the federal reserve and milked interest on the nearly $7.5 billion in cash it gained . . . that was intended to cover loan disbursements that Plaintiffs were entitled to. Plaintiffs even allege that the PPPFL funds were obtained by lying about loans that were never completed. Considering the full context of the complaint that alleges (1) unfulfilled payments, (2) upstreamed money, (3) a wild lending spree that overhauled the nature of Crossroads’s business model, and (4) improperly used government programming funds, actual fraud is met.

Again, personal benefit requires a plaintiff to plead that “funds derived from the corporations’ allegedly fraudulent conduct were pocketed by or diverted to the individual defendant.” If funds are only used for a corporation’s benefit or are diverted to other ventures, a plaintiff’s claim fails.

As discussed above, personal benefit is met for a hundred-million reasons present in Crossroads’ income statements and its insiders’ bank accounts . . .

Because actual fraud is present in the context of Plaintiffs’ complaint and Crossroads personally benefited from its alleged conduct, the liability shield does not apply, and it must face the claims brought by Plaintiffs.


“‘Due to the limited liability that corporations and [limited liability companies] offer to their [managers], a plaintiff seeking to impose individual liability on an owner must ‘pierce the corporate veil.’ Texas law insulates members and managers of LLCs from the corporation’s contractual or contractually related obligations ‘on the basis that the holder . . . is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.’ Tex. Bus. Orgs. Code Ann. § 21.223(a)(2) (West 2023); [i/j d. at 101.002 (extending the provisions regulating and restricting veil piercing of corporations to an LLCs’ managers and members). Section 21.223(b), however, creates an exception to this limitation. A shareholder may be personally liable for a corporation’s obligations ‘if the obligee demonstrates that the . . . beneficial owner . . . 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 . . . beneficial owner.’ Tex. Bus. Orgs. Code Ann. § 21.223(b).

To hold Menon liable for the breach of contract or account stated claims, Torshare must show that Menon used the corporation to perpetrate an actual fraud against Torshare for his personal benefit. Actual fraud is defined as ‘involv[ing] dishonesty of purpose or intent to deceive.’ However, Torshare has not offered any evidence or argument in its Amended Complaint or response to [iGlo LLC’s] Motion to show that Menon’s actions involved dishonesty or a purpose or intent to deceive Torshare. Moreover, Torshare has not offered any evidence that the breach of contract or failure to pay the account directly benefited Menon. Accordingly, Menon is entitled to summary judgment on the breach of contract and account stated claims brought against him as a matter of law as Torshare has not raised an issue for trial on whether the Court should pierce iGlo’s corporate veil and hold him liable.”

L. Creditor’s Remedies: Charging Order, Turnover Order, Receivership


A debtor agreed to appointment of a receiver as requested by the debtor’s creditor, and the trial court placed not only the debtor, but two limited liability companies in which the debtor owned a membership or equitable interest, as well as other “affiliates” of the debtor, into receivership. A third-party creditor or non-managerial member of the LLCs moved to dissolve the receiverships over the LLCs, and the court of appeals held that (1) the third party had standing, as a creditor of the LLCs, to move to dissolve the receiverships; (2) the LLCs did not consent to the receiverships; (3) the LLCs were not “property” of the debtor; and (4) the LLCs were not “business” of the debtor.

G.E.T. Marketing, LLC ("GET"), a creditor of PSW Real Estate, LLC ("PSW"), petitioned for receivership over PSW based on its imminent insolvency. PSW owned a membership or equitable interest in SB Webberville Road, LLC ("Road") and PSW Webberville LLC ("Webberville"). PSW agreed to the receivership and the order executed by the trial court, which placed PSW and 55 “affiliates” into receivership. Two of the 55 affiliates were
Road and Webberville. No evidence was presented showing, nor did GET’s petition argue, that PSW, Road, or Webberville were alter egos of each other or subject to having their respective “corporate” identities disregarded. Additionally, GET did not petition for a receiver over the 55 “affiliates,” prove it was a creditor of Road or Webberville, or show that Road or Webberville were insolvent. Ovation Finance Holdings 5 LLC (“Ovation”), a creditor or member of Road and Webberville, petitioned for dissolution of the receivership, thus raising the question of whether a creditor or non-managerial member of Road or Webberville had standing to attack the trial court’s action. The court of appeals held that the trial court should have granted Ovation’s motion to dissolve the receivership based on the distinct corporate identities involved, the definitions of “property” and “business” in the receivership statute, and settled authority regarding receiverships.

In its analysis, the court of appeals first reviewed relevant provisions of the applicable receivership statute:

Section 11.404 of the Texas Business Organizations Code authorizes courts to appoint a rehabilitative receiver to conserve the “property and business” of an entity and to avoid damage to interested parties. TEX. BUS. ORGS. CODE ANN. § 11.404(b)(1). The authority comes with caveats, though. Appointment is allowed if “all other requirements of law are complied with” and “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 ANN. § 11.404(b)(2), (3); see Ritchie v. Rupe, 443 S.W.3d 856, 863-64 (Tex. 2014) (discussing former rule). Furthermore, the legislature defined “business” to mean “a trade, occupation, profession, or other commercial activity,” TEX. BUS. ORGS. CODE ANN. § 1.002(5), and “property” to include “tangible and intangible property and an interest in that property.” TEX. BUS. ORGS. CODE ANN. § 1.002(77).

The court pointed out that the trial court’s decision to appoint a receiver is an exercise of the court’s discretion subject to the standard of abused discretion, i.e., when the trial court acts without reference to any guiding rules and principles, such as misapplying or misinterpreting the law.

Next the court discussed the principle that corporations have separate legal identities that generally must be respected, eventually noting that LLCs and their members are similarly separate and distinct from one another:

To the foregoing, we add another requirement of the law. It obligates us to recognize that corporations have separate identities, which separateness generally must be observed. Neff ex rel. Weatherford Int’l Ltd. v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (quoting Docudata Records Mgmt. Servs., Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). For example, a subsidiary corporation and its parent corporation are separate and distinct “persons” as a matter of law. ETC Tex. Pipeline, Ltd. v. Addison Expl. & Dev., LLC, 582 S.W.3d 823, 837 (Tex. App.—Eastland 2019, pet. denied), overruled in part on other grounds in Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021). Unless the corporate veil is used as a sham, it matters not that the parent dominates or controls the subsidiary or otherwise treats it as its instrumentality or agency. Id. Nor does commonality of directors or managers alone permit courts to avoid the separateness of which we speak. Id. Similarly, because of their separate identities, corporations generally are not liable for each other’s obligations. Id.

The court concluded that Ovation had standing to seek to vacate the receiverships over Road and Webberville because the Texas Supreme Court has stated that “when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court” and “are bound by the court’s orders approving claims and determining rights in and to the property or its proceeds” if they have notice of the proceedings.

The court next explained that there was no evidence that Road or Webberville consented to being placed in receivership, and neither the receiver nor GET relied on that ground in their appellate briefing. Rather, they argued that placing 55 “affiliates” of PSW in receivership was appropriate because they were the “property and business” of PSW as contemplated by the receivership statute. The court of appeals disagreed with that contention based on the following analysis:

No one disputes that PSW was a member of or otherwise owned an “equity interest” in Road and Webberville. Nor does anyone suggest the corporate veils of Road and Webberville were used as a sham in some way by PSW. Without the latter in play then, both we and the trial court must respect the distinct legal status or identity of Road and Webberville. Moreover, PSW’s membership interest likens to owning stock in a corporation. As such, the former owned an interest in the latter, and that interest constituted property of PSW. TEX. BUS. ORGS. CODE ANN. at § 101.106(a) (stating that a membership interest in a limited liability company is personal property). Owning an interest in them, though, did not make PSW, Road, or Webberville one and the same. Nor did it make the entities Road and Webberville themselves property of PSW; to hold otherwise would be to ignore the separate identities of each. That means PSW’s property subject to receivership under § 11.404(a) included its membership interest in the two other distinct entities, not the entities themselves.

As for whether Road and Webberville were PSW’s “business” under § 11.404(a), we initially say that words grouped in a list should be given related meaning when construing a statute. Ritchie, 443 S.W.3d at 869. We heed that rule of construction when looking at the statutory definition of “business” assigned in the Business Organizations Code. After mentioning “trade,” “occupation,” and “profession,” the legislature ended the definition with the phrase “or other commercial activity.” TEX. BUS. ORGS. CODE ANN. § 1.002(5). The latter passage sets the framework within which we read the former nouns. Simply put, “or other ... activity” alludes to what the entity does or its job, so to speak. Thus, trade, occupation, and profession are to be read as alluding to the insolvent’s business and its scope.[footnote omitted] So, in permitting a trial court to “appoint a receiver for the entity’s ... business ...” TEX. BUS. ORGS. CODE ANN. § 11.404(a), the legislature merely allowed the court to place a receiver in the shoes of the insolvent entity. Once in those shoes, the receiver could then control or manage the insolvent’s job, trade, or commercial activity, as allowed by law. Simply put, the focus rests on gaining control of the insolvent’s business. The statute says nothing about placing distinct legal entities (irrespective of their financial stability) into receivership as well simply because the insolvent may have some financial interest in them. To do that would be to ignore the distinct legal status of the other entities. It would be tantamount to ignoring the expressed statutory conditions precedent to a receivership, such as insolvency, deadlocked management, illegal action by governing persons, the wasting of assets, or deadlocked shareholders. See TEX. BUS. ORGS. CODE ANN. § 11.404(a)(1)(A)-(E) (listing the conditions). And, we hesitate to read into the statute more authority than its own definitions encompass, especially when receiverships are harsh remedies, Fortenberry v. Cavanaugh, No. 03-04-00816-CV, 2005 WL 1412103, at *——— ———, 2005 Tex. App. LEXIS 4665, at *5-6 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op), to be cautiously applied. Elliott v. Weatherman, 396 S.W.3d 224, 228-29 (Tex. App.—Austin 2013, no pet.). Here, that means the trial court could permit a receiver to step into PSW’s shoes and control the latter’s job, trade, work, vocation, or commercial activity. It does not mean the trial court could place into receivership distinct legal entities simply because PSW’s business included commercial interaction with them.

...
In sum, PSW’s insolvency may have warranted the appointment of a receiver. Yet, the extent of that appointment, given our construction of § 11.404(a), was limited. The statute did not allow the trial court to exceed the definitions of “the entity’s property and business” or disregard other statute requirements. See TEX. BUS. ORGS. CODE ANN. § 11.404(a). Nor did it allow the court to disregard the distinct legal identities of other corporations or limited liability companies. So, with PSW’s being the purported insolvent “entity” at issue, the receivership could extend no further. It could not ensnare Road or Webberville into their own receiverships merely because they may be subsidiaries of or have business dealings with PSW.

Thus, the court of appeals held that the trial court abused its discretion by placing Road and Webberville in receivership, and the court ordered that the receiverships over Road and Webberville be dissolved.


In this companion opinion to the opinion summarized below, the court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. Because the court of appeals concluded that there was not evidentiary support for an implied finding by the trial court that a receiver had authority to nonsuit a limited partnership’s lawsuit, the trial court reversed the trial court’s decision to dismiss the limited partnership’s suit and remanded for further proceedings.

In another lawsuit (the “Princeton Lawsuit”), a Harris County district court entered an order (the “Receivership Order”) appointing attorney Seth Kretzer as a receiver to collect on a judgment owed by World Class Capital Group (“WCCG”) and Great Value Storage to Princeton Capital Corporation. The Receivership Order, inter alia, (1) directed WCCG to turn over any “interests” it had in any partnership or limited liability company; (2) gave Kretzer the authority to sell, manage, and operate any limited liability company in which WCCG is a “member”; and (3) authorized Kretzer to take possession of WCCG’s assets, including “causes of action.”

In his capacity as the receiver, Kretzer entered an appearance in a lawsuit pending in a Travis County district court (the “La Zona Rio Lawsuit”) in which WC 4th and Rio Grande, LP (“Rio Grande, LP”) had sued Appellee La Zona Rio, LLC (“La Zona Rio”) to stop La Zona Rio from foreclosing on a building owned by Rio Grande, LP. In his notice, Kretzer stated that he was replacing the attorney for Rio Grande, LP, which he asserted was a “subsidiary” of WCCG; however, he filed no evidence supporting that contention.

Rio Grande, LP filed a motion challenging Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, arguing it was neither a subsidiary of WCCG nor an entity owned or managed by WCCG, but instead a separate legal entity. The trial court did not rule on the motion, but impliedly found that Kretzer had the authority to act on Rio Grande, LP’s behalf and granted a joint motion to dismiss the lawsuit based on representations made by Kretzer and La Zona Rio’s attorney that the parties had resolved their claims against each other.

Rio Grande, LP, through its retained counsel, Burford Perry, filed this second lawsuit against La Zona Rio in Travis County, bringing claims of quiet title and trespass to try title, and further seeking a declaration that it was the true owner of the property. In its petition, which was assigned to a different Travis County judge, Rio Grande, LP again challenged Kretzer’s authority to act on its behalf in the La Zona Rio Lawsuit, to enter into the settlement agreement with La Zona Rio, and to sign a deed in lieu of foreclosure on its behalf pursuant to that agreement. Kretzer then filed a notice of nonsuit, purporting to act in his capacity as the “court appointed Receiver for World Class Capital Group, LLC, Manager of WC 4th and Rio Grande, LP, Plaintiff.” Rio Grande, LP, through its retained attorney, filed a withdrawal of notice of nonsuit, contending that Kretzer was not authorized to act on its behalf in the lawsuit and that the notice was filed without Rio Grande, LP’s permission. Rio Grande, LP also filed a motion to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure, challenging Kretzer’s authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit as well as his authority to act on its behalf in the second lawsuit. In his opposition to the Rule 12 motion, Kretzer included various “company agreements” setting forth the relationships between WCCG, Rio Grande, LP and various other World Class entities, as follows:

1. Natin Paul is the president, sole member, and manager of World Class Capital Group, LLC.
2. World Class Capital Group, LLC is the sole member and manager of World Class Real Estate, LLC.
3. World Class Real Estate, LLC is the sole member of WC 4th and Rio Grande GP, LLC.
4. WC 4th and Rio Grande, LP was created as a partnership between WC 4th and Rio Grande GP, LLC, as the general partner and three other limited partners.
Kretzer argued that these agreements demonstrated a sufficient relationship between Natin Paul; WCCG; Rio Grande, LP; and its general partner, WC4th and Rio Grande, GP, LLC to allow Kretzer to seize control of the La Zona Rio Lawsuit pursuant to his authority under the Receivership Order.

Ultimately, the trial court denied Rio Grande, LP’s motion and granted Kretzer’s motion for entry of order of dismissal and ordered the case dismissed with prejudice. Rio Grande, LP appealed the order of dismissal, and the court of appeals addressed the appeal of this second lawsuit in this opinion.

In this second lawsuit, Rio Grande, LP continued to assert Kretzer lacked the authority to act on its behalf in the La Zona Rio Lawsuit, but Rio Grande, LP also challenged Kretzer’s authority to act on its behalf in this second lawsuit, specifically, to file a nonsuit of its case in his capacity as the receiver appointed in the Princeton Lawsuit. The court of appeals stated that its focus here was the challenge to Kretzer’s authority to file the nonsuit in this second lawsuit, as the filing of the nonsuit led to the trial court’s dismissal order, which in turn was the subject of Rio Grande, LP’s appeal. The court concluded that the record did not support the trial court’s implied finding that Kretzer had authority to nonsuit this second lawsuit brought by Rio Grande, LP against La Zona Rio or the trial court’s dismissal pursuant to the filing of the nonsuit.

As set forth above, the Receivership Order gave Kretzer the authority to seize control of assets, including causes of action, belonging to judgment debtor WCCG. But as we explained in our first opinion, to the extent Rio Grande, LP is considered a separate legal entity entitled to the Texas Business Organizations Code protections, the Receivership Order did not give Kretzer the authority to seize its partnership property or its causes of action. And in the present case, while Kretzer has provided more evidence to establish that WCCG and Rio Grande, LP are related—and that they may even have a parent-subsidiary relationship—he has still not provided any evidence that would have allowed the trial court to conclude that WCCG treated Rio Grande, LP or its general partner (Rio Grande, GP, LLC) as alter egos. Similarly, there is no evidence in the record before us that would have otherwise allowed the trial court to disregard the separate business structure of each entity and treat them as one and the same as WCCG.

In addition, although Kretzer relied heavily on the provision in the Receivership Order giving him the authority to take over the management and operation of any LLC in which WCCG is a member, he has still not produced evidence to establish that WCCG was in fact a member of Rio Grande, GP, LLC such that he would have been entitled to control Rio Grande, LP’s lawsuits by taking over management of the LLC. Instead, the evidence that Kretzer himself produced demonstrates that the only member in Rio Grande, GP, LLC is World Class Real Estate, LLC, which is two steps removed from WCCG in his organizational chart. And again, Kretzer produced no evidence to support a finding that we should disregard the separate business structures of the various entities to allow Kretzer to treat them as one and the same for purposes of his collection efforts.

Thus, the court reversed the trial court’s decision to dismiss this second lawsuit and remanded to the trial court to reconsider its decision consistent with the factors set forth in this opinion and its companion opinion (summarized below).

**WC 4th & Rio Grande, LP v. La Zona Rio, LLC**

The court of appeals withdrew a prior opinion (summarized in last year’s materials for this program) and substituted this opinion. The court of appeals reversed a trial court’s judgment dismissing a case based on a settlement purportedly entered into by a receiver on behalf of a limited partnership because the trial court did not determine whether the receiver had authority to act on behalf of the limited partnership. The record did not support an implied finding that the receiver had authority to act on behalf of the limited partnership and the record did not support the implied finding that the receiver had authority to act on behalf of the limited partnership in settling the lawsuit and seeking dismissal.

Appellant WC 4th and Rio Grande, LP ("Rio Grande, LP") sued Appellee La Zona Rio, LLC ("La Zona Rio") in Travis County seeking to avoid foreclosure on a building in downtown Austin (the "Building") owned by Rio Grande, LP (the "La Zona Rio Lawsuit"). Local real estate developer Natin Paul signed the promissory note secured by the Building on behalf of Rio Grande, LP as the president of WC 4th and Rio Grande GP, LLC — Rio...
Grande, LP’s general partner. After Rio Grande, LP defaulted on the note, La Zona Rio initiated foreclosure proceedings. Rio Grande, LP attempted to pay off the amount owed on the note, but La Zona Rio rebuffed its attempts. Rio Grande, LP then filed this lawsuit, i.e., the La Zona Rio Lawsuit, claiming La Zona Rio was in breach of contract and seeking a declaratory judgment regarding its right to pay off the note under the parties’ loan agreement.

While the La Zona Rio Lawsuit was pending, a Harris County district court appointed attorney Seth Kretzer to collect on a judgment owed by World Class Capital Group, LLC (“WCCG”) and Great Value Storage, LLC (“GVS”) to Princeton Capital Corporation (“Princeton”) in an unrelated lawsuit (the “Princeton Lawsuit”). The order (the “Receivership Order”) gave Kretzer broad powers to assist Princeton in its collection efforts, such as directing WCCG “to identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” The Receivership Order also authorized Kretzer “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.” Relying on this authority, Kretzer then entered an appearance in the La Zona Rio Lawsuit stating he was “appear[ing] as counsel of record” for WCCG and its “subsidiary,” Rio Grande, LP, and purporting to replace prior counsel of record for Rio Grande, LP. Kretzer then entered into a settlement agreement with La Zona Rio that ultimately allowed Kretzer to deed the building to La Zona Rio in lieu of foreclosure for the sum of $10. That same day, La Zona Rio’s attorney and Kretzer, again purporting to act on behalf of Rio Grande, LP, filed a joint motion to dismiss the La Zona Rio Lawsuit with prejudice pursuant to the agreement.

Rio Grande, LP, through its retained attorney, Brian Elliott, filed a motion objecting to Kretzer’s authority. In its motion, Rio Grande, LP conceded that Kretzer had been appointed as a receiver in the Princeton Lawsuit and attached a copy of the Receivership Order, but Rio Grande, LP contested Kretzer’s authority to intervene in the lawsuit. First, Rio Grande, LP pointed out that Kretzer claimed to have authority to act as Rio Grande, LP’s attorney based on the allegation that Rio Grande LP was a “subsidiary” of WCCG, yet Kretzer provided no evidence regarding Rio Grande LP’s status as such a “subsidiary.” Rio Grande, LP denied that it was a subsidiary of WCCG and asserted that it was a separate legal entity that was neither owned nor managed by WCCG. Second, Rio Grande, LP acknowledged that the Receivership Order ostensibly allowed Kretzer to seize the membership interest of any limited liability company or limited partnership in which WCCG was a member and to sell, manage, and operate any such limited liability company in which WCCG was a member as the receiver deemed appropriate, but Rio Grande, LP asserted that Kretzer failed to establish that WCCG in fact had any such interest in either the LLC serving as the general partner or in Rio Grande, LP itself. In addition, Rio Grande, LP argued that even if WCCG had an interest in Rio Grande, LP, Kretzer would not be permitted to seize any assets belonging to Rio Grande, LP because under Texas law, partnership assets belong to the partnership, and a charging order is the exclusive remedy by which to collect on a judgment debtor’s interest in a partnership or limited liability company. (The court explained in a footnote that a charging order charges the partnership interest of the judgment debtor to satisfy the judgment by giving the judgment creditor the right to receive any distribution to which the judgment debtor would otherwise be entitled. The court pointed out that, while the charging order constitutes a lien on judgment debtor’s interest, it does not entitle the judgment creditor to participate in the partnership or compel distributions. The court commented, however, that a Chapter 31 turnover order and receivership order may be used to monitor partnership distributions and effectuate a charging order.)

The trial court granted the joint motion to dismiss without ruling on Rio Grande, LP’s objection. Rio Grande, LP appealed, again arguing that Kretzer lacked the authority to act on its behalf.

In the course of concluding that Rio Grande, LP had the right to challenge Kretzer’s authority to enforce the Receivership Order against it in the La Zona Rio Lawsuit, the court of appeals discussed the significance of the separate existence of Rio Grande, LP as distinguished from the entities that were parties in the Princeton Lawsuit in which the Receivership Order was entered.

As explained below, we conclude that Rio Grande, LP was a third-party stranger to the Princeton Litigation and therefore, the trial court in the La Zona Rio Lawsuit was required to determine Rio Grande, LP’s substantive rights before allowing Kretzer to enforce the Receivership Order against it.

In reaching this conclusion, we emphasize that WCCG and Great Value Storage were the only two defendants in the Princeton Lawsuit and the only two named parties in the Receivership
Order. And although La Zona Rio at times seeks to treat WCCG and its affiliated World Class entities formed by Natin Paul as one and the same, the only evidence in the record demonstrates otherwise. As indicated above, Rio Grande, LP submitted unrebutted evidence in the trial court indicating it was formed as a limited partnership in accordance with the Texas Business Organizations Code. And it is well established that a business entity, such as a limited partnership, is a distinct legal entity in the eyes of the law, separate and apart from its partners and members. See Pike v. Texas EMC Mgmt., LLC, 610 S.W.3d 763, 778 (Tex. 2020) (recognizing that a business organization is a “separate and independent entity”); Am. Star Energy & Minerals Corp. v. Stowers, 457 S.W.3d 427, 431 (Tex. 2015) (recognizing the “Legislature ‘unequivocally embrace(d) the entity theory of partnership’ when it enacted the Texas Revised Partnership Act (TRPA), since codified in the Texas Business Organizations Code”); see also Mims Bros. v. N. A. James, Inc., 174 S.W.2d 276, 278 (Tex. App.—Austin 1943, writ ref’d) (court is required to treat a partnership as a separate legal entity, “at least to the extent of obtaining and enforcing a judgment by or against it”). Similarly, the evidence demonstrated that Rio Grande, LP’s general partner, WC 4th and Rio Grande, GP, LLC, was a limited liability company, which is also a distinct legal entity, separate and apart from its members—even when there is only one member in the LLC. See Sherman v. Boston, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing that a limited liability company is a legal entity separate from its sole member); see also Daniels v. Empty Eye, Inc., 368 S.W.3d 743, 752 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (limited partner who also was president of the corporation serving as general partner of the limited partnership was an entity distinct from the corporate general partner).

Moreover, we note that Kretzer sought to enforce the Receivership Order against Rio Grande, LP, claiming that Rio Grande, LP was a “subsidiary” of WCCG but providing no proof of such. But even if Rio Grande, LP or its general partner could be considered subsidiaries of WCCG, this would not rob either entity of its status as a separate and distinct legal entity apart from WCCG. To the contrary, it is well-established that subsidiary and parent companies are “separate and distinct” entities as a matter of law, and the separate nature of such entities “will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency.” R&M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.) (citing SSP Partners v. Gladstrong Investments (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008) (recognizing that the “[c]reation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace”); see generally BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 798 (Tex. 2002) (recognizing that “Texas law presumes that two separate corporations are indeed distinct entities”).

In addition, “[a] parent company and its subsidiary maintain their independence even though the same persons are directors or managers of both corporations.” Neff v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 376 (Tex. 1984)). “The same is true even though most or all the capital stock of a subsidiary corporation is owned by its parent corporation.” Id. (citing Docudata Records Mgmt. Services, Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). Thus, as the Texas Supreme Court has stated, it has “never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances.” R&M Mixed Beverage, 578 S.W.3d at 229–30 (citing SSP Partners, 275 S.W.3d at 455).

We recognize that in certain situations, a court may disregard a company’s business structure and treat a subsidiary company as being an “alter ego” of its parent, such as when there is evidence of “abuse, or ... injustice and inequity.” See id. at 230 (citing SSP Partners, 275 S.W.3d at 451 (recognizing that the limitation on liability afforded by the corporate structure can be ignored only “when the corporate form has been used as part of a basically unfair device to achieve an inequitable result”)); but see Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy, 508 S.W.3d 569, 585 (Tex. App.—El Paso 2016, no pet.) (recognizing that “[a] subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership,
a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders”).

Here neither La Zona Rio nor Kretzer produced any evidence in the trial court that would have allowed the court to conclude that WCCG used Rio Grande, LP or its general partner as its alter ego. Stated otherwise, there is no evidence in the record to support the conclusion that either Rio Grande, LP or its general partner were not legally distinct from WCCG. Nor does La Zona Rio attempt to assert as much in its appellate briefing. At best, it alleges that the various World Class entities are “affiliates” of WCCG and that Natin Paul does business through these various entities. [footnote omitted] However, as set forth above, regardless of these affiliations, the evidence in the record reflects that Rio Grande, LP and its general partner are separate legal entities, and as such, they had the right to have their substantive rights adjudicated in the trial court before Kretzer could be allowed to enforce the Receivership Order against them.

Next the court of appeals examined whether the trial court could have impliedly found that Kretzer properly exercised his authority in enforcing the Receivership Order against Rio Grande, LP, and the court concluded that the evidence was not sufficient to support such an implied finding. La Zona Rio pointed to three provisions in the Receivership Order that it contended support such a finding, and the court addressed each of them and concluded that they did not support such a finding.

A. The provision requiring WCCG to turn over any “interests” it had in any partnership or limited liability company

First, La Zona Rio points to the provision in the Receivership Order directing WCCG—as the judgment debtor—to “identify and turn over to [Kretzer] all interests of [WCCG] in any business or venture, including limited liability companies and limited partnerships.” Even assuming WCCG had an “interest” in Rio Grande, LP or its general partner—a fact that neither Kretzer nor La Zona Rio established on this record—under Texas law, WCCG’s only “interest” in the partnership or the LLC would be limited to its share of the profits and its right to receive distributions. See Pajooh, 518 S.W.3d at 562 (recognizing that an individual partner has no ownership interest in the specific property belonging to the partnership and that its interests are limited to his share of profits and losses or similar items and the right to receive distributions); see also TEX. BUS. ORGS. CODE ANN. § 152.101 (partnership property is “not property of the partners,” and a partner “does not have an interest in partnership property”); Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829, 846 (Tex. App.—Corpus Christi 2017, no pet.) (recognizing that a member of a limited liability company or his assignee does not have an interest in any specific property of the company) (citing TEX. BUS. ORGS. CODE ANN. § 101.106(b) (“A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company.”)).

Thus, this provision of the Receivership Order would have, at most, authorized Kretzer to collect on WCCG’s “interest” in receiving profits or distributions from either the partnership or the LLC. And as Rio Grande, LP points out, the Texas Business Organizations Code provides that the exclusive remedy by which to obtain a judgment debtor’s interest in either a partnership or an LLC is by the entry of a charging order attaching the distributions owed to either a partner or LLC member, which Kretzer admittedly failed to obtain.[footnote omitted] See Pajooh, 518 S.W.3d at 562, 565 (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.”) and TEX. BUS. ORGS. CODE ANN. § 101.112(d) (“The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.”)); see also In re Prodigy Servs., LLC, No. 14-14-00248-CV, 2014 WL 2936928, at *5 (Tex. App.—Houston [14th Dist.] June 26, 2014, orig. proceeding) (mem. op.) (recognizing same).

La Zona Rio counters that in certain circumstances, courts have allowed a judgment creditor to collect on assets held by either a partnership or an LLC without a charging order, citing
to our sister court’s opinion in 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.).[footnote omitted] In Heckert, the Fort Worth Court of Appeals opined that “the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.” Heckert, 2017 WL 5184840, at *7–9 (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.”)). And the court held that the purpose of requiring a charging order was not served in a personal injury case in which an ex-wife had received a judgment against her ex-husband, where the ex-husband had created a non-operating LLC and partnership, of which he was the sole member and partner, and placed assets into those entities with the apparent intent of sheltering the assets from his ex-wife’s collection efforts. Id. at *7–9. The court found that under those circumstances, the trial court could properly order the ex-husband to turn over those assets to his ex-wife to satisfy the judgment, as doing so would cause no disruption to an operating business or cause harm to any other parties. Id. at *9.

