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Partnership Law

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I. INTRODUCTION

Over the last year, and similar to the last Survey period, while the world still grappled with the COVID-19 pandemic and countless other uncertainties, the Texas courts maintained their conservative approach and commitment to precedent when deciding issues related to partner-

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ship law. While reading the Texas laws strictly, the Texas judiciary made important decisions which shielded third parties from breach of fiduciary duty claims, prevented parties from claiming that a joint venture or partnership was formed, and maintained the high ethical standards attorneys should abide by when entering into a business venture with clients. The Texas courts tended to read the laws literally. And as a result, the Texas courts came to conclusions such as that a partnership may not make an ultra vires claim because the law only provides such a claim for corporations. In addition, the courts paid particular attention to the language used in partnership or joint venture documents when making decisions. This Article is divided into four sections, which discuss cases that concern: (1) partnership formation, (2) requests to review a partnership's books and records, (3) forum-selection clauses, and (4) fiduciary duties owed to a partnership or joint venture.

II. PARTNERSHIP FORMATION

A. Elements of a Partnership

In *J. Michael Ferguson, P.C. v. Ghrist Law Firm, PLLC*, the Court of Appeals for the Second District of Texas at Fort Worth addressed numerous issues, including whether a fee-sharing agreement between lawyers created a partnership for Texas law purposes.[1] Ian Ghrist, an attorney, was an associate and employee of the J. Michael Ferguson, P.C. law firm (Firm) before leaving to start his own law firm.[2] While employed by the Firm, Ghrist entered into an oral fee-sharing agreement (Agreement) with the Firm.[3] The Agreement provided that Ghrist and the Firm would share attorneys' fees for joint cases, with two-thirds of the net recovery (after paying the Firm's expenses) going to the Firm and the remaining one-third of such net recovery going to Ghrist.[4] The Firm was also entitled to a percentage of attorney's fees for the individual cases that Ghrist worked on, but the percentage agreed upon was a contested issue at trial.[5] Importantly, the Agreement provided that the Firm would front expenses for joint cases and did not require Ghrist to repay those expenses.[6]

Ghrist asserted that the Agreement created a partnership for Texas law purposes between him and the Firm because of the sharing of profits.[7] The jury found that the parties had entered into a joint venture under the Texas Business Organizations Code (TBOC) § 152.052(a).[8] The TBOC

1. No. 02-18-00332-CV, 2021 WL 2006321, at *1 (Tex. App.—Fort Worth May 20, 2021, pet. denied) (mem. op.).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *1, *14.
8. *Id.* at *4, *14. "The formation of a joint venture is governed by the same law as governs partnerships." *Id.* at *13 (citing Tex. Bus. Orgs. Code Ann. § 152.051(b)).

lists five factors to consider in determining whether a partnership or joint venture was formed:

> (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.[9]

Because the Firm paid all expenses even if there was no recovery, there was no sharing of losses between Ghrist and the Firm, and thus factor (4) above was not met.[10] Although the TBOC does not require proof of each factor (and instead looks to the totality of the circumstances),[11] at trial, the jury was instructed that satisfaction of *all* elements was required in order to enter into a joint venture.[12] Ghrist did not object to this jury instruction at trial, which the appellate court later recognized as a grave error.[13] This case was being reviewed under a legal sufficiency standard, which, as the appellate court noted, was not measured by the usual case but by the particular charge given to the jury where there was no objection.[14] Accordingly, the jury instruction governed the appellate court's review.[15] The appellate court looked no further than the Agreement to share losses and found that Ghrist did not meet this threshold.[16] The appellate court also reasoned that the Firm's deducting of reimbursed case expenses before splitting attorneys' fees did not equate to the sharing of losses by Ghrist.[17] In conclusion, the appellate court sustained the Ferguson Firm's objection to the trial court's ruling on the joint venture issue due to Ghrist's inability to prove he agreed to share losses as measured by the charge submitted to the jury.[18]

This case serves as a critical reminder that failure to object at trial to a jury charge may seriously or even fatally damage a claim on appeal. In this case, Ghrist was held to a higher threshold than the statutory requirements because the appellate court was bound by an imprecise jury instruction with no objection.

9. *Id.* at *14 (quoting Tex. Bus. Orgs. Code Ann. § 152.052(a)).
10. *Id.* at *15.
11. *Id.* at *14 (citing Ingram v. Deere, 288 S.W.3d 886, 896 (Tex. 2009)).
12. *Id.*
13. *Id.*
14. *Id.* at *14–15.
15. *Id.* at *15.
16. *Id.* at *14–15.
17. *Id.* at *15. The appellate court held instead that "[u]nreimbursed expenses that exceed collected fees, such as expenses fronted on cases that ultimately result in no recovery, are losses." *Id.*
18. *Id.*

B. Timing of Formation

In re Marriage of VanDusen and Kairis[19] serves as an important reminder regarding the importance of timing when forming a partnership. In this case, the Court of Appeals for the Tenth District of Texas at Waco reversed the trial court's prior decision that a divorced couple formed a partnership when one member of the marriage bought property prior to the marriage.[20] Susan VanDusen (VanDusen) purchased a tract of property near her mother's home.[21] Although Richard Kairis (Kairis) initially found the property and lived and worked on the property after VanDusen purchased it, VanDusen used her own income when making the purchase.[22] Later, VanDusen purchased another property with her own income in 2002, and Kairis began to perform repairs on that property as well.[23] In addition, around the same time, Kairis began raising miniature pigs on the first property.[24] Although Kairis raised the pigs, any income from raising the pigs went into VanDusen's bank account.[25] Similarly, VanDusen paid for the expenses and also realized the entire loss from the pig business, as shown in her tax returns from the years 2003–2008.[26]

In 2004, Kairis helped VanDusen's mother sell another piece of property, and Kairis subsequently requested payment from VanDusen for his assistance in the transaction.[27] Evidence showed that he was paid either $15,000.00 or $30,000.00 for his services, which he applied to the mortgage of the property bought in 2002.[28] In 2006 and 2008, VanDusen purchased two more properties, both in her sole name.[29] Both transactions were organized and executed by Kairis, using a power of attorney for VanDusen.[30] At the end of 2008, VanDusen and Kairis began raising cattle.[31] VanDusen would either provide Kairis with cash for the expenses for the cattle raising endeavor, or she would reimburse him for his expenses.[32] In 2009, VanDusen and Kairis were married, and the couple continued to operate the properties as described above until their divorce.[33]

VanDusen filed for divorce in 2017, and Kairis filed a counterpetition

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19. No. 10-18-00285-CV, 2020 WL 6302315, at *1 (Tex. App.—Waco Aug. 26, 2020, no pet.) (mem. op.).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at *2.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The appellate court noted the amount was in dispute but that the amount paid was immaterial to the case. *Id.* at *2, n.2.
29. *Id.* at *2. These properties were also purchased with VanDusen's own funds. *See id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

asserting that the couple was informally married in 1984.[34] Alternatively, Kairis argued the pair formed an informal business partnership, and, as a result, the tracts purchased by VanDusen between 1995 and 2008 were partnership property.[35] The trial court decided that an informal business partnership existed because VanDusen failed to file a verified denial.[36] The trial court also decided the real property purchased by VanDusen from 1995 and 2008 was partnership property.[37]

The appellate court initially explained that it only needed to determine whether the evidence supported the trial court's finding that a partnership was created in 1995.[38] Further, the appellate court noted that, "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name."[39] The appellate court noted the five factors a court is to review in its determination of whether a partnership had been formed:

> (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.[40]

The determination of whether a partnership exists is to be evaluated by the totality of the circumstances.[41] If none of the five factors are present, then a partnership has not been formed.[42] Even if one factor has been conclusively established, it is still unlikely a partnership has been formed.[43] The appellate court further explained that the decision of whether a partnership has been formed will usually be a question of fact.[44]

