FILED
Texas Real Estate Commission
Date: 4/8/21

Hearing No. 201973

Texas Real Estate Commission	§	**Before the Texas Real**
	§	**Estate Commission**
v.	§	**("Commission")**
	§	
1031 Property Care, LLC	§	**Sitting in Austin,**
Unlicensed	§	**Travis County, Texas**

Final Order

On March 1, 2021, a designee of the Executive Director, after investigation of a possible violation(s) and the facts relating to that violation, issued a Notice of Violation and Original Petition ("Notice") to 1031 Property Care, LLC ("Respondent"). The Notice informed Respondent of the determination that Respondent had violated a provision of Chapter 1101 of the Texas Occupations Code and recommended that Respondent be ordered to cease and desist all unlicensed real estate brokerage activities in Texas and the imposition of an administrative penalty of $5,000 ("Penalty"). A copy of the Notice is attached and incorporated here. The Notice was sent by regular and certified mail, return receipt requested, to Respondent's last known address of record as shown by the Commission's records. Respondent failed to submit a written response to the Notice.

Pursuant to Sections 1101.704(b) and 1101.759 of the Texas Occupations Code, the Commission approves the determination and imposition of the recommended Penalty and order to cease and desist. Respondent is ordered to cease and desist all unlicensed real estate brokerage activities in Texas and assessed an administrative penalty of $5,000, effective May 3, 2021.

If enforcement of this Final Order is restrained or enjoined by court order, this Final Order is effective upon a final determination by the court or an appellate court in favor of the Texas Real Estate Commission.

Chelsea Buchholz Digitally signed by Chelsea Buchholz
Date: 2021.04.08 13:49:15 -05'00'

Chelsea Buchholz Date
Executive Director, Texas Real Estate Commission
or
Tony Slagle
Deputy Executive Director, Texas Real Estate Commission

TREC Enforcement Division
Direct Line: (512) 936-3005
Facsimile: (512) 936-3809

March 1, 2021

NOTICE OF ALLEGED VIOLATION
CEASE AND DESIST UNLICENSED ACTIVITY

DO NOT IGNORE THIS IMPORTANT MATTER OR AN ORDER TO CEASE AND DESIST AND IMPOSITION OF AN ADMINISTRATIVE PENALTY WILL BECOME FINAL.

1031 Property Care, LLC
Bruce Armstrong, Registered
Agent [redacted]

Via Email: [redacted]

CM:RRR No. 9214 8901 9403 8333 2870 19
(copy also sent by regular mail)

Re: Our File No. 201973
In the Matter of
1031 Property Care, LLC

Dear Mr. Morgan:

1. Notice. Based on information contained in our referenced file, the Texas Real Estate Commission ("the Commission") has determined that 1031 Property Care, LLC violated Chapter 1101 of the Texas Occupations Code ("The Real Estate License Act") and/or the Rules of the Texas Real Estate Commission ("Commission"). Attached is a copy of an Original Petition which includes a summary of the alleged violations and is incorporated here by reference.

2. Consequences. The legal consequences of these violations could include:

A. an administrative penalty not to exceed $5,000 per violation, with each day a violation continues or occurs a separate violation for purposes of imposing a penalty;

B. a referral to a district or county attorney for criminal prosecution as a Class A misdemeanor, with the following penalties;

1. a fine not to exceed $4,000; and
2. an additional fine not to exceed $10,000; and

C. a temporary or permanent injunction issued by a district court.

3. Cease and Desist. We request that 1031 Property Care, LLC immediately **CEASE AND DESIST** all activities considered to be the business of real estate brokerage as defined in Tex. Occ. Code §1101.002(1). A business entity may not act as or represent that the business entity is a real estate broker until the business entity applies for and obtains an active real estate broker license. *See* Tex. Occ. Code §1101.351(a-1).

Despite the issuance of this cease and desist notification and notification of the following assessment of an administrative penalty, the Commission is not precluded from referring evidence of 1031 Property Care, LLC's unlicensed real estate brokerage activity violations to the proper authorities for criminal prosecution.

4. Penalty. We recommend that the Commission issue a final order:

1) imposing a $5,000 administrative penalty ("Penalty");
2) ordering 1031 Property Care, LLC to immediately cease and desist all unlicensed real estate brokerage activities in Texas; and
3) ordering RESPONDENT to pay reasonable costs.

5. Agreement. If you agree to our determination of the alleged violations and recommended administrative penalty and to have 1031 Property Care, LLC immediately cease and desist unlicensed real estate brokerage activities in Texas, you have not later than the 30th day after the date this letter was sent to notify this office in writing of your agreement, and remit to us the recommended administrative penalty in the form of a cashier's check or money order payable to the Texas Real Estate Commission. Upon our receipt of your written notice of agreement and the administrative penalty, a final order by the Commission will be entered reflecting the recommendation.

6. Hearing Request. If you do not agree to the determination of the violations or recommended administrative penalty, you have **not later than the 30th day** after the date this letter was sent to submit a written request for a hearing. A hearing will be set in Austin, Texas, at a later date and you will be notified of that date and location. A response by phone is not a written request.

7. Applicable Law. The Real Estate License Act and the Rules of the Commission may be found on our website, www.trec.texas.gov.

8. Default Notice.

Failure To Submit Written Request For A Hearing

If you fail to either send a written request for a hearing or a written notice of agreement, pay the administrative penalty, and immediately have 1031 Property Care, LLC cease and desist unlicensed real estate brokerage activities in Texas within the 30-day period described above, the Commission will enter a final order to cease and desist and impose the administrative penalty as described in paragraph 4 above.

Please use the file number on the previous page in any future correspondence with this agency. Please address any written correspondence to the undersigned attorney at the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, or you may fax to (512) 936-3809.

Sincerely,

Aimée Cooper
Staff Attorney
TREC Enforcement Division

AC/rs
Enclosure

SOAH Docket No. _____

Texas Real Estate Commission	**§**	**Before the State Office**
	§	
v.	**§**	**Of**
	§	
1031 Property Care, LLC	**§**	
Unlicensed	**§**	**Administrative Hearings**

Original Petition

The Texas Real Estate Commission ("Commission" or "Petitioner"), brings the following action against 1031 Property Care, LLC ("Respondent"), to seek relief authorized by Sections 1101.351, 1101.759, Texas Occupations Code, and Subchapter O of Chapter 1101, Texas Occupations Code. In support, Petitioner shows the following.

Jurisdiction and Authority

1. Petitioner is responsible for administering and enforcing Chapter 1101, Texas Occupations Code ("The Real Estate License Act"), including ensuring that consumers of real estate brokerage services are protected through the licensing and regulation of those persons engaged in real estate brokerage services. Petitioner is authorized to impose administrative penalties and/or issue a cease and desist order. *See* Tex. Occ. Code §§1101.701, 1101.759, and 22 Tex. Admin. Code §535.191.
2. Contested cases are to be initiated by Petitioner and pursued in accordance with 22 Tex. Admin. Code ch 533. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of this proceeding, including the authority to issue a Proposal for Decision with proposed Findings of Fact and Conclusions of Law. *See* Tex. Gov't. Code ch. 2003 and 22 Tex. Admin. Code ch 533.
3. Real estate brokerage activity is defined in Section 1101.002, Texas Occupations Code.
4. Exemptions to The Real Estate License Act are listed in Section 1101.005, Texas Occupations Code.
5. Unless a business entity holds a license issued under Chapter 1101, Texas Occupations Code, the business entity may not act as or represent that the business entity is a broker. *See* Tex. Occ. Code §1101.351(a-1).

License Status and Address

6. Respondent is not, and was not, a licensed Texas real estate broker at times relevant to this

matter.

7. Respondent's last known mailing address for service is: (1) [redacted] and (2) email address: [redacted]

Facts of Case.

8. Respondent engaged in real estate brokerage services in Texas for another in exchange for a fee or other valuable consideration or with the expectation of receiving valuable consideration as follows.
9. Between 2006 and 2017, Respondent performed property management in Texas, including representing property owners in lease transactions, with the expectation of compensation.
10. Upon admissions made by Bruce Armstrong, registered agent for Respondent, Respondent had previously performed property management for properties in Texas but ceased all property management activities in December 2017.
11. On or about December 6, 2018, Respondent entered into a service agreement with Family Dollar in Horizon City, Texas, to assist in the sale of real property located at 831 Darrington Blvd., Horizon City, Texas, with the expectation of compensation.
12. On or about July 31, 2019, Respondent entered into a service agreement with Family Dollar in San Antonio, Texas, to assist in the sale of real property located at 5938 Old Pearsall Road, San Antonio, Texas, with the expectation of compensation.

Allegations

ACCORDINGLY, Petitioner complains that Respondent committed the following violation:

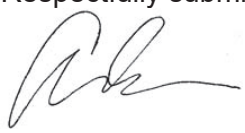
13. Section 1101.351(a-1), Texas Occupations Code, by acting in the capacity of, engaging in the business of, or advertising or holding itself out as engaging in or conducting the business of a real estate broker without first obtaining a real estate license.

Prayer

Petitioner requests that Respondent be cited to appear and answer. Petitioner further requests:

1. Respondent be ordered to pay an administrative penalty of $5,000.00;
2. Respondent be ordered to cease and desist engaging in activity considered to be the activity of a real estate broker as defined in Section 1101.002(1), Texas Occupations Code;
3. Respondent be ordered to pay reasonable costs associated with the hearing if Respondent fails to appear at the hearing; and
4. Such other and further relief to which Petitioner may be justly entitled.

Respectfully submitted,



Aimée Cooper
Staff Attorney
TREC Enforcement Division
Texas Real Estate Commission
State Bar No. 24012450
P.O. Box 12188
Austin, Texas 78711-2188
Telephone: (512) 936-3005
Facsimile: (512) 936-3809

Raquel Salazar

From: Raquel Salazar
Sent: Monday, March 1, 2021 1:22 PM
To: [redacted]
Subject: Notice of Alleged Violation, RE: TREC FILE# 201973
Attachments: 201973.1031PropertyCareLLC.NOAV.pdf; 201973.1031PropertyCareLLC.OPET.pdf; 201973.Bruce Armstrong.NOAV.pdf; 201973.Bruce Armstrong.OPET.pdf

Mr. Bruce Armstrong:

Attached please find important information regarding the above-referenced Commission matter. Please read each Notice of Alleged Violation (NOAV) and Petition (OPET). This information is time-sensitive and requires your prompt attention.

Please keep these documents with your records regarding this matter. You may contact TREC Enforcement at (512) 936-3005 if you have questions or concerns regarding this matter.

Raquel Salazar
Legal Assistant, III
TREC Enforcement
Texas Real Estate Commission
(512) 936-3005

NO. 01-18-00992-CV
Court of Appeals For The First District of Texas

Arc Designs, Inc. v. Nabors Indus.

Decided Apr 21, 2020

NO. 01-18-00992-CV

04-21-2020

ARC DESIGNS, INC., Appellant v. NABORS INDUSTRIES, INC., Appellee

Sherry Radack Chief Justice

On Appeal from the 269th District Court Harris County, Texas
Trial Court Case No. 2015-16752

MEMORANDUM OPINION

Appellee, Nabors Industries, Inc. ("Nabors"), contracted with appellant, Arc Designs, Inc. ("ADI"), for the fabrication and construction of certain drilling rig equipment. After ADI failed to deliver the equipment as agreed under the terms of the parties' Fabrication and Construction Contract ("Contract"), Nabors terminated *2 the Contract and sued ADI for breach of contract. ADI brought a counterclaim, asserting that Nabors breached the Contract by failing to pay as agreed. The trial court rendered summary judgment in favor of Nabors on its claim and awarded it damages. The trial court denied ADI's motion for summary judgment on its counterclaim. After a trial to the court on the limited issue of attorney's fees, the trial court awarded Nabors its fees.

On appeal, ADI presents four issues. In its first issue, ADI contends that the trial court erred in granting summary judgment for Nabors because ADI presented evidence raising a fact issue regarding the applicable termination and damages provisions in the Contract. In its second and third issues, ADI contends that the trial court erred in granting Nabors's summary-judgment motion, and denying that of ADI, because the trial court misconstrued the Contract terms as providing a right of reimbursement and failed to award ADI certain sums due. In its fourth issue, ADI contends that the trial court erred in awarding attorney's fees.

We affirm.

Background

Nabors owns and operates land-based drilling rigs and provides oilfield services. ADI is a drilling-structure manufacturing facility and metal fabricator. On February 12, 2014, Nabors retained ADI to fabricate and construct five sets ("Sets") of drilling rig components. Each Set was comprised of a mast and a substructure. *3 The Contract Price was $651,248.00 for each mast and $1,276,667.00 for each substructure, or a total of $1,927,915.00 for each Set. The parties agreed, as provided in Article 2.2 of the Contract, that Nabors was to pay the Contract Price for each Set in installments, based on the completion of certain "milestones" in the fabrication and construction process, as follows:

> 20% of Contract Price within 10 days of execution of [the] Contract by both parties.
> 25% of Contract Price upon [ADI's] receipt of all structural steel in [ADI's] fabrication facility complete with MTR's that meet contract requirements.
> 45% of Contract Price upon completing of all Work, including electronic delivery of the Equipment's data book and all API nameplates affixed to the Equipment.
> 10% of Contract Price for final payment pursuant to the delivery dates set forth on [the Schedule of Delivery].

Pursuant to the terms of Contract, ADI was to deliver one Set per month for five consecutive months, beginning in October 2014 and ending in February 2015. According to the Schedule of Delivery, Set 1 was to be delivered on October 31, 2014; Set 2 on November 30, 2014; Set 3 on December 31, 2014; Set 4 on January 31, 2015; and, Set 5 on February 28, 2015. The Schedule of Delivery included a "penalty date" occurring 30 days after each due date. And, Article III of the Contract, governing delivery, provided:

> 3.1 [ADI] shall complete the Work as set forth in [Schedule of Delivery]. . . . [I]f any of the Equipment is delivered after the Penalty Date . . . , then [ADI] shall be liable to [Nabors] for liquidated damages in an amount equal to one (1%) of the Contract Price for each day that delivery is delayed, provided that in no event shall [ADI] be liable to [Nabors] for more than ten percent (10%) of the Contract Price.
> 3.2 Time is of the essence with respect to the performance of the Work and there shall be no extension or postponement of the Delivery Date. The Parties agree that this Article is a material term of this Contract for all purposes.
> 3.3 . . . . Any change to [the Schedule of Delivery] will only be made in writing by agreement of the Parties. . . .

In the event that ADI failed to "conduct its operations" under the Contract with diligence or "otherwise breached its obligations," Article IX, "Unsatisfactory Performance," authorized Nabors to elect whether to cover or to pursue other remedies under the law or in equity:

> 9.1 If [ADI] has failed to conduct its operations under this Contract in a diligent, skillful or workmanlike manner . . . , or if the [ADI] has otherwise breached its obligations hereunder, [Nabors] may give [ADI] written notice in which the cause of the dissatisfaction shall be specified. Should [ADI] fail to remedy the dissatisfaction within five (5) days after the receipt of the written notice, [Nabors] may, at its discretion take one of the following courses of action:

4 *4

> 9.1.1 [Nabors] may retain another Contractor ("Substitute Contractor") to complete the remaining Work. In such event [Nabors] shall have no obligation to pay [ADI] any additional sums whatsoever and [ADI] shall be responsible to pay to [Nabors] the difference between the outstanding relevant Purchase Order and the actual cost of completing the Work with the Substitute Contractor.
> 9.1.2 [Nabors] may take over and complete the Work using [ADI's] facilities, equipment and personnel. If [Nabors] takes over the Work, [Nabor's] cost in completing the Work with no allowance for use of [ADI's] facilities,

5 *5

> equipment and personnel shall be
6 deducted from the Contract Price . . . .
> 9.1.3 Upon [Nabors's] request and pursuant to [Article XI], [ADI] shall allow [Nabors] to remove any and all Equipment in whatever stages of completion as well as other manufactured products related to the Equipment.
>
> 9.2 The remedies set forth in this Article are in addition to, and not in lieu of any and all other remedies available to [Nabors] in law or equity.

And, Article 24.4 provided that the "prevailing party in any lawsuit shall be entitled to recover reasonable and necessary attorneys' fees."

Article XI, "Termination of the Contract," provided that Nabors could also terminate the Contract, either at will or for unsatisfactory performance under Article IX above, as follows:

> 11.1 This Contract may be terminated
>
> 11.1.1 By [Nabors] upon 10 days' notice.
>
> . . . .
>
> 11.1.3 By [Nabors] for unsatisfactory performance as set forth in Article IX above.

In the event that Nabors terminated the Contract pursuant to Article 11.1.1, i.e., at will, Article 11.2 governed the amounts owed to ADI as follows:

> [Nabors] shall pay to [ADI] all amounts due and owing at the date of termination together with reasonable additional costs incurred by [ADI] in terminating the Work including if applicable, costs of shipping and the costs of cancellation of subcontracts or purchase orders for materials, equipment and supplies. In no event shall [Nabors] be entitled to payment for any loss of any profit as a result of such termination.

*6

In the event that Nabors terminated the Contract pursuant to Article 11.1.3, i.e., for cause based on ADI's "unsatisfactory performance as set forth in Article IX above," Article 11.4 provided that ADI "shall not be entitled to any compensation whatever [sic]."

It is undisputed that ADI did not deliver Set 1 by the date specified in the Schedule of Delivery, that of October 31, 2014. Rather, ADI delivered a portion of Set 1, the substructure, on December 15, 2014. Nabors asserts that, not only was the substructure almost two months late, but it was defective, causing Nabors to incur $175,000.00 to remedy defects. ADI did not complete the mast component of Set 1 until January 2015. On February 3, 2014, after Sets 2, 3, and 4, which the Schedule of Delivery stated were due by November 30, 2014, December 31, 2014, and January 31, 2015, respectively, were not delivered, Nabors issued a change order to reduce the scope of the Contract to Set 1 and the mast component

of Set 2. Nabors demanded reimbursement of its milestone payments but stated that it was willing to reduce this sum by a mutually agreed upon amount for ADI's expenses on the three masts and four substructures being reduced.

On February 6, 2015, after the parties were unable to reach a resolution, Nabors sent ADI a Notice of Termination, stating that it was terminating the Contract, pursuant to Article 11.1.3, with respect to Sets 1 through 4, based on ADI's "unsatisfactory performance" under Article IX,
7 i.e., inability to comply with the *7 agreed delivery deadlines. Nabors demanded, pursuant to Article 11.4, repayment of $2,804,681.10 that it had paid toward the equipment that ADI had failed to deliver. Noting that the terms of the Contract provided, however, that ADI's obligation to deliver was unconditional and effective notwithstanding any dispute regarding payment of some or all of the Contract Price, Nabors demanded that ADI deliver Set 5 by February 28, 2015, the remaining pending deadline under the Contract. Subsequently, however, after ADI failed to timely deliver Set 5, Nabors sent ADI notice that that it was terminating the Contract, pursuant to Article 11.1.3, with respect to Set 5, based on ADI's unsatisfactory performance.

ADI refused to return any of the sums paid toward the equipment that it had failed to deliver and refused to release the mast component of Set 1 unless Nabors paid an additional $358,186.40.

Nabors sued ADI, alleging that it had materially breached the Contract by failing to deliver the equipment as agreed. Nabors sought reimbursement of $2,388,228.00 in previous payments, as well as delivery and possession of the mast component of Set 1.

ADI filed a counterclaim for breach of contract and quantum meruit, alleging that Nabors had taken delivery of the mast component of Set 1, along with some of the materials for Sets 2 through 5, and had failed to pay $358,186.40 for work and materials supplied under the Contract.
8 *8

Nabors moved for a summary judgment on its breach-of-contract claim, asserting that it was entitled to judgment as a matter of law because the Contract expressly provided for specific delivery deadlines and expressly stated that time was of the essence and that these terms were material. Noting that it was undisputed that ADI had failed to timely deliver Set 1, Nabors asserted that such failure to meet the deadlines in a contract in which time is of the essence, as here, constituted a material breach.

Based on ADI's breach, Nabors asserted that Article 11.1.3 authorized it to terminate the Contract for "unsatisfactory performance" as set forth in Article IX. Article IX authorized termination for failure to perform in a diligent manner or if ADI otherwise breached its obligations, as here. Nabors sent notice to ADI, expressly terminating the Contract pursuant to Article 11.1.3. And, Nabors noted that Article 11.4 provided that if the Contract were terminated pursuant to Article 11.1.3, "Contractor [ADI] shall not be entitled to any compensation whatever [sic]."

With respect to its damages, Nabors asserted that it had received only one of the five Sets for which it had contracted. The Contract Price per Set was $1,927,915.00. Nabors asserted that, after subtracting the maximum ten-percent penalty under Article 3.1 for late delivery, or $192,791.50, it owed ADI a total of $1,735,123.50 for Set 1. At the time of Nabors's termination of the Contract, it had paid ADI a total of $3,948,351.40, including
9 its milestone payments on all five Sets *9 of equipment. Subtracting the total owed on Set 1 from the total it had paid, Nabors sought damages of $2,213,227.90. Nabors presented, as its summary-judgment evidence, the Contract; February 3, 2015 change order; February 6, 2015 Notice of Termination with respect to Sets 1-4;

March 20, 2015 termination letter with respect to Set 5; a table of costs; affidavit of Nabors's Senior QA/QC Manager of the Engineering Department, Kevin Pennington; various emails between Nabors and ADI; deposition excerpts of ADI corporate representative, Joshua W. Norris; and ADI's responses to discovery.

In its summary-judgment response, ADI argued that Nabors had simply terminated the Contract at will, pursuant to Article 11.1.1, and not for cause, and thus it was not entitled to any reimbursement of its previous payments. ADI asserted that Nabors had previously stated that it was re-evaluating the Contract due to the downturn in the oil market. And, ADI had delivered equipment as much as two months late under a previous contract between the parties without issue. Further, Article 3.1 provided for a late delivery penalty. And, because the parties had thereby agreed to liquidated damages, late delivery could not serve as cause for termination under Article XI of the Contract. ADI argued that Article 2.2 of the Contract provided that milestone payments are due once the milestone is completed and, because ADI had completed the initial 20 percent milestones at the time of termination, such sums were not
10 subject to refund. *10

ADI also filed a cross-motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its breach-of-contract counterclaim. It asserted that neither Article 2.2 nor Article 11 provided for refunds. Further, ADI argued, the evidence established that it was entitled to $358,186.40 in unpaid milestone payments for the mast component of Set 1 because ADI had completed the work, and Nabors had approved and taken delivery of it.

The trial court granted summary judgment in favor of Nabors on its breach-of-contract claim and awarded it damages in the amount of $2,213,227.90. The trial court denied ADI's competing motion for summary judgment and dismissed ADI's counterclaim for breach of contract. After a trial to the court on the limited issue of attorney's fees, the trial court found that Nabors was entitled to reasonable and necessary attorneys' fees based on the terms of the Contract and pursuant to Texas Civil Practice & Remedies Code section 38.001. The trial court awarded Nabors attorney's fees in the amount of $161,023.51 and fees for appeal.

Summary Judgment

In its first issue, ADI argues that the trial court erred in granting summary judgment in favor of Nabors on its claim because ADI presented evidence raising a fact issue regarding the applicable termination and damages provisions in the Contract. In its second and third issues, ADI argues that the trial court erred in granting Nabors's summary-judgment motion, and denying
11 that of ADI, because the *11 trial court misconstrued the Contract as providing a right of reimbursement of funds that Nabors had paid prior to its termination of the Contract and the trial court failed to award ADI certain sums outstanding on Set 1. **A.** ***Standard of Review and Overarching Legal Principles***

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

In a traditional motion for summary judgment, the movant has the burden to establish that there exists no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746,

748 (Tex. 1999). When a plaintiff moves for summary judgment on its own claim, the plaintiff must conclusively prove all essential elements of its cause of action. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). When a defendant moves for a traditional summary judgment, it must either: (1) disprove at least one essential element
12 of the plaintiff's cause of action or *12 (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *See Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

When both parties move for summary judgment on the same issue and the trial court grants one motion and denies the other, as here, the reviewing court considers the summary judgment evidence presented by both sides, determines all questions presented, and if the reviewing court determines that the trial court erred, renders the judgment that the trial court should have rendered. *Valence Operating Co.*, 164 S.W.3d at 661. **B. *Breach of Contract***

To prevail on its respective breach-of-contract claim, each party was required to establish (1) a valid contract between the parties; (2) that the movant tendered performance or was excused from doing so; (3) that the non-movant breached the terms of the contract; and (4) that the movant
13 sustained damages as a result of the *13 breach. *AMS Const. Co. v. K.H.K. Scaffolding Hous., Inc.*, 357 S.W.3d 30, 41 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd); *B&W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Here, it is undisputed that the Contract constitutes a valid, enforceable agreement. It is also undisputed that ADI did not deliver Set 1 by the agreed upon date in the Schedule of Delivery and did not deliver Sets 2-5. It is further undisputed that Nabors terminated the Contract. The parties disagree as to the applicable termination provision in the Contract, i.e., Article 11.1.1 (authorizing termination at will) or Article 11.1.3 (authorizing termination for cause), which in turn governs the corresponding measure of damages.

1. *Applicable Termination and Damages Provisions*

In construing a written contract, a court must ascertain and give effect to the true intentions of the parties as expressed in the writing itself. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). 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.* We begin our analysis with the contract's express language. *Id.* And we analyze the provisions of a contract "with reference to the whole agreement." *Frost Nat'l Bank v. L & F Dists., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005); *see also Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex.
14 2006) ("No single *14 provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument."). Contract terms will be given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense. *Valence Operating Co.*, 164 S.W.3d at 662. "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable,

and oppressive.'" *Frost Nat'l Bank*, 165 S.W.3d at 312 (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987)).

If, after applying the pertinent contract construction rules, the contract can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and we will construe the contract as a matter of law. *Id.* If a contract "is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). However, a contract is not ambiguous merely because the parties disagree on its meaning. *Seagull Energy E & P, Inc.*, 207 S.W.3d at 345. Only if a contract is ambiguous may we consider the parties' interpretation and consider extraneous evidence to determine the true meaning of the contract. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 333-34. *15

Here, Article III of the Contract, governing delivery, provides:

> 3.1 *[ADI] shall complete the Work as set forth in [the Schedule of Delivery]*. . . . [I]f any of the Equipment is delivered after the Penalty Date . . . , then [ADI] shall be liable to [Nabors] for liquidated damages in an amount equal to one (1%) of the Contract Price for each day that delivery is delayed, provided that in no event shall [ADI] be liable to [Nabors] for more than ten percent (10%) of the Contract Price.
>
> 3.2 *Time is of the essence with respect to the performance of the Work and there shall be no extension or postponement of the Delivery Date. The Parties agree that this Article is a material term of this Contract for all purposes*.

(Emphasis added.) Thus, Article III provides that ADI was to complete the work by the deadlines set forth in the Schedule of Delivery. The parties agreed that time was of the essence, that there would be no extensions, and that this term is material. It is undisputed that ADI did not timely deliver Set 1 and did not deliver the remaining Sets. Thus, ADI's failure to timely deliver the equipment at issue constitutes a material breach of the Contract. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004); *Henry v. Masson*, 333 S.W.3d 825, 835 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see also Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 21 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding that failure to timely deliver goods constituted breach).

The summary-judgment evidence shows that, based on ADI's breach of the Contract, Nabors, on February 6, 2015, sent ADI a Notice of Termination, stating *16 that, pursuant to Article 11.1.3, it was terminating the Contract with respect to Sets 1-4:

> Based on our numerous written attempts to get [ADI] to comply with the delivery deadlines for the first four [Sets] specified in the [Contract] and [ADI's] inability to comply given ample opportunity, *pursuant to Articles IX and XI of the Agreement*, Nabors is hereby providing you with notice that *the [Contract] is being terminated under Article 11.1.3 for unsatisfactory performance*. In accordance with the terms of Section 11.4 of the Agreement, Nabors demands return of all sums paid to date from Nabors, exclusive of the first substructure already delivered, totaling $2,804,681,10. In addition, Nabors requests, pursuant to Section 9.1.3 that Nabors be allowed to remove any and all Equipment in whatever stages of completion as well as other manufactured products related to the Equipment.

(Emphasis added.)

Further, Nabors's evidence shows that, on March 5, 2015, it sent ADI notice that, pursuant to Article 11.1.3, it was terminating the Contract with respect to Set 5:

> You were notified on February 6, 2015 that the [Contract] was terminated with respect to the first four [Sets] specified therein under Article 11.1.3 for unsatisfactory performance.
>
> You have already demonstrated [ADI's] inability to comply with the [Contract] with respect to the first four [Sets]. Given, your recent correspondence, you are clearly unwilling to comply with the Agreement with respect to the fifth [Set]. *You are hereby notified that the Agreement is being terminated under Article 11.1.3 for unsatisfactory performance with regard to [Set 5]*, which was due on February 28, 2015. Pursuant to Section 11.4 of the [Contract], Nabors demands return of all sums paid for the fifth set, totaling $255,333.40.

17 (Emphasis added.) *17

Article XI, "Termination of the Contract," authorizes Nabors to terminate the Contract, either at will or for unsatisfactory performance, as follows:

> 11.1 This Contract may be terminated
>
> > 11.1.1 By [Nabors] upon 10 days' notice.
>
> 18 . . . .
>
> > 11.1.3 By [Nabors] for unsatisfactory performance as set forth in Article IX above.

In the event that Nabors terminated the Contract pursuant to Article 11.1.1, i.e., at will, Article 11.2 provides the following damages model:

> [Nabors] shall pay to [ADI] all amounts due and owing at the date of termination together with reasonable additional costs incurred by [ADI] in terminating the Work including if applicable, costs of shipping and the costs of cancellation of subcontracts or purchase orders for materials, equipment and supplies. In no event shall [ADI] be entitled to payment for any loss of any profit as a result of such termination.

However, in the event that Nabors terminated the Contract pursuant to Article 11.1.3, i.e., for cause based on ADI's "unsatisfactory performance as set forth in Article IX," as here, Article 11.4 provides that ADI "shall not be entitled to any compensation whatever [sic]."

Article IX defines "unsatisfactory performance" as including any failure by ADI to conduct its operations diligently or any breach of the Contract by ADI and authorizes Nabors to elect to cover or to pursue "*any and all other remedies available to [Nabors] in law or equity*":

> 9.1 *If [ADI] has failed to conduct its operations under this Contract in a diligent, skillful or workmanlike manner . . . , or if the [ADI]*

*18

> *has otherwise breached its obligations hereunder*, [Nabors] may give [ADI] written notice in which the cause of the dissatisfaction shall be specified. Should [ADI] fail to remedy the dissatisfaction within five (5) days after the receipt of the written notice, [Nabors] may, at its discretion take one of the following courses of action:

> 9.1.1 [Nabors] may retain another Contractor ("Substitute Contractor") to complete the remaining Work. In such event [Nabors] shall have no obligation to pay [ADI] any additional sums whatsoever and [ADI] shall be responsible to pay to [Nabors] the difference between the outstanding relevant Purchase Order and the actual cost of completing the Work with the Substitute Contractor.
> 9.1.2 [Nabors] may take over and complete the Work using [ADI's] facilities, equipment and personnel . . . .
> 9.1.3 Upon [Nabors's] request and pursuant to [Article XI], [ADI] shall allow [Nabors] to remove any and all Equipment in whatever stages of completion as well as other manufactured products related to the Equipment.
>
> 9.2 *The remedies set forth in this Article are in addition to, and not in lieu of any and all other remedies available to [Nabors] in law or equity*.

(Emphasis added.) Thus, the summary-judgment evidence shows that Nabors expressly terminated the Contract under Article 11.1.3, based on ADI's "unsatisfactory performance," and that the Contract authorized such termination.

ADI, in its summary-judgment response and in its brief, argues that it presented evidence creating a fact issue regarding whether Nabors actually terminated the Contract at will, pursuant to Article 11.1.1, and not for cause, pursuant to Article 11.1.3. Specifically, ADI points to an email from Nabors, dated January 15, 2015, in which Nabors, noting that the "global drilling industry had recently begun showing signs of a dramatic slowdown," asked ADI for an "immediate update on cost to date for the remaining mast and sub orders." And, Nabors stated that the purpose of its request was to "determine whether [to] proceed or cancel some or all of the remaining orders." ADI argues that this evidence establishes that Nabors's representation that its termination of the Contract was based on ADI's failure to timely deliver equipment was simply pretext for its at-will termination based on market conditions.

19 *19

Taking as true, as we must, the evidence that Nabors considered whether to proceed on its outstanding orders based on market conditions does not, however, negate or contradict the evidence that, ultimately, Nabors expressly terminated the Contract pursuant to Article 11.1.3, "for unsatisfactory performance as set forth in Article IX," based on ADI's undisputed failure to deliver the Sets as agreed.

Next, ADI argues that the "parties' ongoing course of conduct" demonstrates that Nabors did not actually terminate the Contract for cause. ADI points to its summary-judgment evidence that Nabors previously accepted late delivery of three rigs in "a prior contract between the Parties in 2013-2014."

A "'course of dealing' is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." TEX. BUS. & COM. CODE § 1.303. Because a sequence of events is required, a single transaction cannot constitute a course of dealing. *See Shell Trading (US) Co. v. Lion Oil Trading & Transp., Inc.*, No. 14-11-00289-CV, 2012 WL 3958029, at *6, 8 (Tex. App.—Houston [14th Dist.] Sep. 11, 2012, pet. denied) (mem. op.).

20 *20

ADI further argues that Nabors could not have terminated the Contract for cause under Article 11.1.3 because Article 3.1 of the Contract provides that the remedy for a failure to timely deliver is "not termination but merely a late delivery penalty of no more than 10% of the Contract price."

Without citation to authority, ADI asserts that, because the parties "agreed to liquidated damages in the event of late delivery, late delivery cannot be a cause for termination." Again, Article 3.1 states:

> 3.1 [ADI] shall complete the Work as set forth in [Schedule of Delivery]. . . . [I]f any of the Equipment is delivered after the Penalty Date . . . , then [ADI] shall be liable to [Nabors] for liquidated damages in an amount equal to one (1%) of the Contract Price for each day that delivery is delayed, provided that in no event shall [ADI] be liable to [Nabors] for more than ten percent (10%) of the Contract Price.

Setting aside that ADI seems to posit that it could simply accept a ten percent penalty and perpetually delay delivery of any equipment, ADI's argument overlooks that we must analyze Article 3.1 with reference to the whole agreement and give effect to all the provisions so that none will be rendered meaningless. *See Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 333 (noting that we
21 examine and consider *21 entire writing in effort to harmonize); *Frost Nat'l Bank*, 165 S.W.3d at 312; *see also Seagull Energy E&P, Inc.*, 207 S.W.3d at 345 ("No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.").

The language used in Article 3.1 caps the amount of damages for which ADI will be liable in the event that Nabors sought recovery on a claim for delay damages, i.e., in a claim for consequential damages based on ADI failing to deliver the equipment on time. *See Valence Operating Co.*, 164 S.W.3d at 662 (noting we give contract terms their plain, ordinary, and generally accepted meanings). Article 3.1 does not state that it constitutes the sole remedy in the event of a termination of the Contract.

Rather, as discussed above, Article XI, which governs "Termination of the Contract," has its own damages provisions, i.e., Articles 11.2 and 11.4. And, Article XI expressly authorizes Nabors to "terminate" the Contract for "unsatisfactory performance" under Article IX, which includes circumstances in which ADI has "*failed to conduct its operations* under this Contract *in a diligent*, skillful or workmanlike *manner* . . . , *or if [ADI] has otherwise breached its obligations hereunder*." (Emphasis added.)

Taking as true all evidence favorable to ADI and indulging every reasonable inference in its favor, we conclude that Nabors has conclusively
22 established that it *22 terminated the Contract pursuant to Article 11.1.3, "for unsatisfactory performance as set forth in Article IX," based on ADI's undisputed failure to deliver the Sets as agreed.

We overrule ADI's first issue.

2. *Nabors's Damages*

In its second issue, ADI argues that the trial court erred in granting Nabors's motion for summary judgment as to its damages because ADI established that the trial court misconstrued the Contract as authorizing a "reimbursement" or a "refund" of the first milestone payment pertaining to each Set.

We concluded above that Nabors terminated the Contract pursuant to Article 11.1.3. Article 11.4 expressly provides that if Nabors terminates the Contract pursuant to Article 11.1.3, ADI "shall not be entitled to any compensation whatever [sic]."

Nabors's summary-judgment evidence shows that Pennington, in his affidavit, testified that, at the time of Nabors's termination of the Contract, it had paid ADI a total of $3,948,351.40 but had received only 1 of the 5 Sets for which it had contracted. Thus, testified Pennington, ADI was entitled to payment for Set 1, or $1,927,915.00, less the ten percent penalty under Article 3.1 for its late delivery of the equipment, or $197,791.50,

for a total of $1,735,123.50. And, subtracting this amount from the amount that Nabors paid had ADI, $3,948,351.40, established *23 Nabors's damages in the amount of $2,213,227.90. The trial court's judgment reflects that it awarded Nabors damages in the amount of $2,213,227.90.

23

ADI, in its summary-judgment response, asserted that it was entitled to retain Nabors's initial "20% Milestone payments" under Article 2.2 for each of the "remaining rigs," i.e., Sets 2 through 5. Article 2.2 provides for payment of "20% of [the] Contract Price within 10 days of execution of [the] Contract by both parties." ADI asserts that this initial 20 percent functioned as a "down payment" or "booking fee" on Sets 2 through 5 and that, notwithstanding that they were not delivered, neither Article 2.2 nor Article XI provides for any "refund" of milestone payments.

Again, Article 11.4 expressly provides that if the Contract is terminated pursuant to Article 11.1.3, as here, then ADI "shall not be entitled to any compensation whatever [sic]."

We conclude that ADI did not present evidence raising a genuine issue of material fact concerning the calculation of Nabors's damages and that Nabors conclusively established its damages. We hold that the trial court did not err in granting summary judgment for Nabors on its breach-of-contract claim.

We overrule ADI's second issue.

3. *ADI's Damages*

In its third issue, ADI argues that the trial court erred in denying its motion for summary judgment on its counterclaim because its evidence shows that Nabors *24 breached the contract by failing to pay an outstanding balance of $358,186.40 for "the unpaid Milestone payments related to Mast 1," i.e. the mast component of Set 1. In support, ADI presented the affidavit of its representative, Norris, who testified, in pertinent part:

24

> 4. Under Section 2.2 of the Contract, Nabors was required to pay 20% of the Contract price of each mast or substructure to ADI within 10 days of the execution of the Contract, 25% of the Contract price of each mast or substructure to ADI upon receipt of all structural steel for each mast or substructure, 45% of the Contract price for each mast or substructure to ADI upon completion of all work for each mast or substructure, and 10% of the Contract price for each mast or substructure to ADI upon delivery of each mast or substructure. . . . Nabors has made all payments required of it by Section 2.2 of the Contract, *except for the 45% and 10% payments regarding Mast 1*. . . . Nabors owes ADI a balance of $358,186.40 for those unpaid Milestones.
>
> 5. ADI has made not less than two (2) written demands to Nabors requesting payment of the $358,186.40 balance due for the unpaid *Mast 1 Milestones* but, as of this date, Nabors has refused to pay. . . .

(Emphasis added.)

As discussed above, the trial court's judgment reflects that the trial court credited ADI with the full Contract price of Set 1, including both the mast and substructure, against the damages that the trial court awarded to Nabors. Thus, the record does not support ADI's issue on appeal. Accordingly, we hold that the trial court did not err in denying ADI's motion for summary judgment.

We overrule ADI's third issue. *25

25

Attorney's Fees

In its fourth issue, ADI argues that the trial court erred in awarding attorney's fees to Nabors that "(1) exceed what was reasonable and necessary to achieve the results obtained; and/or (2) were not reduced sufficiently to segregate Nabors' warranty claims." ADI asserts that, during trial on the limited issue of attorney's fees, its expert, Stephen

A. Mendel, testified that the "fee invoices produced by Nabors included hours worked that were not necessary to achieve the results that Nabors's counsel obtained" and included discovery that was "irrelevant to the outcome of the case." ADI asserts that a "reasonable fee for the results Nabors' counsel achieved would be approximately $45,000.00." ADI further asserts that, although Nabors segregated its fees pertaining to previous warranty claims and reduced its fees by "5-10%" for related tasks, "the reduction should have been 19.4%."

In its brief, ADI presents its assertions globally and does not present argument or analysis with respect to any specific fees or discovery matters. Further, ADI does not present a single citation to legal authority to support its argument under this point. As such, we conclude that this issue is inadequately briefed and presents nothing for our review. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities . . . ."); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 *26 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (concluding that "Rule 38 requires [the appellant] to provide us with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue" and that "[t]his is not done by merely uttering brief conclusory statements, unsupported by legal citations," and holding that appellant waived its complaints "[b]y presenting such attenuated, unsupported argument"); *see also Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 678 (Tex. App.—Dallas 2004, pet. denied) ("An issue on appeal unsupported by argument or citation to any legal authority presents nothing for the court to review.").

We hold that ADI has waived its fourth issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack

Chief Justice Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

No. 17-20360
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Curtis v. Kunz-Freed

Decided Jun 6, 2018

No. 17-20360

06-06-2018

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON, Plaintiffs - Appellants v. CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99, Defendants - Appellees

PER CURIAM

Appeal from the United States District Court for the Southern District of Texas
USDC No. 4:16-CV-1969 Before HIGGINBOTHAM, DENNIS, and COSTA, Circuit Judges. PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. --------

Candace Louis Curtis and Rik Wayne Munson sued more than fifteen individuals - the judges, attorneys, court officials, and parties from a probate proceeding in Harris County - alleging
2 that the defendants collectively *2 violated RICO, committed common law fraud, and breached their fiduciary duties. Plaintiffs contend that defendants are part of the "Harris County Tomb Raiders a.k.a Probate Mafia," which it alleges is a secret society of probate practitioners, court personnel, probate judges, and other elected officials who are running a "criminal theft enterprise" and "organized criminal consortium," designed to "judicially kidnap and rob the elderly" and other heirs and beneficiaries of their "familial relations and inheritance expectations." The district court dismissed all claims based on a number of often overlapping grounds: (1) judicial immunity, (2) attorney immunity, (3) failure to state a claim, and (4) the court's inherent power to dismiss frivolous complaints.

We review de novo a district court's dismissal under Rule 12(b)(6). *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016). Plaintiffs' appeal focuses on the dismissal of their RICO claim. They set forth the elements of that offense and attempt to address each one. But the factual allegations they use to support those elements are mostly, as the district court put it, "fantastical" and often nonsensical. We agree with the district court that the allegations are frivolous and certainly do not rise to the level of plausibility that the law requires.

AFFIRMED.

NO. 14-17-00374-CV
Court of Appeals of Texas, Houston (14th Dist.).

Drake Interiors, Inc. v. Thomas

531 S.W.3d 325 (Tex. App. 2017)
Decided Sep 7, 2017

NO. 14-17-00374-CV

09-07-2017

DRAKE INTERIORS, INC., Appellant v. Andrea Marie THOMAS and Robert Warren Thomas, Appellees

Chris P. Di Ferrante, Houston, TX, Robert Warren Thomas, Redondo Beach, CA, for Appellees. Stephen A. Mendel, Robert Daniel O'Conor, John Kevin Raley, Houston, TX, for Appellant.

PER CURIAM.

Chris P. Di Ferrante, Houston, TX, Robert Warren Thomas, Redondo Beach, CA, for Appellees.

Stephen A. Mendel, Robert Daniel O'Conor, John Kevin Raley, Houston, TX, for Appellant.

Panel consists of Justices Boyce, Christopher, and Brown.

OPINION ON MOTION FOR REVIEW OF SUPERSEDEAS ORDER

PER CURIAM

The judgment on appeal declares that appellant Drake Interiors, Inc. does not have a lien on certain property (the Asbury Property) owned by appellee Andrea Marie Thomas, expunges the lis pendens filed by Drake with respect to the Asbury Property, and awards Andrea attorney's fees.[1] The trial court set the amount of the security required to supersede the judgment pending appeal at $70,000. Drake filed a motion in this court challenging that order. *See* Tex. R. App. P. 24.4(a). We conclude Drake has not satisfied its burden to show the trial court abused its discretion with respect to the supersedeas order. Accordingly, we deny the motion.

[1] According to the parties, defendant Robert Warren Thomas filed an answer in the trial court but never appeared again or requested any relief. The trial court's judgment does not mention Robert, Robert did not participate in the supersedeas proceedings, and Robert has not appeared in this appeal.

BACKGROUND

The underlying dispute in this case is whether a judgment lien Drake holds attached to the Asbury Property, which Andrea owns and where she lives. This is the second appeal in this matter. In the first appeal, we held an abstract of judgment may create a lien on a home jointly managed as community property if the judgment is based on the premarital debt of only one spouse. We remanded for further proceedings because there was insufficient proof of whether Drake's judgment lien in fact attached and whether the Asbury Property was protected as a homestead when the abstract of judgment was first recorded. *See Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 843 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). This appeal is from the judgment on remand.

A. Judgment on appeal

Drake sought a declaratory judgment that the judgment lien attached to the Asbury Property and Drake was entitled to execute the lien against it. Andrea counterclaimed for a declaratory judgment that the lien did not attach to the Asbury Property. She also sought cancellation of the lis pendens Drake filed in 2009 regarding the Asbury Property. Each party petitioned for attorney's fees.

Both parties moved for summary judgment on their claims for declaratory relief. The trial court denied Drake's motion and granted Andrea's motion in October 2016, leaving the issue of attorney's fees for later disposition.

On April 25, 2017, the trial court signed a final judgment that repeated the rulings *327 of the October 2016 order and awarded attorney's fees to Andrea. The judgment:

- declares that Drake's judgment lien did not attach to the Asbury Property;
- orders that Drake take nothing on its claim for declaratory relief;
- orders Drake to release the lis pendens;
- awards Andrea approximately $45,000 in attorney's fees for work performed to that point; and
- conditionally awards Andrea up to $22,000 in attorney's fees for appellate work.

B. Supersedeas

Drake and Andrea each filed motions with respect to the security required to supersede the judgment pending appeal. Drake moved to stay execution of the judgment without posting security. Andrea opposed Drake's motion and contended security should be set at the property's rental value for two years. Her motion stated she would provide evidence of that value at the hearing on the parties' motions. In its reply in support of its motion, Drake modified the relief sought. It first asked the court to set a bond or cash amount in a "nominal" amount but did not quantify that amount. Alternatively, Drake repeated its original request to stay execution of the judgment without posting security.

The trial court heard both motions in June 2017. Andrea testified and offered documentary evidence in support of her motion. Drake did not call witnesses or offer evidence.

Andrea testified she had held a sales person's license from the Texas Real Estate Commission for the past fifteen years. According to Andrea's analysis, the rental value of properties comparable to the Asbury Property was $3,000 to $3,100 per month. She offered exhibits regarding seven such properties. Her exhibits were admitted without objection. Drake stipulated to Andrea's qualifications to testify about rental value but not to her analysis or conclusion.

On cross-examination, Andrea admitted she had not tried to find a renter for the Asbury Property. She said the appeal was damaging her in that she was prevented from either selling the Asbury Property or moving out and renting it to someone else.

The trial court used the evidence of the Asbury Property's rental value to set the security required to supersede the judgment pending appeal. The court set the amount at $70,000, which is slightly less than two years' worth of rent according to Andrea's testimony.

ANALYSIS

I. Law on supersedeas

A. Rule 24

Texas Rule of Appellate Procedure 24 addresses suspension of enforcement of a judgment pending appeal in civil cases. Under rule 24.1, "[u]nless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by" filing an agreement with the judgment creditor for

suspending enforcement of the judgment, posting a bond, making a deposit in lieu of a bond, or providing alternate security as ordered by the court. Tex. R. App. P. 24.1(a). The amount of security required depends on the type of judgment. *See* Tex. R. App. P. 24.2(a).

A money judgment may be superseded by a bond, deposit, or security equal to the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment, subject to certain limitations. *See* Tex. R. App. P. 24.2(a)(1).
328 To *328 supersede a judgment for the recovery of an interest in real property, the amount of security must be at least the value of the property interest's rent or revenue. Tex. R. App. P. 24.2(a)(2)(A). When the judgment is "for something other than money or an interest in property," the trial court must set the amount and type of security the judgment debtor must post. Tex. R. App. P. 24.2(a)(3). The trial court may decline to permit the judgment debtor to supersede the judgment, however, if the judgment creditor posts "security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted" should an appellate court determine that the relief was improper. *Id.*

B. Standard of review

We review the trial court's supersedeas ruling for an abuse of discretion. *Abdullatif v. Choudhri*, No. 14-16-00116-CV, ——S.W.3d ——, ——, 2017 WL 2484374, at *2 (Tex. App.—Houston [14th Dist.] June 8, 2017, mand. denied) ; *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, No. 14-16-00210-CV, 525 S.W.3d 822, 828–29, 2017 WL 2451946, at *5 (Tex. App.—Houston [14th Dist.] June 6, 2017, mand. denied) ; *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 909 (Tex. App.—Houston [14th Dist.] 2005, order), *disp. on merits*, 207 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Generally, the test for an abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the trial court acted arbitrarily and unreasonably. *See McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) ; *O.C.T.G.*, 2017 WL 2451946, at *5. However, a trial court has no discretion in determining what the law is and applying the law to the facts. *See Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 623–24 (Tex. 2005). A failure by the trial court to analyze or apply the law correctly is an abuse of discretion. *Id.* To the extent the ruling turns on a question of law, our review is de novo. *Abdullatif*, —— S.W.3d at ——, 2017 WL 2484374, at *2 ; *Mansik & Young Plaza LLC v. K-Town Mgmt., LLC*, 470 S.W.3d 840, 841 (Tex. App.—Dallas 2015, op. on motion), *disp. on merits*, No. 05-15-00353-CV, 2016 WL 4306900 (Tex. App.—Dallas Aug. 15, 2016, no pet.) (mem. op.).

II. The trial court did not abuse its discretion by not setting security at $0 or $500.

The parties disagree on the type of the judgment on appeal. Drake contends it is for something other than money or a property interest and therefore controlled by rule 24.2(a)(3). Andrea contends it is a judgment for the recovery of an interest in real property and therefore controlled by rule 24.2(a)(2). Even assuming Drake is correct, Drake did not satisfy its burden of proof on its motion to set the security at $0 or a "nominal amount."

A. Burden of proof

Texas law is clear that a judgment debtor seeking to supersede a money judgment bears the burden to prove its net worth. Tex. R. App. P. 24.2(a)(1) ; *see Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.*, 514 S.W.3d 233, 238 (Tex. App.—Houston [14th Dist.] 2013, order) (per curiam), *disp. on merits*, 436 S.W.3d 9 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ; *Ramco*, 171 S.W.3d at 910. A judgment debtor seeking to lower the amount of security also has the burden to prove it

will suffer substantial economic harm of the amount is not decreased. Tex. Civ. Prac. & Rem. Code Ann. § 52.006(c) (West 2015); Tex. R. App. P. 24.2(b) ; *Ramco*, 171 S.W.3d at 910.*329 No Texas case appears to discuss which party bears the burden to establish the amount of security required for a non-money judgment. However, we see no reason that the party seeking to stay enforcement of a judgment for a recovery of a property interest under rule 24.2(a)(2) or a judgment for something other than money or property under 24.2(a)(3) would not likewise bear the burden to offer at least some evidence of the amount of security required.

329

B. Supersedeas of judgment expunging lis pendens

A lis pendens provides constructive notice of pending litigation concerning certain property. *See Sommers v. Sandcastle Homes, Inc.*, 521 S.W.3d 749, 754 (Tex. 2017). A lis pendens does not prevent sale of the property. *See Neel v. Fuller*, 557 S.W.2d 73, 76 (Tex. 1977) ("If two litigants claim the ownership to a tract of land in a lawsuit, and if lis pendens has been filed, either of the litigants may freely convey to third parties...."). However, a lis pendens has been described as "a cloud on title" and "the functional equivalent of an involuntary lien." *Countrywide Home Loans, Inc. v. Howard*, 240 S.W.3d 1, 5 (Tex. App.—Austin 2007, pet denied) (quoting *FDIC v. Walker*, 815 F.Supp. 987, 990 (N.D. Tex. 1993)).

Underlying Drake's request to stay enforcement of the judgment without security[2] is an assumption that continuation of the lis pendens—a continuation of a cloud on her property—will cause no harm to Andrea. Drake did not provide the trial court or this court with any authority (or evidence) to support that assumption, nor have we found any. Absent such authority, we are unwilling to hold that enforcement of a judgment expunging a lis pendens may be stayed without security.

[2] In its reply in support of its trial court motion, Drake asserts security should be set either at $0 or a "nominal" amount. Drake did not quantify that nominal amount in its reply or at the hearing on the parties' supersedeas motions. It was not until its motion for review in this court that Drake offered $500 as such a nominal amount. The trial court cannot have abused its discretion in not setting the security required at $500 when Drake did not ask the trial court to do so.

CONCLUSION

We express no opinion on whether rental value is a proper benchmark for calculating the harm a lis pendens may cause. We hold only that, on this record, we cannot say the trial court abused its discretion in setting some amount of security.

We deny Drake's motion.

NO. 14-17-00374-CV
State of Texas in the Fourteenth Court of Appeals

Drake Interiors, Inc. v. Thomas

544 S.W.3d 449 (Tex. App. 2018)
Decided Feb 13, 2018

NO. 14–17–00374–CV

02-13-2018

DRAKE INTERIORS, INC., Appellant v. Andrea Marie THOMAS and Robert Warren Thomas, Appellees

Stephen A. Mendel, Robert Daniel O'Conor, John Kevin Raley, Houston, TX, for Appellant. Chris P. Di Ferrante, Houston, TX, for Appellees. Robert Warren Thomas, pro se.

Tracy Christopher, Justice

Stephen A. Mendel, Robert Daniel O'Conor, John Kevin Raley, Houston, TX, for Appellant.

Chris P. Di Ferrante, Houston, TX, for Appellees.

Robert Warren Thomas, pro se.

Panel consists of Justices Boyce, Christopher, and Brown.

451 *451 **OPINION**

Tracy Christopher, Justice

The question in this case is whether a husband and wife abandoned their homestead before they divorced. If the answer is no, then the wife, who was awarded the home in the divorce, took the home free and clear of a judgment lien arising out of the husband's premarital debt. On the other hand, if the answer is yes, then the lien attached during the marriage, and the judgment creditor may now be able to execute against the home.

The wife was granted a summary judgment on the ground that the home never lost its homestead protection. Because the creditor produced some evidence of abandonment in its summary-judgment response, we hold that the wife is not entitled to judgment as a matter of law. We also hold that the creditor is not entitled to judgment on its cross-motion for summary judgment because the evidence of abandonment is not conclusive. Consequently, we reverse the trial court's judgment and remand for additional proceedings.

BACKGROUND

Four years ago, these same parties appeared before us in a related appeal. We begin by discussing the facts and disposition of that appeal because they directly bear on the motions for summary judgment that are under review now.

I. The First Appeal

The origin of this case dates back to the year 2000, when Rob Thomas signed a promissory note to the predecessor-in-interest of Drake Interiors, Inc. The note arose out of the sale of goods, which were supposed to be used in the opening of a nightclub that Rob intended to manage. According to Drake, Rob only made a single payment under the note. To collect the outstanding balance, Drake sued Rob in 2002 and obtained a final judgment against him in 2004.

Rob got married during the pendency of Drake's suit. In 2003, he and his wife, Andrea, purchased a home, which we identify as "Asbury." That home is also where Rob and Andrea started their family.

In 2006, while still living at Asbury, Andrea purchased a second home in her name only. This home, which we identify as "Queenswood," became Andrea's sole management community property. Andrea demolished the home on Queenswood to make room for the construction of a luxury custom home for her and her family.