Relying on the reasoning in Heckert, La Zona Rio contends that a charging order was unnecessary to allow Kretzer to collect on the assets held by Rio Grande, LP because Rio Grande, LP was admittedly a “single purpose entity holding commercial property,” and its business would therefore not be disrupted by ordering a turnover of the property. But Rio Grande, LP points out that unlike the situation in Heckert, the evidence reflected that the partnership was an operating business which had been leasing its building space to tenants, and the partnership had three limited partners whose interests were at stake in the La Zona Rio Lawsuit—in addition to the general partner that La Zona Rio claims was affiliated with WCCG. Therefore, the partnership’s business was disrupted by Kretzer’s actions in utilizing the Receivership Order to allow the partnership’s only asset to be alienated to La Zona Rio. And, unlike the situation in Heckert, the record before us contains no evidence that WCCG created Rio Grande, LP as a “shell” entity for the purpose of sheltering assets from collection.

Accordingly, we conclude that the provision in the Receivership Order requiring WCCG to turn over any interests it had in a partnership or LLC at most gave Kretzer the right to collect on any distributions or profits to which WCCG was entitled by virtue of any such interest and did not give him the right to take possession of the partnership’s assets, which he effectively did by taking control of Rio Grande, LP’s lawsuit. See Pajooh, 518 S.W.3d at 565 (citing 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”)).

B. The provision allowing Kretzer to sell, manage and operate an LLC in which WCCG is a “member”

Second, La Zona Rio points to the provision in the Receivership Order that authorized Kretzer “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 [Kretzer] shall think appropriate.” La Zona Rio contends there was sufficient evidence in the record from which the trial court could have impliedly found that WCCG had a “membership interest” in WC 4th and Rio Grande, GP, LLC—Rio Grande, LP’s general partner. And in turn, La Zona Rio argues that Kretzer had the right under the Receivership Order to take over the operation and management of the LLC and sell its assets. We conclude, however, that there are at least two missing steps in this analysis.

The first missing step is the failure of either Kretzer or La Zona Rio to point to any evidence in the record to establish that WCCG was in fact a “member” of the LLC. The Texas Business Organizations Code provides that an LLC must have at least one member. See TEX. BUS. ORGS. CODE ANN. § 101.101 (a) (“A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.”) However, there is nothing in this record to demonstrate that WCCG was in fact a “member” in WC
4th and Rio Grande, GP, LLC. [footnote omitted] As set forth above, while La Zona Rio may be correct that WCCG is affiliated with the LLC or may even be a parent company, given the lack of any evidence that WCCG was a “member” in the LLC, we cannot say that the trial court could have impliedly found that Kretzer had the authority under the Receivership Order to seize control of the LLC.

Even if WCCG had a membership interest in the LLC, the second missing step is the lack of evidence that Kretzer did in fact seize control of WCCG’s interest in the LLC or that he sought to operate or manage the LLC on WCCG’s behalf. Instead, the only evidence in the record demonstrates that Kretzer simply filed a “notice” with the trial court stating that he had substituted himself as counsel of record for Rio Grande, LP in the La Zona Rio Lawsuit. There is nothing to suggest that he did so as part of his management and operation of the LLC. And in fact, the record does not contain the LLC’s governing documents, or otherwise support an implied finding that Kretzer would have had the right, as part of any assumed management duties in operating the LLC, to unilaterally terminate the La Zona Rio Lawsuit on Rio Grande, LP’s behalf and enter into a settlement agreement with La Zona Rio that included deeding the building to La Zona Rio.

Again, the fallacy in La Zona Rio’s argument lies in its attempts to blur the distinction between the various World Class entities and treat them as one and the same as WCCG in the absence of evidence to support that position.

C. The provision allowing Kretzer to take possession of the judgment debtor’s assets

Finally, La Zona Rio points to a third provision in the Receivership Order giving Kretzer the authority to take possession of and sell all “leviable” and “nonexempt” property of the “Judgment Debtors” to include “real property ... causes of action ... [and] contract rights.” And La Zona Rio urges that a judgment debtor’s “interest” in either a partnership or an LLC is considered “nonexempt” for purposes of the turnover statute, again citing to our sister court’s opinion in Heckert in which the court recognized that a judgment debtor’s interests in both a partnership and an LLC are considered nonexempt assets that may be levied upon by a judgment creditor. See Heckert, 2017 WL 5184840, at *7; see also Stanley v. Reef Secs., Inc., 314 S.W.3d 659, 664, (Tex. App.—Dallas 2010, no pet.) (treating partnership distributions as nonexempt property). In turn, La Zona Rio contends that this provision gave Kretzer the authority to take possession of and sell Rio Grande, LP’s assets. But again, we find several problems with this argument.

First and foremost, the Receivership Order only gave Kretzer the authority to take possession of and sell causes of action and real property belonging to the “judgment debtor,” i.e., WCCG. It did not extend Kretzer’s authority to seize such property from any of WCCG’s subsidiaries or affiliated entities. And once again, we find no evidence in the record to support a finding that WCCG and its affiliated World Class entities can be considered one and the same, or alter egos of each other, such that Kretzer had the authority to collect on assets owned or controlled by either Rio Grande, LP or its general partner to satisfy WCCG’s debt. See United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281, 282–83 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that judgment creditor could not collect on assets owned by two corporations that it claimed were alter egos of the judgment debtors without establishing that the corporations were in fact alter egos in a separate proceeding) (citing Pace Corp. v. Jackson, 284 S.W.2d 340, 351 (Tex. 1955) (recognizing that “[c]ourts will not disregard the corporate fiction and hold individual officers, directors or stockholders liable on the obligations of a corporation except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, avoid personal liability, to avoid the effect of a statute, or in a few other exceptional situations”)); see also Maiz v. Virani, 311 F.3d 334, 336 (5th Cir. 2002) (recognizing that under Texas law, a judgment creditor cannot use the turnover statute to reach the assets of corporations which are allegedly alter-egos of the Judgment Debtors without a separate hearing to “pierce[ ] their corporate veils”); Plaza Court, Ltd. v. West, 879 S.W.2d 271, 276–77 (Tex. App.—Houston [14th Dist.] 1994, no writ) (recognizing that “[t]he turnover statute does not support a proceeding against an entity who is not a judgment debtor, until a judgment creditor succeeds in piercing the corporate veil”). And without such evidence, the trial court could not have impliedly found that Kretzer had this right. To the contrary, as our sister court has recognized, a judgment creditor (or in this case a receiver) may not
simply “announce its belief” that a judgment debtor and a third party are in essence one and the same without proof of such, and in effect, skip a trial on the merits, and “declare itself the winner.”

United Bank Metro, 670 S.W.2d at 283.

By way of footnotes, the court pointed out two recent cases reaching the conclusion that a charging order is the exclusive remedy by which a judgment creditor of a member or other owner of an LLC may satisfy a judgment out of the judgment debtor’s membership interest, and the court stated that there appear to be cases refuting the contention by La Zona Rio that the exclusivity of the charging order remedy only applies to judgment creditors and not to court appointed receivers.

Because the record did not support an implied finding that Kretzer had the authority to act on Rio Grande, LP’s behalf in the La Zona Rio Lawsuit, and because the record did not reflect that the trial court gave Rio Grande, LP the opportunity to have its substantive rights adjudicated before allowing Kretzer to enforce the Receivership Order against it, the court of appeals concluded that the trial court abused its discretion in granting the motion to dismiss the La Zona Rio Lawsuit, and the court reversed and remanded for further proceedings to give Rio Grande, LP that opportunity.

The court held that a membership interest in an LLC is not exempt property under Texas law, distinguishing the charging order statute from a state law exemption.

The debtor in this bankruptcy proceeding owned a 70% interest in DAD Drilling, LLC (“DAD Drilling”), a Texas limited liability company formed in 2010. Although DAD Drilling was originally intended to invest in the energy industry, the only asset it currently held was stock in an Irish semiconductor company. The debtor claimed that his 70% membership interest in DAD Drilling was exempt under Texas law. The court emphatically rejected the debtor’s contention:

[T]he Debtor fails to cite to any relevant section of the Texas Constitution or Property Code for his so-called “exemption.” Id. The Debtor even admits that property such as the DAD Interest is not “listed as an ‘exempt asset’ in Chapter 42 of the Texas Property Code.” Id. at ¶ 27. Instead, in his Schedule C, the Debtor refers to section 101.112 of the Texas Business Organizations Code, which is a charging order statute. See ECF No. 15, p. 11. The Debtor bases his claim for exemption on a 2018 article published by the State Bar of Texas on the topic of collecting judgments under state turnover statutes. See ECF No. 33, p. 6, ¶ 25. The article posits that “[p]artnership and LLC membership interests are exempt property not subject to a turnover order.”[footnote omitted] Ultimately, the Debtor rests on the proposition that because a charging order is the exclusive remedy by which a judgment creditor may reach an LLC membership interest under state law, and a charging order simultaneously deprives that creditor of the ability to attach, seize, or execute on such a membership interest, such an interest is “effectively” exempt in a bankruptcy context where, as here, there are no distributions of profit to receive. To put it mildly, the Court disagrees.
To paraphrase a beloved character from the immortal classic, *Road House*, attempting to exempt an LLC membership interest from a bankruptcy estate is “like putting an elevator in an outhouse — it don’t belong.”[footnote omitted] The question before the Court is whether the DAD Interest is exempt from being considered property of the estate under state law.[footnote omitted] The charging order statute is not the equivalent of a state law exemption. A charging order statute exists in large part to protect other members of an LLC from having to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager.[footnote omitted] Numerous state court decisions make plain that LLC membership interests are non-exempt assets under Texas law.[footnote omitted] Therefore, in the absence of any valid state law exemption under the Texas Constitution or Property Code for an LLC membership interest such as the DAD Interest, the Court hereby concludes that the DAD Interest constitutes non-exempt property of the estate. The Court therefore will sustain the Trustee’s Objection to the claimed exemption in the DAD Interest.


The court of appeals reversed an Order Requiring Turnover and Appointing Receiver to the extent that the order was applicable to a membership interest in an LLC. The court held that the entry of a charging order was the exclusive remedy by which a judgment may be satisfied out of a membership interest in an LLC.

Appellees Spectrum MH, LLC, and Spectrum MHU, LLC (the “Spectrum Parties”) received a judgment against appellants Christopher Bran, CBMJ Investments & Development, LLC, Montrose Multifamily II Holdings, LLC, and UrbanOne Properties, LLC (the “Bran Parties”). The trial court signed an Order Requiring Turnover and Appointing Receiver (“Order”) in which the trial court found that the Bran Parties owned non-exempt property and that there existed an unpaid final judgment against them. The trial court appointed a receiver under section 31.002 of the Civil Practice and Remedies Code and stated that the receiver had the power to take possession of and sell all leviable property of the Bran Parties. In particular, the trial court ordered the Bran Parties to “identify and turn over to the Receiver all interests of the [Bran Parties] in any business or venture, including limited liability companies and limited partnerships, and all agreements, stock certificates and other documents pertaining to the [Bran Parties’] ownership in the business or venture.” In the Order, the receiver was authorized “to seize the membership interest of any limited liability company in which the Bran Parties are a member, and to sell, manage, and operate the limited liability company as the Receiver shall think appropriate.”

The evidence before the trial court showed that Bran conducted business using various limited liability companies and that Bran owned interests in one or more limited liability companies. On appeal, the Bran Parties argued that to the extent they owned an interest in another entity, the Spectrum Parties were entitled only to a charging order. The Bran Parties contended that a charging order was the exclusive remedy by which a judgment creditor of a member may satisfy a judgment out of the judgment debtor’s membership interest.

The court of appeals noted that section 101.112 of the Business Organizations Code provides in its entirety as follows:

(a) On application by a judgment creditor of a member of a limited liability company or of any other owner of a membership interest in a limited liability company, a court having jurisdiction may charge the membership interest of the judgment debtor to satisfy the judgment.

(b) If a court charges a membership interest with payment of a judgment as provided by Subsection (a), the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest.

(c) A charging order constitutes a lien on the judgment debtor’s membership interest. The charging order lien may not be foreclosed on under this code or any other law.

(d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.
(e) This section may not be construed to deprive a member of a limited liability company or any other owner of a membership interest in a limited liability company of the benefit of any exemption laws applicable to the membership interest of the member or owner.

(f) A creditor of a member or of any other owner of a membership 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 liability company.

The court also mentioned in a footnote that “[e]ffective September 1, 2023, to clarify existing law, the legislature added the following language as subsection (g) of section 101.112: “This section applies to both single-member limited liability companies and multiple-member limited liability companies.”

The court also quoted, in pertinent part, from section 31.002 of the Civil Practice and Remedies Code:

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction, including a justice court, through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over nonexempt property that is in the debtor’s possession or is subject to the debtor’s control, together with all documents or records related to the property, to a designated sheriff or constable for execution;

(2) otherwise apply the property to the satisfaction of the judgment; or

(3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

The court engaged in an effort to harmonize the two statutes, and it ultimately concluded that the entry of a charging order was the exclusive remedy by which the Spectrum Parties could satisfy their judgment out of a membership interest owned by one of the Bran Parties:

The charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member. A judgment creditor of a member of a limited liability company or of any other owner of a membership interest in a limited liability company may enforce a judgment against the judgment debtor by requesting a charging order against the judgment debtor’s membership interest. See Tex. Bus. Organs. Code Ann. § 101.112(a). The Spectrum Parties applied for a charging order against interests that the Bran Parties allegedly hold in various limited liability companies, but the record does not reflect that the trial court has ruled on that application. If a court charges a membership interest with payment of a judgment as provided by section 101.112(a), the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest. See Tex. Bus. Organs. Code Ann. § 101.112(b). Under the unambiguous language of section 101.112, the entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest. See Tex. Bus. Organs. Code Ann. § 101.112. This court has held that there is an exception to this exclusivity in a case in which (1) the judgment creditor seeking turnover of the membership interest is the very same limited liability company from which the membership interest derives, and (2) the judgment being satisfied explicitly awards the membership interest itself from one party to the other. This exception adopted by binding precedent does not apply under the facts of today’s case. We conclude that, under the plain text of section 101.112, the entry of a charging order is the exclusive remedy by which the Spectrum Parties may satisfy the Judgment out of a membership interest owned by one of the Bran Parties in a limited liability company. See Tex. Bus. Organs. Code Ann. § 101.112.

Section 31.002 of the Civil Practice and Remedies Code provides that a trial court may appoint a receiver with the authority to take possession of a judgment debtor’s nonexempt property,
sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b). This statute could be reconciled with section 101.112 by construing section 31.002 to apply generally to nonexempt property unless another statute provides for an exclusive remedy. Even if there were an irreconcilable conflict between these statutes, section 31.002 is a general provision that is not the later enactment. See Tex. Bus. Organs. Code Ann. § 101.112; Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b). Therefore, section 101.112, the special provision, prevails as an exception to section 31.002, the general provision. See Tex. Gov’t Code Ann. § 311.026.

The Spectrum Parties argue that a charging order is not the exclusive remedy by which they may satisfy the Judgment out of a membership interest owned by one of the Bran Parties. They contend that section 101.106(a) of the Business Organizations Code shows that a membership interest in a limited liability company constitutes a form of non-exempt intangible personal property and is therefore properly a component of the receivership estate. Section 101.106(a) provides that “A membership interest in a limited liability company is personal property.” Tex. Bus. Organs. Code Ann. § 101.106(a) (West, Westlaw through 2023 R.S.). But the status of a membership interest as personal property does not address the exclusive-remedy issue or in any way conflict with section 101.112. See id.; Tex. Bus. Organs. Code Ann. § 101.112.

The Spectrum Parties also assert that although membership interests in a limited liability company may be seized by a judgment creditor exclusively by a charging order, section 101.112 does not mention receivers and therefore allows courts to give receivers the authority to seize and control these membership interests, especially in single-member limited liability companies. This argument fails based on the text of these two statutes. Section 31.002 provides a remedy by which a judgment creditor may satisfy a judgment through the action of a receiver appointed by a court at the judgment creditor’s request. See Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b). Section 101.112 provides that a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest. See Tex. Bus. Organs. Code Ann. § 101.112. Thus, if a court appoints a receiver under section 31.002 to take possession of a judgment debtor’s membership interest in a limited liability company, sell it, and pay the proceeds to the judgment creditor to satisfy the judgment, the court provides the judgment creditor with a remedy other than the exclusive remedy of a charging order under section 101.112. See Tex. Bus. Organs. Code Ann. § 101.112; Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b). The Spectrum Parties’ suggestion that the exclusive remedy language in section 101.112(d) should not apply to single-member limited liability companies is contrary to the plain text of section 101.112 which makes no distinction between single-member and multiple-member limited liability companies. See Tex. Bus. Organs. Code Ann. § 101.112. In addition, in a recently enacted statute that takes effect on September 1, 2023, the Texas Legislature clarified that the current version of section 101.112 applies to both single-member and multiple-member limited liability companies.

The Spectrum Parties also contend that section 6.155 of the Business Organizations Code shows that a court may appoint a receiver under section 31.002(b) to seize a judgment debtor’s membership interest in a limited liability company. See Tex. Bus. Organs. Code Ann. § 6.155 (West, Westlaw through 2023 R.S.). This statute provides that “(a) [a] receiver may vote an ownership interest standing in the name of the receiver” and “(b) A receiver may vote an ownership interest held by or under the control of the receiver without transferring the interest into the receiver’s name if the court appointing the receiver authorizes the receiver to vote the interest.” Id. The statute does not state that it is addressing a receiver appointed under section 31.002 or that a judgment creditor may satisfy a judgment out of the judgment debtor’s ownership interest by having a receiver appointed to take possession of the ownership interest. Courts may appoint receivers under equitable principles or under various statutes other than section 31.002; therefore, section 6.155 does not conflict with the plain text of section 101.112. See Tex. Bus. Organs. Code Ann. §§ 6.155, 101.112.

Under the unambiguous language of section 101.112, the entry of a charging order is the exclusive remedy by which the Spectrum Parties may satisfy the Judgment out of a membership
interest owned by one of the Bran Parties in a limited liability company. See Tex. Bus. Organs. Code Ann. § 101.112. To the extent the trial court made the Order applicable to a membership interest in a limited liability company owned by one of the Bran Parties, the trial court abused its discretion. See Tex. Bus. Organs. Code Ann. § 101.112.

Klinek v. LuxeYard, Inc., 672 S.W.3d 830 (Tex. App.—Houston [14th Dist.] 2023, no pet.).

The court of appeals concluded that a turnover order was an abuse of discretion to the extent that it applied to membership interests in LLCs because a charging order is the exclusive remedy by which a judgment creditor may satisfy a judgment out of the judgment debtor’s membership interests.

Appellant Robert Klinek appealed an order granting turnover relief and appointing a receiver to aid in the collection of a final money judgment in favor of appellee LuxeYard, Inc. Klinek appealed numerous aspects of the order, including that the turnover order applied to Klinek’s ownership interests in three limited liability companies.

The court began by discussing the applicable law related to turnover orders. A judgment creditor may seek a turnover order against a judgment debtor for the satisfaction of liabilities if the debtor owns property, including present or future rights to property, that are not exempt from attachment, execution, or seizure for the satisfaction of liabilities. Tex. Civ. Prac. & Rem. Code § 31.002(a). The trial court may order the judgment debtor to turn over non-exempt property and may appoint a receiver with the authority to take possession of the non-exempt property, to sell it, and to pay the proceeds to the judgment creditor to satisfy the judgment. See id. § 31.002(b). A court may enter or enforce an order under section 31.002 that requires the turnover of non-exempt property without identifying in the order the specific property subject to turnover. Id. § 31.002(h).

Section 31.002 does not specify or restrict the way in which evidence may be received for a trial court to determine whether section 31.002(a) is satisfied. Nor does the statute require that such evidence be in any particular form, that the evidence be at any particular level of specificity, or that the evidence reach any particular quantum before the court may grant aid under section 31.002. The lack of evidence supporting a turnover order does not automatically invalidate the order, but it is a relevant consideration in determining whether the trial court abused its discretion by signing the order. The court of appeals also observed that “LuxeYard had the initial burden to prove that Klinek owned property; the burden then shifted to Klinek to assert and prove that the property identified either was not owned or was exempt from execution.”

Based on these legal standards, the court concluded that legally sufficient evidence supported the turnover order with respect to certain non-exempt assets; however, to the extent that the order applied to Klinek’s ownership interests in three LLCs, the trial court abused its discretion:

Finally, Klinek argues that his ownership interests as a member in limited liability companies is not subject to turnover relief. Specifically, he asserts that a charging order is the exclusive remedy by which a judgment creditor of an LLC member may satisfy a judgment out of the member’s ownership interest in the LLC.

A judgment creditor of a member of a limited liability company may enforce a judgment against that member by requesting a charging order against the member’s interest in the company. See Tex. Bus. Orgs. Code § 101.112(a). The charging order procedure was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member. A charging order provides only the right to receive any distribution from the limited liability company to which the judgment debtor would be entitled. Tex. Bus. Orgs. Code § 101.112(b). It is a lien on the judgment debtor’s membership interest that may not be foreclosed. Id. § 101.112(c). Moreover, the judgment creditor who obtains a charging order may not compel a limited liability company to make a distribution, take possession of the judgment debtor’s membership interest, or exercise any other legal or equitable remedies with respect to company property. See id. § 101.112(c), (d), (f). A charging order merely directs the limited liability company to send any distributed funds up to the amounts owed by the member directly to the judgment creditor rather than to the member.

A member’s ownership interest in a limited liability company is a non-exempt asset. But we agree with Klinek that a charging order is “the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest.” Tex. Bus. Orgs. Code § 101.112(d). Despite the statute’s
plain language, however, some courts have upheld turnover relief when a member’s interest in a limited liability company is at issue. For example, when a limited liability company has distributed money to a member who retains possession of the funds, turnover relief is appropriate to satisfy the judgment out of the distributed funds. Similarly, in Pajooh v. Royal West Investments LLC, Series E, 518 S.W.3d 557 (Tex. App.—Houston [1st Dist.] 2017, no pet.), the court upheld a turnover order when a charging order was already in place. The court of appeals reasoned that turnover relief was proper to allow the creditor or receiver to “monitor” the limited liability company’s distributions to “effectuate” the existing charging order. Id. at 567. In [Heckert v. Heckert, No. 02-16-00213-CV, 2017 WL 5184840, at *9 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.)], the appellate found no error in the turnover of a member’s interest in a limited liability company because the company was not operating any business and no party’s interest would have been disrupted by granting turnover relief. In [Gillet v. ZUPT, LLC, 523 S.W.3d 749, 758 (Tex. App.—Houston [14th Dist.] 2017, no pet.)], this court upheld turnover relief because (1) the judgment creditor seeking the membership interest was the entity from which the membership interest derived, and (2) the judgment a[t] issue awarded the transfer of the membership interest from one party to another.

None of the circumstances justifying turnover relief in these cases is present here. There is no charging order in place. And there is no evidence that Klinek has received distributions from any of the limited liability companies in which he owns an interest. To the extent the trial court ordered turnover of Klinek’s ownership interests in the limited liability companies . . . it abused its discretion. Nevertheless, nothing about our opinion precludes an appropriate party from pursuing a charging order under the Business Organizations Code and perhaps a subsequent turnover order if the requirements are met.

M. Attorney’s Fees


The appellee did not contest that an award of attorney’s fees against the LLC appellant was improper under the version of Tex. Civ. Prac. & Rem. Code § 38.001(8) applicable to this case.


The court recounted the procedural history leading up to a verdict in favor of the plaintiff against an LLC for breach of contract in determining to what extent the plaintiff was entitled to recover its attorney’s fees from the defendant because the litigation between the parties involved several lawsuits over a time period during which Tex. Civ. Prac. & Rem. Code § 38.001 was amended to permit recovery of attorney’s fees against an LLC.

On June 10, 2021, the plaintiff (“Bee Sand”) sued Pontchartrain Partners, LLC (“Pontchartrain”) for breach of contract in state court in Galveston (the “First Texas Lawsuit”). On June 15, 2021, Governor Abbott signed legislation applicable to lawsuits filed on or after September 1, 2021, permitting recovery of attorney’s fees from an “organization” (including an LLC) as defined by the Texas Business Organizations Code on a breach-of-contract claim. On July 15, 2021, Pontchartrain removed the First Texas Lawsuit to federal district court in the Southern District of Texas. On July 26, 2021, Bee Sand filed a voluntary dismissal of the First Texas Lawsuit with the intention to re-file it after Sept. 1, 2021, so that it could recover attorney’s fees under the new legislation if it prevailed. On August 26, 2021, Pontchartrain sued Bee Sand in Louisiana state court for breach of contract and a declaratory judgment that Pontchartrain did not breach any contract with Bee Sand (the “Louisiana Action”). On September 3, 2021, Bee Sand sued Pontchartrain in state court in Galveston asserting the same causes of action brought in the First Texas Lawsuit (the “Instant Lawsuit”). Bee Sand removed the Louisiana Action to a federal district court in the Eastern District of Louisiana on September 24, 2021, and Pontchartrain removed the Instant Lawsuit to federal district court in the Southern District of Texas on October 21, 2021. On April 19, 2022, the Louisiana federal district court granted Bee Sand’s motion to dismiss Pontchartrain’s lawsuit and motion to transfer to the Southern District of Texas. The Fifth Circuit affirmed on September 15, 2022. On January 30, 2024, the jury returned a verdict for breach of contract in favor of Bee Sand against Pontchartrain.
Given this history, the court held that Bee Sand was not entitled to recover its attorney’s fees from the First Texas Lawsuit because Pontchartrain was an LLC, and Section 38.001 did not permit recovery of attorney’s fees against LLCs at the time that lawsuit was filed. The court concluded that Bee Sand was entitled to recover attorney’s fees from the Louisiana Action because “Bee Sand had to defend itself in Louisiana to eventually prevail on the claims it brought to trial before” the court in the Instant Action. The parties agreed that Bee Sand was entitled to attorney’s fees in the Instant Action.


The court declined to reconsider its prior precedent holding that former Section 38.001(a)(8) of the Texas Civil Practice and Remedies Code did not provide for recovery of attorney’s fees against an LLC “based on the plain meaning of the terms ‘individual’ and ‘corporation,’” and holding that “Integrity Pain, as a professional limited liability company, was not liable for an award of attorney’s fees under former Section 38.001(a)(8).”

**E. Castle Int’l, LLC v. RPI Ridgmar Town Square, Ltd.**, No. 02-23-00186-CV, 2024 WL 123592 (Tex. App.—Fort Worth Jan. 11, 2024, no pet. h.) (mem. op.).

The court held that an LLC was properly held liable for attorney’s fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001 because the action was commenced after September 1, 2021, and Section 38.001 was amended with respect to an action commenced on or after that date to define an “organization” against whom attorney’s fees may be recovered as having “the meaning assigned by Section 1.002, Business Organizations Code, which defines an “organization” to include an LLC.

**Repsol Oil & Gas USA, LLC v. Matrix Petroleum, LLC**, 2023 WL 8897012, __ S.W.3d __ (Tex. App.—San Antonio 2023, no pet.).

When the plaintiff filed its lawsuit in 2014, the defendant was a corporation, but it converted to an LLC during the course of the litigation. At the time the trial court entered its judgment against the defendant, it was an LLC. Because the defendant was an LLC at the time the judgment was entered, the court held that attorney’s fees were not recoverable against the defendant under the version of Section 38.001 of the Texas Civil Practice and Remedies Code applicable to the case.

The court analyzed a claim for recovery of attorney’s fees under Section 38.001 of the Texas Civil Practice and Remedies Code as it applied to suits filed before September 1, 2021, as follows:

When Matrix filed its lawsuit in 2014, it asserted claims against Talisman Energy USA, Inc., a corporation. During the course of litigation, the corporation changed names and converted into the limited liability company Repsol Oil and Gas USA, LLC (which we have defined as “Talisman”). When the trial court entered its initial judgment and later its amended final judgment, Talisman was a limited liability company. At that time, the version of Chapter 38 of the Texas Civil Practice and Remedies Code in effect allowed for an award of attorneys’ fees on a breach of contract claim against a corporation but not against a limited liability company. See Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242 (amended 2021) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 38.001); 8305 Broadway Inc. v. J & J Martindale Ventures, LLC, No. 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San Antonio June 28, 2017, no pet.) (mem. op.).[footnote omitted] Because Talisman was a limited liability company when the trial court entered its judgment, the trial court denied Matrix an attorneys’ fees award against Talisman under Chapter 38.

Matrix appeals this denial. It argues that Talisman breached the JOA when it was a corporation and that Talisman, as a corporation, incurred a “contingent liability” for attorneys’ fees related to the breach that Talisman remained liable for after its conversion to a limited liability company. Texas Business Organizations Code section 10.106(3) provides: “all liabilities and obligations of [a] converting entity continue to be liabilities and obligations of the converted entity in the new organizational form without impairment or diminution because of the conversion.” TEX. BUS. ORGS. CODE ANN. § 10.106(3). Pointing to this section, Matrix argues that a limited liability company, after conversion from a corporation, can be liable for attorneys’ fees arising
from claims based on the actions of the corporation. Talisman responds that section 10.106(3) is not applicable because Talisman had not incurred a liability or obligation related to attorneys’ fees at the time of conversion. According to Talisman, liability for attorneys’ fees arises only after a party prevails on an underlying claim and recovers damages.

We do not resolve the matter of whether attorneys’ fees are “contingent liabilities” which a converted entity may be liable for after conversion under section 10.106(3) of the Business Organizations Code because section 38.001 of the Civil Practice and Remedies Code focuses on “recover[y]” from entities, and not liability. The statute lists the persons from whom a prevailing party “may recover” attorneys’ fees. The applicable version provides: “A person may recover reasonable attorney’s fees from an individual or corporation ... if the claim is for: ... an oral or written contract.” Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242 (amended 2021). Regardless of whether Talisman may be liable for attorneys’ fees under the Business Organizations Code, the Civil Practice and Remedies Code, by its plain language, precludes Matrix’s recovery of such fees from a limited liability company on a contract claim. See 8305 Broadway, 2017 WL 2791322, at *5; see also Maxim Crane Works, L.P. v. Zurich Am. Ins. Co., 642 S.W.3d 551, 557 (Tex. 2022) (“When construing a statute, our primary objective is to determine the Legislature’s intent which, when possible, we discern from the plain meaning of the words chosen.”). Because it is undisputed that Talisman was a limited liability company when the trial court entered its judgment, we hold the trial court did not err by denying Matrix’s request for recovery of attorneys’ fees from that limited liability company under Chapter 38.