VanDusen argued that no partnership was formed in 1995 because at that time none of the elements needed to form a partnership were present.[45] The appellate court agreed with her approach.[46] The appellate court noted that VanDusen used her own funds to purchase the tract and

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at *3.
39. *Id.* (quoting Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., 593 S.W.3d 732, 737 (Tex. 2020)).
40. *Id.* at *3–4 (quoting TEX. BUS. ORGS. CODE ANN. § 152.052(a)).
41. *Id.* at *4 (citing Ingram v. Deere, 288 S.W.3d 886, 903–04 (Tex. 2009)).
42. *Id.* (citing *Ingram*, 228 S.W.3d at 904).
43. *Id.* (citing *Ingram*, 288 S.W.3d at 904).
44. *Id.* (citing Westergren v. Hous. Pilots Ass'n, 566 S.W.3d 7, 16 (Tex. App.—Houston [14th Dist.] 2018, no pet.)).
45. *Id.*
46. *Id.*

that she paid for everything in connection with the property.[47] While Kairis argued he and VanDusen agreed that she would "work hard" in Houston during the week while he worked on the property, the appellate court noted that, even if this was the agreement between the two parties, at that point in time the parties had not yet contemplated using the property to operate a business.[48] Further, the appellate court stated that

> [t]here was no evidence presented regarding the right to receive a share of profits of a business, any intent to be partners in a business, any agreement regarding sharing losses or liability for claims owed to any third parties of any potential business, or an agreement to contribute property to a business.[49]

Thus, based on the five factors laid out by the appellate court, a partnership was not formed at the time in which VanDusen purchased the first property.[50]

This case underscores the importance of ensuring that if an agreement to form a partnership is not memorialized, the five factors needed to show that a partnership was formed must be present from the inception of the business venture. This ruling shows the importance of documenting any partnership that you intend to form. Generally, business partners should be cognizant of the risks in failing to document the business terms of a business property and should ensure to do so at the inception of any business venture.

III. REQUESTS TO REVIEW A PARTNERSHIP'S BOOKS AND RECORDS

Pacific World Energy Ltd. v. PIE Investments LLC[51] highlighted the difference between "failing" and "refusing" to provide an entity's books and records. In this case, Pacific World Energy Ltd. (Pacific), which pleaded that it had recently purchased twenty-five percent of the membership interests in PIE Investments LLC (PIE) for $100,000.00, filed a petition for mandamus to compel PIE to provide copies of its books and records to Pacific.[52] Pacific maintained that it had asked PIE on multiple occasions to provide PIE's corporate books and records.[53] However, PIE only provided two Company Unit Certificates and "a copy of a partial assignment and assumption of a membership interest dated as of September 24, 2014."[54] Pacific responded to PIE's failure to produce the re-

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. No. 09-19-00155-CV, 2020 WL 5240457, at *5 (Tex. App.––Beaumont Sept. 3, 2020, pet. denied) (mem. op.).
52. *Id.* at *1.
53. *Id.*
54. *Id.* Pacific noted they requested these books and records after review of a September 30, 2017 balance sheet which indicated that the company only had assets of $4,410.94. *Id.* at *2.

quested records by sending a written demand letter to PIE requesting: (1) all of PIE's organizational documents; "(2) any voting agreement, voting trust, proxy[,] or other instrument to which any member of PIE is a party and which directly or indirectly relates to the voting of membership interests in PIE;" (3) any instruments evidencing any sale, conveyance, or other transfer by any member of PIE; (4) the unit ledger of PIE; (5) complete financial statements and accounts of PIE since PIE's inception to November 16, 2017; (6) federal and state tax returns of PIE; and (7) written resolutions and consents of PIE's members and directors.[55] PIE responded it would provide the requested information in due course; however, PIE still had not provided the documents by December 5, 2017.[56] Pacific followed up, and PIE "promised to provide all of the requested document[s] on or before January 15, 2018."[57] While PIE eventually provided "unaudited financials since [PIE's] inception and franchise tax filings," PIE failed to produce all of the other requested documents.[58]

> Pacific argued that the reason for its requests to PIE was to obtain an understanding of (1) PIE's full ownership history, (2) the full extent of PIE's assets and liabilities from September 2014 to date, including contributions by members and any oil and gas interests held or divested by PIE, and (3) the full history of PIE's management and operations since Pacific became a member.[59]

By failing to provide the requested documents, Pacific argued that PIE had violated the Texas Business Organizations Code (TBOC)[60] and that further, under the TBOC, PIE owed Pacific attorneys' fees.[61] PIE argued that Pacific's requests were made in bad faith and that Pacific "had sufficient information before making the investment."[62] Further, PIE argued that Pacific owed PIE attorneys' fees because its request for records was made solely for harassment.[63]

In addition, PIE filed a hybrid motion for summary judgment, stating that, because PIE did indeed provide the documents on December 2, 2018, Pacific should not be able to obtain attorneys' fees.[64] Pacific's argument remained that because PIE missed the statutory deadline to provide the requested documents, PIE violated the statute and thus was still liable to Pacific.[65] Further, Pacific argued that PIE's defense that PIE did not refuse to provide the requested documents was not an adequate defense

55. *Id.* at *1.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at *2.
60. *Id.* (citing Tex. Bus. Orgs. Code Ann. § 101.502).
61. *Id.* (citing Tex. Bus. Orgs. Code Ann. § 101.503).
62. *Id.*
63. *Id.*
64. *Id.* (citing Westerburg v. W. Royalty Corp., No. 07-15-0082-CV, 2015 WL 8781425, at *5 (Tex. App.—Amarillo Dec. 11, 2015, pet. denied) (mem. op.)).
65. *Id.* at *3. The statutory deadline that Pacific referred to is the deadline contained in TBOC § 101.501(a). *Id.* Under that provision, a limited liability company is required to make available certain documents "not later than the fifth day after the date the person

to dismiss the case.[66]

Ultimately, the trial court granted PIE's hybrid motion for summary judgment, and the Court of Appeals for the Ninth District of Texas at Beaumont affirmed.[67] The appellate court explained that "[u]nder [TBOC] section 101.503, a limited liability company that 'refuses' to comply with a records request that was made in good faith and for a proper purpose is liable for the requesting party's attorney[ ]s['] fees."[68] The burden of persuasion to show that the company "refused" falls on the requesting party,[69] and the requesting party must show that the limited liability company refused to provide such documents.[70] Because the term "refuse" is not defined in the TBOC, the court must afford the term its common, everyday meaning.[71] The court defined "refuse" as "to deny, decline, reject" and differentiated the term from the term "fail" because to refuse an action "involves an act of the will, while 'fail' may be an act of inevitable necessity."[72]

According to the appellate court, because PIE "consistently agreed to produce documents, initially produced some responsive documents, and ultimately produced all responsive documents," the trial court was correct in finding that PIE did not refuse to provide such documents.[73] Because PIE ultimately did perform by providing the requested documents, PIE did not "refuse," as "refusing" would have involved actively not performing. This is an important case, as it shows the flexibility courts permit regarding the demands placed on entities and the freedoms to run their own businesses. This case also demonstrates that, in order to comply with the TBOC, all a company may need to do is indicate a willingness to provide such documents, even if they do not do so in a timely fashion.

IV. FORUM-SELECTION CLAUSES

In *Rieder v. Woods*, the Texas Supreme Court determined that a series LLC agreement and an operating agreement were not unified in nature, and therefore the forum-selection clause in the series agreement could not be enforced against parties to the operating agreement.[74] This case involves two entities: (1) a Texas entity named CQuentia Series, LLC, (CQuentia) that is headquartered in Fort Worth, Texas and (2) a Nevada entity named Cadbury Solutions, LLC, (Cadbury) that has its principal place of business in Wisconsin.[75] The only members of Cadbury are plain-

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submits a written request to examine the books and records of the company under Section . . . 101.502." *Id.* at *5 (quoting TEX. BUS. ORGS. CODE ANN. § 101.501(a)).