In January 2008, Drake abstracted its 2004 judgment against Rob. When the abstract was recorded, Rob and Andrea were still occupying Asbury, but construction on the new Queenswood residence was underway.

In February 2008, Rob and Andrea separated due to marital difficulties. Rob vacated Asbury and began living with a friend at the friend's apartment. Andrea remained at Asbury, along with the two children born of the marriage. In May 2008, Andrea petitioned for divorce.

On August 1, 2008, and while still separated from Rob, Andrea moved into the newly completed Queenswood residence, along with her children. On that same date, Andrea leased Asbury to a
452 third party.*452 Rob and Andrea divorced on December 31, 2008, when the family court rendered a final decree of divorce. Under the decree, Rob was divested of all interests he owned in Asbury and Queenswood, and Andrea was awarded full ownership of both properties. Andrea designated Queenswood as her homestead for tax purposes effective January 1, 2009.

In April 2009, Drake filed an action for declaratory relief, seeking declarations that its abstract of judgment created a valid lien against Asbury and that Drake was entitled to execute against Asbury. After the commencement of Drake's suit, Andrea and the children moved back into Asbury. In a 2011 pleading, Andrea asserted her homestead rights in Asbury as an affirmative defense to Drake's claims.

In a separate pro se appearance, Rob filed a general denial. Aside from that answer, he filed no other pleadings or motions in connection with the case.

Andrea moved for summary judgment on several grounds, but her primary argument was that Asbury could not be liable for a premarital debt incurred by Rob alone. Andrea did not specifically move for summary judgment on the basis that Asbury was protected as her homestead.

Drake filed a cross-motion for summary judgment, arguing that Asbury could be liable for Rob's premarital debt. Drake also argued, as a counter-affirmative defense, that its abstract of judgment attached to Asbury because Rob and Andrea abandoned Asbury as their homestead. Drake asserted two possible dates for attachment: the first being in January 2008, when the abstract of judgment was recorded; and the second being in August 2008, when neither Rob nor Andrea was living at Asbury.

The trial court granted Andrea's motion and denied Drake's motion. On appeal to this court, we held that Andrea was not entitled to summary judgment on any of the grounds asserted in her motion. We explained that Asbury was joint management community property, which meant that if it lost its homestead protection during the marriage, then it could be used to satisfy Rob's premarital debt.

We also held that Drake was not entitled to judgment on its cross-motion. We explained that abandonment required proof of two elements: discontinued use and an intent never to return. We determined that Drake conclusively established the first element, at least as of August 1, 2008. However, we determined that Drake did not conclusively establish the second element. On that point, we specifically noted that the record contained no evidence of Rob's intentions regarding Asbury.

Having decided that neither side was entitled to judgment as a matter of law, we reversed and remanded for additional proceedings. *See Drake*

Interiors, L.L.C. v. Thomas , 433 S.W.3d 841, 855 (Tex. App.–Houston [14th Dist.] 2014, pet. denied).

II. Proceedings Since the First Appeal

On remand, the parties refined their arguments in light of our opinion, and they moved for summary judgment again.

Andrea filed a combined traditional and no-evidence motion. In the traditional portion of her motion, Andrea argued that she and Rob established Asbury as their homestead; that Asbury remained their one and only homestead for the entire course of their marriage; and that upon divorce, Rob's interest in Asbury passed to her free and clear of Drake's judgment lien. In the no-evidence portion of her motion, Andrea asserted that Drake had no evidence that she and Rob
453 abandoned Asbury during their marriage.*453 Drake filed a response, arguing that there was at least a fact question on the issue of abandonment. In support of its claim that Rob had abandoned Asbury, Drake referred to a mediated settlement agreement that Rob and Andrea had executed on August 1, 2008, the same date that Andrea had moved into the new home on Queenswood. In the MSA—which had not been included as evidence in the previous summary-judgment record—Rob agreed that Andrea should be awarded complete ownership of Asbury in the divorce. Because Rob had already vacated Asbury at the time of the MSA, Drake argued that the MSA manifested Rob's intent to never return to Asbury.

To show that Andrea had abandoned Asbury, Drake again referred to the MSA, where Rob further agreed that he would pay the insurance and property taxes on Queenswood until Andrea remarried or the younger of his two children reached the age of majority or graduated from high school, whichever occurred first. According to Drake, this agreement evidenced Andrea's intent to make Queenswood her permanent home.

In its cross-motion, Drake argued that the MSA conclusively established that Rob and Andrea had abandoned Asbury on August 1, 2008. As an alternative basis for summary judgment, Drake also referred to an agreed decree of divorce, which incorporated the terms of the MSA. Rob and Andrea signed the agreed decree on December 19, 2008, twelve days before the family court rendered the final decree of divorce. Claiming that the agreed decree also manifested the couple's intent to never return to Asbury, Drake argued that abandonment was conclusively established no later than December 19, 2008.

Once again, the trial court granted Andrea's motion and denied Drake's motion. After a nonjury trial on attorney's fees, the trial court rendered a final judgment in favor of Andrea, from which Drake now appeals.

STANDARD OF REVIEW

This case involves motions for summary judgment that were submitted on both traditional and no-evidence grounds. We review both types of motions de novo. *See Boerjan v. Rodriguez* , 436 S.W.3d 307, 310 (Tex. 2014) (per curiam).

In a traditional motion for summary judgment, the movant carries the burden of showing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c) ; *M.D. Anderson Hosp. & Tumor Inst. v. Willrich* , 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). If the movant produces evidence that conclusively establishes its right to summary judgment, then the burden of proof shifts to the nonmovant to present evidence sufficient to raise a fact issue. *See Centeq Realty, Inc. v. Siegler* , 899 S.W.2d 195, 197 (Tex. 1995). We consider all of the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *See Valence Operating Co. v. Dorsett* , 164 S.W.3d 656, 661 (Tex. 2005).

In a no-evidence motion for summary judgment, the movant asserts that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. *See* Tex. R. Civ. P. 166a(i) ; *Timpte Indus., Inc. v. Gish* , 286 S.W.3d 306, 310 (Tex. 2009). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *See Mack Trucks, Inc. v. Tamez* , 206 S.W.3d 572, 582 (Tex. 454 2006). We will sustain a no-evidence *454 motion for summary judgment when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *See City of Keller v. Wilson* , 168 S.W.3d 802, 816 (Tex. 2005).

When both parties move for summary judgment and the trial court grants one motion and denies the other, we consider all questions presented, examine all of the evidence, and render the judgment the trial court should have rendered. *See Commr's Court of Titus Cnty. v. Agan* , 940 S.W.2d 77, 81 (Tex. 1997).

ANDREA'S MOTION

Based on the grounds asserted in her traditional motion for summary judgment, Andrea had the burden of proving that Asbury was her homestead during the course of her marriage. *See Burk Royalty Co. v. Riley* , 475 S.W.2d 566, 568 (Tex. 1972) (the initial burden is on the person claiming the homestead). To satisfy that burden, Andrea was required to prove that she and Rob had occupied Asbury and that they had intended to keep it as their homestead. *See Cheswick v. Freeman* , 155 Tex. 372, 287 S.W.2d 171, 173 (1956).

In the affidavit attached to her motion, Andrea testified that she and Rob purchased Asbury in 2003 with the intent of occupying it as their family home. She also testified that, since purchasing Asbury, she and Rob lived there continuously until February 2008. Rob supplied the same testimony in an affidavit, which was also attached to Andrea's motion. This evidence, none of which Drake has disputed, conclusively established that Rob and Andrea acquired Asbury as their homestead.

Once a property is impressed with homestead rights, the law presumes that the property continues as a homestead. *See Sullivan v. Barnett* , 471 S.W.2d 39, 43 (Tex. 1971). This homestead presumption, when applied to the facts of this case, leads to three interrelated conclusions.

First, for as long as Asbury remained Rob and Andrea's presumptive homestead, Drake's judgment lien could not attach, because the lien arises out of a debt that does not qualify under any of the constitutional exceptions for the forced sale of a homestead. *See* Tex. Const. art. XVI, § 50 ; *Laster v. First Huntsville Props. Co.* , 826 S.W.2d 125, 129 (Tex. 1991).

Second, if Rob owned an undivided homestead interest in Asbury, he could convey that interest to Andrea without depriving Drake of any rights, because Asbury's status as a presumptive homestead already removed Rob's interest from Drake's reach. *See Almanza v. Salas* , No. 14-12-01114-CV, 2014 WL 554807, at *3 (Tex. App.–Houston [14th Dist.] Feb. 11, 2014, no pet.) (mem. op.); *Englander Co. v. Kennedy* , 424 S.W.2d 305, 309 (Tex. Civ. App.–Dallas 1968) ("And notwithstanding the existence of judgments against such debtor he may convey his homestead to whom he pleases free and clear of judgment liens."), *writ ref'd n.r.e.* , 428 S.W.2d 806 (Tex. 1968) (per curiam).

Third, if the presumptive homestead in Asbury continued on December 31, 2008, when the final decree of divorce ordered the conveyance of Rob's interest in Asbury to Andrea, then Andrea acquired a complete interest in Asbury, free and clear of Drake's judgment lien. *See Hankins v.*

Harris , 500 S.W.3d 140, 147 (Tex. App.–Houston [1st Dist.] 2016, pet. denied) (the wife's homestead interest passed to her husband upon divorce and prevented the attachment of a
455 judgment lien arising out *455 of the wife's liability for slander); *see also* Tex. Civ. Prac. & Rem. Code § 31.001 ("A judgment for the conveyance of real property or the delivery of personal property may pass title to the property without additional action by the party against whom the judgment is rendered.").

These three conclusions do not invariably lead to the fourth conclusion that Andrea is entitled to summary judgment, because the homestead presumption can still be rebutted with evidence that the homestead was abandoned. *See Zorrilla v. Aypco Constr. II, LLC* , 469 S.W.3d 143, 160 (Tex. 2015). If Drake produced some evidence that Asbury was abandoned before December 31, 2008, then there would be a question of fact regarding Andrea's claim of homestead, and that fact question would be sufficient to defeat both her traditional motion and her no-evidence motion.

Abandonment occurs when the homestead claimant stops using the property and forms an intent to forsake it as a homestead. *See McMillan v. Warner* , 38 Tex. 410, 414 (Tex. 1873) ; *Churchill v. Mayo* , 224 S.W.3d 340, 345 (Tex. App.–Austin 2006, pet. denied). Because Asbury was acquired as a family homestead, belonging to both Rob and Andrea, abandonment could only be established upon proof that Rob and Andrea had stopped living at Asbury and that they had each formed an intent to forsake Asbury as their homestead.

Drake produced evidence regarding the first element of abandonment, discontinued use. In a deposition attached to Drake's response, Andrea testified that Rob had vacated Asbury in February 2008, and that she had vacated Asbury in August 2008. Andrea also represented that she began living at Queenswood on August 1, 2008, according to an application for a homestead exemption that she filed with the local taxing authority. This evidence showed that both Rob and Andrea had stopped living at Asbury no later than August 1, 2008, several months before they divorced.

To satisfy the second element of abandonment, Drake was required to produce some evidence that both Rob and Andrea intended to abandon Asbury as their homestead. Questions of intent are not always susceptible to direct proof, but circumstantial evidence may be supplied in its stead, which is what Drake produced here. *See Spoljaric v. Percival Tours, Inc.* , 708 S.W.2d 432, 435 (Tex. 1986).

Drake's circumstantial evidence included the MSA, which Rob and Andrea executed on August 1, 2008, a date when neither of them was still living at Asbury. By the terms of the MSA, Rob agreed to give his undivided interest in Asbury to Andrea. That agreement constitutes some evidence that Rob had formed an intent to never return to Asbury. *See Spiegel v. KLRU Endowment Fund* , 228 S.W.3d 237, 244 (Tex. App.–Austin 2007, pet. denied) (a husband's intent to abandon his homestead was evidenced by his agreement in an MSA to give the marital home to his wife).

Rob also agreed in the MSA that he would pay the insurance and property taxes on Queenswood until Andrea remarried or the younger of his two children reached the age of majority or graduated from high school. When Rob made this agreement, Andrea and the children had just begun living at Queenswood, a luxury custom home. A reasonable person could infer that, by bargaining for Rob's agreement, Andrea intended to make Queenswood her permanent home. Indeed, Drake's evidence also included Andrea's application to make Queenswood her homestead for tax purposes, effective January 1, 2009, the
456 earliest possible date for which she could *456 claim the homestead exemption. This evidence supports a finding that Andrea had likewise formed an intent to forsake Asbury as her

homestead. *See Norman v. First Bank & Trust, Bryan* , 557 S.W.2d 797, 802 (Tex. Civ. App.–Houston [1st Dist.] 1977, writ ref'd n.r.e.) ("Removal to a different residence and use and occupancy of it as a homestead, unaccompanied by any act evidencing an intention to return to his former home is evidence that a new homestead has been acquired and the old one abandoned.").

Viewing the evidence in the light most favorable to Drake, the nonmovant, we conclude that there is a fact question as to whether Asbury remained Rob and Andrea's homestead during the course of their marriage. Accordingly, Andrea was not entitled to judgment as a matter of law, and the trial court erred by granting her motion for summary judgment.[1]

[1] Andrea raises an alternative argument in her brief that she acquired equitable title to Rob's homestead interest in Asbury when Rob executed the MSA. We need not address this argument because it was not expressly presented in Andrea's motion for summary judgment. *See McConnell v. Southside Indep. Sch. Dist.* , 858 S.W.2d 337, 339 (Tex. 1993) (plurality op.).

DRAKE'S MOTION

In its cross-motion for summary judgment, Drake argued that Rob and Andrea abandoned Asbury as a matter of law. Because Drake was the movant on this issue, it was required to produce conclusive evidence of abandonment.

The "conclusive evidence" standard is more demanding than the "some evidence" standard that applied when Drake was just the nonmovant. Under the "some evidence" standard, Drake only needed evidence that "would enable reasonable and fair-minded people to differ in their conclusions." *See City of Keller* , 168 S.W.3d at 822. But under the "conclusive evidence" standard, the evidence must be of such a character that "reasonable people could not differ in their conclusions." *Id.* at 816. Typically, evidence is conclusive "when it concerns physical facts that cannot be denied" or "when a party admits it is true." *Id.* at 815.

The undisputed physical facts show that between August 1, 2008 and December 31, 2008, Andrea was living continuously at Queenswood. During at least a part of that time (and possibly all of it), Rob was living in a friend's apartment and a third party was renting Asbury. Because reasonable people could not differ in their conclusions that Rob and Andrea were no longer living at Asbury in the five-month period before their divorce, we conclude now, as we did in the previous appeal, that Drake conclusively established the first element of abandonment. *See Drake Interiors* , 433 S.W.3d at 854.

The second element of abandonment involves a question of intent, which concerns a person's state of mind. Because reasonable people may draw differing conclusions about a defendant's state of mind, depending on his or her credibility, intent questions are generally inappropriate for summary judgment, especially in the absence of an admission. *See Frias v. Atl. Richfield Co.* , 999 S.W.2d 97, 106 (Tex. App.–Houston [14th Dist.] 1999, pet. denied) ("Summary judgment should not be granted when the issues are inherently those for a jury, as in cases involving intent."); *S.S. v. State Farm Fire & Cas. Co.* , 808 S.W.2d 668, 670 (Tex. App.–Austin 1991) ("Summary judgment is rarely proper when the cause involves an issue inherently for the fact-finder, such as intent."), *aff'd* , 858 S.W.2d 374 (Tex. 1993).*457 Nevertheless, Drake argues that summary judgment is appropriate in this case because the evidence conclusively established that Rob and Andrea intended to forsake Asbury as their homestead. In support of this argument, Drake cites to evidence that Andrea acquired Queenswood during her marriage and claimed it as her homestead for tax purposes immediately after her divorce.

Generally, there is no better proof of an intent to abandon a homestead than acquiring and moving into a new homestead. *See Hudgins v. Thompson* , 109 Tex. 433, 211 S.W. 586, 588 (1919). However, that rule is soundest when all members of the family relocate to the new home together. When only part of the family relocates to the new home, evidence of abandonment can be "ambiguous." *See Kendall Builders, Inc. v. Chesson* , 149 S.W.3d 796, 808 (Tex. App.–Austin 2004, pet. denied).

Here, Andrea moved into Queenswood when she was separated from Rob and still a co-owner of Asbury. At any given moment, only one of these properties could be a homestead for as long as Andrea and Rob remained married. *See Silvers v. Welch* , 127 Tex. 58, 91 S.W.2d 686, 687 (1936) ("A family is not entitled to two homesteads at the same time."). Even during their period of separation, Andrea could not claim one homestead and Rob another. *See Tremaine v. Showalter* , 613 S.W.2d 35, 37 (Tex. Civ. App.–Corpus Christi 1981, no writ). Therefore, Andrea could only claim Queenswood as a homestead during her marriage if there was a complete and total abandonment of Asbury before the divorce. That abandonment could not be achieved without Rob's consent—i.e., his intent to abandon his own homestead interest in Asbury. *See* Tex. Prop. Code § 41.004 ("If a homestead claimant is married, a homestead cannot be abandoned without the consent of the claimant's spouse."). If Drake did not conclusively establish that intent, then Drake did not show that it was entitled to judgment as a matter of law.

In support of its argument that Rob had formed an intent to abandon Asbury, Drake cites to the same evidence that was attached to its summary-judgment response, beginning with the MSA. Rob and Andrea executed that MSA pursuant to Section 6.602 of the Texas Family Code, which provides that an agreement that meets certain requirements is binding and irrevocable. *See* Tex. Fam. Code § 6.602(b). Because the MSA in this case meets the statutory requirements, Drake argues that Rob could not repudiate his agreement to be divested of Asbury, which in turn means that there is conclusive evidence that Rob had formed an intent to never return to Asbury.

Drake's argument is partially correct. It is true that the MSA, once executed, became binding and enforceable against Rob. *See Cayan v. Cayan* , 38 S.W.3d 161, 166 (Tex. App.–Houston [14th Dist.] 2000, pet. denied). However, the MSA does not necessarily prove that Rob had formed a present intent to forsake Asbury as his homestead.

The portion of the MSA that addresses the parties' property division is written in the future sense, rather than the present sense. It provides (with emphasis added): "Wife *to be awarded* 100% of the Asbury house." Reasonable and fair-minded people could interpret this forward-looking language as manifesting Rob's future intent to give Asbury to Andrea if and when the divorce is granted.

A future intent is possible in this case because the MSA was not sufficient by itself to effectuate the divorce. *See Milner v. Milner* , 361 S.W.3d 615, 618 (Tex. 2012)*458 (providing that an MSA under Section 6.602 still "requires the rendition of a divorce decree that adopts the parties' agreement"). Only the family court could render a judgment of divorce, and until the moment of rendition, Andrea had an "absolute and unqualified" right to nonsuit her petition. *See Ex parte Norton* , 118 Tex. 581, 17 S.W.2d 1041, 1042–43 (1929) (orig. proceeding). We can think of no reason why this right would be prejudiced by an MSA, even one executed under Section 6.602. *Cf. Crowder v. Union Nat'l Bank of Houston* , 114 Tex. 34, 261 S.W. 375, 376 (1924) (the wife nonsuited her divorce even though she and her husband had already made an agreement for the division of the homestead). Indeed, the public policy in favor of marriage would caution against any suggestion that the right to nonsuit was somehow impaired because of the MSA. *See*

Kelly v. Gross , 4 S.W.2d 296, 297 (Tex. Civ. App.–El Paso 1928, writ ref'd) ("Public policy strongly favors reconciliation of the parties, abandonment of divorce proceedings, and resumption of the marriage relation.").

If a nonsuit were possible and the parties were still free to reconcile, then Rob's execution of the MSA does not necessarily manifest a present intent to forsake Asbury. A reasonable person could infer that Rob signed the MSA with the intent of giving Asbury to Andrea at the time of divorce, rather than before it. *See Crowder* , 261 S.W. at 376 (husband testified that, despite the agreement he made with his wife, he believed that the property "would remain the homestead unless the divorce was granted"). And as we indicated earlier, if the presumptive homestead in Asbury continued on the day of divorce because Rob still had an intent to keep Asbury as his homestead, then Drake's judgment lien could not attach because Andrea acquired Rob's interest when the final decree of divorce ordered its conveyance to her. *See* Tex. Civ. Prac. & Rem. Code § 31.001.

Aside from the MSA, Drake cites to the agreed decree of divorce, which Rob and Andrea signed twelve days before the family court rendered the final decree of divorce. The agreed decree provides as follows: "IT IS ORDERED AND DECREED that the wife, Andrea Marie Thomas, is awarded [Asbury] as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property." Drake argues that this evidence conclusively establishes Rob's intent to abandon because Rob agreed to completely divest himself of Asbury, and both he and Andrea had agreed to end their marriage.

Once again, we think that reasonable people could differ in their conclusions about when Rob agreed to forsake his claim to Asbury. The agreed decree begins with decretal language ("IT IS ORDERED AND DECREED ..."). The voice of that language belongs to the family court, which has the authority to make orders and decrees, not Rob, who has no such authority.

Rob may have had a present intent to never return to Asbury when he signed the agreed decree, but based on the language of the decree itself, a reasonable person could also conclude that Rob intended to give Asbury to Andrea when the family court rendered a final divorce. Because we accept all reasonable inferences in favor of the nonmovant as true, we must hold that the agreed decree of divorce does not conclusively establish that Rob had formed an intent to abandon Asbury before December 31, 2008, when the final decree was rendered.

Drake makes two more arguments that must be addressed.*459 First, Drake argues that abandonment occurred no later than January 1, 2009, because by that date, Rob had agreed to divest himself of Asbury in the divorce, which was granted the day before, but Rob still retained record title in Asbury and Rob did not execute his general warranty deed to Andrea until January 8, 2009. Drake is not entitled to judgment on this ground because it was not expressly presented in Drake's motion for summary judgment. *See McConnell v. Southside Indep. Sch. Dist.* , 858 S.W.2d 337, 339 (Tex. 1993) (plurality op.). Even if this ground had been presented in Drake's motion, it would lack merit because by January 1, 2009, Rob's interest in Asbury had already been conveyed according to the terms of the final decree of divorce, which meant that Rob had no interest in Asbury left to abandon. *See* Tex. Civ. Prac. & Rem. Code § 31.001 ; *see also St. Louis, Ark. & Tex. Ry. v. McKinsey* , 78 Tex. 298, 14 S.W. 645, 645 (1890) (holding that title relates back to the date of the judgment).

459

Second, Drake argues that we should consider two items of late-discovered evidence that Andrea allegedly concealed during discovery. Both items are deeds of trust that Rob and Andrea executed as part of their plan to build a luxury custom home

on Queenswood. In each deed, Rob and Andrea represent that they will establish the new Queenswood home as their "principal residence." Drake construes that language as evidence of an intent to abandon Asbury, but the deeds themselves were executed in 2006 and 2007, when Rob and Andrea were still occupying Asbury. As we held in the previous appeal, abandonment could not be established at that time because the evidence conclusively showed the opposite of discontinued use. *See Drake Interiors* , 433 S.W.3d at 854. A reasonable person could also conclude that even if Rob had formed an intent to abandon Asbury when he executed those two deeds of trust, his intent may have changed in 2008, after he and Andrea began to experience marital difficulties.

We conclude that Drake did not conclusively establish that both Rob and Andrea had formed an intent during their marriage to forsake Asbury as their homestead, which was a necessary element of abandonment. Accordingly, the trial court did not err by denying Drake's cross-motion for summary judgment.[2]

[2] Because neither side established that it was entitled to summary judgment, we need not consider Drake's remaining challenges to the competency of Andrea's evidence or to her award of attorney's fees.

CONCLUSION

The trial court's judgment is reversed and the case is remanded for additional proceedings consistent with this opinion.

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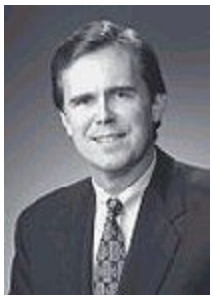

E. Clark Lutz

Born: Pittsburgh, Pennsylvania, July 15, 1956.

Admitted to bar: 1983, Texas, and U.S. Court of Appeals, Fifth Circuit; 1984, U.S. Tax Court.

Education: State University of New York at Geneseo (B.A., magna cum laude, 1977); Syracuse University (J.D., cum laude, 1982). Editor-in-Chief, Syracuse Journal of International Law and Commerce, 1981-1982.

Member: Houston and American Bar Associations; State Bar of Texas; Houston Estate and Financial Forum. (Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization).

Practice Areas: Estate Planning Law; Probate Law; Tax Law.

To Contact Clark Lutz, Please Click Here

Graves, Dougherty, Hearon & Moody
515 Congress Ave., Suite 2300
Austin, TX. 78701

Daniel A. Palmer

Born in Lake Charles, Louisiana. Received both his undergraduate degree and law degree from LSU in Baton Rouge, Louisiana. Received a master's degree of law in taxation (LL.M.) from SMU Law School. Danny is a shareholder and director with the law firm Haley & Davis, P.C. and is a Board Certified Tax Attorney by the Louisiana State Bar Association Specialization Board.

Primary areas of concentration are in the fields of estate planning, probate, business planning, employment contracts for physicians, creditor planning, taxation, financial planning for the elderly and employee benefits. Given numerous lectures to individuals and groups, both layman and professionals, on estate planning and taxation, including the following:

- Asset Preservation - Central Texas Society of CPA's (1992 and 1994), McLennan County Family Practice Residence Program (1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998), Fellowship Program (1993, 1994, 1995, 1998), Waco-McLennan County Bar Association (1992), McLennan County Medical Society (1994), PaineWebber Seminar Series, Corpus Christi (1994, 1995), PaineWebber Insurance Coordinator Regional Meeting (1994), PaineWebber Broker Series, Dallas, San Antonio (1996), Ft. Worth (1997), Waco Association of Life Underwriters (1996); Texas Society of Certified Public

Accounts (Houston Chapter) (1998);

- Estate Planning for the Elderly - Waco Estate Planning Council (1993, 1999), United Bank of Waco "Over 55" Club (1988); Providence Hospital Foundation (1998);

- Why Do I Need A Will? - Texas National Bank Trust Department Seminar (1994), Veteran's Administration Seminar (1992);

- The State of Your Estate - PaineWebber Summer Series for Women (1995, 1996, 1997, 1998), Hillcrest Hospital Hospice Training Programming (1996, 1997), Austin Avenue Methodist Church Seminar (1996), PaineWebber Seminar Series, McAllen (1996, 1997), Waco Business Women's Club (1996), Catholic Diocese (1996); PaineWebber Forum Series, Dallas, Texas (1998);

- The Rules of OSHA for Physicians Regarding Blood-Borne Pathogens - Hillcrest Hospital (1991, 1992);

- Criteria in Selecting an Attorney - KWTX Noon Hour Interview for Waco-McLennan County Young Lawyers Association (1990);

- What is the 1986 Tax Act All About? - First National Bank of Mexia (1987), Farmers and Merchants Bank of Mart (1987), Waco-McLennan County Bar Association (1987), Haley, Davis, Wren, Bristow & Rasner, P.C. Firm Seminar (1986);

- Do I need a Living Trust? - Hillcrest Hospital Hospice Training Programming (1995), First United Methodist Church Senior's Seminar (1995);

- Advanced Estate Planning Techniques for the 90's - Central Texas Society of CPA's (1995), PaineWebber PaceSetters Series, Dallas (1997); PaineWebber Seminar, Waco (1999);

- Tax Treatment of Qualified Accelerated Death Benefits Under Life Insurance Contracts - PaineWebber Branch Manager/Insurance Coordinator Regional Meeting, Beaver Creek Colorado, (1996);

- Why Haven't You Formed Your Family Limited Partnership - Central Texas Society of CPA's (1997), Baylor University Entrepreneur Program Morning Series (1998);

- Practical Legal Considerations to be Considered by New Physicians - McLennan County Family Practice Residence Program (1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998);

- 1997 Taxpayer Act - Relief or Grief? - PaineWebber Insurance Training Seminar, Austin (1997);

- Taxpayer "Hoax" Act of 1997 - PaineWebber Seminar, Ft. Worth (1997); McLennan County Medical Society (1997);

- "Beneficiary Designations and Beyond" - Waco Estate Planning Council (1997); PaineWebber Seminar, Dallas (1999); PaineWebber Pace Setters Seminar, Houston (2000);

- "Estate Planning Strategies Using Life Insurance" - Providence Hospital Foundation (1999); Midland College Foundation, Inc. and Midland Memorial Foundation Seminar (1999);

- "Protecting Your Family Business with a Buy/Sell Agreement" – Texas A&M Family & Owner-Managed Business Program (1999).

Personal:

Danny is very active in local community affairs. He and his wife,

Laura, have three young children, Drew, Grayson and Caroline.

To Contact Daniel A. Palmer, Please Click Here

Haley & Davis, P.C.
Bank One Plaza, Suite 600
510 North Valley Mills St.
Waco, TX. 76710

John McNair

Education:

- Arkansas State University, B.S. in Business - 1978
- University of Arkansas, Fayetteville, J.D. - 1981
- Southern Methodist University, L.L.M. (Tax Law) - 1982

Professional:

- Began private practice of law in Texas in 1983, concentrating in the fields of estate planning and probate and taxation.
- Certified Public Accountant, Texas- 1989
- Board Certified in Estate Planning and Probate by the Texas Board of Legal Specialization - 1990
- Board Certified in Tax Law by the Texas Board of Legal Specialization - 1994
- Speaker for numerous professional organizations including Texas Society of CPA's

To Contact John McNair, Please Click Here

Barnett & McNair, P.C.
5956 Sherry Lane, Suite 600
Dallas, TX. 75225

Kevin Shay

Profile:

Kevin P. Shay is a lawyer in San Antonio, Texas, whose professional concentration is working with individuals and small business owners throughout South and Central Texas to accomplish the planning for the protection and distribution of their estates. Mr. Shay believes that proper planning includes structuring for the protection of a client's assets from creditors and minimizing taxes where possible, and providing for the management of his client's financial affairs in the event they become incapacitated. Mr. Shay helps his clients achieve their goals for the distribution of their estates, and businesses, to whom they want, when they want, in the way want and save all the tax dollars, court costs, and professional fees possible. Mr. Shay has been providing his clients with estate, Business and tax planning services since graduating from Law School in 1979.

Education:

Mr. Shay received his B.B.A. from West Texas State University in 1977 and received his J.D. degree from the University of Iowa College of Law. Mr. Shay is also a CPA since 1978 and a member of the State Bar of Texas, the U.S. Tax Court Bar, the U.S. Supreme Court Bar and the American Bar Association. Mr. Shay is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization.

Services:

Mr. Shay's services include: Design and Preparation of Wills and Trusts; Probate; Asset Protection Conferences; Estate Planning with Family Limited Partnerships; Retirement and Post-Retirement Planning Conferences; Design and Preparation of Executive Compensation Plans; Design and Preparation of Business Buy-Sell Agreements; Business, Tax & Estate Planning for closely held and Family Owned Businesses.

Personal:

Mr. Shay spends his time away from work involved in governing boards of his community, reading, golfing and projects around the house with his wife, Susan. He and his wife have two daughters, the eldest graduated from Mount Holyoke College and the youngest is attending the University of Texas at San Antonio to obtain a bachelor's and master's degree in accounting.

To Contact Kevin P. Shay, Please Click Here

Kevin P. Shay
Independence Plaza II
14350 Northbrook Drive, Suite 220
San Antonio, TX. 78232-5011

David Crowson

Attorney's Specialities:

David Crowson specializes in the area of estate planning and probate law, including estate tax planning for individuals and the business enterprises they own or control.

He also practices a great deal in the area of general corporate and real estate law. Areas in which he has rendered advice include:

- Preparation of wills and trusts to obtain maximum estate tax and inheritance tax advantage, including the use of unified credit shelter trusts and marital deductions trusts.
- Preparation of trusts, both living and testamentary, which include generation skipping transfer provisions.
- Preparation of private annuities.
- Preparation of irrevocable life insurance trusts, split dollar insurance agreements, deferred compensations agreements and other arrangements utilizing life insurance.
- Preparation of stockholders and partnership agreements, including buy/sell agreements.
- Preparation of family limited partnerships to accomplish the orderly transfer of interests in a closely held business enterprise.
- Assistance in negotiating and structuring transactions.

Attorney's Background:

Mr. Crowson has over 19 years of legal experience. He received his Juris Doctor degree from Baylor University in 1979 after having also received a Bachelor of Business Administration degree from Baylor University in 1976. He was licensed as a certified public accountant in 1982 and has spent his entire career practicing law in Longview, Texas. He advises clients on and implements sophisticated estate planning transactions such as family limited partnerships employing valuation discounts, qualified personal residence trusts, and the use of limited liability companies. He is also an adjunct professor of Business Law at LeTourneau University in Longview, Texas.

Firm's Specialties:

The backbone of Coghlan, Crowson, Fitzpatrick, Westbrook & Worthington, LLP has been energy law, both oil and gas law as well as coal and lignite law. In addition to the estate planning and probate practice, the firm has an active litigation practice. The firm also is involved in real estate and oil and gas transactions.

Types of Clients:

The clientele of Coghlan, Crowson, Fitzpatrick, Westbrook & Worthington, LLP includes numerous oil and gas companies and their executive officers. The firm also represents many other closely held enterprises, individuals who have recently sold their businesses, oil and gas investors, real estate investors, physicians, other professionals, and highly compensated executives.

To Contact David L. Crowson, Please Click Here

Coghlan, Crowson, Fitzpatrick, Westbrook & Worthington, LLP
1127 Judson Road
Energy Center, Suite 211
Longview, TX. 75606

Richard Marshall

Biographical Profile:

Richard Marshall is a veteran trial lawyer and a Certified Senior Advisor. His focus is upon the legal problems of senior citizens, both in litigation and in counseling. He has recovered substantial awards and settlements in medical malpractice and nursing home neglect and abuse claims.

His firm provides full representation at all levels of litigation, both individually and through a network of associated counsel throughout Texas.

Richard Marshall also provides legal counsel for senior clients in financial planning, retirement planning, estate planning and long term care planning. He assists clients in drafting wills, trusts, powers of attorney, directives to health care providers, guardian designations, burial instructions, and other planning documents.

He also represents clients in Probate Court in estate administrations, will probates, guardianships, and will contest litigation.

To Contact Richard T. Marshall, Please Click Here

Richard T. Marshall, P.C.
5959 Gateway Blvd. West, Suite 250
El Paso, TX 79925-3316

Samuel D. Griffin, Jr.

Education:

- J.D., University of Houston, 1973
- B.S., Stephen F. Austin State University, 1970

Professional Activities:

- Sole practitioner concentrating in tax law, wills, trusts, estates, real estate, timber and business organizations

Admitted to practice by:

- Supreme Court of the United States of America
- U.S. Court of Appeals for the 5th Circuit
  U.S. Tax Court
- U.S. District Court, Eastern and Northern Districts of Texas
- Supreme Court of Texas

Other:

- Board Certified Specialist in: Residential Real Estate Law and Estate Planning & Probate Law, Tx. Bd. of Legal Specialization
- Instructor, Angelina College, Real Estate and Estate Planning, 1975 – present
- President, Pineywoods Chapter, Texas Association of Business & Chambers of Commerce, 1996 & 1997
- Member, National Academy of Elder Law Attorneys, 1996 – present
- Member, Texas Chapter, NAELA, 1996 - present

Law-Realted Presentations/Publications:

Speaker at numerous seminars for estate planning, real estate and business topics including:

- Speaker for the 1st Annual Forest Profitability Workshop, Estate Planning, September 2000, sponsored by the Arthur Temple College of Forestry at Stephen F. Austin State University, Nacogdoches, Texas.
- Speaker for the Texas Association of Business & Chambers of Commerce, Pineywoods Chapter, Concluding the Employment Relationship, 1995
- Speaker for 1st Annual Tyler Employment Relations Conference, Individual Supervisor and Manager Liability, April 1996, sponsored by the Texas Association of Business & Chambers of Commerce, Tyler Chapter, The Tyler Area Chamber of Commerce, and The Law Firm of Potter, Minton, Roberts, Davis & Jones, P.C.
- Speaker on Estate Planning, Seminar for Certified Public Accountants, May 1996, sponsored by Edward D. Jones Investments.
- Speaker on Estate Planning, Seminar for Certified Public Accountants, 1995, sponsored by Merrill-Lynch.

To Contact Samuel D. Griffin, Jr., Please Click Here

Samuel D. Griffin, Jr., Attorney At Law
PO Box 1965
Lufkin, Texas 75902-1965

Stephen A. Mendel

Profile:

Stephen A. Mendel is a member of the American Academy of Estate Planning Attorneys, a national organization that serves the needs of legal professionals whose practices focus on estate planning and asset protection.

The Academy fosters excellence among its members and helps them deliver the highest possible service to their clients. Stephen A. Mendel provides a broad spectrum of strategies and planning tools that can accomplish very diverse goals.

Education:

Mr. Mendel is a graduate of the School of Architecture at the University of Texas at Austin. He graduated with high honors and received recognition as a College Scholar. After practicing as an architect for several years, he attended South Texas College of Law, where he received his Juris Doctor, graduating summa cum laude. While there, he served as Executive Editor of the Law Journal and received substantial recognition for his academic and literary achievements.

Mr. Mendel was admitted to the Texas Bar in 1987, and is a member of the Houston Bar Association. Mr. Mendel also served two years as a briefing attorney for a U. S. District Court judge, and is a former associate of a nationally recognized law firm.

Services:

Mr. Mendel is an attorney who focuses a substantial part of his practice on estate planning. Mr. Mendel's guiding principle is to provide his clients with quality legal services tailored to each client's specific needs and goals.

Mr. Mendel has been providing quality estate planning for Houston and surrounding area clients for many years. His firm helps numerous people who are concerned about protecting their families from the devastating legal effects of disability and death. The aim of the firm is to help you accomplish your estate planning goals and to take the mystery out of the planning process.

Specific services include, but are not necessarily limited to, design and preparation of wills & trusts, asset protection, use of family limited partnerships as part of the planning process, buy-sell agreements, business counseling, and succession of closely held, family owned businesses.

Personal:

Steve and his family live in Houston, Texas. In his spare time, Steve enjoys coaching youth basketball. He also enjoys cycling, tennis, golf, water skiing, and snow skiing.

To Contact Stephen A. Mendel, Please Click Here

Mendel & Gammell, P.C.
1155 Dairy Ashford, Suite 104
Houston, TX. 77079

Home

No. B14-92-00509-CV
Court of Appeals of Texas, Houston, Fourteenth District

Hearthshire Braeswood Plaza Ltd. Partners v. Bill Kelly Co.

849 S.W.2d 380 (Tex. App. 1993)
Decided Apr 8, 1993

No. B14-92-00509-CV.

February 4, 1993. Rehearing Denied April 8, 1993.

Appeal from 129th District Court, Harris County,
381 Hugo Touchy, J. *381

William K. Andrews, Houston, for appellants.

Stephen A. Mendel, Daryl L. Moore, Houston, for appellee.

Before MURPHY, CANNON and ROBERT E. MORSE (sitting by designation), JJ.

382 *382

OPINION

CANNON, Justice.

This is an appeal from the trial court's order denying appellants' pleas in abatement and motions to stay litigation and compel arbitration. The order of the trial court is reversed in part and affirmed in part.

The appellants in this case are: Hearthshire Braeswood Plaza Limited Partnership (Hearthshire), owner of an apartment complex known as the Gardens of Braeswood (the Gardens); James Birney (Birney), a limited partner of and agent for Hearthshire; and SMP Med Center Partners, Ltd. (SMP), a limited partnership and owner of the Braesbrook Landing Apartments (the Landing). Birney is also an agent for SMP. The appellee is Bill Kelly Company (Kelly), a sole proprietorship owned by Mr. Bill Kelly (Mr. Kelly). Mr. Kelly's company renovates apartment complexes.

In 1991, Hearthshire and Kelly entered into two contracts concerning renovation work on the Gardens, one on January 21, 1991 and one on
383 March 28, 1991. Each *383 contract contained an arbitration clause which provided, in pertinent part:

> All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5.[1]

[1] Paragraph 10.5 states:

> The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party.

Subsequently, disputes arose between the parties. Kelly claimed it fully performed under both contracts, but that Hearthshire only paid for the January contract. Hearthshire claimed the work performed by Kelly was unsatisfactory. On December 13, 1991, Hearthshire filed Demands for Arbitration with the American Arbitration Association (AAA) in order to resolve its disputes with Kelly. The demands requested arbitration under the January contract and the March contract. The cases were given two separate case numbers by the AAA. Kelly objected to arbitration claiming that it was unavailable to Hearthshire because: (1) Hearthshire did not comply with paragraph 10.5; (2) certain claims asserted by Hearthshire were not arbitrable; and (3) Hearthshire had failed to give proper notice under the Texas Deceptive Trade Practices Act. None of the reasons asserted by Kelly at that time, concerned fraud in the inducement of the contract or fraud in the inducement of the arbitration provision.

During the following two month period, the parties corresponded with the AAA concerning the arbitrability of the case. This was done at the request of the AAA. In one of the letters to the AAA, Kelly asserted that arbitration was not available to Hearthshire because the March contract had been procured through fraud. In that same letter, Kelly conceded that certain issues in the January contract were potentially arbitrable.

On January 24, 1992, Kelly filed a lawsuit seeking a declaratory judgment that arbitration was unavailable to Hearthshire, asserting the same objections it had initially made to the AAA. In the petition, Kelly also asserted claims against Hearthshire and Birney for breach of contract, foreclosure of a mechanic and materialman's lien, suit on a sworn account, quantum meruit, fraud, promissory estoppel, negligent misrepresentation, and grossly negligent misrepresentation. The basis for these last four claims was Kelly's contention that it had agreed to perform and finance the renovation work at the Gardens because Hearthshire and Birney had allegedly promised Kelly that it would receive the $4.5 million renovation project on the Landing. Kelly claimed that in reliance on this representation, it financed and completed the renovation work at the Gardens, but never received a contract to renovate the Landing.

Hearthshire and Birney filed a Plea in Abatement and Original Answer on February 28, 1992. On March 9, 1992, Kelly amended its petition to add SMP to the suit, asserting against it the same claims which had asserted against Hearthshire and Birney. On March 11, 1992, Hearthshire and Birney filed a Motion to Stay Litigation and Compel Arbitration and a brief in support of the motion. On March 27, 1992, SMP filed its Plea in Abatement, Motion to Stay Litigation and Compel Arbitration and Original Answer. On April 4, 1992, Kelly filed its response to the motions to stay litigation and compel arbitration, and filed an
384 amended petition. In these *384 documents, Kelly alleged that appellants had fraudulently induced

Kelly to enter into the arbitration provision in the March contract. Kelly asserted that it entered into the March contract because Hearthshire and Birney represented that Project Controllers, Inc. (PCI) would initially resolve all disputes between the parties. Kelly based this assertion on the fact that while PCI was referred to in the contract as "project manager", it acted as architect for other purposes, and paragraph 10.5 stated that all disputes would be initially referred to the architect. Kelly had worked with PCI before and knew it to be qualified. Kelly alleged that this representation induced it to enter into the arbitration provision. Appellants claimed that there was no architect on the project and therefore, the mandates of paragraph 10.5 were inapplicable. As to the January contract, Kelly also claimed that it was not enforceable because Hearthshire had not signed it.

On April 7, 1992, the trial court denied appellants' motions without a hearing. On April 20, 1992, the trial court entered an order denying appellants' pleas in abatement and motions to stay litigation and compel arbitration. The court further ordered that the arbitration proceedings under the January and March contracts be stayed. The trial court did not explain the reasons for, or set out specific grounds for its ruling. Further, the trial court did not file findings of fact and conclusions of law. Appellants appeal from that order.

In their third point of error[2], appellants contend that there was no evidence or insufficient evidence to support the trial court's finding of fraud in the inducement of the contract as a whole.

[2] Appellants have listed their points of error in outline form, 1.A. through 1.L. For clarity, we have renumbered the points as numbers one through twelve.

In a standard appeal when the appellant raises "no evidence" and "factual insufficiency" points, the appellate court reviews the "no evidence" point first. *Glover v. Texas Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex. 1981). If the court finds there is some evidence, it proceeds then to consider the insufficient evidence point. *Id.* Though appellants style this point of error and others as "no evidence" and "insufficient evidence," the proper standard of review in an appeal from an interlocutory order concerning a motion to stay litigation and compel arbitration is simply "no evidence." *Wetzel v. Sullivan, King Sabom, P.C.,* 745 S.W.2d 78, 79 (Tex.App. — Houston [1st Dist.] 1988, no writ); *Gulf Interstate Eng'g v. Pecos Pipeline,* 680 S.W.2d 879, 881 (Tex.App. — Houston [1st Dist.] 1984, writ dism'd). Therefore, we will review this point of error and the others similarly styled under the "no evidence" standard of review.

In reviewing "no evidence" or legal sufficiency points, the court considers only the evidence and inferences, when viewed in their most favorable light, that tend to support the finding under attack, and disregards all evidence and inferences to the contrary. *Davis v. City of San Antonio,* 752 S.W.2d 518, 522 (Tex. 1988); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). If there is any evidence of probative force to support the finding, the point must be overruled and the finding upheld. *Sherman v. First Nat'l Bank,* 760 S.W.2d 240, 242 (Tex. 1988); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). When, as in this case, there are no findings of fact and conclusions of law, we must affirm the judgment if there is evidence to support it upon any legal theory asserted by the prevailing party. *Gulf Interstate,* 680 S.W.2d at 881.

Article 224 of the Texas General Arbitration Act states, in pertinent part:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract. A court shall refuse to enforce an agreement or contract provision to submit a controversy to arbitration if the court

385 *385

> finds it was unconscionable at the time the agreement or contract was made.

TEX.REV.CIV.STAT.ANN. art. 224 (Vernon Supp. 1992).

In its suit for declaratory judgment, Kelly maintained that arbitration was unavailable to appellants because they had fraudulently induced Kelly to enter into the contract as a whole, and that under article 224, this was sufficient to deny appellants' demands for arbitration. Kelly based this contention on its claim that appellants had allegedly represented to Kelly that it would receive the $4.5 million renovation project on the Landing if Kelly financed and completed the renovations on the Gardens. Kelly alleged that it fulfilled its end of the bargain, but that appellants did not give Kelly the Landing renovation project as promised. Kelly claimed that the representation as to the $4.5 million project induced it to enter the contract, and that this was done fraudulently.

In order to prove fraud, Kelly had to show that: (1) a material representation was made; (2) the representation was false; (3) when appellants made it they knew it was false, or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the representation was made with the intention that it should be acted upon by Kelly; (5) Kelly acted in reliance upon the representation; and (6) Kelly thereby suffered injury due to its reliance on the representation. *Trenholm v. Ratcliff,* 646 S.W.2d 927, 930 (Tex. 1983); *Stone v. Lawyers Title Ins. Corp.,* 554 S.W.2d 183, 185 (Tex. 1977); *New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.,* 703 S.W.2d 209, 213-14 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.). Further, because the representation involved a promise to do an act in the future, i.e., allow Kelly to renovate the Landing in the future, Kelly also had to prove that at the time the representation was made, appellants had no intention of performing the act. *Crim Truck Tractor v. Navistar Int'l Transp. Corp.,* 823 S.W.2d 591, 597 (Tex. 1992); *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 433 (Tex. 1986). The evidence in the record in support of Kelly's contentions consists of two affidavits of Mr. Kelly. One of these affidavits is attached to Kelly's response to appellants' motions to stay litigation and compel arbitration. The other affidavit is attached to Kelly's second amended petition. Besides these affidavits and a copy of the contract, the other documents in the record are pleadings, motions, and responses filed by the parties.

Kelly urges this court to accept the affidavits and their pleadings as evidence in support of the fraud claim. Kelly argues that because appellants filed pleas in abatement, the trial court was required to accept as true the factual allegations of fraud in the inducement as set forth in the second amended petition, unless those allegation were disproved. *See Seth v. Meyer,* 730 S.W.2d 884, 885 (Tex.App. — Fort Worth 1987, no writ). We refuse to accept Kelly's argument for three reasons: (1) the appellants did not simply file pleas in abatement, rather the pleas in abatement were supplanted by, or at best, coupled with appellants' motions to stay litigation and compel arbitration; (2) the burden of proof is on the party resisting arbitration; and (3) the standard suggested by Kelly for plea in abatement review is incompatible with the "no evidence" standard of review also advocated by Kelly.

A fair reading of the motions filed by appellants clearly shows that they were not mere pleas in abatement. The substance of the motions is a request for the trial court to stay the litigation and compel arbitration. The plea in abatement filed by the appellants Hearthshire and Birney was filed with their original answer as provided for under the Texas Rules of Civil Procedure. *See* TEX.R.CIV.P. 85. Later, they filed their motion to stay litigation and compel arbitration. SMP, who was later added as a defendant by Kelly, simply lumped the plea in abatement in with their original answer and motion to stay litigation and compel arbitration. If the relief sought by appellants had concerned only a plea in abatement, this court would not have jurisdiction over this appeal. An order overruling a plea in abatement is
386 interlocutory *386 in nature because the order does not finally resolve the controversy. 745 S.W.2d 78, 79; *City of Arlington v. Texas Elec. Serv. Co.,* 540 S.W.2d 580, 582 (Tex.Civ.App. — Fort Worth 1976, writ ref'd n.r.e.). However, we have jurisdiction in this case because the trial court's order did not just overrule a plea in abatement, rather the order required the parties to litigate and stayed the arbitration proceedings. TEX.REV.CIV.STAT.ANN. art. 238-2, Sec. A(1) and (2) (Vernon 1973). Because the relief sought by appellants and denied by the trial court was not solely for abatement, the cases cited by Kelly in support of its plea in abatement argument are inapplicable.

The cases cited by Kelly, supporting the argument that the trial court had to accept its pleadings as true unless appellants disproved those allegations, do not involve arbitration.[3] The burden of proof in a plea in abatement action is very different from the burden of proof in an action where a party is seeking to avoid arbitration.

[3] *Seth v. Meyer,* 730 S.W.2d 884 (Tex.App. — Fort Worth 1987, no writ); *Flowers v. Steelcraft Corp.,* 406 S.W.2d 199 (Tex. 1966).

Arbitration is favored by the courts of this state. *Manes v. Dallas Baptist College,* 638 S.W.2d 143, 145 (Tex.App. — Dallas 1982, writ ref'd n.r.e.); *Carpenter v. North River Ins. Co.,* 436 S.W.2d 549, 553 (Tex.Civ.App. — Houston [14th Dist.] 1968, writ ref'd n.r.e.). Under the Texas General Arbitration Act, an agreement to arbitrate is valid unless grounds exist for revocation. TEX.REV.CIV.STAT.ANN. art. 224 (Vernon Supp. 1992). As stated in *Gulf Interstate,* fraud and unconscionability are defenses to the enforcement of an arbitration provision under article 224. *Gulf Interstate,* 680 S.W.2d at 881. Since the law favors arbitration, and article 224 sets up fraud and unconscionability as defenses, the burden of proof is on the party seeking to avoid arbitration. *See Id.* Because Kelly was the party seeking to avoid arbitration, it was Kelly's burden to prove fraud. Therefore, the trial court was not required to accept the allegations in Kelly's pleadings as true.

Finally, we cannot accept the plea in abatement standard of review suggested by Kelly because it is inconsistent with the "no evidence" standard of review also advocated by Kelly. Under the plea in abatement standard, Kelly argues that the trial court should have accepted Kelly's pleadings as true since appellants failed to disprove them. Kelly's argument on appeal suggests that we are required to do the same; however, Kelly also argues that this court should use the "no evidence" standard. Under this standard, we are required to consider only the evidence which supports the trial court's order, i.e. Kelly's evidence, and to disregard all evidence to the contrary, i.e. appellants' evidence. If we used both standards, we would have to accept the allegations in Kelly's pleadings as true, and ignore any evidence in the record that contradicted those pleadings. In other words, Kelly would automatically prevail on appeal because its contentions would be accepted and any evidence brought by appellants would be ignored.

It is apparent from our analysis that the plea in abatement argument proposed by Kelly is flawed. Therefore, we hold that Kelly's pleadings are not to be taken as evidence and the proper standard of review in this appeal is the "no evidence" standard.

Since we have determined that Kelly's pleadings do not constitute evidence in this case, we now look to the two affidavits of Mr. Kelly to determine if they are sufficient to sustain Kelly's claim of fraud in the inducement of the contract as a whole.

The affidavit which is attached to Kelly's second amended petition swears to the allegations in the petition concerning Kelly's claim for sworn account. There is nothing in that affidavit to support Kelly's fraud claim. Therefore, the affidavit attached to Kelly's response to appellants' motions to stay litigation and compel arbitration is
387 the *387 only document that speaks to Kelly's allegation that it was induced to enter the contract relating to the Gardens because appellants fraudulently represented that Kelly would be given the $4.5 million renovation project on the Landing. Now, we must look to the affidavit and determine whether it contains some evidence on each of the elements of fraud.

Paragraphs eleven through thirteen contain statements regarding the Landing. In these paragraphs, Mr. Kelly states that:

> 1. Birney requested that Kelly perform work on the Landing, a complex owned by SMP.
>
> 2. Kelly was not allowed to perform the work on the Landing.
>
> 3. The negotiations with Birney for the Landing project were in his individual capacity and/or as president of the general partner for SMP.
>
> 4. There was no written agreement between the parties as to the Landing project, and therefore Kelly is not required to arbitrate disputes regarding the Landing.

Viewing these statements in the light most favorable to the trial court's order, Kelly has failed to present sufficient evidence to support its claim of fraud in the inducement of the contract as a whole. The only evidence in this affidavit supporting a fraud allegation is Mr. Kelly's statements that Birney told Kelly that it would receive the Landing project, and that Kelly did not receive the project. There is no evidence that: (1) Birney knew the statement was false when it was made; (2) Birney intended Kelly to rely on the statement; (3) Kelly did in fact enter into the contracts for the Gardens because of this statement; or (4) at the time the representation was made, appellants did not intend to give Kelly the Landing project. Therefore, we hold that there is no evidence of fraud in the inducement of the contract as a whole. Kelly failed to present evidence on each of the elements of fraud. If the trial court based its decision on fraudulent inducement of the contract as a whole, it committed error because there is no evidence to support that contention. Appellants' third point of error is sustained.

In their first point of error, appellants allege that fraud in the inducement of the contract as a whole cannot be used as grounds to defeat an arbitration clause. Because we have determined that there was no evidence to support fraudulent inducement of the contract as a whole, it is unnecessary for us to decide this point of error. Whether a claim of fraudulent inducement of the contract as a whole is sufficient to defeat an arbitration provision is irrelevant in this instance because Kelly failed to present evidence of such fraud.

Since the trial court did not specify the reasons for its ruling, we must proceed with our review of appellants' remaining points to determine if there

is any legal theory to support the trial court's decision. *Id.*

Appellants argue, in their fifth point of error, that there was no evidence or insufficient evidence to support the finding of fraud in the inducement of the arbitration provision. Again, using only the "no evidence" standard as set out above at length, we hold that there is no evidence to support a finding of fraud in the inducement of the arbitration provision.