Plan B Holdings, LLC v. RSLLP, 681 S.W.3d 443 (Tex. App.—Austin 2023, no pet.). “Appellants do not challenge the award of actual damages against CIPE and Plan B. They do, however, complain of the trial court’s award of attorney’s fees against those entities. It is undisputed that CIPE and Plan B were limited liability companies (LLCs). Appellants assert that an award of attorney’s fees against the LLCs was improper under the circumstances of this case. . . .

The Firm sought attorney’s fees solely pursuant to Section 38.001 of the Texas Civil Practice and Remedies Code. As currently worded, that section provides that for certain types of claims, including rendered services, a sworn account, and an oral or written contract, attorney’s fees may be recovered 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[.] Tex. Civ. Prac. & Rem. Code § 38.001(b). LLCs fit within the definition of ‘organization.’ See id. § 38.001(a); Tex. Bus. Org. Code § 1.002.

The foregoing language, however, has been part of Section 38.001 only since September 1, 2021. Before that date, the statute allowed for the recovery of attorney’s fees only from ‘an individual or corporation.’ Suits filed before September 1, 2021, are governed by the prior language. Because the present case was filed on June 8, 2017, the older statutory language governs this case.

Texas cases construing the older version of Section 38.001 have uniformly held that attorney’s fees are not allowed against LLCs under that statutory language. See Benge Gen. Contracting, LLC v. Hertz Elec., LLC, No. 05-19-01506-CV, 2021 WL 5317840, at *3–4 (Tex. App.—Dallas Nov. 16, 2021, no pet.) (mem. op.) (‘Under the plain language of section 38.001, a trial court cannot order limited liability partnerships (LLP), limited liability companies (LLC), or limited partnerships (LP) to pay attorney’s fees.’); Spicer v. Maxus Healthcare Partners, LLC, 616 S.W.3d 59, 128–29 (Tex. App.—Fort Worth 2020, no pet.) (‘Convinced by our sister courts’ reasoning, we hold that an LLC is not liable for attorney’s fees under Section 38.001 . . . .’) (collecting cases).

Accordingly, the trial court erred in awarding attorney’s fees against CIPE and Plan B.”

Pioneer Emerald Pointe, LLC v. Texmenian Contractors, LLC, No. 05-22-00493-CV, 2023 WL 3963991 (Tex. App.—Dallas June 13, 2023, no pet.) (mem. op.). “Pioneer first contends that Red Carpet was not entitled to recover attorney’s fees related to its breach of contract, sworn account, and quantum meruit claims from Pioneer, a limited liability company, under section 38.001...
of the Texas Civil Practice and Remedies Code. We agree. Under Texas law, ‘litigants may recover attorney’s fees only if specifically provided for by statute or contract.’ Although section 38.001 authorizes recovery of attorney’s fees for claims arising out of written contracts, sworn accounts, or quantum meruit, it did not permit recovery against a limited liability company when this suit was filed. [The legislature amended section 38.001, effective September 1, 2021, to permit recovery of attorney’s fees from an individual or ‘organization,’ as defined by section 1.002 of the Texas Business Organizations Code. See Act of May 28, 2021, 87th Leg., R.S., ch. 665, § 1, 2021 Tex. Sess. Law Serv. 1393, 1393 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 38.001). Because this suit was filed prior to the amendment taking effect, we apply the version that was in effect when this action was commenced. See id. § 2.]

However, Red Carpet also sought attorney’s fees under section 53.156 of the property code, which requires a trial court to award costs and attorney’s fees that it deems ‘are equitable and just’ in an action to foreclose a lien or declare a lien invalid, and section 37.009 of the civil practice and remedies code, which gives the court discretion in declaratory judgment actions to ‘award costs and reasonable and necessary attorney’s fees as are equitable and just.’ TEX. PROP. CODE § 53.156; TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. Because Red Carpet prevailed on its claim to foreclose on the lien and successfully defended against Pioneer’s claim for a declaratory judgment that the lien was invalid, we conclude these statutes provided a legal basis for the trial court’s award of attorney’s fees.”

N. Standing or Capacity to Sue

_Carter v. AgAmerica Lending, LLC_, No. 11-22-00294-CV, 2024 WL 1774132 (Tex. App.—Eastland Apr. 25, 2024, no pet. h.) (mem. op.).

Stating that an individual’s role as manager and owner of an LLC would not create a sufficient interest in the property of the LLC to confer standing on the owner to assert a claim for wrongful foreclosure on the property, the court remanded for further proceedings to consider whether the facts supported other asserted interests in the property, such as an assignment of the right to pursue claims against the defendant.

Debra Carter asserted claims against the defendants for wrongful foreclosure on a ranch property purchased by an LLC. The defendants contended that Carter lacked standing to bring the claims, and the court of appeals couched its analysis in terms of the jurisdictional issue of standing. The court stated that “[p]arties who are merely owners of a business entity do not have standing to assert individual claims for damages that are sustained by or to the business itself.” Carter asserted in her pleadings that the LLC had assigned to her “all right title and the right to declare a lien invalid,” and section 37.009 of the civil practice and remedies code, which gives the court discretion in declaratory judgment actions to ‘award costs and reasonable and necessary attorney’s fees as are equitable and just.’ TEX. PROP. CODE § 53.156; TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. Because Red Carpet prevailed on its claim to foreclose on the lien and successfully defended against Pioneer’s claim for a declaratory judgment that the lien was invalid, we conclude these statutes provided a legal basis for the trial court’s award of attorney’s fees.”


A debtor agreed to appointment of a receiver as requested by the debtor’s creditor, and the trial court placed not only the debtor, but two limited liability companies in which the debtor owned a membership or equitable interest, as well as other “affiliates” of the debtor, into receivership. A third-party creditor or non-managerial member of the LLCs moved to dissolve the receiverships over the LLCs, and the court of appeals held that (1) the third party had standing, as a creditor of the LLCs, to move to dissolve the receiverships; (2) the LLCs did not consent to the receiverships; (3) the LLCs were not “property” of the debtor; and (4) the LLCs were not “business” of the debtor.

G.E.T. Marketing, LLC (“GET”), a creditor of PSW Real Estate, LLC (“PSW”), petitioned for receivership over PSW based on its imminent insolvency. PSW owned a membership or equitable interest in SB Webberville Road, LLC (“Road”) and PSW Webberville LLC (“Webberville”). PSW agreed to the receivership and the order
executed by the trial court, which placed PSW and 55 “affiliates” into receivership. Two of the 55 affiliates were Road and Webberville. No evidence was presented showing, nor did GET’s petition argue, that PSW, Road, or Webberville were alter egos of each other or subject to having their respective “corporate” identities disregarded. Additionally, GET did not petition for a receiver over the 55 “affiliates,” prove it was a creditor of Road or Webberville, or show that Road or Webberville were insolvent. Ovation Finance Holdings 5 LLC (“Ovation”), a creditor or member of Road and Webberville, petitioned for dissolution of the receivership, thus raising the question of whether a creditor or non-managerial member of Road or Webberville had standing to attack the trial court’s action. The court of appeals held that the trial court should have granted Ovation’s motion to dissolve the receivership based on the distinct corporate identities involved, the definitions of “property” and “business” in the receivership statute, and settled authority regarding receiverships.

In its analysis, the court of appeals first reviewed relevant provisions of the applicable receivership statute:

Section 11.404 of the Texas Business Organizations Code authorizes courts to appoint a rehabilitative receiver to conserve the “property and business” of an entity and to avoid damage to interested parties. TEX. BUS. ORGS. CODE ANN. § 11.404(b)(1). The authority comes with caveats, though. Appointment is allowed if “all other requirements of law are complied with” and “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 ANN. § 11.404(b)(2), (3); see Ritchie v. Rupe, 443 S.W.3d 856, 863-64 (Tex. 2014) (discussing former rule). Furthermore, the legislature defined “business” to mean “a trade, occupation, profession, or other commercial activity,” TEX. BUS. ORGS. CODE ANN. § 1.002(5), and “property” to include “tangible and intangible property and an interest in that property.” TEX. BUS. ORGS. CODE ANN. § 1.002(77).

The court pointed out that the trial court’s decision to appoint a receiver is an exercise of the court’s discretion subject to the standard of abused discretion, i.e., when the trial court acts without reference to any guiding rules and principles, such as misapplying or misinterpreting the law.

Next the court discussed the principle that corporations have separate legal identities that generally must be respected, eventually noting that LLCs and their members are similarly separate and distinct from one another:

To the foregoing, we add another requirement of the law. It obligates us to recognize that corporations have separate identities, which separateness generally must be observed. Neff ex rel. Weatherford Int’l. Ltd. v. Brady, 527 S.W.3d 511, 525 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (quoting Docudata Records Mgmt. Servs., Inc. v. Wieser, 966 S.W.2d 192, 197 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)). For example, a subsidiary corporation and its parent corporation are separate and distinct “persons” as a matter of law. ETC Tex. Pipeline, Ltd. v. Addison Expl. & Dev., LLC, 582 S.W.3d 823, 837 (Tex. App.—Eastland 2019, pet. denied), overruled in part on other grounds in Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021). Unless the corporate veil is used as a sham, it matters not that the parent dominates or controls the subsidiary or otherwise treats it as its instrumentality or agency. Id. Nor does commonality of directors or managers alone permit courts to avoid the separateness of which we speak. Id. Similarly, because of their separate identities, corporations generally are not liable for each other’s obligations. Id.

The court concluded that Ovation had standing to seek to vacate the receiverships over Road and Webberville because the Texas Supreme Court has stated that “when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court” and “are bound by the court’s orders approving claims and determining rights in and to the property or its proceeds” if they have notice of the proceedings.

The court next explained that there was no evidence that Road or Webberville consented to being placed in receivership, and neither the receiver nor GET relied on that ground in their appellate briefing. Rather, they argued that placing 55 “affiliates” of PSW in receivership was appropriate because they were the “property and business” of PSW as contemplated by the receivership statute. The court of appeals disagreed with that contention based on the following analysis:

No one disputes that PSW was a member of or otherwise owned an “equity interest” in Road and Webberville. Nor does anyone suggest the corporate veils of Road and Webberville were used as a sham in some way by PSW. Without the latter in play then, both we and the trial court must respect the distinct legal status or identity of Road and Webberville. Moreover, PSW’s membership interest likens to owning stock in a corporation. As such, the former owned an interest in the latter, and that interest constituted property of PSW. TEX. BUS. ORGS. CODE ANN. at § 101.106(a) (stating that a membership interest in a limited liability company is personal property). Owning an interest in them, though, did not make PSW, Road, or Webberville one and the same. Nor did it make the entities Road and Webberville themselves property of PSW; to hold otherwise would be to ignore the separate identities of each. That means PSW’s property subject to receivership under § 11.404(a) included its membership interest in the two other distinct entities, not the entities themselves.

As for whether Road and Webberville were PSW’s “business” under § 11.404(a), we initially say that words grouped in a list should be given related meaning when construing a statute. Ritchie, 443 S.W.3d at 869. We heed that rule of construction when looking at the statutory definition of “business” assigned in the Business Organizations Code.

After mentioning “trade,” “occupation,” and “profession,” the legislature ended the definition with the phrase “or other commercial activity.” TEX. BUS. ORGS. CODE ANN. § 1.002(5). The latter passage sets the framework within which we read the former nouns. Simply put, “or other ... activity” alludes to what the entity does or its job, so to speak. Thus, trade, occupation, and profession are to be read as alluding to the insolvent’s business and its scope.[footnote omitted] So, in permitting a trial court to “appoint a receiver for the entity’s ... business ....” TEX. BUS. ORGS. CODE ANN. § 11.404(a), the legislature merely allowed the court to place a receiver in the shoes of the insolvent entity. Once in those shoes, the receiver could then control or manage the insolvent’s job, trade, or commercial activity, as allowed by law. Simply put, the focus rests on gaining control of the insolvent’s business. The statute says nothing about placing distinct legal entities (irrespective of their financial stability) into receivership as well simply because the insolvent may have some financial interest in them. To do that would be to ignore the distinct legal status of the other entities. It would be tantamount to ignoring the expressed statutory conditions precedent to a receivership, such as insolvency, deadlocked management, illegal action by governing persons, the wasting of assets, or deadlocked shareholders. See TEX. BUS. ORGS. CODE ANN. § 11.404(a)(1)(A)-(E) (listing the conditions).

And, we hesitate to read into the statute more authority than its own definitions encompass, especially when receiverships are harsh remedies, Fortenberry v. Cavanaugh, No. 03-04-00816-CV, 2005 WL 1412103, at *———— ————, 2005 Tex. App. LEXIS 4665, at *5-6 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op), to be cautiously applied. Elliott v. Weatherman, 396 S.W.3d 224, 228-29 (Tex. App.—Austin 2013, no pet.). Here, that means the trial court could permit a receiver to step into PSW’s shoes and control the latter’s job, trade, work, vocation, or commercial activity. It does not mean the trial court could place into receivership distinct legal entities simply because PSW’s business included commercial interaction with them.
In sum, PSW’s insolvency may have warranted the appointment of a receiver. Yet, the extent of that appointment, given our construction of § 11.404(a), was limited. The statute did not allow the trial court to exceed the definitions of “the entity’s property and business” or disregard other statute requirements. See TEX. BUS. ORGS. CODE ANN. § 11.404(a). Nor did it allow the court to disregard the distinct legal identities of other corporations or limited liability companies. So, with PSW’s being the purported insolvent “entity” at issue, the receivership could extend no further. It could not ensnare Road or Webberville into their own receiverships merely because they may be subsidiaries of or have business dealings with PSW.

Thus, the court of appeals held that the trial court abused its discretion by placing Road and Webberville in receivership, and the court ordered that the receiverships over Road and Webberville be dissolved.

_Dunster Live, LLC v. LoneStar Logos Mgmt. Co., LLC_,

No. 03-22-00014-CV, 2024 WL 291403 (Tex. App.—Austin Jan. 26, 2024, no pet. h.) (mem. op.).

The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

LoneStar Logo & Signs, LLC (“LoneStar Logo”) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (“Quorum Media”) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. The contract provided, contingent upon TxDOT’s approval, an opportunity for an extended five-year term that would run from December 31, 2011 to December 31, 2016. LoneStar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). LoneStar Logo managed the logo program, but LoneStar Logo itself was not the “vendor” and had no contract with TxDOT. LoneStar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after LoneStar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in LoneStar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of LoneStar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of LoneStar Logo.

After Dunster obtained its ownership interest in LoneStar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of LoneStar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate in day-to-day running of the logo program and failing to provide assistance to LoneStar Logo’s business in general. The members and managers other than Dunster formed a new company named LoneStar Logos Management Company, LLC (“LoneStar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As provided by the terms of the company agreement, LoneStar Logo was set to terminate at the end of the 2007–2016 contract.
In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and LoneStar Management, and LoneStar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. LoneStar Logo informed Dunster of these financial issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to LoneStar Logo.

The managers agreed at a meeting that LoneStar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in dismissing Dunster’s derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement, (2) the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:

**3.03 Failure to Contribute.** If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. If such additional Capital Contributions are not
received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member. The redemption option may be exercised by the action of any single Manager, without the need for a vote. The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated.

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement. With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. See LoneStar Logo, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the Zauber exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. See Zauber v. Murray Sav. Ass'n, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref'd n.r.e., 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. Id.

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed to meet its burden in proving that the Zauber exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the Zauber exception, it
ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. See LoneStar Logo, 552 S.W.3d at 350. We overrule Dunster’s first issue.

Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the Zauber exception). Because we have already concluded Dunster failed to prove the first element of the Zauber exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive. The court of appeals [in an analysis that conflated case law, statutes, and terminology in the corporate and LLC contexts] provided the following explanation:

Under Texas law, the business and affairs of a corporation are managed through a board of directors. See Loy v. Harter, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (citing Gearhart Indus., Inc. v. Smith Int’l, Inc., 741 F.2d 707, 719 (5th Cir. 1984)). These duties are owed to the corporation, not to individual shareholders or even to a majority of shareholders. Gearhart Indus., 741 F.2d at 721. A director’s fiduciary status also includes a duty to dedicate “uncorrupted business judgment for the sole benefit of the corporation.” Ritchie, 443 S.W.3d at 868 (quoting International Bankers Life Ins. v. Holloway, 368 S.W.2d 567, 577 (Tex. 1963)).

A breach of fiduciary duty necessarily requires the existence of the duty itself. The issue here is therefore whether any fiduciary duty between the members of LoneStar Logo existed. Dunster argues that the unanimity provision in Section 5.01(b)(iii) of the Agreement creates a fiduciary duty upon all parties, and that appellees, in bidding for the 2017–2026 contract, violated said duties. This unanimity provision states in relevant part:

The Managers may not cause the Company to do any of the following unless there is unanimous agreement among the Managers: ... (iii) take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.

Appellees respond that Texas law does not recognize fiduciary duties between members of a closely-held corporation, or, in the alternative, no fiduciary duties existed in the first place because the Agreement, which was voted through majority agreement of the members, intentionally foreclosed any fiduciary duty that the members owed each other. We agree with appellees.

The Texas Supreme Court has held that members of an LLC owe a fiduciary duty to the LLC, but not to the individual members themselves. Ritchie, 443 S.W.3d 856, 890 n. 62 (“We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”). The Richey [sic] court held that, “[a]bsent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation’s business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.” Id.
at 888–89 (footnote omitted). Recently, the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the corporation for that shareholder’s benefit. See In re Estate of Poe, 648 S.W.3d 277, 287 (Tex. 2022). Accordingly, as members of the closely-held corporation, appellees did not owe either a formal or informal fiduciary duty to Dunster and therefore appellees could not have violated such duties when they formed LoneStar Management without Dunster.13[footnote 12 discussed Allen v. Devon Energy Holdings, LLC, characterizing it as recognizing an “informal fiduciary duty to a fellow member only when ‘the alleged fiduciary has a legal right of control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC’” and declining to further address the application of Allen because LoneStar Logo’s company agreement “foreclosed the possibility of a fiduciary duty owed towards fellow members.”]

Notwithstanding our above conclusion, the Richey [sic] court noted that disputes in closely-held corporations may be prevented and resolved through shareholders’ agreements and that the Legislature granted corporate founders and owners “broad freedom to dictate for themselves the rights, duties, and procedures that govern their relationship with each other and with the corporation.” Ritchie, 443 S.W.3d at 881; see also Tex. Bus. Orgs. Code §§ 7.001(d)(3) (providing that, in limited liability corporation, liability of governing person may be limited or eliminated by its certificate of formation or company agreement), 101.401 (providing that limited liability company agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that member, manager, officer, or other person has to company or to member or manager of company); Strebel v. Wimberly, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that fiduciary duty claim was foreclosed by operation of contractual disclaimer within limited partnership agreement). Here, as permitted by both Sections 7.001(d)(3) and 101.401 of the Business Organizations Code, the members voted by majority agreement to eliminate any prohibition on the members’ outside business ventures. This decision was reflected in the Agreement as follows:

5.07 Conflicts of Interest. Each Manager, Member and officer of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including ones in competition with the Company, with no obligation to offer to the company or any other Member, Manager or officer the right to participate.

The evidence is uncontroverted that LoneStar Logo was formed for the sole purpose of operating the 2007–2016 contract. Because of this, appellees claim, the 2017–2026 contract would fall within the phrase “other business ventures” in Section 5.07. We agree. And importantly, nothing precluded Dunster from bidding on the 2017–2026 logo program itself, as the Agreement provided that “[t]he Managers may not cause the Company to take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.” Accordingly, even viewing the evidence in the light most favorable to Dunster, see Ford Motor Co., 135 S.W.3d at 601, we conclude appellees did not violate a fiduciary duty to Dunster because, under both Texas law and the parties’ Agreement, none existed.


Plaintiff members of an LLC sufficiently pleaded direct RICO claims in their individual capacities against the defendant members and an entity controlled by them but failed to sufficiently plead derivative RICO claims because they did not plead that they had made a pre-suit written demand. The plaintiff members sufficiently pleaded direct claims against the defendant members for breach of fiduciary duties owed to the plaintiffs.

In 2016, the plaintiffs formed Allied Lab Solutions, LLC (“Allied”) to provide medical lab services to rural hospitals, entering into a company agreement and becoming members of Allied. Around the same time, defendant Nichols formed Medical Management Professionals (“MMP”), also with the purpose of providing lab services to
rural hospitals. The plaintiffs then formed Allied Lab Solutions Management, LLC (“Allied Management”) for the sole purpose of distributing money from MMP to Allied. Defendant Ellis was the member-manager of Allied Management and Allied from November 2016 to April 2017, and defendant Forage was the member-manager of Allied Management and Allied from May 2017 to April 2019.

In April 2017, Allied and MMP entered into a Service Agreement in which they agreed to perform lab services for several rural hospitals (“Participating Rural Hospitals”). The plaintiffs alleged that the defendants repeatedly misreported to the plaintiffs the income that MMP was receiving from the Participating Rural Hospitals from December 2016 to April 2019 and that Ellis and Forage knew that the reports were falsified and that the amount of money going to each member was incorrect. According to the plaintiffs, Ellis deposited some of MMP’s unreported money in a bank account for another one of his companies located in Colorado, and Ellis and Forage sent Allied’s members annual tax forms confirming the amounts they received from their membership shares that falsely understated amounts from MMP’s financial reports. The plaintiffs allege that the defendants committed both wire fraud and money laundering in carrying out this scheme. From May 2019 to June 2020, MMP failed to make any payments to Allied Management, Allied, or the plaintiffs. Defendants Nichols, Ellis, and Forage allegedly claimed that MMP had not received any monies from Participating Rural Hospitals since April 2018 although the CEO of one of the Participating Rural Hospitals stated that MMP received $2,425,725 between May 2019 and June 2020 from his hospital alone.

In October 2020, Forage, acting as Allied’s manager, terminated Allied and Allied Management by filing documents with the Texas Secretary of State. The plaintiffs alleged that he did so without the consent of Allied’s members in order to cover up the defendants’ scheme to skim money from MMP’s income.

In this lawsuit, the plaintiffs’ causes of action included direct RICO claims in the plaintiffs’ individual capacities, derivative RICO claims on behalf of Allied and MMP, and direct claims for breach of fiduciary duty against Ellis and Forage. The defendants sought to dismiss all of these claims.

The defendants contended that the plaintiffs individually lacked standing or capacity to bring RICO claims. (The court explained that the Fifth Circuit uses the terms “standing” and “capacity” in relation to RICO claims brought in an individual capacity, but the Texas Supreme Court has stated that “[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.”) Recognizing that Allied, Allied Management, and MMP were all LLCs rather than corporations or partnerships, the court applied the same three-part test used by the Fifth Circuit to determine whether shareholders or partners may bring RICO claims individually. The test is: (1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of action accrues in the corporation. The defendants argued that the plaintiffs failed all three parts of the test, but the court disagreed.

The court agreed with the defendants that the plaintiffs did not sufficiently plead that their injuries were not derived from, and thus distinct from, Allied’s injuries. Only because of the plaintiffs’ relationship with Allied as its members did they receive less profit than they would have if not for the defendants’ alleged racketeering activity. The court determined, however, that the plaintiffs sufficiently pleaded that the defendants’ racketeering activity was directed at the members individually rather than solely at Allied and that Texas law could allow for the individual members to have a cause of action separate from the LLCs. The plaintiffs alleged that they acted in reliance on the defendants’ false statements by trusting that the monthly financial reports and checks from MMP and Allied were correct. According to the court, if the plaintiffs did not allege that Allied’s managers knew of and actively participated in the scheme, then the defendants would be correct in stating that only Allied was targeted and not its individual members, but the court said that the plaintiffs had sufficiently shown at this stage that the defendants targeted their activities not only at Allied but also at its individual members. The court acknowledged that “Texas courts generally have held that a member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company,” but the court relied on Texas cases (Saden v. Smith, 415 S.W.3d 450, 463 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652, at *7 (W.D. Tex. Aug. 27, 2018)), in support of its conclusion that Texas courts sometimes allow for individual members to assert a separate cause of action from the LLC where members of an LLC “used their status as members of an LLC to benefit themselves to the detriment of the other members.” The court thus declined to dismiss the RICO claims brought by the plaintiffs in their individual capacities.
With respect to the RICO claims brought by the plaintiffs derivatively, the court relied on the statutory provisions of the Texas Business Organizations Code applicable to LLC derivative proceedings to conclude that the claims should be dismissed. The court first noted that Federal Rule of Civil Procedure 23.1 requires a shareholder derivative complaint to state with particularity “any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members” and “the reasons for not obtaining the action or not making the effort,” but the court then stated that “the particularity of a plaintiff’s pleadings is governed by the standards of the state of incorporation.” Because Allied and MMP were both Texas LLCs, the court turned to a discussion of the provisions of the Texas Business Organizations Code. The court concluded that the plaintiffs sufficiently pleaded that they fairly and adequately represented the interests of the LLC, but they failed to plead that they had made a written pre-suit demand. [The plaintiffs apparently did not attempt to rely on the provisions of the Texas Business Organizations Code that exclude the fair representation and demand requirements in the context of a derivative claim against members, managers, or officers of a closely held LLC, i.e., an LLC with fewer than 35 members and no membership interests listed on an exchange.]

The Texas Business Code sets forth standing requirements for members of LLCs who wish to bring claims in a derivative capacity, or on behalf of the LLC itself. Section 101.452 states that a member must have been a member of the LLC at the time of the act or omission complained of and must fairly and adequately represent the interests of the LLC in enforcing the right of the LLC. Section 101.453 states that a member “may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the limited liability company stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the limited liability company take suitable action” (emphasis added).

Defendants argue that Plaintiffs have failed to plead that they fairly and adequately represent the interests of the LLC and that they made a written demand for the LLC to take action and were rejected. (Mot., Dkt. 15, at 10–11). Defendants also contend that Plaintiffs have not pleaded enough facts to show that the RICO claims are not collusive ones pleaded just to confer jurisdiction on the federal court. (Id. at 11 (citing Fed. R. Civ. P. 23.1(b)(2))). As discussed above, the Court finds that Plaintiffs have sufficiently pleaded a RICO claim in their individual capacities and therefore the Court does not believe there is sufficient evidence that Plaintiffs only pleaded a RICO claim to get into federal court at this time. Further, the Court finds that Plaintiffs, as several members of Allied who benefit from Allied’s success, have pleaded enough facts to show that they fairly and adequately represent the interests of the LLC. However, the Court agrees with Defendants that Plaintiffs have failed to plead that they filed a written demand with Allied or MMP that stated the act or omission that is the subject of this suit and demanded action. While Plaintiffs did plead that they made two requests to Defendant Forage to bring a suit on behalf of Allied, (Am. Comp., Dkt. 14, at 41), they fail to allege that these demands were written.

In their response, Plaintiffs simply reiterate the statements from their amended complaint: that they made two demands to Defendant Forage to bring an action on the basis of the alleged fraudulent activities through an attorney acting on their behalf and that Defendant Forage rejected both demands. (Resp., Dkt 20, at 10–11). The Court notes that Plaintiffs seem to have strategically eliminated the word “written” when providing a quote from Section 101.453. (See id.). Because Plaintiffs have failed to allege that they have met the conditions to bring a derivative claim on behalf of Allied required Texas law, the Court finds that Plaintiffs’ claims, to the extent they are brought in a derivative capacity, are dismissed.[footnote omitted]

The defendants also sought dismissal of the plaintiffs’ breach-of-fiduciary-duty claims against defendants Forage and Ellis, arguing that Forage and Ellis “owed fiduciary duties only to Allied, and not to the Plaintiffs as individual members of Allied.” Relying on Texas case law that has recognized fiduciary duties may be owed by member-managers to other members in some situations, the court concluded that the plaintiffs’ allegations were sufficient to allow them to proceed with their breach-of-fiduciary-duty claims against Ellis and Forage.

Defendants are correct that Texas courts have generally held that fiduciary duties of a corporate director “run to the corporation, not to the individual shareholders.” Straehla v. AL Glob.
“Neither the Texas Limited Liability Company Act nor the subsequently-enacted limited liability company provisions of the Texas Business Organizations Code directly address the duties owed by managers and/or members of limited liability companies.” Cardwell v. Gurley, No. 05-09-01068-CV, 2018 WL 3454800 (Tex. App.—Dallas July 18, 2018, pet. denied) (citing Tex. Bus. Orgs. Code Ann. § 101.401). “Both, however, presume the existence of fiduciary duties, providing that a limited liability company may ‘expand or restrict’ any duties (including fiduciary duties) of a member, manager, officer, or other person.” Id.

Texas courts have recognized a fiduciary duty between a manager member of an LLC and an individual member of an LLC in certain contexts. In Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 392–93 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the court found that a “sole member-manager” of an LLC who had “a high degree of control” over the LLC’s day-to-day operations was more analogous to a general partner in a limited partnership than a director or majority shareholder in a corporation. Thus, because “a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity,” id. at 391, and because the member manager “[had] a legal right of control and exercise[d] that control by virtue of his status,” id. at 395, the court concluded that there was a formal fiduciary relationship between the member-manager and the individual members in the specific context of purchasing a minority member’s interest, id. at 396. Similarly, in Cardwell v. Gurley, No. 4-10-CV-706, 2011 WL 6338813, at *9 (E.D. Tex. Dec. 19, 2011), aff’d sub nom. In re Cardwell, 487 Fed. Appx. 183 (5th Cir. 2012), a federal district court upheld a Texas trial court’s finding that a member-manager of an LLC owed another member “direct fiduciary duties of loyalty, due care, and full disclosure as a matter of law.” The court noted that the Fifth Circuit has held that “persons exercising control of a business owe trust-type obligations to partners and shareholders that do not control the business.” Id. at *8.

The Court finds these cases to be illuminating as to whether member-managers of an LLC can ever be held to owe a fiduciary duty to the individual members of the LLC and not just the LLC itself.[In footnote 4, the court noted that the plaintiffs suggested some sort of informal duty might exist between the plaintiffs and Ellis and Forage based on a pre-existing relationship but stated the plaintiffs did not allege any facts supporting the existence of informal fiduciary duties and sufficiently pleaded the existence of fiduciary duties owed by Ellis and Forage to the plaintiffs based on their control over Allied, not because of any informal, pre-existing relationships.] Plaintiffs alleged that both Defendants Ellis and Forage actively worked to mislead Plaintiffs as to how much money they were entitled to through their membership shares of Allied. (Am. Compl., Dkt. 14, at 4). Plaintiffs also alleged that Defendants Ellis and Forage ran the day-to-day operations of Allied as the managing members, which allowed them to mislead Plaintiffs. (Id. at 15). Adding to the alleged authority of Ellis and Forage to oversee Allied is the fact that Ellis and Forage were also the member-managers of Allied Management, which was also a member-manager of Allied. (Id. at 15–16). Thus, Plaintiffs ... may proceed with their breach of fiduciary claims against Defendants Ellis and Forage.[footnote omitted]


The court of appeals upheld the trial court’s grant of summary judgment on the grounds that (a) a voluntarily terminated LLC loses its ability to sue three years after termination and (b) an individual member has no capacity to sue for damages to the LLC.