66. *Id.* at *3.
67. *Id.* at *5–6.
68. *Id.* at *5 (citing TEX. BUS. ORGS. CODE ANN. § 101.503).
69. *Id.* (citing *Westerburg*, 2015 WL 8781425, at *5).
70. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 101.503(a)).
71. *Id.* (citing *Westerburg*, 2015 WL 8781425, at *5).
72. *Id.*
73. *Id.* at *6 (citing *Westerburg*, 2015 WL 8781425, at *5–6).
74. 603 S.W.3d 86, 89 (Tex. 2020).
75. *Id.*

tiff Kenny Woods and defendants Anthony Rieder and Ed Rapee III.[76] Alan Meeker is the CEO and manager of CQuentia.[77]

Prior to Cadbury's formation, Woods, Rieder, and Rapee discussed exploring business opportunities in the healthcare sector.[78] At that time, CQuentia's primary business was producing and selling generic testing services to healthcare providers.[79] Accordingly, Woods introduced Rieder and Rapee to Meeker at CQuentia.[80] The parties discussed forming a separate entity that would promote and sell CQuentia products at the national level.[81]

On February 1, 2016, Woods, Rieder, and Rapee formed Cadbury and executed a joint venture agreement (Cadbury Agreement).[82] Neither CQuentia nor Meeker was mentioned in the Cadbury Agreement, and at trial the parties disputed whether Cadbury was created for the sole purpose of doing business with CQuentia.[83] The Cadbury Agreement was drafted broadly, granting members the power to exercise all powers legally exercisable in Nevada.[84] The Cadbury Agreement also included a choice of law provision requiring the contract to be construed under Nevada law.[85]

On the same day Cadbury was formed, Cadbury executed a series agreement with CQuentia (Series Agreement).[86] Unlike the Cadbury Agreement, the Series Agreement specifically stated that the purpose of the series was the sale and distribution of medical-related services.[87] The Series Agreement required application of Texas law and had a forum-selection clause mandating Tarrant County, Texas as the exclusive jurisdiction.[88] None of the individuals signed the Series Agreement in their individual capacity, and only Woods and Meeker signed the Series Agreement in their official capacity.[89] The Series Agreement did not reference the Cadbury Agreement.[90]

Shortly after execution of these agreements, Cadbury and CQuentia's relationship disintegrated.[91] Thereafter, when CQuentia tried to hire Woods for employment, Cadbury invoked the noncompete covenant within the Cadbury Agreement.[92] As a result, Woods sued Rieder,

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 89–90.
83. *Id.* at 90.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 91.

Rapee, and Cadbury in Tarrant County, Texas, and Meeker and CQuentia later intervened.[93]

In the Texas suit, Woods sought a declaration that: (1) the parties had no legal obligations to one another; (2) Cadbury failed to ever become a viable legal entity; (3) the Series Agreement was invalid because the board of directors never ratified it, as required by the Cadbury Agreement; and (4) Woods was not bound by the noncompete covenant in the Cadbury Agreement because it never became effective.[94]

The trial court held that the Series Agreement gave the trial court personal jurisdiction over CQuentia and Meeker.[95] Therefore, the trial court could enforce the forum-selection clause against CQuentia and Meeker; however, they lacked jurisdiction over Cadbury, Rieder and Rapee.[96] Additionally, the trial court denied the special appearance as to CQuentia's and Meeker's claims.[97]

The Court of Appeals for the Second District of Texas at Fort Worth affirmed in part and reversed in part, ultimately holding that the forum-selection clause bound all parties.[98] The appellate court construed the Cadbury Agreement and the Series Agreement as a single, unified instrument;[99] therefore, the appellate court held that Meeker and Woods, nonsignatories to the Series Agreement, could enforce the Series Agreement against nonsignatories, Rieder and Rapee.[100] The appellate court found that the board-exculpation clause in the Cadbury Agreement and the broad language of the forum-selection clause in the Series Agreement gave Woods the power to enforce the forum-selection clause against Rieder and Rapee because it evidenced the parties' intent for any disputes among Cadbury members to be submitted to a Texas forum.[101] Additionally, the appellate court invoked the "transaction participant" and "closely related to the contractual relationship" enforcement theories to allow Meeker's and CQuentia's claims.[102]

On appeal, the Texas Supreme Court addressed two issues.[103] The first issue was whether nonsignatories Woods and Meeker could enforce the forum-selection clause against nonsignatories Rieder and Rapee and signatory Cadbury.[104] The second issue was whether signatory CQuentia could enforce the forum-selection clause against nonsignatories Rieder and Rapee.[105]

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93. *Id.* Cadbury later sued Woods and Meeker in Wisconsin. *Id.*
94. *Id.*
95. *Id.* at 91–92.
96. *Id.*
97. *Id.* at 92.
98. *Id.* (citing Rieder v. Meeker, 587 S.W.3d 32, 37 (Tex. App.—Fort Worth 2018, pet. granted) (mem. op.), *rev'd sub nom. Rieder*, 603 S.W.3d at 102).
99. *Id.* (citing *Rieder*, 587 S.W.3d at 47–48).
100. *Id.* (citing *Rieder*, 587 S.W.3d at 54–56).
101. *Id.* (citing *Rieder*, 587 S.W.3d at 53–54).
102. *Id.* at 92–93 (citing *Rieder*, 587 S.W.3d at 54–56).
103. *Id.* at 94.
104. *Id.*
105. *Id.*

The supreme court first had to assess whether the Series Agreement and the Cadbury Agreement could be construed as a unified instrument and ultimately held that such agreements could not be.[106] "In determining whether multiple agreements are part and parcel of a unified instrument, a court may consider whether each written agreement and instrument was 'a necessary part of the same transaction.'"[107] It was particularly compelling to the supreme court that the Cadbury Agreement made no mention of CQuentia or the Series Agreement, nor did the Cadbury Agreement contain any language that would insinuate that the sole purpose of Cadbury's formation was to consummate the Series Agreement transaction.[108] Similarly, the Series Agreement only listed Cadbury and CQuentia as parties and had a specific purpose, which differs from Cadbury's purpose.[109] Furthermore, the Series Agreement mentioned Cadbury, as a party, but did not refer to the Cadbury Agreement.[110] Lastly, both agreements contained standard merger clauses,[111] which further supported the supreme court's conclusion that the agreements were independent.[112]

The supreme court interpreted the Series Agreement as the parties' intent to create a series limited liability company that existed separate and apart from both Cadbury and CQuentia and that was formed for the specific purpose of selling and distributing medical-related services.[113] Because the agreements were separate, it logically followed that Woods could not enforce the forum-selection clause from the Series Agreement against Rieder and Rapee through the board-exculpation clause in the Cadbury Agreement.[114]

Next, the supreme court discussed whether the forum-selection clause could be enforced against Cadbury, Rieder, and Rapee as transaction participants or parties who are closely related to the contractual relationship.[115] In *Pinto Technology Ventures, L.P. v. Sheldon*, the Texas Supreme Court recognized that "'transaction participants' may enforce a valid forum-selection clause even if they are not actual signatories to the contract."[116] However, in *Sheldon*, a nonsignatory was enforcing a forum-

106. *Id.* at 94–95.

107. *Id.* at 94 (quoting Bd. Of Ins. Comm'rs v. Great S. Life Ins. Co., 239 S.W.2d 803, 809 (Tex. 1951)).

108. *Id.* at 95.

109. *Id.* at 95–96.

110. *Id.* at 96.

111. *Id.* "A merger clause is a 'contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract.'" *Id.* (quoting *Integration (Merger) Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

112. *Id.* at 97. The supreme court also noted that Rieder, Woods, and Rapee could have bound themselves to the Series Agreement as individuals and could have done so without forming Cadbury. *Id.* at 98.