As we have already discussed, only the affidavit attached to Kelly's response to the motions to stay litigation and compel arbitration contains evidence of any type of fraud. We will now examine the affidavit to determine whether it contains evidence on the elements of fraud as set out above, as the claim relates to fraud in the inducement of the arbitration provision. Kelly's argument as to this claim of fraud states that it was fraudulently induced to enter into the arbitration provision because appellants falsely represented the PCI would act as the initial arbitrator for all disputes between the parties. The pertinent parts of Kelly's affidavit state, as summarized:

> 1. At the request of PCI, Kelly agreed to renovate the Gardens.
>
> 2. All negotiations were with Birney, and PCI participated in the negotiations.
>
> 3. The contracts were standard owner/contractor agreements. These types

388 *388

> of agreements generally provide that an architect will oversee the work; however, it is not uncommon that another party will be substituted in the architect's place and carry out his duties.
>
> 4. Hearthshire substituted PCI as the entity to perform the architect's duties. PCI performed numerous duties, assigned under the terms of the contract, to the architect.
>
> 5. When Hearthshire complained about defective workmanship, Kelly had no reason not to believe that PCI would resolve the dispute.
>
> 6. The March contract did not disqualify PCI from handling any disputes. Page one of the contract indicates that PCI is substituted for the architect for all purposes including dispute resolution.
>
> 7. Based on the fact that PCI would serve as project manager, the nature of the work PCI would perform, and the language of paragraph 10.5, Kelly agreed to the contract containing the arbitration provision. Kelly also agreed that PCI would substitute for the architect. Kelly was comfortable with the arbitration provision because he had worked with PCI on other projects.
>
> 8. Hearthshire never submitted its complaints to PCI as required by the contract. PCI confirmed that Hearthshire never submitted any disputes for resolution.

While the affidavit is more substantial as to fraud in the inducement of the arbitration provision, it still falls short of what is required. In the affidavit, Mr. Kelly states that Hearthshire represented that PCI would be the architect and this representation, coupled with the wording of paragraph 10.5 induced him to enter into the arbitration provision. He further stated that the representation was false when it came to dispute resolution. But, nowhere in the affidavit does Mr. Kelly maintain that appellants knew the statement was false when it was made, that they intended that Kelly act based upon the statement, or that when the agreement was made, appellants had no present intent to perform. Kelly argues that these three elements of fraud can be inferred. In support of this proposition, Kelly cites *New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.*, 703 S.W.2d 209

(Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.); however, *New Process Steel* is distinguishable from the case before us.

In *New Process Steel,* S S Alloys (S S) owed Steel Corporation of Texas (SCOT) an unsecured debt of $500,000. Because of the financial condition of S S, it was questionable whether the debt would ever be paid. *Id.* at 211. When the secured creditors of S S threatened foreclosure, SCOT bought out their interests, and decided to obtain better management for S S so that it could become profitable again. *Id.* SCOT's board of directors authorized its president, Kiefer, to negotiate with New Process Steel about taking over management of S S. *Id.* As a result of the negotiations, a management agreement was reached. New Process Steel agreed to provide management, inventory, and working capital to S S while deciding if it was interested in purchasing the business. *Id.* SCOT agreed that: (1) it would not try to collect its debt from S S during the term of the management agreement; and (2) that as the sole secured creditor of S S, it would place an upper limit on its security interest in an amount equal to the dollar value of that security interest at the time New Process Steel began its management. *Id.* During the management period, New Process Steel made sales and cash advances to S S, while the parties continued to negotiate regarding the purchase of S S. *Id.* New Process Steel considered SCOT's release of its security interest in S S essential to any agreement. *Id.* Kiefer kept SCOT's executive board informed throughout the negotiations. *Id.*

The parties reached an agreement, and a closing date was set for January 16, 1979. *Id.* Before the closing date, Kiefer spoke with a majority of the executive board members and received their approval. *Id.* At closing, New Process Steel purchased S S with the understanding that SCOT would accept a new note in exchange for the $1,000,000 note that SCOT held against S S, and
389 the outstanding accounts receivable *389 due to SCOT from S S. *Id.* at 212. This "understanding" was not reduced to writing at the time of the closing.

After the closing, SCOT's management had second thoughts about the agreement. *Id.* SCOT fired Kiefer in June of 1979, and then advised New Process Steel that it would not perform the January 16 agreement. *Id.* Thereby, in effect, denying the existence of the agreement. New Process Steel brought suit against SCOT for breach of contract and fraud. *Id.* The jury found for New Process Steel on its fraud claim[4], but the trial court refused to give effect to the damage issue based on the fraud claim. *Id.* at 213. New Process Steel complained about this refusal on appeal.

[4] The other jury findings in the case are irrelevant for our purposes here.

The court of appeals held that a trial court may disregard a jury's finding to a special issue, only if the finding has no support in the evidence or it is rendered immaterial by other findings. *Id.* The court then set out to determine whether the evidence was sufficient to support a finding of fraud and the damages awarded by the jury for the fraud claim. As in the case before us, *New Process Steel* involved a promise to take action in the future.

After listing the elements of fraud, including present intent not to perform, the court of appeals stated that fraudulent intent is an element of fraud that is difficult to prove. *Id.; see Freeman v. Greenbriar Homes, Inc.,* 715 S.W.2d 394, 397 (Tex.App. — Dallas 1986, writ ref'd n.r.e.). But, the court stated, when a party denies making the agreement and fails to perform, this constitutes evidence from which lack of present intent to perform may be inferred. *New Process Steel,* 703 S.W.2d at 214. In order for *New Process Steel* to aid Kelly, we must find that the element of "lack of present intent to perform" is in effect the same as the element "knowingly making a false statement." Thus, Kelly's argument must be that if

one can infer the former, the latter element of fraud may also be inferred. Further, Kelly would also have this court assume that if these two elements can be inferred, it is reasonable to assume that the statement was made with the intent that it should be acted upon. Kelly wants us to accept this hypothesis because these three elements are the ones not addressed in Mr. Kelly's affidavit. Kelly argues that they should be inferred based upon *New Process Steel.* Even if we were to accept this interpretation, which we do not, Kelly's argument still fails because *New Process Steel* differs in one crucial respect.

In *New Process Steel,* Kiefer testified that he kept the board apprised of the negotiations, had full authority to make the agreement, and that the agreement was approved by the board. *Id.* Despite this, the chairman of the SCOT board denied that either he or the board had ever approved the agreement, and the evidence was clear that SCOT failed to perform under the agreement. *Id.* at 215. The court held that the denial of the agreement and the failure to perform was sufficient to allow the jury to infer that SCOT had never intended to perform the agreement, and had therefore defrauded New Process Steel. *See Id.*

In this case, we are not confronted with a party denying the existence of an agreement. Appellants do not deny the existence of the contract or the arbitration provision. In fact, they wish to rely on the arbitration provision and force Kelly to abide by it. Appellants simply do not agree with Kelly's interpretation of the contract or the arbitration provision. This is altogether different from denying that the agreement exists. Even if we were to accept Kelly's argument, we cannot, under the facts of *New Process Steel,* infer the missing fraud elements because appellants have not denied the existence of the agreement.

Therefore, since Kelly failed to provide some evidence on each of the elements of fraud in the inducement of the arbitration provision, the trial court erred if its order was based on Kelly's claim of fraud in the inducement of the arbitration provision. In that there is no evidence to support fraud in the inducement of the arbitration
390 provision, *390 appellants' fifth point of error is sustained.

In points of error two, four, and six, appellants contend that the trial court erred in denying their motions to stay litigation and compel arbitration based on unconscionability. After reviewing the record, we find that the legal theory of unconscionability was never raised or argued by Kelly as grounds for avoiding the arbitration provision. When there are no findings of facts and conclusions of law, we must affirm the judgment if there is evidence to support it on any legal theory raised by the prevailing party. *Gulf Interstate,* 680 S.W.2d at 881. Since unconscionability was never asserted by Kelly, it could not have been relied on by the trial court in making its determination to deny appellants' motions. Thus, it is unnecessary for us to address points two, four, and six since they could not have been the basis for the trial court's order.

In their seventh point of error, appellants contend that the trial court erred in finding that the Texas Property Code preludes the resolution of the underlying contract dispute by arbitration.

In its second amended petition, Kelly sought enforcement and foreclosure of a mechanic and materialman's lien. Kelly argued in the trial court that under Texas Property Code Secs. 53.154 and 53.158, it was required to bring the action through a lawsuit and not through arbitration. We agree with Kelly that an M M lien must be foreclosed by a court of competent jurisdiction; however, this does not mean that the underlying contract, which forms the basis of the lien, cannot be arbitrated.

The Texas Property Code provides:

> A mechanic's lien may be foreclosed only on judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien.

TEX.PROP.CODE ANN. Sec. 53.154 (Vernon 1984).

The Code also provides:

> Suit must be brought to foreclose the lien within two years after the date of filing the lien affidavit under Section 53.052 or within one year after completion of the work under the original contract under which the lien is claimed, whichever is later.

TEX.PROP.CODE ANN. Sec. 53.158 (Vernon Supp. 1992). Kelly contends that the language of these sections is mandatory, and therefore, arbitration is unavailable on this issue. The sections are mandatory; however, Kelly desires a broader interpretation than is permitted by the clear language of the sections.

Sections 53.154 and 53.158 require that a suit for foreclosure must be brought, and that the lien can only be foreclosed by a court of competent jurisdiction. Appellants contend that these sections do not state that arbitration is unavailable to determine which party prevails in the underlying dispute. They argue that these sections only require that the actual foreclosure of the lien be performed by a court of competent jurisdiction. In support of their argument, appellants cite *Mountain Plains Constructors, Inc. v. Torrez,* 785 P.2d 928 (Colo. 1990).

We decline to follow the approach advocated by Kelly, and choose to adopt the one presented by appellants and accepted by the Colorado Supreme Court. In *Mountain Plains,* the Colorado court addressed the issue of the proper disposition of an M M lien when arbitration is required. The court held that when a party is entitled to arbitration, the foreclosure of an M M lien shall be stayed until the arbitrators determine whether the party seeking foreclosure prevails in the underlying dispute. *Id.* at 931.

Kelly argues that we should not accept this approach because this case is interpreting Colorado statutory law, not Texas law. Though we have found no Colorado statutes that correspond precisely to the language contained TEX.PROP.CODE ANN. Secs. 53.154 and 53.158, it is clear from the statutes regarding the enforcement of liens that Colorado also requires that foreclosure be accomplished by filing suit in a court of competent jurisdiction. *See* COLO.REV.STAT.ANN. Secs. 38-20-106, 38-22-105.5, 391 *391 38-22-110 through 38-22-116, and 38-22-120 (West 1990 1992). Therefore, there is no reason to decline to adopt this approach.

But beyond this, our decision on this issue is the result of common sense. If we allowed Kelly to foreclose the M M lien before arbitration, and the arbitrators found for appellants, they would be without recourse. The lien would be foreclosed, the property disposed of, and no money judgment could adequately replace the lost property. However, if Kelly prevails in the arbitration, it may then have the arbitration award confirmed by the court under the Texas General Arbitration Act, and can sue to foreclose the M M lien. TEX.REV.CIV.STAT.ANN. art. 236 (Vernon 1973). Kelly will have an adequate remedy at law. Appellants' seventh point of error is sustained.

In their eighth point of error, appellants allege that the trial court erred in finding that Kelly's claims as to the Landing renovation project are not arbitrable.

As part of its fraudulent inducement claim, Kelly asserted that it had only entered into the contracts involving the Gardens because it had been promised the $4.5 million renovation project on the Landing. Besides using this as part of its claim for fraudulent inducement, Kelly, in its second amended petition, filed claims against appellants for negligent and grossly negligent

misrepresentation, DTPA, promissory estoppel, and breach of an oral contract based on the Landing project. Appellants contend that all of these claims should be included in the arbitration proceedings because they "arise out of, or relate to the contract or breach thereof," as provided in the arbitration provisions contained in the January and March contracts covering the Gardens.

We agree with appellants that causes of action sounding in tort are not automatically exempted from arbitration. A dispute arising out of a contractual relationship may give rise to breach of contract claims and tort claims. *See Valero Energy Corp. v. Wagner Brown,* 777 S.W.2d 564, 566-67 (Tex.App. — El Paso 1989, writ denied). To determine whether the particular tort claim is subject to arbitration, the court must determine whether the particular tort claim is so interwoven with the contract that it could not stand alone or, on the other hand, is a tort completely independent of the contract and could be maintained without reference to the contract. *Id.* at 566. Thus, here, the question is whether Kelly's claims as to the Landing project can stand alone or can be maintained without reference to the contracts involving the Gardens. We hold that they can.

The only connection between the Landing project and the contracts involving the Gardens is Kelly's claim that the promise of the Landing project fraudulently induced it to enter the contracts for the renovation of the Gardens. If necessary, Kelly need not even refer to the contracts involving the Gardens in order to maintain the claims regarding the Landing. Kelly could assert that it was fraudulently promised the Landing project and that the promise was breached, even if the Garden contracts had never existed. Further, when a dispute arises between contracting parties whose relationship includes an agreement to arbitrate any dispute arising out of or under the contract, the trial court must determine whether the issues presented are subject to arbitration under that agreement. *Id.* at 567. The parties must have specifically agreed by clear language to arbitrate the matters in dispute. *Id.* The contracts covering the Gardens make no reference to the Landing project and it would take a leap of logic to argue that the arbitration provisions in the contracts were meant to encompass any disputes arising out of a project not mentioned in the contract and one that had not even been fully discussed. We hold that the claims arising out of the Landing renovation project are separate and distinct from those arising out of the contracts pertaining to the Gardens. Therefore, the Landing claims do not have to be arbitrated, and Kelly may proceed with the litigation as to those claims. Appellants' eighth point of error is overruled.

392 *392 In point of error nine, appellants assert that the trial court erred in finding that the dispute between the parties over paragraph 10.5 of the contract is not a proper subject for arbitration.

Though both sides have made numerous allegations against the other, the real dispute in this case concerns the interpretation of paragraph 10.5 of the contract, i.e., whether PCI was, or was to act as, the architect on the Gardens project. Arbitration is designed for that purpose. If we were to say that it is improper to allow arbitrators to determine the meaning of contractual provisions, we would render the entire arbitrary scheme meaningless. Since we have already determined that Kelly has failed to prove fraud, or any other ground to excuse itself from the arbitration provision, all of the disputes involving the contracts pertaining to the Gardens should be arbitrated, including the interpretation of paragraph 10.5. The issue as to whether there is a valid arbitration provision is separate from the issue of whether the contract was breached, the former is determined the court, and the latter by an arbitrator. *Shearson Lehman Hutton, Inc. v. McKay,* 763 S.W.2d 934, 938 (Tex.App. — San Antonio 1989, no writ). Appellants' ninth point of error is sustained.

Appellants next contend that the trial court erred in finding that the arbitration provision of the January contract was not enforceable against Kelly because Hearthshire did not sign the contract.

Article 224 of the Texas General Arbitration Act provides that arbitration agreements, whether separate or within the confines of a contract, must be in writing. TEX.REV.CIV.STAT.ANN. art. 224 (Vernon Supp. 1992). Article 224, however, does not require that the agreement or the contract be signed by the parties in order for the arbitration provision to be valid except in two specific instances: contracts for the acquisition of property, services, money, or credit where the consideration is $50,000 or less, and claims for personal injury. Those instances do not apply here.

Since article 224 provides that an arbitration provision may be revoked "upon such grounds as exist at law or in equity for the revocation of any contract," we must determine whether Hearthshire's failure to sign the January contract is a ground to revoke the contract, and therefore, the arbitration provision. Under the general rules of contract law, a party is bound by the terms of the contract that he has signed, except upon a showing of special circumstances. *Shearson Lehman Hutton,* 763 S.W.2d at 937. Kelly has produced no evidence of any special circumstances. Further, for a contract to be valid, it is not necessary that the agreement be signed by both parties. *E.g., Velasquez v. Schuehle,* 562 S.W.2d 1, 3 (Tex.Civ.App. — San Antonio 1977, no writ). If one party signs, the other may accept by his acts, conduct or acquiescence in the terms of the contract. *Id.* Kelly signed the January contract, and though Hearthshire did not sign the contract, its acts, including the execution of the March contract and the position taken in this appeal, clearly show intent to be bound by the January contract. Appellants' tenth point of error is sustained.

Point of error number eleven states that even if only some of the claims are arbitrable and others are not, the trial court erred in not staying the litigation as to any of the claims that are arbitrable and compelling arbitration of those claims. Our holding in point of error eight makes it unnecessary to review this point of error. We have already determined which claims are not arbitrable and which are. The parties are to arbitrate all claims involving the contracts pertaining to the Gardens. Any claims that relate to the Landing renovation project may proceed to litigation. Our reasons for this decision were spelled out in the discussion under point of error number eight.

In their final point of error, appellants contend that the trial court erred in not consolidating the arbitration proceedings because Kelly presented no evidence, or insufficient evidence that it would be prejudiced by the resolution of all disputes in one consolidated proceeding.

393 *393 When Hearthshire filed its demands for arbitration with the AAA, it filed a separate demand for each contract. It then immediately sought to consolidate them according to AAA procedures. Appellants want this court to order the trial court to consolidate the arbitrable claims into one proceeding.

Because the trial court denied, in error, appellants' motions to stay litigation and compel arbitration, it never reached the issue of whether the arbitration proceedings should be consolidated. We cannot reverse a trial court on a decision it never reached. Appellants' twelfth point of error is overruled.

The order of the trial court is reversed except as to Kelly's claims involving the Landing renovation project. The trial court is directed to make orders such as are necessary to comply with this court's opinion.

Civil Action 1:19-cv-03846-SDG
United States District Court, Northern District of Georgia

Hensley v. Westin Hotel

Decided Mar 30, 2023

Civil Action 1:19-cv-03846-SDG

03-30-2023

CANDACE C. HENSLEY and TIMOTHY HENSLEY, Plaintiffs, and HARTFORD CASUALTY INSURANCE COMPANY A/S/O/ GEORGIA ASSISTED LIVING FEDERATION OF AMERICA, Plaintiff-Intervenor, v. WESTIN HOTEL, a subsidiary of MARRIOTT INTERNATIONAL, INC., et al., Defendants.

STEVEN D. GRIMBERG, UNITED STATES DISTRICT COURT JUDGE.

OPINION AND ORDER ON REMAND

STEVEN D. GRIMBERG, UNITED STATES DISTRICT COURT JUDGE.

This matter is before the Court on limited remand from the Eleventh Circuit Court of Appeals to determine the citizenship of all parties and whether diversity jurisdiction existed at the time of removal and throughout the proceedings. For the following reasons, Plaintiffs' latest objections are **OVERRULED** [ECF 170], and the Court finds that diversity jurisdiction existed at the time of removal but was destroyed by Plaintiff-Intervenor's intervention in this suit.

I. Background

The Court entered an Order to Show Cause on September 2, 2022 for the purpose of determining the
2 citizenship of all parties (Plaintiffs; Plaintiff-Intervenor *2 Hartford Casualty Insurance Company A/S/O Georgia Assisted Living Federation of America (Hartford); and Defendants Merritt Hospitality, LLC (Merritt), Westin Hotel Management, L.P. (WHM), Marriott International, Inc. (Marriott), and Westin Hotel, a subsidiary of Marriott International, Inc. (Westin Hotel) (collectively, Defendants)), and whether diversity jurisdiction existed at the time of removal and continued throughout the proceedings.[1] Specifically, the Court ordered the parties to address three jurisdictional defects in this case: (1) Merritt's reliance on allegations of Plaintiffs' residence, not their citizenship, in removing the case; (2) Merritt's inadequate allegations of its own and WHM's citizenship; and (3) Hartford's failure to allege its own citizenship in its bid to intervene in this case.

[1] ECF 157.

On September 16, 2022, Defendants filed a joint response to the Order to Show Cause. Hartford did not timely respond to the Court's Order. On September 27, the Court held a hearing to discuss the parties' responses, and Plaintiffs indicated that they wished to lodge objections to the Court's exercise of subject matter jurisdiction.[2] At the conclusion of the hearing, the Court issued a clear order: Plaintiffs were granted leave to file objections,
3 Defendants were permitted *3 to file a response to Plaintiffs' objections, and Hartford was instructed to file its response to the Court's Order to Show Cause.

2 ECF 160.

On October 11, 2022, Hartford responded to the Order to Show Cause.[3] Plaintiffs and Defendants continued to file: Plaintiffs' October 11 objections,[4] Defendants' October 19 response,[5] Plaintiffs' October 24 Motion to Strike,[6] Defendants' November 9 response to Plaintiffs' Motion to Strike,[7] and Plaintiffs' November 17 reply regarding their Motion to Strike.[8]

3 ECF

4 ECF

5 ECF

6 ECF

7 ECF

8 ECF

On February 27, 2023, the Court resolved Plaintiffs' Objections and motion to strike, and ordered Defendants and Hartford to supplement their jurisdictional allegations.[9] On March 6, Defendants supplemented their
4 jurisdictional allegations,[10] and, without leave of Court, Plaintiffs lodged additional objections.[11] *4 Again, Hartford did not timely respond and asserted that it did not receive the Court's Order.[12] On March 13, the Court ordered Hartford to supply additional jurisdictional allegations,[13] which Hartford did on March 17.[14] With sufficient information for the Court to determine the parties' citizenships, the Eleventh Circuit's order of limited remand is now finally ripe for resolution.

9 ECF

10 ECF

11 ECF 170. These objections (*e.g.*, that because one of Hartford's board members is a resident of Georgia, Hartford is a citizen of Georgia) are procedurally improper and misstate or misunderstand the law on diversity jurisdiction. *See, e.g.*, *infra* Section II.C. Accordingly, they are **OVERRULED**.

12 ECF 172.

13 D.E. 3/13/23.

14 ECF 173.

II. Discussion

Merritt, the removing party, bears the burden of adequately alleging Plaintiffs' and Defendants' citizenship. *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1363-64 (11th Cir. 2018) (The party invoking federal jurisdiction "must prove, by a preponderance of the evidence, facts supporting the exercise of jurisdiction."). Hartford, the intervening party, must establish its citizenship and show that its intervention in this action does not destroy complete diversity. *Sunpoint Sec., Inc. v. Porta*, 192 F.R.D. 716, 718 (M.D. Fla. 2000) (citing 28 U.S.C. § 1367); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985) ("It is well-established . . . that a
5 *5 party must have 'independent jurisdictional grounds' to intervene permissively under Rule 24(b).").

Merritt has met its burden with respect to Marriott: Marriott's Delaware and Maryland citizenships were established at the outset of this case.[15] Westin Hotel is a misnomer for Marriott, and the Court has already determined that, as a fictitious party, it is irrelevant to the diversity jurisdiction calculus.[16] Further, because Plaintiffs indicated in their October 11 brief that they "have never disputed that they have been citizens of the State of Georgia at all times relevant to this action,"[17]the Court is satisfied that Plaintiffs have been and are Georgia citizens. So, to comply with the Eleventh Circuit's instruction on limited remand, the Court need only determine whether (1) Merritt has shown WHM's citizenship; (2) Merritt has adequately alleged its own citizenship; and (3) Hartford has established its citizenship.

15 ECF 1, ¶ 13.

16 ECF 157, at 4.

17 ECF 161, at 3.

A. Merritt Has Established WHM's Citizenship.

WHM is a limited partnership. For diversity jurisdiction purposes, the citizenship of a limited partnership is
6 any state of which a member of the *6 partnership is a citizen. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004). Merritt maintains that, at all times material to this litigation, Starwood Hotels & Resorts Worldwide, LLC has been the sole limited partner of WHM, and WHLP Acquisitions, LLC has been the sole general partner.[18] Marriott is the sole member of Starwood Hotels & Resorts Worldwide, LLC and WHLP Acquisitions, LLC, and Marriott is incorporated in Delaware and maintains its principal place of business in Maryland. So, WHM, like Marriott, is a citizen of Delaware and Maryland. *Id.* ("[A] limited liability company is a citizen of any state of which a member of the company is a citizen.").

18 ECF 158, at 8.

B. Merritt Has Established Its Own Citizenship.

In its September 16 filing, Merritt failed to establish its own citizenship such that the Court could determine whether it has diversity jurisdiction over this case. Specifically, Defendants represented that, from 2019 to 2021, Merritt was owned by Gary Mendell, a citizen of Connecticut, and HEI Hospitality, LLC.[19] HEI Hospitality, in turn, was owned at the time of removal by Gary Mendell; Stephen Mendell, a citizen of Florida;
7 and Stephen Rushmore, a citizen of Florida.[20] *7 However, the Affidavit of Brian Russo indicates that these individuals did not directly own HEI Hospitality, LLC; it instead states that their interests were held "via their Revocable Trusts and through Family LLCs or trusts."[21] Because Defendants indicated that multiple unnamed trusts and limited liability companies were the direct members of HEI Hospitality, LLC, and that Gary Mendell, Stephen Mendell, and Stephen Rushmore were only beneficiaries of these trusts and "family LLCs," the Court inquired further.[22]

19 *Id.* at 7.

20 *Id.*

21 ECF 158-5, ¶ 4. Defendants allege that Ted Darnell and Clark Hanrattie, citizens of Connecticut, "were added as owners of Merritt" in 2021. *Id.* ¶ 5. These additional owners neither change Merritt's citizenship nor destroy diversity.

22 *Id.*

1. Determining the Citizenship of a Trust

To determine the citizenship of a limited liability company like HEI Hospitality, LLC, Merritt's part-owner, the Court must assess the citizenship of each of the LLC's members and submembers until the Court is left with only individuals or corporations. *Rolling Greens*, 374 F.3d at 1022. However, when the member or submember is a trust, the analysis changes.

The method for determining a trust's citizenship for diversity purposes depends on whether it is a business trust or a traditional trust. *Americold Realty Tr. v. Conagra Foods, Inc.,* *8 577 U.S. 378, 382-83 (2016). A business trust, which is an unincorporated entity capable of bringing suit in its own name, possesses the citizenship of its member-beneficiaries. *Id.* By contrast, "a 'traditional trust' holds the citizenship of its *trustee*, not of its beneficiaries." *Alliant Tax Credit 31, Inc. v. Murphy*, 924 F.3d 1134, 1143 (11th Cir. 2019) (citation omitted). *See also Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 730 (2d Cir. 2017) ("[F]or . . . traditional trusts, it is the citizenship of the trustees holding the legal right to sue on behalf of the trusts, not that of beneficiaries, that is relevant to jurisdiction."); *Wang ex rel. Wong v. New Mighty U.S. Tr.*, 843 F.3d 487, 495 (D.C. Cir. 2016) (A "traditional trust . . . generally describes a fiduciary relationship regarding property where the trust cannot sue and be sued as an entity under state law."). Determining whether a trust is "traditional" requires reference to the "law of the state where the trust is formed." *Wang*, 843 F.3d at 495.

2. Findings

In its March 6, 2023 filing, Merritt (jointly with Defendants) asserts that HEI Hospitality, LLC has been comprised of (1) the Gary M. Mendell Revocable Trust, a citizen of Connecticut; (2) the Stephen Mendell Revocable Trust, a citizen of Florida; (3) the 2020 Mendell Family GST Trust, a citizen of Florida; (4) the ESJJJ *9 Family LLC, a citizen of Florida; and (5) Stephen Rushmore, a citizen of Florida.[23]The Court finds that Merritt has established these citizenships.

[23] ECF 169, at 3.

***i.* The Gary M. Mendell Revocable Trust Is a Citizen of Connecticut.**

Merritt represents that the Gary M. Mendell Revocable Trust is a traditional trust formed under Connecticut law, and that, at all times material to this litigation, the trustee has been Gary Mendell, a citizen of Connecticut.[24]Accordingly, the Court finds that the Gary M. Mendell Revocable Trust (and therefore HEI Hospitality, LLC and Merritt) is a citizen of Connecticut.

[24] *Id.* at 4.

***ii.* The Stephen Mendell Revocable Trust Is a Citizen of Florida.**

Merritt avers that the Stephen Mendel Revocable Trust is a traditional trust formed under Florida law, and that, at all times material to this litigation, the trustee has been Stephen Mendell, a citizen of Florida.[25] Thus, the Court finds that the Stephen Mendell Revocable Trust is a Florida citizen. *10

[25] *Id.*

***iii.* The 2020 Mendell Family GST Trust Is a Citizen of Florida.**

Merritt likewise asserts that the 2020 Mendell Family GST Trust is a citizen of Florida.[26] As a traditional trust formed under Connecticut law, its citizenship is that of its trustee, Stephen Mendell, a citizen of Florida.[27] The 2020 Mendell Family GST Trust's citizenship has not changed at any time relevant to this litigation.[28] So, the 2020 Mendell Family GST Trust is a citizen of Florida.

26 *Id.* at 4-5.

27 *Id.* at 5.

28 *Id.*

***iv.* The ESJJJ Family LLC Is a Citizen of Florida.**

Because an LLC's citizenship depends on the citizenship of its members, Merritt needed to identify the ESJJJ Family LLC's members and submembers and establish their citizenships to determine the citizenship of HEI Hospitality, LLC and, consequently, Merritt. Merritt avers that, at all times relevant to this litigation, the ESJJJ Family LLC has been comprised of one member: the Mendell Family 2011 GST Trust f/b/o Jordan Mendell, Jamie Mendell, and Jenna Mendell.[29] Merritt further asserts that the Mendell Family 2011 GST Trust is a
11 traditional trust formed under South Dakota law, and that, at all times relevant to this litigation, its trustee *11
has been Ellen-Jo Mendell, a citizen of Florida. Therefore, the ESJJJ Family LLC is a citizen of Florida.

29 *Id.*

3. Summary

Based on the citizenships of its members and submembers, the Court finds that Merritt has established that HEI Hospitality, LLC - and Merritt - are citizens of Connecticut and Florida.

C. Hartford Has Established Its Citizenship.

In its March 17 response to the Court's March 13 Order to Show Cause, Hartford avers that its principal place of business and state of incorporation are Connecticut. Plaintiffs disagree and argue that Hartford is a Georgia corporation because (1) one of its directors is a Georgia resident and (2) Hartford is a subrogee for Georgia Assisted Living Federation, a Georgia corporation.[30]

30 ECF 170, ¶ 6.

Setting aside the fact that Plaintiffs have neglected the Court's repeated instruction that *residence* does not equate to *citizenship*, a corporation's citizenship is not impacted by its directors' citizenships. In any event, Hartford is not a Georgia citizen. While, as Plaintiffs argue, Hartford "steps into the shoes" of Georgia Assisted
12 Living Federation of America for purposes of recovering worker *12 compensation it paid,[31] it does not assume a new citizenship in doing so. *Cf. De La Rosa v. IFCO Sys. N. Am., Inc.*, 2010 WL 1781505, at *2 (N.D.Ga. May 4, 2010) (noting that diversity was not destroyed when the subrogee, a Massachusetts corporation, stepped into the shoes of a Georgia plaintiff). So, the Court finds that Hartford is a Connecticut citizen.

31 *Id.*

III. Conclusion

Plaintiffs' latest objections are **OVERRULED** [ECF 170]. Plaintiffs are Georgia citizens and Defendants are not Georgia citizens. However, because Hartford is a Connecticut citizen and Merritt is a Connecticut citizen, the Court recommends that its judgment be vacated and the case remanded to this Court so that it may vacate its grant of Hartford's permissive intervention, dismiss Hartford from the case, and enter summary judgment against Plaintiffs. *13

13

The Clerk is **DIRECTED** to forward a copy of this Order to the Eleventh Circuit Court of Appeals.

SO ORDERED.

No. 11-22-00279-CV
Court of Appeals of Texas, Eleventh District

In re Rino-K&K Compression, Inc.

656 S.W.3d 153 (Tex. App. 2022)
Decided Nov 21, 2022

No. 11-22-00279-CV

11-21-2022

IN RE RINO-K&K COMPRESSION, INC.

Murray A. "Trey" Crutcher III, Alex Reynolds, Atkins, Hollmann, Jones, Peacock, Lewis & Lyon, Odessa, for Relator. Elizabeth Leonard, Judge, for Respondent. Dennis John Sullivan, Jad Stepp, Stepp & Sullivan, Houston, Stephen A. Mendel, The Mendel Law Firm, LP, Houston, for Real parties in Interest.

W. STACY TROTTER, JUSTICE

Murray A. "Trey" Crutcher III, Alex Reynolds, Atkins, Hollmann, Jones, Peacock, Lewis & Lyon, Odessa, for Relator.

Elizabeth Leonard, Judge, for Respondent.

Dennis John Sullivan, Jad Stepp, Stepp & Sullivan, Houston, Stephen A. Mendel, The Mendel Law Firm, LP, Houston, for Real parties in Interest.

Panel consists of: Bailey, C.J., Trotter, J., and Williams, J.

W. STACY TROTTER, JUSTICE

Relator, Rino-K&K Compression, Inc., filed this original petition for writ of mandamus asserting that Respondent, the Honorable Elizabeth Byer Leonard, presiding judge of the 238th District Court of Midland County, abused her discretion when she granted the motion to transfer venue filed by real parties in interest (RPI), Global Compressor, L.P. and Compressor Management, LLC, without notice to the parties and without conducting a hearing as required by Rule 87 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 87(1), (3)(b) ; 156 *Henderson v. O'Neill* , 797 S.W.2d 905 (Tex. 1990) (orig. proceeding) (mandamus is the appropriate remedy when a trial court fails to give sufficient notice to a party as required by Rule 87). Relator requests that we order Judge Leonard to vacate the order of transfer that she signed on July 22, 2022. Because Judge Leonard did not comply with the procedural requirements mandated by Rule 87 for the trial court's consideration of a motion to transfer venue, we agree with Relator and conditionally grant Relator's petition.

I. *Procedural History*

Relator filed the underlying suit in the 238th Judicial District Court of Midland County on June 1, 2022. RPI answered and filed a motion on July 1, 2022, to transfer venue to Harris County. Along with its motion to transfer venue, RPI submitted a proposed order. However, RPI did not request that Judge Leonard set a hearing on its motion to transfer venue as required by Rule 87. *See* TEX. R. CIV. P. 87(1) ("The movant has the duty to request a setting on the motion to transfer.").

On July 22, 2022, without either notice to the parties or a hearing on the motion as required by Rule 87, Judge Leonard signed RPI's proposed order transferring venue to Harris County. Judge Leonard has filed a written response in this proceeding wherein she states that she "mistakenly" believed that the proposed order had

been submitted for her signature pursuant to a local rule. *See* MIDLAND (TEX.) LOC. R. 4.09(a), (d)(2) (*after the rendition or announcement of the trial court's ruling* on a pending matter, if a party is unable to secure opposing counsel's approval as to the form of a proposed order within the thirty-day period prescribed by subsection (a), counsel may submit a letter and the proposed order to the trial court requesting that the trial court sign the order if no written objection has been received from opposing counsel within ten days from the date of counsel's letter and request).[1] The case was transferred to Harris County three days later.

[1] The parties in their submissions erroneously refer to Rule 2.6.c.2 of the Local Rules of Practice for the Courts of Midland County. However, the Local Rules of Practice for the Courts of Midland County were revised, and the amended version became effective on February 28, 2022. Thus, we note that the applicable local rule for purposes of this proceeding is Rule 4.09(a), (d)(2).

Although RPI claims that it received notice of a Transfer Certificate by electronic notification on July 25, 2022,[2] Relator asserts that it did not receive notice or become aware of either the trial court's order transferring venue or the Transfer Certificate until Relator contacted Judge Leonard's court coordinator and the Midland County district clerk's office on September 26, 2022. This lack of notice is supported by Relator's later filings in the
157 Midland County suit: a Certificate of Written *157 Discovery on September 9, 2022, and an Agreed Stipulated Confidentiality Order on September 15, the latter of which was signed by Judge Leonard on September 20. On September 20, RPI filed a motion to withdraw the agreed confidentiality order, stating that the order was "inadvertently and erroneously filed in Midland County, Texas although this case has been transferred to the 269th Judicial District Court in Harris County, Texas per this Courts [sic] July 22, 2022, Order."[3] Judge Leonard granted RPI's motion to strike the agreed confidentiality order on September 27.

[2] RPI avoids directly stating whether it received notice of the transfer order signed by Judge Leonard. In its submissions, RPI contends that RPI received notice "at the time the Transfer Certificate was filed and served via e-service from the Harris County District Court as a party to the action." It is unclear from RPI's initial response whether RPI received notice of the order granting its motion to transfer venue, or whether RPI received only the Transfer Certificate filed on July 25, 2022 and served electronically by Harris County. In its supplemental response, RPI states that the "court *presumably* provided prompt notice to all parties as [RPI] received electronic notice from the court *on or about* July 27, 2022, that the case had been transferred to Harris County," citing Rule 306a. *See* Tex. R. Civ. P. 306a(3) (requiring the clerk to immediately give notice to the parties after a judgment or order is signed). Therefore, we cannot discern whether RPI actually received notice of the transfer order.

[3] To explain why the agreed confidentiality order was filed in Midland County, RPI contends that Relator, during its review of the draft order, changed the heading of the order before it was filed "to list Midland County in the case style"; RPI has attached an "original draft" of the agreed order in support of its contention. We note that, while the "original draft" does list the 269th District Court of Harris County in the heading, both the "original draft" and the file-stamped order show the Midland County cause number.

In its petition, Relator requests that we order Judge Leonard to, among other things, vacate the July 22, 2022 order transferring venue because (1) she failed to comply with Rule 87 's procedural requirements and (2) she did not afford Relator

due process under such rule. *See Henderson* , 797 S.W.2d at 905. Relator stresses that mandamus is "the only available remedy to address [Judge Leonard's] oversight" because Relator was not aware of and did not receive notice of the trial court's transfer order until "well after her plenary power [had] expired."[4]

[4] Judge Leonard's plenary power presumably expired on August 22, 2022, thirty days after she signed the transfer order. *See HCA Health Servs. of Tex., Inc. v. Salinas* , 838 S.W.2d 246, 248 (Tex. 1992) (indicating that under Rule 87 a trial court has plenary power for thirty days after the transfer order is signed). The record before us shows that Relator received actual notice of the transfer order on September 26, 2022; the instant mandamus petition was filed on October 19, 2022.

As previously noted, Judge Leonard has filed a response to Relator's petition and has graciously acknowledged the oversight. Judge Leonard agrees that we should grant Relator's request for relief based on her mistake in signing the order transferring venue without providing notice to the parties and setting a hearing on the motion. According to Judge Leonard, she "does not know why notice was not sent to Relator."

RPI responds that Relator's petition for mandamus is "barred by laches" and that mandamus should not issue because Relator "provided no excuse or explanation for its failure to act in this case for over three (3) months given it was provided the same notice as RPI." In the alternative, RPI argues that Judge Leonard "acted within her discretion and reasonably" in granting RPI's motion to transfer venue because she relied on a local rule that allows a party to file a motion for the entry of an order if (1) the party is "unable to secure the approval as to form [of the order from] all opposing counsel and self-represented litigants" and (2) the trial court has not received a party's written objection to the proposed order within ten days of the trial court's receipt of such order and request for signature. *See* LOC. R. 4.09(d)(2). As discussed in greater detail below, we conclude that Relator's petition (1) is not barred laches and (2) should be conditionally granted. *See Henderson* , 797 S.W.2d at 905 (mandamus should issue when a trial court fails to follow the procedures required in Rule 87); *Union Carbide Corp. v. Moye* , 798 S.W.2d 792, 793 (Tex. 1990) (orig. proceeding) (conditionally granting a writ of mandamus where "the court effectively deprived Union Carbide of
158 its fundamental *158 due process right to notice and a hearing").

II. *Standard of Review*

Mandamus is an extraordinary remedy issued at the discretion of the court. *In re K & L Auto Crushers, LLC* , 627 S.W.3d 239, 247 (Tex. 2021) (orig. proceeding). To obtain relief by mandamus, a relator must show both that (1) the trial court clearly abused its discretion and (2) the relator has no adequate remedy by appeal. *In re Texan Millwork* , 631 S.W.3d 706, 711 (Tex. 2021) (orig. proceeding) (per curiam) ; *In re H.E.B. Grocery Co., L.P.* , 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief should be granted only when a relator establishes "that only one outcome in the trial court was permissible under the law." *In re Murrin Bros. 1885, Ltd.* , 603 S.W.3d 53, 56 (Tex. 2019) (orig. proceeding). "It is meant for circumstances 'involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.' " *Id.* at 57 (quoting *Walker v. Packer* , 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

Although mandamus is not an equitable remedy, its proceedings are guided by equitable principles. *In re Prudential Ins. Co. of Am.* , 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (citing *Rivercenter Asscos. v. Rivera* , 858 S.W.2d 366, 367 (Tex. 1993)). Therefore, mandamus, "[a]s a selective procedure, ... can correct clear errors in

exceptional cases and afford appropriate guidance to the law without the disruption and burden of [an] interlocutory appeal." *Id.*

III. *Analysis*

Rule 87 of the Texas Rules of Civil Procedure requires that the trial court and the movant follow certain procedures prior to, during, and after the trial court's determination of a motion to transfer venue. First, the movant must request a setting on the motion. TEX. R. CIV. P. 87(1). Next, the trial court must give each party to the action at least forty-five days' notice of the date the motion has been set for a hearing. *Id.* After the hearing on the motion has concluded, the trial court then must determine the motion "promptly" based on the pleadings, stipulations, and affidavits. *Id.* R. 87(1), (3)(b). In this context, the question of venue cannot be relitigated once venue is either (1) "sustained as against a motion to transfer" or (2) transferred to a county of proper venue in response to such a motion, and interlocutory appeals of venue determinations are not permitted. *Id.* R. 87(5), (6) ; *In re Team Rocket, L.P.* , 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Further, Rule 89 similarly requires that certain actions be undertaken by the transferee county following the transferor court's venue determination. TEX. R. CIV. P. 89 (*e.g.* , requiring the clerk of the transferee county to provide notice, collect fees, and advise the plaintiff or counsel for the plaintiff that the cause can be dismissed if fees are not paid).

A. *The Trial Court Clearly Abused its Discretion*

We must first decide if the trial court clearly abused its discretion. In that regard, we must determine whether the trial court's order is void or merely "voidable." An appellate court may issue a writ of mandamus if a trial court's order is void even if a relator has an adequate remedy by appeal. *See In re Sw. Bell Tel. Co.* , 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding). Conversely, mandamus will not issue to direct a trial court to act on a voidable order *unless* a relator lacks an adequate remedy by appeal or "*exceptional circumstances* " exist that cause an appeal to
159 become an inadequate remedy. *159 *In re Masonite Corp.* , 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding).

Here, Judge Leonard had jurisdiction to sign the transfer order, despite her failure to follow the procedural requirements of Rule 87 ; therefore, the transfer order is "voidable," not void. *See id.* (" [T]he mere fact that an action by a [trial] court ... is contrary to a statute, constitutional provision or rule of civil or appellate procedure makes it [not void but] 'voidable' or erroneous." (third and fourth alterations in original) (quoting *Mapco, Inc., v. Forrest* , 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding))); *see also Mapco* , 795 S.W.2d at 703 ("A judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.").

We conclude that Judge Leonard clearly abused her discretion when she signed the transfer order without complying with the procedural requirements of Rule 87 ; therefore, she signed a "voidable" order. *See Henderson* , 797 S.W.2d at 905 ; *Mapco* , 795 S.W.2d at 703. As such, we must next determine whether Relator has an adequate remedy by appeal as a result of the trial court's clear abuse of discretion. *In re Masonite Corp.* , 997 S.W.2d at 198.

B. *Relator Does Not Have an Adequate Remedy by Appeal*

To challenge an adverse venue determination, a party ordinarily has an adequate appellate remedy through a direct appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064 (West 2017). As a general rule, mandamus will not issue for venue determinations. *See In re Masonite Corp.* , 997 S.W.2d at 198. However, the Texas Supreme Court has promulgated exceptions to this general rule when, as in the case before us, "*extraordinary circumstances* " exist. *See, e.g., In re Team Rocket*

, 256 S.W.3d at 262 (the "trial court made no effort to follow" Rule 87); *Union Carbide* , 798 S.W.2d at 793 (the trial court "effectively deprived" the relator of due process during the venue proceeding); *Henderson* , 797 S.W.2d at 905 (the trial court failed to follow the requirements of Rule 87).

In *Henderson* , the supreme court held that the relator was "*entitled* to a writ of mandamus directing the trial court to vacate its order sustaining the defendants' motion to transfer venue" because the trial court signed its order without giving the relator sufficient notice as required by Rule 87. *Henderson* , 797 S.W.2d at 905 (emphasis added). The court in *Henderson* , however, did not discuss the second prong of the mandamus analysis—whether the relator had an adequate remedy by appeal. Based on this record, we believe that the circumstances in this case are "exceptional" and cause a direct appeal to become an inadequate remedy. *See id.* ; *see also In re Masonite Corp.* , 997 S.W.2d at 198.

Although, as stated above, a party may typically appeal a trial court's venue determination through a direct appeal, this circumstance assumes that the trial court provided the appealing party with the requisite notice and due process that Rule 87 demands. *See* CIV. PRAC. & REM. § 15.064(a) ("In all venue *hearings* , no factual proof concerning the merits of the case shall be required to establish venue." (emphasis added)). For example, in *In re Team Rocket* , the supreme court read Section 15.064 and Rule 87 together to conclude that "once a venue determination has been made, that determination is conclusive as to those parties and claims." *In re Team Rocket* , 256 S.W.3d at 260. Importantly, the court reasoned:

> Once a ruling is made on the merits, as in a summary judgment, that decision becomes final as to that issue and cannot be vitiated by nonsuiting and refiling the case.... This concept is rooted in the long-standing and fundamental judicial doctrines of res judicata and collateral estoppel, which "promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the *relitigation* " of matters that have already been decided or could have been litigated in a prior suit. Just as a decision on the merits cannot be circumvented by nonsuiting and refiling the case, a final determination fixing venue in a particular county *must likewise be protected from relitigation.*

Id. (emphasis added) (citations omitted).

Here, in the absence of receiving the requisite notice and a hearing that Rule 87 requires, Relator was not provided the opportunity to challenge or litigate the issue of whether venue is proper in Midland County or Harris County in the first instance. Further, Relator is prohibited from seeking an interlocutory appeal of the trial court's venue determination. *See* CIV. PRAC. & REM. § 15.064(a) ; TEX. R. CIV. P. 87(6). Significantly, the issue of venue cannot be relitigated by the district court in Harris County because venue has been "fixed" there by Judge Leonard's order transferring venue. *See In re Team Rocket* , 256 S.W.3d at 260. Therefore, we conclude that Relator lacks an adequate remedy by appeal, and the facts in this case constitute "exceptional circumstances" that necessitate action by this court. *See Henderson* , 797 S.W.2d at 905 ; *see also In re Masonite Corp.* , 997 S.W.2d at 198.

C. *Mandamus is not Barred by Laches or Midland Local Rule 4.09*

We next turn to RPI's responses to Relator's petition. RPI contends that Relator's mandamus request is barred by laches principles and, alternatively, that Judge Leonard appropriately granted the motion to transfer and signed the

160 *160

transfer order pursuant to a local rule. We first consider RPI's second assertion. It is true that local court rules do not trump the Texas Rules of Civil Procedure, the rules of evidence, or any other statutory requirement. *See* TEX. R. CIV. P. 3a(2) ("no time period provided by these rules may be altered by local rules"); *cf.* TEX. R. APP. P. 1.2(c) ("A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure[.]"). In fact, the Texas Supreme Court recently reiterated this principle when it amended Rule 3a to specify that local court rules must not be inconsistent with (1) the rules the Texas Supreme Court has adopted, including the Texas Rules of Civil Procedure, or (2) state or federal law. *See Final Approval of Amendments to Rule 3a of the Texas Rules of Civil Procedure, Rule 1.2 of the Texas Rules of Appellate Procedure, and Rule 10 of the Texas Rules of Judicial Administration* , Misc. Docket No. 22-9081 (Tex. Sept. 23, 2022), available at https://www.txcourts.gov/media/1454923/229081.pdf (effective Jan. 1, 2023).

Moreover, RPI's reliance on Midland Local Rule 4.09(d)(2) is clearly misplaced. The notice requirement in this local rule only applies when a trial court has actually rendered or announced its ruling on a matter after the matter has been submitted to it for determination. *See* LOC. R. 4.09(a) (within thirty days after *the trial court's rendition and announcement of its rulings* , counsel shall reduce to writing all judgments, decrees, or orders, and forward same to opposing counsel for approval as to form, and deliver such orders for the trial court to sign); *Id.* R. 4.09(d)(2) (if counsel is unable to secure the signature or approval from opposing counsel as to the form of
161 a proposed order, counsel may *161 present the trial court with the proposed order and a letter requesting that the trial court sign the proposed order if the trial court has not received any written objection from opposing counsel within ten days from the date of counsel's letter). Contrary to RPI's contention, Midland Local Rule 4.09 is not applicable to the circumstances before us and would not bar Relator's request for mandamus relief. Because the motion to transfer venue was not submitted to Judge Leonard for determination and because no hearing on the motion to transfer ever occurred, Judge Leonard did not *render or announce a ruling* on the motion. Further, RPI never submitted a letter to Judge Leonard requesting that she sign a transfer order. Above all, even if Midland Local Rule 4.09 did apply, this local rule cannot override or supplant the deadlines, notice requirements, and due process requirements of Rule 87. TEX. R. CIV. P. 3a(2).

With respect to RPI's laches argument, RPI contends that we "may analogize to the doctrine of laches, which bars equitable relief." For this assertion, RPI cites only to cases where courts have denied mandamus relief when mandamus petitions were filed four or more months after the trial court acted. *See, e.g., Rivercenter* , 858 S.W.2d at 367 (four months); *In re East Tex. Salt Water Disposal Co.* , 72 S.W.3d 445, 449 (Tex. App.—Tyler 2002, orig. proceeding) (ten years). Undoubtedly, as stated above, mandamus proceedings are guided by equitable principles and "[o]ne such principle is that '[e]quity aids the diligent and not those who slumber on their rights.' " *In re Am. Airlines, Inc.* , 634 S.W.3d 38, 43 (Tex. 2021) (orig. proceeding) (second alteration in original) (quoting *Rivercenter* , 858 S.W.2d at 367). In this case, however, Relator did not "slumber on their rights." Relator explains, and Judge Leonard has confirmed, that Relator did not become aware of the trial court's order transferring venue until September 26, 2022. Once it became aware of the order, Relator expeditiously filed this petition for writ of mandamus within eighteen business days. The record supports Relator's reasonable explanation. Therefore, we cannot say that upon becoming aware of the transfer order, Relator's subsequent "delay" in filing this original proceeding would subject its petition to a laches bar. *See In re Am.*

Airlines , 634 S.W.3d at 43 (conditionally granting the petition for mandamus where a year-long delay was "neither unexplained nor unreasonable").

D. *The Trial Court's Plenary Power*

Finally, we address the issue of the trial court's plenary power. Relator asserts that, as evidenced by RPI's motion to transfer venue, the trial court sua sponte signed the transfer order because RPI's motion merely requested "limited discovery to establish evidence of the facts regarding venue" rather than requesting a hearing on such motion. Relator submits that, because the trial court sua sponte and without authority transferred venue of the underlying suit to Harris County, the trial court's transfer order is void and, therefore, her plenary power has not expired. *See Robertson v. Gregory* , 663 S.W.2d 4, 5 (Tex. App.—Houston [14th Dist.] 1983, orig. proceeding) (a transfer order on the trial court's own motion without notice to the parties was void); *see also Dorchester Master Ltd. P'ship v. Anthony* , 734 S.W.2d 151, 152 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding) (the trial court's sua sponte reconsideration of its transfer order denial was precluded by Rule 87(5) and therefore void). Irrespective of Relator's assertion, Judge Leonard mistakenly signed the transfer order based on the mere filing of RPI's motion to transfer venue, not
162 on her own motion. *162 Furthermore, statutory errors do not result in void orders, as Relator suggests, but instead result in "voidable" orders. *In re Masonite Corp.* , 997 S.W.2d at 198 ; *Mapco* , 795 S.W.2d at 703. Thus, as we have said, because Judge Leonard had jurisdiction to sign the transfer order, the order is "voidable," not void. *In re Masonite Corp.* , 997 S.W.2d at 198 ; *Mapco* , 795 S.W.2d at 703. Nevertheless, even though the trial court's order is voidable, we conclude that Relator lacks an adequate remedy by appeal.

RPI contends that the trial court's plenary power expired thirty days after the transfer order was signed, absent a "timely fil[ed] appropriate post judgment motion." For this assertion, RPI cites to and relies on Rule 329b(d) and the supreme court's decision in *Philbrook v. Berry* . [5] RPI claims that a "post judgment motion" would have been timely if Relator had filed such a motion within the trial court's "initial thirty-day [plenary] period." RPI's assertions are flawed. First, although the supreme court has referred to Rule 329b(d) in support of the argument that a trial court's plenary power expires thirty days after a transfer order is signed, the court also expressly overruled *Philbrook* in favor of "requir[ing] courts of appeals to find appellate jurisdiction" where possible. *HCA Health Servs.* , 838 S.W.2d at 248 ; *Mitschke* , 645 S.W.3d at 258.[6] Second, and most importantly for purposes of our analysis, Relator *did not have an opportunity* to file a "timely" post-judgment motion or other request while the trial court retained plenary power because Relator was unaware of and did not receive notice of the transfer order during that thirty-day period. Relator filed its petition for a writ of mandamus *because* it received notice of the trial court's erroneous transfer order *after* the trial court's plenary power had expired. Clearly, the lack of notice deprived Relator of the opportunity to advise Judge Leonard of her mistake within the thirty-day plenary period.

[5] 683 S.W.2d 378, 379 (Tex. 1985), *overruled by Mitschke v. Borromeo* , 645 S.W.3d 251, 266 (Tex. 2022).

[6] In its responses, RPI also takes issue with Relator not filing either a motion to vacate or reconsider, a bill of review, or a motion for a new trial. Courts of appeals are divided on whether a motion for reconsideration pursuant to Rule 306a extends the trial court's plenary power. *Compare In re Ashley* , No. 13-09-00022-CV, 2009 WL 332312 (Tex. App.—Corpus Christi–Edinburg Feb. 10, 2009, orig. proceeding) (mem. op.) (Rule 306a motion extended trial court's plenary power), *with In re Chester* , 309 S.W.3d 713, 717 (Tex. App.—Houston [14th Dist.] 2010, orig.

proceeding) (motion for rehearing of transfer order does not extend trial court's plenary power). Albeit in the context of a trial court denying a motion to transfer venue, courts of appeals are also divided on whether a trial court may reconsider its initial order in disposing of such a motion. *See In re Lowe's Home Ctrs., L.L.C* , 531 S.W.3d 861, 877 n.4 (Tex. App.—Corpus Christi–Edinburg 2017, orig. proceeding) (collecting cases). Some courts that favor allowing a trial court to reconsider its order cite to language in *HCA Health Services* for support. *See, e.g., In re Reynolds* , 369 S.W.3d 638, 647 (Tex. App.—Tyler 2012, orig. proceeding) (Rule 87(5) "does not preclude reconsideration of the 'first and only motion to transfer scheduled for hearing' " (quoting *Orion Enters., Inc. v. Pope* , 927 S.W.2d 654, 659 (Tex. App.—San Antonio 1996, orig. proceeding), which quotes *HCA Health Servs.* , 838 S.W.2d at 248)). In any event, these holdings are of no consequence here because we conclude that Relator has pursued the only avenue for relief available to it based on the circumstances and the state of the law at the time its petition was filed.

E. *Equitable Principles in Mandamus Proceedings Require Action*

Importantly, we refer again to the equitable principles that guide us in mandamus proceedings.
163 *See* *163 *In re Prudential Ins. Co. of Am.* , 148 S.W.3d at 138. We have concluded that Judge Leonard clearly abused her discretion when she signed the transfer order without following the procedures required by Rule 87. Equally troubling is that the Midland County district clerk failed to provide timely notice of the signed transfer order to Relator, which further precluded Relator from filing a timely challenge to the trial court's erroneous and voidable order. The district clerk's error only enhances Relator's argument and its entitlement to mandamus relief. As we have said, mandamus will not issue to challenge a trial court's venue determination unless "extraordinary circumstances" exist. In this case, such circumstances exist, and the equitable principles established by the supreme court compel the result that we announce today.

IV. *This Court's Ruling*

We conditionally grant Relator's petition for writ of mandamus and direct Respondent to vacate the transfer order that she signed on July 22, 2022. Vacating the transfer order will allow Judge Leonard to consider the motion to transfer venue pursuant to the requirements of Rule 87. A writ of mandamus will issue only if Judge Leonard fails to act by December 15, 2022.