Appellant William Taylor was an inventor. Taylor, along with his business partner Tina Pantoja, developed a software application called SafeCell. Pantoja had a preexisting entity, W2W, LLC. Taylor and Pantoja each became fifty percent owners of W2W. Taylor and Pantoja then assigned the rights to any patent derived from the SafeCell application to W2W.

W2W, through Taylor, approached Andrews Kurth partner Douglas Rommelmann to obtain a patent on the SafeCell application. At that time, Brett Cooke was an Andrews Kurth associate who worked with Rommelmann on W2W’s patent application. These discussions led to W2W engaging Andrews Kurth to patent the SafeCell idea.
Andrews Kurth ultimately submitted two patent applications, which resulted in a patent being issued (the “762 Patent”) for the SafeCell Application. W2W, however, did not pay Andrews Kurth’s bill for legal services rendered. Those bills were still not paid when Taylor and Pantoja formally terminated W2W as an entity on March 27, 2017. Taylor and Pantoja had previously assigned the 762 Patent to themselves.

More than a year after terminating W2W, Taylor and Pantoja created a new LLC, WPEM, LLC. They then assigned the 762 Patent to WPEM so that WPEM could pursue a patent infringement suit against SOTI, Inc. WPEM’s patent infringement suit failed and the federal district court assessed the defendant’s attorney’s fees against WPEM.

When the patent infringement suit failed, WPEM, Taylor, and the terminated entity W2W (collectively the appellants) filed a legal malpractice suit against Andrews Kurth, Rommelmann, and Cooke (collectively the appellees). Appellants alleged that appellees were negligent and grossly negligent in their handling of the 762 Patent application process which in turn caused appellants’ damages including lost revenues and the loss of the patent infringement lawsuit. All of the alleged acts of malpractice at issue in the lawsuit occurred in the 2012 to 2013 time period. These included allegations that Andrews Kurth and its lawyers failed to prosecute the 762 patent correctly, failed to take steps to ensure the 762 patent would have priority over the similar software involved in the patent infringement suit, failed to advise appellants on changes to patent law, and failed to advise appellants to not allow an earlier patent application to be abandoned.

Appellees moved for traditional summary judgment on the entities’ claims against them. They argued, in part, that they were entitled to judgment as a matter of law on W2W’s claims because W2W had been terminated as an entity and the winding up period provided by statute had expired before the lawsuit was filed. The trial court agreed and granted the motion. Appellees then moved for traditional summary judgment on Taylor’s claims against them. They argued, in part, that Taylor personally suffered no damages. The trial court granted the motion as to Andrews Kurth and Cooke, but denied it as to Rommelmann.

On appeal, appellants first argued that the trial court erred when it granted appellees’ motion for summary judgment on W2W’s claims because appellees did not include lack of capacity to maintain a lawsuit in a verified denial as required by Rule 93(2) of the Texas Rules of Civil Procedure. Appellees responded that they were not required to file a verified denial because W2W lacked standing as a terminated entity. The court agreed with the appellees:

Standing, a component of subject-matter jurisdiction, is a constitutional prerequisite to maintaining suit under Texas law. Standing requires that a real controversy exists between the parties that will be determined by the judicial declaration sought. Standing cannot be waived and can be raised for the first time on appeal. Standing can also be raised in a traditional motion for summary judgment. When reviewing standing on appeal, we construe the petition in favor of the plaintiff and, if necessary, review the entire record to determine whether any evidence supports standing. Whether a party has standing to bring a claim is a question of law reviewed de novo.

“At common law, dissolution terminated the legal existence of a corporation. Once dissolved, the corporation could neither sue nor be sued, and all legal proceedings in which it was a party abated.” To alleviate this harsh result, the Texas legislature enacted section 11.356(a) of the Texas Business Organizations Code, which continued the terminated filing entity’s existence for three years for the purpose of “prosecuting or defending in the terminated filing entity’s name an action or proceeding brought by or against the terminated entity[.]” See Tex. Bus. Orgs. Code Ann. § 11.356(a)(1). [The Texas Business Organizations Code defines “filing entity” as “a domestic entity that is a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust.” Tex. Bus. Orgs. Code Ann. § 1.002(22).] This permitted “the survival of an existing claim by or against the terminated filing entity.” See id. § 11.356(a)(2). Under the Texas Business Organizations Code, the survival period is three years from the effective date of termination. See Tex. Bus. Orgs. Code Ann. § 11.356(a).

This statutory provision “is a survival statute, and not a statute of limitations.” “The distinction between a statute of limitations and a survival statute is that a statute of limitations affects the time that a stale claim may be brought while a survival statute gives life for a limited time to a right or claim that would have been destroyed entirely but for the statute.” “Thus, a survival statute creates a right or claim that would not exist apart from the statute.” Therefore, once
the survival period ends, a terminated company has no legal existence and can no longer bring a lawsuit because it lacks standing.

It is undisputed that Taylor and Pantoja formally terminated W2W’s existence as a filing entity on March 27, 2017. Therefore, W2W’s survival period expired on March 27, 2020. See Tex. Bus. Orgs. Code Ann. § 11.356(a). Appellants did not file this lawsuit until May 29, 2020, which was after the survival period ended. As a result, we conclude that W2W had ceased to exist for all purposes and therefore did not have standing to file suit.

W2W argues that the survival statute did not extinguish its malpractice claims against appellees because the claims were not existing claims as defined in the survival statute. W2W argues that the actual malpractice occurred before W2W was terminated, but the claim did not accrue until after termination because the patent infringement litigation was not resolved until that time. We conclude this argument does not change the result because even if we accept W2W’s accrual argument, W2W admits the claim accrued within the survival period and because they did not file suit during that three-year period, the claim was extinguished.

W2W admits that its claim against appellees accrued by October 2018, the date the patent infringement litigation was lost. The Texas Business Organization Code defines a “claim” as a right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured.” See Tex. Bus. Orgs. Code Ann. § 11.001(1). The Code also defines “existing claim” as (1) a claim that existed before an entity’s termination and is not barred by limitations; and (2) a claim that exists after termination but before the third anniversary of the date of the entity’s termination. See Tex. Bus. Orgs. Code Ann. § 11.001(3). Thus, even if we accept W2W’s accrual argument, W2W’s claims against appellees were “existing claims” under the Code because they accrued within the three-year survival period. It is undisputed that W2W did not file suit within that time period and therefore W2W’s claims against appellees were extinguished. See Tex. Bus. Orgs. Code Ann. § 11.359(a) (providing that “an existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.”).

Finally, even if we accept W2W’s argument that its claims against appellees do not fit within the Code’s definition of “existing claim,” the result would still be the same. As explained above, under the common law, a dissolved corporation could neither sue nor be sued. To alleviate the effect of this common law rule, the Texas legislature enacted section 11.356(a) of the Texas Business Organizations Code, which continued the terminated filing entity’s existence for three years for the purpose of “prosecuting or defending in the terminated filing entity’s name an action or proceeding brought by or against the terminated entity[].” See Tex. Bus. Orgs. Code Ann. § 11.356(a)(1). This permitted “the survival of an existing claim by or against the terminated filing entity.” See id. § 11.356(a)(2). Therefore, if a claim belonging to a terminated filing entity somehow does not fit within the definition of an “existing claim,” it is extinguished immediately upon the filing entity’s termination. Because the trial court did not err when it granted appellees’ motion for summary judgment on W2W’s claims, we overrule appellants’ first issue on appeal.

Appellants then argued that the trial court erred when it granted summary judgment on Taylor’s individual claims against Andrews Kurth and Cooke. The court of appeals noted that damages were an element of Taylor’s legal malpractice and negligent misrepresentation causes of action. Because Taylor, individually, suffered no damages, the court disagreed with appellants:

Under the corporate injury rule, an owner of a company cannot sue to recover damages personally for a wrong done to the company. See Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 775 (Tex. 2020) (“A corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong.”). Texas courts also apply the rule discussed in Pike to limited liability companies. See Sherman v. Boston, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (“A member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company.”) (internal quotations omitted).
The record conclusively establishes that Taylor suffered no damages from the alleged professional negligence or negligent misrepresentation because either WPEM or W2W owned the patent at all times relevant to this appeal. The damages Taylor seeks are the amount of his share of purported revenues that the companies would have received from enforcing the patent but for the alleged negligence. Taylor, however, cannot recover lost revenues of the companies because of the corporate injury rule.

The cases Taylor relies upon do not change this result because they are distinguishable. In [Linegar v. DLA Piper, LLP (US), 495 S.W.3d 276, 280-81 (Tex. 2016)], the Texas Supreme Court acknowledged the corporate injury rule but nonetheless allowed the plaintiff, who was a shareholder in the corporation, to recover damages from the corporation’s law firm. But the unique facts present in Linegar do not exist here because that plaintiff suffered individual losses apart from the corporation’s and also had an attorney-client relationship with the law firm himself. Taylor had neither individual losses because he did not own the patent nor did he have an attorney-client relationship with Andrews Kurth or Cooke. The same is true in the other cases cited by Taylor.

Taylor also filed “derivative claims seeking derivative damages.” Taylor asserts that even if W2W is defunct, he still “has the legal right to assert the claims derivatively as a member and beneficial owner.” This argument is also unavailing because the expiration of the survival period does more than just terminate W2W’s existence for all purposes; it causes all claims to be extinguished. Tex. Bus. Orgs. Code § 11.356(a)(1) (entity), § 11.359(a) (claims).

As a result, Taylor, as a former owner of W2W, cannot sue derivatively because W2W’s claims are extinguished. See Tex. Bus. Orgs. Code § 11.359(a) (“[A]n existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.”).

Finally, Taylor argues that he suffered a loss distinct from the loss the owners of the patent suffered, namely the attorney’s fees awarded as a sanction in the patent infringement litigation against SOTI. SOTI moved to recover its attorneys’ fees in the federal infringement litigation. The federal court agreed and ordered WPEM, not Taylor, to pay SOTI attorney’s fees in an approximate amount of $180,000. WPEM appealed those fees and lost the appeal. At the time of Taylor’s deposition, those fees had not been paid by WPEM or anyone else. According to Taylor, he did not pay the fee award because WPEM is a limited liability company and he is not individually liable for the company’s debt. These alleged personal damages are speculative and thus no damages.

The trial court did not err when it granted Andrews Kurth and Cooke’s motion for summary judgment on Taylor’s individual claims. . . .

McLane Champions, LLC v. Houston Baseball Partners LLC, 671 S.W.3d 907 (Tex. 2023).

“As an initial matter, Champions argues that Partners [an LLC] lacks standing to sue—and the courts thus lack subject matter jurisdiction over Partners’ claims—because Partners assigned all its rights under the purchase agreement to Holdings [an LLC and wholly owned subsidiary of Partners]. Partners responds that Champions is challenging its capacity to sue, not standing in the true constitutional, and jurisdictional, sense of the term.

Lack of constitutional standing deprives the trial court of subject matter jurisdiction. Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 773 (Tex. 2020). Because standing is a threshold jurisdictional issue that ‘is essential to a court’s power to decide a case,’ we address that issue before turning to the substance of the [claim].

To show constitutional standing, a plaintiff must demonstrate that: (1) it suffered a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant’s conduct; and (3) a favorable decision is likely to redress the injury. Partners easily satisfies these requirements. Partners presented evidence that it transferred over $300 million of its own money—and obligated itself to repay additional bank loans—to fund the purchase of the Astros, a textbook ‘pocketbook injury.’ Partners further alleges that it paid a bloated purchase price in reliance on Champions’ material misrepresentations. And Partners seeks to recover money damages to redress its injury.

Champions nevertheless contends that Partners’ assignment of its rights under the purchase agreement to Holdings deprives Partners of standing to sue because all its claims arise out of that purchase. Our recent precedent
confirms, however, that such ‘extra-constitutional restrictions on the right of a particular plaintiff to bring a particular lawsuit’ do not implicate standing in the jurisdictional sense. Stated differently, ‘a plaintiff does not lack standing simply because some other legal principle may prevent it from prevailing on the merits; rather, a plaintiff lacks standing if its claim of injury is too slight for a court to afford redress.’

Here, the legal principle Champions raises that may prevent Partners from recovering is its capacity to sue on the purchase agreement—that is, its ‘legal authority to act’ despite the assignment. Pike, 610 S.W.3d at 775 (“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.”) (citation omitted)). And the assignment may (or may not) affect Partners’ ability to recover damages from Champions. But it does not affect Partners’ constitutional standing and thus does not call into question the court’s subject matter jurisdiction. At this stage of the litigation, we need not inquire further into the assignment’s impact on Partners’ claims.”

O. Derivative Litigation


The court held that an LLC member whose membership interest was redeemed pursuant to provisions of the company agreement triggered by the member’s failure to satisfy a capital call did not have standing to bring a derivative suit on behalf of the LLC because derivative standing is generally limited to a person who is currently a member. The redemption was valid and did not constitute an involuntary termination of the member’s membership interest; therefore, an exception that is potentially available to former members was not met. The court also held that there was no direct duty owed by the defendants to the former member that would support a breach of fiduciary duty because members generally owe their duties to the LLC rather than individual members, and the evidence did not support the existence of any fiduciary duty to the former member.

LoneStar Logo & Signs, LLC (‘LoneStar Logo’) was created by Media Choice, LLC (“Media Choice”) and Quorum Media Group, LLC (‘Quorum Media’) in 2006 for the purpose of operating the Texas Department of Transportation’s (TxDOT) “logo program” that includes the oversight of highway signs preceding exits that inform drivers of nearby businesses such as gas stations, restaurants, and hotels. In 2006, Quorum Media and Media Choice bid together, and won, the logo program for a five-year contract from 2007 through 2011. The contract provided, contingent upon TxDOT’s approval, an opportunity for an extended five-year term that would run from December 31, 2011 to December 31, 2016. LoneStar Logo was created for the sole purpose of serving as the operator of the logo program for the entire duration of the contract (2007–2016). LoneStar Logo managed the logo program, but LoneStar Logo itself was not the “vendor” and had no contract with TxDOT. LoneStar Logo’s initial management agreement provided that its corporate existence was to terminate “immediately” upon the end of the 2007–2016 contract.

Dunster Live, LLC (“Dunster”) was a Dallas-based investment vehicle created by two individuals, Dunlap and Lippincott. In 2010, three years after LoneStar Logo was formed, Dunster obtained a controlling interest in Quorum Media, which resulted in Dunster obtaining a 30 percent ownership interest in LoneStar Logo. After Dunster obtained this interest in Quorum Media, the ownership structure and management of LoneStar Logo was modified. Two entities and two individuals held the remaining 70%, and Dunlap, Lippincott, and four other individuals were appointed as managers who managed the day-to-day operations of LoneStar Logo.

After Dunster obtained its ownership interest in LoneStar Logo, the original company agreement (which was entered into by Media Choice and Quorum Media) was revised to reflect the changes in ownership structure. The terms of the amended agreement were agreed upon by all parties. For purposes of this appeal, the relevant sections included Section 5.07 (permitting members and managers to engage in competing businesses) and Section 3 (providing for capital calls and an option to redeem a member’s interest in the event of a failure to contribute).

In 2013, the members of LoneStar Logo were informed that TxDOT would host a new statewide bidding process for the next contract instead of extending the original logo program contract. The members did not wish to continue business with Dunster based on Dunster’s previous actions, including allegedly failing to participate in day-to-day running of the logo program and failing to provide assistance to LoneStar Logo’s business in general. The members and managers other than Dunster formed a new company named LoneStar Logos Management Company, LLC (“LoneStar Management”) to bid on TxDOT’s upcoming 2017–2026 logo program contract. As
provided by the terms of the company agreement, LoneStar Logo was set to terminate at the end of the 2007–2016 contract.

In early 2016, TxDOT awarded the 2017–2026 logo program contract to vendor Media Choice and LoneStar Management, and LoneStar Logo began preparing to close out its management of the logo program. A capital infusion was necessary to make up for a cash shortfall. LoneStar Logo informed Dunster of these financial issues, and in March 2016 provided Dunster a “closeout forecast” that showed the expected budget deficit for that year. The next month, Dunster received notice of its share owed to LoneStar Logo.

The managers agreed at a meeting that LoneStar Logo’s capital calls would be made monthly rather than all at once. Dunster and other members were provided monthly financial statements and notices of each member’s required capital contribution. Dunster received notice that its share of the capital call was due on October 12, 2016, but Dunster did not meet that deadline. The next day, pursuant to Section 3.03 of the company agreement, Dunster received an email from a manager notifying Dunster of the redemption of its membership interest. The day after the redemption, Dunster responded by sending $45,000 to LoneStar Logo, which was less than the required capital amount of $71,166. LoneStar Logo returned the payment as untimely, stating that Dunster’s failure to meet its capital call requirement meant it had lost its membership interest per Section 3.03 of the agreement.

After bringing and dismissing an action in federal court, Dunster sued in state court in March 2017 asserting direct and derivative claims including breach of fiduciary duty and breach of contract. Dunster primarily relied on allegations that LoneStar Logo issued improper capital calls and improperly redeemed Dunster’s membership interest. In a prior opinion, the court of appeals granted a writ of mandamus and concluded that the trial court should dismiss Dunster’s derivative claims due to lack of standing since Dunster was no longer a member. The trial court thus entered summary judgment against Dunster on its derivative claims. Dunster sought a writ of mandamus from the court of appeals, seeking a determination that the redemption was void as a matter of law, but the court of appeals denied that petition for writ of mandamus. Eventually, the trial court entered a take-nothing judgment on all Dunster’s claims, and Dunster appealed.

On appeal, Dunster asserted various issues, which the court of appeals addressed in three groups with various subparts: (1) whether the trial court erred in dismissing Dunster’s derivative claims by finding that Dunster’s interests in LoneStar Logo were redeemed as a matter of law; (2) whether the trial court erred in granting summary judgment against Dunster’s direct claims based on breach of fiduciary duty; and (3) whether the trial court erred in denying Dunster’s motion for new trial.

Dunster argued that the trial court erred in granting summary judgment against Dunster on its derivative claims because the redemption of Dunster’s membership interests was void. Specifically, Dunster argues the redemption was void because (1) the members’ option to redeem was ineffective under the company agreement, (2) the members breached fiduciary duties, and (3) the members had an invalid business purpose. The court rejected all these arguments.

Dunster argued that the appellees improperly modified the terms of Section 3 of the company agreement by changing the required redemption payment to a different metric, specifically by incorrectly substituting Dunster’s capital account balance for the contractually required consideration—the value of Dunster’s Capital Contributions, which the appellees claimed was less than zero but which Dunster claimed was $181,500. Because the appellees modified the terms of the option, Dunster claimed that the exercise of the redemption legally operated as a rejection, and the option terminated. The appellees argued that the amount of the redemption payment was irrelevant because the agreement provided that the redemption itself was immediately effective upon written notice. The court agreed with the appellees.

Relying on corporate case law (Ritchie v. Rupe), the court stated that “[s]hareholders of closely-held corporations may address and resolve difficulties in selling one’s shares by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.” The court proceeded to analyze the “plain language” of Section 3.03 of the company agreement, which addressed the consequences of a failure to contribute, since no party alleged that the terms of the agreement were ambiguous.

Section 3 of the agreement provided that all members would be subject to capital calls, and Section 3.03 provided that a member’s failure to timely meet a capital call would trigger an option for redemption of that member’s share:

3.03 Failure to Contribute. If a Member fails to make such Member’s additional Capital Contribution under Section 3.02 in accordance with the notice sent by the Managers, the Company
shall have the option to redeem such Member’s Membership Interest for the outstanding value of such Member’s Capital Contributions, if any. If such additional Capital Contributions are not received by the Company within the time period set forth in the Managers’ notice with respect to the additional Capital Contributions, the Company is entitled to exercise this redemption option by serving written notice upon such Member. The redemption option may be exercised by the action of any single Manager, without the need for a vote. The redemption will be effective upon written notice to the Non-Contributing Member and the redemption payment, if any, must be made to the Non-Contributing member within thirty (30) working days of the redemption notice. Effective immediately upon the notice of redemption: (i) the redeemed Membership Interest shall be terminated resulting in a pro rata increase of the ownership of the Company by the Contributing Members; and (ii) the Managers appointed by the redeemed Member shall be terminated.

The court of appeals stated that the undisputed summary judgment evidence showed that Dunster received timely notice of the September 2016 capital call and that Dunster failed to timely make the capital call within the required deadline, due to an error by Dunster’s accountant. As a result, a manager immediately emailed Dunster its notice to exercise redemption of its membership interests. Dunster did not immediately protest the amount included in the notice of the capital call. The court concluded that the redemption was effective at that point pursuant to the unambiguous terms of the agreement.

With regard to the redemption price, the court commented in a footnote:

Section 3.04 of the Agreement states that any “Capital Contributions” will not be returned. Instead, in the event of a redemption (Section 3.03), the member will be paid the “outstanding value” of those contributions at the time of the redemption. The redemption amount was not the “value” of capital contributions when earlier made, but the “outstanding value” at the time of the redemption. Due to LoneStar Logo’s uncontroverted cash shortfall existing in October 2016, the “outstanding value of Dunster’s Capital Contributions [was] less than zero,” and therefore Dunster was not owed a redemption payment.

The court rejected Dunster’s argument that it should be permitted to pursue its derivative claims even though it was no longer a member of LoneStar Logo. Dunster relied on Texas case law recognizing that a former shareholder may proceed with derivative claims if the plaintiff’s status as a shareholder was involuntarily destroyed with no valid business purpose, but the court concluded that the termination of Dunster’s membership was not involuntary.

Texas courts, and this Court in particular, have previously and consistently held that a former member of a corporation lacks standing to bring a derivative claim against the corporation. *See LoneStar Logo*, 552 S.W.3d at 350 (“[A] fundamental and definitional attribute of a derivative action, as long known to Texas law (and more generally), is that the claimant possesses a present ownership interest in the entity on whose behalf it purports to sue, such that it has a stake in the outcome of those claims.”) (cleaned up). The only carve-out to this rule is the *Zauber* exception, which provides that the corporate transaction that caused the loss of ownership status can be deemed a nullity, and the plaintiff may proceed with its derivative claims, if (1) the plaintiff’s stockholder status was involuntarily destroyed, and (2) there was no valid business purpose for the involuntary loss of membership status. *See Zauber v. Murray Sav. Ass’n*, 591 S.W.2d 932, 937–38 (Tex. App.—Dallas 1979, writ ref’d n.r.e., 601 S.W.2d 940 (Tex. 1980) (per curiam). The plaintiff moving to establish the exception has the burden to plead and prove both elements. *Id.*

We find nothing in the record to suggest that Dunster’s failure to meet the capital call—and resulting immediate redemption of its membership interests—was outside of Dunster’s control and therefore involuntary. To the contrary, the undisputed evidence shows that Dunster, like all of the LoneStar Logo members, had the opportunity to maintain its membership interest by paying the amount required under the September 2016 capital call. Dunster admits that its failure to do so was the result of its own accountant’s error. Accordingly, we conclude Dunster has failed
to meet its burden in proving that the *Zauber* exception applies. Because Dunster could not show the redemption was invalid and could not meet its burden in proving the *Zauber* exception, it ceased being a member of LoneStar Logo on October 13, 2016, and therefore lacked standing to bring its derivative suit. *See* LoneStar Logo, 552 S.W.3d at 350. We overrule Dunster’s first issue.

Dunster also argued that the trial court erred in not granting a new trial based on newly discovered evidence that Dunster alleged revealed the capital calls were only initiated because the appellees improperly redirected millions in funds that rightfully belonged to LoneStar Logo into an account for LoneStar Management. The court of appeals said LoneStar Logo’s financial documents were “not material because they would only serve to persuade the trial court that the redemption was not done for a ‘valid business purpose’ (i.e. the second element of the *Zauber* exception). Because we have already concluded Dunster failed to prove the first element of the *Zauber* exception (i.e. the ousted stockholder’s membership status was involuntarily destroyed), the issue of whether it can prove the second element is irrelevant.”

Dunster argued that the trial court erred in granting summary judgment against Dunster on its direct claims of breach of fiduciary duty. The appellees offered several reasons that the court should affirm the summary judgment on Dunster’s derivative claim, and the court found the argument that Texas law does not impose fiduciary duties between members of a limited liability company to be dispositive. The court of appeals [in an analysis that conflated case law, statutes, and terminology in the corporate and LLC contexts] provided the following explanation:


A breach of fiduciary duty necessarily requires the existence of the duty itself. The issue here is therefore whether any fiduciary duty between the members of LoneStar Logo existed. Dunster argues that the unanimity provision in Section 5.01(b)(iii) of the Agreement creates a fiduciary duty upon all parties, and that appellees, in bidding for the 2017–2026 contract, violated said duties. This unanimity provision states in relevant part:

> The Managers may not cause the Company to do any of the following unless there is unanimous agreement among the Managers: ... (iii) take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.

Appellees respond that Texas law does not recognize fiduciary duties between members of a closely-held corporation, or, in the alternative, no fiduciary duties existed in the first place because the Agreement, which was voted through majority agreement of the members, intentionally foreclosed any fiduciary duty that the members owed each other. We agree with appellees.

The Texas Supreme Court has held that members of an LLC owe a fiduciary duty to the LLC, but not to the individual members themselves. *Ritchie*, 443 S.W.3d 856, 890 n. 62 (“We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”). The *Richey* [sic] court held that, “[a]bsent a contractual or other legal obligation, the officer or director has no duty to conduct the corporation’s
business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.” *Id.* at 888–89 (footnote omitted). Recently, the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the corporation for that shareholder’s benefit. *See In re Estate of Poe*, 648 S.W.3d 277, 287 (Tex. 2022). Accordingly, as members of the closely-held corporation, appellees did not owe either a formal or informal fiduciary duty to Dunster and therefore appellees could not have violated such duties when they formed LoneStar Management without Dunster.[footnote 12 discussed *Allen v. Devon Energy Holdings, LLC*, characterizing it as recognizing an “informal fiduciary duty to a fellow member only when ‘the alleged fiduciary has a legal right of control by virtue of his status as the majority owner and sole member-manager of a closely-held LLC’” and declining to further address the application of *Allen* because LoneStar Logo’s company agreement “foreclosed the possibility of a fiduciary duty owed towards fellow members.”]

Notwithstanding our above conclusion, the *Richey* [sic] court noted that disputes in closely-held corporations may be prevented and resolved through shareholders’ agreements and that the Legislature granted corporate founders and owners “broad freedom to dictate for themselves the rights, duties, and procedures that govern their relationship with each other and with the corporation.” *Ritchie*, 443 S.W.3d at 881; *see also* Tex. Bus. Orgs. Code §§ 7.001(d)(3) (providing that, in limited liability corporation, liability of governing person may be limited or eliminated by its certificate of formation or company agreement), 101.401 (providing that limited liability company agreement may expand or restrict any duties, including fiduciary duties, and related liabilities that member, manager, officer, or other person has to company or to member or manager of company); *Strebel v. Wimberly*, 371 S.W.3d 267, 285 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that fiduciary duty claim was foreclosed by operation of contractual disclaimer within limited partnership agreement). Here, as permitted by both Sections 7.001(d)(3) and 101.401 of the Business Organizations Code, the members voted by majority agreement to eliminate any prohibition on the members’ outside business ventures. This decision was reflected in the Agreement as follows:

5.07 Conflicts of Interest. Each Manager, Member and officer of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including ones in competition with the Company, with no obligation to offer to the company or any other Member, Manager or officer the right to participate.

The evidence is uncontroverted that LoneStar Logo was formed for the sole purpose of operating the 2007–2016 contract. Because of this, appellees claim, the 2017–2026 contract would fall within the phrase “other business ventures” in Section 5.07. We agree. And importantly, nothing precluded Dunster from bidding on the 2017–2016 logo program itself, as the Agreement provided that “[t]he Managers may not cause the Company to] take any action that will result in any benefit, financial or otherwise, flowing from the Company to any Member, or any entity affiliated with any Member, that is not made equally available to every other Member in proportion to their respective pro rata share of the Membership Units.” Accordingly, even viewing the evidence in the light most favorable to Dunster, *see Ford Motor Co.*, 135 S.W.3d at 601, we conclude appellees did not violate a fiduciary duty to Dunster because, under both Texas law and the parties’ Agreement, none existed.


Plaintiff members of an LLC sufficiently pleaded direct RICO claims in their individual capacities against the defendant members and an entity controlled by them but failed to sufficiently plead derivative RICO claims because they did not plead that they had made a pre-suit written demand. The plaintiff members sufficiently pleaded direct claims against the defendant members for breach of fiduciary duties owed to the plaintiffs.
In 2016, the plaintiffs formed Allied Lab Solutions, LLC (“Allied”) to provide medical lab services to rural hospitals, entering into a company agreement and becoming members of Allied. Around the same time, defendant Nichols formed Medical Management Professionals (“MMP”), also with the purpose of providing lab services to rural hospitals. The plaintiffs then formed Allied Lab Solutions Management, LLC (“Allied Management”) for the sole purpose of distributing money from MMP to Allied. Defendant Ellis was the member-manager of Allied Management and Allied from November 2016 to April 2017, and defendant Forage was the member-manager of Allied Management and Allied from May 2017 to April 2019.

In April 2017, Allied and MMP entered into a Service Agreement in which they agreed to perform lab services for several rural hospitals (“Participating Rural Hospitals”). The plaintiffs alleged that the defendants repeatedly misreported to the plaintiffs the income that MMP was receiving from the Participating Rural Hospitals from December 2016 to April 2019 and that Ellis and Forage knew that the reports were falsified and that the amount of money going to each member was incorrect. According to the plaintiffs, Ellis deposited some of MMP’s unreported money in a bank account for another one of his companies located in Colorado, and Ellis and Forage sent Allied’s members annual tax forms confirming the amounts they received from their membership shares that falsely understated amounts from MMP’s financial reports. The plaintiffs allege that the defendants committed both wire fraud and money laundering in carrying out this scheme. From May 2019 to June 2020, MMP failed to make any payments to Allied Management, Allied, or the plaintiffs. Defendants Nichols, Ellis, and Forage allegedly claimed that MMP had not received any monies from Participating Rural Hospitals since April 2018 although the CEO of one of the Participating Rural Hospitals stated that MMP received $2,425,725 between May 2019 and June 2020 from his hospital alone.