113. *Id.* at 97–98.

114. *Id.* at 98.

115. *Id.*

116. *Id.* at 99 (quoting Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428, 444 (Tex. 2017)).

selection clause against a signatory,[117] which could be distinguished from this case where a nonsignatory to the Series Agreement was attempting to enforce the clause against another nonsignatory.[118] Ultimately, in this case, the Texas Supreme Court determined that it was improper to use the transaction-participant theory in the latter instance.[119]

There are two key takeaways from this case. First, this case illustrates the comprehensive analysis for determining whether two contracts are unified in nature and shows that the analysis goes far beyond whether the contracts merely bear a similar relationship to each other, whether the parties desire for the contracts to be unified, and whether it is prudent to make that abundantly clear in the terms of each such contract. Second, this case reinforces the established premise that forum-selection clauses are creatures of contract, and the terms of those contracts are fundamental to the court's analysis of whether a forum-selection clause can be enforced.

V. FIDUCIARY DUTIES OWED TO A PARTNERSHIP OR JOINT VENTURE

A. Common Fiduciary Duty

In *Rex Performance Products, LLC v. Tate*, the Court of Appeals for the Second District of Texas at Fort Worth addressed a fascinating breach of fiduciary duty claim by a joint venture against its highest officers.[120] The facts are fascinating as Rex Performance Products (RPP) officers secretly negotiated substantial bonuses from the purchaser of the joint venture and, the other owners of the joint venture had learned of the secret bonuses before the closing but did not derail the sale in spite of such bonuses.[121]

RPP is a Michigan limited liability company that specializes in manufacturing polyethylene foam material used to protect goods during shipping.[122] Pregis Performance Products (Pregis) is a provider of protective packaging materials.[123] In February 2018, RPP sold its assets to Pregis.[124]

The parties began negotiations in November 2016, when Manu Bettegowda, a member of the board of directors of Pregis, approached RPP about the asset sale.[125] James Tate, the President of RPP and a substantial owner, and Michael Cuffia, the director of operations of RPP and also a

117. *Id.* at 100 (citing *Sheldon*, 526 S.W.3d at 444–45).
118. *Id.* The Texas Supreme Court noted that both Cadbury's and CQuentia's business forms were designed to shield their members from personal liability. *Id.* at 101.
119. *Id.* at 101.
120. No. 02-20-00009-CV, 2020 WL 7776795, at *1 (Tex. App.—Forth Worth Dec. 31, 2020, pet. denied) (mem. op.).
121. *Id.* at *1–4.
122. *Id.* at *1.
123. *Id.*
124. *Id.*
125. *Id.*

substantial owner, led the negotiations on behalf of RPP.[126] As the purchase price lowered to $20 million, Tate claimed that he should receive a larger portion of the sales price than his ownership share due to his alleged contributions to RPP and the sale process.[127] The other owners of RPP rejected Tate's position.[128] From that moment forward, Tate and Cuffia appeared to be willing to negotiate an even lower sales price for RPP's assets in return of bonuses to Tate and Cuffia, bonuses that were not intended to be disclosed to RPP or its other owners.[129] Tate and Cuffia ultimately negotiated a $17 million purchase price for RPP's assets but with a secret $1.5 million super bonus to the executive team (which turned out to be Tate and Coffin, $750,000.00 each) for their "commitment to Pregis."[130] In spite of Tate's duties to RPP, in his correspondence with Pregis, Tate insinuated that his commitment was to better serve Pregis, rather than RPP.[131]

While conducting an email review in January 2018, Rex Hansen, an indirect owner of RPP, discovered conversations regarding the confidential bonuses.[132] Despite his findings, RPP's other owners decided that the best option for RPP was to complete the sale and not approach Tate at that time.[133] Hansen was certain that approaching Tate would result in him leaving RPP, which would leave the company in a vulnerable place with no viable backup management plan.[134]

As the deal moved closer to closing, Tate and Cuffia began demanding full releases from any liability and attempted to withhold their signatures from the agreement unless they were granted.[135] Each time the demand was unequivocally refused.[136] Ultimately, Tate signed the agreement without them; however, two days before closing, a suspicious virus attacked Tate's computer and email.[137]

Three days after closing, RPP filed suit against Tate and Pregis, among other parties.[138] The two leading causes of action were "(1) breach of common law fiduciary duty against Tate and Cuffia on several grounds[ ] [and] (2) breach of common law fiduciary duty against Tate for destroying RPP electronic information by allegedly downloading a virus onto his computer" in order to delete his RPP emails.[139]

At trial, Tate and Cuffia moved for summary judgement, arguing that because RPP knew of the retention bonus they waived or ratified any

126. *Id.* *1–2.
127. *Id.* at *2.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *3.
132. *Id.* at *4.
133. *Id.*
134. *Id.*
135. *Id.* at *5.
136. *Id.*
137. *Id.*
138. *Id.* at *6.
139. *Id.*

alleged breach and that there was no evidence that Tate hacked his own computer.[140] The trial court granted the motion for summary judgement.[141]

The appellate court reviewed this case under a de novo standard, which required that they review the evidence in the light most favorable to the nonmovant.[142] It is well settled law that corporate officers and directors owe a fiduciary duty to the corporation with which they serve.[143] Directors and officers of a corporation must make full disclosure of their personal interest in a transaction that they are negotiating for a corporation.[144] As officers of RPP, Tate and Cuffia owed a fiduciary duty to RPP.[145] A core issue was whether Hansen, by having knowledge of the super bonus but carrying out the deal anyway, had ratified or waived his right to claim a breach of fiduciary duty on behalf of RPP.[146] Ultimately, the appellate court found that he had not.[147] It was not until the discovery phase that Hansen gained full knowledge of the bonus agreements.[148] Although the parties dispute this point, the appellate court noted that "[a]n after-the-fact disclosure of the facts that form the basis of a breach-of-fiduciary duty claim does not restore the parties to a position as if there had been no breach."[149] The appellate court went on to say that knowledge of the super bonuses was not dispositive because Tate and Cuffia had committed various other breaches in the duration of the negotiations such as

> a duty not to usurp corporate opportunities for personal gain; a duty of utmost good faith in the officer[s'] relations with the corporation; a duty of full disclosure of any personal interest the officer or director has in the subject matter of a contract the officer or director negotiates with the corporation; a duty of loyalty; and a duty to use uncorrupted business judgment for the corporation.[150]

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140. *Id.*

141. *Id.*

142. *Id.* (citing Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009)).

143. *Id.* at *7 (citing Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 576 (Tex. 1963); Grinnell v. Munson, 137 S.W.3d 706, 718 (Tex. App.—San Antonio 2004, no pet.)).

144. *Id.* (citing Gen. Dynamics v. Torres, 915 S.W.2d 45, 49 (Tex. App.—El Paso 1995, writ denied)).

145. *Id.* at *8.

146. *Id.* at *10–11. "The elements of the affirmative defense of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act." *Id.* at *8 (citing Samms v. Autumn Run Cmty. Improvement Ass'n, Inc., 23 S.W.3d 398, 403 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)). "The elements of waiver include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right." *Id.* (citing Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 778 (Tex. 2008)).

147. *Id.* at *11.

148. *Id.* at *9.

149. *Id.* (citing McCullough v. Scarbrough, Medlin & Assocs., Inc., 435 S.W.3d 871, 903 (Tex. App.—Dallas 2014, pet. denied)).

150. *Id.* at *9–10.

Ultimately, the appellate court found that Tate and Cuffia had failed to establish waiver and failed to establish ratification as affirmative defenses and therefore remanded the issue for trial.[151]

This case is remarkable in at least two respects. First, it creates the implication that ratification of a fiduciary duty may not apply in a circumstance in which the damaged party knew of the breach before taking the action that resulted in the alleged damages if the damaged party learning of such breach was so late in the process to effectively enable the damaged party to back out. Second, it illustrates the risk of ratification of the fiduciary duty breach in a circumstance in which the damaged party has knowledge of the wrongdoing before taking the act that results in the damages (although, in this case, Hansen did not have enough knowledge as to constitute a waiver of his right or ratification of wrongdoing).