In granting this relief, we do not express an opinion on whether venue is proper in Midland County or Harris County.

FORM ADV

UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND REPORT BY EXEMPT REPORTING ADVISERS

Primary Business Name: INTEGRITY ADVISORY SOLUTIONS	**CRD Number: 288817**
Other-Than-Annual Amendment - All Sections	**Rev. 10/2021**
6/25/2024 4:35:00 PM	

WARNING: Complete this form truthfully. False statements or omissions may result in denial of your application, revocation of your registration, or criminal prosecution. You must keep this form updated by filing periodic amendments. See Form ADV General Instruction 4.

Item 1 Identifying Information

Responses to this Item tell us who you are, where you are doing business, and how we can contact you. If you are filing an *umbrella registration*, the information in Item 1 should be provided for the *filing adviser* only. General Instruction 5 provides information to assist you with filing an *umbrella registration*.

A. Your full legal name (if you are a sole proprietor, your last, first, and middle names):
INTEGRITY ADVISORY SOLUTIONS, LLC

B. (1) Name under which you primarily conduct your advisory business, if different from Item 1.A.
INTEGRITY ADVISORY SOLUTIONS

List on Section 1.B. of Schedule D any additional names under which you conduct your advisory business.

(2) If you are using this Form ADV to register more than one investment adviser under an *umbrella registration*, check this box ☐

If you check this box, complete a Schedule R for each relying adviser.

C. If this filing is reporting a change in your legal name (Item 1.A.) or primary business name (Item 1.B.(1)), enter the new name and specify whether the name change is of
☐ your legal name or ☐ your primary business name:

D. (1) If you are registered with the SEC as an investment adviser, your SEC file number: **801-123090**
(2) If you report to the SEC as an *exempt reporting adviser*, your SEC file number:
(3) If you have one or more Central Index Key numbers assigned by the SEC ("CIK Numbers"), all of your CIK numbers:
No Information Filed

E. (1) If you have a number ("*CRD* Number") assigned by the *FINRA's CRD* system or by the IARD system, your *CRD* number: **288817**

If your firm does not have a CRD number, skip this Item 1.E. Do not provide the CRD number of one of your officers, employees, or affiliates.

(2) If you have additional *CRD* Numbers, your additional *CRD* numbers:
No Information Filed

F. *Principal Office and Place of Business*

(1) Address (do not use a P.O. Box):

Number and Street 1:		Number and Street 2:	
2823 SOUTH CHURCH STREET			
City:	State:	Country:	ZIP+4/Postal Code:
BURLINGTON	North Carolina	United States	27215

If this address is a private residence, check this box: ☐

List on Section 1.F. of Schedule D any office, other than your principal office and place of business, at which you conduct investment advisory business. If you are applying for registration, or are registered, with one or more state securities authorities, you must list all of your offices in the state or states to which you are applying for registration or with whom you are registered. If you are applying for SEC registration, if you are registered only with the SEC, or if you are reporting to the SEC as an exempt reporting adviser, list the largest twenty-five offices in terms of numbers of employees as of the end of your most recently completed fiscal year.

(2) Days of week that you normally conduct business at your *principal office and place of business:*
◉ Monday - Friday ○ Other:

Normal business hours at this location:
8:00 AM - 5:00PM

(3) Telephone number at this location:
(336) 660-2782

(4) Facsimile number at this location, if any:
(336) 217-8020

(5) What is the total number of offices, other than your *principal office and place of business*, at which you conduct investment advisory business as of

the end of your most recently completed fiscal year?
13

G. Mailing address, if different from your *principal office and place of business* address:

Number and Street 1: | Number and Street 2:

City: | State: | Country: | ZIP+4/Postal Code:

If this address is a private residence, check this box: ☐

H. If you are a sole proprietor, state your full residence address, if different from your *principal office and place of business* address in Item 1.F.:

Number and Street 1: | Number and Street 2:

City: | State: | Country: | ZIP+4/Postal Code:

	Yes	No
I. Do you have one or more websites or accounts on publicly available social media platforms (including, but not limited to, Twitter, Facebook and LinkedIn)?	◉	○

If "yes," list all firm website addresses and the address for each of the firm's accounts on publicly available social media platforms on Section 1.I. of Schedule D. If a website address serves as a portal through which to access other information you have published on the web, you may list the portal without listing addresses for all of the other information. You may need to list more than one portal address. Do not provide the addresses of websites or accounts on publicly available social media platforms where you do not control the content. Do not provide the individual electronic mail (e-mail) addresses of employees or the addresses of employee accounts on publicly available social media platforms.

J. Chief Compliance Officer

(1) Provide the name and contact information of your Chief Compliance Officer. If you are an *exempt reporting adviser*, you must provide the contact information for your Chief Compliance Officer, if you have one. If not, you must complete Item 1.K. below.

Name: | Other titles, if any:

Telephone number: | Facsimile number, if any:

Number and Street 1: | Number and Street 2:

City: | State: | Country: | ZIP+4/Postal Code:

Electronic mail (e-mail) address, if Chief Compliance Officer has one:

(2) If your Chief Compliance Officer is compensated or employed by any *person* other than you, a *related person* or an investment company registered under the Investment Company Act of 1940 that you advise for providing chief compliance officer services to you, provide the *person's* name and IRS Employer Identification Number (if any):

Name:

IRS Employer Identification Number:

K. Additional Regulatory Contact Person: If a person other than the Chief Compliance Officer is authorized to receive information and respond to questions about this Form ADV, you may provide that information here.

Name: | Titles:

Telephone number: | Facsimile number, if any:

Number and Street 1: | Number and Street 2:

City: | State: | Country: | ZIP+4/Postal Code:

Electronic mail (e-mail) address, if contact person has one:

	Yes	No
L. Do you maintain some or all of the books and records you are required to keep under Section 204 of the Advisers Act, or similar state law, somewhere other than your *principal office and place of business*?	◉	○

If "yes," complete Section 1.L. of Schedule D.

	Yes	No
M. Are you registered with a *foreign financial regulatory authority*?	○	◉

Answer "no" if you are not registered with a foreign financial regulatory authority, even if you have an affiliate that is registered with a foreign financial regulatory authority. If "yes," complete Section 1.M. of Schedule D.

	Yes	No
N. Are you a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934?	○	◉

	Yes	No
O. Did you have $1 billion or more in assets on the last day of your most recent fiscal year?	○	◉

If yes, what is the approximate amount of your assets:

- ○ $1 billion to less than $10 billion
- ○ $10 billion to less than $50 billion

- ○ $50 billion or more

For purposes of Item 1.O. only, "assets" refers to your total assets, rather than the assets you manage on behalf of clients. Determine your total assets using the total assets shown on the balance sheet for your most recent fiscal year end.

P. Provide your *Legal Entity Identifier* if you have one:

A *legal entity identifier* is a unique number that companies use to identify each other in the financial marketplace. You may not have a *legal entity identifier*.

SECTION 1.B. Other Business Names

List your other business names and the jurisdictions in which you use them. You must complete a separate Schedule D Section 1.B. for each business name.

Name: INTEGRITY WEALTH

Jurisdictions

☑ AL	☑ IL	☑ NE	☑ SC
☐ AK	☑ IN	☑ NV	☑ SD
☑ AZ	☑ IA	☑ NH	☑ TN
☑ AR	☑ KS	☑ NJ	☑ TX
☑ CA	☑ KY	☑ NM	☑ UT
☑ CO	☑ LA	☑ NY	☐ VT
☐ CT	☑ ME	☑ NC	☐ VI
☐ DE	☑ MD	☐ ND	☑ VA
☐ DC	☑ MA	☑ OH	☑ WA
☑ FL	☑ MI	☑ OK	☐ WV
☑ GA	☑ MN	☑ OR	☑ WI
☐ GU	☐ MS	☑ PA	☑ WY
☐ HI	☑ MO	☐ PR	☐ Other:
☑ ID	☑ MT	☐ RI	

List your other business names and the jurisdictions in which you use them. You must complete a separate Schedule D Section 1.B. for each business name.

Name: AMERICAN ACADEMY WEALTH

Jurisdictions

☐ AL	☐ IL	☐ NE	☐ SC
☐ AK	☐ IN	☐ NV	☐ SD
☐ AZ	☐ IA	☐ NH	☐ TN
☐ AR	☐ KS	☐ NJ	☐ TX
☐ CA	☐ KY	☐ NM	☐ UT
☐ CO	☐ LA	☑ NY	☐ VT
☐ CT	☐ ME	☐ NC	☐ VI
☐ DE	☐ MD	☐ ND	☐ VA
☐ DC	☐ MA	☐ OH	☐ WA
☐ FL	☐ MI	☐ OK	☐ WV
☐ GA	☐ MN	☐ OR	☐ WI
☐ GU	☐ MS	☐ PA	☐ WY
☐ HI	☐ MO	☐ PR	☐ Other:
☐ ID	☐ MT	☐ RI	

SECTION 1.F. Other Offices

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
765-367-2365

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
310-903-0993

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business.

You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
917-715-0758

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
702-949-0930

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or

if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
252-902-7331

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
704-287-2840

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
770-298-5344

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
253-677+3460

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:
10 BROAD STREET

Number and Street 2:
SUITE 202

City:
RED BANK

State:
New Jersey

Country:
United States

ZIP+4/Postal Code:
07701

If this address is a private residence, check this box: ☐

Telephone Number:
7322994574

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:
620204

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☑ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:
COMPLIANCE PROGRAM OVERSIGHT OF ANOTHER REGISTERED INVESTMENT ADVISER.

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:
4135 NW URBANDALE DRIVE

Number and Street 2:

City:
URBANDALE

State:
Iowa

Country:
United States

ZIP+4/Postal Code:
50322

If this address is a private residence, check this box: ☐

Telephone Number:
8778661939

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:
294284

How many *employees* perform investment advisory functions from this office location?
16

Are other business activities conducted at this office location? (check all that apply)

☑ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:
OPERATIONAL OVERSIGHT AND SUPERVISION OF A DUAL REGISTRANT.

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
919-222-5663

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:

Number and Street 2:

City:

State:

Country:

ZIP+4/Postal Code:

If this address is a private residence, check this box: ☑

Telephone Number:
910-520-1428

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

☐ (1) Broker-dealer (registered or unregistered)

☐ (2) Bank (including a separately identifiable department or division of a bank)

☑ (3) Insurance broker or agent

☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)

☐ (5) Registered municipal advisor

☐ (6) Accountant or accounting firm

☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest twenty-five offices (in terms of numbers of *employees*).

Number and Street 1:
3001 NORTH ROCKY POINT DRIVE EAST

Number and Street 2:
SUITE 200

City:	State:	Country:	ZIP+4/Postal Code:
TAMPA	Florida	United States	33607

If this address is a private residence, check this box: ☐

Telephone Number:
727-371-8085

Facsimile Number, if any:

If this office location is also required to be registered with FINRA or a *state securities authority* as a branch office location for a broker-dealer or investment adviser on the Uniform Branch Office Registration Form (Form BR), please provide the *CRD* Branch Number here:

How many *employees* perform investment advisory functions from this office location?
1

Are other business activities conducted at this office location? (check all that apply)

- ☐ (1) Broker-dealer (registered or unregistered)
- ☐ (2) Bank (including a separately identifiable department or division of a bank)
- ☑ (3) Insurance broker or agent
- ☐ (4) Commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (5) Registered municipal advisor
- ☐ (6) Accountant or accounting firm
- ☐ (7) Lawyer or law firm

Describe any other *investment-related* business activities conducted from this office location:

SECTION 1.I. Website Addresses

List your website addresses, including addresses for accounts on publicly available social media platforms where you control the content (including, but not limited to, Twitter, Facebook and/or LinkedIn). You must complete a separate Schedule D Section 1.I. for each website or account on a publicly available social media platform.

Address of Website/Account on Publicly Available Social Media Platform: https://integritywealthsolutions.com/

SECTION 1.L. Location of Books and Records

Complete the following information for each location at which you keep your books and records, other than your *principal office and place of business*. You must complete a separate Schedule D, Section 1.L. for each location.

Name of entity where books and records are kept:
BROKERS INTERNATIONAL FINANCIAL SERVICES, LLC

Number and Street 1:
4135 NW URBANDALE DRIVE

Number and Street 2:

City:	State:	Country:	ZIP+4/Postal Code:
URBANDALE	Iowa	United States	50322

If this address is a private residence, check this box: ☐

Telephone Number:
8778661939

Facsimile number, if any:

This is (check one):

- ◉ one of your branch offices or affiliates.
- ○ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
CLIENT ONBOARDING DOCUMENTS, TRADING, FEE CALCULATION, AND CERTAIN COMPLIANCE TESTING RECORDS.

Name of entity where books and records are kept:
SOFTEK

Number and Street 1:
9635 MAROON CIRCLE

Number and Street 2:
#100

City:
ENGLEWOOD

State:
Colorado

Country:
United States

ZIP+4/Postal Code:
80112

If this address is a private residence, check this box: ☐

Telephone Number:
877-358-1324

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
PROVIDER OF BACK-OFFICE SYSTEM HOUSING TRANSACTIONAL DATA, AND REPRESENTATIVE INFORMATION, ALONG WITH RECORDS OF OVERSIGHT AND REVIEW OF TRANSACTIONS/ACCOUNTS.

Name of entity where books and records are kept:
DOCUPACE

Number and Street 1:
101 CRAWFORDS CORNER ROAD

Number and Street 2:
SUITE 1324

City:
HOLMDEL

State:
New Jersey

Country:
United States

ZIP+4/Postal Code:
07733

If this address is a private residence, check this box: ☐

Telephone Number:
310-445-7722

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
ELECTRONIC DOCUMENT STORAGE.

Name of entity where books and records are kept:
ZIX

Number and Street 1:
2711 N HASKELL AVENUE

Number and Street 2:
SUITE 2300

City:
DALLAS

State:
Texas

Country:
United States

ZIP+4/Postal Code:
75204

If this address is a private residence, check this box: ☐

Telephone Number:
888-576-4949

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
MAINTAINS BOOKS AND RECORDS FOR EMAIL AND SOCIAL MEDIA.

Name of entity where books and records are kept:
SMARSH INC.

Number and Street 1:		Number and Street 2:	
851 SW 6TH AVENUE		SUITE 800	
City:	**State:**	**Country:**	**ZIP+4/Postal Code:**
PORTLAND	Oregon	United States	97204

If this address is a private residence, check this box: ☐

Telephone Number:	Facsimile number, if any:
866-762-7741	

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
LEGACY SOCIAL MEDIA AND TEXT ARCHIVE.

Name of entity where books and records are kept:
TEACHABLE, INC.

Number and Street 1:		Number and Street 2:	
470 PARK AVENUE SOUTH		FLOOR 5	
City:	**State:**	**Country:**	**ZIP+4/Postal Code:**
NEW YORK	New York	United States	10016

If this address is a private residence, check this box: ☐

Telephone Number:	Facsimile number, if any:
347-215-3202	

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
SUPERVISED PERSONS' EDUCATION MATERIALS, ACKNOWLEDGEMENTS AND RELATED COMPLIANCE RECORDS.

Name of entity where books and records are kept:
REDTAIL TECHNOLOGY

Number and Street 1:		Number and Street 2:	
17605 WRIGHT STREET			
City:	**State:**	**Country:**	**ZIP+4/Postal Code:**
OMAHA	Nebraska	United States	68130

If this address is a private residence, check this box: ☐

Telephone Number:
(800) 206-5030

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
CLIENT MANAGEMENT SYSTEM NOTES, ENTRIES AND RECORDS.

Name of entity where books and records are kept:
CDW

Number and Street 1:
200 N. MILWAUKEE AVENUE

Number and Street 2:

City:
VERNON HILLS

State:
Illinois

Country:
United States

ZIP+4/Postal Code:
60061

If this address is a private residence, check this box: ☐

Telephone Number:
(847) 371-6090

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ◉ a third-party unaffiliated recordkeeper.
- ○ other.

Briefly describe the books and records kept at this location.
ADVISOR EMAIL ARCHIVE.

Name of entity where books and records are kept:
REVISOR WEALTH MANAGEMENT LLC

Number and Street 1:
11 HARVESTER DRIVE

Number and Street 2:

City:
AKRON

State:
Ohio

Country:
United States

ZIP+4/Postal Code:
44321

If this address is a private residence, check this box: ☐

Telephone Number:
(440) 786-6110

Facsimile number, if any:

This is (check one):
- ○ one of your branch offices or affiliates.
- ○ a third-party unaffiliated recordkeeper.
- ◉ other.

Briefly describe the books and records kept at this location.
SUB-ADVISER. MAINTAINING CLIENT TRADING RECORDS.

Name of entity where books and records are kept:
SCHWAB

Number and Street 1:

Number and Street 2:

3000 SCHWAB WAY

City:	State:	Country:	ZIP+4/Postal Code:
WESTLAKE	Texas	United States	76262

If this address is a private residence, check this box: ☐

Telephone Number: (800) 435-4000

Facsimile number, if any:

This is (check one):

- ○ one of your branch offices or affiliates.
- ○ a third-party unaffiliated recordkeeper.
- ◉ other.

Briefly describe the books and records kept at this location.
CUSTODIAL RECORDS.

Name of entity where books and records are kept:
FIDELITY

Number and Street 1:
245 SUMMER STREET

Number and Street 2:

City:	State:	Country:	ZIP+4/Postal Code:
BOSTON	Massachusetts	United States	02210

If this address is a private residence, check this box: ☐

Telephone Number: (617) 563-0803

Facsimile number, if any:

This is (check one):

- ○ one of your branch offices or affiliates.
- ○ a third-party unaffiliated recordkeeper.
- ◉ other.

Briefly describe the books and records kept at this location.
CUSTODIAL RECORDS.

SECTION 1.M. Registration with Foreign Financial Regulatory Authorities

No Information Filed

Item 2 SEC Registration / Reporting

Responses to this Item help us (and you) determine whether you are eligible to register with the SEC. Complete this Item 2.A. only if you are applying for SEC registration or submitting an *annual updating amendment* to your SEC registration. If you are filing an *umbrella registration*, the information in Item 2 should be provided for the *filing adviser* only.

A. To register (or remain registered) with the SEC, you must check **at least one** of the Items 2.A.(1) through 2.A.(12), below. If you are submitting an *annual updating amendment* to your SEC registration and you are no longer eligible to register with the SEC, check Item 2.A.(13). Part 1A Instruction 2 provides information to help you determine whether you may affirmatively respond to each of these items.

You (the adviser):

☑ (1) are a **large advisory firm** that either:

(a) has regulatory assets under management of $100 million (in U.S. dollars) or more; or

(b) has regulatory assets under management of $90 million (in U.S. dollars) or more at the time of filing its most recent *annual updating amendment* and is registered with the SEC;

☐ (2) are a **mid-sized advisory firm** that has regulatory assets under management of $25 million (in U.S. dollars) or more but less than $100 million (in U.S. dollars) and you are either:

(a) not required to be registered as an adviser with the *state securities authority* of the state where you maintain your *principal office and place of business*; or

(b) not subject to examination by the *state securities authority* of the state where you maintain your *principal office and place of business*;

*Click **HERE** for a list of states in which an investment adviser, if registered, would not be subject to examination by the state securities authority.*

(3) Reserved

☐ (4) have your *principal office and place of business* **outside the United States**;

☐ (5) are **an investment adviser (or subadviser) to an investment company** registered under the Investment Company Act of 1940;

☐ (6) are **an investment adviser to a company which has elected to be a business development company** pursuant to section 54 of the Investment Company Act of 1940 and has not withdrawn the election, and you have at least $25 million of regulatory assets under management;

☐ (7) are a **pension consultant** with respect to assets of plans having an aggregate value of at least $200,000,000 that qualifies for the exemption in rule 203A-2(a);

☐ (8) are a **related adviser** under rule 203A-2(b) that *controls*, is *controlled* by, or is under common *control* with, an investment adviser that is registered with the SEC, and your *principal office and place of business* is the same as the registered adviser;

If you check this box, complete Section 2.A.(8) of Schedule D.

☐ (9) are an **adviser** relying on rule 203A-2(c) because you **expect to be eligible for SEC registration within 120 days;**

If you check this box, complete Section 2.A.(9) of Schedule D.

☐ (10) are a **multi-state adviser** that is required to register in 15 or more states and is relying on rule 203A-2(d);

If you check this box, complete Section 2.A.(10) of Schedule D.

☐ (11) are an **Internet adviser** relying on rule 203A-2(e);

☐ (12) have **received an SEC order** exempting you from the prohibition against registration with the SEC;

If you check this box, complete Section 2.A.(12) of Schedule D.

☐ (13) are **no longer eligible** to remain registered with the SEC.

State Securities Authority Notice Filings **and State Reporting by** ***Exempt Reporting Advisers***

C. Under state laws, SEC-registered advisers may be required to provide to *state securities authorities* a copy of the Form ADV and any amendments they file with the SEC. These are called *notice filings*. In addition, *exempt reporting advisers* may be required to provide *state securities authorities* with a copy of reports and any amendments they file with the SEC. If this is an initial application or report, check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to direct your *notice filings* or reports to additional state(s), check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to your registration to stop your *notice filings* or reports from going to state(s) that currently receive them, uncheck the box(es) next to those state(s).

Jurisdictions

☑ AL	☑ IL	☑ NE	☑ SC
☐ AK	☑ IN	☑ NV	☑ SD
☑ AZ	☑ IA	☑ NH	☑ TN
☑ AR	☑ KS	☑ NJ	☑ TX
☑ CA	☑ KY	☑ NM	☑ UT
☑ CO	☑ LA	☑ NY	☐ VT
☐ CT	☑ ME	☑ NC	☐ VI
☐ DE	☑ MD	☐ ND	☑ VA
☐ DC	☑ MA	☑ OH	☑ WA
☑ FL	☑ MI	☑ OK	☐ WV
☑ GA	☑ MN	☑ OR	☑ WI
☐ GU	☐ MS	☑ PA	☑ WY
☐ HI	☑ MO	☐ PR	
☑ ID	☑ MT	☐ RI	

If you are amending your registration to stop your notice filings or reports from going to a state that currently receives them and you do not want to pay that state's notice filing or report filing fee for the coming year, your amendment must be filed before the end of the year (December 31).

SECTION 2.A.(8) Related Adviser

If you are relying on the exemption in rule 203A-2(b) from the prohibition on registration because you *control*, are *controlled* by, or are under common *control* with an investment adviser that is registered with the SEC and your *principal office and place of business* is the same as that of the registered adviser, provide the following information:

Name of Registered Investment Adviser

CRD Number of Registered Investment Adviser

SEC Number of Registered Investment Adviser
-

SECTION 2.A.(9) Investment Adviser Expecting to be Eligible for Commission Registration within 120 Days

If you are relying on rule 203A-2(c), the exemption from the prohibition on registration available to an adviser that expects to be eligible for SEC registration within 120 days, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations. You must make both of these representations:

☐ I am not registered or required to be registered with the SEC or a *state securities authority* and I have a reasonable expectation that I will be eligible to register with the SEC within 120 days after the date my registration with the SEC becomes effective.

☐ I undertake to withdraw from SEC registration if, on the 120th day after my registration with the SEC becomes effective, I would be prohibited by Section 203A(a) of the Advisers Act from registering with the SEC.

SECTION 2.A.(10) Multi-State Adviser

If you are relying on rule 203A-2(d), the multi-state adviser exemption from the prohibition on registration, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations.

If you are applying for registration as an investment adviser with the SEC, you must make both of these representations:

☐ I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of 15 or more states to register as an investment adviser with the *state securities authorities* in those states.

☐ I undertake to withdraw from SEC registration if I file an amendment to this registration indicating that I would be required by the laws of fewer than 15 states to register as an investment adviser with the *state securities authorities* of those states.

If you are submitting your *annual updating amendment*, you must make this representation:

☐ Within 90 days prior to the date of filing this amendment, I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of at least 15 states to register as an investment adviser with the *state securities authorities* in those states.

SECTION 2.A.(12) SEC Exemptive *Order*

If you are relying upon an SEC *order* exempting you from the prohibition on registration, provide the following information:

Application Number:
803-

Date of *order*:

Item 3 Form of Organization

If you are filing an *umbrella registration*, the information in Item 3 should be provided for the *filing adviser* only.

A. How are you organized?

- ○ Corporation
- ○ Sole Proprietorship
- ○ Limited Liability Partnership (LLP)
- ○ Partnership
- ◉ Limited Liability Company (LLC)
- ○ Limited Partnership (LP)
- ○ Other (specify):

If you are changing your response to this Item, see Part 1A Instruction 4.

B. In what month does your fiscal year end each year?
DECEMBER

C. Under the laws of what state or country are you organized?

State	Country
Delaware	United States

If you are a partnership, provide the name of the state or country under whose laws your partnership was formed. If you are a sole proprietor, provide the name of the state or country where you reside.

If you are changing your response to this Item, see Part 1A Instruction 4.

Item 4 Successions

		Yes	No
A.	Are you, at the time of this filing, succeeding to the business of a registered investment adviser, including, for example, a change of your structure or legal status (e.g., form of organization or state of incorporation)?	○	◉

If "yes", complete Item 4.B. and Section 4 of Schedule D.

B. Date of Succession: (MM/DD/YYYY)

If you have already reported this succession on a previous Form ADV filing, do not report the succession again. Instead, check "No." See Part 1A Instruction 4.

SECTION 4 Successions

No Information Filed

Item 5 Information About Your Advisory Business - Employees, Clients, and Compensation

Responses to this Item help us understand your business, assist us in preparing for on-site examinations, and provide us with data we use when making regulatory policy. Part 1A Instruction 5.a. provides additional guidance to newly formed advisers for completing this Item 5.

Employees

If you are organized as a sole proprietorship, include yourself as an employee in your responses to Item 5.A. and Items 5.B.(1), (2), (3), (4), and (5). If an employee performs more than one function, you should count that employee in each of your responses to Items 5.B.(1), (2), (3), (4), and (5).

A. Approximately how many *employees* do you have? Include full- and part-time *employees* but do not include any clerical workers.

39

B. (1) Approximately how many of the *employees* reported in 5.A. perform investment advisory functions (including research)?

39

(2) Approximately how many of the *employees* reported in 5.A. are registered representatives of a broker-dealer?

23

(3) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives*?

35

(4) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives* for an investment adviser other than you?

17

(5) Approximately how many of the *employees* reported in 5.A. are licensed agents of an insurance company or agency?

24

(6) Approximately how many firms or other *persons* solicit advisory *clients* on your behalf?

118

In your response to Item 5.B.(6), do not count any of your employees and count a firm only once – do not count each of the firm's employees that solicit on your behalf.

Clients

In your responses to Items 5.C. and 5.D. do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

C. (1) To approximately how many *clients* for whom you do not have regulatory assets under management did you provide investment advisory services during your most recently completed fiscal year?

0

(2) Approximately what percentage of your *clients* are non-*United States persons*?

0%

D. *For purposes of this Item 5.D., the category "individuals" includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members, but does*

not include businesses organized as sole proprietorships.
The category "business development companies" consists of companies that have made an election pursuant to section 54 of the Investment Company Act of 1940. Unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, do not answer (1)(d) or (3)(d) below.

Indicate the approximate number of your *clients* and amount of your total regulatory assets under management (reported in Item 5.F. below) attributable to each of the following type of *client*. If you have fewer than 5 *clients* in a particular category (other than (d), (e), and (f)) you may check Item 5.D.(2) rather than respond to Item 5.D.(1).

The aggregate amount of regulatory assets under management reported in Item 5.D.(3) should equal the total amount of regulatory assets under management reported in Item 5.F.(2)(c) below.

If a *client* fits into more than one category, select one category that most accurately represents the *client* to avoid double counting *clients* and assets. If you advise a registered investment company, business development company, or pooled investment vehicle, report those assets in categories (d), (e), and (f) as applicable.

Type of *Client*	(1) Number of *Client(s)*	(2) Fewer than 5 *Clients*	(3) Amount of Regulatory Assets under Management
(a) Individuals (other than *high net worth individuals*)	559	☐	$ 64,034,025
(b) *High net worth individuals*	8	☐	$ 83,464,298
(c) Banking or thrift institutions		☐	$
(d) Investment companies			$
(e) Business development companies			$
(f) Pooled investment vehicles (other than investment companies and business development companies)			$
(g) Pension and profit sharing plans (but not the plan participants or government pension plans)		☐	$
(h) Charitable organizations		☐	$
(i) State or municipal *government entities* (including government pension plans)		☐	$
(j) Other investment advisers		☐	$
(k) Insurance companies		☐	$
(l) Sovereign wealth funds and foreign official institutions		☐	$
(m) Corporations or other businesses not listed above		☐	$
(n) Other:		☐	$

Compensation Arrangements

E. You are compensated for your investment advisory services by (check all that apply):

- ☑ (1) A percentage of assets under your management
- ☑ (2) Hourly charges
- ☐ (3) Subscription fees (for a newsletter or periodical)
- ☑ (4) Fixed fees (other than subscription fees)
- ☐ (5) Commissions
- ☐ (6) *Performance-based fees*
- ☐ (7) Other (specify):

Item 5 Information About Your Advisory Business - Regulatory Assets Under Management

Regulatory Assets Under Management

	Yes	No
F. (1) Do you provide continuous and regular supervisory or management services to securities portfolios?	◉	○

(2) If yes, what is the amount of your regulatory assets under management and total number of accounts?

		U.S. Dollar Amount		Total Number of Accounts
Discretionary:	(a)	$ 147,498,323	(d)	783
Non-Discretionary:	(b)	$ 0	(e)	0
Total:	(c)	$ 147,498,323	(f)	783

Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management. You must follow these instructions carefully when completing this Item.

(3) What is the approximate amount of your total regulatory assets under management (reported in Item 5.F.(2)(c) above) attributable to *clients* who are non-*United States persons*?

$ 0

Item 5 Information About Your Advisory Business - Advisory Activities

Advisory Activities

G. What type(s) of advisory services do you provide? Check all that apply.

- [x] (1) Financial planning services
- [x] (2) Portfolio management for individuals and/or small businesses
- [ ] (3) Portfolio management for investment companies (as well as "business development companies" that have made an election pursuant to section 54 of the Investment Company Act of 1940)
- [ ] (4) Portfolio management for pooled investment vehicles (other than investment companies)
- [ ] (5) Portfolio management for businesses (other than small businesses) or institutional *clients* (other than registered investment companies and other pooled investment vehicles)
- [ ] (6) Pension consulting services
- [x] (7) Selection of other advisers (including *private fund* managers)
- [ ] (8) Publication of periodicals or newsletters
- [ ] (9) Security ratings or pricing services
- [ ] (10) Market timing services
- [ ] (11) Educational seminars/workshops
- [x] (12) Other(specify): CONSULTING SERVICES

Do not check Item 5.G.(3) unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, including as a subadviser. If you check Item 5.G.(3), report the 811 or 814 number of the investment company or investment companies to which you provide advice in Section 5.G.(3) of Schedule D.

H. If you provide financial planning services, to how many *clients* did you provide these services during your last fiscal year?

- (•) 0
- ( ) 1 - 10
- ( ) 11 - 25
- ( ) 26 - 50
- ( ) 51 - 100
- ( ) 101 - 250
- ( ) 251 - 500
- ( ) More than 500

  If more than 500, how many?
  (round to the nearest 500)

In your responses to this Item 5.H., do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

		Yes	No
I.	(1) Do you participate in a *wrap fee program*?	(•)	( )

(2) If you participate in a *wrap fee program*, what is the amount of your regulatory assets under management attributable to acting as:

(a) *sponsor* to a *wrap fee program*
$ 0

(b) portfolio manager for a *wrap fee program*?
$ 0

(c) *sponsor* to and portfolio manager for the same *wrap fee program*?
$ 0

If you report an amount in Item 5.I.(2)(c), do not report that amount in Item 5.I.(2)(a) or Item 5.I.(2)(b).

If you are a portfolio manager for a wrap fee program, list the names of the programs, their sponsors and related information in Section 5.I.(2) of Schedule D.

If your involvement in a wrap fee program is limited to recommending wrap fee programs to your clients, or you advise a mutual fund that is offered through a wrap fee program, do not check Item 5.I.(1) or enter any amounts in response to Item 5.I.(2).

		Yes	No
J.	(1) In response to Item 4.B. of Part 2A of Form ADV, do you indicate that you provide investment advice only with respect to limited types of investments?	( )	(•)
	(2) Do you report *client* assets in Item 4.E. of Part 2A that are computed using a different method than the method used to compute your regulatory assets under management?	( )	(•)

K. Separately Managed Account *Clients*

		Yes	No
	(1) Do you have regulatory assets under management attributable to *clients* other than those listed in Item 5.D.(3)(d)-(f) (separately managed account *clients*)?	(•)	( )

If yes, complete Section 5.K.(1) of Schedule D.

	(2) Do you engage in borrowing transactions on behalf of any of the separately managed account *clients* that you advise?	( )	(•)

If yes, complete Section 5.K.(2) of Schedule D.

(3) Do you engage in derivative transactions on behalf of any of the separately managed account *clients* that you advise? ○ ◉

If yes, complete Section 5.K.(2) of Schedule D.

(4) After subtracting the amounts in Item 5.D.(3)(d)-(f) above from your total regulatory assets under management, does any custodian hold ten percent or more of this remaining amount of regulatory assets under management? ◉ ○

If yes, complete Section 5.K.(3) of Schedule D *for each custodian.*

L. Marketing Activities

	Yes	No
(1) Do any of your *advertisements* include:		
(a) Performance results?	○	◉
(b) A reference to specific investment advice provided by you (as that phrase is used in rule 206(4)-1(a)(5))?	○	◉
(c) *Testimonials* (other than those that satisfy rule 206(4)-1(b)(4)(ii))?	○	◉
(d) *Endorsements* (other than those that satisfy rule 206(4)-1(b)(4)(ii))?	◉	○
(e) *Third-party ratings*?	○	◉
(2) If you answer "yes" to L(1)(c), (d), or (e) above, do you pay or otherwise provide cash or non-cash compensation, directly or indirectly, in connection with the use of *testimonials*, *endorsements*, or *third-party ratings*?	◉	○
(3) Do any of your *advertisements* include *hypothetical performance* ?	○	◉
(4) Do any of your *advertisements* include *predecessor performance* ?	○	◉

SECTION 5.G.(3) Advisers to Registered Investment Companies and Business Development Companies

No Information Filed

SECTION 5.I.(2) *Wrap Fee Programs*

If you are a portfolio manager for one or more *wrap fee programs*, list the name of each program and its *sponsor*. You must complete a separate Schedule D Section 5.I.(2) for each *wrap fee program* for which you are a portfolio manager.

Name of *Wrap Fee Program*

IAS ASPIRE PROGRAM

Name of *Sponsor*

INTEGRITY ADVISORY SOLUTIONS

Sponsor's SEC File Number (if any) (e.g., 801-, 8-, 866-, 802-):

801 - 123090

Sponsor's CRD Number (if any):

288817

SECTION 5.K.(1) Separately Managed Accounts

After subtracting the amounts reported in Item 5.D.(3)(d)-(f) from your total regulatory assets under management, indicate the approximate percentage of this remaining amount attributable to each of the following categories of assets. If the remaining amount is at least $10 billion in regulatory assets under management, complete Question (a). If the remaining amount is less than $10 billion in regulatory assets under management, complete Question (b).

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you

subadvise.

End of year refers to the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment* . Mid-year is the date six months before the end of year date. Each column should add up to 100% and numbers should be rounded to the nearest percent.

Investments in derivatives, registered investment companies, business development companies, and pooled investment vehicles should be reported in those categories. Do not report those investments based on related or underlying portfolio assets. Cash equivalents include bank deposits, certificates of deposit, bankers' acceptances and similar bank instruments.

Some assets could be classified into more than one category or require discretion about which category applies. You may use your own internal methodologies and the conventions of your service providers in determining how to categorize assets, so long as the methodologies or conventions are consistently applied and consistent with information you report internally and to current and prospective clients. However, you should not double count assets, and your responses must be consistent with any instructions or other guidance relating to this Section.

(a)

Asset Type	Mid-year	End of year
(i) Exchange-Traded Equity Securities	%	%
(ii) Non Exchange-Traded Equity Securities	%	%
(iii) U.S. Government/Agency Bonds	%	%
(iv) U.S. State and Local Bonds	%	%
(v) *Sovereign Bonds*	%	%
(vi) Investment Grade Corporate Bonds	%	%
(vii) Non-Investment Grade Corporate Bonds	%	%
(viii) Derivatives	%	%
(ix) Securities Issued by Registered Investment Companies or Business Development Companies	%	%
(x) Securities Issued by Pooled Investment Vehicles (other than Registered Investment Companies or Business Development Companies)	%	%
(xi) Cash and Cash Equivalents	%	%
(xii) Other	%	%

Generally describe any assets included in "Other"

(b)

Asset Type	End of year
(i) Exchange-Traded Equity Securities	16 %
(ii) Non Exchange-Traded Equity Securities	0 %
(iii) U.S. Government/Agency Bonds	35 %
(iv) U.S. State and Local Bonds	0 %
(v) *Sovereign Bonds*	0 %
(vi) Investment Grade Corporate Bonds	0 %
(vii) Non-Investment Grade Corporate Bonds	0 %
(viii) Derivatives	0 %
(ix) Securities Issued by Registered Investment Companies or Business Development Companies	27 %
(x) Securities Issued by Pooled Investment Vehicles (other than Registered Investment Companies or Business Development Companies)	1 %
(xi) Cash and Cash Equivalents	21 %
(xii) Other	0 %

Generally describe any assets included in "Other"

SECTION 5.K.(2) Separately Managed Accounts - Use of *Borrowings* and Derivatives

☐ **No information is required to be reported in this Section 5.K.(2) per the instructions of this Section 5.K.(2)**

If your regulatory assets under management attributable to separately managed accounts are at least $10 billion, you should complete Question (a). If your regulatory assets under management attributable to separately managed accounts are at least $500 million but less than $10 billion, you should complete Question (b).

(a) In the table below, provide the following information regarding the separately managed accounts you advise. If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you subadvise. End of year refers to the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment*. Mid-year is the date six months before the end of year date.

In column 1, indicate the regulatory assets under management attributable to separately managed accounts associated with each level of gross notional exposure. For purposes of this table, the gross notional exposure of an account is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any *borrowings* and (b) the *gross notional value* of all derivatives, by (ii) the regulatory assets under management of the account.

In column 2, provide the dollar amount of *borrowings* for the accounts included in column 1.

In column 3, provide aggregate *gross notional value* of derivatives divided by the aggregate regulatory assets under management of the accounts included in column 1 with respect to each category of derivatives specified in 3(a) through (f).

You may, but are not required to, complete the table with respect to any separately managed account with regulatory assets under management of less than $10,000,000.

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

(i) Mid-Year

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***	**(3) Derivative Exposures**					
			(a) *Interest Rate Derivative*	**(b) *Foreign Exchange Derivative***	**(c) *Credit Derivative***	**(d) *Equity Derivative***	**(e) *Commodity Derivative***	**(f) *Other Derivative***
Less than 10%	$	$	%	%	%	%	%	%
10-149%	$	$	%	%	%	%	%	%
150% or more	$	$	%	%	%	%	%	%

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

(ii) End of Year

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***	**(3) Derivative Exposures**					
			(a) *Interest Rate Derivative*	**(b) *Foreign Exchange Derivative***	**(c) *Credit Derivative***	**(d) *Equity Derivative***	**(e) *Commodity Derivative***	**(f) *Other Derivative***
Less than 10%	$	$	%	%	%	%	%	%
10-149%	$	$	%	%	%	%	%	%
150% or more	$	$	%	%	%	%	%	%

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

(b) In the table below, provide the following information regarding the separately managed accounts you advise as of the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment*. If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you subadvise.

In column 1, indicate the regulatory assets under management attributable to separately managed accounts associated with each level of gross notional exposure. For purposes of this table, the gross notional exposure of an account is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any *borrowings* and (b) the *gross notional value* of all derivatives, by (ii) the regulatory assets under management of the account.

In column 2, provide the dollar amount of *borrowings* for the accounts included in column 1.

You may, but are not required to, complete the table with respect to any separately managed accounts with regulatory assets under management of less than $10,000,000.

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***
Less than 10%	$	$
10-149%	$	$
150% or more	$	$

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

SECTION 5.K.(3) Custodians for Separately Managed Accounts

Complete a separate Schedule D Section 5.K.(3) for each custodian that holds ten percent or more of your aggregate separately managed account regulatory assets under management.

(a) Legal name of custodian:

CHARLES SCHWAB & CO., INC.

(b) Primary business name of custodian:

CHARLES SCHWAB & CO., INC.

(c) The location(s) of the custodian's office(s) responsible for *custody* of the assets :

City:	State:	Country:
SAN FRANCISCO	California	United States

		Yes	No
(d)	Is the custodian a *related person* of your firm?	○	◉

(e) If the custodian is a broker-dealer, provide its SEC registration number (if any)

8 - 16514

(f) If the custodian is not a broker-dealer, or is a broker-dealer but does not have an SEC registration number, provide its *legal entity identifier* (if any)

(g) What amount of your regulatory assets under management attributable to separately managed accounts is held at the custodian?

$ 141,764,770

Item 6 Other Business Activities

In this Item, we request information about your firm's other business activities.

A. You are actively engaged in business as a (check all that apply):

- ☐ (1) broker-dealer (registered or unregistered)
- ☐ (2) registered representative of a broker-dealer
- ☐ (3) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (4) futures commission merchant
- ☐ (5) real estate broker, dealer, or agent
- ☐ (6) insurance broker or agent
- ☐ (7) bank (including a separately identifiable department or division of a bank)
- ☐ (8) trust company
- ☐ (9) registered municipal advisor
- ☐ (10) registered security-based swap dealer
- ☐ (11) major security-based swap participant
- ☐ (12) accountant or accounting firm
- ☐ (13) lawyer or law firm
- ☐ (14) other financial product salesperson (specify):

If you engage in other business using a name that is different from the names reported in Items 1.A. or 1.B.(1), complete Section 6.A. of Schedule D.

			Yes	No
B.	(1)	Are you actively engaged in any other business not listed in Item 6.A. (other than giving investment advice)?	○	◉
	(2)	If yes, is this other business your primary business?	○	○

If "yes," describe this other business on Section 6.B.(2) of Schedule D, and if you engage in this business under a different name, provide that name.

		Yes	No
(3)	Do you sell products or provide services other than investment advice to your advisory *clients*?	○	◉

If "yes," describe this other business on Section 6.B.(3) of Schedule D, and if you engage in this business under a different name, provide that name.

SECTION 6.A. Names of Your Other Businesses

No Information Filed

SECTION 6.B.(2) Description of Primary Business

Describe your primary business (not your investment advisory business):

If you engage in that business under a different name, provide that name:

SECTION 6.B.(3) Description of Other Products and Services

Describe other products or services you sell to your *client*. You may omit products and services that you listed in Section 6.B.(2) above.

If you engage in that business under a different name, provide that name:

Item 7 Financial Industry Affiliations

In this Item, we request information about your financial industry affiliations and activities. This information identifies areas in which conflicts of interest may occur between you and your *clients*.

A. This part of Item 7 requires you to provide information about you and your *related persons*, including foreign affiliates. Your *related persons* are all of your *advisory affiliates* and any *person* that is under common *control* with you.

You have a *related person* that is a (check all that apply):

- [x] (1) broker-dealer, municipal securities dealer, or government securities broker or dealer (registered or unregistered)
- [x] (2) other investment adviser (including financial planners)
- [ ] (3) registered municipal advisor
- [ ] (4) registered security-based swap dealer
- [ ] (5) major security-based swap participant
- [ ] (6) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- [ ] (7) futures commission merchant
- [ ] (8) banking or thrift institution
- [ ] (9) trust company
- [ ] (10) accountant or accounting firm
- [ ] (11) lawyer or law firm
- [x] (12) insurance company or agency
- [ ] (13) pension consultant
- [ ] (14) real estate broker or dealer
- [ ] (15) sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
- [ ] (16) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

Note that Item 7.A. should not be used to disclose that some of your employees perform investment advisory functions or are registered representatives of a broker-dealer. The number of your firm's employees who perform investment advisory functions should be disclosed under Item 5.B.(1). The number of your firm's employees who are registered representatives of a broker-dealer should be disclosed under Item 5.B.(2).

Note that if you are filing an umbrella registration, you should not check Item 7.A.(2) with respect to your relying advisers, and you do not have to complete Section 7.A. in Schedule D for your relying advisers. You should complete a Schedule R for each relying adviser.

For each related person, including foreign affiliates that may not be registered or required to be registered in the United States, complete Section 7.A. of Schedule D.

You do not need to complete Section 7.A. of Schedule D for any related person if: (1) you have no business dealings with the related person in connection with advisory services you provide to your clients; (2) you do not conduct shared operations with the related person; (3) you do not refer clients or business to the related person, and the related person does not refer prospective clients or business to you; (4) you do not share supervised persons or premises with the related person; and (5) you have no reason to believe that your relationship with the related person otherwise creates a conflict of interest with your clients.

You must complete Section 7.A. of Schedule D for each related person acting as qualified custodian in connection with advisory services you provide to your clients (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)), regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

SECTION 7.A. Financial Industry Affiliations

Complete a separate Schedule D Section 7.A. for each *related person* listed in Item 7.A.

1. Legal Name of *Related Person*:
   GLADSTONE INSTITUTIONAL ADVISORY LLC

2. Primary Business Name of *Related Person*:
   GLADSTONE WEALTH PARTNERS

3. *Related Person's* SEC File Number (if any) (e.g., 801-, 8-, 866-, 802-)
   801 - 101532
   or
   Other

4. *Related Person's*
   (a) *CRD* Number (if any):
   250787
   (b) CIK Number(s) (if any):

No Information Filed

5. *Related Person* is: (check all that apply)

(a) ☐ broker-dealer, municipal securities dealer, or government securities broker or dealer
(b) ☑ other investment adviser (including financial planners)
(c) ☐ registered municipal advisor
(d) ☐ registered security-based swap dealer
(e) ☐ major security-based swap participant
(f) ☐ commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
(g) ☐ futures commission merchant
(h) ☐ banking or thrift institution
(i) ☐ trust company
(j) ☐ accountant or accounting firm
(k) ☐ lawyer or law firm
(l) ☐ insurance company or agency
(m) ☐ pension consultant
(n) ☐ real estate broker or dealer
(o) ☐ sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
(p) ☐ sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

	Yes	No
6. Do you *control* or are you *controlled* by the *related person*?	○	◉
7. Are you and the *related person* under common *control*?	◉	○
8. (a) Does the *related person* act as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*?	○	◉
(b) If you are registering or registered with the SEC and you have answered "yes," to question 8.(a) above, have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)-2(d)(5)) from the *related person* and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*?	○	○

(c) If you have answered "yes" to question 8.(a) above, provide the location of the *related person's* office responsible for *custody* of your *clients'* assets:

Number and Street 1:
Number and Street 2:
City:
State:
Country:
ZIP+4/Postal Code:
If this address is a private residence, check this box: ☐

	Yes	No
9. (a) If the *related person* is an investment adviser, is it exempt from registration?	○	◉

(b) If the answer is yes, under what exemption?

10. (a) Is the *related person* registered with a *foreign financial regulatory authority* ? ○ ◉

(b) If the answer is yes, list the name and country, in English of each *foreign financial regulatory authority* with which the *related person* is registered.

No Information Filed

11. Do you and the *related person* share any *supervised persons*?	◉	○
12. Do you and the *related person* share the same physical location?	◉	○

1. Legal Name of *Related Person*:
BROKERS INTERNATIONAL FINANCIAL SERVICES, LLC

2. Primary Business Name of *Related Person*:
BROKERS FINANCIAL

3. *Related Person's* SEC File Number (if any) (e.g., 801-, 8-, 866-, 802-)
801 - 69742
or
Other

4. *Related Person's*

(a) *CRD* Number (if any):
139627

(b) CIK Number(s) (if any):

No Information Filed

5. *Related Person* is: (check all that apply)

(a) ☑ broker-dealer, municipal securities dealer, or government securities broker or dealer
(b) ☑ other investment adviser (including financial planners)
(c) ☐ registered municipal advisor
(d) ☐ registered security-based swap dealer

(e) ☐ major security-based swap participant
(f) ☐ commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
(g) ☐ futures commission merchant
(h) ☐ banking or thrift institution
(i) ☐ trust company
(j) ☐ accountant or accounting firm
(k) ☐ lawyer or law firm
(l) ☑ insurance company or agency
(m) ☐ pension consultant
(n) ☐ real estate broker or dealer
(o) ☐ sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
(p) ☐ sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

	Yes	No
6. Do you *control* or are you *controlled* by the *related person*?	○	◉
7. Are you and the *related person* under common *control*?	◉	○
8. (a) Does the *related person* act as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*?	○	◉
(b) If you are registering or registered with the SEC and you have answered "yes," to question 8.(a) above, have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)-2(d)(5)) from the *related person* and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*?	○	○

(c) If you have answered "yes" to question 8.(a) above, provide the location of the *related person's* office responsible for *custody* of your *clients'* assets:

Number and Street 1: Number and Street 2:
City: State: Country: ZIP+4/Postal Code:
If this address is a private residence, check this box: ☐

	Yes	No
9. (a) If the *related person* is an investment adviser, is it exempt from registration?	○	◉
(b) If the answer is yes, under what exemption?		
10. (a) Is the *related person* registered with a *foreign financial regulatory authority* ?	○	◉

(b) If the answer is yes, list the name and country, in English of each *foreign financial regulatory authority* with which the *related person* is registered.

No Information Filed

11. Do you and the *related person* share any *supervised persons*?	◉	○
12. Do you and the *related person* share the same physical location?	◉	○

1. Legal Name of *Related Person*:
SUPERIOR PERFORMERS INC.

2. Primary Business Name of *Related Person*:
SUPERIOR PERFORMERS INC. D/B/A NATIONAL AGENTS ALLIANCE

3. *Related Person's* SEC File Number (if any) (e.g., 801-, 8-, 866-, 802-)
-
or
Other

4. *Related Person's*
(a) *CRD* Number (if any):

(b) CIK Number(s) (if any):

No Information Filed

5. *Related Person* is: (check all that apply)
(a) ☐ broker-dealer, municipal securities dealer, or government securities broker or dealer
(b) ☐ other investment adviser (including financial planners)
(c) ☐ registered municipal advisor
(d) ☐ registered security-based swap dealer
(e) ☐ major security-based swap participant
(f) ☐ commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
(g) ☐ futures commission merchant
(h) ☐ banking or thrift institution
(i) ☐ trust company
(j) ☐ accountant or accounting firm

(k) ☐ lawyer or law firm
(l) ☑ insurance company or agency
(m) ☐ pension consultant
(n) ☐ real estate broker or dealer
(o) ☐ sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
(p) ☐ sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

		Yes	No
6.	Do you *control* or are you *controlled* by the *related person*?	○	◉
7.	Are you and the *related person* under common *control*?	◉	○
8. (a)	Does the *related person* act as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*?	○	◉
(b)	If you are registering or registered with the SEC and you have answered "yes," to question 8.(a) above, have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)-2(d)(5)) from the *related person* and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*?	○	○

(c) If you have answered "yes" to question 8.(a) above, provide the location of the *related person's* office responsible for *custody* of your *clients'* assets:

Number and Street 1:
Number and Street 2:
City: State: Country: ZIP+4/Postal Code:
If this address is a private residence, check this box: ☐

		Yes	No
9. (a)	If the *related person* is an investment adviser, is it exempt from registration?	○	◉
(b)	If the answer is yes, under what exemption?		
10. (a)	Is the *related person* registered with a *foreign financial regulatory authority* ?	○	◉

(b) If the answer is yes, list the name and country, in English of each *foreign financial regulatory authority* with which the *related person* is registered.

No Information Filed

11.	Do you and the *related person* share any *supervised persons*?	○	◉
12.	Do you and the *related person* share the same physical location?	○	◉

1. Legal Name of *Related Person*:
ANNEXUS SECURITIES, LLC

2. Primary Business Name of *Related Person*:
ANNEXUS SECURITIES, LLC

3. *Related Person's* SEC File Number (if any) (e.g., 801-, 8-, 866-, 802-)
8 - 69829
or
Other

4. *Related Person's*
(a) *CRD* Number (if any):
285198
(b) CIK Number(s) (if any):

No Information Filed

5. *Related Person* is: (check all that apply)
(a) ☑ broker-dealer, municipal securities dealer, or government securities broker or dealer
(b) ☐ other investment adviser (including financial planners)
(c) ☐ registered municipal advisor
(d) ☐ registered security-based swap dealer
(e) ☐ major security-based swap participant
(f) ☐ commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
(g) ☐ futures commission merchant
(h) ☐ banking or thrift institution
(i) ☐ trust company
(j) ☐ accountant or accounting firm
(k) ☐ lawyer or law firm
(l) ☐ insurance company or agency
(m) ☐ pension consultant
(n) ☐ real estate broker or dealer
(o) ☐ sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
(p) ☐ sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

	Yes	No
6. Do you *control* or are you *controlled* by the *related person*?	○	◉
7. Are you and the *related person* under common *control*?	◉	○
8. (a) Does the *related person* act as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*?	○	◉
(b) If you are registering or registered with the SEC and you have answered "yes," to question 8.(a) above, have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)-2(d)(5)) from the *related person* and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*?	○	○

(c) If you have answered "yes" to question 8.(a) above, provide the location of the *related person's* office responsible for *custody* of your *clients'* assets:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

If this address is a private residence, check this box: ☐

	Yes	No
9. (a) If the *related person* is an investment adviser, is it exempt from registration?	○	○
(b) If the answer is yes, under what exemption?		
10. (a) Is the *related person* registered with a *foreign financial regulatory authority* ?	○	◉

(b) If the answer is yes, list the name and country, in English of each *foreign financial regulatory authority* with which the *related person* is registered.

No Information Filed

11. Do you and the *related person* share any *supervised persons*?	◉	○
12. Do you and the *related person* share the same physical location?	○	◉

Item 7 *Private Fund* Reporting

	Yes	No
B. Are you an adviser to any *private fund*?	○	◉

If "yes," then for each private fund that you advise, you must complete a Section 7.B.(1) of Schedule D, except in certain circumstances described in the next sentence and in Instruction 6 of the Instructions to Part 1A. If you are registered or applying for registration with the SEC or reporting as an SEC exempt reporting adviser, and another SEC-registered adviser or SEC exempt reporting adviser reports this information with respect to any such private fund in Section 7.B.(1) of Schedule D of its Form ADV (e.g., if you are a subadviser), do not complete Section 7.B.(1) of Schedule D with respect to that private fund. You must, instead, complete Section 7.B.(2) of Schedule D.

In either case, if you seek to preserve the anonymity of a private fund client by maintaining its identity in your books and records in numerical or alphabetical code, or similar designation, pursuant to rule 204-2(d), you may identify the private fund in Section 7.B.(1) or 7.B.(2) of Schedule D using the same code or designation in place of the fund's name.

SECTION 7.B.(1) *Private Fund* Reporting

No Information Filed

SECTION 7.B.(2) *Private Fund* Reporting

No Information Filed

Item 8 Participation or Interest in *Client* Transactions

In this Item, we request information about your participation and interest in your *clients*' transactions. This information identifies additional areas in which conflicts of interest may occur between you and your *clients*. Newly-formed advisers should base responses to these questions on the types of participation and interest that you expect to engage in during the next year.

Like Item 7, Item 8 requires you to provide information about you and your *related persons*, including foreign affiliates.