In October 2020, Forage, acting as Allied’s manager, terminated Allied and Allied Management by filing documents with the Texas Secretary of State. The plaintiffs alleged that he did so without the consent of Allied’s members in order to cover up the defendants’ scheme to skim money from MMP’s income.

In this lawsuit, the plaintiffs’ causes of action included direct RICO claims in the plaintiffs’ individual capacities, derivative RICO claims on behalf of Allied and MMP, and direct claims for breach of fiduciary duty against Ellis and Forage. The defendants sought to dismiss all of these claims.

The defendants contended that the plaintiffs individually lacked standing or capacity to bring RICO claims. The court explained that the Fifth Circuit uses the terms “standing” and “capacity” in relation to RICO claims brought in an individual capacity, but the Texas Supreme Court has stated that “[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.” Recognizing that Allied, Allied Management, and MMP were all LLCs rather than corporations or partnerships, the court applied the same three-part test used by the Fifth Circuit to determine whether shareholders or partners may bring RICO claims individually. The test is: (1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of action accrues in the corporation. The defendants argued that the plaintiffs failed all three parts of the test, but the court disagreed.

The court agreed with the defendants that the plaintiffs did not sufficiently plead that their injuries were not derived from, and thus distinct from, Allied’s injuries. Only because of the plaintiffs’ relationship with Allied as its members did they receive less profit than they would have if not for the defendants’ alleged racketeering activity. The court determined, however, that the plaintiffs sufficiently pleaded that the defendants’ racketeering activity was directed at the members individually rather than solely at Allied and that Texas law could allow for the individual members to have a cause of action separate from the LLCs. The plaintiffs alleged that they acted in reliance on the defendants’ false statements by trusting that the monthly financial reports and checks from MMP and Allied were correct. According to the court, if the plaintiffs did not allege that Allied’s managers knew of and actively participated in the scheme, then the defendants would be correct in stating that only Allied was targeted and not its individual members, but the court said that the plaintiffs had sufficiently shown at this stage that the defendants targeted their activities not only at Allied but also at its individual members. The court acknowledged that “Texas courts generally have held that a member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company,” but the court relied on Texas cases (Sadén v. Smith, 415 S.W.3d 450, 463 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); French v. Fisher, No. 1:17-CV-248-DAE, 2018 WL 8576652, at *7 (W.D. Tex. Aug. 27, 2018)), in support of its conclusion that Texas courts sometimes allow for individual members to assert a separate cause of action from the LLC where members of an LLC “used
their status as members of an LLC to benefit themselves to the detriment of the other members.” The court thus declined to dismiss the RICO claims brought by the plaintiffs in their individual capacities.

With respect to the RICO claims brought by the plaintiffs derivatively, the court relied on the statutory provisions of the Texas Business Organizations Code applicable to LLC derivative proceedings to conclude that the claims should be dismissed. The court first noted that Federal Rule of Civil Procedure 23.1 requires a shareholder derivative complaint to state with particularity “any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members” and “the reasons for not obtaining the action or not making the effort,” but the court then stated that “the particularity of a plaintiff’s pleadings is governed by the standards of the state of incorporation.” Because Allied and MMP were both Texas LLCs, the court turned to a discussion of the provisions of the Texas Business Organizations Code. The court concluded that the plaintiffs sufficiently pleaded that they fairly and adequately represented the interests of the LLC, but they failed to plead that they had made a written pre-suit demand. [The plaintiffs apparently did not attempt to rely on the provisions of the Texas Business Organizations Code that exclude the fair representation and demand requirements in the context of a derivative claim against members, managers, or officers of a closely held LLC, i.e., an LLC with fewer than 35 members and no membership interests listed on an exchange.]

The Texas Business Code sets forth standing requirements for members of LLCs who wish to bring claims in a derivative capacity, or on behalf of the LLC itself. Section 101.452 states that a member must have been a member of the LLC at the time of the act or omission complained of and must fairly and adequately represent the interests of the LLC in enforcing the right of the LLC. Section 101.453 states that a member “may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the limited liability company stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the limited liability company take suitable action” (emphasis added).

Defendants argue that Plaintiffs have failed to plead that they fairly and adequately represent the interests of the LLC and that they made a written demand for the LLC to take action and were rejected. (Mot., Dkt. 15, at 10–11). Defendants also contend that Plaintiffs have not pleaded enough facts to show that the RICO claims are not collusive ones pleaded just to confer jurisdiction on the federal court. (Id. at 11 (citing Fed. R. Civ. P. 23.1(b)(2))). As discussed above, the Court finds that Plaintiffs have sufficiently pleaded a RICO claim in their individual capacities and therefore the Court does not believe there is sufficient evidence that Plaintiffs only pleaded a RICO claim to get into federal court at this time. Further, the Court finds that Plaintiffs, as several members of Allied who benefit from Allied’s success, have pleaded enough facts to show that they fairly and adequately represent the interests of the LLC. However, the Court agrees with Defendants that Plaintiffs have failed to plead that they filed a written demand with Allied or MMP that stated the act or omission that is the subject of this suit and demanded action. While Plaintiffs did plead that they made two requests to Defendant Forage to bring a suit on behalf of Allied, (Am. Comp., Dkt. 14, at 41), they fail to allege that these demands were written.

In their response, Plaintiffs simply reiterate the statements from their amended complaint: that they made two demands to Defendant Forage to bring an action on the basis of the alleged fraudulent activities through an attorney acting on their behalf and that Defendant Forage rejected both demands. (Resp., Dkt 20, at 10–11). The Court notes that Plaintiffs seem to have strategically eliminated the word “written” when providing a quote from Section 101.453. (See id.). Because Plaintiffs have failed to allege that they have met the conditions to bring a derivative claim on behalf of Allied required Texas law, the Court finds that Plaintiffs’ claims, to the extent they are brought in a derivative capacity, are dismissed.[footnote omitted]

The defendants also sought dismissal of the plaintiffs’ breach-of-fiduciary-duty claims against defendants Forage and Ellis, arguing that Forage and Ellis “owed fiduciary duties only to Allied, and not to the Plaintiffs as individual members of Allied.” Relying on Texas case law that has recognized fiduciary duties may be owed by member-managers to other members in some situations, the court concluded that the plaintiffs’ allegations were sufficient to allow them to proceed with their breach-of-fiduciary-duty claims against Ellis and Forage.
Defendants are correct that Texas courts have generally held that fiduciary duties of a corporate director “run to the corporation, not to the individual shareholders.” *Strahla v. AL Glob. Servs., LLC*, 619 S.W.3d 795, 805 (Tex. App.—San Antonio 2020, pet. denied). However, “[n]either the Texas Limited Liability Company Act ... nor the subsequently-enacted limited liability company provisions of the Texas Business Organizations Code ... directly address the duties owed by managers and/or members of limited liability companies.” *Cardwell v. Gurley*, No. 05-09-01068-CV, 2018 WL 3454800 (Tex. App.—Dallas July 18, 2018, pet. denied) (citing Tex. Bus. Orgs. Code Ann. § 101.401). “Both, however, presume the existence of fiduciary duties, providing that a limited liability company may ‘expand or restrict’ any duties (including fiduciary duties) of a member, manager, officer, or other person.” *Id.*

Texas courts have recognized a fiduciary duty between a manager member of an LLC and an individual member of an LLC in certain contexts. In *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 392–93 (Tex. App.—Houston [1st Dist.] 2012, no pet.), the court found that a “sole member-manager” of an LLC who had “a high degree of control” over the LLC’s day-to-day operations was more analogous to a general partner in a limited partnership than a director or majority shareholder in a corporation. Thus, because “a general partner in a limited partnership owes a fiduciary duty to the limited partners because of its control over the entity,” *id.* at 391, and because the member manager “[had] a legal right of control and exercise[d] that control by virtue of his status,” *id.* at 395, the court concluded that there was a formal fiduciary relationship between the member-manager and the individual members in the specific context of purchasing a minority member’s interest, *id.* at 396. Similarly, in *Cardwell v. Gurley*, No. 4-10-CV-706, 2011 WL 6338813, at *9 (E.D. Tex. Dec. 19, 2011), aff’d sub nom. *In re Cardwell*, 487 Fed. Appx. 183 (5th Cir. 2012), a federal district court upheld a Texas trial court’s finding that a member-manager of an LLC owed another member “direct fiduciary duties of loyalty, due care, and full disclosure as a matter of law.” The court noted that the Fifth Circuit has held that “persons exercising control of a business owe trust-type obligations to partners and shareholders that do not control the business.” *Id.* at *8.

The Court finds these cases to be illuminating as to whether member-managers of an LLC can ever be held to owe a fiduciary duty to the individual members of the LLC and not just the LLC itself.’ [In footnote 4, the court noted that the plaintiffs suggested some sort of informal duty might exist between the plaintiffs and Ellis and Forage based on a pre-existing relationship but stated the plaintiffs did not allege any facts supporting the existence of informal fiduciary duties and sufficiently pleaded the existence of fiduciary duties owed by Ellis and Forage to the plaintiffs based on their control over Allied, not because of any informal, pre-existing relationships.] Plaintiffs alleged that both Defendants Ellis and Forage actively worked to mislead Plaintiffs as to how much money they were entitled to through their membership shares of Allied. (Am. Compl., Dkt. 14, at 4). Plaintiffs also alleged that Defendants Ellis and Forage ran the day-to-day operations of Allied as the managing members, which allowed them to mislead Plaintiffs. (*Id.* at 15). Adding to the alleged authority of Ellis and Forage to oversee Allied is the fact that Ellis and Forage were also the member-managers of Allied Management, which was also a member-manager of Allied. (*Id.* at 15–16). Thus, Plaintiffs ... may proceed with their breach of fiduciary claims against Defendants Ellis and Forage.[footnote omitted]


The court of appeals upheld the trial court’s grant of summary judgment on the grounds that (a) a voluntarily terminated LLC loses its ability to sue three years after termination, (b) an individual member has no capacity to sue for damages to the LLC, and (3) the extinguishment of claims of a terminated entity after three years applies to claims brought derivatively by a member as well as claims brought by the LLC itself.

Appellant William Taylor was an inventor. Taylor, along with his business partner Tina Pantoja, developed a software application called SafeCell. Pantoja had a preexisting entity, W2W, LLC. Taylor and Pantoja each became fifty percent owners of W2W. Taylor and Pantoja then assigned the rights to any patent derived from the SafeCell application to W2W.
W2W, through Taylor, approached Andrews Kurth partner Douglas Rommelmann to obtain a patent on the SafeCell application. At that time, Brett Cooke was an Andrews Kurth associate who worked with Rommelmann on W2W’s patent application. These discussions led to W2W engaging Andrews Kurth to patent the SafeCell idea. Andrews Kurth ultimately submitted two patent applications, which resulted in a patent being issued (the “762 Patent”) for the SafeCell Application. W2W, however, did not pay Andrews Kurth’s bill for legal services rendered. Those bills were still not paid when Taylor and Pantoja formally terminated W2W as an entity on March 27, 2017. Taylor and Pantoja had previously assigned the 762 Patent to themselves.

More than a year after terminating W2W, Taylor and Pantoja created a new LLC, WPEM, LLC. They then assigned the 762 Patent to WPEM so that WPEM could pursue a patent infringement suit against SOTI, Inc. WPEM’s patent infringement suit failed and the federal district court assessed the defendant’s attorney’s fees against WPEM.

When the patent infringement suit failed, WPEM, Taylor, and the terminated entity W2W (collectively the appellants) filed a legal malpractice suit against Andrews Kurth, Rommelmann, and Cooke (collectively the appellees). Appellants alleged that appellees were negligent and grossly negligent in their handling of the 762 Patent application process which in turn caused appellants’ damages including lost revenues and the loss of the patent infringement lawsuit. All of the alleged acts of malpractice at issue in the lawsuit occurred in the 2012 to 2013 time period. These included allegations that Andrews Kurth and its lawyers failed to prosecute the 762 patent correctly, failed to take steps to ensure the 762 patent would have priority over the similar software involved in the patent infringement suit, failed to advise appellants on changes to patent law, and failed to advise appellants to not allow an earlier patent application to be abandoned.

Appellees moved for traditional summary judgment on the entities’ claims against them. They argued, in part, that they were entitled to judgment as a matter of law on W2W’s claims because W2W had been terminated as an entity and the winding up period provided by statute had expired before the lawsuit was filed. The trial court agreed and granted the motion. Appellees then moved for traditional summary judgment on Taylor’s claims against them. They argued, in part, that Taylor personally suffered no damages. The trial court granted the motion as to Andrews Kurth and Cooke, but denied it as to Rommelmann.

On appeal, appellants first argued that the trial court erred when it granted appellees’ motion for summary judgment on W2W’s claims because appellees did not include lack of capacity to maintain a lawsuit in a verified denial as required by Rule 93(2) of the Texas Rules of Civil Procedure. Appellees responded that they were not required to file a verified denial because W2W lacked standing as a terminated entity. The court agreed with the appellees:

Standing, a component of subject-matter jurisdiction, is a constitutional prerequisite to maintaining suit under Texas law. Standing requires that a real controversy exists between the parties that will be determined by the judicial declaration sought. Standing cannot be waived and can be raised for the first time on appeal. Standing can also be raised in a traditional motion for summary judgment. When reviewing standing on appeal, we construe the petition in favor of the plaintiff and, if necessary, review the entire record to determine whether any evidence supports standing. Whether a party has standing to bring a claim is a question of law reviewed de novo.

“At common law, dissolution terminated the legal existence of a corporation. Once dissolved, the corporation could neither sue nor be sued, and all legal proceedings in which it was a party abated.” To alleviate this harsh result, the Texas legislature enacted section 11.356(a) of the Texas Business Organizations Code, which continued the terminated filing entity’s existence for three years for the purpose of “prosecuting or defending in the terminated filing entity’s name an action or proceeding brought by or against the terminated entity[.]” See Tex. Bus. Orgs. Code Ann. § 11.356(a)(1). [The Texas Business Organizations Code defines “filing entity” as “a domestic entity that is a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust.” Tex. Bus. Orgs. Code Ann. § 1.002(22).] This permitted “the survival of an existing claim by or against the terminated filing entity.” See id. § 11.356(a)(2). Under the Texas Business Organizations Code, the survival period is three years from the effective date of termination. See Tex. Bus. Orgs. Code Ann. § 11.356(a).

This statutory provision “is a survival statute, and not a statute of limitations.” “The distinction between a statute of limitations and a survival statute is that a statute of limitations
affects the time that a stale claim may be brought while a survival statute gives life for a limited time to a right or claim that would have been destroyed entirely but for the statute.” “Thus, a survival statute creates a right or claim that would not exist apart from the statute.” Therefore, once the survival period ends, a terminated company has no legal existence and can no longer bring a lawsuit because it lacks standing.

It is undisputed that Taylor and Pantoja formally terminated W2W’s existence as a filing entity on March 27, 2017. Therefore, W2W’s survival period expired on March 27, 2020. See Tex. Bus. Orgs. Code Ann. § 11.356(a). Appellants did not file this lawsuit until May 29, 2020, which was after the survival period ended. As a result, we conclude that W2W had ceased to exist for all purposes and therefore did not have standing to file suit.

W2W argues that the survival statute did not extinguish its malpractice claims against appellees because the claims were not existing claims as defined in the survival statute. W2W argues that the actual malpractice occurred before W2W was terminated, but the claim did not accrue until after termination because the patent infringement litigation was not resolved until that time. We conclude this argument does not change the result because even if we accept W2W’s accrual argument, W2W admits the claim accrued within the survival period and because they did not file suit during that three-year period, the claim was extinguished.

W2W admits that its claim against appellees accrued by October 2018, the date the patent infringement litigation was lost. The Texas Business Organization Code defines a “claim” as a right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured.” See Tex. Bus. Orgs. Code Ann. § 11.001(1). The Code also defines “existing claim” as (1) a claim that existed before an entity’s termination and is not barred by limitations; and (2) a claim that exists after termination but before the third anniversary of the date of the entity’s termination. See Tex. Bus. Orgs. Code Ann. § 11.001(3). Thus, even if we accept W2W’s accrual argument, W2W’s claims against appellees were “existing claims” under the Code because they accrued within the three-year survival period. It is undisputed that W2W did not file suit within that time period and therefore W2W’s claims against appellees were extinguished. See Tex. Bus. Orgs. Code Ann. § 11.359(a) (providing that “an existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.”).

Finally, even if we accept W2W’s argument that its claims against appellees do not fit within the Code’s definition of “existing claim,” the result would still be the same. As explained above, under the common law, a dissolved corporation could neither sue nor be sued. To alleviate the effect of this common law rule, the Texas legislature enacted section 11.356(a) of the Texas Business Organizations Code, which continued the terminated filing entity’s existence for three years for the purpose of “prosecuting or defending in the terminated filing entity’s name an action or proceeding brought by or against the terminated entity[.]” See Tex. Bus. Orgs. Code Ann. § 11.356(a)(1). This permitted “the survival of an existing claim by or against the terminated filing entity.” See id. § 11.356(a)(2). Therefore, if a claim belonging to a terminated filing entity somehow does not fit within the definition of an “existing claim,” it is extinguished immediately upon the filing entity’s termination. Because the trial court did not err when it granted appellees’ motion for summary judgment on W2W’s claims, we overrule appellants’ first issue on appeal.

Appellants then argued that the trial court erred when it granted summary judgment on Taylor’s individual claims against Andrews Kurth and Cooke. The court of appeals noted that damages were an element of Taylor’s legal malpractice and negligent misrepresentation causes of action. Because Taylor, individually, suffered no damages, the court disagreed with appellants:

Under the corporate injury rule, an owner of a company cannot sue to recover damages personally for a wrong done to the company. See Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 775 (Tex. 2020) (“A corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong.”). Texas courts also apply the rule discussed in Pike to limited liability companies. See Sherman v. Boston, 486 S.W.3d 88,
The record conclusively establishes that Taylor suffered no damages from the alleged professional negligence or negligent misrepresentation because either WPEM or W2W owned the patent at all times relevant to this appeal. The damages Taylor seeks are the amount of his share of purported revenues that the companies would have received from enforcing the patent but for the alleged negligence. Taylor, however, cannot recover lost revenues of the companies because of the corporate injury rule.

The cases Taylor relies upon do not change this result because they are distinguishable. In Linegar v. DLA Piper, LLP (US), 495 S.W.3d 276, 280-81 (Tex. 2016), the Texas Supreme Court acknowledged the corporate injury rule but nonetheless allowed the plaintiff, who was a shareholder in the corporation, to recover damages from the corporation’s law firm. But the unique facts present in Linegar do not exist here because that plaintiff suffered individual losses apart from the corporation’s and also had an attorney-client relationship with the law firm himself. Taylor had neither individual losses because he did not own the patent nor did he have an attorney-client relationship with Andrews Kurth or Cooke. The same is true in the other cases cited by Taylor.

Taylor also filed “derivative claims seeking derivative damages.” Taylor asserts that even if W2W is defunct, he still “has the legal right to assert the claims derivatively as a member and beneficial owner.” This argument is also unavailing because the expiration of the survival period does more than just terminate W2W’s existence for all purposes; it causes all claims to be extinguished. Tex. Bus. Orgs. Code § 11.356(a)(1) (entity), § 11.359(a) (claims).

As a result, Taylor, as a former owner of W2W, cannot sue derivatively because W2W’s claims are extinguished. See Tex. Bus. Orgs. Code § 11.359(a) (“[A]n existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.”).

Finally, Taylor argues that he suffered a loss distinct from the loss the owners of the patent suffered, namely the attorney’s fees awarded as a sanction in the patent infringement litigation against SOTI. SOTI moved to recover its attorneys’ fees in the federal infringement litigation. The federal court agreed and ordered WPEM, not Taylor, to pay SOTI attorney’s fees in an approximate amount of $180,000. WPEM appealed those fees and lost the appeal. At the time of Taylor’s deposition, those fees had not been paid by WPEM or anyone else. According to Taylor, he did not pay the fee award because WPEM is a limited liability company and he is not individually liable for the company’s debt. These alleged personal damages are speculative and thus no damages.

The trial court did not err when it granted Andrews Kurth and Cooke’s motion for summary judgment on Taylor’s individual claims. . . .

P. Bankruptcy


“A statutory insider is defined in Bankruptcy Code § 101(31), with respect to a corporation, to include ‘(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor’ as well as an ‘affiliate, or insider of an affiliate as if such affiliate were the debtor’ and ‘[a] managing agent of the debtor.’ [SCC is a limited liability company, which, for purposes of determining statutory insider status, is treated as a corporation.]”
Q. Securities Laws


The court granted summary judgment in favor of the SEC on its claims for federal securities fraud against two LLCs and the two individuals who controlled and operated the LLCs.

Larry Leonard and his wife Shuwana Leonard created and controlled Teshuater, LLC (“Teshuater”) and Texas Business Group, LLC (“TBG”). Larry Leonard was the president of both companies and Shuwana Leonard was their director of operations. Teshuater was a Texas member-managed limited liability company formed in 2017 by the Leonards. TBG was Teshuater’s sole managing member. The Leonards touted Teshuater as the first Black-owned alkaline water company. Although Teshuater had some operations, it generated minimal revenues. In 2021, the Texas Secretary of State forfeited Teshuater’s certificate of formation.

TBG was also a Texas member-managed limited liability company formed in 2017 by the Leonards. TBG’s members included the Leonards. The Leonards raised nearly $500,000 from 500 investors in numerous states through the offer and sale of bogus Teshuater “stock certificates,” a crypto asset called “TeshuaCoin,” and a Bitcoin-mining investment.

The court concluded that the Leonards, on behalf of Teshuater, offered and sold purported shares of Teshuater stock to investors, which were “securities” under both the Securities Act of 1933 and the Securities Exchange Act of 1934 because both statutes include “stock” in the definition of a “security.” The court explained the requirements for an investment to qualify as a “security” as an “investment contract” under S.E.C. v. W.J. Howey Co. and concluded that the TeshuaCoin and Bitcoin-mining investments were investment contracts and thus securities (i.e., investors invested money in a common enterprise with the expectation of profits to be derived solely from the efforts of others). Although the court stated that a Howey analysis of the offers of Teshuater stock was not required because the definitions of “security” include “stock,” the court concluded that the offers and sales of the Teshuater stock also satisfied the Howey test.

The court further concluded that Teshuater and the Leonards violated the Securities Act by selling unregistered securities and that the defendants also committed securities fraud under Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act.


The court of appeals affirmed a summary judgment in favor of investors in a limited partnership for violation of the Texas Securities Act and breach of fiduciary duty against an individual who was the managing member and president of the LLC general partner of the limited partnership. The court determined that the evidence established that the individual was primarily liable as a “seller” under the Texas Securities Act and that the individual was liable for breach of fiduciary duty to the limited partners of the limited partnership because he knowingly participated in a breach of fiduciary duty owed by the LLC general partner to the limited partners.

Michael O’Donnell was the managing member and president of Pepperwood Fund II GP, LLC (“Pepperwood II GP”), the general partner of Pepperwood Fund II, LP (“Pepperwood II”), a limited partnership which was formed as a vehicle to raise cash from investors for a controlling interest in Behavioral Recognition Systems, Inc. (“BRS”) through the purchase of Ray and Debi Davis’s BRS stock. O’Donnell solicited investments in Pepperwood II from the appellees (two individuals and an investment entity owned by them) and represented to them that their investments would be used so that Pepperwood II could purchase the controlling preferred and common stock in BRS from the Davises and then cause BRS to issue Series A stock to Pepperwood II’s investors. Based on these representations, the appellees became limited partners of Pepperwood II in exchange for capital contributions from the individuals and a loan from their entity.

In 2020, the appellees sued O’Donnell and Pepperwood II claiming that they had violated the Texas Securities Act (TSA) by selling securities to the appellees while omitting and misrepresenting material facts surrounding their investments in Pepperwood II, i.e., by representing that the investment funds would be used to purchase the Davises’ stock without disclosing that O’Donnell had already purchased the Davises’ stock and by failing to disclose the existence of a referral agreement under which O’Donnell received payment for soliciting the appellees’ investments. The appellees also sought to hold O’Donnell liable for breach of fiduciary duty and various fraud-based claims. The appellees asserted in their petition that after they became limited partners in Pepperwood
II, and without informing them until afterwards, O’Donnell executed a document on behalf of BRS to transfer all of its intellectual property assets to Pepperwood II, then executed a second document to transfer those same assets from Pepperwood II to Omni AI, Inc. (“Omni”), an entity controlled by O’Donnell. Through Pepperwood II’s general partner Pepperwood II GP, O’Donnell offered appellees the options to either exchange their limited partnership interests in Pepperwood II for shares in Omni or to withdraw from Pepperwood II and receive their capital contribution with ten percent interest. One of the individual appellees along with their investment entity opted not to sign either an exchange or a withdrawal agreement, and the other individual appellee signed both (half of his interest to be exchanged for Omni shares and the remaining interest to be withdrawn in exchange for return of capital plus interest). He received no payment despite his demands for payment from O’Donnell. Eventually the trial court granted summary judgment in favor of the appellees on their claims for breach of the TSA and breach of fiduciary duty. O’Donnell appealed.

On appeal, O’Donnell argued that the trial court erred because the evidence did not conclusively establish that O’Donnell was a “seller” under the TSA. The court of appeals explained that the TSA provides for both primary and secondary liability for violations of the Act.

Primary liability arises when a person “offers or sells a security ... by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.” See id. (quoting TEX. REV. CIV. STAT. art. 581–33A(2)).[recodified in the Texas Government Code effective Jan. 1, 2022] Secondary liability is derivative liability for another person’s securities violation; it can attach to either a control person, defined as “[a] person who directly or indirectly controls a seller, buyer, or issuer of a security,” or to an aider, defined as one “who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security.” Id. (quoting REV. CIV. art. 581–33F(1)–(2)).[footnote omitted]

O’Donnell argued that he acted only in a representative capacity in the transactions at issue, but the appellees argued that the definition of a “seller” in the TSA is broader than the issuer of the security. The court provided the following analysis in concluding that the evidence was sufficient to characterize O’Donnell as a “seller”:

Appellees respond that the definition of “seller” under the TSA imposes liability on a “person who offers or sells a security” and that “person” is broader than the company issuing the security but includes a corporation, a person, a company, and other business entities. While appellees rely on the current version of the TSA, the version in effect when this suit was filed similarly defined “person” and “company” to include “a corporation, person, joint stock company, partnership, limited partnership, association, company, firm, syndicate, trust, incorporated or unincorporated, heretofore or hereafter formed under the laws of this or any other state, country, sovereignty or political subdivision thereof, and shall include a government, or a political subdivision or agency thereof.” Compare GOVT. § 4001.064 with REV. CIV. art. 581–4(B). Appellees agree that federal cases may be used to interpret the TSA and urge that “the range of persons potentially liable under [the federal securities act] is not limited to persons who pass title.” See Pinter, 486 U.S. at 643. Appellees also point to evidence of O’Donnell’s financial interest being the referral agreement, under which O’Donnell admitted his company Pepperwood I, LLC received a $5 million finder’s fee.

In their motion for summary judgment, appellees asserted O’Donnell was liable as a seller because he offered and sold securities in Pepperwood II to them by means of an untrue statement or omission of material fact. Appellees urged that O’Donnell misrepresented in the partnership agreement (dated June 12, 2015), first amendment (dated November 19, 2015), and supplemental private placement memorandum (dated September 2015) that appellees’ investments would be used to acquire stock from the Davises in BRS when O’Donnell had already signed a sale agreement with the Davises for that same stock (dated July 28, 2015). As support for their motion, appellees relied on admissions by O’Donnell, signed and dated copies of the agreements and private
placement memorandum, and declarations from each appellee.[footnote omitted] And, as appellees argue, the summary-judgment evidence includes the referral fee pursuant to which Pepperwood I was paid $5 million for soliciting investors to purchase the Davises’ stock, as well as O’Donnell’s admissions that Pepperwood I received that fee under that agreement and that he signed the referral agreement as manager of Pepperwood I.

We conclude the foregoing is sufficient to establish O’Donnell was liable as a “seller” under the TSA because the evidence established O’Donnell “offer[ed] or [sold] a security ... by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.” See REV. CIV. art. 581–33A(2). In discussing who may be liable as a “seller” under the federal securities act, the Supreme Court held that liability extends to persons other than the person who passes title, thus we conclude appellees need not have established O’Donnell passed any title. See Pinter, 486 U.S. at 643. As for O’Donnell’s argument that appellees needed to have established his financial interest in the transaction, we note that the Supreme Court further held that liability under the federal securities act extends to a person “motivated at least in part by a desire to serve his own financial interest or those of the securities owner,” see id. at 647, and that at least one Texas court has applied that requirement to “seller” under the TSA. See Highland Cap. Mgmt., L.P. v. Ryder Scott Co., 402 S.W.3d 719, 742 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

Even assuming, without deciding, the TSA’s definition of “seller” required evidence of O’Donnell’s financial interest in this transaction, we conclude the foregoing evidence is sufficient. In Pinter, the Supreme Court discussed whether liability under the federal securities act should extend to brokers and others who solicit offers to purchase securities and concluded it should, noting that “[t]he solicitation of a buyer is perhaps the most critical stage of the selling transaction” and that “brokers and other solicitors are well positioned to control the flow of information to a potential purchaser ... and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors.” See Pinter, 486 U.S. at 646. Thus, O’Donnell’s arguments that any financial interest was that of an LLC of which he was a member and that he only acted in an agent capacity on behalf of Pepperwood II GP and Pepperwood II are unavailing.

O’Donnell also argued on appeal that the appellees failed to conclusively establish that he was secondarily liable as a “control person” under the TSA, but the court of appeals found it unnecessary to address this argument since the court had already concluded that the appellees proffered sufficient summary-judgment evidence to support O’Donnell’s primary liability as a “seller” under the TSA.