B. Conspiracy to Commit a Breach of Fiduciary Duty and Aiding and Abetting the Breach of Fiduciary Duty

In *In re Silver State Holdings*, the U.S. Bankruptcy Court for the Northern District of Texas, Fort Worth Division reinforced the importance of the fiduciary duties of loyalty and care owed by an agent of a limited liability company.[152] However, this case did not go so far as to extend the fiduciary duties owed to a limited liability company to the creditors of a limited liability company.[153] In this case, Richard Morash was the sole member of the entity 7901 BLVD 26, LLC (7901).[154] 7901 owned property in North Richland Hills, Texas.[155] The North Richland Hills property was subject to three liens: (1) a Tarrant County ad valorem tax lien, (2) a deed of trust held by Frost Bank, and (3) a third-priority lien held by the City of North Richland Hills (City).[156] The subject property was damaged by a severe thunder storm, and Valley Ridge was hired to repair the roof of the building on the property.[157] Subsequently, 7901 disputed the amount owed to Valley Ridge for the work done to the roof.[158] The parties went to arbitration, and a judgment and a judgment lien were granted to Valley Ridge.[159]

In the midst of Valley Ridge's attempts to be repaid for its work done to the roof, Morash formed a new entity, Silver State Holdings (Silver State).[160] Silver State then acquired the City's third-priority lien, fore-

151. *Id.* at *11, *14.
152. Valley Ridge Roofing and Constr., LLC v. Silver State Holdings (*In re* Silver State Holdings), Ch. 7 Case No. 19-41579-MXM, Adv. No. 19-4043-MXM, 2020 WL 7414434, at *1 (Bankr. N.D. Tex. Dec. 17, 2020).
153. *Id.* at *31.
154. *Id.* at *1.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* The Valley Ridge judgment lien was fourth in priority to the other three liens previously referenced. *Id.*
160. *Id.*

closed on the property, and subsequently eradicated Valley Ridge's judgment lien.[161] In response, Valley Ridge filed an involuntary bankruptcy petition against 7901.[162] Silver State then filed its own bankruptcy case and sold the property pursuant to § 363 of the U.S. Bankruptcy Code (Bankruptcy Code).[163] After the remaining liens on the property were paid off, $577,000.00 in net proceeds remained, and Valley Ridge filed a proceeding seeking the turnover of the $577,000.00.[164] Valley Ridge argued that the act done by Morash, in creating Silver State, constituted a preferential and fraudulent transfer, and, that as a result, Morash breached his fiduciary duties to 7901's creditors.[165]

The bankruptcy court initially did find that the transfer was a preference and could be avoided under § 547 of the Bankruptcy Code.[166] Further, the bankruptcy court decided that the act was also considered an actual fraudulent transfer under § 548(a)(1)(A) of the Bankruptcy Code, as it was made with intent to "hinder, delay, or defraud Valley Ridge."[167] The bankruptcy court also held that the acts done by Morash and Silver State constituted an actual fraudulent transfer under § 24.005(a)(1) of the Texas Business and Commerce Code (TBCC) because the acts were done with the intent to hinder or defraud Valley Ridge.[168] However, the bankruptcy court rejected Valley Ridge's assertion that these acts also constituted a constructive fraudulent transfer under § 548(a)(1)(B) of the Bankruptcy Code and § 24.006(a) of the TBCC because 7901 presumably received a reasonably equivalent value at the foreclosure sale of the property.[169]

In addition, the bankruptcy court found that Morash breached his fiduciary duties to 7901 because his acts caused injury to 7901, as 7901 could have used the revenue from the sale of the property to repay its creditors for 7901's benefit.[170] The bankruptcy court explained that, under the Texas Business Organizations Code (TBOC), the duties of a manager or member of a limited liability company are not explicitly outlined; however, "duty-of-loyalty concerns appear to underlie statutory provisions addressing transactions with governing persons and renunciation of business opportunities."[171] The bankruptcy court also noted that the TBOC suggests that a company agreement may restrict or expand the duties, including fiduciary duties, and liabilities of a member or manager, and thus a member or manager may owe fiduciary duties to a limited liability

161. *Id.*
162. *Id.*
163. *Id.* (citing 11 U.S.C. § 363).
164. *Id.*
165. *Id.*
166. *Id.* at *16 (citing 11 U.S.C. § 547).
167. *Id.* at *21 (citing 11 U.S.C. § 548(a)(1)(A)).
168. *Id.* at *23 (citing Tex. Bus. & Com. Code Ann. § 24.005(a)(1)).
169. *Id.* at *28 (citing 11 U.S.C. § 548(a)(1)(B); Tex. Bus. & Com. Code Ann. § 24.006(a)).
170. *Id.* at *31.
171. *Id.* at *30 (citing Tex. Bus. Orgs. Code Ann. §§ 2.101(21), 101.255).

company.[172] The bankruptcy court noted that "[t]he duty of loyalty holds officers and directors to an 'extreme measure of candor, unselfishness[,] and good faith,' particularly where there is an interested transaction."[173] "Interested transactions include those in which officers or directors derive personal profit as well as those which deprive the corporation of an opportunity to profit."[174] The director or officer has the burden to prove that the transaction was fair.[175]

The bankruptcy court found that Morash breached his fiduciary duties to 7901 by allowing Silver State to acquire the property because if 7901 had instead sold the property, then 7901 would have then had the assets it needed to pay back its creditors.[176] However, the bankruptcy court made an important distinction in that Morash did not owe fiduciary duties to 7901's creditors.[177] The bankruptcy court simply relied on precedent and explained that, under Texas law, "[o]fficers and directors of [an operating corporate debtor] have fiduciary duties to the corporation—not the corporation's creditors."[178]

Finally, the bankruptcy court found that Morash and Silver State were jointly and severally liable for Morash's breaches of fiduciary duty to 7901 because the bankruptcy court found that Morash and Silver State were a part of a conspiracy and that Silver State aided and abetted Morash's breaches of fiduciary duty.[179] "The elements of civil conspiracy are: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of minds on the object or course of actions, (4) one or more overt unlawful acts, and (5) damages proximately resulting from those acts."[180] A conspiracy may be proved by circumstantial evidence,[181] and once a conspiracy has been proven, each co-conspirator is responsible for all acts done by any conspirator in furtherance of the conspiracy.[182] Co-conspirators are jointly and severally liable for the actual damages that result from the acts in furtherance of the conspiracy.[183] Similarly, "[a]iding and abetting requires: (1) the existence of a violation by the primary (opposed to the aiding and abetting) party, (2) knowledge of this violation on the part of the aider and abettor, and (3) substantial assis-

172. *Id.* (citing TEX. BUS. ORGS. CODE ANN. §§ 101.401, 101.052).
173. *Id.* (quoting Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 577 (Tex. 1963)).
174. *Id.* (citing Assurance Sys. Corp. v. Jackson (*In re* Jackson), 141 B.R. 909, 916 (Bankr. N.D. Tex. 1992)).
175. *Id.* (citing *In re Jackson*, 141 B.R. at 916).
176. *Id.* at *31.
177. *Id.*
178. *Id.* (quoting *In re* ATP Oil & Gas Corp., 711 Fed. App'x 216, 221 (5th Cir. Oct. 27, 2017)).
179. *Id.* at 33.
180. *Id.* at *32 (citing *In re* Performance Nutrition, Inc., 239 B.R. 93, 113 (Bankr. N.D. Tex. 1999)).
181. *Id.* (citing *In re Performance Nutrition, Inc.*, 239 B.R. at 113).
182. *Id.* (citing *In re* Enron Corp. Sec., Derivative & ERISA Litig., 623 F. Supp. 2d 798, 832–34 (S.D. Tex. 2009)).
183. *Id.* (citing *In re* Enron Corp. Sec., Derivative & ERISA Litig., 623 F. Supp. 2d 798, 832–34 (S.D. Tex. 2009)).