Proprietary Interest in *Client* Transactions

A. Do you or any *related person*:	Yes	No
(1) buy securities for yourself from advisory *clients*, or sell securities you own to advisory *clients* (principal transactions)?	○	◉
(2) buy or sell for yourself securities (other than shares of mutual funds) that you also recommend to advisory *clients*?	◉	○
(3) recommend securities (or other investment products) to advisory *clients* in which you or any *related person* has some other proprietary (ownership) interest (other than those mentioned in Items 8.A.(1) or (2))?	○	◉

Sales Interest in *Client* Transactions

		Yes	No
B.	Do you or any *related person*:		
(1)	as a broker-dealer or registered representative of a broker-dealer, execute securities trades for brokerage customers in which advisory *client* securities are sold to or bought from the brokerage customer (agency cross transactions)?	○	◉
(2)	recommend to advisory *clients*, or act as a purchaser representative for advisory *clients* with respect to, the purchase of securities for which you or any *related person* serves as underwriter or general or managing partner?	○	◉
(3)	recommend purchase or sale of securities to advisory *clients* for which you or any *related person* has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer)?	○	◉

Investment or Brokerage Discretion

		Yes	No
C.	Do you or any *related person* have *discretionary authority* to determine the:		
(1)	securities to be bought or sold for a *client's* account?	◉	○
(2)	amount of securities to be bought or sold for a *client's* account?	◉	○
(3)	broker or dealer to be used for a purchase or sale of securities for a *client's* account?	○	◉
(4)	commission rates to be paid to a broker or dealer for a *client's* securities transactions?	○	◉
D.	If you answer "yes" to C.(3) above, are any of the brokers or dealers *related persons*?	○	○
E.	Do you or any *related person* recommend brokers or dealers to *clients*?	◉	○
F.	If you answer "yes" to E. above, are any of the brokers or dealers *related persons*?	◉	○
G. (1)	Do you or any *related person* receive research or other products or services other than execution from a broker-dealer or a third party ("soft dollar benefits") in connection with *client* securities transactions?	○	◉
(2)	If "yes" to G.(1) above, are all the "soft dollar benefits" you or any *related persons* receive eligible "research or brokerage services" under section 28(e) of the Securities Exchange Act of 1934?	○	○
H. (1)	Do you or any *related person*, directly or indirectly, compensate any *person* that is not an *employee* for *client* referrals?	◉	○
(2)	Do you or any *related person*, directly or indirectly, provide any *employee* compensation that is specifically related to obtaining *clients* for the firm (cash or non-cash compensation in addition to the *employee's* regular salary)?	○	◉
I.	Do you or any *related person*, including any *employee*, directly or indirectly, receive compensation from any *person* (other than you or any *related person*) for *client* referrals?	○	◉

In your response to Item 8.I., do not include the regular salary you pay to an employee.

In responding to Items 8.H. and 8.I., consider all cash and non-cash compensation that you or a related person gave to (in answering Item 8.H.) or received from (in answering Item 8.I.) any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals.

Item 9 Custody

In this Item, we ask you whether you or a *related person* has *custody* of *client* (other than *clients* that are investment companies registered under the Investment Company Act of 1940) assets and about your custodial practices.

		Yes	No
A. (1)	Do you have *custody* of any advisory *clients'*:		
(a)	cash or bank accounts?	○	◉
(b)	securities?	○	◉

If you are registering or registered with the SEC, answer "No" to Item 9.A.(1)(a) and (b) if you have custody solely because (i) you deduct your advisory fees directly from your clients' accounts, or (ii) a related person has custody of client assets in connection with advisory services you provide to clients, but you have overcome the presumption that you are not operationally independent (pursuant to Advisers Act rule 206(4)-2(d)(5)) from the related person.

(2) If you checked "yes" to Item 9.A.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which you have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $	(b)

If you are registering or registered with the SEC and you have custody solely because you deduct your advisory fees directly from your clients' accounts, do not include the amount of those assets and the number of those clients in your response to Item 9.A.(2). If your related person has custody of client assets in connection with advisory services you provide to clients, do not include the amount of those assets and number of those clients in your response to 9.A.(2). Instead, include that information in your response to Item 9.B.(2).

		Yes	No
B. (1)	In connection with advisory services you provide to *clients*, do any of your *related persons* have *custody* of any of your advisory *clients'*:		
(a)	cash or bank accounts?	○	◉
(b)	securities?	○	◉

You are required to answer this item regardless of how you answered Item 9.A.(1)(a) or (b).

(2) If you checked "yes" to Item 9.B.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which your *related persons* have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $	(b)

C. If you or your *related persons* have *custody* of *client* funds or securities in connection with advisory services you provide to *clients*, check all the following that apply:

(1) A qualified custodian(s) sends account statements at least quarterly to the investors in the pooled investment vehicle(s) you manage. ☐

(2) An *independent public accountant* audits annually the pooled investment vehicle(s) that you manage and the audited financial statements are distributed to the investors in the pools. ☐

(3) An *independent public accountant* conducts an annual surprise examination of *client* funds and securities. ☐

(4) An *independent public accountant* prepares an internal control report with respect to custodial services when you or your *related persons* are qualified custodians for *client* funds and securities. ☐

If you checked Item 9.C.(2), C.(3) or C.(4), list in Section 9.C. of Schedule D the accountants that are engaged to perform the audit or examination or prepare an internal control report. (If you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.(1) of Schedule D).

D. Do you or your *related person(s)* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*?

	Yes	No
(1) you act as a qualified custodian	○	◉
(2) your *related person(s)* act as qualified custodian(s)	○	◉

If you checked "yes" to Item 9.D.(2), all related persons that act as qualified custodians (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)) must be identified in Section 7.A. of Schedule D, regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

E. If you are filing your *annual updating amendment* and you were subject to a surprise examination by an *independent public accountant* during your last fiscal year, provide the date (MM/YYYY) the examination commenced:

F. If you or your *related persons* have *custody* of *client* funds or securities, how many *persons*, including, but not limited to, you and your *related persons,* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients?*
3

SECTION 9.C. *Independent Public Accountant*

No Information Filed

Item 10 Control Persons

In this Item, we ask you to identify every *person* that, directly or indirectly, *controls* you. If you are filing an *umbrella registration*, the information in Item 10 should be provided for the *filing adviser* only.

If you are submitting an initial application or report, you must complete Schedule A and Schedule B. Schedule A asks for information about your direct owners and executive officers. Schedule B asks for information about your indirect owners. If this is an amendment and you are updating information you reported on either Schedule A or Schedule B (or both) that you filed with your initial application or report, you must complete Schedule C.

	Yes	No
A. Does any *person* not named in Item 1.A. or Schedules A, B, or C, directly or indirectly, *control* your management or policies?	○	◉

If yes, complete Section 10.A. of Schedule D.

B. If any *person* named in Schedules A, B, or C or in Section 10.A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934, please complete Section 10.B. of Schedule D.

SECTION 10.A. *Control Persons*

No Information Filed

SECTION 10.B. *Control Person* Public Reporting Companies

No Information Filed

Item 11 Disclosure Information

In this Item, we ask for information about your disciplinary history and the disciplinary history of all your *advisory affiliates*. We use this information to determine whether to grant your application for registration, to decide whether to revoke your registration or to place limitations on your activities as an investment adviser, and to identify potential problem areas to focus on during our on-site examinations. One event may result in "yes" answers to more than one of the questions below. In accordance with General Instruction 5 to Form ADV, "you" and "your" include the *filing adviser* and all *relying advisers* under an *umbrella registration*.

Your *advisory affiliates* are: (1) all of your current *employees* (other than *employees* performing only clerical, administrative, support or similar functions); (2) all of your officers, partners, or directors (or any *person* performing similar functions); and (3) all *persons* directly or indirectly *controlling* you or *controlled* by you. If you are a "separately identifiable department or division" (SID) of a bank, see the Glossary of Terms to determine who your *advisory affiliates* are.

If you are registered or registering with the SEC or if you are an exempt reporting adviser, you may limit your disclosure of any event listed in Item 11 to ten years following the date of the event. If you are registered or registering with a state, you must respond to the questions as posed; you may, therefore, limit your disclosure to ten years following the date of an event only in responding to Items 11.A.(1), 11.A.(2), 11.B.(1), 11.B.(2), 11.D.(4), and 11.H.(1)(a). For purposes of calculating this ten-year period, the date of an event is the date the final order, judgment, or decree was entered, or the date any rights of appeal from preliminary orders, judgments, or decrees lapsed.

You must complete the appropriate Disclosure Reporting Page ("DRP") for "yes" answers to the questions in this Item 11.

	Yes	No
Do any of the events below involve you or any of your *supervised persons*?	○	◉

For "yes" answers to the following questions, complete a Criminal Action DRP:

	Yes	No
A. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*?	○	◉
(2) been *charged* with any *felony*?	○	◉

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.A.(2) to charges that are currently pending.

B. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a *misdemeanor* involving: investments or an *investment-related* business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	○	◉
(2) been *charged* with a *misdemeanor* listed in Item 11.B.(1)?	○	◉

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.B.(2) to charges that are currently pending.

For "yes" answers to the following questions, complete a Regulatory Action DRP:

	Yes	No
C. Has the SEC or the Commodity Futures Trading Commission (CFTC) ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	○	◉
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of SEC or CFTC regulations or statutes?	○	◉
(3) *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	◉
(4) entered an *order* against you or any *advisory affiliate* in connection with *investment-related* activity?	○	◉
(5) imposed a civil money penalty on you or any *advisory affiliate*, or *ordered* you or any *advisory affiliate* to cease and desist from any activity?	○	◉
D. Has any other federal regulatory agency, any state regulatory agency, or any *foreign financial regulatory authority*:		
(1) ever *found* you or any *advisory affiliate* to have made a false statement or omission, or been dishonest, unfair, or unethical?	○	◉
(2) ever *found* you or any *advisory affiliate* to have been *involved* in a violation of *investment-related* regulations or statutes?	○	◉
(3) ever *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	◉
(4) in the past ten years, entered an *order* against you or any *advisory affiliate* in connection with an *investment-related* activity?	○	◉
(5) ever denied, suspended, or revoked your or any *advisory affiliate's* registration or license, or otherwise prevented you or any *advisory affiliate*, by *order*, from associating with an *investment-related* business or restricted your or any *advisory affiliate's* activity?	○	◉
E. Has any *self-regulatory organization* or commodities exchange ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	○	◉
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the SEC)?	○	◉
(3) *found* you or any *advisory affiliate* to have been the cause of an *investment-related* business having its authorization to do business denied,	○	◉

suspended, revoked, or restricted?

(4) disciplined you or any *advisory affiliate* by expelling or suspending you or the *advisory affiliate* from membership, barring or suspending you or the *advisory affiliate* from association with other members, or otherwise restricting your or the *advisory affiliate's* activities? ○ ◉

F. Has an authorization to act as an attorney, accountant, or federal contractor granted to you or any *advisory affiliate* ever been revoked or suspended? ○ ◉

G. Are you or any *advisory affiliate* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of Item 11.C., 11.D., or 11.E.? ○ ◉

For "yes" answers to the following questions, complete a Civil Judicial Action DRP:

H.		Yes	No
(1)	Has any domestic or foreign court:		
	(a) in the past ten years, *enjoined* you or any *advisory affiliate* in connection with any *investment-related* activity?	○	◉
	(b) ever *found* that you or any *advisory affiliate* were *involved* in a violation of *investment-related* statutes or regulations?	○	◉
	(c) ever dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you or any *advisory affiliate* by a state or *foreign financial regulatory authority*?	○	◉
(2)	Are you or any *advisory affiliate* now the subject of any civil *proceeding* that could result in a "yes" answer to any part of Item 11.H.(1)?	○	◉

Item 12 Small Businesses

The SEC is required by the Regulatory Flexibility Act to consider the effect of its regulations on small entities. In order to do this, we need to determine whether you meet the definition of "small business" or "small organization" under rule 0-7.

Answer this Item 12 only if you are registered or registering with the SEC **and** you indicated in response to Item 5.F.(2)(c) that you have regulatory assets under management of less than $25 million. You are not required to answer this Item 12 if you are filing for initial registration as a state adviser, amending a current state registration, or switching from SEC to state registration.

For purposes of this Item 12 only:

- Total Assets refers to the total assets of a firm, rather than the assets managed on behalf of *clients*. In determining your or another *person's* total assets, you may use the total assets shown on a current balance sheet (but use total assets reported on a consolidated balance sheet with subsidiaries included, if that amount is larger).
- *Control* means the power to direct or cause the direction of the management or policies of a *person*, whether through ownership of securities, by contract, or otherwise. Any *person* that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of another *person* is presumed to *control* the other *person*.

	Yes	No
A. Did you have total assets of $5 million or more on the last day of your most recent fiscal year?	○	○

If "yes," you do not need to answer Items 12.B. and 12.C.

B.	Do you:		
(1)	*control* another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year?	○	○
(2)	*control* another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	○	○
C.	Are you:		
(1)	*controlled* by or under common *control* with another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year?	○	○
(2)	*controlled* by or under common *control* with another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	○	○

Schedule A

Direct Owners and Executive Officers

1. Complete Schedule A only if you are submitting an initial application or report. Schedule A asks for information about your direct owners and executive officers. Use Schedule C to amend this information.
2. Direct Owners and Executive Officers. List below the names of:
   (a) each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer(Chief Compliance Officer is required if you are registered or applying for registration and cannot be more than one individual), director, and any other individuals with similar status or functions;
   (b) if you are organized as a corporation, each shareholder that is a direct owner of 5% or more of a class of your voting securities, unless you are a public reporting company (a company subject to Section 12 or 15(d) of the Exchange Act);
   Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of your voting securities. For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

(c) if you are organized as a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of your capital;

(d) in the case of a trust that directly owns 5% or more of a class of your voting securities, or that has the right to receive upon dissolution, or has contributed, 5% or more of your capital, the trust and each trustee; and

(e) if you are organized as a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of your capital, and (ii) if managed by elected managers, all elected managers.

3. Do you have any indirect owners to be reported on Schedule B? (•) Yes ( ) No

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner or executive officer is an individual.

5. Complete the Title or Status column by entering board/management titles; status as partner, trustee, sole proprietor, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: NA - less than 5% B - 10% but less than 25% D - 50% but less than 75%
A - 5% but less than 10% C - 25% but less than 50% E - 75% or more

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

(c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired MM/YYYY	Ownership Code	*Control Person*	PR	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
NORRIS, CHRISTOPHER, STUART	I	PRESIDENT	07/2017	NA	Y	N	4324480
SLOMIN, ROBERT, PAUL	I	CHIEF COMPLIANCE OFFICER	02/2024	NA	Y	N	3043306
AUKES, BRIAN, EDWARD	I	CHIEF ADMINISTRATIVE OFFICER	02/2024	NA	Y	N	2712193
OSBY, ANDREW, ALLEN	I	CHIEF INVESTMENT OFFICER	02/2024	NA	Y	N	4202621
MUJDZIC, BELMA	I	CHIEF OPERATIONS OFFICER	02/2024	NA	Y	N	4629710
INTEGRITY WEALTH, LLC	DE	MEMBER	06/2024	E	Y	N	

Schedule B

Indirect Owners

1. Complete Schedule B only if you are submitting an initial application or report. Schedule B asks for information about your indirect owners; you must first complete Schedule A, which asks for information about your direct owners. Use Schedule C to amend this information.

2. Indirect Owners. With respect to each owner listed on Schedule A (except individual owners), list below:

(a) in the case of an owner that is a corporation, each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation;

For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

(b) in the case of an owner that is a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 25% or more of the partnership's capital;

(c) in the case of an owner that is a trust, the trust and each trustee; and

(d) in the case of an owner that is a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Continue up the chain of ownership listing all 25% owners at each level. Once a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act) is reached, no further ownership information need be given.

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner is an individual.

5. Complete the Status column by entering the owner's status as partner, trustee, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: C - 25% but less than 50% E - 75% or more
D - 50% but less than 75% F - Other (general partner, trustee, or elected manager)

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

(c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Entity in Which Interest is Owned	Status	Date Status Acquired MM/YYYY	Ownership Code	*Control Person*	PR	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
INTEGRITY, LLC	DE	INTEGRITY	INDIRECT	07/2020	E	Y	N	

		MARKETING PARENT, LLC	OWNER					
INTEGRITY MARKETING PARENT, LLC	DE	INTEGRITY MARKETING INTERMEDIATE, LLC	INDIRECT OWNER	07/2020	E	Y	N	
INTEGRITY MARKETING INTERMEDIATE, LLC	DE	INTEGRITY MARKETING ACQUISITION, LLC	INDIRECT OWNER	07/2020	E	Y	N	
INTEGRITY MARKETING ACQUISITION, LLC	DE	INTEGRITY MARKETING PARTNERS, LLC	INDIRECT OWNER	07/2020	E	Y	N	
INTEGRITY MARKETING PARTNERS, LLC	DE	INTEGRITY WEALTH, LLC	INDIRECT OWNER	06/2024	E	Y	N	

Schedule D - Miscellaneous

You may use the space below to explain a response to an Item or to provide any other information.

Schedule R

No Information Filed

DRP Pages

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

Part 2

Exemption from brochure delivery requirements for SEC-registered advisers

SEC rules exempt SEC-registered advisers from delivering a firm brochure to some kinds of clients. If these exemptions excuse you from delivering a brochure to *all* of your advisory clients, you do not have to prepare a brochure.

	Yes	No
Are you exempt from delivering a brochure to all of your clients under these rules?	○	◉

If no, complete the ADV Part 2 filing below.

Amend, retire or file new brochures:

Brochure ID	Brochure Name	Brochure Type(s)
392683	IAS WRAP BROCHURE	Individuals, High net worth individuals, Foundations/charities, Other institutional, Wrap program
392684	IAS FORM ADV, PART 2A BROCHURE	Individuals, High net worth individuals, Foundations/charities, Other institutional, Financial Planning Services, Selection of Other Advisers/Solicitors

Part 3

CRS	Type(s)	Affiliate Info	Retire

	Investment Advisor		

Execution Pages

DOMESTIC INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the Secretary of State or other legally designated officer, of the state in which you maintain your *principal office and place of business* and any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding*, or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are submitting a *notice filing*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: ROBERT SLOMIN	Date: MM/DD/YYYY 06/25/2024
Printed Name: ROBERT SLOMIN	Title: CHIEF COMPLIANCE OFFICER
Adviser *CRD* Number: 288817	

NON-RESIDENT INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint each of the Secretary of the SEC, and the Secretary of State or other legally designated officer, of any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such persons may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of any state in which you are submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

3. *Non-Resident* Investment Adviser Undertaking Regarding Books and Records

By signing this Form ADV, you also agree to provide, at your own expense, to the U.S. Securities and Exchange Commission at its principal office in Washington D.C., at any Regional or District Office of the Commission, or at any one of its offices in the United States, as specified by the Commission, correct, current, and complete copies of any or all records that you are required to maintain under Rule 204-2 under the Investment Advisers Act of 1940. This undertaking shall be binding upon you, your heirs, successors and assigns, and any *person* subject to your written irrevocable consents or powers of attorney or any of your general partners and *managing agents*.

Signature

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Signature:

Date: MM/DD/YYYY

Printed Name:

Title:

Adviser *CRD* Number:
288817

No. 14-05-00363-CV
Court of Appeals of Texas, Fourteenth District, Houston

Kennedy Ship & Repair, L.P. v. Pham

210 S.W.3d 11 (Tex. App. 2006)
Decided Nov 2, 2006

No. 14-05-00363-CV.

October 5, 2006. Rehearing Overruled November 12, 2006. *12

Appeal from the 56th District Court, Galveston County, Norma Jo Venso J. *13

George W. Vie, III, Galveston, Christopher Tran, Chan Minh Nguyen, Houston, for appellant.

Stephen A. Mendel, Houston, for appellee.

Panel consists of Justices HUDSON, FOWLER, and SEYMORE.

*15

OPINION

J. HARVEY HUDSON, Justice.

Appellant, Kennedy Ship Repair, L.P. ("Kennedy Ship"), appeals the judgment entered in favor of appellee, Dranson Charlie Pham ("Pham"), on his breach of contract claim. We affirm.

I. BACKGROUND

On January 4, 2001, Kennedy Ship and Pham entered into a contract under which Kennedy Ship agreed to build a commercial shrimp trawler for Pham for a purchase price of $808,000. The contract provided for a delivery date of June 2001, in time for shrimping season. In January 2001, Pham made a $50,000 down payment on the shrimp trawler. The contract provided that the first payment of $50,000 — after the down payment — was due "when hull erection [is] completed," the second payment of $50,000 was due one month from the date of the first payment, the third payment of $50,000 was due two months from the date of the first payment, and the fourth payment of $608,000 was due "upon completion from bank loan."

On April 12, 2001, Kennedy Ship wrote Pham that the hull had been erected and Pham was $100,000 overdue on his contract. On April 18, 2001, a $50,000 payment was made to Kennedy Ship on behalf of Pham. On July 23, 2001, Kennedy Ship wrote Pham again that he was $100,000 overdue on his contract and his "hull position has been lost unless payment arrangements have been made and agreed upon in the next fifteen days." On August 21, 2001, Kennedy Ship informed Pham that it was "proceeding with the construction of the hull for a new purchaser." In September 2001, Pham tried to make a payment on the shrimp trawler, but was told by Chris Kennedy, the general partner of Kennedy Ship, that the hull had been transferred to another purchaser. *16

Pham sued Kennedy Ship for breach of contract and Kennedy Ship counterclaimed against Pham for breach of contract.[1] The jury found Kennedy Ship had failed to comply with its agreement to build a commercial shrimp trawler for Pham, and Pham had failed to comply with his agreement to purchase a commercial shrimp trawler from Kennedy Ship. The jury found Pham's failure to comply was excused by Kennedy Ship's previous failure to comply with a material obligation of the same agreement, but Kennedy Ship's failure to

comply was not excused. The jury awarded Pham $100,000, which was the amount Pham had paid to Kennedy Ship, on his breach of contract claim.

[1] Pham also brought claims for violations of the Texas Deceptive Trade Practices Act ("DTPA"), promissory estoppel, fraud, and violations of civil rights under 42 U.S.C. §§ 1981. Pham also sued Chris Kennedy, individually, and another company related to Kennedy Ship. Kennedy also counterclaimed against Pham for fraudulent inducement.

On appeal, Kennedy Ship claims (1) the evidence is legally and factually insufficient to support the jury's finding that it breached its agreement with Pham, (2) the jury's finding that it's performance of the contract was not excused from performance is against the great weight and preponderance of the evidence, (3) the evidence is factually insufficient to support the jury's finding that Pham's performance of the contract was excused, and (4) the trial court erred in not including an instruction on material breach in the jury charge.

II. KENNEDY SHIP'S BREACH

A. Legal Sufficiency

17 In its first issue, Kennedy ship challenges the legal sufficiency of the evidence to support the jury's finding that it breached the agreement to build a commercial shrimp trawler for Pham. When reviewing the legal sufficiency of the evidence, we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *Id.* at 827. The evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review. *Id.*

Because the appellate court is not the fact finder, it may not substitute its own judgment for that of the trier of fact, even if a different answer could be reached on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *Grey Wolf Drilling Co. v. Boutte*, 154 S.W.3d 725, 733-34 (Tex.App.-Houston [14th Dist.] 2004, pet. dism'd by agr.). The amount of evidence necessary to affirm the judgment is far less than necessary to reverse a judgment. *Bracewell v. Bracewell*, 20 S.W.3d 14, 23 (Tex.App.-Houston [14th Dist.] 2000, no pet.).

1. American Bureau of Shipping Standards

Kennedy Ship contends the evidence is not legally to support a finding that it breached the contract because the shrimp trawler was not classed and certified by the American Bureau of Shipping ("ABS"). The American Bureau of Shipping ("ABS") is a classification society whose purpose is to promote certain standards within the shipping industry.

The contract between Kennedy Ship and Pham provided:

Classifications and Certificates:

> Admeasurement under 200 gross tons. Built to ABS standards.

*17

Although neither party pleaded ambiguity, the trial court determined the above quoted contract term was ambiguous and, accordingly, instructed the jury:

> It is your duty to interpret the following language of the agreement: "Classifications and Certificates: Built to ABS standards[.]"

You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties and any trade customs.[2]

[2] The trial court may conclude a contract is ambiguous, even in the absence of such pleading by either party, and submit the ambiguity to the jury if it was tried by consent of the parties. *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993) (citing TEXR. CIV. P. 67). Pham objected to the trial court's determination that the language with regard to ABS standards is ambiguous and the inclusion of the instruction in the jury charge. The trial court overruled Pham's objection. Neither Kennedy Ship nor Pham complain on appeal that the trial court erred in finding the contract provision regarding ABS standards to be ambiguous and submitting the ambiguity to the jury.

Kennedy Ship argues that the plain language of the contract states it would build the boat to ABS standards, not that the boat would be classified or certified by the ABS as argued by Pham. Even under Kennedy Ship's interpretation that it was not obligated to have the vessel ABS classed and certified, but only that it would build it to ABS standards, we conclude the evidence is legally sufficient to support a jury finding that Kennedy Ship did not build the shrimp trawler to ABS standards.

Ken Tamura, the manager of the Rules and Standards Department at the ABS, described the process for obtaining ABS classification and certification for a vessel. First, an application of the classification request must be submitted to the ABS, which reviews it to make sure it is appropriate for classification and the ABS issues the verification. The design for the vessel is then submitted to the ABS for its review to make sure it is in compliance with ABS rules and standards. After the ABS approves the design and the vessel is under construction, an ABS surveyor is stationed periodically at the construction site to verify that the construction complies with the approved design and that materials used in the construction meet ABS standards. After the construction has been completed, the ABS surveyor issues a certificate stating the vessel complies with ABS standards. Tamura stated that a builder can use ABS standards without having the vessel actually classified by the ABS, but the ABS will not have any involvement.

Chris Kennedy testified he told the naval architecture firm, DNC, located in Mobile, Alabama, that although the vessel would not be ABS classed, he still wanted the vessel designed to meet ABS standards. Dean Hartmann, the naval architect who designed this shrimp trawler, testified the boat was designed to comply with U.S. Coast Guard safety regulations, but admitted Coast Guard rules are not identical to the ABS rules and regulations for the construction of vessels, and a boat built to Coast Guard specifications or requirements may not necessarily meet ABS requirements.

Hartmann stated that he used ABS rules for building and classing steel vessels under 90 meters, but not every section in the rules would apply to this vessel. Hartmann testified the boat's longitudinal strength, shell plating, deck plating, bottom structure, side frames, keel, beams, deck girders, deck traverses, pillars, deep tanks, stern frames, shaft struts, box rails, dream ports, port lights, window ventilators, and tank vents meet
18 ABS standards. *18

Hartmann said the hull structure was intended to meet ABS standards, but he did not claim other aspects of the boat complied with ABS standards. For example, Hartmann could not testify that certain systems, i.e., the electrical system, piping, machinery, outriggers, sewer pipes, refrigeration,

and hydraulics met ABS standards. In fact, many of the hull accouterments were not included in Hartmann's plans, but, instead, were yard-designed.

Sonny Bosworth, who worked for Kennedy Ship as a supervisor or "troubleshooter," was involved in the construction of the first two shrimp trawlers Kennedy Ship had under contract, but not the one for Pham. However, according to Hartmann, all the shrimp trawlers were based on the same design and should have been identical. Thus, Hartman said he would expect a design defect to carry through the entire line of vessels. Bosworth testified there were a number of problems with the design of the shrimp trawler. For example, Bosworth explained there was too much water and fuel at the bow with no buoyancy, i.e., an air tank at the bow to carry the weight of the boat. According to Bosworth, this had to be modified because if the front tank had been filled with fuel and water, the boat would not have been able to carry the weight.

Hartmann disagreed with Bosworth with regard to buoyancy. Hartmann explained there was no buoyancy chamber in the original design because there is no such thing as a buoyancy chamber. Hartmann testified the vessel did well in the stability test. However, when Hartmann conducted the stability test on one of the boats based on his design, he was not aware that a "buoyancy chamber had been cut into the design" and the vessel had been modified in accordance with Bosworth's recommendation.

Bosworth also testified there was a problem with the motor bed. The motor bed is the framework on which the engine is placed. The engine did not fit in the motor bed properly and Bosworth had to cut the motor bed out in the back and modify the motor bed so that the motor could be lined up properly with the propeller shaft. Hartmann disagreed with Bosworth that there was any problem with the motor bed or that the engine would not fit.

Hartmann's design specified "grade A 36" steel. However, not all grade A 36 steel is approved by the ABS. The ABS inspects, and stamps its approval on, all steel used in ABS classed vessels. Hartmann did not know if any of the steel used in the construction of Kennedy Ship's boats was actually approved by ABS and the ABS did not survey the construction of these vessels.

Bosworth testified not all of the steel was ABS certified because it did not have the ABS markings. On the other hand, Kennedy testified all the steel on the vessel was ABS certified. Kennedy stated that the steel was stamped as certified by the ABS, but explained why the certification stamps would not be visible:

> You wouldn't be able to see it at this time. There are stamps, but after it's painted you wouldn't see it. And we also receive paperwork from the steel company. In this case we purchased all the plates from O'Neal, and they would supply us ABS A36 sheets that would guarantee that it was ABS plate. . . . That's all the plate that makes the entire vessel: Around the hull, deckhouse, pilothouse, main deck, interior bulkheads, everything.

Hartmann testified the ABS has very specific rules and regulations with respect to the types of welds used in the construction of vessels and its inspection process regarding welds. Hartmann explained *19 that his design did not provide any specifications comparable to ABS specifications regarding welds and he has no way of knowing whether the welds on the vessel are compliant with ABS standards.

19

Finally, a survey of one of the shrimp trawlers built by Kennedy Ship noted some problems, including the vessel's inability to carry a "load line," the incorrect mounting of the generators that could potentially damage the main engines' bearings, and the aft engine room bulkhead's not being watertight:

> Vessel's builder reports that the vessel hull is built to American Bureau of Shipping standards although the machinery is not classed nor will she carry a load line.
>
> * * *
>
> Vessel's owner is to be made aware that the mounting of the generators to the same foundation as the main engines will, thru vibration when the main engines are not running potentially damage the main engines' bearings with resultant reduction in operating hours between overhauls of the main engines. This common mounting of the generators and main engines on the same foundation is not to best marine practice and should have been avoided.
>
> * * *
>
> At time of inspection, vessel's aft engine room bulkhead was noted not water-tight.

The fact that Dean Hartmann, who designed the shrimp trawler, could not state that the entire vessel would meet ABS standards, the fact that Sonny Bosworth encountered a number of serious design flaws in the construction of the shrimp trawler, and the fact that a survey conducted on the shrimp trawler noted problems are legally sufficient to support a finding that Kennedy Ship did not construct the shrimp trawler in accordance with ABS standards and, thus, breached its contract with Pham.

2. Timeliness of the Delivery of the Boat

Kennedy Ship contends the evidence is legally insufficient to support a finding that it breached the contract by failing to timely deliver the boat to Pham. Kennedy Ship argues that while the contract states delivery was for June 2001, Kennedy Ship argues the contract did not make time of the essence.

Ordinarily, time is not of the essence. *Municipal Admin. Servs., Inc. v. City of Beaumont*, 969 S.W.2d 31, 36 (Tex.App.-Texarkana 1998, no pet.); *Superior Signs, Inc. v. American Sign Servs., Inc.*, 507 S.W.2d 912, 915 (Tex.Civ.App.-Dallas 1974, no writ). Also, a date stated for performance does not mean time is of the essence. *Cadle Co. v. Castle*, 913 S.W.2d 627, 637 (Tex.App.-Dallas 1995, writ denied); *Shaiv v. Kennedy, Ltd.*, 879 S.W.2d 240, 246 (Tex.App.-Amarillo 1994, no writ). Instead, the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. *Municipal Admin. Servs., Inc.*, 969 S.W.2d at 36; *Siderius, Inc. v. Wallace Co.*, 583 S.W.2d 852, 863 (Tex.Civ.App.-Tyler 1979, no writ). Unless the contract expressly makes time of the essence, the issue is a fact question for the jury. *Siderius, Inc.*, 583 S.W.2d at 863.

We agree with Kennedy Ship that while the contract stated a delivery date of June 2001, the contract did not express that time was of the essence. However, in light of the nature or purpose of the contract, i.e., building a vessel to be used for shrimping, and the surrounding circumstances,
20 *20 we find time was of the essence. Pham testified the June 2001 delivery date was "[v]ery important. . . . Because that is right in the season and then I can make money to pay back my debts." Likewise, Chris Kennedy knew the purchasers of shrimp trawlers wanted the boats for shrimp season, which begins in July, and the shrimpers needed income from shrimping in order to make payments on the boats. Chris explained:

> All of the fishermen ask for delivery dates prior to fishing season . . . There was [sic] requests made by fisherman to have the vessel before the fishing season so that they wouldn't have to make payments during the winter, so that was a theme throughout the building of these vessels is that all the fishermen wanted to have the vessel just prior to [the] opening of the season so they could make that season. The payments for these vessels usually ran 14 to $16,000 a month and, therefore, they did not want to make those payments when the boat wasn't making money.

Kennedy also argues time was not of the essence because, after the June 2001 deadline was not met, Pham elected to affirm the agreement and continue to seek performance by requesting Kennedy Ship build the boat and deliver it by December 2001.

A time of the essence provision may be waived. *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 255 (Tex.App.-Dallas 2002, pet. denied); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 846 (Tex.App.-Houston [1st Dist.] 1984, writ ref'd n.re.). The acceptance of late performance may indicate that it was not intended that time be of the essence. *Superior Signs, Inc.*, 507 S.W.2d at 915. "A waiver of time of performance of a contract will result from any act that *induces* the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon." *Laredo Hides Co. v. H H Meat Prods. Co.*, 513 S.W.2d 210, 218 (Tex.Civ.App.-Corpus Christi 1974, writ ref'd n.r.e.) (emphasis added).

After receiving the July 23, 2001 letter, Pham saw Chris Kennedy. Pham told Kennedy he would give him more money when the hull was finished and had been turned. Pham still wanted the vessel and, in September, when Pham saw that the hull had been turned, he approached Chris Kennedy, offering a $50,000 payment, but, instead, was told by Chris that "you have lost your boat already."

Chris testified that he transferred Pham's hull to another customer, Christopher Tran, in August 2001. However, there is evidence to support a finding that Kennedy Ship had already transferred the hull to Tran in May 2001. Tran and Kennedy Ship entered a contract on February 19, 2001. According to Chris, Tran paid $10,000 to hold a hull position because there were already contracts for the construction of five other boats ahead of Tran and there was no room at the yard to start a boat for Tran. Chris explained that under Tran's contract, a $50,000 down payment would be due when Kennedy Ship started on a hull for Tran or transferred a hull to Tran from another buyer. On May 1, 2001, Tran paid Kennedy Ship $50,000 via wire transfer. When Tran made his $50,000 payment on May 1, 2001, Kennedy Ship had three hulls under construction — Pham's and two others. Thus, when Tran wired the $50,000 payment for a fourth hull, there were only three hulls under construction.

Chris denied that Kennedy Ship was taking money from both Pham and Tran for the same vessel, but admitted that Kennedy Ship was taking money from four fishermen when only three hulls were under construction. Chris stated that he would
21 only accept $50,000 from a fisherman *21 if Kennedy Ship were going to start building a boat for that fisherman, but he could not offer any explanation for taking a $50,000 payment from Tran:

> Q. How do you explain to the jury that you are accepting money from four different fisherman when you only have three hulls under construction?
>
> A. Because Christopher [Tran] was taking over Charlie's [Pham] position.
>
> Q. Okay. Then that means that you were transferring Charlie's [Pham] boat to Christopher [Tran] in May, not in August as you testified earlier; right?

> A. I don't know. I mean, I don't know about — I didn't personally request that $50,000 be wired. There was other negotiations that went on there. There was a special agreement made with Christopher [Tran] that he signed.
>
> * * *
>
> Q. Then do you have any other explanation for why you are accepting $50,000 from Christopher Tran at the same time you are accepting money from Charlie Tran [sic] [Pham], Joe Nguyen, and Chau Nguyen?
>
> A. No.
>
> * * *
>
> Q. Who's [sic] hull was Christopher Tran taking when he wired that $50,000 to you?
>
> A. Charlie's [Pham].

Roxanne Kennedy testified that the purpose of the May 2001 $50,000 payment from Tran was to secure Tran's position on Pham's hull ahead of other contracts that could potentially take over Pham's hull in the event that Pham did not come through with his payments. Tran, however, testified that his $50,000 payment in May 2001, was not an additional deposit.

Therefore, in light of evidence that Kennedy Ship had already transferred the hull under Pham's contract to another purchaser in May 2001, Pham could not have induced Chris Kennedy, in September 2001, into believing that "exact performance within the time designated in the contract w[ould] not be insisted upon." *Laredo Hides Co.*, 513 S.W.2d at 218. The evidence is legally sufficient to support a finding that the parties intended that time be of the essence and that Kennedy Ship breached the contract by failing to timely deliver the boat to Pham in June 2001. Kennedy Ship's first issue is overruled.

B. Factual Sufficiency of the Evidence

In its second issue, Kennedy Ship claims the evidence is factually insufficient to support a finding that it breached the contract with Pham based on its premature demand for payment from Pham and its failure to build the boat to ABS standards. When conducting a factual sufficiency review, we must examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding, and set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

1. Premature Demand for Payment

Kennedy Ship contends the evidence is factually insufficient to support a jury finding that it breached the contract by prematurely demanding payments from Pham. The contract provides the first $50,000 payment (after the down payment) was "due when hull erection [is] completed." The trial court did not expressly hold the term "hull erection completed" was ambiguous, but admitted parole evidence without objection regarding the meaning of the term. The trial court may conclude a contract is ambiguous, even in the absence of such pleading by either party, and 22 *22 submit the ambiguity to the jury if it was tried by consent of the parties. *Sage Street Assocs.*, 863 S.W.2d at 445 (citing TEX.R. CIV. P. 67).

Whether a contract is ambiguous is a question of law for the court. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). We review the trial court's legal conclusions de novo. *MCI Telecomms. Corp. v. Texas Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). We determine whether the contract is ambiguous by looking at the contract as a whole in light of the circumstances present when the parties entered the contract. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003).

If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. *SAS Inst, Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam) (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). A contract, however, is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L F. Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (per curiam).

Our primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as it is expressed in the contract. *Seagull Energy E P, Inc. v. Eland Energy, Inc.*, 49 Tex. Sup.Ct. J. 744, 2006 WL 1651684, at *2 (Tex. June 16, 2006). To achieve this objective, courts should 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. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense. *Id.*

"Lack of clarity does not create an ambiguity, and `[n]ot every difference in the interpretation of a contract . . . amounts to an ambiguity.'" *Universal Health Servs., Inc.*, 121 S.W.3d at 746 (quoting *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994)). We may consider the parties' interpretations of the contract through extrinsic or parol evidence only after we have first determined that the contract is ambiguous. *Friends-wood Dev. Co. v. McDade Co.*, 926 S.W.2d 280, 283 (Tex. 1996) (per curiam). Parol evidence is not admissible for the purpose of creating an ambiguity. *National Union Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).

Kennedy Ship argues the terms "hull completed" and "hull erection completed" do not have the same meaning and to conclude otherwise would render the word "erection" superfluous, void, and insignificant. We disagree. The plain meaning of the term "erection" is "a building or structure,"[3] or "the act or process of erecting something: CONSTRUCTION."[4] Thus, we conclude the phrase "hull erection completed" means, in its common usage, to have completed building the hull.[5] *23

23

[3] OXFORD AMERICAN DICTIONARY AND THESAURUS 182 (2003).

[4] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 423 (11th ed.2003).

[5] Even when used as a naval term, erection means "[t]he process of hoisting into place and joining the various part's of a ship's hull, machinery, etc." Nomenclature of Naval Vessels, Naval Historical Center, http://www. history.navy.mil/books/nnv/dh.htm# E (last visited September 19, 2006).

Kennedy Ship argues the conduct of the parties is the best indicator of the construction they placed on contract. Kennedy Ship argues the first payment for Pham was made on April 18, after delivery of the April 12 letter. Kennedy Ship argues there was no evidence before this suit was filed that Pham had taken the position that "hull erection completed" had not occurred. Contrary to Kennedy Ship's assertion, "[t]he objective intent as expressed in the agreement controls the construction of an unambiguous contract, not a party's after-the-fact conduct." *In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006) (per curiam).

Even if the term "hull erection completed" could be interpreted to mean the completion of only the skeleton or ribs of the hull, without the attachment of plates, we still find the evidence is factually sufficient to support a finding that Kennedy Ship breached the contract by demanding the first and

second payments before they were due. On April 12, 2001, Kennedy Ship wrote to Pham, informing him that he was "$100,000 over due" on his contract and "the hull is in full erection." The first $50,000 payment was due when "hull erected [is] completed" and the second $50,000 payment was due one month from the date of the first payment. Therefore, if Pham were over due on his contract by $100,000, i.e., the first and second payments, then "hull erection completed" would have been in early to mid-March 2001.

Chris Kennedy testified that by writing the letter on April 12, Kennedy Ship was taking the position that 30 days before that, i.e., March 12, the hull erection was complete on Pham's boat. However, Chris testified the shipyard was still working on two other hulls in March 2001, and there was no room to start Pham's boat until those first two hulls had been turned. The first two hulls were turned on March 18, 2001. When Chris was questioned about pictures from Kennedy's Ship's website showing the flooding of the docks and the turning of the first two hulls on March 18, he acknowledged that the April 12, 2001 letter representing that Pham's hull was erect six days before the first two hulls were turned was a misrepresentation of the progress on his hull.[6]

[6] In a post-submission brief, Kennedy Ship asserts there is no evidence that Kennedy Ship misrepresented when Pham's payments were due. To the contrary, Chris Kennedy testified:

> Q. All right. If you assume with me that the dates on that website are accurate when this occurred [on] March 18. Then when you sent Mr. Pham a letter representing that his hull was fully erect six days before those boats were flipped, then that would be a *misrepresentation* on the progress on his hulls, wouldn't it?
>
> A. Yes.
>
> Emphasis added.

Sonny Bosworth testified that Pham's hull, along with two other hulls, was started in April, two or three weeks after the first two hulls had been turned. Bosworth explained Kennedy Ship had to wait two or three weeks after the first two hulls had been turned over because its employees needed to clean the two "jigs"[7] on top of which the hulls would be built and to construct a third jig so that three hulls could be built at one time. Bosworth testified the "frames" for the second set of hulls, including Pham's, were finished in June 2001.

[7] A jig is "device used to maintain mechanically correct the positional relationship between a piece of work and the tool or between parts of work during assembly." WEBSTERS NINTH NEW COLLEGIATE DICTIONARY 649 (1983).

We conclude the evidence is factually sufficient to support a jury finding that Kennedy Ship breached the contract by prematurely demanding the first and second *24 payments prior to "hull erection completed." 24

2. ABS Standards

Kennedy Ship claims the evidence is factually insufficient to support the jury's finding that it failed to perform the contract based on the failure to construct the boat to comply with ABS standards. The trial below involved two other plaintiffs, Chau Nguyen and Chris Tran (to whom Kennedy Ship had transferred Pham's hull) who also sued Kennedy Ship for breach of contract. The jury found that Kennedy Ship did not breach the other two contracts with Tran and Nguyen.[8] As Kennedy Ship points out, all three contracts contained the same language regarding ABS standards, the three boats were similarly constructed, and Tran's boat had initially been

constructed for Pham. In its original appellate brief, Kennedy Ship argues it is unlikely the jury determined that the boat constructed under Pham's contract and transferred to Tran had not been built to ABS standards or that Kennedy Ship was obligated under the contract to obtain ABS certification.

[8] Although Tran and Nguyen filed a notice of appeal, we dismissed their appeal for want of prosecution.

In a post-submission brief, Kennedy Ship argues we must reconcile the jury's various answers in a consistent fashion because the presumption is always that the jury did not intend conflicting answers. Kennedy Ship acknowledges that it has not argued the jury's answers are inconsistent, but contends we should presume the jury intended consistent answers. Therefore, we should, in conducting our factual sufficiency review,[9] assume the jury intended its answers to be consistent among the three plaintiffs.

[9] In its original appellate brief, Kennedy Ship raised the argument that the evidence is factually insufficient to support a finding that it breached its contract with Pham by failing to build the boat to ABS standards or obtain ABS certification because the jury found against Tran on this issue. In its post-submission brief, Kennedy Ship contends we should assume the jury intended its answers to be consistent among all three plaintiffs in conducting our *legal sufficiency* review, in addition to our factual sufficiency review. However, we need not address any arguments raised in Kennedy Ship's post-submission brief that were not raised in its original brief. *See Romero v. State*, 927 S.W.2d 632, 634 n. 2 (Tex. 1996) (stating petitioner failed to preserve issue for review by raising it for first time post-submission).

To preserve error that the jury's findings are inconsistent, the complaining party must raise an objection in the trial court before the jury is discharged. *Columbia Med. Ctr. of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835, 861 (Tex.App.-Fort Worth 2003, pet. denied); *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex.App.-Corpus Christi 1999, pet. denied); *Durkay v. Madco Oil Co.*, 862 S.W.2d 14, 23 (Tex.App.-Corpus Christi 1993, writ denied); *Wells v. Wells*, No. 14-04-00549-CV, 2006 WL 850844, at *1 (Tex.App.-Houston [14th Dist] Apr. 4, 2006, pet. filed) (mem.op.). Kennedy Ship has waived this issue by failing to raise it before the trial court discharged the jury and, instead, raising this complaint for the first time on appeal. In any event, we have already determined that the evidence is factually sufficient to support a finding that Kennedy Ship breached the contract by prematurely asking for payment. Kennedy Ship's second issue is overruled.

III. KENNEDY SHIP'S EXCUSE

In its third issue, Kennedy Ship claims the jury's finding that it was not excused from performance is against the great weight and preponderance of the evidence. Because Kennedy Ship challenges
25 the factual sufficiency of an adverse *25 finding on which it had the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). In reviewing the complaint that the jury's finding is against the great weight and preponderance of the evidence, we must consider and weigh all the evidence, setting aside the verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*

Kennedy Ship argues it was excused from any breach because Pham did not make his interim payments, and did not provide adequate assurance he would pay the $700,000 due on the boat if constructed. Section 2.609 of the Uniform Commercial Code,[10] as adopted in Texas, provides that when reasonable grounds for insecurity arise

with respect to the performance of either party under a contract, the other party may demand adequate assurance of due performance. *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 140 (Tex.App.-Houston [14th Dist.] 2000, pet. dism'd) (citing TEX. Bus. COM. CODE ANN. §§ 2.609 (Vernon 1994)). The insecure party may suspend any performance for which it has not already received the agreed return until the assurance is received. *Id.* Kennedy Ship argues the greater weight of the evidence established that it demanded in writing adequate assurance of performance and once the assurances were not received, it was entitled to suspend performance. Kennedy Ship argues 30 days after the July 23 letter, Pham's failure to provide assurance constituted repudiation of the contract.

10 TEX. BUS COM. CODE ANN. §§ 2.609 (Vernon 1994).

Kennedy Ship's argument assumes all facts it puts forth are true and various payments were due. However, any assurance of payment would not have arisen because, as addressed above, the evidence supports findings that Kennedy Ship (1) had prematurely demanded a $100,000 payment from Pham on April 12, 2001, (2) had not timely delivered the boat in June 2001, and (3) had transferred Pham's hull to Christopher Tran in May 2001. Kennedy Ship's third issue is overruled.

IV. PHAM'S EXCUSE

In its fourth issue, Kennedy Ship contends the evidence is factually insufficient to support the jury's finding that Pham's breach of the contract was excused. Kennedy Ship argues Pham could not use the June 2001 schedule as an excuse for his nonperformance because, after the June 2001 deadline had passed, Pham elected to affirm the agreement and continue to seek performance, by requesting that it complete the boat and deliver it by December 2001.

"If after a party breaches a contract, the other party continues to insist on performance on the part of the party in default, the previous breach constitutes no excuse for nonperformance on the part of the party not in default and the contract continues in force for the benefit of both parties." *Houston Belt Terminal Ry. v. J. Weingarten, Inc.*, 421 S.W.2d 431, 435 (Tex.Civ.App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.). Thus, when one party materially breaches a contract, the nonbreaching party is forced to elect between two courses of action, i.e., continuing performance or ceasing performance. *Chilton Ins. Co. v. Pate Pate Enters., Inc.*, 930 S.W.2d 877, 887-88 (Tex.App.-San Antonio 1996, writ denied). Treating the contract as continuing after a breach deprives the nonbreaching party of any excuse for terminating
26 its own performance. *Id.* at 888. *26

As addressed above, the evidence is factually sufficient to support a jury finding that Kennedy Ship had already transferred the boat under its contract with Pham to Christopher Tran in May 2001. Even if Pham stated in September 2001, that he still wanted the boat under his contract, the subject matter of the contract was no longer available to Pham. Kennedy' breach in transferring the boat under Pham's contract in May 2001, excused Pham from any further performance. Therefore, the evidence is factually sufficient to support a jury finding that Pham is excused for failing to perform under the contract. Kennedy Ship's fourth issue is overruled.

V. JURY CHARGE INSTRUCTION

In its fifth issue, Kennedy argues the trial court erred in refusing to include a requested jury instruction. Kennedy Ship complains the jury was not asked to decide who breached first. Kennedy Ship contends it was necessary to instruct the jury when a breach is material and asserts it requested, in substantially correct wording, the following instruction on material breach:

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) the extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) the extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) the extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) the greater or less hardship on the party failing to perform in terminating the contract;

(e) the wilful, negligent or innocent behavior of the party failing to perform;

(f) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Advance Components, Inc. v. Goodstein, 608 S.W.2d 737, 739-4O (Tex.Civ.App.-Dallas 1980, writ ref'd n.r.e.).

27 At the charge conference, the following took place:

MR. BUCKLEY: There is an instruction on materiality I would ask the Court be included. As you know, there are certainly instances where the term "material breach" is used. In Mr. Baker's proffer. And I would ask the definition of "material breach" as contained in *Advance Components, Inc. Vs [sic] Jerald P. Goodstein*, in the jury charge, that begins on 739 of that case and continues on in the indented section through Subsection F, and for the convenience of the record and with the permission and consent of Mr. Baker and the Court, I would ask that I be permitted to just bracket that section from the case and to have the Court Reporter mark that as an exhibit for this hearing and — or I could read it word for word into the record, but if we substitute.

THE COURT: We will not mark it as an exhibit but put it in with the proffers.

MR. BUCKLEY: I offer that definition on "materiality" from Section 235 Restatement of the law of Contracts, Your Honor.

THE COURT: Okay.[11]

*27

[11] At the charge conference, Kennedy Ship's trial counsel apparently marked the relevant portion of a copy of *Advance Components, Inc. v. Goodstein* and offered it as an exhibit for the charge conference. Although the trial court stated that the copy of the case would be placed "with the proffers," there is no such copy in the appellate record. Kennedy Ship provided this court with a citation to *Advance Components, Inc. v. Goodstein* in its appellate brief.

Rule 278 of the Texas Rules of Civil Procedure states "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the

judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." TEX.R. CIV. P. 278. To preserve error, the complaining party must tender a written request to the trial court for submission of the instruction, which is in substantially correct wording. *Gerdes v. Kennamer*, 155 S.W.3d 523, 534 (Tex.App.-Corpus Christi 2004, pet. denied). A ruling is also required to preserve error. Sears, *Roebuck Co. v. Abell*, 157 S.W.3d 886, 892 (Tex.App.-El Paso 2005, pet. denied).

We find nothing in the record to show that the trial court ruled on Kennedy Ship's request and conclude Kennedy Ship has not preserved this complaint for appellate review.[12] Kennedy Ship's fifth issue is overruled.

[12] Because Kennedy Ship never obtained a ruling on its request, it is not necessary for us to determine whether Kennedy Ship submitted the requested instruction in substantially correct wording.

Accordingly, the judgment of the trial court is affirmed.

593 *593

NO. 14-16-00802-CV
State of Texas in the Fourteenth Court of Appeals

Norris v. Tex. Dev. Co.

547 S.W.3d 656 (Tex. App. 2018)
Decided Apr 12, 2018

NO. 14-16-00802-CV

04-12-2018

Joshua NORRIS, Appellant v. TEXAS DEVELOPMENT COMPANY, Appellee

Timothy Jadloski, Emily J. Wyatt, Stephen A. Mendel, Houston, TX, for Appellant. John S. Torigian, Houston, TX, for Appellee.

Kem Thompson Frost, Chief Justice

Timothy Jadloski, Emily J. Wyatt, Stephen A. Mendel, Houston, TX, for Appellant.

John S. Torigian, Houston, TX, for Appellee.

Panel consists of Chief Justice Frost and Justices Boyce and Jewell.

658 Kem Thompson Frost, Chief Justice*658 A guarantor of amounts owing under a rental agreement challenges the trial court's granting of traditional summary judgment on the creditor's claim for breach of the guaranty agreement. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant/defendant Joshua Norris signed a guaranty agreement, dated September 17, 2015, guaranteeing ARC Designs, Inc.'s deferred rental payments to appellee/plaintiff Texas Development Company, in the amount of $337,944, to be paid in twelve monthly installments (the "Guaranty"). When ARC Designs defaulted in making the payments, Texas Development Company demanded Norris pay the amounts owing under the Guaranty. And, when Norris failed to pay, Texas Development Company brought suit against ARC Designs to recover the rental payments and against Norris to recover on the Guaranty.

Texas Development Company filed a traditional motion for summary judgment against both defendants. The trial court granted the motion, rendering judgment against ARC Designs for the unpaid rent and against Norris on the Guaranty. The trial court awarded attorney's fees to Texas Development Company against both defendants, in different amounts. Norris appealed the trial court's judgment; ARC Designs did not appeal.

ISSUE PRESENTED

Norris asserts on appeal that the trial court erred in granting the summary judgment because Norris and Texas Development Company never formed a valid contract. According to Norris, after he signed the Guaranty, Texas Development Company made a counteroffer. Norris contends that the Guaranty is not binding because it was part of the counteroffer and became void as a matter of law upon the making of the counteroffer. According to Norris, because there was no deferred-base-rent agreement between Texas Development Company and ARC Designs, there was nothing for Norris to guarantee.

STANDARD OF REVIEW

In a traditional motion for summary judgment, if the movant's motion and summary-judgment evidence facially establish the movant's right to judgment as a matter of law, the burden shifts to

the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich* , 28 S.W.3d 22, 23 (Tex. 2000). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez* , 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes* , 236 S.W.3d 754, 755 (Tex. 2007). When, as in this case, the order granting summary judgment does not specify the 659 *659 grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868, 872 (Tex. 2000).

BREACH-OF-GUARANTY ANALYSIS

To prevail on summary judgment on a claim for breach of a guaranty, the plaintiff must establish (1) the existence and ownership of the guaranty, (2) the terms of the underlying contract, (3) the occurrence of the condition on which liability is based, and (4) the guarantor's failure or refusal to perform the promise. *See Wasserberg v. RES-TX One, LLC* , No. 14-13-00674-CV, 2014 WL 6922545, at *6 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (mem. op.). In its motion for summary judgment, Texas Development Company asserted that it conclusively proved its entitlement to summary judgment on its breach-of-guaranty claim. Texas Development Company established that Norris executed the Guaranty and that ARC Designs defaulted on its obligation to pay deferred rent. In his summary-judgment response, Norris asserted that the Guaranty is ineffective because Texas Development Company rejected the terms of Norris's proposed deferred-base-rent agreement. Thus, Norris reasons, there was nothing for him to guarantee.

On appeal, Norris frames his argument in terms of contract formation; he does not address the elements required to prove breach of a guaranty agreement. Norris argues that the Guaranty is void but cites no authority to support that proposition.

The Guaranty states that Norris "hereby guarantees ... the payment of the deferred base rent described in the Deferred Base Rent Agreement attached hereto." The Guaranty states that by signing the document, Norris on that day guaranteed the payment of the deferred base rent described in the attached "Deferred Base Rent Agreement." Norris then delivered the Guaranty to Texas Development Company. Norris does not deny signing the Guaranty or sending the Guaranty to Texas Development Company, but he asserts that the Guaranty became void when Texas Development Company rejected the proposed deferred-base-rent agreement attached to the Guaranty.