The court also reviewed the summary-judgment evidence relating to O’Donnell’s liability for breach of fiduciary duty in connection with the transfer of the IP assets out of Pepperwood II to Omni, an entity in which O’Donnell had an interest. The court concluded that O’Donnell owed a fiduciary duty directly to the limited partners by reason of his controlling position as president and manager of Pepperwood II GP, the general partner of Pepperwood II. Moreover, because Pepperwood II GP owed a fiduciary duty to the limited partners, the court found the evidence sufficient to establish O’Donnell’s liability for knowing participation in breach of fiduciary duty by signing the agreements that transferred the IP assets out of Pepperwood II to Omni without prior disclosure to the appellees.


The court granted summary judgment in favor an investor in an LLC on the investor’s claim for securities fraud under Section 10(b) of the Securities Exchange Act and Rule 10b-5, concluding that the shares purchased in the LLC were “securities,” that officers of the LLC misstated and omitted material facts, and that the officers acted with scienter. The court also granted summary judgment in favor of the investor on his claim for fraud in a transaction involving real estate or stock under Section 27.01 of the Texas Business and Commerce Code as well as the investor’s claim for common-law fraud.
Dr. Campos, a physician-investor in a hospital organized as a limited liability company, purchased five Class B shares in the hospital for $250,000. Before making the investment, Dr. Campos was provided financial information by two officers of the hospital. After those officers left and the new CEO provided new financial information showing that the hospital had incurred large losses instead of profits as reflected on the previous financial statements, Dr. Campos sued the hospital for fraud. After responding to the court’s request for more specific allegations meeting the heightened pleading standard for fraud, the hospital did not rebut the facts but merely informed the court that it had “ceased operations” and instructed its counsel to cease work on the case. In this opinion, the court granted Dr. Campos summary judgment on his claims for securities fraud under Section 10(b) of the Securities Exchange Act, fraud in a transaction involving stock or real estate under Section 27.01 of the Texas Business and Commerce Code, and common law fraud.

In connection with the claim under Section 10(b) of the Securities Exchange Act, the court stated that the purchase of five Class B Shares in the hospital for $250,000 was the purchase of an “investment contract” as that term is used in the statutory definition of a “security.” As defined by the Supreme Court in S.E.C. v. W.J. Howey Co., an investment contract is a “contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party ....” According to the court, the hospital was “a ‘common enterprise’ he shared with the other shareholders and the organization’s leadership. Moreover, Dr. Campos was a passive investor and received assurance that his investment would grow, at approximately 6%, without any effort of his own. ... Therefore, the Class B shares Dr. Campos purchased constitute ‘securities’ under the definition of the Securities Exchange Act.” The court described how the statements made by two officers of the hospital misstated material facts, noting that the hospital was bound to the officers’ actions because “each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for the purposes of carrying out the company’s business.” Tex. Bus. Orgs. Code §101.254. The court also described unrebutted facts showing that the statements made by the officers were intentionally deceptive or made with severe recklessness, thus satisfying the scienter requirement of the federal securities fraud claim.

The court next addressed Dr. Campos’s claim for “fraud in a transaction involving real estate or stock” under Section 27.01 of the Texas Business and Commerce Code. Under this statute, the plaintiff must show that the defendant had (1) fraudulent intent (made a false representation of a past or existing material fact for the purpose of inducing the plaintiff to enter into a contract) and (2) the plaintiff relied on the false representation to enter into the contract. The court found that Dr. Campos met the elements to prevail on this claim and that the hospital did not rebut any of his factual allegations, thus entitling him to summary judgment on this claim.

Finally, the court concluded that Dr. Campos was entitled to summary judgment on his claim of common law fraud under Texas law, which requires that the plaintiff prove (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act on it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. Because Dr. Campos provided facts to meet the elements of fraud, and the hospital did not rebut any of those facts, the court found that Dr. Campos was entitled to summary judgment on this claim.

R. Diversity Jurisdiction

The Fifth Circuit Court of Appeals and federal district courts continue to hold that the citizenship of a partnership or LLC is determined by the citizenship of each of its partners or members. (If the partners or members are themselves partnerships, LLCs, or corporations, their citizenship must be alleged in accordance with the rules of that entity, and the citizenship must be traced through however many layers of members or partners there may be.) The district court opinions applying this principle are too numerous to include in this paper, but recent opinions of the Fifth Circuit Court of Appeals as well as district court opinions addressing somewhat novel situations or unsettled issues in this context are included below.

The court pointed out the distinction between “citizenship” and “residency” as well as the distinction between “membership” and “ownership” and the necessity to specify both the membership and the citizenship of each member of an LLC for purposes of establishing diversity jurisdiction.

As to the individuals listed, “[t]he difference between citizenship and residency is a frequent source of confusion”; “[f]or natural persons, § 1332 citizenship is determined by domicile, which requires residency plus an intent to make the place of residency one’s permanent home”; and “[a]n allegation of residency alone does not satisfy the requirement of an allegation of citizenship” because “residency is not citizenship for purposes of § 1332.” SXSW, L.L.C. v. Fed. Ins. Co., 83 F.4th 405, 407, 408 (5th Cir. 2023) (cleaned up).

As to First Republic Trust Company of Delaware, LLC, a limited liability company’s citizenship “is determined by the citizenship of all of its members.” Tewari De-Ox Systems, Inc. v. Mountain States/Rosen, LLC, 757 F.3d 481, 483 (5th Cir. 2014); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008). “To establish diversity jurisdiction in a suit by or against an LLC, a party ‘must specifically allege the citizenship of every member of every LLC.’ ” SXSW, L.L.C. v. Fed. Ins. Co., 83 F.4th 405, 408 (5th Cir. 2023) (quoting Settlement Funding, LLC v. Rapid Settlements, Ltd., 851 F.3d 530, 536 (5th Cir. 2017)). And “the appropriate tests for citizenship involve tracing entities’ citizenship down the various organizational layers where necessary.” Alphonse v. Arch Bay Holdings, L.L.C., 618 Fed. Appx. 765, 768 (5th Cir. 2015).

Alleging the state law under which a LLC is formed is required information because a state law governing the LLC’s formation and organization may permit non-owner members whose citizenship must also be considered. See SXSW, 83 F.4th at 407-08. And, so, alleging that a LLC is a “wholly owned subsidiary” of a bank is insufficient because it does not address membership and, under some state law, ownership may not equate to membership. See id. at 408.


The court concluded that the defendant was not judicially estopped from taking the position that diversity jurisdiction existed in this action in which several LLCs were plaintiffs although the defendant had attempted to obtain dismissal of a prior substantially similar action between the parties. The court stated that the defendant’s current position was not “plainly inconsistent with its prior legal position” because its attempt to obtain dismissal of the prior action was based on the plaintiffs’ failure to adequately plead the membership of any of the LLC plaintiffs or the citizenship of those members. The defendant did not contend that diversity jurisdiction did not exist in the prior action; rather, it argued that the plaintiffs failed to satisfy their burden of establishing diversity jurisdiction due to their failure to disclose the members and citizenship of the LLC plaintiffs. The court stated that “[s]uch a contention, based on a lack of relevant information, is not inconsistent with [the defendant’s] current position. Accordingly, in this case, [the defendant], now bearing the burden of demonstrating that this court has jurisdiction, is not judicially estopped from asserting that diversity of citizenship jurisdiction exists.”


The court held that the failure of a counter-plaintiff’s complaint to adequately allege the citizenship of all parties, including by alleging the citizenship of the members of the counter-defendant LLC, was not fatal because the defect was cured by other pleadings of the counter-plaintiff that adequately alleged the citizenship of all parties.

Villamil v. Fayrustin, 2024 WL 1664791, __ F. Supp. 3d __ (W.D. Tex. 2024). The court held that a defendant failed to satisfy its burden to allege the citizenship of each member of the defendant to the extent that the defendant was an LLC. The defendant described itself as a corporation doing business as a limited liability company. The court also discussed disclosures required of the parties under Rule 7.1(a)(2) of the Federal Rules of Civil Procedure, pointing out a question regarding the scope and coverage of the rule.

223
2. A-Star’s Citizenship to the Extent it “Does Business as” an LLC

Further complicating matters is the fact that A-Star purports to “do business as” a limited liability company (“LLC”) named Your Trusted Solutions LLC. It’s unclear how an entity organized as a corporation can “do business as” an LLC, which is a completely different form of business association.

But assuming arguendo that A-Star can do business as an LLC, the legal standards governing an LLC’s citizenship are completely different than those that apply to corporations. Unlike a corporation, “the citizenship of an LLC is determined by the citizenship of all of its members.” Where an LLC maintains its principal place of business is therefore irrelevant, as is the state in which the LLC is organized. A-Star thus bears the burden to “specifically allege the citizenship of every member of [the] LLC.”

A-Star hasn’t done so. Although A-Star’s Notice of Removal states that “Your Trusted Solutions LLC[ ] is a Florida domestic limited liability company with its principal place of business in Miami, Florida,” neither the LLC’s state of organization nor the place it maintains its principal place of business has any bearing on its citizenship for the reasons stated above. And although A-Star insists that “[n]o member of the LLC is a citizen of the State of Texas,” merely “asserting that ... no members [of an LLC] are citizens of a certain state[ ] is insufficient.” A-Star must instead affirmatively “name—and identify the citizenship of—every” member of the LLC.

. . . [The court next explained that it lacked the information necessary to determine the individual defendant’s citizenship because a mere allegation of residency does not establish citizenship.]

D. The Parties Failed to Comply with Federal Rule of Civil Procedure 7.1(a)(2)

Frustratingly, the Court would already have some or all of that missing information if the parties had obeyed Federal Rule of Civil Procedure 7.1(a)(2). That Rule provides that where— as here—“jurisdiction is based on diversity under 28 U.S.C. § 1332(a),” each party to the case “must, unless the court orders otherwise, file a disclosure statement” “with its first appearance, pleading, petition, motion, response, or other request addressed to the court.” That disclosure statement “must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party.”

. . . [The court explained that a plaintiff next friend of a minor child and a plaintiff decedent’s estate representative needed to file Rule 7.1(a)(2) disclosure statements “naming” and “identifying the citizenship of” the minor child and decedent when they first appeared.]

2. A-Star Should Have Filed a Disclosure Statement Naming and Specifying the Citizenship of Each of Your Trusted Solutions LLC’s Members

Likewise, if it’s true that A-Star “does business as” an LLC, then A-Star would take on the citizenship of each of the LLC’s members. A-Star therefore needed to file a Rule 7.1(a)(2) disclosure statement identifying the name and citizenship of each of Your Trusted Solutions LLC’s members at the time A-Star removed the case.

A-Star didn’t do so then, so the Court orders A-Star to do so now.

3. The Court Orders the Remaining Parties to Disclose Their Citizenship

While Rule 7.1(a)(2) unequivocally applies to litigants who derive their citizenship from other entities (such as LLCs and representatives of estates or minor children), it’s less clear whether and how the Rule applies to litigants who don’t.

. . .

Or, consider A-Star (to the extent it’s defending this lawsuit in its capacity as a corporation rather than an LLC). Corporations typically don’t derive their citizenship from any other entity either. They don’t, for instance, take on their shareholders’ citizenship the way that LLCs take on their members’ citizenship. Instead, a corporation is usually a citizen of its own state(s) of incorporation and the state where it maintains its own principal place of business. So, generally speaking, no other entity’s citizenship is “attributed” to a corporation either.
By its plain text, however, Rule 7.1(a)(2) requires every party to a diversity case to file a disclosure statement—not just those parties who derive their citizenship from some other entity.[footnote omitted] The Court must therefore determine what a party’s disclosure statement must contain if there’s no other “individual or entity whose citizenship is attributed to that party.”[footnote omitted]

The most literal reading of Rule 7.1(a)(2) would merely require such a party to file a statement saying something like: “There are no other individuals or entities whose citizenship is attributed to me for diversity jurisdiction purposes.” But that would be pointless. When (for example) a litigant identifies a party as a corporation in its pleading or notice of removal, that by itself almost always suffices to inform the Court that there are no other entities whose citizenship is attributable to that corporation.[footnote omitted] Forcing that corporation to file a document saying nothing more than that would therefore serve no practical purpose.

The more sensible option is therefore to read Rule 7.1(a)(2) more flexibly to require every party to a diversity case to disclose whatever facts the Court needs to determine that party’s citizenship—which will vary depending on what type of entity the party is and the capacity in which that party is litigating the case. So, for example, Fayrustin is an individual defending this suit in his own personal capacity alone, so there’s only one “individual or entity whose citizenship is attributed to” Fayrustin: Fayrustin himself.[footnote omitted] Thus, under the more flexible reading of Rule 7.1(a)(2), Fayrustin would have to “file a disclosure statement ... identifying his own citizenship.”[footnote omitted] Villamil [next friend of a minor child and representative of the estate of a decedent], by contrast, isn’t litigating this case in her individual capacity alone.[footnote omitted] So, under the more flexible reading, Villamil would have to disclose her own citizenship, as well as the names and citizenships of the two “individual[s] ... whose citizenship is attributed to her” (i.e., R.A.V. and Decedent).

That broader reading better serves the entire purpose behind Rule 7.1(a)(2): to give courts and litigants the information they need to determine at the case’s outset whether the parties are diverse.[footnote omitted] As noted, diversity jurisdiction requires complete diversity.[footnote omitted] Thus, for a court to evaluate whether it may permissibly exercise diversity jurisdiction over any particular case, it needs to know every party’s citizenship—not just the citizenship of the parties who derive their citizenship from some other entity.[footnote omitted] It would therefore make little sense for Rule 7.1(a)(2) to only require LLCs, representatives of decedents’ estates, and individuals suing on behalf of minors and incompetent persons to disclose their citizenship at the beginning of the case, but not corporations or individuals litigating exclusively on their own behalf.

Perhaps for that reason, several courts have adopted that more flexible interpretation of Rule 7.1(a)(2)—albeit without analyzing the issue in depth. That is, several courts have required all parties to a diversity case—as opposed to just those parties whose citizenship is determined with reference to some other entity—to disclose their citizenship at the beginning of the litigation so that the court can meaningfully assess whether subject matter jurisdiction exists.[footnote omitted]

The Court will therefore adopt that broader reading of Rule 7.1(a)(2) and require every party to this diversity case to file a disclosure statement giving the Court the information it needs to assess whether the parties are completely diverse. However, the Rules Committee may wish to amend Rule 7.1(a)(2) to make clearer whether the reading that this Court adopts today is the one the Committee intended.


The court discussed the distinction between “citizenship” and “residency” and concluded that filings and documents indicating that an individual member of an LLC was physically present in Texas before the case was filed but did not indicate an intent to remain in Texas permanently were not necessarily indicative of citizenship, and since residency alone cannot satisfy an allegation of citizenship, the documents were not conclusive as to the individual’s citizenship.
The parties disputed the citizenship of Petro Guardian, LLC (“Petro Guardian”), which had two members, Robert F. Morris, III and Stephen D. Morris. The point of contention among the parties was Stephen Morris’s citizenship. Documents on file with the Texas Secretary of State identified Stephen Morris as Petro Guardian’s registered agent in Texas, and the plaintiffs alleged that Stephen Morris resides and is domiciled in Texas. On September 14, 2023, Petro Guardian received an affidavit from Stephen Morris ("Morris Affidavit") in which Stephen Morris asserted he was a resident of Louisiana, and Petro Guardian removed the action on September 15, 2023. In its response to the plaintiffs’ motion to remand, Petro Guardian submitted an affidavit from Robert Morris stating that Stephen Morris was a Louisiana resident. The court concluded that Petro Guardian did not satisfy its burden to establish diversity of citizenship at the time of both filing and removal.

After concluding that Stephen Morris’s affidavit was not an “other paper” under 28 U.S.C. 1446(b)(3) that started the 30-day removal period under 28 U.S.C. 1446(b)(3), the court proceeded to analyze whether Petro Guardian satisfied its burden even if Stephen Morris’s affidavit constituted an “other paper.”

The Fifth Circuit recognizes a difference between citizenship and residency. *MidCap Media Fin., LLC v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019). “For individuals, ‘citizenship has the same meaning as domicile,’ and ‘the place of residence is prima facie the domicile.’” *Id.* (citing *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)). That said, “[c]itizenship requires not only ‘[r]esidence in fact’ but also ‘the purpose to make the place of residence one’s home.’ ” *Id.* (citing *Texas v. Florida*, 306 U.S. 398, 424 (1939)). In other words, to establish a person’s domicile or citizenship, a removing party must show (1) physical presence in the state and (2) an intent to remain indefinitely. *Preston v. Tenet Healthsystem Mem’l Med. Ctr.*, 485 F.3d 793, 797–98 (5th Cir. 2007).

Federal courts must consider several non-determinative factors when determining domicile. *Coury*, 85 F.3d at 251. These factors include where a person “exercises civil and political rights, pays taxes, owns real and personal property, has a driver’s license and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family.” *Id.* Statements of intent to remain in a domicile or establish a new one are entitled to little weight if conflicting with objective facts. *Acridge v. Evangelical Lutheran Good Samaritan Soc.*, 334 F.3d 444, 448 (5th Cir. 2003).

First, the Court finds Petro Guardian’s documents filed with the Texas Secretary of State only show Stephen Morris resided in Texas from June 2019 to at least March 2023. (Docs. 6-2; 6-3; 6-4). These documents indicate Stephen Morris was physically present in Texas before this case was filed, but do not reveal an intent to remain in Texas permanently. And since an allegation of residency alone cannot satisfy an allegation of citizenship, the Court does not find these documents conclusive as to Stephen Morris’s citizenship. *MidCap*, 929 F.3d at 313 (citing *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984)).

Second, the Court finds the Morris Affidavit establishes complete diversity at the time of removal, but not at the time of filing. In the Morris Affidavit, Stephen Morris states he resides in Louisiana in his home located at 125 Chamale Drive. (Doc. 12-1 at 3). He denies residing in Midland, Texas and affirms no members of Petro Guardian reside in Texas. *Id.* In the Second Morris Affidavit, Robert Morris also states that Stephen Morris resides in Louisiana and adds that “he intends to remain a resident of Louisiana indefinitely.” (Doc. 12-2 at 3). But, as Plaintiffs contend, neither the Morris Affidavit nor the Second Morris Affidavit state when Stephen Morris began residing in Louisiana. The affidavits provide no information about Stephen Morris’s residence before September 14, 2023. (Doc. 12-1 at 3). The Court thus cannot determine whether Stephen Morris was a Louisiana resident at the time the state action was filed. *See SXSW, LLC v. Fed. Ins. Co.*, 83 F.4th 405 (2023) (holding diversity at the time of filing could not be determined from documents later filed because the court had no way of knowing whether those later documents reflected an LLC’s membership structure at the time of filing); *Chambers v. Biess*, No. 08-CV-372, 2008 WL 5683483, at *4 (W.D. Tex. Dec. 8, 2009) (holding plaintiff failed to show defendant nondiverse when deposition testimony did not specify defendant moved to Texas before the start of the suit); *see also Maldonando v. Bankers Standard Ins. Co.*, No. 15-6644, 2016 WL 945057, at *2 (E.D. La. Mar. 14, 2016) (finding diversity when the affidavits established defendant
was diverse at all relevant times); *Nyamtsu v. Melgar*, No. H-13-2333, 2013 WL 6230454, at *3 (S.D. Tex. Dec. 2, 2013) (holding a sworn statement stating defendant’s residence and domicile changed prior to the filing and removal showed diversity).

As a result, the Court finds Petro Guardian did not bear its burden of showing Stephen Morris was a citizen of Louisiana at the time of filing and removal.


Prior to oral argument on appeal, the court noticed an apparent jurisdictional defect because the plaintiff, SXSW, L.L.C., alleged its state of registration and principal place of business instead of alleging the citizenship of all of its members. As an LLC, SXSW’s citizenship was determined by that of its members. See **SXSW, L.L.C. v. Fed. Ins. Co.**, 83 F.4th 405 (5th Cir. 2023), summarized below. After remand to the district court so that SXSW could amend its complaint to establish jurisdictional facts, the court was satisfied that there was complete diversity. As a corporation, the defendant was a citizen of Indiana (its state of incorporation) and New Jersey (its principal place of business). SXSW’s members made it a citizen of California, Connecticut, Delaware, Florida, Massachusetts, Michigan, Nevada, New York, North Carolina, Pennsylvania, Texas, Virginia, Switzerland, and the United Kingdom.


The court rejected the attempt of defendant Lane Bryant Brands OpCo, LLC (“Lane Bryant”) to allege its citizenship “upon information and belief.” Lane Bryant submitted a letter to the court alleging that “[u]pon information and belief, the partners of [the two limited partnerships that comprise Ascena GP LLC] are citizens of Ohio.” In a footnote, the court stated: “Based on the letter and Lane Bryant’s Amended Notice of Removal, Ascena GP LLC is a member of LB Group L.P., which is a member of LB Topco Holdco LLC, which is the sole member of LB Guarantor LLC, which is the sole member of LB Buyco LLC, which is the sole member of Lane Bryant Brands OpCo, LLC.” The court concluded that the defendant had yet to satisfy its burden of establishing subject matter jurisdiction, explaining:

> [E]very single case that Lane Bryant cites for the proposition that it can allege its own citizenship upon information and belief is a case in which a court permitted “a party [to] plead the citizenship of an opposing party ‘upon information and belief.’ ” [footnote omitted]


In this opinion, the court distinguished “citizenship” from “residency” as well as distinguishing “ownership” from “membership” for purposes of establishing diversity of citizenship.

> [Employee Funding of America, LLC (EFOA)] alleges that Clark and Flowers are “residents of Texas and Illinois,” and that “EFOA is a limited liability company organized under the laws of Delaware with its principal place of business in Florida, and none of its members are citizens of Texas or Illinois.” *Id.* ¶ 9. Clark and Flowers argue that EFOA has failed to allege sufficient facts in its notice of removal to show that the Court has subject-matter jurisdiction. ECF No. 6 at 16-18. The Court agrees.

At the outset, there are three flaws with EFOA’s jurisdictional allegations. First, what matters for purposes of diversity jurisdiction is “citizenship,” not where parties may claim “residency.” **SXSW**, 83 F.4th at 407 (“An allegation of residency alone ‘does not satisfy the requirement of an allegation of citizenship.’ ” (quotation omitted)). EFOA’s reference to Clark’s and Flowers’s residency fails to satisfy its burden of alleging citizenship and is immaterial. Second,
there are multiple LLC parties involved—EFOA is an LLC, and Clark and Flowers also include several LLC parties—and yet EFOA fails to “specifically allege the citizenship of every member of every LLC.” Id. at 408 (quotation omitted). EFOA’s assertion that none of its members are citizens of the same state does not satisfy its burden. Third, EFOA must establish complete diversity both at the time of removal and when the action was filed in state court. In re Levy, 52 F.4th at 246. EFOA alleges no facts about the citizenship of Clark and Flowers when the state court action was filed, regardless of whether the QSF petition, intervention, or counterclaim is considered the start of the action.[footnote omitted] Likewise, EFOA fails to allege any facts pertaining to its membership as of July 18, 2023, when Clark and Flowers filed their counterclaim against it; as of May 17, 2021, at the time of intervention; or as of December 22, 2020, when the QSF petition was filed. EFOA thus failed to include sufficient jurisdictional allegations in the notice of removal.

Nonetheless, courts may consider evidence beyond the pleadings to determine subject-matter jurisdiction,[footnote omitted] and “courts often consider summary judgment type evidence in dealing with motions to remand.” Rodriguez v. CVS Pharmacy, Inc., No. 1:23-CV-006, 2023 WL 3690102, at *5 (S.D. Tex. Apr. 26, 2023), report and recommendation adopted, No. 1:23-CV-00006, 2023 WL 3688009 (S.D. Tex. May 26, 2023). The parties have since filed certificates of interested parties. See FED. R. CIV. P. 7.1(a)(2). In their filing, Clark and Flowers confirm that they and all members of their LLC parties are citizens of Texas and Illinois. ECF No. 8. In its amended certificate, EFOA provides the following description:

EFOA is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Florida. EFOA is a wholly owned indirect subsidiary of 777 Partners, LLC. 777 Partners, LLC is registered under the laws of the state of Delaware and has two members. Each of those members are LLCs registered under the laws of the state of Florida. Each of those members, in turn, has a single member, each of which is an individual person who is a citizen of Florida. No publicly-held corporation has a membership interest in 777 Partners, LLC.

ECF No. 9 at 1. Once again, these allegations are insufficient, as principal place of business and state of incorporation are irrelevant for LLCs. See SXSW, 83 F.4th at 407-08. EFOA’s statement that it is a “wholly owned indirect subsidiary” of another LLC is also insufficient, as ownership does not equate to membership. See id. at 408. EFOA never identifies any of its LLC members in later filings, and EFOA again fails to allege the citizenship of its members at or before the time of intervention.

Even more concerning is that Clark and Flowers attach filings from another federal case where 777 Partners, LLC—the only entity EFOA identifies in relation to its membership or ownership structure—judicially admitted to being a citizen of Texas as recently as October of 2019. ECF Nos. 6-20, 6-21. Clark and Flowers also identify JusticeFunds, LLC as one of EFOA’s possible members based on prior exchanges. See ECF Nos. 6-22, 6-23. EFOA responds that “those filings predate changes in EFOA’s ownership,” and JusticeFunds, LLC “is not a direct or indirect owner or member of EFOA.” ECF No. 10 at 17. Aside from conflating ownership with membership again, EFOA does not state when those alleged changes took place. EFOA either fails or refuses to identify each of its LLC members, instead basing its opposition on inappropriate case law for corporate citizenship. See id. at 17 n.54. EFOA’s response thus fails to carry its burden. Complete diversity is absent on this record, and the Court lacks subject-matter jurisdiction over this action. Therefore, the case should be remanded based on this record.


“Starr is a corporation incorporated in Texas with its principal place of business in New York. This makes it a citizen of Texas and New York for diversity purposes. 28 U.S.C. § 1332(c)(1). Clearview is a limited liability company, and two of its members turn out to be Texas citizens. A limited liability company takes the citizenship of all its members, see MidCap Media Fin., L.L.C. v. Pathway Data, Inc., 929 F.3d 310, 314 (5th Cir. 2019), so
Clearview is a citizen of Texas for diversity purposes. Accordingly, there is no diversity jurisdiction in this case under 28 U.S.C. § 1332(a).”


The Fifth Circuit Court of Appeals identified important distinctions between membership and ownership of an LLC (such that it is not sufficient to address only the citizenship of an LLC’s owners because there may be members who are not owners whose citizenship must be taken into account) and between citizenship and residency (pointing out that residency is not the same as citizenship). The court also emphasized the importance of establishing citizenship as of the time the complaint was filed.

“For limited liability companies, § 1332 citizenship is determined by the citizenship of ‘all of its members.’ To establish diversity jurisdiction in a suit by or against an LLC, a party ‘must specifically allege the citizenship of every member of every LLC.’ In its complaint dated October 6, 2021, SXSW noted that it was a limited liability company. Instead of alleging the citizenship of all of its members, SXSW only alleged its principal place of business, confusing LLC citizenship with corporate citizenship. ROA.8; cf. 28 U.S.C. § 1332(c)(1).

In an exhibit dated December 14, 2021 and attached to its motion for summary judgement, Federal detailed SXSW’s organizational structure. ROA.519. The exhibit stated that SXSW, LLC has two members: SXSW Holdings, Inc. and Starr Hill Presents – SX, LLC. ROA.519. SXSW Holdings, Inc.’s corporate citizenship (Texas and Texas) is alleged elsewhere in the record. ROA.225. But Federal’s chart nowhere alleged the citizenship of Star Hill Presents – SX, LLC. ROA.519. And the parties have not pointed us to another place in the record. The only allegation regarding the citizenship of Star Hill Presents – SX, LLC comes 14 months later in SXSW’s opening brief in our court, dated February 22, 2023. Blue Br. 1. The brief’s jurisdictional statement specified “Starr Hill Presents – SX LLC is wholly owned by Starr Hill Presents LLC, which is wholly owned by Robert C. Capshaw, a Virginia resident.” Ibid.

This procedural history reveals at least three potential jurisdictional defects in SXSW’s citizenship.

First, there is a potentially important difference between LLC membership and LLC ownership. State law governs LLC formation and organization. Several states permit LLC membership without ownership. See, e.g., DEL. CODE ANN. tit. 6, § 18-301(d); TEX. BUS. ORGS. § 101.102. But SXSW’s jurisdictional statement refers only to the ownership of Starr Hill Presents – SX LLC and Starr Hill Presents LLC. Blue Br. 1. And SXSW has not shown the relevant LLCs were formed in States that equate membership and ownership.[footnote omitted] If those LLCs have non-owner members, the citizenship of those members will trickle up to SXSW, potentially defeating complete diversity. In any event, the lack of clarity does not satisfy our requirement of “clear, distinct, and precise affirmative jurisdictional allegations.” Getty Oil, 841 F.2d at 1259.

Second, SXSW stated that Capshaw was a Virginia resident. But residency is not citizenship for purposes of § 1332. See MidCap, 929 F.3d at 314; Strain, 742 F.2d at 889; Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

Finally, there is a timing issue. For diversity jurisdiction, we look to citizenship at the time the complaint was filed. See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). SXSW filed its complaint on October 6, 2021. ROA.8. The complaint makes no allegations about the citizenship of SXSW’s members. Federal’s December 14, 2021 exhibit contains some additional information, ROA.519, as does SXSW’s February 22, 2023 appellant brief. Blue Br. 1. But we have no way of knowing whether those later documents reflect SXSW’s membership structure as of October 6, 2021. And we know from oral argument that SXSW’s organizational structure has undergone significant changes in the last few years. Oral Arg. Trans. 1:30–5:00. This too prohibits us from exercising jurisdiction at this stage.[footnote omitted]”

**IFG Port Holdings, L.L.C. v. Lake Charles Harbor & Terminal Dist.**, 82 F.4th 402 (5th Cir. 2023).

“The case involves a years-long contract dispute between a commercial tenant, plaintiff-appellee IFG Port Holdings, LLC (“IFG”), and its commercial landlord, defendant-appellant the Lake Charles Harbor & Terminal District, d/b/a the Port of Lake Charles (“the Port”). . . .

It is undisputed that the Port is a Louisiana citizen, as it is a political subdivision created by statute. IFG is an LLC, and an LLC’s citizenship for diversity purposes is determined by the citizenship of all of its members. Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008). Accordingly, for complete diversity to exist, none of IFG’s members may be citizens of Louisiana.