tance by the aider and abetter in the achievement of the primary violation."[184] The bankruptcy court ultimately found that the evidence showed Morash violated his fiduciary duties to 7901 when he caused the fraudulent transfer of the property to Silver State, and that Silver State, as the aider and abettor, "had intimate and direct knowledge of this violation and actively participated in the violation."[185] Thus, the three elements of aiding and abetting were established.[186] Further, although the bankruptcy court agreed with Morash and Silver State's argument that a corporation cannot conspire with itself,[187] there was substantial evidence Morash was acting in favor of his individual capacity, not just for 7901 or Silver State.[188] As a result, both Morash and Silver State were jointly and severally liable to Valley Ridge due to their acts of conspiracy and aiding and abetting.[189]

In re Silver State Holdings is important because not only does it underscore the importance of the fiduciary duties owed by a member or manager to a limited liability company, but it also demonstrates the ease with which a court would potentially hold an officer or agent of a limited liability company liable for conspiring with the entity it manages. However, it should be reassuring that the court limited the reach of the fiduciary duties by limiting the duties owed to only the entity itself and not to the entity's creditors.

Similar to *In re Silver State Holdings*, the Court of Appeals for the First District of Texas at Houston, in *Cohen v. NewBiss Property, L.P.*,[190] grappled with the issues of civil conspiracy to breach fiduciary duties and aiding and abetting in connection with a general partner's breach of a fiduciary duty. In this case, Jay Cohen, as trustee of JHC Trusts I & II, transferred real property out of the trust and into a limited partnership entitled Flat Stone II, Ltd.[191] Matthew Dilick, the controlling shareholder of Flat Stone II of Texas, Inc., Flat Stone II Ltd.'s general partner, granted a first lien deed of trust on the property transferred by Cohen to Flat Stone II Ltd. (West Newcastle Property), as collateral for a personal loan.[192] Dilick then defaulted and entered into a foreclosure–forbearance agreement with the bank.[193] A few weeks later, Dilick transferred a por-

184. *Id.* at *33 (citing *In re* Ramirez, 413 B.R. 621, 629 (Bankr. S.D. Tex. 2009)).
185. *Id.*
186. *Id.*
187. *Id.* (quoting Tex. Integrated Conveyor Sys. v. Innovative Conveyor Concepts, 300 S.W.3d 348, 381–82 (Tex. App.—Dallas 2009, pet. denied)).
188. *Id.* The bankruptcy court specifically cited the example that although 7901 had waived its attorney–client privilege with its attorneys for the transactions referenced in this case, 7901's attorneys refused to answer questions regarding any communication with Morash about the assignment of the City's lien. *Id.* The attorneys for 7901 noted that this was because those communications were with Morash individually and not in his capacity as an agent for 7901 or Silver State. *Id.*
189. *Id.*
190. No. 01-19-00397-CV, 2020 WL 6878414, at *1 (Tex. App.—Houston [1st Dist.] Nov. 24, 2020, pet. denied) (mem. op.).
191. *Id.*
192. *Id.*
193. *Id.*

tion of the West Newcastle Property to a new limited partnership called West Newcastle, Ltd.[194] Cohen filed suit and argued that the transfer was fraudulent.[195] In addition, Cohen argued that such transfer was also outside the scope of Dilick's authority.[196]

The trial court initially sided with Dilick and expunged the notice of lis pendens, and Cohen appealed.[197] While the case was still pending at the appellate level, Dilick further conveyed the tract of the West Newcastle Property to Sandcastle Homes, Inc. (Sandcastle) for $750,000.00.[198] The appellate court then found that the trial court had erred in their finding that Cohen had not articulated a real-property claim.[199] Back at the trial court level, Cohen added Sandcastle as a party to the suit.[200] The trial court then again decided to expunge the notice of lis pendens and held that Cohen had not shown by a preponderance of the evidence the probable validity of a real-property claim.[201]

Just before the trial court expunged the notice of lis pendens, Dilick transferred the remainder of the West Newcastle Property back to Flat Stone II Ltd. and then proceeded to sell this portion of the property to NewBiss Property, L.P. (NewBiss).[202] Cohen then added NewBiss as a party to the case.[203] Both NewBiss and Sandcastle argued that they had bona-fide-purchaser status.[204] The trial court agreed with their argument, and Cohen appealed.[205] The appellate court also found that NewBiss and Sandcastle were bona-fide purchasers.[206] Cohen appealed again, and the Texas Supreme Court reversed the appellate court's decision and decided that an expunged lis pendens did not constitute a lack of notice.[207] Ultimately, the supreme court remanded the case back to the trial court because of the "unresolved fact issue" of whether NewBiss and Sandcastle had actual knowledge of the issues covered by the lis pendes notice.[208]

With the case on remand after the supreme court's decision, Cohen added new claims against NewBiss and Sandcastle to his petition, which included, among other things, that they both: (1) aided and abetted Dilick in his breach of fiduciary duties and (2) conspired with Dilick to breach his fiduciary duties.[209] In addition, Cohen sought recission of the sales

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at *2.
205. *Id.*
206. *Id.* (citing Cohen v. Sandcastle Homes, Inc., 469 S.W.3d 173, 185–86 (Tex. App.—Houston [1st Dist.] 2015), *rev'd sub nom.* Sommers v. Sandcastle Homes, Inc., 521 S.W.3d 749 (Tex. 2017)).
207. *Id.* (citing *Sommers*, 521 S.W.3d at 756).
208. *Id.* (citing *Sommers*, 521 S.W.3d at 757).
209. *Id.*

based on Dilick's ultra-vires acts.[210] Both purchasers filed no-evidence and traditional motions of summary judgment, which were granted.[211] Cohen appealed again.[212]

In his appeal, Cohen initially argued to the appellate court that the trial court erred in granting summary judgment on his aiding-and-abetting claim against the new purchasers.[213] The appellate court explained that Cohen needed to show that

> (1) Dilick committed a breach of fiduciary duty to Cohen, (2) the purchasers knew that Dilick's conduct constituted a breach of his fiduciary duties, (3) the purchasers intended to assist Dilick in breaching his fiduciary duty, (4) the purchasers gave Dilick assistance or encouragement in his breach, and (5) the purchasers' assistance or encouragement was a substantial factor in causing the tort.[214]

Cohen, relying on *Graham Mortgage Corp. v. Hall*, argued that because NewBiss and Sandcastle were considered bona-fide purchasers, due to their knowledge of the litigation between Cohen and Dilick, they must also be joint tortfeasors with Dilick because their purchase of the properties "aided and abetted the torts alleged to have been committed by Dilick."[215]

In *Graham*, a mortgage lender, Graham, loaned money to a partnership whose purpose was to "acquire, own, operate, manage, and develop" a specific parcel of real property.[216] Hall, a partner in this partnership, later sued Douglas, another partner in the partnership, on a claim that Douglas had breached his fiduciary duty to the partnership by using that real property to secure the debts of other entities.[217] Hall also sued Graham, claiming Graham aided and abetted Douglas in his breach of fiduciary duty because the loan proceeds that were obtained during the breach were used to make payments on other loans between the Douglas and Graham.[218] The Court of Appeals for the Fifth District of Texas at Dallas held that because Graham knew of the purpose of the partnership and participated in prior loans with the partnership, there was evidence that the lender knowingly participated in the breach of fiduciary duty by Douglas.[219]