The Lease Agreements and Deferred Base Rent Agreement

Between January 2012 and October 2014, Texas Development Company, as landlord, and ARC Designs, as tenant, executed five lease agreements for properties located at 11987 FM 529, 12221 FM 529, 12231 FM 529, 12233 FM 529, and 12261 FM 529. In early 2015, due to a downturn in ARC Designs's business, the company began seeking subtenants to reduce its rental expenses. In the summer of 2015, ARC Designs sought rental concessions—including deferral of a portion of the rental payments due—from Texas Development Company. ARC Designs began deferring a portion of its rental payments, and Texas Development Company began accepting a reduced rental payment.

Texas Development Company asserts that in the summer of 2015, ARC Designs sought a deferred-base-rent agreement. According to Texas Development Company, the parties reached an oral agreement as to the deferred base rent and began performing the agreement. Texas Development Company asserts that ARC Designs memorialized that agreement in writing in a letter sent from Norris and ARC Designs to Texas Development Company in September 2015 ("September 2015 Letter"). The September 2015 Letter is attached to the Guaranty and the parties refer to it in the Guaranty as the "Deferred *660 Base Rent Agreement." The final paragraph of the September 2015 Letter contains a signature block for both parties to sign confirming that the September 2015 Letter accurately stated the Deferred Base Rent Agreement.

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Norris asserts that the parties began negotiating a deferred-base-rent agreement in the summer of 2015, but that they did not reach agreement. According to Norris, the September 2015 Letter constituted an offer of a deferred-base-rent agreement. In October 2015, Texas Development Company e-mailed a letter to Norris and ARC Designs stating that the final deferred-base-rent agreement was enclosed ("October 2015 Letter") and asking that Norris sign it along with the enclosed guaranty. The enclosed guaranty was a copy of the guaranty that Norris had signed and sent to ARC Designs. Norris asserts that the October 2015 Letter amounts to a counteroffer and a rejection of the offer contained in the September 2015 Letter. According to ARC Designs, after Texas Development Company sent the October 2015 Letter, Texas Development Company signed the September 2015 Letter.

The September 2015 Letter "confirms" that ARC Designs, Norris, and Texas Development Company "reached an agreement to modify the lease terms" for the five buildings. Norris's letter describes the conditions under which ARC Designs will be released from its lease for 11987 FM 529, and states that the new base rent due under the deferred-base-rent agreement will be a sum of $90,000 for the time period beginning June 1, 2015 and running through November 30, 2015. The letter sets out the repayment terms for the deferred base rent and provides that Norris personally will guarantee the amount of the deferred base rent.

The Guaranty Agreement

Both parties state that as part of any agreement to defer rent, Norris, the owner of ARC Designs, agreed to personally guarantee the amount of deferred base rent. Norris attached the September 2015 Letter to the instrument entitled, "Guaranty of Deferred Base Rent Agreement," which states in pertinent part:

> FOR VALUE RECEIVED, and in consideration for, and as an inducement to THE TEXAS DEVELOPMENT COMPANY to enter into the attached Deferred Base Rent Agreement, Josh Norris hereby guarantees to THE TEXAS DEVELOPMENT COMPANY, its heirs, legal representatives successors and assigns, the payment of the deferred base rent described in the Deferred Base Rent Agreement attached hereto, in the amount of $337,944.00 to be paid in 12 monthly installments of $28,162.00 per month for the months of January through December 2016, for which Josh Norris hereby agrees to be jointly and severally liable together with ARC DESIGNS, INC., without requiring any notice of nonpayment, nonperformance, or proof of notice or demand, whereby to charge Josh Norris all of which Josh Norris hereby expressly waives; provided, however, in the event that the actual amount of the Deferred Base Rent is less than $337,944.00 as of December 21, 2015, then the obligations under this Guaranty Agreement shall not exceed the actual amount of such Deferred Base Rent, and the monthly payment amount shall be adjusted accordingly. This is an irrevocable, absolute, complete, and continuing guaranty of payment and not a guaranty of collection ...
>
> Josh Norris further covenants and agrees that this Guaranty shall be absolute and unconditional and shall remain

661 *661

> and continue in full force and effect as to any renewal, extension, amendment, addition, assignment, sublease, transfer or other modification of the Lease Agreement or the Deferred Base Rent Agreement.

The Guaranty contains a September 17, 2015 execution date. Norris signed the document as guarantor.

In the October 2015 Letter, Texas Development Company responded with the "final Deferred Base Rent Agreement and Personal Guaranty of Mr. Norris." The October 2015 Letter included a schedule of payments through the end of the lease terms. Texas Development Company attached a copy of the Guaranty, which Norris signed in September 2015, and attached to the September 2015 Letter.

Default in Rent Payment and Collection Suit

In November 2015, ARC Designs failed to timely remit payment on the lease and Texas Development Company filed suit, alleging that (1) ARC Designs breached the agreement contained in the September 2015 Letter by failing to tender the amounts owed under the lease and (2) Norris breached his guaranty agreement by failing to remit payment due under the Guaranty.

Traditional Motion for Summary Judgment

After ARC Designs and Norris denied Texas Development Company's allegations, Texas Development Company filed a traditional motion for summary judgment, asserting that its evidence conclusively proved its entitlement to judgment on its breach-of-contract and breach-of-guaranty claims. The summary-judgment record includes the following evidence:

• Affidavit of Michael Farris, manager of real estate for Texas Development Company in which Farris avers that in the summer of 2015, ARC Designs approached Texas Development Company with a request to defer a portion of its base-rent obligation. Texas Development Company agreed to defer rent as long as Joshua Norris personally would guarantee that ARC Designs would repay the deferred base rent. Farris stated that after negotiations between the parties, on the date of the September 2015 Letter, Texas Development Company and ARC Designs executed a deferred-base-rent agreement under which Norris personally guaranteed the deferred rent in the amount of $337,944. In November 2015, ARC Designs breached the lease agreement by vacating two buildings and remaining in two buildings without paying rent. ARC Designs did not pay any of the deferred base rent, and Norris has failed to make any payments under the Guaranty.

• A copy of the September 2015 Letter and the attached Guaranty.

• A copy of the October 2015 Letter and the attached copy of the Guaranty.

• A letter dated November 6, 2015, stating that ARC Designs was in default under the lease.

In his response to Texas Development Company's summary-judgment motion, Norris asserted that he is not liable under the Guaranty because Texas Development Company rejected the agreement in the October 2015 Letter. According to Norris, at that point, the parties did not have any agreement.

The trial court granted Texas Development Company's motion for summary-judgment. After judgment in the trial *662 court, an entity controlled by Texas Development Company acquired control of ARC Designs. ARC Designs did not appeal the judgment.

Operative Terms of the Guaranty Agreement

The Guaranty states that it is an "irrevocable, absolute, complete, and continuing guaranty of payment and not a guaranty of collection." Although the Guaranty was attached to the agreement, the Guaranty contains its own terms and is not part of the deferred-base-rent agreement under negotiation. *See Universal Metals & Machinery, Inc. v. Bohart* , 539 S.W.2d 874, 877 (Tex. 1976). Nothing in the Guaranty makes Norris's guaranty obligation contingent on the acceptance and validity of the Deferred Base Rent Agreement. *See id.*

The Guaranty states, "FOR VALUE RECEIVED, and in consideration for, and as an inducement to THE TEXAS DEVELOPMENT COMPANY to enter into the attached Deferred Base Rent Agreement, Josh Norris hereby guarantees ..." but this reference to the guaranty as being to induce Texas Development Company to enter into the "Deferred Base Rent Agreement" is insufficient to invalidate the Guaranty for lack of consideration. *See id.* at 878 (Tex. 1976) (holding guaranty agreement did not fail for lack of consideration because agreement stated "for value received"). The Guaranty is complete. Texas Development Company owned the Guaranty, and nothing in the Guaranty stated that the Guaranty would become void if the parties did not enter into a deferred-base-rent agreement. *See Morales v. Cemex Const. Materials South, LLC* , No. 14-10-00727-CV, 2011 WL 3628861, at *3 (Tex. App.—Houston [14th Dist.] Aug. 18, 2011, no pet.) (mem. op.). To the contrary, the Guaranty states on its face that it is "irrevocable." The summary-judgment evidence showed that the Guaranty exists and Texas Development Company owns the Guaranty. *See id.*

Norris did not argue that because no valid contract existed between Texas Development Company and ARC Designs, the court could not determine the terms of the underlying agreement. Because he did not make this argument in his brief, Norris has waived this argument. *See Fairfield Industries, Inc. v. EP Energy E & P Co., L.P.* , 531 S.W.3d 234, 253 (Tex. App.—Houston [14th Dist.] 2017, pet. filed) ; *Navarro v. Grant Thornton, LLP* , 316 S.W.3d 715, 719–20 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Norris did not raise in his summary-judgment response the argument that we cannot determine the terms of the underlying agreement, so we cannot reverse the trial court's summary judgment on this basis. *See City of Houston v. Clear Creek Basin Auth.* , 589 S.W.2d 671, 678 (Tex. 1979) ; *Lopez v. Exxon Mobil Dev. Co.* , No. 14-16-00826-CV, 2017 WL 4018359, at *13 (Tex. App.—Houston [14th Dist.] Sept. 12, 2017, pet. filed) (mem. op.).

Even if Norris had raised this argument in his briefing and in his summary-judgment response, we would not reverse the trial court's granting of summary judgment because the record contains the terms of the agreement, which Texas Development Company proved as a matter of law by its traditional motion for summary judgment. To determine a guarantor's liability, we look to the language of the guaranty agreement. *Silvestri v. Intern'tl Bank of Commerce* , No. 01-11-00921, 2013 WL 485804, at *5 (Tex. App.—Houston [1st Dist.] Feb. 7, 2013, pet. denied) (mem. op.). A court must construe a guaranty strictly according to its precise terms and not extend by construction
663 the guarantor's obligation. *663 *Univ. Sav. Ass'n v. Miller* , 786 S.W.2d 461, 462 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

The Guaranty states that the amount guaranteed is $337,944.00 and the Guaranty provides that the $337,944.00 is to be paid in twelve monthly installments of $28,162.00 per month for the months of January through December 2016. The Guaranty further provides that in the event that the actual amount of deferred base rent is less than $337,944.00, then the agreement shall be adjusted accordingly. The Guaranty identifies the amount guaranteed and the terms of payment. The Guaranty is not conditioned upon the parties' acceptance of the specifics of the "Deferred Base Rent Agreement." *See id.* Under the instrument's plain terms, Norris guaranteed $337,944.00 or the amount of the deferred base rent if that amount is less than $337,944.00. *See id.*

The summary-judgment record contains a valid guaranty agreement signed by Norris. The Guaranty recites the terms of the agreement, and the terms of the underlying agreement, on the face of the instrument. Thus, by its motion for summary judgment, Texas Development Company conclusively proved each element of its claim: (1) the existence and ownership of the Guaranty, (2) the terms of the underlying contract, (3) the occurrence of the condition on which liability is based, and (4) the guarantor's failure or refusal to perform the promise. *See Wasserberg* , 2014 WL 6922545, at *6. We overrule Norris's issue.

Having overruled Norris's sole issue, we affirm the trial court's judgment.

Index No.: 652108/2015
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 58

S&H Nadlan, LLC v. MLK Assocs. LLC

2016 N.Y. Slip Op. 30523
Decided Mar 7, 2016

Index No.: 652108/2015

03-07-2016

S&H NADLAN, LLC and DROR ARGAMAN, Plaintiffs, v. MLK ASSOCIATES LLC, BEACH 84TH ST I, LLC, MENDEL GROUP INC., ABE MENDEL and STEVEN MENDEL, Defendants.

DONNA MILLS, J.

:

In this declaratory judgment action, plaintiffs S & H Nadlan, LLC (Nadlan) and Dror Argaman (Argaman) (together plaintiffs) move, pursuant to CPLR 3212, for summary judgment compelling defendants MLK Associates LLC (MLK), Beach 84th St I, LLC (Beach) (together, the LLCs), Mendel Group Inc. (MGI), Abe Mendel and Steven Mendel (the Mendels) to produce the books and records of the LLCs and for accountings of those entities.

The facts of this case are undisputed. Plaintiffs are minority members of the LLCs which are limited liability companies that hold the deeds to properties in Rockaway Beach and Brooklyn, New York.[1] MGI manages those properties. In February, March and May 2015, plaintiffs sent MGI demands for inspection of the LLCs' books and records, along with a demand for accountings.

[1] Plaintiffs became members of MLK in 2007 and they became members of Beach in 2008.

Defendants do not object to plaintiffs' request for
2 access to the LLCs' books and records *2 (Mendel Aff., ¶ 3). However, defendants requested that plaintiffs sign a confidentiality agreement wherein plaintiffs would agree to protect the LLCs' confidential information, including rent rolls, bank statements, tax returns and other financial records and, wherein they would agree not to contact other members of the LLCs (*id*. ¶ 20).

Plaintiffs do not object to signing an appropriate confidentiality agreement for documents that are confidential (Rosenberg affirmation, ¶ 9), but they take the position that defendants have no legal right to prohibit them from contacting other members of the LLCs, and they refused to sign a confidentiality agreement that contains that prohibition.

Defendants argue that plaintiffs have no legitimate business reason to contact the other members of the LLCs (Mendel aff, ¶ 20) and, to date, they have not produced the books and records of those entities.

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs*., 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to

produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994] [it "is not enough that the party opposing summary *3 judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . ."). *4

Plaintiffs have made a prima facie showing that they are entitled to judgment as a matter of law by submitting defendants' answer where in defendants admit that, pursuant to the Limited Liability Company Law (LLCL), plaintiffs are entitled to inspect the books and records of the LLCs (Rosenberg affirmation, exhibit 2, ¶¶ 22, 35; *see also Gartner v Cardio Ventures, LLC*, 121 AD3d 609 [1st Dept 2014] [a member of an LLC has an independent statutory right to inspect the LLC's books and records]).

Moreover, LLCL § 1102 (a) provides, in pertinent part, that a limited liability company is required to maintain: "a current list of the full name . . . and last known mailing address of each member together with the contribution and the share of profits and losses of each member . . . ; a copy of the articles of organization and all amendments thereto or restatements thereof . . .; a copy of the operating agreement, any amendments thereto and any amended and restated operating agreement; and a copy of the limited liability company's federal, state and local income tax returns . . ., if any, for the three most recent fiscal years."

LLCL § 1102 (b) states:

> "Any member may, *subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement*, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable"

(emphasis added).

The only restrictions on a member's right to inspect the LLC's books and records are set forth in LLCL § 1102 (c):

> *If provided in the operating agreement*, certain members or managers shall have the right to keep confidential from other members for such period of time as such certain members or the managers deem reasonable, any information which such members or the managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which such certain members or the managers in good faith believe is not in the best interest of the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential"

(emphasis added).

In opposition, defendants have failed to produce the operating agreements of the LLCs, or any other evidence, to demonstrate that there are restrictions on plaintiffs' right to inspect the LLCs' books and records and/or restrictions on plaintiffs' right to contact the other LLC members. Moreover, defendants' unsubstantiated and

speculative allegations that plaintiffs want to contact the other members of the LLCs to solicit the sale of their memberships or to solicit other, unrelated investments and/or that the other members' privacy rights must be respected, is insufficient to overcome plaintiffs' prima facie showing that they are entitled to inspect the LLCs' books and records and contact the other members of the LLCs.

Plaintiffs' demand for accountings of the LLCs is also granted. Here, defendants have admitted that plaintiffs are members of the LLCs and it is well settled that, as such, they are entitled to an accounting (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550, 551 [1st Dept 2009] ["(M)embers of a limited liability company may
5 seek an equitable accounting under *5 common law"]; *Jacobs v Westchester Industrial Complex LLC*, 2014 WL 7927865 at *40 [Sup Ct, Westchester County 2014] "[LLC members may seek an equitable accounting given the fiduciary relation between the members"]; *363-367 Neptune Ave., LLC v Neary*, 30 Misc 3d 779, 795 [Sup Ct, Kings County 2010]). Defendants have failed to oppose plaintiffs' demand for accountings and, therefore plaintiffs' demand for accountings for MLK and Beach is granted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975] ["in the absence of (a) party challenging the verity of the alleged facts, as is true in the instant case, there is, in effect, a concession that no question of fact exists"]; *see also Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 609 [1st Dept 2012]).

Accordingly, it is ORDERED that the branch of plaintiffs S & H Nadlan, LLC and Dror Argaman's motion which seeks a declaratory judgment with respect to the subject matter of the complaint's first and second causes of action is granted; and it is further

ADJUDGED and DECLARED that plaintiffs are entitled to a declaratory judgment against defendants MLK Associates LLC, Beach 84th St I LLC, Mendel Group Inc., Abe Mendel, and Steven Mendel declaring that defendants must grant plaintiffs a full inspection of the books and records of the Beach 84th Street I LLC and MLK Associates LLC companies; and it is further

ORDERED that the branch of the motion that seeks a full accounting of Beach 84th St I LLC is granted; and it is further

ORDERED that the branch of the motion that seeks a full accounting of MLK Associates LLC is granted; and it is further

ORDERED and ADJUDGED that plaintiffs S & H Nadlan, LLC and Dror Argaman, having an
6 address at _____, do recover from *6 defendants MLK Associates LLC, Beach 84th St I LLC, Mendel Group Inc., Abe Mendel, and Steven Mendel, having an address at _____, costs and disbursements as taxed by the Clerk upon presentation of an appropriate bill of costs. Dated: 3/7/16

ENTER:

/s/_____

J.S.C.

STEPHEN ANTHONY MENDEL

CRD#: 4593474

IA Investment Adviser

INTEGRITY ADVISORY SOLUTIONS
CRD#: **288817**
19419 Kessington Lane
Houston, TX 77094

0	9 Years of Experience
Disclosures	2 Firms
1	1
Exam Passed	State License

Examination(s)

State Securities Law Exam

IA	Series 65 - Uniform Investment Adviser Law Examination	Jan 4, 2015

Additional information including this individual's professional designations is available in the Detailed Report.

License(s)

State Registrations

IA	Texas	2/10/2015

FORM ADV

UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND REPORT BY EXEMPT REPORTING ADVISERS

Primary Business Name: VESTED LEGACY WEALTH MANAGEMENT, L.P.	**CRD Number: 174462**
Annual Amendment - All Sections	**Rev. 10/2021**
3/17/2024 11:53:47 AM	

WARNING: Complete this form truthfully. False statements or omissions may result in denial of your application, revocation of your registration, or criminal prosecution. You must keep this form updated by filing periodic amendments. See Form ADV General Instruction 4.

Item 1 Identifying Information

Responses to this Item tell us who you are, where you are doing business, and how we can contact you. If you are filing an *umbrella registration*, the information in Item 1 should be provided for the *filing adviser* only. General Instruction 5 provides information to assist you with filing an *umbrella registration*.

A. Your full legal name (if you are a sole proprietor, your last, first, and middle names):
VESTED LEGACY WEALTH MANAGEMENT, L.P.

B. (1) Name under which you primarily conduct your advisory business, if different from Item 1.A.
VESTED LEGACY WEALTH MANAGEMENT, L.P.

List on Section 1.B. of Schedule D any additional names under which you conduct your advisory business.

(2) If you are using this Form ADV to register more than one investment adviser under an *umbrella registration*, check this box ☐

If you check this box, complete a Schedule R for each relying adviser.

C. If this filing is reporting a change in your legal name (Item 1.A.) or primary business name (Item 1.B.(1)), enter the new name and specify whether the name change is of
☐ your legal name or ☐ your primary business name:

D. (1) If you are registered with the SEC as an investment adviser, your SEC file number:
(2) If you report to the SEC as an *exempt reporting adviser*, your SEC file number:
(3) If you have one or more Central Index Key numbers assigned by the SEC ("CIK Numbers"), all of your CIK numbers:
No Information Filed

E. (1) If you have a number ("*CRD* Number") assigned by the *FINRA's CRD* system or by the IARD system, your *CRD* number: **174462**

If your firm does not have a CRD number, skip this Item 1.E. Do not provide the CRD number of one of your officers, employees, or affiliates.

(2) If you have additional *CRD* Numbers, your additional *CRD* numbers:
No Information Filed

F. *Principal Office and Place of Business*

(1) Address (do not use a P.O. Box):

Number and Street 1:		Number and Street 2:	
1155 DAIRY ASHFORD		STE 104	
City:	State:	Country:	ZIP+4/Postal Code:
HOUSTON	Texas	United States	77079

If this address is a private residence, check this box: ☐

List on Section 1.F. of Schedule D any office, other than your principal office and place of business, at which you conduct investment advisory business. If you are applying for registration, or are registered, with one or more state securities authorities, you must list all of your offices in the state or states to which you are applying for registration or with whom you are registered. If you are applying for SEC registration, if you are registered only with the SEC, or if you are reporting to the SEC as an exempt reporting adviser, list the largest twenty-five offices in terms of numbers of employees as of the end of your most recently completed fiscal year.

(2) Days of week that you normally conduct business at your *principal office and place of business:*
◉ Monday - Friday ○ Other:

Normal business hours at this location:
8:00AM-5:00PM

(3) Telephone number at this location:
832-465-6040

(4) Facsimile number at this location, if any:
281-966-1777

(5) What is the total number of offices, other than your *principal office and place of business*, at which you conduct investment advisory business as of

the end of your most recently completed fiscal year?
0

G. Mailing address, if different from your *principal office and place of business* address:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

If this address is a private residence, check this box: ☐

H. If you are a sole proprietor, state your full residence address, if different from your *principal office and place of business* address in Item 1.F.:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

	Yes	No
I. Do you have one or more websites or accounts on publicly available social media platforms (including, but not limited to, Twitter, Facebook and LinkedIn)?	○	◉

If "yes," list all firm website addresses and the address for each of the firm's accounts on publicly available social media platforms on Section 1.I. of Schedule D. If a website address serves as a portal through which to access other information you have published on the web, you may list the portal without listing addresses for all of the other information. You may need to list more than one portal address. Do not provide the addresses of websites or accounts on publicly available social media platforms where you do not control the content. Do not provide the individual electronic mail (e-mail) addresses of employees or the addresses of employee accounts on publicly available social media platforms.

J. Chief Compliance Officer

(1) Provide the name and contact information of your Chief Compliance Officer. If you are an *exempt reporting adviser*, you must provide the contact information for your Chief Compliance Officer, if you have one. If not, you must complete Item 1.K. below.

Name: Other titles, if any:

Telephone number: Facsimile number, if any:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

Electronic mail (e-mail) address, if Chief Compliance Officer has one:

(2) If your Chief Compliance Officer is compensated or employed by any *person* other than you, a *related person* or an investment company registered under the Investment Company Act of 1940 that you advise for providing chief compliance officer services to you, provide the *person's* name and IRS Employer Identification Number (if any):

Name:

IRS Employer Identification Number:

K. Additional Regulatory Contact Person: If a person other than the Chief Compliance Officer is authorized to receive information and respond to questions about this Form ADV, you may provide that information here.

Name: Titles:

Telephone number: Facsimile number, if any:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

Electronic mail (e-mail) address, if contact person has one:

	Yes	No
L. Do you maintain some or all of the books and records you are required to keep under Section 204 of the Advisers Act, or similar state law, somewhere other than your *principal office and place of business*?	○	◉

If "yes," complete Section 1.L. of Schedule D.

	Yes	No
M. Are you registered with a *foreign financial regulatory authority*?	○	◉

Answer "no" if you are not registered with a foreign financial regulatory authority, even if you have an affiliate that is registered with a foreign financial regulatory authority. If "yes," complete Section 1.M. of Schedule D.

	Yes	No
N. Are you a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934?	○	◉

	Yes	No
O. Did you have $1 billion or more in assets on the last day of your most recent fiscal year?	○	◉

If yes, what is the approximate amount of your assets:

- ○ $1 billion to less than $10 billion
- ○ $10 billion to less than $50 billion

- ○ $50 billion or more

For purposes of Item 1.O. only, "assets" refers to your total assets, rather than the assets you manage on behalf of clients. Determine your total assets using the total assets shown on the balance sheet for your most recent fiscal year end.

P. Provide your *Legal Entity Identifier* if you have one:

A *legal entity identifier* is a unique number that companies use to identify each other in the financial marketplace. You may not have a *legal entity identifier*.

SECTION 1.B. Other Business Names

No Information Filed

SECTION 1.F. Other Offices

No Information Filed

SECTION 1.I. Website Addresses

No Information Filed

SECTION 1.L. Location of Books and Records

No Information Filed

SECTION 1.M. Registration with Foreign Financial Regulatory Authorities

No Information Filed

Item 3 Form of Organization

If you are filing an *umbrella registration*, the information in Item 3 should be provided for the *filing adviser* only.

A. How are you organized?

- ○ Corporation
- ○ Sole Proprietorship
- ○ Limited Liability Partnership (LLP)
- ○ Partnership
- ○ Limited Liability Company (LLC)
- ◉ Limited Partnership (LP)
- ○ Other (specify):

If you are changing your response to this Item, see Part 1A Instruction 4.

B. In what month does your fiscal year end each year?
DECEMBER

C. Under the laws of what state or country are you organized?

State	Country
Texas	United States

If you are a partnership, provide the name of the state or country under whose laws your partnership was formed. If you are a sole proprietor, provide the name of the state or country where you reside.

If you are changing your response to this Item, see Part 1A Instruction 4.

Item 4 Successions

		Yes	No
A.	Are you, at the time of this filing, succeeding to the business of a registered investment adviser, including, for example, a change of your structure or legal status (e.g., form of organization or state of incorporation)?	○	◉

If "yes", complete Item 4.B. and Section 4 of Schedule D.

B. Date of Succession: (MM/DD/YYYY)

If you have already reported this succession on a previous Form ADV filing, do not report the succession again. Instead, check "No." See Part 1A Instruction 4.

SECTION 4 Successions

No Information Filed

Item 5 Information About Your Advisory Business - Employees, Clients, and Compensation

Responses to this Item help us understand your business, assist us in preparing for on-site examinations, and provide us with data we use when making regulatory policy. Part 1A Instruction 5.a. provides additional guidance to newly formed advisers for completing this Item 5.

Employees

If you are organized as a sole proprietorship, include yourself as an employee in your responses to Item 5.A. and Items 5.B.(1), (2), (3), (4), and (5). If an employee performs more than one function, you should count that employee in each of your responses to Items 5.B.(1), (2), (3), (4), and (5).

A. Approximately how many *employees* do you have? Include full- and part-time *employees* but do not include any clerical workers.

1

B. (1) Approximately how many of the *employees* reported in 5.A. perform investment advisory functions (including research)?

1

(2) Approximately how many of the *employees* reported in 5.A. are registered representatives of a broker-dealer?

0

(3) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives*?

1

(4) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives* for an investment adviser other than you?

0

(5) Approximately how many of the *employees* reported in 5.A. are licensed agents of an insurance company or agency?

0

(6) Approximately how many firms or other *persons* solicit advisory *clients* on your behalf?

0

In your response to Item 5.B.(6), do not count any of your employees and count a firm only once – do not count each of the firm's employees that solicit on your behalf.

Clients

In your responses to Items 5.C. and 5.D. do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

C. (1) To approximately how many *clients* for whom you do not have regulatory assets under management did you provide investment advisory services during your most recently completed fiscal year?

0

(2) Approximately what percentage of your *clients* are non-*United States persons*?

0%

D. *For purposes of this Item 5.D., the category "individuals" includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members, but does not include businesses organized as sole proprietorships.*
The category "business development companies" consists of companies that have made an election pursuant to section 54 of the Investment Company Act of 1940. Unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company

Act of 1940, do not answer (1)(d) or (3)(d) below.

Indicate the approximate number of your *clients* and amount of your total regulatory assets under management (reported in Item 5.F. below) attributable to each of the following type of *client*. If you have fewer than 5 *clients* in a particular category (other than (d), (e), and (f)) you may check Item 5.D.(2) rather than respond to Item 5.D.(1).

The aggregate amount of regulatory assets under management reported in Item 5.D.(3) should equal the total amount of regulatory assets under management reported in Item 5.F.(2)(c) below.

If a *client* fits into more than one category, select one category that most accurately represents the *client* to avoid double counting *clients* and assets. If you advise a registered investment company, business development company, or pooled investment vehicle, report those assets in categories (d), (e), and (f) as applicable.

Type of *Client*	(1) Number of *Client(s)*	(2) Fewer than 5 *Clients*	(3) Amount of Regulatory Assets under Management
(a) Individuals (other than *high net worth individuals*)	13	☐	$ 2,983,657
(b) *High net worth individuals*	20	☐	$ 26,324,460
(c) Banking or thrift institutions	0	☐	$ 0
(d) Investment companies	0		$ 0
(e) Business development companies	0		$ 0
(f) Pooled investment vehicles (other than investment companies and business development companies)	0		$ 0
(g) Pension and profit sharing plans (but not the plan participants or government pension plans)	0	☐	$ 0
(h) Charitable organizations	0	☐	$ 0
(i) State or municipal *government entities* (including government pension plans)	0	☐	$ 0
(j) Other investment advisers	0	☐	$ 0
(k) Insurance companies	0	☐	$ 0
(l) Sovereign wealth funds and foreign official institutions	0	☐	$ 0
(m) Corporations or other businesses not listed above	0	☐	$ 0
(n) Other:	0	☐	$ 0

Compensation Arrangements

E. You are compensated for your investment advisory services by (check all that apply):

- ☑ (1) A percentage of assets under your management
- ☑ (2) Hourly charges
- ☐ (3) Subscription fees (for a newsletter or periodical)
- ☐ (4) Fixed fees (other than subscription fees)
- ☐ (5) Commissions
- ☐ (6) *Performance-based fees*
- ☑ (7) Other (specify): SELECTION OF OTHER ADVISERS FEES

Item 5 Information About Your Advisory Business - Regulatory Assets Under Management

Regulatory Assets Under Management

	Yes	No
F. (1) Do you provide continuous and regular supervisory or management services to securities portfolios?	◉	○

(2) If yes, what is the amount of your regulatory assets under management and total number of accounts?

		U.S. Dollar Amount		Total Number of Accounts
Discretionary:	(a)	$ 0	(d)	0
Non-Discretionary:	(b)	$ 29,308,117	(e)	75
Total:	(c)	$ 29,308,117	(f)	75

Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management. You must follow these instructions carefully when completing this Item.

(3) What is the approximate amount of your total regulatory assets under management (reported in Item 5.F.(2)(c) above) attributable to *clients* who are non-*United States persons*?

$ 0

Item 5 Information About Your Advisory Business - Advisory Activities

Advisory Activities

G. What type(s) of advisory services do you provide? Check all that apply.

- [x] (1) Financial planning services
- [x] (2) Portfolio management for individuals and/or small businesses
- [ ] (3) Portfolio management for investment companies (as well as "business development companies" that have made an election pursuant to section 54 of the Investment Company Act of 1940)
- [ ] (4) Portfolio management for pooled investment vehicles (other than investment companies)
- [ ] (5) Portfolio management for businesses (other than small businesses) or institutional *clients* (other than registered investment companies and other pooled investment vehicles)
- [ ] (6) Pension consulting services
- [x] (7) Selection of other advisers (including *private fund* managers)
- [ ] (8) Publication of periodicals or newsletters
- [ ] (9) Security ratings or pricing services
- [ ] (10) Market timing services
- [ ] (11) Educational seminars/workshops
- [ ] (12) Other(specify):

Do not check Item 5.G.(3) unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, including as a subadviser. If you check Item 5.G.(3), report the 811 or 814 number of the investment company or investment companies to which you provide advice in Section 5.G.(3) of Schedule D.

H. If you provide financial planning services, to how many *clients* did you provide these services during your last fiscal year?

- ○ 0
- ○ 1 - 10
- ○ 11 - 25
- ◉ 26 - 50
- ○ 51 - 100
- ○ 101 - 250
- ○ 251 - 500
- ○ More than 500

  If more than 500, how many?
  (round to the nearest 500)

In your responses to this Item 5.H., do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

	Yes	No
I. (1) Do you participate in a *wrap fee program*?	○	◉

(2) If you participate in a *wrap fee program*, what is the amount of your regulatory assets under management attributable to acting as:

(a) *sponsor* to a *wrap fee program*
$

(b) portfolio manager for a *wrap fee program*?
$

(c) *sponsor* to and portfolio manager for the same *wrap fee program*?
$

If you report an amount in Item 5.I.(2)(c), do not report that amount in Item 5.I.(2)(a) or Item 5.I.(2)(b).

If you are a portfolio manager for a wrap fee program, list the names of the programs, their sponsors and related information in Section 5.I.(2) of Schedule D.

If your involvement in a wrap fee program is limited to recommending wrap fee programs to your clients, or you advise a mutual fund that is offered through a wrap fee program, do not check Item 5.I.(1) or enter any amounts in response to Item 5.I.(2).

	Yes	No
J. (1) In response to Item 4.B. of Part 2A of Form ADV, do you indicate that you provide investment advice only with respect to limited types of investments?	○	◉
(2) Do you report *client* assets in Item 4.E. of Part 2A that are computed using a different method than the method used to compute your regulatory assets under management?	○	◉

K. Separately Managed Account *Clients*

	Yes	No
(1) Do you have regulatory assets under management attributable to *clients* other than those listed in Item 5.D.(3)(d)-(f) (separately managed account *clients*)?	◉	○

If yes, complete Section 5.K.(1) of Schedule D.

(2) Do you engage in borrowing transactions on behalf of any of the separately managed account *clients* that you advise?	○	◉

If yes, complete Section 5.K.(2) of Schedule D.

(3) Do you engage in derivative transactions on behalf of any of the separately managed account *clients* that you advise? ○ ◉

If yes, complete Section 5.K.(2) of Schedule D.

(4) After subtracting the amounts in Item 5.D.(3)(d)-(f) above from your total regulatory assets under management, does any custodian hold ten percent or more of this remaining amount of regulatory assets under management? ◉ ○

If yes, complete Section 5.K.(3) of Schedule D for each custodian.

L. Marketing Activities

	Yes	No
(1) Do any of your *advertisements* include:		
(a) Performance results?	○	◉
(b) A reference to specific investment advice provided by you (as that phrase is used in rule 206(4)-1(a)(5))?	○	◉
(c) *Testimonials* (other than those that satisfy rule 206(4)-1(b)(4)(ii))?	○	◉
(d) *Endorsements* (other than those that satisfy rule 206(4)-1(b)(4)(ii))?	○	◉
(e) *Third-party ratings*?	○	◉
(2) If you answer "yes" to L(1)(c), (d), or (e) above, do you pay or otherwise provide cash or non-cash compensation, directly or indirectly, in connection with the use of *testimonials*, *endorsements*, or *third-party ratings*?	○	○
(3) Do any of your *advertisements* include *hypothetical performance* ?	○	◉
(4) Do any of your *advertisements* include *predecessor performance* ?	○	◉

SECTION 5.G.(3) Advisers to Registered Investment Companies and Business Development Companies

No Information Filed

SECTION 5.I.(2) *Wrap Fee Programs*

No Information Filed

SECTION 5.K.(1) Separately Managed Accounts

After subtracting the amounts reported in Item 5.D.(3)(d)-(f) from your total regulatory assets under management, indicate the approximate percentage of this remaining amount attributable to each of the following categories of assets. If the remaining amount is at least $10 billion in regulatory assets under management, complete Question (a). If the remaining amount is less than $10 billion in regulatory assets under management, complete Question (b).

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you subadvise.

End of year refers to the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment* . Mid-year is the date six months before the end of year date. Each column should add up to 100% and numbers should be rounded to the nearest percent.

Investments in derivatives, registered investment companies, business development companies, and pooled investment vehicles should be reported in those categories. Do not report those investments based on related or underlying portfolio assets. Cash equivalents include bank deposits, certificates of deposit, bankers' acceptances and similar bank instruments.

Some assets could be classified into more than one category or require discretion about which category applies. You may use your own internal methodologies and the conventions of your service providers in determining how to categorize assets, so long as the methodologies or conventions are consistently applied and consistent with information you report internally and to current and prospective clients. However, you should not double count assets, and your responses must be consistent with any instructions or other guidance relating to this Section.

(a)

Asset Type	Mid-year	End of year
(i) Exchange-Traded Equity Securities	%	%
(ii) Non Exchange-Traded Equity Securities	%	%
(iii) U.S. Government/Agency Bonds	%	%

(iv)	U.S. State and Local Bonds	%	%
(v)	*Sovereign Bonds*	%	%
(vi)	Investment Grade Corporate Bonds	%	%
(vii)	Non-Investment Grade Corporate Bonds	%	%
(viii)	Derivatives	%	%
(ix)	Securities Issued by Registered Investment Companies or Business Development Companies	%	%
(x)	Securities Issued by Pooled Investment Vehicles (other than Registered Investment Companies or Business Development Companies)	%	%
(xi)	Cash and Cash Equivalents	%	%
(xii)	Other	%	%

Generally describe any assets included in "Other"

(b)

Asset Type		**End of year**
(i)	Exchange-Traded Equity Securities	0 %
(ii)	Non Exchange-Traded Equity Securities	0 %
(iii)	U.S. Government/Agency Bonds	0 %
(iv)	U.S. State and Local Bonds	0 %
(v)	*Sovereign Bonds*	0 %
(vi)	Investment Grade Corporate Bonds	0 %
(vii)	Non-Investment Grade Corporate Bonds	0 %
(viii)	Derivatives	0 %
(ix)	Securities Issued by Registered Investment Companies or Business Development Companies	100 %
(x)	Securities Issued by Pooled Investment Vehicles (other than Registered Investment Companies or Business Development Companies)	0 %
(xi)	Cash and Cash Equivalents	0 %
(xii)	Other	0 %

Generally describe any assets included in "Other"

SECTION 5.K.(2) Separately Managed Accounts - Use of *Borrowings* and Derivatives

☐ **No information is required to be reported in this Section 5.K.(2) per the instructions of this Section 5.K.(2)**

If your regulatory assets under management attributable to separately managed accounts are at least $10 billion, you should complete Question (a). If your regulatory assets under management attributable to separately managed accounts are at least $500 million but less than $10 billion, you should complete Question (b).

(a) In the table below, provide the following information regarding the separately managed accounts you advise. If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you subadvise. End of year refers to the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment*. Mid-year is the date six months before the end of year date.

In column 1, indicate the regulatory assets under management attributable to separately managed accounts associated with each level of gross notional exposure. For purposes of this table, the gross notional exposure of an account is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any *borrowings* and (b) the *gross notional value* of all derivatives, by (ii) the regulatory assets under management of the account.

In column 2, provide the dollar amount of *borrowings* for the accounts included in column 1.

In column 3, provide aggregate *gross notional value* of derivatives divided by the aggregate regulatory assets under management of the accounts included in column 1 with respect to each category of derivatives specified in 3(a) through (f).

You may, but are not required to, complete the table with respect to any separately managed account with regulatory assets under management of less than $10,000,000.

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

(i) Mid-Year

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***	**(3) Derivative Exposures**				

			(a) *Interest Rate Derivative*	(b) *Foreign Exchange Derivative*	(c) *Credit Derivative*	(d) *Equity Derivative*	(e) *Commodity Derivative*	(f) *Other Derivative*
Less than 10%	$	$	%	%	%	%	%	%
10-149%	$	$	%	%	%	%	%	%
150% or more	$	$	%	%	%	%	%	%

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

(ii) End of Year

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***	**(3) Derivative Exposures**					
			(a) *Interest Rate Derivative*	**(b) *Foreign Exchange Derivative***	**(c) *Credit Derivative***	**(d) *Equity Derivative***	**(e) *Commodity Derivative***	**(f) *Other Derivative***
Less than 10%	$	$	%	%	%	%	%	%
10-149%	$	$	%	%	%	%	%	%
150% or more	$	$	%	%	%	%	%	%

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

(b) In the table below, provide the following information regarding the separately managed accounts you advise as of the date used to calculate your regulatory assets under management for purposes of your *annual updating amendment*. If you are a subadviser to a separately managed account, you should only provide information with respect to the portion of the account that you subadvise.

In column 1, indicate the regulatory assets under management attributable to separately managed accounts associated with each level of gross notional exposure. For purposes of this table, the gross notional exposure of an account is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any *borrowings* and (b) the *gross notional value* of all derivatives, by (ii) the regulatory assets under management of the account.

In column 2, provide the dollar amount of *borrowings* for the accounts included in column 1.

You may, but are not required to, complete the table with respect to any separately managed accounts with regulatory assets under management of less than $10,000,000.

Any regulatory assets under management reported in Item 5.D.(3)(d), (e), and (f) should not be reported below.

Gross Notional Exposure	**(1) Regulatory Assets Under Management**	**(2) *Borrowings***
Less than 10%	$	$
10-149%	$	$
150% or more	$	$

Optional: Use the space below to provide a narrative description of the strategies and/or manner in which *borrowings* and derivatives are used in the management of the separately managed accounts that you advise.

SECTION 5.K.(3) Custodians for Separately Managed Accounts

Complete a separate Schedule D Section 5.K.(3) for each custodian that holds ten percent or more of your aggregate separately managed account regulatory assets under management.

(a) Legal name of custodian:

CHARLES SCHWAB & CO., INC.

(b) Primary business name of custodian:

CHARLES SCHWAB & CO., INC.

(c) The location(s) of the custodian's office(s) responsible for *custody* of the assets :

City:	State:	Country:
WESTLAKE	Texas	United States

	Yes	**No**
(d) Is the custodian a *related person* of your firm?	○	◉

(e) If the custodian is a broker-dealer, provide its SEC registration number (if any)

8 - 16514

(f) If the custodian is not a broker-dealer, or is a broker-dealer but does not have an SEC registration number, provide its *legal entity identifier* (if any)

(g) What amount of your regulatory assets under management attributable to separately managed accounts is held at the custodian?

$ 23,792,755

Item 6 Other Business Activities

In this Item, we request information about your firm's other business activities.

A. You are actively engaged in business as a (check all that apply):

- ☐ (1) broker-dealer (registered or unregistered)
- ☐ (2) registered representative of a broker-dealer
- ☐ (3) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (4) futures commission merchant
- ☐ (5) real estate broker, dealer, or agent
- ☐ (6) insurance broker or agent
- ☐ (7) bank (including a separately identifiable department or division of a bank)
- ☐ (8) trust company
- ☐ (9) registered municipal advisor
- ☐ (10) registered security-based swap dealer
- ☐ (11) major security-based swap participant
- ☐ (12) accountant or accounting firm
- ☐ (13) lawyer or law firm
- ☐ (14) other financial product salesperson (specify):

If you engage in other business using a name that is different from the names reported in Items 1.A. or 1.B.(1), complete Section 6.A. of Schedule D.

		Yes	No
B. (1)	Are you actively engaged in any other business not listed in Item 6.A. (other than giving investment advice)?	○	◉
(2)	If yes, is this other business your primary business?	○	○

If "yes," describe this other business on Section 6.B.(2) of Schedule D, and if you engage in this business under a different name, provide that name.

		Yes	No
(3)	Do you sell products or provide services other than investment advice to your advisory *clients*?	○	◉

If "yes," describe this other business on Section 6.B.(3) of Schedule D, and if you engage in this business under a different name, provide that name.

SECTION 6.A. Names of Your Other Businesses

No Information Filed

SECTION 6.B.(2) Description of Primary Business

Describe your primary business (not your investment advisory business):

If you engage in that business under a different name, provide that name:

SECTION 6.B.(3) Description of Other Products and Services

Describe other products or services you sell to your *client*. You may omit products and services that you listed in Section 6.B.(2) above.

If you engage in that business under a different name, provide that name:

Item 7 Financial Industry Affiliations

In this Item, we request information about your financial industry affiliations and activities. This information identifies areas in which conflicts of interest may occur between you and your *clients*.

A. This part of Item 7 requires you to provide information about you and your *related persons*, including foreign affiliates. Your *related persons* are all of your *advisory affiliates* and any *person* that is under common *control* with you.

You have a *related person* that is a (check all that apply):

- ☐ (1) broker-dealer, municipal securities dealer, or government securities broker or dealer (registered or unregistered)
- ☐ (2) other investment adviser (including financial planners)
- ☐ (3) registered municipal advisor
- ☐ (4) registered security-based swap dealer

- ☐ (5) major security-based swap participant
- ☐ (6) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (7) futures commission merchant
- ☐ (8) banking or thrift institution
- ☐ (9) trust company
- ☐ (10) accountant or accounting firm
- ☑ (11) lawyer or law firm
- ☐ (12) insurance company or agency
- ☐ (13) pension consultant
- ☑ (14) real estate broker or dealer
- ☐ (15) sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
- ☐ (16) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

Note that Item 7.A. should not be used to disclose that some of your employees perform investment advisory functions or are registered representatives of a broker-dealer. The number of your firm's employees who perform investment advisory functions should be disclosed under Item 5.B.(1). The number of your firm's employees who are registered representatives of a broker-dealer should be disclosed under Item 5.B.(2).

Note that if you are filing an umbrella registration, you should not check Item 7.A.(2) with respect to your relying advisers, and you do not have to complete Section 7.A. in Schedule D for your relying advisers. You should complete a Schedule R for each relying adviser.

For each related person, including foreign affiliates that may not be registered or required to be registered in the United States, complete Section 7.A. of Schedule D.

You do not need to complete Section 7.A. of Schedule D for any related person if: (1) you have no business dealings with the related person in connection with advisory services you provide to your clients; (2) you do not conduct shared operations with the related person; (3) you do not refer clients or business to the related person, and the related person does not refer prospective clients or business to you; (4) you do not share supervised persons or premises with the related person; and (5) you have no reason to believe that your relationship with the related person otherwise creates a conflict of interest with your clients.

You must complete Section 7.A. of Schedule D for each related person acting as qualified custodian in connection with advisory services you provide to your clients (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)), regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

SECTION 7.A. Financial Industry Affiliations

No Information Filed

Item 7 *Private Fund* Reporting

	Yes	No
B. Are you an adviser to any *private fund*?	○	◉

If "yes," then for each private fund that you advise, you must complete a Section 7.B.(1) of Schedule D, except in certain circumstances described in the next sentence and in Instruction 6 of the Instructions to Part 1A. If you are registered or applying for registration with the SEC or reporting as an SEC exempt reporting adviser, and another SEC-registered adviser or SEC exempt reporting adviser reports this information with respect to any such private fund in Section 7.B.(1) of Schedule D of its Form ADV (e.g., if you are a subadviser), do not complete Section 7.B.(1) of Schedule D with respect to that private fund. You must, instead, complete Section 7.B.(2) of Schedule D.

In either case, if you seek to preserve the anonymity of a private fund client by maintaining its identity in your books and records in numerical or alphabetical code, or similar designation, pursuant to rule 204-2(d), you may identify the private fund in Section 7.B.(1) or 7.B.(2) of Schedule D using the same code or designation in place of the fund's name.

SECTION 7.B.(1) *Private Fund* Reporting

No Information Filed

SECTION 7.B.(2) *Private Fund* Reporting

No Information Filed

Item 8 Participation or Interest in *Client* Transactions

In this Item, we request information about your participation and interest in your *clients*' transactions. This information identifies additional areas in which conflicts of interest may occur between you and your *clients*. Newly-formed advisers should base responses to these questions on the types of participation and interest that you expect to engage in during the next year.

Like Item 7, Item 8 requires you to provide information about you and your *related persons*, including foreign affiliates.

Proprietary Interest in *Client* Transactions

		Yes	No
A.	Do you or any *related person*:		
(1)	buy securities for yourself from advisory *clients*, or sell securities you own to advisory *clients* (principal transactions)?	○	◉
(2)	buy or sell for yourself securities (other than shares of mutual funds) that you also recommend to advisory *clients*?	◉	○
(3)	recommend securities (or other investment products) to advisory *clients* in which you or any *related person* has some other proprietary (ownership) interest (other than those mentioned in Items 8.A.(1) or (2))?	○	◉

Sales Interest in *Client* Transactions

		Yes	No
B.	Do you or any *related person*:		
(1)	as a broker-dealer or registered representative of a broker-dealer, execute securities trades for brokerage customers in which advisory *client* securities are sold to or bought from the brokerage customer (agency cross transactions)?	○	◉
(2)	recommend to advisory *clients*, or act as a purchaser representative for advisory *clients* with respect to, the purchase of securities for which you or any *related person* serves as underwriter or general or managing partner?	○	◉
(3)	recommend purchase or sale of securities to advisory *clients* for which you or any *related person* has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer)?	○	◉

Investment or Brokerage Discretion

		Yes	No
C.	Do you or any *related person* have *discretionary authority* to determine the:		
(1)	securities to be bought or sold for a *client's* account?	○	◉
(2)	amount of securities to be bought or sold for a *client's* account?	○	◉
(3)	broker or dealer to be used for a purchase or sale of securities for a *client's* account?	○	◉
(4)	commission rates to be paid to a broker or dealer for a *client's* securities transactions?	○	◉
D.	If you answer "yes" to C.(3) above, are any of the brokers or dealers *related persons*?	○	○
E.	Do you or any *related person* recommend brokers or dealers to *clients*?	◉	○
F.	If you answer "yes" to E. above, are any of the brokers or dealers *related persons*?	○	◉
G. (1)	Do you or any *related person* receive research or other products or services other than execution from a broker-dealer or a third party ("soft dollar benefits") in connection with *client* securities transactions?	○	◉
(2)	If "yes" to G.(1) above, are all the "soft dollar benefits" you or any *related persons* receive eligible "research or brokerage services" under section 28(e) of the Securities Exchange Act of 1934?	○	◉
H. (1)	Do you or any *related person*, directly or indirectly, compensate any *person* that is not an *employee* for *client* referrals?	○	◉
(2)	Do you or any *related person*, directly or indirectly, provide any *employee* compensation that is specifically related to obtaining *clients* for the firm (cash or non-cash compensation in addition to the *employee's* regular salary)?	○	◉
I.	Do you or any *related person*, including any *employee*, directly or indirectly, receive compensation from any *person* (other than you or any *related person*) for *client* referrals?	○	◉

In your response to Item 8.I., do not include the regular salary you pay to an employee.

In responding to Items 8.H. and 8.I., consider all cash and non-cash compensation that you or a related person gave to (in answering Item 8.H.) or received from (in answering Item 8.I.) any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals.

Item 9 Custody

In this Item, we ask you whether you or a *related person* has *custody* of *client* (other than *clients* that are investment companies registered under the Investment Company Act of 1940) assets and about your custodial practices.

		Yes	No
A. (1)	Do you have *custody* of any advisory *clients'*:		
	(a) cash or bank accounts?	○	◉
	(b) securities?	○	◉

If you are registering or registered with the SEC, answer "No" to Item 9.A.(1)(a) and (b) if you have custody solely because (i) you deduct your advisory fees directly from your clients' accounts, or (ii) a related person has custody of client assets in connection with advisory services you provide to clients, but you have overcome the presumption that you are not operationally independent (pursuant to Advisers Act rule 206(4)-2(d)(5)) from the related person.

(2) If you checked "yes" to Item 9.A.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which you have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $	(b)

If you are registering or registered with the SEC and you have custody solely because you deduct your advisory fees directly from your clients' accounts, do not include the amount of those assets and the number of those clients in your response to Item 9.A.(2). If your related person has custody of client assets in connection with advisory services you provide to clients, do not include the amount of those assets and number of those clients in your response to 9.A.(2). Instead, include that information in your response to Item 9.B.(2).

B. (1) In connection with advisory services you provide to *clients*, do any of your *related persons* have *custody* of any of your advisory *clients'*:

	Yes	No
(a) cash or bank accounts?	○	◉
(b) securities?	○	◉

You are required to answer this item regardless of how you answered Item 9.A.(1)(a) or (b).

(2) If you checked "yes" to Item 9.B.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which your *related persons* have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $	(b)

C. If you or your *related persons* have *custody* of *client* funds or securities in connection with advisory services you provide to *clients*, check all the following that apply:

(1) A qualified custodian(s) sends account statements at least quarterly to the investors in the pooled investment vehicle(s) you manage. ☐

(2) An *independent public accountant* audits annually the pooled investment vehicle(s) that you manage and the audited financial statements are distributed to the investors in the pools. ☐

(3) An *independent public accountant* conducts an annual surprise examination of *client* funds and securities. ☐

(4) An *independent public accountant* prepares an internal control report with respect to custodial services when you or your *related persons* are qualified custodians for *client* funds and securities. ☐

If you checked Item 9.C.(2), C.(3) or C.(4), list in Section 9.C. of Schedule D the accountants that are engaged to perform the audit or examination or prepare an internal control report. (If you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.(1) of Schedule D).

D. Do you or your *related person(s)* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*?

	Yes	No
(1) you act as a qualified custodian	○	◉
(2) your *related person(s)* act as qualified custodian(s)	○	◉

If you checked "yes" to Item 9.D.(2), all related persons that act as qualified custodians (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)) must be identified in Section 7.A. of Schedule D, regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

E. If you are filing your *annual updating amendment* and you were subject to a surprise examination by an *independent public accountant* during your last fiscal year, provide the date (MM/YYYY) the examination commenced:

F. If you or your *related persons* have *custody* of *client* funds or securities, how many *persons*, including, but not limited to, you and your *related persons,* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients?*

SECTION 9.C. *Independent Public Accountant*

No Information Filed

Item 10 Control Persons

In this Item, we ask you to identify every *person* that, directly or indirectly, *controls* you. If you are filing an *umbrella registration*, the information in Item 10 should be provided for the *filing adviser* only.

If you are submitting an initial application or report, you must complete Schedule A and Schedule B. Schedule A asks for information about your direct owners and executive officers. Schedule B asks for information about your indirect owners. If this is an amendment and you are updating information you reported on either Schedule A or Schedule B (or both) that you filed with your initial application or report, you must complete Schedule C.

	Yes	No
A. Does any *person* not named in Item 1.A. or Schedules A, B, or C, directly or indirectly, *control* your management or policies?	○	◉

If yes, complete Section 10.A. of Schedule D.

B. If any *person* named in Schedules A, B, or C or in Section 10.A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934, please complete Section 10.B. of Schedule D.

SECTION 10.A. *Control Persons*

No Information Filed

SECTION 10.B. *Control Person* Public Reporting Companies

No Information Filed

Item 11 Disclosure Information

In this Item, we ask for information about your disciplinary history and the disciplinary history of all your *advisory affiliates*. We use this information to determine whether to grant your application for registration, to decide whether to revoke your registration or to place limitations on your activities as an investment adviser, and to identify potential problem areas to focus on during our on-site examinations. One event may result in "yes" answers to more than one of the questions below. In accordance with General Instruction 5 to Form ADV, "you" and "your" include the *filing adviser* and all *relying advisers* under an *umbrella registration*.

Your *advisory affiliates* are: (1) all of your current *employees* (other than *employees* performing only clerical, administrative, support or similar functions); (2) all of your officers, partners, or directors (or any *person* performing similar functions); and (3) all *persons* directly or indirectly *controlling* you or *controlled* by you. If you are a "separately identifiable department or division" (SID) of a bank, see the Glossary of Terms to determine who your *advisory affiliates* are.

If you are registered or registering with the SEC or if you are an exempt reporting adviser, you may limit your disclosure of any event listed in Item 11 to ten years following the date of the event. If you are registered or registering with a state, you must respond to the questions as posed; you may, therefore, limit your disclosure to ten years following the date of an event only in responding to Items 11.A.(1), 11.A.(2), 11.B.(1), 11.B.(2), 11.D.(4), and 11.H.(1)(a). For purposes of calculating this ten-year period, the date of an event is the date the final order, judgment, or decree was entered, or the date any rights of appeal from preliminary orders, judgments, or decrees lapsed.

You must complete the appropriate Disclosure Reporting Page ("DRP") for "yes" answers to the questions in this Item 11.

	Yes	No
Do any of the events below involve you or any of your *supervised persons*?	○	◉

For "yes" answers to the following questions, complete a Criminal Action DRP:

	Yes	No
A. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*?	○	◉
(2) been *charged* with any *felony*?	○	◉

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.A.(2) to charges that are currently pending.

B. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a *misdemeanor* involving: investments or an *investment-related* business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	○	◉
(2) been *charged* with a *misdemeanor* listed in Item 11.B.(1)?	○	◉

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.B.(2) to charges that are currently pending.

For "yes" answers to the following questions, complete a Regulatory Action DRP:

	Yes	No
C. Has the SEC or the Commodity Futures Trading Commission (CFTC) ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	○	◉
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of SEC or CFTC regulations or statutes?	○	◉
(3) *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	◉
(4) entered an *order* against you or any *advisory affiliate* in connection with *investment-related* activity?	○	◉
(5) imposed a civil money penalty on you or any *advisory affiliate*, or *ordered* you or any *advisory affiliate* to cease and desist from any activity?	○	◉
D. Has any other federal regulatory agency, any state regulatory agency, or any *foreign financial regulatory authority*:		
(1) ever *found* you or any *advisory affiliate* to have made a false statement or omission, or been dishonest, unfair, or unethical?	○	◉
(2) ever *found* you or any *advisory affiliate* to have been *involved* in a violation of *investment-related* regulations or statutes?	○	◉
(3) ever *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	◉
(4) in the past ten years, entered an *order* against you or any *advisory affiliate* in connection with an *investment-related* activity?	○	◉
(5) ever denied, suspended, or revoked your or any *advisory affiliate's* registration or license, or otherwise prevented you or any *advisory*	○	◉

affiliate, by *order*, from associating with an *investment-related* business or restricted your or any *advisory affiliate's* activity?

E. Has any *self-regulatory organization* or commodities exchange ever:

(1) *found* you or any *advisory affiliate* to have made a false statement or omission? ○ ◉

(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the SEC)? ○ ◉

(3) *found* you or any *advisory affiliate* to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted? ○ ◉

(4) disciplined you or any *advisory affiliate* by expelling or suspending you or the *advisory affiliate* from membership, barring or suspending you or the *advisory affiliate* from association with other members, or otherwise restricting your or the *advisory affiliate's* activities? ○ ◉

F. Has an authorization to act as an attorney, accountant, or federal contractor granted to you or any *advisory affiliate* ever been revoked or suspended? ○ ◉

G. Are you or any *advisory affiliate* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of Item 11.C., 11.D., or 11.E.? ○ ◉

For "yes" answers to the following questions, complete a Civil Judicial Action DRP:

H.		Yes	No
(1)	Has any domestic or foreign court:		
	(a) in the past ten years, *enjoined* you or any *advisory affiliate* in connection with any *investment-related* activity?	○	◉
	(b) ever *found* that you or any *advisory affiliate* were *involved* in a violation of *investment-related* statutes or regulations?	○	◉
	(c) ever dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you or any *advisory affiliate* by a state or *foreign financial regulatory authority*?	○	◉
(2)	Are you or any *advisory affiliate* now the subject of any civil *proceeding* that could result in a "yes" answer to any part of Item 11.H.(1)?	○	◉

Item 12 Small Businesses

The SEC is required by the Regulatory Flexibility Act to consider the effect of its regulations on small entities. In order to do this, we need to determine whether you meet the definition of "small business" or "small organization" under rule 0-7.

Answer this Item 12 only if you are registered or registering with the SEC **and** you indicated in response to Item 5.F.(2)(c) that you have regulatory assets under management of less than $25 million. You are not required to answer this Item 12 if you are filing for initial registration as a state adviser, amending a current state registration, or switching from SEC to state registration.

For purposes of this Item 12 only:

- Total Assets refers to the total assets of a firm, rather than the assets managed on behalf of *clients*. In determining your or another *person's* total assets, you may use the total assets shown on a current balance sheet (but use total assets reported on a consolidated balance sheet with subsidiaries included, if that amount is larger).
- *Control* means the power to direct or cause the direction of the management or policies of a *person*, whether through ownership of securities, by contract, or otherwise. Any *person* that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of another *person* is presumed to *control* the other *person*.

		Yes	No
A.	Did you have total assets of $5 million or more on the last day of your most recent fiscal year?	○	○

If "yes," you do not need to answer Items 12.B. and 12.C.

B.			
(1)	*control* another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year?	○	○
(2)	*control* another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	○	○
C.	Are you:		
(1)	*controlled* by or under common *control* with another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year?	○	○
(2)	*controlled* by or under common *control* with another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	○	○

Schedule A

Direct Owners and Executive Officers

1. Complete Schedule A only if you are submitting an initial application or report. Schedule A asks for information about your direct owners and executive officers. Use Schedule C to amend this information.
2. Direct Owners and Executive Officers. List below the names of:
   (a) each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer(Chief Compliance Officer is required if you are registered or applying for registration and cannot be more than one individual), director, and any other individuals with similar

status or functions;

(b) if you are organized as a corporation, each shareholder that is a direct owner of 5% or more of a class of your voting securities, unless you are a public reporting company (a company subject to Section 12 or 15(d) of the Exchange Act);
Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of your voting securities. For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

(c) if you are organized as a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of your capital;

(d) in the case of a trust that directly owns 5% or more of a class of your voting securities, or that has the right to receive upon dissolution, or has contributed, 5% or more of your capital, the trust and each trustee; and

(e) if you are organized as a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of your capital, and (ii) if managed by elected managers, all elected managers.

3. Do you have any indirect owners to be reported on Schedule B? ○ Yes ◉ No

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner or executive officer is an individual.

5. Complete the Title or Status column by entering board/management titles; status as partner, trustee, sole proprietor, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: NA - less than 5% B - 10% but less than 25% D - 50% but less than 75%
A - 5% but less than 10% C - 25% but less than 50% E - 75% or more

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

(c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired MM/YYYY	Ownership Code	*Control Person*	PR	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
MENDEL, STEPHEN, ANTHONY	I	PRESIDENT	12/2014	E	Y	N	4593474
VL-GP, L.L.C	DE	GENERAL PARTNER	07/2005	NA	N	N	

Schedule B

Indirect Owners

1. Complete Schedule B only if you are submitting an initial application or report. Schedule B asks for information about your indirect owners; you must first complete Schedule A, which asks for information about your direct owners. Use Schedule C to amend this information.

2. Indirect Owners. With respect to each owner listed on Schedule A (except individual owners), list below:

(a) in the case of an owner that is a corporation, each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation;

For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

(b) in the case of an owner that is a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 25% or more of the partnership's capital;

(c) in the case of an owner that is a trust, the trust and each trustee; and

(d) in the case of an owner that is a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Continue up the chain of ownership listing all 25% owners at each level. Once a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act) is reached, no further ownership information need be given.

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner is an individual.

5. Complete the Status column by entering the owner's status as partner, trustee, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: C - 25% but less than 50% E - 75% or more
D - 50% but less than 75% F - Other (general partner, trustee, or elected manager)

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.

(b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.

(c) Complete each column.

No Information Filed

Schedule D - Miscellaneous

You may use the space below to explain a response to an Item or to provide any other information.

Schedule R

No Information Filed

DRP Pages

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)

No Information Filed

Arbitration DRPs

No Information Filed

Bond DRPs

No Information Filed

Judgment/Lien DRPs

No Information Filed

Part 1B Item 1 - State Registration

You must complete this Part 1B only if you are applying for registration, or are registered, as an investment adviser with any of the *state securities authorities*.

Complete this Item 1 if you are submitting an initial application for state registration or requesting additional state registration(s). Check the boxes next to the states to which you are submitting this application. If you are already registered with at least one state and are applying for registration with an additional state or states, check the boxes next to the states in which you are applying for registration. Do not check the boxes next to the states in which you are currently registered or where you have an application for registration pending.

Jurisdictions

☐ AL	☐ IL	☐ NE	☐ SC
☐ AK	☐ IN	☐ NV	☐ SD
☐ AZ	☐ IA	☐ NH	☐ TN
☐ AR	☐ KS	☐ NJ	☑ TX
☐ CA	☐ KY	☐ NM	☐ UT
☐ CO	☐ LA	☐ NY	☐ VT
☐ CT	☐ ME	☐ NC	☐ VI
☐ DE	☐ MD	☐ ND	☐ VA
☐ DC	☐ MA	☐ OH	☐ WA
☐ FL	☐ MI	☐ OK	☐ WV
☐ GA	☐ MN	☐ OR	☐ WI
☐ GU	☐ MS	☐ PA	☐ WY
☐ HI	☐ MO	☐ PR	
☐ ID	☐ MT	☐ RI	

Part 1B Item 2 - Additional Information

Complete this Item 2A. only if the person responsible for supervision and compliance does not appear in Item 1J. or 1K. of Form ADV Part 1A:

A. Person responsible for supervision and compliance:

Name: Title:

Telephone: Fax:

Number and Street 1: Number and Street 2:

City: State: Country: ZIP+4/Postal Code:

Email address, if available:

If this address is a private residence, check this box: ☐

B. Bond/Capital Information, if required by your *home state*

(1) Name of Issuing Insurance Company:

(2) Amount of Bond:

$ .00

(3) Bond Policy Number:

	Yes	No
(4) If required by your home state, are you in compliance with your home state's minimum capital requirements?	○	○

Part 1B - Disclosure Questions

BOND DISCLOSURE

For "yes" answers to the following question, complete a Bond DRP.

	Yes	No
C. Has a bonding company ever denied, paid out on, or revoked a bond for you, any *advisory affiliate*, or any *management person*?	○	◉

JUDGMENT/LIEN DISCLOSURE

For "yes" answers to the following question, complete a Judgment/Lien DRP.

	Yes	No
D. Are there any unsatisfied judgments or liens against you, any *advisory affiliate*, or any *management person*?	○	◉

ARBITRATION DISCLOSURE

For "yes" answers to the following questions, complete an Arbitration DRP.

	Yes	No
E. Are you, any *advisory affiliate*, or any *management person* currently the subject of, or have you, any *advisory affiliate*, or any *management person* been the subject of, an arbitration claim alleging damages in excess of $2,500, involving any of the following:		
(1) any investment or an *investment-related* business or activity?	○	◉
(2) fraud, false statement, or omission?	○	◉
(3) theft, embezzlement, or other wrongful taking of property?	○	◉
(4) bribery, forgery, counterfeiting, or extortion?	○	◉
(5) dishonest, unfair, or unethical practices?	○	◉

CIVIL JUDICIAL DISCLOSURE

For "yes" answers to the following questions, complete a Civil Judicial Action DRP.

	Yes	No
F. Are you, any *advisory affiliate*, or any *management person* currently subject to, or have you, any *advisory affiliate*, or any *management person* been *found* liable in, a civil, *self-regulatory organization*, or administrative *proceeding* involving any of the following:		
(1) an investment or *investment-related* business or activity?	○	◉
(2) fraud, false statement, or omission?	○	◉
(3) theft, embezzlement, or other wrongful taking of property?	○	◉
(4) bribery, forgery, counterfeiting, or extortion?	○	◉
(5) dishonest, unfair, or unethical practices?	○	◉

Part 1B - Business Information

G. Other Business Activities

(1) Are you, any *advisory affiliate*, or any *management person* actively engaged in business as a(n) (check all that apply):

- ☐ Tax Preparer
- ☐ Issuer of securities
- ☐ Sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
- ☐ Sponsor, general partner, managing member (or equivalent) of pooled investment vehicles
- ☐ Real estate adviser

(2) If you, any *advisory affiliate*, or any *management person* are actively engaged in any business other than those listed in Item 6.A of Part 1A or Item 2.G(1) of Part 1B, describe the business and the approximate amount of time spent on that business:

H. If you provide financial planning services, the investments made based on those services at the end of your last fiscal year totaled:

	Securities Investments	Non-Securities Investments
Under $100,000	○	◉
$100,001 to $500,000	○	○
$500,001 to $1,000,000	○	○

$1,000,001 to $2,500,000	○	○
$2,500,001 to $5,000,000	◉	○
More than $5,000,000	○	○

If securities investments are over $5,000,000, how much? (round to the nearest $1,000,000)

If non-securities investments are over $5,000,000, how much? (round to the nearest $1,000,000)

		Yes	No
I.	*Custody*		
(1)	Advisory Fees		
	Do you withdraw advisory fees directly from your *clients'* accounts? If you answered "yes", respond to the following:	◉	○
	(a) Do you send a copy of your invoice to the custodian or trustee at the same time that you send a copy to the *client*?	◉	○
	(b) Does the custodian send quarterly statements to your *clients* showing all disbursements for the custodian account, including the amount of the advisory fees?	◉	○
	(c) Do your *clients* provide written authorization permitting you to be paid directly for their accounts held by the custodian or trustee?	◉	○
(2)	Pooled Investment Vehicles and Trusts		
	(a) (i) Do you or a *related person* act as a general partner, managing member, or person serving in a similar capacity, for any pooled investment vehicle for which you are the adviser to the pooled investment vehicle, or for which you are the adviser to one or more of the investors in the pooled investment vehicle? If you answered "yes", respond to the following:	○	◉
	(a) (ii) As the general partner, managing member, or person serving in a similar capacity, have you or a *related person* engaged any of the following to provide authority permitting each direct payment or any transfer of funds or securities from the account of the pooled investment vehicle?		
	Attorney	○	○
	Independent certified public accountant	○	○
	Other independent party	○	○
	Describe the independent party:		

For purposes of this Item 2I.2(a), "Independent party" means a person that: (A) is engaged by the investment adviser to act as a gatekeeper for the payment of fees, expenses and capital withdrawals from the pooled investment; (B) does not control and is not controlled by and is not under common control with the investment adviser; (C) does not have, and has not had within the past two years, a material business relationship with the investment adviser; and (D) shall not negotiate or agree to have material business relations or commonly controlled relations with an investment adviser for a period of two years after serving as the person engaged in an independent party agreement.

	(b) Do you or a *related person* act as investment adviser and a trustee for any trust, or act as a trustee for any trust in which your advisory clients are beneficiaries of the trust?	○	◉
(3)	Do you require the prepayment of fees of more than $500 per *client* and for six months or more in advance?	○	◉

		Yes	No
J.	If you are organized as a sole proprietorship, please answer the following:		
(1)	(a) Have you passed, on or after January 1, 2000, the Series 65 examination?	○	○
	(b) Have you passed, on or after January 1, 2000, the Series 66 examination and also passed, at any time, the Series 7 examination?	○	○
(2)	(a) Do you have any investment advisory professional designations?	○	○

If "no",you do not need to answer Item 2.J(2)(b).

(b) I have earned and I am in good standing with the organization that issued the following credential:

- ☐ Certified Financial Planner ("CFP")
- ☐ Chartered Financial Analyst ("CFA")
- ☐ Chartered Financial Consultant ("ChFC")
- ☐ Chartered Investment Counselor ("CIC")
- ☐ Personal Financial Specialist ("PFS")
- ☐ None of the above

(3) Your Social Security Number:

K. If you are organized other than as a sole proprietorship, please provide the following:

(1) Indicate the date you obtained your legal status. Date of formation: 07/08/2005

(2) Indicate your IRS Empl. Ident. No.:

Part 2

Amend, retire or file new brochures:

Brochure ID	Brochure Name	Brochure Type(s)
126189	ADV PART 2B- MENDEL	The document is a Brochure Supplement for one or more supervised persons (state-registered advisers only)
126190	ADV PART 2A-VESTED LEGACY WEALTH MANAGEMENT, L.P.	Selection of Other Advisers/Solicitors, Individuals, High net worth individuals, Financial Planning Services

Execution Pages

DOMESTIC INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the Secretary of State or other legally designated officer, of the state in which you maintain your *principal office and place of business* and any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding*, or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are submitting a *notice filing*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Signature:
STEPHEN A. MENDEL

Date: MM/DD/YYYY
03/17/2024

Printed Name:
STEPHEN A. MENDEL

Title:
PRESIDENT/CCO

Adviser *CRD* Number:
174462

NON-RESIDENT INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint each of the Secretary of the SEC, and the Secretary of State or other legally designated officer, of any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such persons may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of any state in which you are submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

3. *Non-Resident* Investment Adviser Undertaking Regarding Books and Records

By signing this Form ADV, you also agree to provide, at your own expense, to the U.S. Securities and Exchange Commission at its principal office in Washington D.C., at any Regional or District Office of the Commission, or at any one of its offices in the United States, as specified by the Commission, correct, current, and complete copies of any or all records that you are required to maintain under Rule 204-2 under the Investment Advisers Act of 1940. This undertaking shall be binding upon you, your heirs, successors and assigns, and any *person* subject to your written irrevocable consents or powers of attorney or any of your general partners and *managing agents*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the *non-resident* investment adviser. The investment adviser and I both

certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Signature:

Date: MM/DD/YYYY

Printed Name:

Title:

Adviser *CRD* Number:
174462

STATE-REGISTERED INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial application for state registration and all amendments to registration.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the legally designated officers and their successors, of the state in which you maintain your *principal office and place of business* and any other state in which you are applying for registration or amending your registration, as your agents to receive service, and agree that such persons may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding*, or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is founded, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are applying for registration or amending your registration.

2. State-Registered Investment Adviser Affidavit

If you are subject to state regulation, by signing this Form ADV, you represent that, you are in compliance with the registration requirements of the state in which you maintain your principal place of business and are in compliance with the bonding, capital, and recordkeeping requirements of that state.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Date: MM/DD/YYYY
03/17/2024

Printed Name:
STEPHEN A. MENDEL

Adviser *CRD* Number:
174462

Signature:
STEPHEN A. MENDEL

Title:
PRESIDENT/CCO

CIVIL ACTION NO. H-04-2220
United States District Court, S.D. Texas

Whitney National Bank v. Air Ambulance

516 F. Supp. 2d 802 (S.D. Tex. 2007)
Decided May 1, 2007

CIVIL ACTION NO. H-04-2220.

803 May 1, 2007. *803

Teresa Letson Schneider, Yasmin Islam Atasi, Demetra L. Liggins, Winstead Sechrest et al., Houston, TX, for Plaintiff.

Joe W. Redden, Jr., Beck Redden Secrest, Stephen A. Mendel, The Mendel Law Firm, L.P., Frederick Thomas Dietrich, The Dietrich Law Firm, John Kevin Raley, Houston, TX, for Defendants.

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MEMORANDUM AND OPINION

ROSENTHAL, District Judge.

This memorandum and opinion addresses Whitney Bank's motion for partial summary judgment for the deficiency remaining on the unpaid loan. (Docket Entry No. 136). Horridge has raised the affirmative defense that Whitney Bank's disposition of the aircraft securing the loans was not commercially reasonable. (Docket Entry No. 136). Horridge has responded to the motion for partial summary judgment. (Docket Entry No. 154). In a related motion, Whitney Bank seeks to exclude the testimony of expert witnesses Horridge designated on the issue of whether the sale of the aircraft was commercially reasonable. (Docket Entry No. 139). Horridge has responded, asserting that the record raises disputed fact issues material to determining whether the collateral was sold in a commercially reasonable manner. (Docket Entry No. 153).

Based on careful consideration of the pleadings, the motions and responses, the parties' submissions, and the applicable law, this court grants Whitney Bank's motion for 2 *2 partial summary judgment as to the deficiency claim and the motion to exclude Horridge's expert witnesses. (Docket Entry Nos. 136, 139). The reasons for the rulings are explained below.

I. Background

Most of the pertinent facts were set out in the earlier memorandum and opinion and are not repeated here except to put the motions relating to the deficiency and the commercial reasonableness of the sale into context. Briefly, Whitney Bank made several loans to Air Ambulance, secured by aircraft owned by B C Flight Management as well as by Horridge's personal guaranty. (Docket Entry No. B-5 to B-10). The aircraft subject to the Security Agreements were two Cessnas and six Lear Jets. (Docket Entry No. 136, Ex. C at 107-09; Ex. K-1).[1] As of April 2004, Air Ambulance's outstanding indebtedness to Whitney Bank exceeded $4.5 million. Air Ambulance also had outstanding loans with Bank One secured by other aircraft. (*Id.,* Ex. C at 107-108; Ex. K-1).

[1] The Cessnas had registration numbers N 5EU and N 42ML; the Lear Jets had registration numbers N 860MX, N 140 GC, N 251DS, N 988AS, N 535TA, andN 9108Z. (Docket Entry No. 136, Ex. B-4 to B-9, Ex. K-1).

The FAA requires that each airplane have an FAA-issued airworthiness certificate. An aircraft owner is required to keep accurate records of the hours the aircraft flies ("times" or "hours") and, for Lear Jets, when they take off and raise the landing gear and land and lower the landing gear ("cycles"). For Lear Jets, a record of "cycles" must be kept for the aircraft and the engines. This information 3 in turn determines what inspections and *3 maintenance are required, as well as the length of service of certain parts. (Docket Entry No. 136, Ex. C at 120-121; Docket Entry No. 136, Ex. D at 83-84, 123-124).

In April 2004, Horridge asked Whitney Bank to loan Air Ambulance an additional $1 million and 806 to refinance the existing *806 loans. Horridge did not tell Whitney Bank about the FAA investigation. (Docket Entry No. 136, Ex. C. at 213-14). On May 3, 2004, the FAA sent Horridge a letter identifying "serious deficiencies" in the maintenance of the Lear Jets and demanding that the aircraft be reexamined to evaluate their airworthiness. *(Id.,* Ex. K-3). On May 7, 2004, Whitney Bank made an additional $1 million loan to Air Ambulance and renewed and extended the existing debt, secured in part by six Lear Jets and two Cessna. (Docket Entry No. 136, Exs. B-1 to B-9; *Id.,* Ex. K-1).[2] The Commercial Note was in the amount of $5,685,597.00. The warranties and representations in each of the earlier aircraft Security Agreements were reaffirmed in the Ratification of Previously Executed Security Agreements. (Docket Entry No. 136, Ex. B-4). The Security Agreements specifically stated that B C Flight Management would keep the aircraft in "such condition as may be necessary to enable the airworthiness certification of the Collateral to be maintained in good standing at all times." (*Id.,* Exs. B-5 to B-9). The Security Agreements specifically represented the condition of the planes and their engines, maintenance, and airworthiness. 4 *(Id.)*. The *4 Security Agreements defined a condition of default to include any failure to perform any agreement made to the Secured Party. *(Id.)*.

2 The first Security Agreement covered the two Cessnas, N 5EU and N 42ML, and one Lear Jet, N 860MX. (Docket Entry No. 136, Ex. B-5 at 1). The second agreement covered Lear Jet N 9108Z. *(Id.,* Ex. B-6 at 1). The third security agreement covered Lear Jet N 140GC. *(Id.,* Ex. B-7 at 1). The fourth security agreement covered Lear Jet N 535TA. *(Id.,* Ex. B-8 at 1). The fifth security agreement covered Lear Jets N 988AS and N 251DS. *(Id.,* Ex. B-9 at 1).

On May 20, 2004, the FAA issued an emergency order suspending the airworthiness certificates for Air Ambulance's eight Lear Jets. (Docket Entry No. 136, Ex. K-9). The FAA found numerous critical problems in the flight and maintenance records for each of the eight Lear Jets, stating that the times and cycles shown in the B C Flight Management records were "not correct because they were fabricated by B C or were derived from data taken from fabricated B C documents." *(Id.* at Counts I — VIII). The FAA determined that "the company has not been recording all of the flight time for any of the aircraft, and it has systematically reduced the numbers of hours and cycles on them, resulting in required maintenance and inspections being significantly delayed or omitted and the aircraft being unairworthy. The true total time and cycles, which trigger maintenance actions for these aircraft, are unknown. Therefore, this action is taken to suspend the airworthiness certificates of the aircraft . . . until such time as the FAA can determine that they have been returned to conformity with their type certificates." *(Id.,* Determination of Emergency). On June 2, 2004, the FAA issued an emergency order revoking B C Flight Management's Air Carrier Certificate based on "consistent findings of deceptive, false record keeping." *(Id.,* Ex. K-10). The FAA found that B C Flight Management had "made, or caused to be

made, entries in the maintenance records of all the Learjet aircraft on its operations specifications . . . [that] were false and designed to mislead. . . . These false statements include, but are not limited to, reduced numbers of hours on the aircraft, 5 reduced numbers of cycles on the *5 aircraft, statements that required inspections had been accomplished when they hadn't been, and entries reciting the accomplishment of Airworthiness Directives (ADs) that had not been done." *(Id.,* Determination of Emergency). The FAA found 807 that B C Flight Management *807 had operated aircraft without "complying with required maintenance inspections, without complying with applicable airworthiness directives, and without replacing life limited parts in a timely manner. . . . B C operated the aircraft when they were not in an airworthy condition. . . . The entries were false and designed to mislead the FAA. . . . B C operated these aircraft with management's full knowledge of these type falsifications and in complete disregard of the danger these unairworthy aircraft presented to the public and the crews that operated them." *(Id.,* Ex. K-10). Air Ambulance was unable to operate without the airworthiness certificates for its planes and without the air carrier certificate for B C Flight Management.[3]

[3] Horridge testified in his deposition that he believed three pilots who planned to compete with him "manipulated the forms." (Docket Entry No. 136, Ex. C at 121). He also testified that the "hours and cycles were correct to start with," but that the "FAA was trying to destroy our company. They had a special mission." *(Id.,* Ex. E at 27).

On June 2, 2004, Whitney Bank notified Air Ambulance of its default under the loan agreement based on the FAA actions. On June 4, 2004, Whitney Bank accelerated the May 7, 2004 Commercial Note. (Docket Entry No. 136, Exs. B-10, B-11). On June 7, 2004, Whitney Bank filed this suit against Air Ambulance, B C Flight Management, and Horridge, seeking a temporary restraining order to prevent Horridge from 6 transferring or *6 damaging the aircraft that served as collateral for the loan. (Docket Entry No. 1).[4] This court entered a temporary restraining order sequestering the aircraft. (Docket Entry Nos. 3, 4). On June 24, 2004, this court entered an agreed preliminary injunction preventing Horridge from transferring or damaging the aircraft and transferring possession to Whitney Bank. (Docket Entry No. 15). On July 15, 2004, Whitney Bank sought and obtained another temporary restraining order prohibiting Horridge, Air Ambulance, and B C Management from transferring any assets. Whitney Bank based its application for this expanded temporary restraining order on evidence that it had discovered new information about Horridge's past and present asset transfers, bankruptcy filings, and other litigation, which Whitney Bank claimed were fraudulent. (Docket Entry No. 18). That temporary restraining order was extended on an agreed basis on July 22, 2004. (Docket Entry No. 27).

[4] On November 14, 2005, Whitney Bank dismissed its claims against Air Ambulance and B C Flight Management. (Docket Entry No. 57). Whitney Bank later added as a defendant Horridge's former wife, alleging fraudulent transfer of assets. The claims involving Horridge's former wife have been resolved through settlement.

On June 17, 2004, B C Flight Management reached a Settlement Agreement with the FAA. The FAA withdrew the order suspending the airworthiness certificates for the eight Lear Jets but "retained custody" of the certificates; the planes could not be flown. Under the agreement, B C Flight Management was to make a proposal to revise the records of takeoffs, landings, and hours in flight for each aircraft, to bring the records into compliance with the FAA regulations. The FAA would then decide whether to approve the proposal for revising the records for each aircraft

including approval of the method to be used. If the FAA issued *7 the approval, and if the plane had the additional necessary maintenance work performed, and if that plane then passed FAA inspection, the airworthiness certificate for that plane would be returned. (Docket Entry No. 136, Ex. K-14). Pending this work, the FAA did not return the airworthiness certificates to B C Flight Management. As a result, the planes were not commercially *808 operable. The FAA also insisted that Horridge could not be involved in operating B C Flight Management or in "any related activity." (*Id.,* ¶ 14).

The Settlement Agreement was between B C Flight Management and the FAA. Whitney Bank was not a party. The Settlement Agreement referred to the suit filed by Whitney Bank, acknowledged that the aircraft were subject to a writ of sequestration issued in that suit instituted by Whitney Bank, and stated that B C Flight Management was attempting to sell the aircraft "and/or its remaining operations to one or more unrelated parties, who pursuant to any such transaction will work with the FAA under the terms of this Order and agreement to return the Aircraft to service." *(Id.).* The Settlement Agreement did not refer to any obligation on the part of Whitney Bank to work with the FAA.

Horridge testified that he provided a proposal to the FAA that would calculate times and cycles for each of the aircraft, but that proposal was not acceptable to the FAA. (Docket Entry No. 136, Ex. E at 27). George Crow, an attorney who worked on Air Ambulance's aviation law matters, did not know of Horridge's failed attempt. He worked with Horridge and two other Air Ambulance employees to make another proposal to the FAA. (Docket Entry No. 136, Ex. J at 144). B C Flight Management made this proposal to the FAA for only one plane, the Lear Jet with registration number N 9108Z, which was among those *8 pledged to Whitney Bank. (*Id,* Ex. J at 169.).[5] To attempt to correct the records on flight hours and take offs and landings for that one aircraft, Crow obtained the FAA's air traffic control records, but the FAA records had many duplications and gaps. *(Id.,* Ex. J at 137, 141, 145). To recreate the flight history of the plane, B C Flight Management had to correlate and attempt to reconcile the FAA data with other records. Crow testified that the process took more than 40 hours for one plane. *(Id.* at 266). Horridge testified that the work occupied three or four employees for at least 30 days. (Docket Entry No. 136, Ex. E at 30). Crow testified that no one at Whitney Bank stopped anyone at Air Ambulance from working with the FAA. *(Id.,* Ex. D at 268).

[5] Crow testified that B C Flight Management chose that plane because it was "without a doubt, the most valuable of the airplanes. It had the most utilization capacity and range, and it also, I think had — since it was a little bit newer than some of them, had — given approval of the times and cycles number, would have had the least amount of maintenance." *(Id.* at 169).

It is undisputed that the only proposal submitted to the FAA to implement the first step of the FAA Settlement Agreement covered only one aircraft, the Lear Jet 9108Z. Crow testified that no other work was done. No repairs or maintenance were performed on the Lear Jet that had its records corrected because B C Flight Management and Air Ambulance had no money for the work. (Docket Entry No. 136, Ex. D at 267). No work was done to correct the records on the other aircraft subject to the FAA suspension order because the focus had shifted to work on the Cheyenne and Cessna aircraft. *(Id.).* Although Horridge testified that work had been done on the records for the other Lear Jets, *(id.,* Ex. C at 126), he acknowledged that Crow was the one actually doing whatever work was being done. Crow *9 testified that he did no such work. Horridge testified that Crow did not do the work or, if he did, failed to submit the records to the FAA because "he was working without retainer and an unpaid bill." *(Id.,* Ex. E at 49). *809 Crow testified that on October 8, 2004,

David Donnell of the FAA left a message on Crow's answering machine that Crow interpreted as approving the proposal to correct the hours and cycles for the 9108Z. (Docket Entry No. 136, Ex. J at 192; Docket Entry No. 154, Ex. C at 2; Docket Entry No. 136, Ex. B-16). That message stated, "[y]our hours and cycles on 9108Z are good, were very acceptable to the Administrator." (Docket Entry No. 136, Ex. J at 197). The message also itemized "issues" that need to be resolved on a "discrepancy list." *(Id.* at 197-98). The message asked Crow to contact a specific FAA inspector, asked for records, and asked for assistance in inspections. The message stated that the speaker would "be back in the office on Tuesday." (*Id.* at 201-03). Crow did not return the call. (*Id.* at 197, 206-07).[6]

> 6 Brian Ingraham, one of the experts Horridge designated, testified that he was "surprised" that the FAA did not issue an approval in writing. He testified that in his experience "[FAA approval is] in writing and it's on FAA letterhead, or it's in an FAA e-mail which happens occasionally." (*Id.* at 118, 121). Ingraham testified that he did not ask for an explanation, despite finding this "curious." (*Id.* at 118-119). Ingraham testified that "I would say it was accepted; I don't think it was approved." (*Id.* at 119).

A recording of the phone mail message was sent to Whitney Bank on March 21, 2005. (Docket Entry No. 136, Ex. B-20). It is undisputed that the FAA did not issue any approval in writing of the proposal to determine the hours and cycles on one aircraft. (Docket Entry No. 136, Ex. J at 186). It is undisputed that B C Flight Management did not submit a proposal to the FAA to correct the hours and cycles for any aircraft except the 9108Z. And
10 *10 it is undisputed that B C Flight Management did not perform repairs or maintenance to that aircraft. (Docket Entry No. 136, Ex. J at 207). In short, only one of the steps required under the FAA Settlement Agreement was performed and only as to one aircraft, and no written approval was received as to that step.

On August 19, 2004, Whitney Bank notified counsel for Air Ambulance, B C Management, and Horridge that it intended to conduct a private sale of the aircraft securing the loan. (Docket Entry No. 136, Ex. B at ¶ 18). Horridge transferred his Air Ambulance stock on August 19 or 20, 2004. (Docket Entry No. 136, Ex. C at 92-93). On August 20, 2004, Air Ambulance declared bankruptcy. (Docket Entry No. 136, Ex. C at ¶ 18). Whitney Bank obtained relief from the bankruptcy stay and sold the collateral in a private sale conducted with sealed bids.

Whitney Bank hired Sugar Land Jet Sales to conduct the sale. *(Id.* at ¶ 19). The sale was advertised in four aviation publications: Trade-A-Plane, Executive Controller, Controller, and Business Air Today. Over 500 emails were sent to aircraft dealers and brokers. *(Id.* at ¶ 21). Sugar Land Jet Sales responded to all inquiries and sent out over 100 bid packages on March 26 and March 27, 2005. *(Id.* at ¶ 22). The bid packages contained specification sheets for each plane and a copy of the FAA Settlement Agreement. The bid packages "notified all potential bidders that the aircraft and engine times and cycles were under dispute with the FAA and referred bidders to an individual at the FAA for further information concerning procedures to re-establish times and
11 cycles." *(Id.; see also* Exs. G-1, G-2). *11

Twenty-two bids were received in May and June 2005. One failed because it was a contingency bid and the bidder was unable to obtain financing. *(Id.,* Docket Entry No. 136, Ex. G at 1-2). The successful bidders were Dodson International and
810 Michael Scroggins, bidding $133,770 for *810 one Cessna, and Dodson International, bidding $1,779,504 for the remaining aircraft. *(Id.,* Docket Entry No. 136, Ex. G at 2). Deducting interest on the loan, commissions to Sugar Land Sales, outstanding liens on the aircraft, and costs related

to the sale, Whitney Bank calculated the deficiency at $4,827,393.22. (Docket Entry No. 139, Ex. B at 7).

Horridge has asserted the affirmative defense that the sale was not commercially reasonable. Horridge alleges that the sale was commercially unreasonable primarily because Whitney Bank failed to regain the airworthiness certificates the aircraft before the sale. (Docket Entry No. 154).

Horridge designated three witnesses — himself, George Crow, and Brian Ingraham — to testify that Whitney Bank's auction was not "commercially reasonable" under Texas law. (Docket Entry No. 139, Exs. A, C, E). Each opined that Whitney Bank had a duty to complete B C Flight Management's obligations under the FAA Settlement Agreement and regain the airworthiness certificates before selling the planes. They also opined that Whitney Bank should have disclosed to prospective bidders that the FAA had approved a method for reestablishing the times and cycles of the aircraft, referring to the telephone message. (Docket Entry No. 154). Ingraham also testified that Whitney Bank should
12 have accepted one *12 contingent bid and loaned that bidder funds when it could not achieve financing on its own, and that Whitney Bank was premature in seizing the aircraft in the first place.

Whitney Bank has moved for partial summary judgment on the deficiency owed. (Docket Entry No. 136). Horridge has responded. (Docket Entry No. 153). Whitney Bank has moved to exclude the testimony of these witnesses on the commercial reasonableness of the sale, arguing that because it had no legal duty to perform B C Flight Management's obligations under the FAA Settlement Agreement to reinstate the airworthiness certificates, the opinion that it was commercially unreasonable to sell the collateral without doing so is irrelevant. Whitney Bank also argues that Ingraham is not qualified to give many of the opinions he expressed and that his testimony is unreliable. (Docket Entry No. 139).

II. The Summary Judgment Standard

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A dispute about a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict for the non-moving party. *Id.* at 248. The court must draw all reasonable inferences in favor of the non-moving party. *Id.* at 255. Because Whitney Bank has the burden of proof on the deficiency issue, it cannot obtain summary judgment unless its own submissions present conclusive evidence showing that it is entitled to judgment as a matter of law. *See Torres Vargas v. Santiago Cummings*, 149 F.3d
13 29 (1st Cir. 1998) (citing *Fontenotv. Upjohn* *13 *Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986)); *see also Martin v. Alamo Community College Dist.*, 353 F.3d 409, 412 (5th Cir. 2003); *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002).

III. Commercial Reasonableness

Section 9.610 of the Texas Business and Commerce Code states that "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present
811 condition or *811 following any commercially reasonable preparation or processing." TEX. BUS. COMM. CODE § 9.610(a). Section 9.610(b) continues:

> Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

Id. at § 9.610(b). The Uniform Commercial Code Comment explains as follows:

> **4. Pre-Disposition Preparation and Processing.** Former Section 9-504(1) appeared to give the secured party the choice of disposing of collateral either "in its then condition or following any commercially reasonable preparation or processing." Some courts held that the "commercially reasonable" standard of former Section 9-504(3) nevertheless could impose an affirmative duty on the secured party to process or prepare the collateral prior to disposition. Subsection (a) retains the substance of the quoted language. Although courts should not be quick to impose a duty of preparation or processing on the secured party, subsection (a) does not grant the secured party the right to dispose of the collateral "in its then condition" under all circumstances. A secured party may not dispose of collateral "in its then condition" when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the
14 costs at its risk, it *14 would be commercially unreasonable to dispose of the collateral in that condition.

Section 9.627 addresses the "Determination of Whether Conduct was Commercially Reasonable." It states:

> (a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> (b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or
>
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Id. at § 9.627.

Whether a sale of collateral was reasonable is a fact question. *Morgan Stanley Dean Witter Credit Corp. v. Griffin,* 2002 WL 463312 (Tex.App.-Austin 2002, no writ); *Gordon Assoc. v. Cullen Bank Citywest, N. A.,* 880 S.W.2d 93, 96 (Tex.App. — Corpus Christi 1994, no writ). Summary judgment is appropriate if there is no genuine disputed issue of fact and the lender is entitled to judgment as a matter of law. Because the debtor, Horridge, raised the issue of commercial reasonableness, Whitney Bank has the burden to show that its sale was commercially reasonable. TEX. BUS. COMM. CODE § 9.626; *Lister v. Lee-Swofford Investments, L.L.P.,* 195 S.W.3d 746, 748 (Tex.App. — Amarillo 2006).
15 Proof that a greater *15 amount could have been obtained for the collateral by its disposition in a different method is not sufficient to preclude a showing of commercial reasonableness. At the
812 same time, "[a] low sales price *812 suggests the court should scrutinize carefully all aspects of the disposition to insure each aspect was commercially reasonable." *Lister,* 195 S.W.3d at 748.

The Business and Commerce Code provides a nonexclusive list of commercially reasonable dispositions, which include those made "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." TEX. Bus. COMM.

CODE § 9.627(b)(3). Courts have considered various factors to evaluate the commercial reasonableness of a disposition, including "whether the secured party endeavored to obtain the best price possible, whether the sale was private or public, the condition of the collateral and any efforts made to enhance its condition, the advertising undertaken, the number of bids received and the method employed in soliciting bids." *Lister,* 195 S.W.3d at 749 (collecting cases).

Horridge does not challenge the choice of the company that handled the sale or the way in which the sale was advertised or the notice provided. Horridge does not allege, and the record does not reflect, that the general approach used to auction the aircraft was unreasonable. *Cf. Heller Financial Leasing, Inc. v. Gordon,* 2006 WL 850914, at *4-5 (N.D. Ill. 2006) (finding fact questions as to whether aircraft were devalued by secured creditor's use of plane, insufficient advertising, declined offer, and delay). Horridge also does not allege, and the record does not show, that the aircraft were undervalued considering their absence of airworthiness certificates. (Docket
16 Entry No. 136, Ex. J at 216). Instead, *16 Horridge alleges that Whitney Bank had an affirmative duty to improve the condition (and value) of the planes by performing work to correct the records, performing necessary maintenence, and passing FAA inspection to regain the aircraft's airworthiness certifications. (Docket Entry No. 154 at 5). Horridge also argues that Whitney Bank had a duty to notify bidders that "the FAA had approved a method for reestablishing the hours and cycles." *(Id.).*

The reported cases show that in some circumstances, minor repairs or minor improvements may be required to make a sale commercially reasonable. *See, e.g., All-States Leasing Co. v. Ochs,* 600 P.2d 899 (Or.App. 1979) (failure to repair computer system relevant fact); *Liberty Weiss v. Northwest Acceptance Corp.,* 546 P.2d 1065 (Or. 1976) (washing and cleaning trucks); *In Re Bryan,* 20 UCCRS 571 (S.D. Ohio 1976) (cleaning and repairing a mobile home). Horridge has not cited a case holding that a lender seeking to sell a complex piece of equipment, such as an airplane, must perform extensive and expensive repair or maintenance work to make the sale commercially reasonable. Horridge has not cited a case holding that a lender seeking to sell equipment that no longer complies with regulatory requirements for operation is required to bring the equipment back into full compliance before the sale can be commercially reasonable.

Under the Texas Business Commercial Code § 9.610(b), the issue is whether, "taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in that condition." TEX. BUS. COMM. CODE § 9.610(b), cmt. 4. Whitney Bank was not a subsequent owner of the aircraft or a party to the
17 *17 Settlement Agreement with the FAA. The Agreement made it clear that only an owner or subsequent owner had any obligation under the FAA Settlement Agreement. The undisputed facts in the record, or disputed facts taken in the light most favorable to the nonmovant, show the extent
813 and uncertainty *813 of the work that remained to be done before any of the aircraft could have their certificates of airworthiness restored. To regain the airworthiness certificates required creating proposals of times and cycles for each aircraft, submitting them to the FAA, and receiving approvals from the FAA. (Docket Entry No. 136, Ex. J at 140, Ex. E at 30). The work necessary to submit such a proposal had been performed only on one of the Lear Jets. That work took an extensive amount of time and expertise, with estimates ranging from in excess of 40 hours expended by Crow and others assisting him to a month of time expended by Horridge, Crow, and others.

Crow testified that an FAA representative left a telephone message that "[y]our hours and cycles on 9108Z are good, were very acceptable to the

Administrator." (Docket Entry No. 136, Ex. J at 197). The message indicated that some issues remained, but the call was not returned. No written FAA approval followed. Even assuming that the FAA had indicated its approval of the proposal and the method used and that a formal acceptance would have followed if B C Flight Management had pursued it, it is undisputed that B C Flight Management did not pursue formal approval for that plane, correct the times and cycles for any other plane, or perform any of the maintenance and repair work on any plane.

Until the times and cycles were corrected for each of the aircraft, the amount of work, time, and money needed to complete the maintenance and
18 repairs were speculative. The *18 repair proposal submitted to Whitney Bank on July 2, 2004 shows that the "Short-term Cost" was estimated at $15,000, $62,500, $53,500, $6,500, $13,000, and $115,000 for each Lear Jet. (Docket Entry No. 136, Ex. K-12 at 5). The chart also shows "Later Cost" of "260,000.00 or rent 200/hr" for two of the Lear Jets. *(Id.)*. A notation at the bottom of the chart states "Before 12/31/04 each Lear will also need RVSM @ $100,000 each." *(Id.)*. The cost estimated to repair the Lear Jets was as high as $1,485,500 and the time required ranged to as much as three weeks for two of the jets. *(Id.)*. Horridge and Crow acknowledged that this was an estimate. (Docket Entry No. 136, Ex. E at 62-63; Ex. J at 210). Horridge opined that it would cost approximately $576,000 to perform the work necessary to obtain FAA airworthiness certificates for the planes. (Docket Entry No. 139, Ex. A at 2). The record also shows that if Whitney Bank did receive the approval and performed maintenance, the FAA would have to inspect the planes again. The cases discussing aircraft sold in deficiency sales do not impose a duty to perform such extensive, expensive, burdensome, and uncertain work on a lender to make its sale of collateral commercially reasonable.

In *Dynalectron Corp. v Jack Richards Aircraft Co.,* 337 F. Supp. 659 (W.D. Okla. 1972), the record showed that the lender did not take any steps to prepare the airplane for sale or advertise the sale in appropriate publications, making the sale not commercially reasonable. The court found that the costs, including ground insurance, airport fees, and engine expenses, would have been $300 a month for an aircraft that later sold for $22,500.00. *Id.* at 662. This case did not involve extensive or uncertain repair or maintenance work. By contrast, in *Grumman Credit Corp. v. Rivair Flying Service, Inc.,* 845 P.2d 182 (Okl. 1992),
19 and *Bank of* *19 *Oklahoma, N. A. v. Little Judy Industries, Inc.,* 387 So.2d 1002 (Fla.App. 1980), the courts found that there was no duty to perform extensive and expensive repairs on aircraft. In *Bank of Oklahoma,* the court found procedural problems with the sale, and the case was remanded to determine fair market value, which is not at issue in this case. *Id.* at 1005. In *Grumman,*
814 a jury concluded *814 that the sale of aircraft in disrepair was commercially reasonable. In that case, the repair work was estimated at $8,000 and, if repaired, the plane would have been worth up to $13,000. The jury concluded that the sale, which without the repair work performed resulted in a price of $6,000, was commercially reasonable. 845 P.2d at 182-184.

Under Texas law, "courts should not be quick to impose a duty of preparation or processing on the secured party." TEX. BUS. COMM. CODE § 9.627(a), n. 4. In some cases, a creditor might have a duty to prepare the collateral if that preparation is part of the usual practice. *See, e.g., Liberty Nat. Bank Trust Co. v Acme Tool Div. of Rucker Co.,* 540 F2d 1375 (10th Cir. 1976) (cleaning and painting an oil rig found to be usual practice); *Mt. Vernon Dodge, Inc. v Seattle-First Nat. Bank,* 570 P2d 702 (Wash.App. 1977) (minor body work to automobiles); *In Re Bryan,* 20 UCCRS 571 (S.D. Ohio 1976) (cleaning and repairing a mobile home found to be usual practice). There is no testimony in this case that it

is usual practice for a lender selling an airplane in a deficiency sale to have to restore that airplane's airworthiness certificate, if it has been suspended, by recreating the record of times and cycles, performing the maintenance and inspections shown to be necessary, and passing FAA inspection. None of the expert testimony Horridge relies on shows that such work is customary. The facts on which the designated expert witnesses
20 rely to reach their own *20 opinions show that as a matter of law, there was no duty on the part of Whitney Bank to restore the airworthiness certificates to make the sale of the aircraft commercially reasonable.

Horridge also argued that Whitney Bank's sale was not commercially reasonable because it failed to notify bidders that "the FAA had approved a method for reestablishing the hours and cycles." (Docket Entry No. 154 at 5). This argument fails to create a fact issue as to commercial reasonableness on several grounds. First, the FAA did not issue a formal, written approval. Second, the telephone message approval was only as to a single aircraft and raised issues that were not resolved. Third, Whitney Bank provided the FAA Settlement Agreement, which would allow any prospective bidder to learn the processes required to regain the certifications. Fourth, Whitney Bank provided both the email and the phone number of a contact at the FAA to inquire about the status of the certifications. (Docket Entry No. 136, Ex. G-1 at AIRAM 8131).

The opinions of the expert witnesses do not create a fact issue as to commercial reasonableness because the witnesses assumed that Whitney Bank had a duty to repair the aircraft, which as a matter of law, based on the undisputed facts in the record, it did not have. The facts the witnesses relied on for their opinion establishes that, as a matter of law, no such duty was present. The witness also testified that Whitney Bank should have taken other steps that the record shows either were taken or were beyond the witnesses' competence to testify about. As explained below, these flaws and others require the exclusion of their testimony on commercial reasonableness.

III. The Motion to Exclude Expert Testimony *21
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A. The Legal Standard

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,
> 815 training, or education, may *815 testify thereto in the form of an opinion or otherwise, if
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> (1) the testimony is based upon sufficient facts or data,
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> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. Rule 702 "charges trial courts to act as `gate-keepers,' making a `preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993)); FED. R. EVID. 702 Advisory Committee Note. Expert testimony must be both "relevant and reliable" to be admissible. *United States v. Tucker*, 345 F.3d 320, 327 (5th Cir. 2003) (quoting *Pipitone*, 288 F.3d at 243-44); *Daubert*, 509 U.S. at 589 (stating that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

Witnesses may be qualified as experts if they possess specialized knowledge, skill, experience, training, or education. FED. R. EVID. 702. The Fifth Circuit has stated that an expert must have expertise in the general area in which he testifies,
22 but need not have *22 expertise in the specialized area directly pertinent to the issues in question. *United States v. Marler,* 614 F.2d 47, 50 (5th Cir. 1980). The court must determine whether the proposed expert's training or experience are sufficiently related to the issues and evidence before the court that the expert's testimony will assist the trier of fact. *Primrose Operating Co. v. Nat'l Am. Ins.,* 382 F.3d 546, 562-63 (5th Cir. 2004).

A court must determine relevance by asking whether the expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702; *Daubert,* 509 U.S. at 591; *Pipitone,* 288 F.3d at 245. In making its reliability determination, the court should not decide the validity of the expert's conclusions, but instead consider the soundness of the general principles or reasoning on which the expert relies and the propriety of the methodology that applies those principles to the facts of the case. *Daubert,* 509 U.S. at 594-95; *Watkins v. Telsmith, Inc.,* 121 F.3d 984, 989 (5th Cir. 1997); *Brumley v. Pfizer, Inc.,* 200 F.R.D. 596, 600 (S.D. Tex. 2001). The considerations apply to all types of expert testimony, whether based on "scientific, technical, or other specialized knowledge." FED. R. EVID. 702; *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147-48 (1999); *Tucker,* 345 F.3d at 327.

Several factors guide a district court's inquiry into the reliability of expert testimony. The reliability factors from *Daubert* include whether the expert's technique or theory can be or has been tested; whether it has been subjected to peer review and publication; whether it has a known or potential rate of error or standards and controls guiding its operation; and whether it has been generally accepted in the scientific community. *Pipitone,*
23 288 F.3d at 244 *23 (citing *Daubert,* 509 U.S. at 593). Other factors include: whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions
816 expressly for purposes of testifying," *816 *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995); whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997); whether the expert has adequately accounted for obvious alternative explanations, *Claar v. Burlington N.R.R.,* 29 F.3d 499, 502 (9th Cir. 1994); whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting," *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997); and whether the expert's claimed field of expertise is known to reach reliable results for the type of opinion the expert would give, *Kumho Tire Co.,* 526 U.S. at 151.

The test for reliability is flexible. The specific factors listed in *Daubert* and its progeny neither necessarily nor exclusively apply to all experts or in every case. *Kumho Tire Co.,* 526 U.S. at 150. A district court has latitude to decide *how* to determine reliability as well as to make the ultimate reliability determination. *Id.* at 152. The trial court's role as gatekeeper is not intended to replace the adversary system; "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596; *Pipitone,* 288 F.3d at 250. "[A] trial court must take care not to transform a *Daubert* hearing into a trial on the merits." *Pipitone,* 288
24 F.3d at 250. *24

Admissibility of expert testimony is an issue for the trial judge to resolve under Federal Rule of Evidence 104(a). *Daubert,* 509 U.S. at 592-93; *Brumley,* 200 F.R.D. at 601. The party offering the testimony must prove by a preponderance of the

evidence that the expert's opinion is relevant and reliable. *Bourjaily v. United States,* 483 U.S. 171, 175-76 (1987); *Mathis v. Exxon Corp.,* 302 F.3d 448,460 (5th Cir. 2002); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *Brumley,* 200 F.R.D. at 601. "A trial court's ruling regarding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous." *Satcher v. Honda Motor Co.,* 52 F.3d 1311, 1317 (5th Cir. 1995).

B. Relevance and Reliability

Ingraham, Crow, and Horridge all testified that Whitney Bank had a duty to regain the airworthiness certification of the aircraft. (Docket Entry No. 136, Ex. J at 270-73, Ex. B. at 19-21; Docket Entry No. 139, Ex. F at 98). Their testimony assumes a legal duty that the record does not support.

The witnesses testified that regaining airworthiness certificates would increase the value of the aircraft, which is undisputed. None of these witnesses testified that regaining the certificates was standard practice. Instead, the witnesses assumed that the lender was required to receive "top dollar," and then speculated as to the methods Whitney Bank was obligated to use. (Docket Entry No. 136, Ex. J at 270-73, Ex. B. at 19-21; Docket Entry No. 139, Ex. F at 98). Ingraham's testimony was also based on the admittedly false assumption that proposals for correcting the hours and cycles on each aircraft had been submitted to the FAA
25 *25 and approved. (Docket Entry No. 139 Ex. F at 109, 110). He incorrectly assumed "that the FAA had been provided, had accepted the methodology for the reconciliation of the time and cycles on each aircraft." *(Id.* at 111). Ingraham also incorrectly assumed that the FAA Settlement
817 Agreement *817 had not been provided to potential buyers. *(Id.* at 162).

Incorrect assumptions critical to an expert's opinion make that opinion unreliable. *Moore v. Ashland Chem., Inc.,* 151 F.3d 269 (5th Cir. 1998) (reliance on inaccurate information makes an expert's analysis and testimony inadmissible); *Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d 1153, 1175 (3d Cir. 1993) ("An opinion based on false assumptions is unhelpful in aiding the jury in its search for the truth, and is likely to mislead and confuse."); *see also Advanced Display Systems, Inc. v. Kent State Univ.,* 2002 WL 1489555 (N.D. Tex. 2002) (expert assumed that fees paid were "lump sum paid-up royalty," made assumptions about hypothetical negotiation and incorrectly interpreted testimony).

C. Testimony Outside the Area of Expertise

Ingraham opined that the aircraft were undervalued and that the sale was not commercially unreasonable because Whitney Bank "acted in haste to remove the aircraft . . . before the airworthiness dispute could be rectified," even though the "FAA was in fact willing to open dialogue to rectify the situation." (Docket Entry No. 154, Ex. 3-A at 5). However, the record shows that Whitney Bank did not block B C Flight Management's efforts to work with the FAA after seizing the aircraft. George Crow testified that Whitney Bank never hampered his efforts to work with the FAA. (Docket Entry No. 139, Ex. D at 268) In his deposition, Ingraham testified that he was aware of no action that
26 Whitney Bank *26 took to prevent B C Flight Management from working with the FAA after Whitney Bank seized the aircraft. (*Id.* at 137). Ingraham also testified that B C Flight Management needed no assistance from Whitney Bank to send reconciliations to the FAA. (*Id.* at 127). The record shows that Ingraham's own testimony undermines the conclusions in his expert report.

Whitney Bank has objected to Ingraham's testimony about banking practices, the reasonableness of the conduct of the bank, or a lender's duties upon a borrower's default. Ingraham testified that one of the bids, which was contingent on funding, should have been accepted

and that Whitney Bank had the obligation to provide the financing. (Docket Entry No. 154, Ex. 3-A at 6). Ingraham's speculation that Whitney Bank should have funded the bidder's effort to acquire the planes is beyond his area of knowledge and has no basis in the facts. Ingraham's testimony that the bank "acted in haste," in seizing the aircraft is beyond his area of knowledge and has no basis in the facts. Ingraham admitted that he is "not a banking expert or anything like that." (Docket Entry No. 136, Ex. F at 81, 138). Ingraham's testimony about banking practices is simply beyond his expertise, providing an additional basis for exclusion.

IV. Conclusion

Whitney Bank's motion for partial summary judgment on the deficiency owed and its motion to exclude the testimony of the witnesses designated
27 as experts on the commercial *27 reasonableness of the sale are granted.