The Port first emphasizes that IFG did not adequately allege diversity in its pretrial pleadings. The Port is correct. To meet its burden of establishing complete diversity, a litigant must ‘distinctly and affirmatively allege
the citizenship of the parties.’ When LLCs are involved, the party invoking jurisdiction must ‘specifically allege the citizenship of every member of every LLC . . . involved in [the] litigation.’ Here, IFG did not allege the citizenship of its members in its initial complaint, nor in any of its amended or supplemental complaints filed before trial. The jurisdictional allegations were therefore deficient at the pleading stage.

But this deficiency was cured by IFG’s post-trial amendment. Under 28 U.S.C. § 1653, ‘[d]efective allegations of jurisdiction may be amended . . . in the trial or appellate courts.’ The Port acknowledges this rule but argues that the amended allegations are ‘generalized’ and ‘remain[ ] defective.’ But the Port does not explain why this is so. The amended complaint includes a two-page exhibit fully alleging the citizenship of each owner-member of the LLC, as required by the case law. Nor does the Port otherwise cast doubt on or articulate any substantive challenge to IFG’s foreign citizenship, which is supported by an ownership chart, as well as multiple affidavits and their attachments. Put differently, the Port does not seriously argue that diversity is lacking. Because the record documents indicate that none of IFG’s members was a citizen of Louisiana on the date this suit commenced, and because the Port offers no specific reason to doubt that IFG is not a citizen of Louisiana, we conclude that complete diversity exists.”

Wesdem, L.L.C. v. Illinois Tool Works, Inc., 70 F.4th 285 (5th Cir. 2023) (“In the district court, both parties made the common mistake of alleging Wesden’s citizenship based on its principal place of business. But Wesden is an LLC, whose citizenship is determined not by its business operations but instead by the citizenship of all of its members. On appeal, the parties were instructed to address whether complete diversity exists. Defective jurisdictional pleadings may be amended, even on appeal.”).


The court granted the defendant’s motion to transfer venue of the case to Colorado in the interest of justice, stating that factors supporting transfer included “suspicious behavior by Plaintiff [a Texas LLC]—purportedly forming a Colorado corporation before filing suit in Texas state court [and making the corporation a member of Plaintiff] to defeat complete diversity.”

S. Fraudulent Transfer

In re Talen Energy Supply, LLC, No. 22-90054, 2023 WL 4035723 (Bankr. S.D. Tex. June 14, 2023). In this adversary proceeding to recover a distribution by a Delaware LLC under Montana fraudulent transfer law and the Bankruptcy Code, the court analyzed whether to apply the three-year statute of repose under Section 18-607(c) of the Delaware Limited Liability Company Act or the four-year statute of limitations under Montana fraudulent transfer laws. After a lengthy analysis in which the court applied a multi-factor test under Section 145 of the Restatement (Second) Conflicts of Law, the court held that all factors favored the application of Montana fraudulent transfer law rather than the Delaware provision. The court thus held that Montana fraudulent transfer law applied.

T. Personal Jurisdiction

Derm Growth Partners I, LLC v. Selkin, No. 05-21-00956-CV, 2023 WL 5089286 (Tex. App.—Dallas Aug. 9, 2023, pet. denied) (mem. op.) (“There are two paradigmatic bases for general jurisdiction over a corporation: its state of incorporation and the state of its principal place of business. . . . Limited liability companies are treated the same as corporations for general-jurisdiction purposes.”).

Vertellus Holdings LLC v. Johnson, 674 S.W.3d 675 (Tex. App.—Houston [1st Dist.] 2023, no pet.). “Texas courts may assert personal jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction and (2) the exercise of jurisdiction is consistent with federal due-process guarantees. The Texas long-arm statute provides that ‘“nonresident” includes: (1) an individual who is not a resident of this state; and (2) a foreign corporation, joint-stock company, association, or partnership.’ TEX. CIV. PRAC.
Texas courts, including this one, have implicitly determined that the nonexclusive definition of nonresident also includes limited liability companies.”


U. Service of Process

Lawton Candle, LLC v. BG Pers., LP, 2024 WL 2126709, __ S.W.3d __ (Tex. App.—Dallas May 13, 2024, no pet. h.).

The court held that the plaintiff’s service of process on an Oklahoma LLC’s registered agent in Oklahoma was not permitted by Texas law, and the default judgment entered against the LLC was thus erroneous.

The plaintiff sued an Oklahoma LLC that was not registered to do business in Texas and did not maintain a registered agent in Texas, and whose operations were based entirely in Oklahoma. The plaintiff served the LLC’s Oklahoma registered agent and obtained a default judgment after the LLC’s failure to answer.

The court of appeals reviewed permissible means of serving an LLC under Texas law as follows:

Service may be made on the entity’s registered agent, president, or any vice president. TEX. BUS. ORGS. CODE ANN. §§ 5.201(b), 5.255(1); see also id. § 5.201(b)(1) (providing that a registered agent is an agent who is authorized to receive service for the entity). For the purpose of service of process, each manager of a manager-managed domestic limited liability company and each member of a member-managed domestic limited liability company is an agent of that limited liability company. Id. § 5.255(3).

Section 2.256 expands proper service on a foreign limited liability company to include (in addition to those individuals discussed above) “other means of service of process, notice or demand ... as provided by law.” Id. § 2.256. Section 5.201 provides that each foreign filing entity shall “designate and continuously maintain in this state” a registered agent, which is “an agent of the entity on whom may be served any process, notice or demand required or permitted by law to be served on the entity.” Id. § 5.201. The registered agent, however, cannot be a resident of a different state because the statute expressly states that, for the agent to be a proper individual for service, it must be an individual who (i) is a resident of this state; and (ii) has consented in a written or electronic form developed by the Texas Secretary of State to serve as the registered agent of the entity. Id.

When a foreign entity fails to maintain a registered agent in the state (as required by § 5.201), the only other means for service on that entity expressly stated in the Business Organizations Code is through the Texas Secretary of State. See id. § 5.251. “The secretary of state is an agent of an entity for purposes of service of process, notice, or demand on the entity if: (1) the entity is a foreign entity or a foreign filing entity; and (A) the entity fails to appoint or does not maintain a registered agent in this state ....” Id.

The court stated that service of process was not properly achieved because the plaintiff’s argument was “based on the premise that all methods of service of process are allowable if not otherwise prohibited, but the reverse is true under Texas law,” and the plaintiff failed to identify “any provision in the Business Organizations Code or other authority, and we are aware of none, that expressly permits a foreign entity to designate a registered agent who is not located in the State of Texas as its agent for purposes of service of process.”


The court concluded that service of process on an LLC was deficient where the complaint and return of service filed by the plaintiff indicated that the LLC’s registered agent for service of process was a PLLC law firm located in Dallas, and there was no indication in the return of service that the individual to whom the summons and
complaint were delivered was an authorized agent of the PLLC law firm. The court stated that, because the law firm
was a limited liability company, service would have been proper if a copy of the summons and complaint was
delivered to “an officer, a managing or general agent, or any other agent authorized ... to receive service of process,”
citing Fed. R. Civ. P. 4(h) and Tex. Bus. Orgs. Code § 5.255(3) The court stated that the conclusory statement in
the return of service that the individual to whom the summons and complaint were delivered was an “authorized
employee” was not sufficient to determine that the individual was an agent authorized to accept service of process
on behalf of the PLLC.

Balkan Express, LLC v. Hollins, No. 01-22-00911-CV, 2023 WL 8720912 (Tex. App.—Houston [1st
Dist.] Dec. 19, 2023, no pet. h.) (mem. op.).

The court of appeals concluded that an LLC was negligent in failing to update the address of its registered
agent on file with the Secretary of State and thus the LLC failed to satisfy the requirements for relief by a bill of
review after a default judgment was entered against the LLC following substituted service on the Secretary of State
after repeated failed attempts to serve the registered agent at the registered office address on file with the Secretary
of State.

Stefanie Hollins was involved in a collision with a truck owned by Balkan Express, LLC (“Balkan”) and
driven by one of Balkan’s employees. Hollins sued Balkan for negligence and attempted on three occasions to serve
Balkan with process through its registered agent, Zlatan Karic, at the address on file with the Texas Secretary of
State. After the third unsuccessful attempt to serve Balkan, Hollins requested that citation be issued to the Texas
Secretary of State as the designated agent for process for Balkan pursuant to Section 5.253 of the Texas Business
Organizations Code.

Hollins served the Texas Secretary of State, and the Secretary of State served Balkan by certified mail,
return receipt requested, sending the citation and amended petition to Balkan’s registered agent at the address on
file with the Secretary of State. Process was returned to the Secretary of State’s office “Bearing Notation Return
to Sender, Attempted Not Known, Unable to Forward.” The Secretary of State issued a “Whitney Certificate,”
certifying it received service of process for Balkan and that it forwarded the citation to Balkan pursuant to Section
5.253 of the Texas Business Organizations Code.

A default judgment was entered against Balkan, and about a year later Balkan filed a bill of review seeking
to set aside the default judgment. Balkan argued that its failure to update its registered office address with the
Secretary of State did not constitute negligence, attaching the declaration of Zlatan Karic, “Balkan’s president and
sole shareholder.” Karic explained that the address on file was his home address at the time he “incorporated” the
company and that he had not lived at that address for five years at the time Hollins served the Secretary of State.

Hollis argued that Balkan had been negligent in failing to fulfill its legal duty to maintain a correct address for its
registered agent with the Secretary of State. After lengthy discussion, the court concluded that Balkan was negligent
in failing to update the address of its registered agent on file with the Secretary of State. In the course of its
discussion, the court stated that it was not incumbent on Hollis to perform an internet search or review the police
report for Balkan’s address even if it would have been easy for Hollins to find Balkan’s correct address. The court
affirmed the trial court’s denial of Balkan’s bill of review.

Huffman Asset Mgmt., LLC v. Colter, No. 05-22-00779-CV, 2023 WL 7319054 (Tex. App.—Dallas
Nov. 7, 2023) (no pet.) (mem. op.).

The court concluded that the defendant LLCs were properly served and, as a result, the default judgment
entered against them was proper. The court also concluded that the defendants were not entitled to a new trial.

In August 2019, the Colters leased an apartment in Denton, Texas. The lease listed Prairie Capital, LLC
as the property’s “Owner.” The Colters alleged that Huffman Asset Management, LLC (“HAM”) was the
management company for Prairie Capital. According to the Colters, before signing the lease, a HAM representative
assured them that the apartment units at the complex were not prone to insect infestations and the landlord would
“routinely” address any issues “with immediate and regular steps to eliminate any issues.” After moving in,
however, the Colters discovered their apartment unit had “persistent and continuous roach infestation problems.”
The Colters alleged that HAM and Prairie Capital failed to resolve the insect infestation issues and, as a result, the
insects “proceeded to ruin” the Colters’ belongings and caused more than $2,700 in property damage.
The Colters asserted DTPA, fraud, non-disclosure, and negligence claims against HAM and Prairie Capital and asserted additional claims against Prairie Capital for wrongful retention of their security deposit and breach of the lease. The Original Petition stated that HAM and Prairie Capital could be served with citation as follows:

HAM could be served through its registered agent for service of process, Douglas J. Huffman, at 3121 Overlook Circle, Highland Village, Texas 75077;
Prairie Capital could be served through its registered agent for service of process, Doug Huffman, at 8214 Westchester Drive, Suite 850, Dallas, Texas 75225.

The Original Petition also stated that HAM’s “principal address” was 8214 Westchester Drive, Suite 850, Dallas, Texas 75225. The Colters attempted to serve HAM, Prairie Capital, and Huffman at the Overlook Circle address, the Westchester Drive address, and the address listed in the lease, 4211 San Jacinto Street, Suite 112, Dallas, Texas 75204. Process server Robbin R. Lorenz was unable to serve HAM, Prairie Capital, or Huffman with the Original Petition at those addresses.

When their efforts at service failed, the Colters amended their petition. In the first amended petition, the Colters asserted that they were unable to serve HAM, Prairie Capital, and Huffman despite using reasonable diligence to serve them through a process server. The Colters further asserted that, under those circumstances, the Secretary of State may be served as HAM and Prairie Capital’s agent for service. See TEX. BUS. ORGS. CODE § 5.251(1)(B) (the secretary of state is an entity’s agent for service of process if “(A) the entity fails to appoint or does not maintain a registered agent in this state; or (B) the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity . . . ”). The Colters then served the Secretary of State as HAM and Prairie Capital’s agent for service of process.

In a November 22, 2021 Whitney certificate (a certificate from the Secretary of State showing that it forwarded a copy of the citation to the defendant), the Secretary of State confirmed that (1) its office received the citation and first amended petition on October 25, 2021, (2) its office forwarded a copy of the citation and first amended petition by certified mail return receipt requested to HAM’s “Registered Agent Douglas J Huffman” at 3121 Overlook Circle, Highland Village, TX 75077 on November 2, 2021, and (3) the process was returned to the Secretary of State on November 22, 2021 “Bearing Notation, Forward Time Expired, Return to Sender.”

In a December 2, 2021 Whitney certificate, the Secretary of State confirmed (1) its office received the citation and first amended petition on October 25, 2021, (2) its office forwarded a copy of the citation and first amended petition by certified mail return receipt requested to Prairie Capital’s “Registered Agent Doug Huffman” at 8214 Westchester Drive, Suite 850, Dallas, TX 75214 on November 2, 2021, and (3) the process was returned to the Secretary of State’s office on December 1, 2021, “Bearing Notation, Return to Sender, Attempted Not Known, Unable to Forward.”

The Colters filed a motion for entry of default judgment, and the trial court signed it. The default judgment awarded the Colters the following damages: (1) economic damages of $2,712 for property damage, (2) additional damages under the DTPA of $15,424, (3) damages and statutory penalties for wrongful retention of their security deposit totaling $1,000, (4) attorney’s fees through the date of judgment of $4,667.24, (5) conditional post-trial and appellate attorney’s fees; and (6) prejudgment interest, post judgment interest, and costs. The trial court also awarded the Colters $5,000 each for mental anguish.

The trial court sent HAM and Prairie Capital a Notice of Default Judgment to 4201 San Jacinto, #112, Dallas, TX 75204, which was the address the Colters submitted in their first amended certificates of last-known mailing address.

On appeal, HAM and Prairie Capital argued that the default judgment should be reversed because service on the Secretary of State was invalid. Both maintained that they did not receive the notice from the Secretary of State because the Colters gave the Secretary of State a “bad” address known by the Colters to be incorrect. Rather than giving the Secretary of State the address of HAM’s registered agent (the Overlook Circle address) and Prairie Capital’s registered agent (the Westchester Drive address), HAM and Prairie Capital argued that the Colters should have provided the Secretary of State with the address of HAM and Prairie Capital’s principal place of business, which they asserted was 4211 San Jacinto Street, #112, Dallas, TX 75214. They argued that the San Jacinto address was the only proper address for service because it was “the most recent” address for both entities on file with the Secretary of State. To make this argument, HAM and Prairie Capital relied on public information reports filed with the Secretary of State listing the San Jacinto address as the address of each entity’s principal place of business.
The court of appeals began by discussing the basic rules for service and the role of the Secretary of State:

Chapter 5 of the business organizations code requires each filing entity to “designate and continuously maintain” a registered agent and a registered office in Texas. TEX. BUS. ORGS. CODE § 5.201. A party is required to serve the entity’s registered agent with process at the entity’s registered office. Id. at §§ 5.201(b)(1), (b)(3), (c), (d); § 5.206. The Certificates of Fact provided by the Secretary of State show at the time the Colters attempted to serve Huffman, HAM, and Prairie Capital, Huffman was the designated registered agent for HAM and Prairie Capital, the Overlook Circle address was the address of HAM’s designated registered office, and the Westchester Drive address was the address of Prairie Capital’s designated registered office. The Colters’ pleadings and the process server’s affidavits establish service was attempted at the addresses Huffman, HAM, and Prairie Capital provided to the Secretary of State as their registered agent’s address and registered office addresses. . . .

If the registered agent cannot with reasonable diligence be found “at the registered office,” the Secretary of State is deemed an agent for service of process on the corporation. TEX. BUS. ORGS. CODE § 5.251(1)(B). “[A] diligent party may rely on the registered address a [limited liability company] has placed on file with the Secretary of State.” Indeed “it is well-settled that a plaintiff is only required to attempt service at the address given to the [SOS], and need not make any attempt to serve the defendant elsewhere.” Further, reasonable diligence may be shown by evidence that service of process was attempted but was unsuccessful because the address of the registered office no longer belonged to the registered agent at that time.

Under this framework, the court concluded that the Colters were entitled to use service on the Secretary of State, and that HAM and Prairie Capital were properly served:

Here, the Colters’ process server attempted to serve HAM, Prairie Capital, and Huffman at the registered office addresses on file with the Secretary of State and at the registered agent’s address on file with that office. The process server’s affidavits establish service of process was attempted at those addresses but failed because Huffman no longer lived at the Overlook Circle address, a bank occupied the Westchester Drive address, and neither HAM, Prairie Capital, nor Huffman maintained offices at or could be found at the Westchester Drive address. Although the Colters had no obligation to attempt service at the San Jacinto address, the record also confirms the process server tried to serve the parties at the San Jacinto address but could not access the apartment building located there. Under this record, we conclude the Colters exercised reasonable diligence to serve HAM, Prairie Capital, and Huffman. The Colters were, therefore, entitled to use substituted service on the secretary of state to serve HAM and Prairie Capital as their agent for service of process. See TEX. BUS. ORGS. CODE § 5.251(1)(B). . . .

Service of process on the Secretary of State is accomplished by delivering duplicate copies of the process and any required fee to the Secretary of State. TEX. BUS. ORGS. CODE § 5.252. When substituted service on the Secretary of State is allowed, the secretary “is not an agent for serving but for receiving process on the defendant’s behalf.” As an agent for receiving process on an entity’s behalf, the Secretary of State’s receipt of the process gives the entity constructive notice of the lawsuit and constitutes proper service.

Here, the Whitney certificates confirm the Secretary of State received the service of process for HAM and Prairie Capital as each entity’s agent for service. As an agent for receiving process on HAM and Prairie Capital’s behalf, the Secretary of State’s receipt of the process gave HAM and Prairie Capital constructive notice of the lawsuit. . . .

After service on the Secretary of State, the secretary forwards the process to the corporation by certified mail, return receipt requested and “addressed to the most recent address of the entity on file with the secretary of state.” TEX. BUS. ORGS. CODE § 5.253. A certificate by the Secretary of State as to service conclusively establishes that process was served. “Absent fraud or mistake, the [SOS’s] certificate is conclusive evidence that the [SOS], as agent of [the
defendant], received service of process for [the defendant] and forwarded the service as required by the statute.”

The Whitney certificates confirm that, after receiving the service of process for HAM and Prairie Capital as each entity’s agent for service, the Secretary of State forwarded the notice of process to HAM and Prairie Capital at the addresses of their registered agents and registered offices then on file with the Secretary of State.

HAM and Prairie Capital, however, argued that the Secretary of State should not have sent the process to the address of their registered agent or registered offices because those addresses were “bad” or “dead.” They asserted that the language in section 5.253 requiring the Secretary of State’s notice of process to be “addressed to the most recent address of the entity on file with the secretary of state” means notice must be sent to the last filed address of the entity, regardless of whether that address is where the registered agent may be served.

HAM and Prairie Capital cited the predecessor statute to section 5.253 to support their interpretation of the statute. See TEX. BUS. CORP. ACT art. 2.11(B) (Service of Process on Corporation). Article 2.11(B) provided:

B. Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any process, notice, or demand shall be made by delivering to and leaving with him, or with the Deputy Secretary of State, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered mail, addressed to the corporation at its registered office. Any service so had on the Secretary of State shall be returnable in not less than thirty (30) days.

See TEX. BUS. CORP. ACT, art. 2.11(B) (emphasis added). HAM and Prairie Capital argued that section 5.253 replaced the requirement that the Secretary of State serve an entity at its registered office with the requirement that the entity be served at “the most recent address of the entity on file with the secretary of state.” The court disagreed with this interpretation:

As a preliminary matter, section 5.253 did not replace article 2.11(B). Rather, article 2.11(B) was codified into sections 5.251, 5.252, and 5.253 of the Texas Business Organizations Code. Those sections must, therefore, be read together when comparing article 2.11(B) and read in the context of Chapter 5 as a whole. Under Subchapter E of Chapter 5 of the business organizations code, each filing entity is required to (1) designate and continuously maintain a registered agent and registered office for service of process, (2) provide the Secretary of State with the addresses of the registered agent and registered office, (3) file a statement of change if the entity changes its registered office, registered agent, or both, and (4) include in the statement of change any changes to the registered agent’s name, the entity’s registered office, or the addresses of the registered agent or registered office. Id. §§ 5.200–.206. Subchapter F’s provisions, in turn, ensure service of process on an entity that fails to appoint a registered agent, does not maintain a registered agent, or whose registered agent cannot be found with reasonable diligence at the registered office of the entity. See id. §§ 5.251–.253. The purpose of both Subchapters E and F, however, is to effect service on the designated registered agent of a filing entity at the registered office of that agent and entity. See generally id. §§ 5.200–.257.

Under HAM and Prairie Capital’s interpretation of section 5.253, the Secretary of State would be required to ignore an entity’s filings concerning its registered agent and registered office in favor of information contained in a more recent filing that is unrelated to service of process and does not designate or change a registered agent, registered office, or their accompanying addresses. Such an interpretation ignores the overarching requirement that corporations maintain a registered agent and registered office for service of process and keep the addresses of both updated with the Secretary of State. These requirements enable “aggrieved citizens to serve the corporation with a
lawsuit.” An entity’s principal place of business is not equivalent to the entity’s address for service of process. The statute provides no basis for requiring the Secretary of State to forward notice to anyone other than an entity’s registered agent at [the] entity’s registered office. As such, section 5.253’s reference to “the most recent address of the entity on file with the secretary of state” necessarily means the most recent address of the entity’s registered agent and registered office for service of process.

Service of process on the Secretary of State is accomplished by delivering duplicate copies of the process and any required fee to the Secretary of State. TEX. BUS. ORGS. CODE § 5.252. After service on the Secretary of State, the secretary forwards the process by certified mail, return-receipt requested to the corporation’s registered agent at the registered office address. TEX. BUS. ORGS. CODE § 5.253. A certificate of service from the Secretary of State conclusively establishes that process was served.

In this case, we conclude the Whitney certificates constitute conclusive proof that the Secretary of State, as agent of HAM and Prairie Capital, received service of process for HAM and Prairie Capital and forwarded the service of process as required by the statute.

In addition to affirming the trial court’s entry of a default judgment, the court of appeals upheld the trial court’s denial of a motion for new trial filed by HAM and Prairie Capital. According to the court, a new trial was warranted when (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. The court concluded that the first requirement was not met because “the Colters established as a matter of law that HAM and Prairie Capital’s own negligence in not complying with the duties imposed upon them by statute prevented them from responding to the lawsuit.”

**Dansk Express, LLC v. IPFS Corp.,** No. 01-22-00621-CV, 2023 WL 4937497 (Tex. App.—Houston [1st Dist.] Aug. 3, 2023, no pet.) (mem. op.).

The court of appeals affirmed a default judgment entered against appellant Dansk Express, LLC. The court concluded that Dansk had been properly served via the Secretary of State.

In December 2019, Dansk financed a commercial auto insurance policy through a Premium Finance Agreement with IPFS Corp. Pursuant to the agreement, IPFS paid the annual premium of $196,650.24 to the insurer, and Dansk agreed to pay IPFS in 10 monthly installments of $20,482.00. The Agreement listed the insured as: “Jarrett Justice, Danske Express LLC, 278 Park Road, Glendale, TX 75862.” [Jarrett] Justice executed the agreement on behalf of Dansk.

In September 2021, IPFS sued Dansk, asserting that Dansk had failed to pay as agreed and that its breach of the agreement had caused IPFS to incur damages of $26,595.88. In its petition, IPFS directed that Dansk be served through its “Registered Agent, Jarrett B. Justice, at the registered address: 8211 Shoregrove, Humble, Texas 77346” (the “Shoregrove address”).

The process server’s affidavit was filed with the trial court. In her October 20, 2021 “Affidavit of Due Diligence,” the process server stated that she attempted to deliver the citation to Justice at the Shoregrove address on October 18, 19, and 20, 2021—but was unsuccessful. On October 20, 2021, the process server returned the citation unexecuted and recommended service upon the Texas Secretary of State.

On November 10, 2021, IPFS filed an amended petition and asserted that, because Dansk’s registered agent could not “with reasonable diligence be found at the registered office,” service through the Secretary of State was authorized under section 5.251 of the Texas Business Organizations Code. IPFS directed that Dansk be served by delivering the citation to the Secretary of State for service on Dansk “at the most recent address on file with the Secretary of State,” which it identified as the Shoregrove address. IPFS attached the process server’s affidavit to its amended petition.

On February 23, 2022, IPFS filed the Secretary of State’s “Whitney Certificate.” In that Certificate, the Secretary of State certified (a) that it had received a copy of the citation and IPFS’s amended petition, (b) that it forwarded these by certified mail to Dansk at the Shoregrove address, and (c) that “[t]he Process was returned to this office on January 31, 2022, [b]earing the notation Return to Sender, Unable to Forward.”
Dansk did not file an answer. On March 9, 2022, IPFS moved for a default judgment, asserting that Dansk had been duly served and had failed to appear. IPFS filed a “Certificate of Last Known Address,” listing the Shoregrove address. IPFS sought damages in the amount of $26,595.88 and attorney’s fees.

On March 11, 2022, the trial court signed a Final Default Judgment. It found that Dansk, although duly served with process, had failed to file an answer and that the return had been on file for at least 10 days. It also found that Dansk was in default on the agreement and that the damages were liquidated. The trial court awarded IPFS $26,595.88 in damages and $8,865.00 in attorney’s fees.

On appeal, Dansk asserted that the trial court erred in rendering a default judgment against it because the record showed that IPFS failed to properly serve Dansk in strict compliance with the applicable rules. Dansk argued that “according to the Texas Business Organizations Code [section 5.251], [IPFS] does not get to serve [Dansk] through the [Secretary of State] all the while alleging and affirming the existence of [Dansk’s] registered agent, Jarrett B. Justice.”

The court began by setting forth the legal principles relevant to determining whether service of process is effective:

A court obtains jurisdiction over a defendant through valid service of process or through the defendant’s appearance. And where a court rendering judgment has no jurisdiction over the parties, that judgment is void.

In reviewing a no-answer default judgment in a restricted appeal, we do not presume valid issuance, service, and return of citation. A no-answer default judgment cannot stand unless the record shows strict compliance with the rules of procedure governing issuance, service, and return of citation. A record that fails to affirmatively show proper service of process constitutes error apparent on the face of the record. “Whether service strictly complies with the rules is a question of law which we review de novo.”

Section 5.251 of the Texas Business Organizations Code, governing substituted service of process through the SOS [Secretary of State], provides that the SOS “is an agent of an entity for purposes of service of process, notice, or demand on the entity” if: (1) the entity is a filing entity . . . and: (A) the entity fails to appoint or does not maintain a registered agent in this state; or (B) the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity[.] TEX. BUS. ORGS. CODE § 5.251.

A “filing entity” includes a “domestic entity that is a . . . limited liability company.” Id. § 1.002(22). Here, Dansk is a domestic limited liability company. The Business Organizations Code requires that each such filing entity “shall designate and continuously maintain in this state: (1) a registered agent; and (2) a registered office.” Id. § 5.201(a). “The designation or appointment of a person as registered agent by an organizer or managerial official of an entity in a registered agent filing is an affirmation by the organizer or managerial official that the person named as registered agent has consented to serve in that capacity.” Id. § 5.2011(a).

Diligence is determined by whether the plaintiff acted as an ordinarily prudent person would under the same or similar circumstance. Generally, the question of the plaintiff’s diligence in effecting service is one of fact and is determined by examining the type of effort or lack of effort the plaintiff expended in procuring service. This Court has held that “[a]t least one attempt to serve the registered agent must be made before resorting to substituted service.” And “reasonable diligence” under section 5.251 may be shown by a single attempt to serve the registered agent at the registered address if further attempts would be futile. Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc., 121 S.W.3d 31, 34–35 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

When a defendant’s registered agent cannot be served after reasonable diligence, the SOS becomes “an agent of [the defendant] entity for purposes of service of process, notice, or demand on the entity.” See TEX. BUS. ORGS. CODE § 5.251. “When substituted service on a statutory agent is allowed, the designee is not an agent for serving but for receiving process on the defendant’s behalf.”

A plaintiff is authorized to serve process on the SOS as the defendant’s agent by delivering duplicate copies of the process to the SOS. TEX. BUS. ORGS. CODE § 5.252(a). In turn, the SOS’s duty is to forward the process, by certified mail, return receipt requested, to the named
entity at the “most recent address of the entity on file with the [SOS].” Id. § 5.253(b)(1). After doing so, the SOS issues a certificate (known as a “Whitney Certificate”) stating that the SOS received the process and forwarded it to the registered address. “Absent fraud or mistake, the [SOS’s] certificate is conclusive evidence that the [SOS], as agent of [the defendant], received service of process for [the defendant] and forwarded the service as required by the statute.”

Applying these principles to the facts of the dispute, the court concluded that proper service was made:

Here, IPFS stated in its original petition that Dansk “may be served with citation by delivering the citation to [Dansk’s] Registered Agent, [Justice], at the registered address: 8211 Shoregrove, Humble, Texas 77346.” The process server’s Affidavit states that she attempted three times, at different times of the day (October 18, 2021 at 6:10 p.m.; October 19, 2021 at 1:35 p.m.; and October 20, 2021 at 9:00 a.m.), to serve Justice at the Shoregrove address, but was unsuccessful. Each time, there was not an answer at the door. And neighbors were unable to confirm whether Justice resided there. The process server returned the citation unexecuted and recommended service upon the SOS.

Thus, IPFS attempted to serve Dansk’s registered agent at its registered office three times before serving the SOS. This is not a case in which no such effort was made.

Dansk presents no authority that IPFS was required to continue with more repeated attempts to serve Dansk’s registered agent at the registered address.