The Court of Appeals for the First District of Texas at Houston found

210. *Id.*
211. *Id.* at *2–3.
212. *Id.* at *3.
213. *Id.* at *4. The appellate court also noted that "the Texas Supreme Court has not expressly decided whether Texas recognizes a cause of action for aiding and abetting" in this circumstance. *Id.* at *4 n.3 (citing *see* First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 224 (Tex. 2017)). However, the appellate court decided that for this case it would assume that Texas does recognize such. *Id.*
214. *Id.* at *4 (citing Juhl v. Airington, 936 S.W.2d 640, 643–44 (Tex. 1997)).
215. *Id.* at *5 (citing Graham Mortg. Corp. v. Hall, 307 S.W.3d 472 (Tex. App.––Dallas 2010, no pet.)).
216. *Id.* (quoting *Graham Mortg. Corp.*, 307 S.W.3d at 475).
217. *Id.* (citing *Graham Mortg. Corp.*, 307 S.W.3d at 479).
218. *Id.* (citing *Graham Mortg. Corp.*, 307 S.W.3d at 480).
219. *Id.*

that this case differed from *Graham*.[220] The appellate court explained that the lender in *Graham* was "extensively involved" in the partnership's business, especially because Graham had knowledge of the terms in the partnership agreement between Hall and Douglas.[221] Unlike in *Graham*, the appellate court, in this case, found that NewBiss and Sandcastle were part of an arms-length transaction.[222] Further, the appellate court noted that NewBiss and Sandcastle did not have anything to do with the conduct which gave rise to the lawsuit between Dilick and Cohen.[223]

Similarly, NewBiss and Sandcastle argued that despite their purchase of the properties at issue, there was no evidence that either party purchased either property with the intention to assist Dilick in breaching his fiduciary duties.[224] NewBiss and Sandcastle argued that even if they knew about the conflict between Cohen and Dilick, the two were a part of an arms-length transaction.[225] NewBiss and Sandcastle relied on *KCM Financial, LLC v. Bradshaw* to support their argument.[226] In that case, a nonparticipating royalty interest holder sued the executive-right interest holder for breach of fiduciary duty.[227] The nonparticipating royalty interest holder claimed that the executive-right interest holder had executed a mineral lease on submarket terms and had "acted in concert with the executive in facilitating the breach and that the executive's ill-gotten gains were fraudulently transferred to third parties."[228] The Texas Supreme Court held that the claimant had not presented "any evidence raising a fact issue that [the lessee] was complicit in the underlying tort."[229] Further, the supreme court explained that all the evidence showed was "a typical business transaction in which the parties reached a meeting of the minds as to terms mutually acceptable to both sides."[230] In addition, the lessee did not have a preexisting relationship with either the nonparticipating royalty interest owner or the executive-right interest holder; instead, the lessee was purely negotiating the lease as part of an arms-length transaction.[231]

The Court of Appeals for the First District of Texas at Houston agreed with the purchasers' approach and found that *Bradshaw* was more similar to the facts in this case than *Graham*.[232] Specifically, the appellate court

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220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at *6. The appellate court also cited to the Texas Supreme Court's decision in *KCM Financial, LLC v. Bradshaw*, which defines an arms-length transaction "as a transaction between two unrelated and unaffiliated parties." *Id.* at *6 n.5 (citing KCM Fin., LLC v. Bradshaw, 457 S.W.3d 70, 85 n.11 (Tex. 2015)).
226. *Id.* at *6 (citing *Bradshaw*, 457 S.W.3d at 70).
227. *Id.* (citing *Bradshaw*, 457 S.W.3d at 74).
228. *Id.* (quoting *Bradshaw*, 457 S.W.3d at 74).
229. *Id.* (quoting *Bradshaw*, 457 S.W.3d at 85).
230. *Id.* (quoting *Bradshaw*, 457 S.W.3d at 86).
231. *Id.* (citing *Bradshaw*, 457 S.W.3d at 85–86).
232. *Id.*

noted that it was "undisputed" that neither NewBiss nor Sandcastle had any involvement with Dilick prior to the sales of the real property.[233] Further, in order to find NewBiss or Sandcastle liable for aiding and abetting Dilick in his breach of fiduciary duty, Cohen would have needed to provide proof that the parties "intended to assist Dilick in committing a tort."[234] Ultimately, the appellate court held that even though NewBiss and Sandcastle had knowledge of the lawsuit, this knowledge was not enough for them to be held liable for aiding and abetting Dilick in his breach of fiduciary duty to the partnership.[235]

The appellate court then addressed Cohen's claim of civil conspiracy to commit a breach of fiduciary duty.[236] The appellate court explained that Cohen needed to show: (1) a combination between two or more persons; (2) the persons sought to establish an object or course of action; (3) the persons reached a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts were taken in pursuance of the object or course of action; and (5) damages occurred as a proximate result.[237] Cohen argued that the overt act was the sale of the property to NewBiss and Sandcastle.[238] He argued that this, along with the fact that both NewBiss and Sandcastle knew about the lawsuit and "'chose to go ahead with the purchase of the property," was evidence that NewBiss and Sandcastle were part of a conspiracy.[239] NewBiss and Sandcastle relied on *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.* and responded that, under that case, their knowledge of the lawsuit did not constitute an overt act in furtherance of a conspiracy.[240]

In *Schlumberger*, Nortex Oil & Gas Corp. (Nortex) bought mineral interests in wells which were found to be illegally bottomed beyond their lease lines, meaning that these wells were worth much less than what Nortex initially paid for them.[241] Schlumberger Well Surveying Corp. (Schlumberger), a well servicing company, continued to log and perforate these wells and also attempted to prevent its customers from learning about these illegally bottomed wells.[242] Nortex sued Schlumberger on a claim of civil conspiracy, arguing that Schlumberger conspired with the lease owners and dwellers.[243] The Texas Supreme Court disagreed and found that even if Schlumberger had knowledge of the fact that the lease owners and drillers illegally bottomed out the wells, there was no evidence that Schlumberger agreed with the lease owners and drillers to drill

233. *Id.*
234. *Id.*
235. *Id.* at *6–7.
236. *Id.* at *7.
237. *Id.* (citing First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 222 (Tex. 2017); Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005)).
238. *Id.*
239. *Id.*
240. *Id.* (citing Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854 (Tex. 1968)).
241. *Id.* at *8 (citing *Schlumberger*, 435 S.W.2d at 855).
242. *Id.* (citing *Schlumberger*, 435 S.W.2d at 856).
243. *Id.* (citing *Schlumberger*, 435 S.W.2d at 856).

in an illegal fashion.[244]

The Court of Appeals for the First District of Texas at Houston found that *Schlumberger* was on point here and agreed with NewBiss and Sandcastle that their knowledge of the litigation between Cohen and Dilick did not constitute a "meeting of the mind[s]."[245] Although the purchasers may have been on notice that a tort occurred, their consummation of the purchase of the property did not indicate that either party planned to commit further tortious acts related to Dilick's prior potential torts.[246] This case is similar to *Schlumberger* because even though NewBiss and Sandcastle had a modicum of knowledge of the circumstance, this knowledge did not involve the parties' active participation in the wrongdoing by the other parties.[247] The appellate court found that "[a]bsent evidence that the purchasers knew that Dilick intended to misappropriate the proceeds of the sale for his own personal use, they cannot have, as a matter of law, intended to facilitate that wrong."[248]

Further, Cohen argued that the summary judgment should be overturned, as he was entitled to a constructive trust or to rescind the sales of the properties because Dilick committed ultra-vires acts in his sale of the properties.[249] Cohen claimed that because the limited partnership agreement did "not permit the general partner to use Limited Partnership assets as collateral for an individual loan to be used for non-partnership business," the sales of the properties were ultra-vires acts.[250] The appellate court held that the "ultra-vires doctrine is not applicable to limited partnerships under Texas law."[251] The appellate court noted that the Texas Business Organizations Code (TBOC) only provides a cause of action for ultra-vires acts when the act is done by a corporation.[252]

Cohen is an important case because the appellate court protects a third party from involvement in breaching a fiduciary duty to a partnership. While we saw in *In re Silver State Holdings* that courts are not hesitant to find a breach of a fiduciary duty when it is committed by an officer or agent of the entity, it is reassuring that the Court of Appeals for the First District of Texas at Houston did not further broaden this concept to a third party in this case. Further, it is also worth noting that the appellate court explicitly made clear that it believes an ultra-vires claim is not actionable against a partnership in Texas.

244. *Id.* (citing *Schlumberger*, 435 S.W.2d at 857).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at *13.
250. *Id.*
251. *Id.*
252. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 20.002).

C. Fiduciary Duties Owed by an Attorney to a Client

The Court of Appeals for the Fourteenth District of Texas at Houston, in *Adam v. Marcos*, highlighted the heightened fiduciary obligations placed on an attorney when he or she enters into a business venture with a client during an attorney–client relationship.[253] Souhail Adam was a business owner of several small businesses.[254] Javier Marcos, Jr. owned a small law firm and was Adam's primary attorney for several years.[255] The parties disputed the specifics of their business relationship; however, according to Marcos, after several years of legal representation, the parties agreed to form a partnership as to future specified activities, agreeing to share profit and cost evenly as to these ventures.[256] Remarkably (for a lawyer), Marcos asserted that the agreement was sealed by a fist bump and never reduced to writing.[257] Marcos alleged that Adam suggested that Marcos be a silent partner and accordingly left his name off all of the organizational documents.[258] In support of Marcos's partnership claim, Marcos alleged that Marcos provided legal services free of charge and consequently did not bill the thousands of hours worked between 2006 to 2014, when the relationship ended.[259] At the inception of their business relationship, Marcos claimed that he provided $250,000.00 to start the joint venture and that Adam personally guaranteed a loan of $1 million from a third party.[260] Marcos also alleged that the parties referred to each other as business partners.[261]

According to Adam, the parties never agreed to enter a joint venture.[262] Adam alleged that Marcos gave Adam $230,000.00 to invest in his business as Adam saw fit, and he was to provide Marcos a return on his investment.[263] In support of Adam's point, he noted that Marcos's name did not appear on any of the organizational documents or legal documents where such recognition would be required or expected.[264] Additionally, Adam claimed that it was customary for he and Marcos to exchange services for each other, noting multiple times that Adam performed automobile repairs for Marcos.[265]

This lawsuit followed after Marcos questioned Adam on the partnership's finances but was met with opposition.[266] Marcos alleged that after Adam expressed that he no longer desired to be partners, Marcos later

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253. Adam v. Marcos, 620 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).
254. *Id.* at 494.
255. *Id.*
256. *Id.* at 494–96.
257. *Id.* at 495.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 496.
264. *Id.*
265. *Id.*
266. *Id.* at 495.

learned that Adam had been taking profits from the joint venture and not using them to pay down the note, as Marcos alleged that they had agreed upon.[267] Consequently, Marcos filed suit.[268] Marcos brought several causes of action, including breach of the partnership agreement and breach of fiduciary duty.[269]

At the end of the trial, the jury found that: (1) the parties entered into a partnership agreement regarding two of the four business entities; (2) Adam failed to comply with the partnership agreement, and Marcos suffered damages as a result; but (3) Marcos failed to comply with his fiduciary duties to Adam.[270] After extensive posttrial briefing, the trial court disregarded the jury's finding on breach of the partnership agreement, which led to this appeal by Marcos.[271]

The appellate court noted that it was undisputed that the alleged partnership agreement was entered while the two parties were in an attorney-client relationship.[272] It also noted that an attorney-client relationship gives rise to a fiduciary relationship as a matter of law.[273] As the appellate court highlighted, contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized.[274] "Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts."[275] The attorney has the burden of overcoming that presumption by proving the fairness and reasonableness of the agreement.[276]

In its analysis, the appellate court first addressed whether the agreement was enforceable, which was essentially asking whether Marcos had met his burden of proving fairness.[277] Ultimately, the appellate court found that he had not.[278] The appellate court focused on the fact that: (1)

267. *Id.* However, both parties acknowledged that Adam paid Marcos $230,000.00 before trial as reimbursement for the money Marcos contributed to start the joint venture. *Id.*

268. *Id.*

269. *Id.* at 496.

270. *Id.* The jury also found that Marcos performed compensable work for Adam for which he was not paid, but the value of this work was $0.00; Marcos incurred reasonable attorney's fees; and Marcos did not defame Adam. *Id.* at 496–97.

271. *Id.* at 497.

272. *Id.* at 504.

273. *Id.* (citing Meyer v. Cathey, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam); Izen v. Laine, 614 S.W.3d 775, 784–85 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (mem. op.)).

274. *Id.* (citing Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 699 (Tex. 2000); Wilson v. Fleming, 566 S.W.3d 410, 426 (Tex. App.—Houston [14th Dist.] 2018) *rev'd on other grounds*, Fleming v. Wilson, 610 S.W.3d 18, 18 (Tex. 2020) (per curiam)).

275. *Id.*

276. *Id.* (citing Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Dyke v. Hall, No. 03-18-00457-CV, 2019 WL 5251139, at *10 (Tex. App.—Austin Oct. 17, 2019, no pet.) (mem. op.)).

277. *Id.* at 505–06. The appellate court analyzed whether the agreement was enforceable and whether Marcos breached his fiduciary duty simultaneously. *Id.*

278. *Id.* at 506. In order to obtain a reversal, Marcos would have needed to show that the jury's finding was so against the weight and preponderance of the evidence as to be clearly wrong and unjust. *Id.* at 505–06 (citing *see* Bhatia v. Woodlands N. Houston Heart

Marcos allowed his client to enter into a formal agreement with a fist bump, and not a formal writing; (2) Adam was the only person listed on formational documents, while both men contributed equal amounts of startup funds; (3) only Adam personally guaranteed the $1 million loan; (4) Marcos may have allowed Adam to violate banking and tax laws by making him a silent partner; (5) there was no evidence Adam was fully informed of the legal ramifications of the alleged partnership agreement and was never encouraged to seek independent counsel.[279] Ultimately, the appellate court echoed the trial court's sentiment that "Marcos displayed 'a disgraceful lack of paying attention to [his] professional obligations.'"[280]

Because the agreement was unenforceable, the appellate court also ruled against Marcos's claim that Adam breached his fiduciary duty derived from the agreement, noting that "[f]iduciary relationships do not arise from unenforceable contracts."[281]

This case is a telling story of the importance of attorneys taking the utmost caution and skepticism when entering business ventures with current clients. While Marcos's actions may have been deemed fair and equitable for a layperson, attorneys are held to the highest ethical standards in business dealings with their clients.

VI. CONCLUSION

Consequently, the law created by the cases discussed in this Article demonstrates the importance of mindfulness when forming a partnership and drafting the partnership's corresponding documents. Moreover, these cases articulate the Texas judiciary's deference to the law currently in place, and lawyers and clients should take care that they track the courts and the changes to partnership law when drafting documents and making important business decisions. In addition, partners in a partnership should be vigilant to avoid acts that might be deemed a breach of a fiduciary duty, as a court will not hesitate to find a breach if it exists; however, third-party creditors should take comfort in knowing that courts will likely limit a breach to officers or agents of an entity themselves. Generally, attorneys and clients alike should stay vigilant and pay close attention to the words of the Texas judiciary and the written word of law when making any sort of partnership decision.

Ctr., PLLC, 396 S.W.3d 658, 665 (Tex. App.—Houston [14th Dist.] 2013, pet. denied)). The appellate court held that he did not meet this threshold. *Id.* at 506.

279. *Id.* at 506.

280. *Id.* Marcos did not report any income for the entities or the alleged partnership on his tax returns. *Id.* at 496.

281. *Id.* at 507 (citing Knowles v. Wright, 288 S.W.3d 136, 146–47 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)).