Thus, we conclude that the trial court did not err in its implied conclusion that IPFS used reasonable diligence in attempting service on Dansk’s registered agent before taking the final step of serving the SOS. Because Justice, as the registered agent of Dansk, could not “with reasonable diligence be found at the registered office of the entity,” substituted service through the SOS was authorized. See TEX. BUS. ORGS. CODE § 5.251.3

Subsequently, IPFS filed an amended petition, stating: Defendant may be served with citation by delivering said citation to the [SOS] at: PO Box 12079, Austin, Texas 78711-2079. The [SOS] shall serve the Defendant at the most recent address on file with the [SOS]: 8211 SHOREGROVE, HUMBLE, TEXAS 77346[,] The named entity defendant has failed to appoint or maintain a registered office in the State of Texas. Alternatively, the Defendant’s registered agent cannot with reasonable diligence be found at the registered office of the entity. Therefore, the [SOS] is an agent of the limited liability company defendant upon whom any such process, notice, or demand may be served pursuant to [TEX. BUS. ORGS. CODE § 5.251] . . . .

The SOS’s Whitney Certificate, which was filed in the trial court on February 23, 2022, states that the SOS received copies of IPFS’s citation and amended petition on November 29, 2021, and forwarded them to Dansk at the 8211 Shoregrove address by certified mail, return receipt requested, on December 7, 2021. See id. § 5.253(b) (requiring SOS to send process to defendant at “the most recent address of the entity on file with the [SOS]”).

Once the Certificate was filed, it constituted conclusive evidence, absent evidence of fraud or mistake, that the SOS, as the agent of Dansk, received service of process for Dansk and forwarded the service as required by the statute.

Dansk does not allege that any fraud or mistake occurred in the SOS’s service. We therefore conclude that the SOS’s Certificate conclusively established service of process and the trial court’s personal jurisdiction over Dansk.

Dansk complained that service was improper because IPFS had “actual possession and/or knowledge of [Justice’s] individual, home address (but never served him)” there. That argument was unavailing, as the court noted that “a diligent party may rely on the registered address a [limited liability company] has placed on file with the Secretary of State.” Moreover, “[I]t is well-settled that a plaintiff is only required to attempt service at the address given to the [SOS], and need not make any attempt to serve the defendant elsewhere.”

The court observed that in Ingram Industries, Inc., 121 S.W.3d at 35, the defendant argued that the plaintiff did not exercise reasonable diligence in effecting service of process because the plaintiff and its counsel knew the address of the defendant’s actual place of business but did not serve the citation at that address. The Ingram court
concluded that there was no requirement that the plaintiff also attempt service at the defendant’s place of business. The court further held that the plaintiff demonstrated reasonable diligence because its only duty was to attempt to serve the defendant’s registered agent at its registered address prior to serving the Secretary of State.

Dansk also argued that the record contained no evidence that it had been duly served with process. The court pointed out that the Secretary of State’s Whitney Certificate constituted conclusive evidence that the Secretary of State, as the agent of Dansk, received service of process for Dansk and forwarded the service as required by the statute. The Certificate reflected that “Process was returned” to the Secretary of State “on January 31, 2022 [b]earing the notation: ‘Return to Sender, Unable to Forward.’” The Secretary of State was statutorily required to forward process to Dansk at the “most recent address of the entity on file.” See TEX. BUS. ORGS. CODE § 5.253. The record showed that the Secretary of State sent process to Dansk at the Shoregrove address; moreover, Dansk did not assert that the Shoregrove address was incorrect or was no longer its registered address. As the court concluded: “Because the SOS’s Whitney Certificate conclusively established that Dansk was properly served with process, we conclude that Dansk has not demonstrated error on the face of the record with respect to service of process.”

**LCAR Frisco, LLC v. GCRE/TX Frisco Master, LLC**, No. 05-22-00149-CV, 2023 WL 4199260 (Tex. App.—Dallas June 26, 2023, no pet.) (mem. op.).

The court of appeals affirmed the entry of a default judgment and rejected the argument that service upon an LLC was defective. The court concluded that service was properly made on a person authorized to accept service on the registered agent’s behalf.

GCRE/TX Frisco Master, LLC sued LCAR Frisco, LLC for breach of contract and other claims. After LCAR failed to answer, GCRE obtained a default judgment awarding $380,000 in liquidated damages, $5,000 in attorneys’ fees, conditional appellate attorneys’ fees, and post-judgment interest.

LCAR filed a restricted appeal and challenged the default judgment. It asserted, among other arguments, that the record showed a defective service of process. The court of appeals noted that the record must demonstrate strict compliance with service rules and that whether strict compliance occurred was a question of law which it reviewed de novo.

The court began by stating some of the rules associated with serving an LLC:

“A limited liability company (LLC) is not a person capable of accepting process on its own behalf and must be served through an agent.” A plaintiff may serve an LLC by serving, among others authorized by statute, its registered agent. See TEX. BUS. ORGS. CODE §§ 5.201(b), 5.255(3). And an organization may serve as the registered agent for another organization. See TEX. BUS. ORG. CODE § 5.201(b). Because such an organization must also be served through one of its agents, the business organizations code provides that a registered-agent organization “must have an employee available at the registered office during normal business hours to receive service of process, notice, or demand.” See id. § 5.201(d). “Any employee of the organization may receive service at the registered office.” Id. And when a registered-agent organization is served, “[t]he record must show whether the person served was in fact . . . an agent for the [organization] acting as the registered agent.”

Under these rules, the court determined that service was effective:

Here, the return shows service on “LCAR Frisco, LLC care of its Registered Agent, REGISTERED AGENTS, INC. by and through its designated agent, Brad Wilson.” This is prima facie proof that service was made on a person authorized to accept service on the registered agent’s behalf.

We are not persuaded by LCAR’s argument that, because the business organizations code provides that a registered-agent organization “must have an employee available” to accept service and that “[a]ny employee of the organization may receive service at the registered office,” the service return must affirmatively state that the person accepting service on the registered agent’s behalf is its employee. A service “return should be given a fair, reasonable, and natural construction” as “to its intent and meaning.” The only reasonable reading of the return here is that
GCRE served LCAR through its registered agent, at the registered agent’s office, by serving a person “designated” by the registered agent to accept service on its behalf. This case is thus unlike those where the service return failed to attempt to state the connection between the person who accepted service and the registered-agent organization. See, e.g., Turbo Restaurants, LLC v. Reid’s Refrigeration Inc., 657 S.W.3d 490, 500 (Tex. App.—El Paso 2022, no pet.) (service invalid where return neither stated that the person served was an employee of the registered agent nor showed the person was “otherwise authorized to accept service on the agent’s behalf”); [Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist., 180 S.W.3d 903, 905 (Tex. App.—Dallas 2005, pet. denied)] (service invalid where return did not indicate person’s capacity or explain her “authority to receive service”).

Moreover, the term “employee” is not defined in the Business Organizations Code. We give words their ordinary meaning when they are not defined. In the context here, a return of service, we are asked only to determine whether a person listed as “designated agent” may ordinarily be determined to be an “employee available at the registered office during normal business hours to receive service of process, notice, or demand.” See TEX. BUS. ORG. CODE § 5.201(d).

“The elements of common-law agency are present in the relationships between employer and employee” and the common law of agency “encompasses the employment relation.” See REST. (3D) OF AGENCY § 1.01 cmt. c (Elements of Agency). Other courts have concluded that an “agent is the employee of his principal,” particularly where such an interpretation serves the legislature’s purpose in adopting a statute.

Here, the legislature intended to facilitate service on registered-agent organizations by providing that any employee at the office is authorized to accept service. This includes the ordinary understanding that every employee is its “agent” for purposes of accepting service because we deem it unlikely the Legislature intended to make a person’s authorization to accept service contingent on that person’s employment status, as that term might be used in other contexts. We conclude LCAR has not presented “error apparent on the face of the record,” see TEX. R. APP. P. 26.1(c), and reject the contention that serving the “designated agent” of a registered-agent organization does not strictly comply with service rules.

V. Venue

_In re USA Today_, No. 09-23-00140-CV, 2023 WL 6885016 (Tex. App.—Beaumont Oct. 19, 2023, no pet.) (mem. op.).

The court of appeals conditionally granted mandamus relief on the ground that the proper venue for an LLC suing for defamation is the county where the LLC maintains its principal office.

Ryan LLC brought a breach of contract and defamation lawsuit against USA Today. In its trial court pleadings, Ryan alleged that it maintained its principal place of business in Dallas, Texas. The trial court ruled that the mandatory venue statute for defamation claims allowed Ryan to elect to bring the suit in a county where a member of Ryan resides. Since three of Ryan’s members reside in Montgomery County, the trial court denied USA Today’s motion to transfer venue to Dallas County, where Ryan maintained its principal office.

On mandamus review, USA Today argued that the trial court clearly abused its discretion because, as an LLC, Ryan resides where it maintains its principal office. In response, Ryan argued the venue statute governing defamation claims treats LLCs the same as partnerships, and that partnerships “reside” where their partners reside, not where the partners maintain a principal office.

The court of appeals began by observing that § 15.017 of the Civil Practice and Remedies Code allows a plaintiff to elect to file a defamation suit in the domicile of any corporate defendant. Section 15.017 does not include language that allows a plaintiff to elect to file a defamation suit in the domicile of the plaintiff. It does, however, allow a plaintiff to file a suit for damages for libel, slander, or invasion of privacy in the county where the plaintiff resided when the claim accrued. Ryan argued, and the trial court agreed, that because § 15.017 is silent as to a plaintiff that is an LLC, and because natural persons “reside” while corporations are “domiciled,” an LLC must “reside” where its members reside and not where the company maintains its principal office. The court of appeals also noted that similar language to § 15.017 is used in the general venue statute, which allows a plaintiff
to file a lawsuit (1) in the county where the events giving rise to the claim occurred, (2) in the county of the
defendant’s residence if the defendant is a natural person, (3) in the county of the defendant’s principal office if
the defendant is not a natural person, or (4) if none of those situations apply, in the county in which the plaintiff

The court relied upon the Texas Supreme Court’s decision in In re Transcon. Realty Inv’rs, Inc., 271
S.W.3d 270 (Tex. 2008), in ultimately rejecting Ryan’s position:

The Texas Supreme Court rejected a strict application of “resided” in a case where the
issue was whether the legislature, by distinguishing between natural and non-natural defendants
in the general venue statute, “intended to eliminate corporations and other legal entities from all
statutes that refer to a place where one ‘resides.’” In re Transcon. Realty Inv’rs, Inc., 271 S.W.3d
venue in “the county in which the owner of the property being condemned resides if the owner
resides in a county in which part of the property is located.” Id. at 271 (citing Tex. Prop. Code Ann.
§ 21.013(a)). The Court rejected the notion that the legislature intended to eliminate corporations
from every other statute referring to “residence” when it amended the permissive venue statute in
1983. Id. Thus, a corporation could enforce the mandatory venue statute to compel transfer of a
condemnation case to the county where the corporation maintains its principal office. Id. at 272.
Otherwise, the Court reasoned, that “when the defendant resides and all events occur out of state,
a plaintiff corporation cannot bring the suit anywhere in Texas.” Id. (emphasis in original).

Here, the trial court concluded that when the legislature drafted Chapter 15 of the Civil
Practice and Remedies Code it must have been referring to the residences of the members of a
limited liability company or it would have used a word other than “resided” in section 15.017. But
the Supreme Court has recognized the broader, commonly understood meaning of “resided” in
Chapter 15 to refer to a corporation’s principal office. See id. The logic of Transcontinental Realty
applies with equal force to section 15.017, which contains the same language found in section
15.002(a)(4) regarding where the plaintiff “resided” at the time the action accrued and makes
the same distinction between natural and non-natural defendants. Just as the use of the word “resided”
in section 15.002(a)(4) was not intended to remove corporations from all the statutory provisions
that call for venue in a county where the plaintiff “resided,” the use of the word “resided” in
section 15.017 is not intended to change where a limited liability company “resided” from the
county of its principal office to the counties where its members live.

We may issue a writ of mandamus to remedy a clear abuse of discretion by the trial court
when the relator lacks an adequate remedy by appeal. We conclude that the trial court acted
without reference to guiding rules and principles when it ruled that Ryan filed its lawsuit in a
county of mandatory venue under section 15.017. A trial court abuses its discretion if it fails to
correctly analyze or apply the law, because “‘[a] trial court has no ‘discretion’ in determining what
the law is or [in] applying the law to the facts[.]’” “Mandamus relief is the proper remedy to
enforce a mandatory venue provision when the trial court has denied a motion to transfer venue.”

W. Pro Se Representation

Apr. 25, 2024) (“But, insofar as Defendants Headstart Warranty Group, LLC and JCHW, Inc. are each neither an
individual nor a sole proprietorship, these defendants are not permitted to proceed pro se or through a non-attorney
but rather must be represented by an attorney in litigation in federal court. See M3Girl Designs, LLC v. Purple
‘that a corporation as a fictional legal person can only be represented by licensed counsel.’” Donovan v. Road
Motors Acceptance Corp., 652 F.2d 398, 399 (5th Cir. 1982)). And this applies to limited liability companies.”).

report and recommendation adopted, No. 6:23-CV-413-JDK, 2024 WL 2094650 (E.D. Tex. May 9, 2024) (“Courts
have noted that ‘[t]he failure by a limited liability company, corporation, or partnership to comply with a court order that it appear through counsel constitutes a failure to defend a civil action, and a court should direct the clerk of the court to enter a default in such cases.’”).


The magistrate judge struck the answers of defendants (a corporation and an LLC) and entered defaults against them because they did not comply with the court’s order to retain counsel.

Each, “as a fictional legal person,” may “only be represented by licensed counsel.” **Donovan v. Road Rangers Country Junction, Inc.**, 736 F.2d 1004, 1005 (5th Cir. 1984) (per curiam) (“The ‘clear’ rule is ‘that a corporation as a fictional legal person can only be represented by licensed counsel.’” (quoting **K.M.A., Inc. v. Gen. Motors Acceptance Corp.**, 652 F.2d 398, 399 (5th Cir. 1982))); see also **Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council**, 506 U.S. 194, 201-02 (1993) (“[L]ower courts have uniformly held that 28 U.S.C. § 1654 . . . does not allow corporations, partnerships, or associations to appear in federal court otherwise than by licensed counsel”).


“But Plaintiff identifies itself as an LLC. And an LLC (or limited liability company), ‘as a fictional legal person,’ may ‘only be represented by licensed counsel.’ **Donovan v. Road Rangers Country Junction, Inc.**, 736 F.2d 1004, 1005 (5th Cir. 1984) (per curiam) (“The ‘clear’ rule is ‘that a corporation as a fictional legal person can only be represented by licensed counsel.’” (quoting **K.M.A., Inc. v. Gen. Motors Acceptance Corp.**, 652 F.2d 398, 399 (5th Cir. 1982))); see also **Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council**, 506 U.S. 194, 201-02 (1993) (“[L]ower courts have uniformly held that 28 U.S.C. § 1654 . . . does not allow corporations, partnerships, or associations to appear in federal court otherwise than by licensed counsel”).

So, if Plaintiff can establish that the Court has subject matter jurisdiction, Plaintiff must then retain counsel to continue with this case in federal court.”

**Milligan v. Mayhew**, No. 05-22-00675-CV, 2023 WL 4540274 (Tex. App.—Dallas July 14, 2023, no pet.) (mem. op.).

“In their first issue, appellants argue the trial court erred by not entering a default judgment against SSF Consulting, LLC because it was not represented by counsel and defaulted. Appellants rely on two established legal propositions: (1) a non-attorney may not appear for a limited liability company, (2) and when a defendant files an answer but does not appear at trial, the court may enter a default judgment. We disagree with both arguments.

When considering answers filed by non-attorney corporate officers, appellate courts have ‘gone to great lengths to excuse defects in answers to prevent the entry of default judgments against parties who have made some attempt, albeit deficient, unconventional, or flat out forbidden under the Rules of Civil Procedure, to acknowledge that they have received notice of the lawsuit pending against them.’ Thus, an answer filed on behalf of a corporation by a non-attorney is sufficient to prevent a default judgment.

Appellees, appearing pro se, filed a letter ‘From Defendants: Amber Mayhew, Keith Mayhew, and SSF Consulting, LLC DBA Nanny Poppinz,’ in response to ‘the papers’ served on them. They also signed the letter on behalf of all defendants. During the bench trial, the court acknowledged the letter was sufficient to prevent a default judgment against Nanny Poppinz. Accordingly, appellees attempt to answer the lawsuit, despite doing so as non-lawyers on behalf of the LLC, was sufficient to excuse any defects and prevent a default judgment.

To the extent appellants argue Nanny Poppinz was not represented at trial, they ignore the trial court’s finding that Nanny Poppinz forfeited its charter in 2019. They have not challenged this finding. . . . Appellants have presented no arguments or pointed to any evidence establishing, as a matter of law, that Nanny Poppinz’s corporate charter was not forfeited during the time of their dispute.

Appellants repeatedly acknowledged Nanny Poppinz was not a legal entity. They stated in their original petition the LLC was no longer in good standing. Counsel for appellants explained during pretrial discussions that the basis for suing appellees individually was because the corporate charter did not exist during the relevant time
period. And during trial, appellants asked the trial court to take judicial notice of a printout from the Texas Secretary of State website indicating the corporate charter had been revoked at all times material to the suit.

The trial court could not grant a default judgment against a ‘terminated’ legal entity. See, e.g., Donica Grp., LP v. Thompson Excavating, Inc., No. 05-19-00235-CV, 2020 WL 57340, at *3 (Tex. App.—Dallas Jan. 6, 2020, no pet.) (mem. op.) (noting corporate entity that forfeited charter was a ‘terminated entity’ that ‘no longer existed’ for purposes of defending a default judgment). Accordingly, the trial court properly denied appellant’s request for a default judgment against Nanny Poppinz."

Kalkan v. Salamanca, 672 S.W.3d 725 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (stating that “Texas’s prohibition against nonlawyer representation of corporate entities applies to limited liability companies”).


“Attorneys Ashley R. Presson and David J. Kaminski have moved to withdraw as Defendant SunLife Power LLC’s counsel in this matter because Defendant can no longer afford their services. Defendant is unopposed to its attorneys’ request to withdraw. Granting the attorneys’ request, however, would leave Defendant unrepresented. This is a problem.

Business entities—including Limited Liability Companies (‘LLCs’) like Defendant—cannot represent themselves in court. They must have a licensed attorney. That does not necessarily mean, however, that Defendants’ attorneys can’t withdraw.

‘An attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client.’ Where, as here, a client is unable to pay for its attorneys’ services, good cause for withdrawing may exist. Still, the Court must consider whether allowing counsel to withdraw ‘would cause unnecessary delay, prejudice, or interference with justice.’

The Court is reluctant to allow counsel to withdraw right now because it may cause delay and prejudice; though, the Court is not opposed to permitting withdrawal in the future. The prudent approach is to keep counsel on the case while Defendant looks for other counsel or decides how else it would like to proceed.”

X. Statute of Limitations

Estate of Ewers, 2024 WL 333334, __ S.W.3d __ (Tex. App.—Houston [1st Dist.] Jan. 30, 2024, no pet.).

Two investors asserted claims against the estate of a deceased individual, Larry Ewers (“Larry”), whom they alleged defrauded them in connection with investments relating to Larry’s LLC. In discussing whether the plaintiffs failed to exercise reasonable diligence in discovering the fraud, the court acknowledged that the investors could have inspected the records of the LLC because they held membership interests in the LLC (citing Tex. Bus. Orgs. Code § 101.109(a)(3)), but the court stated that “even though they could have, due to Larry’s fraud, they had no reason to think they needed to investigate further.” The court also explained that “appellees’ investment in Citadel was a private deal between friends; Janice [Larry’s widow and executor] has not identified any public records detailing Citadel’s financial dealings, and Larry himself was the appellees’ only source of information. But Larry was also the source of the fraud.” The court concluded that “the trial court properly found that the action they [the investors] took was reasonable and reasonable diligence would not have uncovered Larry’s fraud because he concealed it and actively misled them for years.”


In this adversary proceeding to recover a distribution by a Delaware LLC under Montana fraudulent transfer law and the Bankruptcy Code, the court analyzed whether to apply the three-year statute of repose under Section 18-607(c) of the Delaware Limited Liability Company Act or the four-year statute of limitations under Montana fraudulent transfer laws. After a lengthy analysis in which the court applied a multi-factor test under Section 145 of the Restatement (Second) Conflicts of Law, the court held that all factors favored the application of Montana fraudulent transfer law rather than the Delaware provision. The court thus held that Montana fraudulent transfer law applied.
Y. Fifth Amendment Privilege Against Self-Incrimination

_In re Lee_, 686 S.W.3d 449 (Tex. App.—Eastland 2024, orig. proceeding).

The court held that the trial court abused its discretion when it ordered that counterclaims brought by a professional limited liability company would be dismissed if its orthodontist member did not waive his Fifth Amendment privilege against self-incrimination in a patient’s lawsuit arising out of the orthodontist’s alleged sexual assault of the patient.

Barnes filed a lawsuit against Dr. Lee and Lee Orthodontics, PLLC, in which Barnes alleged that Dr. Lee sexually assaulted her. Dr. Lee invoked the privilege against self-incrimination in response to the majority of questions asked in Dr. Lee’s deposition in the suit. The PLLC brought counterclaims against Barnes for tortious interference with contract and defamation based in part on an email sent by Barnes to another dental practice in which Barnes expressed “shock” that the dental practice was referring children to Dr. Lee and in which Barnes asserted that Dr. Lee was well known for “crimes against multiple women.” Barnes sought to depose Dr. Lee again in connection with the PLLC’s counterclaims. In an order relating to discovery disputes among the parties, the trial court required Dr. Lee to file a written election indicating whether he would waive his Fifth Amendment privilege and that the PLLC’s affirmative claims would be dismissed if he did not do so within fourteen days. In this mandamus proceeding, the court of appeals concluded that the trial court abused its discretion in ordering that the PLLC’s claims would be dismissed if Dr. Lee did not waive the privilege against self-incrimination.

After discussing the role of the privilege against self-incrimination in a civil case, the court analyzed the offensive use of privilege and sanctions as follows:

Like other privileges, the privilege against self-incrimination is subject to limitations when it is used offensively in a civil case, that is, where the party that is asserting the privilege is also the party asserting a claim for affirmative relief. See _Tex. Dep’t of Pub. Safety Officers Ass’n v. Denton_, 897 S.W.2d 757, 761 (Tex. 1995).

At issue is the propriety of sanctioning a business entity for the decision of an individual to assert the privilege against self-incrimination. Here, the trial court’s order required that an individual elect to waive his claim of privilege against self-incrimination; otherwise, failing such an election within the deadline given, the affirmative claims alleged against Barnes by PLLC, a separate business entity of which the individual is a member, “shall be summarily dismissed.” While the fact scenario here is unique, we are unaware of any Texas case in which one party was given death penalty sanctions, or put to such an election, based on the claim of privilege asserted by another party. No such sanction or the potential of striking the claims of the business entity was at issue in _Wil-Roye_, rather, the special relationship of the party’s agent was discussed only in the application of Rule 513(c).

Evidence that the tort claims of Barnes occurred in the course and scope of professional services provided to her by the PLLC was not presented at the hearing. Importantly, we note that the trial court granted summary judgment against Barnes on the issue of PLLC’s respondeat superior responsibility for the torts allegedly committed by Dr. Lee as pled by Barnes. Further, there are no pleadings provided in the record by Barnes that somehow there is a “piercing [of] the corporate veil” as it relates to PLLC as a limited liability company, a theory that must be specifically pleaded or it is waived, unless it is tried by consent. _Town Hall Estates-Whitney, Inc. v. Winters_, 220 S.W.3d 71, 86 & n.11 (Tex. App.—Waco 2007, no pet.); see _Mapco, Inc. v. Carter_, 817 S.W.2d 686, 688 (Tex. 1991); _Chico Auto Parts & Serv., Inc. v. Crockett_, 512 S.W.3d 560, 572 (Tex. App.—El Paso 2017, pet. denied). Further, veil piercing is a fact-specific inquiry, and whether a corporate fiction—where individuals abuse the corporate privilege—may be disregarded is typically not a question of law, but rather a question of fact. _Castleberry v. Branscum_, 721 S.W.2d 270, 271, 273, 277 (Tex. 1986), superseded by statute on other grounds, TEX. BUS. ORGS. CODE ANN. § 21.223 (West 2020); _HHH Farms, L.L.C. v. Fannin Bank_, 648 S.W.3d 387, 409 (Tex. App.—Texarkana 2022, pet. denied); _Clement v. Blackwood_, No. 11-16-00087-CV, 2018 WL 826856, at *6 (Tex. App.—Eastland Feb. 8, 2018, pet. denied) (mem. op.).

Other than his membership in PLLC, of which there was small mention during the hearing, the record includes no documentation in the form of bylaws, membership structure, voting rights
or governing persons, etc., of PLLC. That Dr. Lee, as a member and owner of PLLC, might benefit if PLLC recovers in the suit—as this may be true, and would be expected, in the case of any PLLC seeking a recovery of damages and the possible ultimate benefit to the members thereof—is not sufficient evidence to judicially merge the Relators.

In Republic Ins. Co. v. Davis, the supreme court warned that “an offensive use waiver of a privilege should not lightly be found.” 856 S.W.2d 158, 163 (Tex. 1993). It then set out a three-part test for determining whether a party has engaged in an offensive use that justifies the imposition of sanctions.[footnote omitted] Id. As an initial requirement, affirmative relief must be sought by “the party asserting the privilege.” Id. (emphasis added). “Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted.” Id. Finally, disclosure of the privileged information “must be the only means by which the aggrieved party may obtain the evidence.” Id. (emphasis added). If the three-part test is satisfied, a court may issue an order requiring a party to elect “whether to maintain the privilege or risk suffering a sanction.” Denton, 897 S.W.2d at 761. But based on this record, and without more, we cannot say that even the first requirement of Republic’s three-part test has or can be satisfied.

Regardless, even the proper application of the Republic standard would not fully resolve the issue. The trial court must still determine whether the form of sanctions selected were appropriate. See Denton, 897 S.W.2d at 763 (although the offensive use standard was satisfied, “[t]he question remains ... whether the sanction imposed by the trial court in this case was an appropriate one”). In this case, the trial court did not merely rule that PLLC would be sanctioned if Dr. Lee failed to provide deposition testimony. It also determined that, if this occurred, the claims of PLLC would be summarily dismissed. In that regard, and without deciding whether Republic was properly applied in this instance, we have determined that the trial court’s order was an abuse of discretion.

The court next discussed the factors that the Texas Supreme Court stated should be weighed in Tex. Dep’t of Pub. Safety Officers Ass’n v. Denton, 897 S.W.2d 757, 761 (Tex. 1995) (i.e., the nature of the questions asked, the privilege asserted, whether more narrow questions could serve the defendant’s discovery needs, whether the privilege is asserted against a bona fide fear of self-incrimination (as opposed to an effort to merely avoid discovery or create delay), unfairness to a party if trial were to proceed, remedies that could be imposed during trial (such as prohibiting a party from introducing evidence on matters about which the party asserted his privilege or allowing a civil jury to make a negative inference from the assertion of the privilege), options for delaying civil proceedings during the pendency of criminal investigations or parallel criminal proceedings in light of the statute of limitations and the impact of delay on the defendant’s ability to prepare a defense, and options to impose remedies in the future if any delay afforded the plaintiff resulted in unanticipated or extraordinary hardships). The court ultimately concluded that the trial court’s order was an abuse of discretion under the standards set out in Denton for two reasons.

First, the trial court should properly weigh Dr. Lee’s concerns regarding the potential for the prosecution for any sexual assault offense. During the hearing on the motion to compel, the trial court inquired about two criminal charges that had been brought against Dr. Lee in connection with Barnes’s allegations. According to counsel for Dr. Lee, both of those charges had been resolved.[footnote omitted] However, Dr. Lee had not been charged with sexual assault. After counsel for Dr. Lee indicated that the district attorney could still indict him with sexual assault within the ten year limitations period, the trial court suggested that no harm would result from a waiver unless the prosecutions occurred, and stated that it would be “willing to risk” that no charges would ever be filed.

Although the trial court may be correct, that the prospects of future prosecutions are unlikely, it should not limit its consideration to an all-or-nothing gamble that no harm will result from a waiver of the privilege. Rather, the trial court’s role is to consider all of the factors described above, including the risk of future prosecutions, and then to fashion an appropriate sanction based on the totality of the circumstances. See Denton, 897 S.W.2d at 763; see also
When the trial court dismissed the threat of future prosecution as an acceptable risk, rather than acknowledging it as an important factor for consideration, it abused its discretion.

Additionally, regardless of the issue of the separate nature of Dr. Lee versus PLLC as an entity, the trial court failed to consider whether lesser sanctions would be appropriate under these circumstances. For example, the record does not indicate that the trial court considered the possibility of (1) prohibiting Dr. Lee from introducing evidence on the matters about which he asserted his privilege, or (2) allowing the jury to make a negative inference from the assertion of the privilege.[footnote omitted] See Denton, 897 S.W.2d at 763; see also Wehling, 608 F.2d at 1088–89.

The Denton court recognized the possibility that death penalty sanctions could be issued in response to the assertion of the privilege against self-incrimination,[footnote omitted] 897 S.W.2d at 759. However, such a sanction is particularly harsh in this context. We have not found any precedent since Denton that has resulted in the imposition of death penalty sanctions based on the assertion of the privilege against self-incrimination, and we are likewise hard-pressed to imagine any circumstances where the unfairness to the other party resulting from the assertion of the privilege, standing alone, could not be remedied by an appropriate application of Rule 513(c) and/or lesser sanctions.

Z. Power of Eminent Domain


In the context of an LLC’s effort to exercise the right of eminent domain in order to establish a pipeline to transport polymer grade propylene (“PGP”), the court held that the LLC was a common carrier of an “oil product” under the eminent domain provisions of the Natural Resources Code and Texas Business Organizations Code. (“Since ‘oil’ includes, but is not limited to, ‘crude petroleum oil,’ and PGP is a petroleum product, it would also necessarily be an ‘oil product’ under section 2.105 of the Business Organizations Code. Thus, PGP is an oil product whether it is derived from the catalytic fracturing and distillation of oil, as in Hlavinka, or from the dehydrogenation of propane that might have come from a gas well, as is the situation here.”).