818 *818

CASE NO: 19-32784
UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Williams v. Farris (In re Williams)

Decided Apr 6, 2021

CASE NO: 19-32784 ADVERSARY NO. 19-3683

04-06-2021

IN RE: KYLE KINCAID WILLIAMS, Debtor. KYLE KINCAID WILLIAMS and RENEE ARCEMONT WILLIAMS, Plaintiffs, v. PENNEY ELAINE FARRIS and MATTHEW FARRIS and PATRICK FARRIS and GARY LYNN LAUGHLIN, Defendants.

Eduardo Rodriguez United States Bankruptcy Judge

CHAPTER 13

MEMORANDUM OPINION

Much like the timeless "The Song That Doesn't End," litigation over the property at issue in this case "goes on and on, my friends."[1] Defendants Penney Elaine Farris, Matthew Farris, and Patrick Farris seek entry of an order granting partial summary judgment as to (i) Plaintiffs Kyle Williams and Renee Arcemont Williams' claims for turnover and fraudulent transfer and (ii) Defendants'[2] counter claims for suit to quiet title and declaratory relief as it pertains to the property located at 9706 Ellen Street, Baytown, Chambers County Texas. A hearing was held on the Motion on March 29, 2021. *2

[1] SHARI LEWIS, *The Song That Doesn't End*, *on* LAMB CHOP'S SING-ALONG, PLAY-ALONG (A&M Records 1992).

[2] Herein, "Defendants" refers only to Penney Elaine Farris, Matthew Farris, and Patrick Farris. Gary Lynn Laughlin did not file an answer to Kyle Kincaid Williams and Renee Arcemont Williams' complaint, nor did he appear in this adversary proceeding.

For the reasons stated herein, the Court grants in part and denies in part Defendants' Motion for Partial Summary Judgment and grants Defendants' counter claims for suit to quiet title and declaratory relief. Kyle Kincaid Williams and Renee Arcemont Williams's cause of action for turnover pursuant to 11 U.S.C. § 542(a): (i) regarding the promissory note in the amount of $237,008.42 executed by Penney Elaine Farris and Ken Farris and Gary Laughlin in partial payment of the purchase price of real property located at 9706 Ellen Drive, Baytown, Texas 77521, is not dismissed and will proceed to trial solely as the issue pertains to whether Kyle Kincaid Williams and Renee Arcemont Williams are entitled to such funds; and (ii) regarding the remainder of Kyle Kincaid Williams and Renee Arcemont Williams's claims for turnover are dismissed with prejudice. Kyle Kincaid Williams and Renee Arcemont Williams's cause of action for voidance of a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b)(1) and 548, and Texas Business and Commerce Code sections 24.005(a) and 24.006(a)-(b) is dismissed with prejudice. Kyle Kincaid Williams and Renee Arcemont Williams's objection to Penney Elaine Farris, Matthew Farris, and Patrick Farris's Proof of Claim Number 8 will proceed to trial.

Penney Elaine Farris, Matthew Farris, and Patrick Farris's counterclaim for suit to quiet title to the real property located at 9706 Ellen Drive, Baytown, Texas 77521 is granted. The lien created by Kyle Kincaid Williams and Renee Arcemont Williams's Abstract of Judgment in the amount of $477,380.47, plus pre-judgment interest at a rate of 5% per annum commencing on December 6, 2006, and attorney's fees in the amount of $35,000, filed for record in Chambers County on July 20, 2009, with the County Clerk of Chambers County, under document number 2009-46382, is invalid and unenforceable as to the real property located at 9706 Ellen Drive, Baytown, Texas 77521, and title is quieted in Penney Elaine Farris, Matthew Farris, and Patrick Farris. Kyle Kincaid Williams and Renee Arcemont Williams, and any person claiming under them has *3 no estate, right, title, lien, or interest in or to the real property or any part of such property.

3

Penney Elaine Farris, Matthew Farris, and Patrick Farris's counterclaim for declaratory relief is granted in part and denied in part: (i) Penney Elaine Farris, Matthew Farris, and Patrick Farris's request for declaratory relief that they own 9706 Ellen Drive, Baytown, Texas 77521 free and clear of all claims asserted by Kyle Kincaid Williams and Renee Arcemont Williams's, and Kyle Kincaid Williams and Renee Arcemont Williams have no legal or equitable interest in the 9706 Ellen Drive, Baytown, Texas 77521 property whatsoever is granted; (ii) Penney Elaine Farris, Matthew Farris, and Patrick Farris's request for declaratory relief regarding whether all Notices or other Instruments that Kyle Kincaid Williams and Renee Arcemont Williams and/or their court-appointed receivers have recorded in the Official Public Records of Real Property of Chambers County, Texas and/or served on Stewart Title Company, the escrow officer, and any other persons relating to 9706 Ellen Drive, Baytown, Texas 77521 are null and void for all purposes is granted; and (iii) Penney Elaine Farris, Matthew Farris, and Patrick Farris's request for declaratory relief regarding whether the escrow officer may proceed to record the Laughlin Release of Lien[3] in the Official Public Records of Real Property of Chambers County Texas is denied and is reserved for trial.

[3] ECF No. 27 Ex. 13.

The remainder of Kyle Kincaid Williams and Renee Arcemont Williams's claims and Penney Elaine Farris, Matthew Farris, and Patrick Farris's counterclaims will be resolved by final trial on the merits. All other relief is denied.

I. Background Facts and Procedural History

A. Uncontested Factual History

1. On February 6, 2002, Gary and Melanie Laughlin purchased 9706 Ellen Street, Baytown, Chambers County, Texas ("*Property*").[4]

4 *4

2. On June 18, 2004, Gary and Melanie Laughlin obtained a loan secured by a First Lien Deed of Trust from AmCap Mortgage, Ltd., to build their home on the Property. They entered into a Mechanic's Lien Contract to build the home; the lien created therein was assigned to AmCap Mortgage, Ltd.[5]

3. In 2005, after the Texas Gulf Coast suffered substantial hurricane damage, Plaintiff Kyle Williams ("*Williams*") began working with Gary Laughlin ("*Laughlin*") and others undertaking hurricane damage abatement work in the Gulf Coast area.[6] Williams also met Ken Farris in 2004 or 2005 at a motorcycle race track.[7]

4. On March 16, 2009, Plaintiffs were awarded a $477,380.47 judgment plus $35,000 in attorney's fees and pre-and-post judgment interest against Laughlin and others in Cause No. 2006-77415 - *Kyle Williams v. Abatement Incorporated*, *Alan Manring and Gary Laughlin*, in the 127th District Court, Harris County, Texas ("*State Court Action*")[8] The judgment stemmed from a soured business relationship between Williams, Laughlin, and others.[9]

5. On July 20, 2009, Plaintiffs recorded an abstract of judgment in Chambers County, Texas ("*Abstract of Judgment*").[10]

6. On August 7, 2009, Laughlin filed for bankruptcy in the Southern District of Texas.[11] In that bankruptcy, Laughlin included the Property in Schedule A and claimed the Property as exempt in Schedule C.[12]

7. On November 8, 2009, Plaintiffs filed a Proof of Claim in the Laughlin Bankruptcy Case with the Abstract of Judgment attached and incorporated therewith.[13]

8. Plaintiffs did not file an objection to Laughlin's claimed homestead exemption.[14]

9. On November 11, 2009, Williams initiated an adversary proceeding in Laughlin's bankruptcy case and after a trial on the merits, the court ruled in favor of Williams, awarding him a non-dischargeable judgment in the amount of $576,785.40 in actual damages plus post-judgment interest and costs of court ("*Bankruptcy Court Judgment*").[15]

10. On September 12, 2012, the Bankruptcy Court Judgment was domesticated in the 129th

5 *5

District Court of Harris County, Texas.[16]

11. On December 5, 2014, Gary and Melanie Laughlin divorced.[17]

12. On April 14, 2015, Melanie deeded her interest in the Property to Laughlin and Laughlin conveyed the Property to Penney Farris and her husband, Ken Farris ("*Farrises*").[18] At the time it was conveyed, the Chambers County Appraisal District valued the Property at $495,160.[19] On the same date, the Farrises executed a note, promising to pay $237,008.42 to Laughlin ("*Farris Note*")[20] and tendered $33,613.49 to Laughlin for the balance of the purchase price, plus $22,660.65 for pro-rated property tax and closing costs.[21] Laughlin also executed a release of lien on the same day.[22]

13. On October 30, 2015, Williams filed his Ex Parte Motion for Turnover and Appointment of Receiver Pursuant to § 31.002 of the Texas Civil Practice & Remedies Code in Cause No. 2012-53113, *Kyle Williams v. Gary Laughlin*, in the 129th District Court of Harris County, Texas ("*State Court Receivership Suit*").[23]

14. On December 7, 2015, Williams succeeded in the State Court Receivership Suit and a receiver was appointed.[24]

15. On December 15, 2015, an interest in the Farris Note was claimed by the receiver and subjected to the receiver's authority.[25] Notice was issued.[26]

16. On May 20, 2017, Ken Farris died and his interest in the Property passed pursuant to a family settlement agreement, giving Penney Elaine Farris, Matthew Farris, and Patrick Farris ("*Defendants*") an interest in the Property.[27]

17. On April 12, 2018, Defendants filed suit in the 253rd District Court of Chambers County, Texas, to, inter alia, quiet title to the Property in Defendants in Cause No. 18DCV0252, *Penney Farris, et al v. Kyle Williams, et al*.[28]

18. On April 11, 2019, the state court receiver filed another suit in state court alleging that

6 *6

Laughlin's conveyance of the Property to the Farrises was fraudulent.[29]

19. On May 16, 2019, Plaintiffs filed their chapter 13 bankruptcy petition.[30]

4 ECF No. 28 at 2 (citing ECF No. 26 Ex. 1); *see also* ECF No. 35 at 4-5.

5 ECF No. 28 at 2 (citing ECF No. 26 Ex. 2).

6 ECF No. 35 at 2.

7 ECF No. 34 Ex. 24, at 38.

8 ECF No. 28 at 2; ECF No. 35 at 2.

9 ECF No. 35 at 2.

10 ECF No. 34 Ex. 4.

11 ECF No. 28 at 2-3; ECF No. 35 at 3. Gary Laughlin's bankruptcy is under Case No. 09-35842.

12 ECF No. 34 Ex. 5.

13 ECF No. 34 Ex. 6.

14 ECF No. 28 at 3.

15 ECF No. 28 at 3; ECF No. 35 at 3; ECF No. 34 Ex. 7.

16 ECF No. 34 Ex. 18, at 1 (referencing Cause #2012-53113; *Kyle Williams v. Gary Laughlin*, in the 129th District Court, Harris County, Texas, which was not provided by Plaintiffs as an exhibit).

17 ECF No. 28 at 4; ECF No. 35 at 4; ECF No. 34 Ex. 8.

18 ECF No. 28 at 4; ECF No. 35 at 4.

19 ECF No. 34 Ex. 17, at 23.

20 ECF No. 28 at 4; ECF No. 35 at 5.

21 ECF No. 35 at 5; ECF No. 34 Ex. 14, at 1.

22 ECF No. 28 at 4; ECF No. 35 at 5-6; ECF No. 34 Ex. 15.

23 ECF No. 28 at 5; ECF No. 26 Ex. 15.

24 ECF No. 28 at 5; ECF No. 35 at 4; ECF No. 34 Ex. 18.

25 ECF No. 28 at 5; ECF No. 35 at 4; ECF No. 26 Ex. 17. Stephen Mendel replaced the original receiver, Lisa White Watkins, in January 2016.

26 ECF No. 26 Ex. 17.

27 ECF No. 28 at 5-6.

28 ECF No. 28 at 6 (citing ECF No. 26 Ex. 19).

29 ECF No. 35 at 7.

30 Citations to Debtor Kyle Kincaid Williams's Bankruptcy case, 19-32784, shall take the form "Bankr. ECF No. — ." Bankr. ECF No. 1. Plaintiff Renee Arcemont Williams was dismissed from the bankruptcy case on September 4, 2019. Bankr. ECF No. 49.

B. Procedural History

Williams, and as next friend for Renee Arcemont Williams,[31] Plaintiffs in this case, filed the instant adversary proceeding ("*Complaint*").[32] In the Complaint, Plaintiffs pled the following causes of action: (1) turnover pursuant to 11 U.S.C. § 542(a); (2) fraudulent transfer; and (3) objection to claim against Penney Elaine Farris,

Matthew Farris, Patrick Farris, and Gary Lynn Laughlin[33] Gary Lynn Laughlin never filed a response to Plaintiffs' Complaint nor did he make an appearance in this case. Defendants, which solely include Penney Elaine Farris, Matthew Farris, and Patrick Farris for purposes of this Memorandum Opinion, filed an answer, and asserted the following counterclaims: (1) quiet title; (2) slander of title; (3) tortious interference with contractual relations; and (4) request for declaratory judgment.[34] Plaintiffs never filed an answer to Defendants' counterclaims.

31 Debtor and Renee Arcemont Williams are a married couple. Plaintiffs' Complaint indicates that the money embezzled by Laughlin was community property. ECF No. 4 at 4.

32 ECF No. 4

33 *Id*.

34 ECF No. 17.

On November 16, 2020, Defendants timely filed their Motion for Partial Summary Judgment ("*Motion*"),[35] memorandum of law supporting that motion,[36] and a statement of facts undisputed by Defendants.[37] On
7 December 16, 2020, Plaintiffs timely filed their response to *7 Defendants' Motion,[38] a brief in opposition,[39] exhibits in support,[40] and their own statement of facts.[41] Plaintiffs also filed a response to Defendants' statement of undisputed facts[42] and later amended that response.[43]

35 ECF No. 26.

36 ECF No. 27.

37 ECF No. 28.

38 ECF No. 29.

39 ECF No. 32.

40 ECF No. 34.

41 ECF No. 35.

42 ECF No. 30.

43 ECF No. 33.

II. Jurisdiction and Venue

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334 and now exercises its jurisdiction in accordance with Southern District of Texas General Order 2012-6.[44] While bankruptcy judges can issue final orders and judgments for core proceedings, absent consent, they can only issue reports and recommendations for non-core proceedings.[45] Plaintiffs' causes of action under 11 U.S.C. §§ 542(a), 544(b)(1), and 548 arise under title 11 and Plaintiffs' fraudulent transfer claims under the Texas Uniform Fraudulent Transfer Act arise in a case under title 11.[46] Plaintiffs' claims are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (H). Conversely, Defendants' counterclaims to quiet title and seek declaratory judgment under the Texas Declaratory Judgment

Act, are "related to a case under title 11" and non-core because they do not invoke a substantive right created by the Bankruptcy Code and could exist outside of bankruptcy.[47] To issue a final order as to Defendants' counterclaims, both parties must consent to this Court doing so. *8

44 *In re*: *Order of Reference to Bankruptcy Judges*, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).

45 *See* 28 U.S.C. §§ 157(b)(1), (c)(1); *see also*, *e.g.*, *Stern v. Marshall*, 564 U.S. 462, 480 (2011); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938-40 (2015).

46 *See* 28 U.S.C. § 157(b)(1).

47 *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002); *see also Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987) ("If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy, it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an "otherwise related" or non-core proceeding.").

Pursuant to Federal Rule of Bankruptcy Procedure 7008, "[i]n an adversary proceeding before the bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court." Here, Plaintiffs consented to the entry of final orders and judgments in their Complaint, adhering to Rule 7008.[48] Defendants consented to this Court's jurisdiction and entry of final orders in their Motion.[49] In response to Defendants' Motion, however, Plaintiffs challenged the jurisdiction of this Court and its authority to enter a final order solely as to Defendants' counterclaims, providing no support for their proposition that this Court lacks jurisdiction or the authority to enter a final order or judgment.[50] Despite that challenge, Plaintiffs never filed a notice withdrawing their original consent to entry of final orders or judgments by this Court. Accordingly, the parties consented, and this Court has the constitutional authority to enter a final judgment.

48 ECF No. 4.

49 ECF No. 27

50 ECF No. 29 at 2; ECF No. 32 at 8.

Alternatively, even if Plaintiffs did not explicitly consent, they impliedly consented to adjudication of this dispute by this Court, giving this Court the constitutional authority to enter a final judgment as to Defendants' counterclaims.[51] First, this Court ordered the parties to enter a Notice of Consent or Non-Consent as to this Court's entry of final orders or judgments on non-core matters no later than April 9, 2020.[52] Neither party filed such notice by the deadline. Second, Plaintiffs filed their Complaint in this Court challenging Defendants' interest in the Property and appeared before this Court for two hearings before making any indication that they did not consent *9 to entry of a final order or judgment on non-core matters by this Court.[53] Third, after Defendants detailed their counterclaims in their answer to Plaintiffs' Complaint,[54] Plaintiffs and Defendants filed a joint discovery plan wherein Plaintiffs asserted federal jurisdiction pursuant to 28 U.S.C. §§ 157(a) and 1334, raising no challenges to this Court's jurisdiction over Defendants' counterclaims.[55] Plaintiffs failure to file their Notice of Consent or Non-Consent by the deadline prescribed and their appearances and actions before this Court without objecting to this Court's constitutional authority to enter a final order or judgment constitutes implied consent.

51 *Sharif*, 135 S. Ct. at 1947 ("Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be expressed. We disagree. Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent . . . .").

52 ECF No. 22.

53 See ECF Nos. 4, 13, 21.

54 ECF No. 17.

55 ECF No. 19 at 4.

Nevertheless, adjudication of Defendants' Motion for Partial Summary Judgment only requires this Court to enter an interlocutory order, not a final order or judgment, because "[a] partial summary judgment is an interlocutory motion, and the constitutional limitations on the Court's authority to enter final judgments are not implicated."[56] This Court may enter an interlocutory order even where the Court does not have authority to issue a final order or judgment.[57]

56 *Olstowski v. Petroleum Analyzer Co. (In re Atom Instrument Corp.)*, 478 B.R. 252, 255 (Bankr. S.D. Tex. 2012) (citing *West v. Peterson (In re Noram Res., Inc.)*, 2012 Bankr. LEXIS 2991, at *3-4 (Bankr. S.D. Tex. July 2, 2012)).

57 *In re Atom Instrument Corp.*, 478 B.R. at255. The Advisory Committee Notes to Rule 60(b) of the Federal Rules of Civil Procedure explain that "interlocutory judgments are not brought within the restrictions of this rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." FED. R. CIV. P. 60(b) advisory committee's note.

Finally, venue is governed by 28 U.S.C. §§ 1408 and 1409. Venue is proper because the Court is currently presiding over Plaintiff Kyle Williams's underlying bankruptcy.[58]

58 *See* Bankr. ECF No. 1.

III. Evidentiary Objections

In support of their Motion, Defendants submitted twenty-five exhibits for this Court's review.[59] Plaintiffs object to Defendants' exhibits number 7 and 21.[60] As to Defendants' Exhibit 7, *10 Plaintiffs contend that the exhibit is not the best evidence because the exhibits attached to the original proof of claim are not included, making the exhibit incomplete.[61] Plaintiffs submit Plaintiffs' Exhibit 6 as a complete rendition of the proof of claim filed as Defendants' Exhibit 7.[62] In their sur-reply, Defendants do not address Plaintiffs' objection to Defendants' Exhibit 7.[63] Nevertheless, Plaintiffs misunderstand the best evidence rule. Federal Rule of Evidence 1002 says "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Here, Plaintiffs' objection is not that Defendants must submit the original proof of claim because they are trying to prove the content of that claim. Thus, the best evidence rule is not implicated. At best, Federal Rule of Evidence 106 is implicated but not asserted. Plaintiffs' objection is overruled. Defendants' Exhibit 7 is admitted.

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59 ECF No. 27 at 3-4.

60 ECF No. 32 at 7.

61 *Id.*

62 *Id.*

63 ECF No. 43 at 2.

Plaintiffs also object to Defendants' Exhibit 21, which is the court reporter's record of a summary judgment hearing in case number 18DCV0252 in the 253rd District Court in Chambers County, Texas.[64] Plaintiffs argue that the exhibit is hearsay, irrelevant, and merely attorneys' arguments, not evidence.[65] Defendants counter that the exhibit is not offered for the attorneys' arguments made at trial, but rather for the judge's ruling on the record.[66] Defendants contend that the exhibit is a certified transcript of a court proceeding that is relevant because it shows that a state court already decided that the Property was Laughlin's homestead and that therefore, the Plaintiffs' judgment lien did not attach when the Property was sold to the Farrises.[67]

64 ECF No. 32 at 7; ECF No. 26 Ex. 21.

65 ECF No. 32 at 7.

66 ECF No. 43 at 2.

67 *Id.*

11 Plaintiffs' first ground for objection is that Defendants' Exhibit 21 is not relevant, and *11 Plaintiffs cite to Federal Rule of Civil Procedure 402.[68] Plaintiffs argue that the exhibit is "inflammatory and irrelevant to any issue in the case at bar and it has no relevance under any theory pled by Defendants."[69] Defendants counter that the exhibit is relevant because it demonstrates that a court has already decided the Property was Laughlin's homestead and that the Plaintiffs' judgment lien did not attach when the Property was sold to the Farrises.[70]

68 ECF No. 32 at 7.

69 ECF No. 45 at 2.

70 ECF No. 43 at 2.

Federal Rule of Evidence 401 says that evidence is relevant if it tends to make a fact more or less probable than it would be without the evidence and the fact is one of consequence in determining the action. Whether the Property was Laughlin's homestead at the time he sold it to the Farrises is at the heart of this case. The issue is that Defendants' Exhibit 21 does not make it more or less probable that the Property was Laughlin's homestead. This Court is not bound by the factual findings of another court.[71] Moreover, Defendants never cite to Exhibit 21 in their Motion, their statement of facts, or their sur-reply to Plaintiffs' response to their Motion.[72] Accordingly, because Defendants' Exhibit 21 in no way makes it more or less probable that the Property was Laughlin's homestead and that Plaintiffs' judgment lien attached to the Property, particularly where Defendants have not used it to support either of those contentions, Plaintiffs' objection to Defendants' Exhibit 21 is sustained. Defendants' Exhibit 21 is not admitted. This Court need not address Plaintiffs' other two grounds for objection to Defendants' Exhibit 21. Pursuant to Federal Rule of Evidence 402, irrelevant evidence in not admissible. Analyzing the other two grounds would be futile.

71 *In re: HL Builders, LLC*, 2020 WL 6390103, at *5 (Bankr. S.D. Tex. Oct. 30, 2020).

72 See ECF Nos. 17, 27, 43.

IV. Summary Judgment Standard

12 *12

A. Federal Rule 56(c)

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[73] A genuine dispute of material fact exists if the fact at issue could affect the outcome of the case and based on the evidence, a reasonable jury could return a verdict for the non-moving party.[74] A movant asserting that a fact cannot be genuinely disputed must cite to particular parts of material in the record evidencing that no genuine dispute is present, or show that an adverse party cannot produce admissible evidence to support that fact.[75] While the Court may consider other materials in the record, it need only consider those actually cited.[76]

73 FED. R. CIV. P. 56(a); *see Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1286 (5th Cir. 1990) (citing *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989)).

74 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

75 *Prescott v. Wells Fargo Bank, N.A. (In re Prescott)*, 607 B.R. 288, 294 (Bankr. S.D. Tex. 2019) (citing FED. R. CIV. P. 56(c)(1)).

76 *Id.* (citing FED. R. CIV. P. 56(c)(3)).

B. Burdens of Proof

In a motion for summary judgment, "[t]he movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact."[77] Where the nonmoving party has the burden of proof at trial, the movant must show the court that the nonmoving party lacks evidence of one or more material elements of its case.[78] This does not require the movant to negate the elements of the nonmovant's case—demonstrating the absence of evidence suffices.[79] If the movant fails to meet this burden, the summary-judgment motion must be denied.[80] Conversely, if the movant succeeds in showing a lack of
13 evidence, then the *13 nonmoving party "must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial."[81] A court is not to weigh evidence, assess its probative value, or resolve factual disputes, but it must construe the evidence in the light most favorable to the non-moving party.[82]

77 *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)).

78 *See Celotex Corp.*, 477 U.S. at 325.

79 *See Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005).

80 *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

81 *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007) (citing *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc)).

82 *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996).

V. Analysis

The parties' dispute centers around property located at 9706 Ellen Street, Baytown, Chambers County, Texas 77521, and a bankruptcy judgment against the original owner of the Property, Gary Laughlin, in favor of Plaintiffs. The parties disagree as to whether the Property qualified as Laughlin's homestead and passed to Defendants free and clear of Plaintiffs' judgment lien when the Property was deeded to Penney Farris and her late husband, Ken Farris.

It is important to note that there are two judgment liens based on the soured business relationship between Williams and Laughlin—the Abstract of Judgment and the Bankruptcy Court Judgment. Hereafter, reference to "Plaintiffs' judgment lien" pertains only to the Abstract of Judgment. Defendants contend that the Bankruptcy Court Judgment was not abstracted or recorded in Chambers County.[83] Plaintiffs dispute that assertion and respond that the Bankruptcy Court Judgment incorporated the Abstract of Judgment, which was recorded in Chambers County on July 20, 2009.[84] The Bankruptcy Court Judgment, submitted by both parties as evidence, does not reflect that it was recorded in Chambers County.[85]

83 ECF No. 28 at 4, ¶ 18; *see also* ECF No. 26 Ex. 8.

84 ECF No. 30 at 3-4, ¶ 18 (citing ECF No. 34 Ex. 7).

85 ECF No. 26 Ex. 8; ECF No. 34 Ex. 7.

14 Texas Property Code section 52.007 permits the recording and indexing of an abstract of *14 judgment rendered in Texas by a federal court, creating a lien on the real property of a defendant located in the county in which the abstract is recorded.[86] Under Texas law, the Bankruptcy Court Judgment itself needed to be recorded in Chambers County.[87] The Bankruptcy Court Judgment was not somehow recorded there merely by its incorporation of the Abstract of Judgment that was recorded nearly three years before the Bankruptcy Court Judgment. The Bankruptcy Court Judgment was domesticated in Harris County, Texas, on September 12, 2012,[88] but the Property is not located in Harris County. Therefore, the only lien at issue in this case is the one created by the Abstract of Judgment.

86 *Tanner v. McCarthy*, 274 S.W.3d 311, 318 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

87 TEX. PROP. CODE § 52.007.

88 ECF No. 34 Ex. 18, at 1.

A. Whether Defendants are entitled to summary judgment

Defendants move for partial summary judgment as to two of Plaintiffs' claims, turnover pursuant to 11 U.S.C. § 542(a) and avoidance of a fraudulent transfer pursuant to 11 U.S.C. § 544(b)(1), 11 U.S.C. § 548, and Texas Business and Commerce Code sections 24.005(a) and 24.006(a)-(b). Defendants also seek partial summary judgment on their counterclaims to quiet title to the Property and a declaratory judgment that Defendants are the owners of the Property, free and clear of Plaintiffs' claims.[89]

89 ECF No. 27 at 2, ¶ 6.

Plaintiffs bear the burden of proof at trial for turnover pursuant to § 542 [90] and fraudulent transfer pursuant to §§ 544(b)(1) and 548, and Texas Business and Commerce Code sections 24.005(a) and 24.006(a)-(b).[91]
15 Defendants, therefore, must show the absence of a genuine issue *15 of disputed fact as to one or more material elements of Plaintiffs' claims that entitles Defendants to judgment as a matter of law.[92] If successful, the burden shifts to Plaintiffs to identify specific record evidence and articulate precisely how that evidence supports Plaintiffs' claims, to defeat summary judgment.[93]

90 *See Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991).

91 *In re Donnell*, 357 B.R. 386, 396 (Bankr. W.D. Tex. 2006) ("The burden of proof in such an action lies with the party seeking turnover.") (citing *Turner*, 947 F.2d at 774 (finding that the burden of proof was on the trustee as the representative of the bankruptcy estate in the turnover action)); *Jenkins v. Chase Home Mortg. Corp. (In re Maple Mortg.)*, 81 F.3d 592, 596 (5th Cir. 1996) ("[T]he trustee has the burden of proving the elements of a fraudulent transfer.") (citing *In re McConnell*, 934 F.2d 662, 665 n.1 (5th Cir. 1991)).

92 *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017).

93 *See Matson v. Sanderson Farms, Inc.*, 388 F. Supp. 3d 853, 869 (S.D. Tex. 2019) (quoting *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014)).

1. Plaintiffs' claim for turnover pursuant to 11 U.S.C. § 542

Section 542(a) provides:

> an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.[94]

Under § 363, "[t]he trustee . . . may use, sell, or lease, other than in the ordinary course of business, property of the estate." Property of the estate is defined by § 541 and includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Property interests held by a debtor at the time of filing are determined by reference to state law.[95] Federal bankruptcy law establishes the extent to which those state property rights are property of the estate.[96]

94 11 U.S.C. § 542(a).

95 *Burrell v. Auto-Pak-USA, Inc. (In re Burrell)*, 2012 U.S. Dist. LEXIS 121323, at *16 (S.D. Tex. Aug. 27, 2012) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."). *Butner* was a ruling pre-BAPCPA so was superseded by statute, but courts have consistently cited it for the proposition that property interests are determined based on state law unless there is controlling federal law. See *UTSA Apts. L.L. C. v. UTSA Apts. 8, L.L.C. (In re UTSA Apts. 8, L.L.C.)*, 886 F.3d 473, 487 (5th Cir. 2018).

96 *In re Burrell*, 2012 U.S. Dist. LEXIS 121323, at *16 (citing *Mitchell v. BankIllinois (In re Mitchell)*, 316 B.R. 891, 896 (S.D. Tex. 2003)).

As discussed more fully below, Plaintiffs claim the Property is part of Plaintiff Kyle Williams's bankruptcy estate pursuant to § 541 because Laughlin's homestead protection never extended to the entire Property or, in the alternative, Laughlin waived or abandoned his homestead.[97] Plaintiffs also claim that Laughlin never used
16 the proceeds from the sale thereof to purchase *16 another homestead.[98] Those alleged facts, Plaintiffs contend, allowed Plaintiffs' judgment lien to attach to the Property.[99] The Farrises,[100] they continue, purchased the Property with actual or constructive notice of the judgment lien and thus, purchased the Property subject thereto.[101] Defendants counter that Laughlin established his homestead rights by filing the appropriate homestead exemption documents and occupying the Property until shortly after he conveyed it to the Farrises.[102] Defendants conclude that the Property passed to the Farrises free and clear of Plaintiffs' judgment lien.[103]

97 ECF No. 4 at 7-8; ECF No. 32 at 16-17.

98 ECF No. 4 at 7-8; ECF No. 32 at 16-17.

99 ECF No. 4 at 7-8; ECF No. 32 at 16-17.

100 The Property was originally purchased by Penney and Ken Farris. Subsequently, Ken Farris died and the Defendants, who include Ken Farris's wife Penney Farris, and his two sons, Matthew and Patrick Farris, became the joint owners of the Property.

101 ECF No. 4 at 8.

102 ECF No. 27 at 6-7, 9.

103 ECF No. 27 at 6-7.

a. Homestead character of the Property

i. Whether the Property was validly exempt under Texas homestead laws

In their Motion, Defendants contend that Laughlin continuously maintained his homestead exemption and cite *Hankins* for the proposition that "[a] judgment debtor may sell a homestead 'and pass title free of any judgment lien, and the purchaser may assert that title against the judgment creditor.'"[104] Because the Property was protected by Laughlin's homestead exemption at all times, Defendants maintain that they own the Property free and clear of any interest Plaintiffs claim to have.[105]

104 *Id*. at 7 (citing *Hankins v. Harris*, 500 S.W.3d 140, 145 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)).

105 ECF No. 27 at 6-7.

Plaintiffs respond that Laughlin's homestead exemption should be denied because although Texas homestead protections are vast, they are "not a sanctuary for crooks and embezzlers."[106] Plaintiffs allege that beginning in
17 2005, Laughlin and Williams worked together for several years *17 undertaking damage abatement work, during which time Laughlin unlawfully took funds belonging to Plaintiffs.[107] A finding, they allege, made by the jury in the State Court Action and the Bankruptcy Court Judgment.[108] Laughlin, Plaintiffs continue, used those embezzled funds to help acquire the Property, pay the mortgage on the Property, and make improvements

to the Property by constructing a pool and deck.[109] Citing several cases, Plaintiffs argue that homestead protection can never shelter fraudulently acquired funds and therefore urge this Court to impose a constructive trust or equitable lien on the Property and proceeds from the sale of the Property to the Farrises.[110]

106 ECF No. 32 at 13.

107 ECF No. 35 at 2. Plaintiffs plead that these funds were community property of Kyle Williams and Renee Arcemont Williams.

108 *Id*. (citing ECF No. 34 Ex. 3, at 6-8); *see also* ECF No. 34 Ex. 3, at 1-2 (offering the Bankruptcy Court's Final Judgment, "finding specifically that the standards for non-dischargeability have been met for *embezzlement* pursuant to 11 U.S.C. § 523(a)(4) and that the standards for non-dischargeability have been met for willful injury pursuant to 11 U.S.C. § 523(a)(6).").

109 ECF No. 32at 15-16.

110 ECF No. 32 at 15-19 (citing *First State Bank of Ellinger v. Zelesky*, 262 S.W. 190 (Tex. Civ. App.—Galveston 1924); Bramson *v. Standard Hardware*, 874 S.W.2d 919, 928 (Tex. App.—Fort Worth 1994, writ denied); *Gamble-Ledbetter v. Andra Group, L.P.*, 419 B.R. 682, 700-03 (Bankr. E.D. Tex. 2009); *Smith v. Green*, 243 S.W. 1006, 1007-08 (Tex. App.—Amarillo 1992, writ ref'd); *Baucum v. Texam Oil Corp*., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); *Bush v. Gaffney*, 84 S.W.2d 759, 762 (Tex. Civ. App.—San Antonio 1935, no writ)).

As movants, Defendants bear the initial burden to show the court that there is no evidentiary support for one or more material elements of Plaintiffs' claim for turnover pursuant to 11 U.S.C. § 542.[111] An essential element of Plaintiffs' claim for turnover is that the Property is property of the estate pursuant to 11 U.S.C. § 541 and subject to turnover. Defendants offer an authenticated appraisal from the Chambers County Appraisal District purporting to show that the Property was owned by Gary Laughlin and classified as a homestead for the 2005 to 2015 tax years.[112] That document constitutes *prima facie* evidence that Laughlin's homestead exemption was valid.[113] Additionally, Defendants highlight Penney Farris's deposition testimony that Laughlin *18 was living on the Property when the Farrises viewed it before purchasing the Property and that there was furniture and personal belongings in the house.[114] Penny Farris also testified that Laughlin continued to live at the Property for about a month after the sale was finalized.[115] And, Defendants show that Williams recognized the homestead nature of the Property in the State Court Receivership Suit and interrogatories answered during discovery in this case.[116]

18

111 *See Celotex Corp*., 477 U.S. at 325.

112 ECF No. 26 Ex. 3.

113 *See In re Michelena*, 620 B.R. 570, 578 (Bankr. S.D. Tex. 2020).

114 ECF No. 26 Ex. 22, at 11:12-12:1; 17:14-24; 26:2-18.

115 *Id*. at 27:2-14.

116 ECF No. 27 at 12-13, ECF No. 26, Exs. 15, 23.

Although the evidence is scant, Defendants have successfully demonstrated that Laughlin's homestead exemption was valid and co-extensive with the value of the Property. As Defendants correctly articulate, judgment liens on a Texas homestead are generally invalid pursuant to the Texas Constitution,[117] preventing Plaintiffs' judgment lien from attaching to the Property. Thus, the burden shifts to Plaintiffs to identify specific record evidence demonstrating that there is a genuine issue of material fact for trial concerning the Property's homestead character.[118] Plaintiffs challenge Laughlin's homestead exemption on the Property on the basis that Laughlin allegedly used fraudulently obtained funds to acquire the Property, pay the mortgage on the Property, and improve the Property.[119] Plaintiffs correctly point out that Texas law prevents a homestead exemption from attaching to a portion of a property purchased, paid for, or improved with unlawfully obtained funds.[120] Relevant Texas case law holds that "the homestead protection afforded by the Texas Constitution was never
19 intended to protect stolen funds."[121] "Stolen funds used for the *19 purchase of a homestead or improvement of an existing homestead can never acquire homestead rights as they are held in trust for the rightful owners of the funds."[122] That fraudulent use, Plaintiffs claim, entitles them to an equitable lien or constructive trust on the Property.[123]

117 *United States v. Johnson*, 160 F.3d 1061, 1064 (5th Cir. 1998) (quoting TEX. CONST. art. XVI § 50).

118 *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007) ("If the movant satisfies its initial burden of demonstrating the absence of a material fact issue, then 'the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial.'") (citing *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc).

119 ECF No. 32 at 15-16.

120 *Id.* at 13-14.

121 *Bransom*, 874 S.W.2d at 928 (citing *Pace v. McEwen*, 617 S.W.2d 816, 818 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ)).

122 *Id.* (citing *Zelesky*, 262 S.W. at 192).

123 ECF No. 32 at 18-19.

As a preliminary matter, Plaintiffs did not request the imposition of an equitable lien or constructive trust in their Complaint.[124] Plaintiffs' response to Defendants' Motion is not the appropriate place to request additional relief. The arguments regarding Plaintiffs' request for imposition of a constructive trust or equitable lien will not be addressed by this Court as those arguments in no way impact whether Plaintiffs are entitled to such relief. Plaintiffs' failure to request that relief in their Complaint precludes consideration of such relief.

124 ECF No. 4.

Moreover, Plaintiffs provide no evidence that the Property was acquired with wrongfully obtained funds, and based on the timeline detailed above, no fraudulently obtained funds could have been used to acquire the Property. The Property was purchased in 2002 and a loan was obtained to build a home on the Property in 2004,[125] before Laughlin and Williams engaged in a business relationship in 2005.[126] All that remains for consideration is whether embezzled funds were used by Laughlin for mortgage payments and to construct a pool on the Property.

125 ECF No. 28 at 2 (citing ECF No. 26 Exs. 1, 2); *see also* ECF No. 26 at 4-5.

126 ECF No. 35 at 2.

To establish that fraudulent funds were used to pay down the mortgage on the Property, Plaintiffs submit a copy of Laughlin's bankruptcy schedules, reflecting a secured claim of $265,472.36 on the Property[127] and the HUD settlement statement generated when Laughlin sold the Property to the Farrises reflecting what Plaintiffs classify as "the balance of the lien on the first mortgage on the Property" in the amount of $237,008.42.[128]
20 Finding the difference between those *20 two amounts, Plaintiffs conclude that "Laughlin paid off $28,463.94 of the principle [sic] on the first mortgage on the Property with embezzled funds" between August 21, 2009, when Laughlin was in bankruptcy, and April 14, 2015, the date the Property was sold to the Farrises.[129] The HUD statement actually describes the $237,008.42 line item as "Owner finance/Wrap," not a first mortgage.[130] However, Defendants agree that the balance owed on Laughlin's mortgage at the time of the sale was $237,008.42[131] and under Texas law, a wraparound note typically includes the principal amount of underlying senior notes.[132]

127 ECF No. 34 Ex. 5.

128 *Id*. Ex. 14.

129 ECF No. 45 at 3-4.

130 ECF No. 34 Ex. 5.

131 ECF No. 28 at 4.

132 *Summers v. Consolidated Capital Special Trust*, 1990 Tex. LEXIS 38, at *7 (Tex. 1990).

Plaintiffs also argue that the pool and deck on the Property were constructed with funds belonging to Plaintiffs shortly before Laughlin filed for bankruptcy, evidenced by an affidavit by Plaintiffs' attorney, H. Brad Parker, declaring that a pool was built on the Property before Laughlin's bankruptcy case was filed,[133] an authenticated appraisal by the Chambers County Appraisal District reflecting the addition of a pool on the Property,[134] and Laughlin's bankruptcy schedules, which do not list any creditors or pre-petition debt from the pool installation.[135] Plaintiffs contend that the Chambers County Appraisal District added the pool to the appraisal in 2010 for the tax year 2009.[136] That is not what the document reflects, however. The pool is listed on the appraisal for the tax year 2010 and specifically indicates that it was built in 2010.[137]

133 ECF No. 34 Ex. 22, at 3.

134 *Id*. Ex. 17 at 14.

135 ECF No. 32 at 17; ECF No. 34 Ex. 5.

136 ECF No. 32 at 16-17.

137 ECF No. 34 Ex. 17, at 14.

Defendants counter that Plaintiffs offer no admissible evidence that embezzled funds were used to pay
21 Laughlin's mortgage or construct a pool and deck.[138] Defendants, on the other hand, *21 offer Williams's deposition testimony that he did not know how Laughlin paid for the pool or whether it was paid for by Melanie Laughlin as evidence that Plaintiffs' postulations about how embezzled funds were spent is pure speculation.[139]

138 ECF No. 43 at 5.

139 *Id*. (citing ECF No. 34 Ex. 24, at 64:9-14).

Plaintiffs failed to satisfy their burden to raise specific evidence demonstrating that Laughlin used embezzled funds to pay his mortgage and improve the Property. The evidence Plaintiffs offer does establish that Laughlin paid down the principal balance on his mortgage by $28,463.94 from August 2009 to April 2015, but Plaintiffs offer nothing demonstrating that embezzled funds can be traced to Laughlin's mortgage payments. As for the pool, the bankruptcy schedules, affidavit, and appraisal submitted by Plaintiffs establish that a pool was built around 2009 or 2010, but again, there is no evidence that embezzled funds were traced to the construction of the pool.

Importantly, Federal Rule of Civil Procedure 56(d) governs situations where facts are unavailable to nonmovants. That Rule requires a nonmovant to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Plaintiffs have not offered such affidavit or declaration. Plaintiffs merely argue that "most embezzlers do not provide a road map showing the use of monies that they have embezzled."[140] Where Plaintiffs do not provide specific evidence to establish that embezzled funds can be traced to house payments and property improvements, there is no genuine material dispute as to whether Laughlin's homestead exemption covered the entire Property. Absent a genuine dispute as to the homestead character of the Property, Plaintiffs likewise cannot establish that there is a genuine dispute of material fact as to whether the Property is property of Williams's bankruptcy estate. The entirety of the Property was Laughlin's
22 homestead when he conveyed it to the Farrises and under Texas law, *22 when Laughlin sold the Property, he passed title free of Plaintiffs' judgment lien, and the Farrises can assert that title against Plaintiffs.[141]

140 ECF No. 45 at 3.

141 *Hankins*, 500 S.W.3d at 145.

b. Homestead forfeiture by abandonment or alienation

i. Whether Laughlin forfeited the homestead character of the Property by abandonment

Plaintiffs alternatively argue that both Melanie and Gary Laughlin abandoned their homestead exemption right in the Property, allowing Plaintiffs' judgment lien to attach.[142] Defendants bear the burden of directing this Court to an absence of evidence in the record demonstrating that Gary and Melanie Laughlin abandoned the homestead. If Defendants meet that burden, the burden shifts to Plaintiffs to submit competent evidence that a genuine issue exists as to whether the Property lost its homestead character by abandonment.

142 ECF No. 4 at 8.

"Once property has been dedicated as a homestead, it can only lose such designation by abandonment, alienation, or death."[143] Abandonment requires that one offer "competent evidence that clearly, conclusively, and undeniably shows that the homestead claimant moved with the intention of not returning to the

property."[144] Texas law unequivocally requires "undeniably clear" evidence "beyond almost the shadow at least (of) all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption."[145] Additionally, "to be an abandonment that would subject the homestead property to
23 seizure and sale, there must be voluntary leaving or quitting of the residence."[146] *23

143 *Wilcox*, 103 S.W.3d at 472 (citing *Garrard v. Henderson*, 209 S.W.2d 225, 229 (Tex. Civ. App.—Dallas 1948, no writ)).

144 *Marincasiu*, 441 S.W.3d at 561 (internal marks omitted) (citing *Taylor v. Mosty Bros. Nursery, Inc.*, 777 S.W.2d 568, 569 (Tex. App.—San Antonio 1989, no hist.)); *see also, e.g.*, TEX. CONST. art. 16, § 50; TEX. PROP. CODE § 41.001.

145 *Florey v. Estate of McConnell*, 212 S.W.3d 439, 444 (Tex. App.—Austin 2006, pet. denied) (quoting *Burkhardt v. Lieberman*, 159 S.W.2d 847, 852 (Tex. 1942)).

146 *Id.* (citing *King v. Harter*, 8 S.W. 308, 309 (Tex. 1888)).

Defendants successfully demonstrate that the homestead was never abandoned by offering an authenticated appraisal reflecting Laughlin as the owner of the Property and designating the Property as a homestead from 2005 to 2015,[147] a deed from Melanie Laughlin to Laughlin, deeding her interest in the Property to him following their divorce,[148] and deposition testimony of Penney Farris that Laughlin had furniture and personal belongings at the Property and appeared to be living there.[149] The burden shifts to Plaintiffs to submit competent evidence that a genuine issue exists as to whether the Property lost its homestead character by abandonment.

147 ECF No. 26 Ex. 3.

148 ECF No. 26 Ex. 10.

149 ECF No. 26 Ex. 22, at 11:12-12:1; 17:14-24; 26:2-18; 27:2-14.

Plaintiffs' theory is that Laughlin abandoned the house by selling it to one of his alleged creditors, Ken Farris.[150] Plaintiffs offer an authenticated appraisal from the Chambers County Appraisal District, reasoning that the Property was worth $495,160[151] when Laughlin sold the Property to the Farrises for $298,300 in April 2015.[152] As part of the purchase price, the Farrises executed a promissory note in the amount of $237,008.42 to be paid within six months of the sale, and paid Laughlin approximately $33,613.49 cash.[153] Plaintiffs also assert that Laughlin did business, mostly on a cash basis, with Ken Farris several times in the past,[154] and was indebted to Ken Farris at the time Laughlin sold the Farrises the Property.[155] To establish that Laughlin was indebted to Ken Farris at the time of the sale, Plaintiffs offer deposition testimony from both Penney Farris and Williams that Laughlin once sold Ken Farris a tractor,[156] Williams's deposition testimony that Laughlin and
24 Ken Farris exchanged cash regularly allegedly because "[Laughlin] owed *24 Ken money,"[157] and Penney Farris's deposition testimony that Ken Farris made house payments on behalf of Laughlin.[158] Taken together, there is some evidence that Laughlin was indebted to Ken Farris at the time the Property was conveyed. Even so, selling the Property at a discounted price to pay off debt does not constitute abandonment of a Texas homestead under Texas law.

150 ECF No. 32 at 19-20.

151 ECF No. 32 at 19 (citing ECF No. 34 Ex. 17, at 23-24).

152 *Id*. (citing ECF No. 34 Ex. 14, at lines 101, 401).

153 *Id*. at 23 (citing ECF No. 34 Ex. 14, at lines 207, 507, 603).

154 *Id*. at 20 (citing ECF No. 34 Ex. 23, at 49:12-53:6; ECF No. 34 Ex. 24, at 38:2-41:4, 41:25-43:17).

155 *Id*. at 19; ECF No. 35 at 5.

156 ECF No. 34 Exs. 21, at 10:7-10:15, 23, at 50:1-50:19.

157 ECF No. 34 Ex. 24, at 38:20-41:4.

158 ECF No. 34 Ex. 21, at 14:5-14:17.

Plaintiffs cite to a series of non-binding cases outside the Fifth Circuit for the proposition that a debtor's choice to transfer property to a creditor is a choice not to claim that property as exempt, and conclude that Laughlin forfeited his homestead exemption by selling it the Farrises for approximately $200,000 less than its fair market value.[159] None of these cases interpret the applicable Texas homestead laws, however. Plaintiffs provide no support grounded in Texas law for their contention because none exists. Texas law is clear that a homestead may only be lost by abandonment, alienation, or death;[160] none of which involve sale of the Property to a creditor at a discounted price.

159 ECF No. 32 at 21 (citing *In re Richards*, 92 B.R. 369, 372 (Bankr. N.D. Ind. 1988) (citing *In re Kewin*, 24 B.R. 158, 161 (Bankr. E.D. Mich. 1982)); *Waldschmidt v. Sanders (In re Sanders)*, 213 B.R. 324, 329 (Bankr. M.D. Tenn. 1997)).

160 *Wilcox*, 103 S.W.3d at 472 (citing *Garrard*, 209 S.W.2d at 229).

Plaintiffs also cite cases outside the Fifth Circuit interpreting certain provisions of the bankruptcy code to support their argument that Laughlin abandoned his homestead exemption by selling the Property to Ken Farris, an alleged creditor.[161] Those cases hold that a choice to transfer exemptible property to a creditor is a choice not to claim that property as exempt.[162] While that may be true, which this Court need not decide, those cases are inapposite here. There is no evidence in the record that Laughlin was a debtor in bankruptcy when he
25 sold the Property to the *25 Farrises. Laughlin entered bankruptcy in 2009[163] and the final decree in his bankruptcy was entered in 2012.[164] The Property was not sold until 2015. Thus, the Bankruptcy Code is inapplicable, only Texas law applies. And to reiterate, under Texas law only death, abandonment, or alienation destroy homestead character,[165] not sale to a creditor for a discounted price. Therefore, even if this Court accepted Plaintiffs' argument that the discounted sales price was to pay off debt, Plaintiffs still do not satisfy their burden to show a triable dispute exists as to whether Laughlin abandoned his homestead by selling it to the Farrises for a discounted price.

161 ECF No. 32 at 21-22 (citing *In re Richards*, 92 B.R. at 372 (citing *In re Kewin*, 24 B.R. at161); *In re Sanders*, 213 B.R. at 329).

162 *Id*.

163 09-35842, ECF No. 1.

164 09-35842, ECF No. 62.

165 *Wilcox*, 103 S.W.3d at 472 (citing *Garrard*, 209 S.W.2d at 229).

Plaintiffs further submit that: (1) the final divorce decree, attached as one of Plaintiffs' exhibits, between Gary and Melanie Laughlin, which required the pair to sell the property with the help of a licensed real estate broker, evidences an intent to abandon the Property;[166] and (2) deeds reflecting Melanie Laughlin's conveyance of the Property to Laughlin and her purchase of a new home evidence her intent to abandon the Property as her homestead.[167] These arguments, a copy of the divorce decree, and the deeds, do not create a fact issue as to abandonment. To find abandonment, Texas law requires a voluntary discontinued use of a homestead with the intent never to return.[168] Melanie Laughlin abandoned the homestead by conveying her interest in the Property and purchasing a new property to occupy,[169] but her actions have no effect on those of Laughlin himself.[170] It is
26 undisputed that the Property was still listed as a homestead by the Chambers *26 County Appraisal District when it was sold to the Farrises and that Laughlin appeared to occupy the Property until shortly after it was sold to the Farrises.[171]

166 ECF No. 45 at 4.

167 *Id*. at 5-6.

168 *Parks v. Buckeye Ret. Co., L.L.C. (In re Parks)*, 2006 U.S. Dist. LEXIS 38383, at *11 (S.D. Tex. June 9, 2006) (citing *Montague v. Nat'l Loan Investors, L.P.*, 70 S.W.3d 242, 248 (Tex. App.—San Antonio 2001, pet denied)).

169 *In re Parks*, 2006 U.S. Dist. LEXIS 38383, at *11 ("Mere removal from premises occupied as a homestead, even to another state, does not constitute an abandonment so long as no other homestead is acquired and there remains at all times an intention to return and again occupy the property as the family residence.") (quoting *W. Tex. State Bank of Snyder v. Helms*, 326 S.W.2d 47, 49 (Tex. App.—Eastland 1959, no writ)).

170 *Fairfield Financial Group, Inc. v. Synnott*, 300 S.W.3d 316, 319-23 (Tex. App.—Austin 2009, no pet.) (finding that regardless whether the ex-husband abandoned the property, it remained protected at all times by the ex-wife's undivided homestead interest); *see also, e.g., Salomon v. Lesay*, 369 S.W.3d 540, 555 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("[S]o long as real property is a family homestead by virtue of one spouse's intention and use, that property is protected by the homestead exemption, unless abandonment is pleaded and proved."); *Hankins*, 500 S.W.3d at 147 (finding that an ex-husband's undivided homestead interest protected the property at all relevant times and prevented the a judgment lien from attaching because both before and after the divorce, because before the divorce, each spouse has an undivided homestead interest as a family member and after divorce, the ex-husband received the full homestead interest pursuant to the divorce decree and transfer of land).

171 ECF No. 27 at 9; ECF No. 26, Exs. 3, 22.

Plaintiffs failed to submit any competent evidence showing that Laughlin abandoned the Property either as a result of the divorce decree or when he sold it to the Farrises. Accordingly, the Court finds that the Property did not lose its homestead character by abandonment and therefore, no genuine issue of material fact remains for trial.

ii. Whether Laughlin forfeited the homestead character of the Property by alienation

A Texas homestead cannot lose its designation by "waiver,"[172] as Plaintiffs pled, and Plaintiffs provide no case law to indicate otherwise. This Court interprets Plaintiffs use of "waiver" to mean alienation.

172 ECF No. 4 at 8.

Abandonment is distinct from alienation.[173] When abandonment by discontinuation of use cannot be shown, alienation may nevertheless result in termination of the homestead.[174] Alienation occurs "when the title to the property is transferred or conveyed to another, regardless of whether the grantor retains possession of the property,"[175] but "[a] subsequent purchaser of homestead property may assert the prior person's homestead protection against a prior lienholder so long as there is no gap between the time of homestead alienation and
27 recordation of his title."[176] However, *27 "if there is a gap in between the time of alienation of the homestead and the recordation of the subsequent purchaser's interest," any valid judgment lien will attach to the property.[177]

173 *Resolution Trust Corp. v. Olivarez*, 29 F.3d 201, 206 (5th Cir. 1994) ("Abandonment and alienation of title have frequently been described as distinct methods of extinguishing a homestead interest.").

174 *Id.* at 207.

175 *Perry v. Dearing (In re Perry)*, 345 F.3d 303, 310 n.8 (5th Cir. 2003) (citing *Olivarez*, 29 F.3d at 206-07).

176 *Marincasiu*, 441 S.W.3d at 559 (citing *Dominguez v. Castaneda*, 163 S.W.3d 318, 330 (Tex. App.—El Paso 2005, pet. denied)).

177 *Intertex, Inc. v. Kneisley*, 1992 Tex. App. LEXIS 2153, at *5 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (citing *Hoffman v. Love*, 494 S.W.2d 591, 594-95 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.)).

Defendants provided competent summary judgment evidence demonstrating that the Property was Laughlin's homestead until shortly after it was sold to the Farrises, so the burden shifts to Plaintiffs to show that the sale to the Farrises resulted in alienation of Laughlin's homestead. It is undisputed that the Property was sold to the Farrises, but Plaintiffs do not argue nor do they submit any competent summary judgment evidence that there was any lapse in time between the conveyance and when the Farrises recorded title to the Property. As explained above, a gap between conveyance and recordation is the only way a judgment lien can attach to a homestead by alienation.[178] No genuine issue of material fact remains for trial as to whether the Property lost its homestead exemption by alienation because Plaintiffs failed to submit any competent summary judgment evidence to that point.

178 *Id.* at *5 (citing *Hoffman*, 494 S.W.2d at 594-95).

Accordingly, because the Property was neither abandoned nor alienated by Laughlin, the Property retained its valid Texas homestead exemption and Defendants can assert Laughlin's Texas homestead exemption against Plaintiffs.

c. Homestead character of the Property's sales proceeds

Plaintiffs' final argument for turnover is that even if the homestead exemption applied and Laughlin did not abandon or "waive" it, Plaintiffs are nevertheless entitled to the proceeds from the sale.[179] Plaintiffs contend that because the proceeds were not used by Laughlin within six months of the sale for a new homestead,
28 Plaintiffs' judgment lien attached to those proceeds.[180] *28 Plaintiffs claim they are entitled to proceeds in the form of: (i) the $33,613.49 cash payment made by the Farrises to Laughlin;[181] (ii) the $237,008.42 Farris Note;[182] and (iii) "the Deep Discount ($200,000), which Gary Laughlin transferred to his friend and business associate, Ken Farris, as part of the fraud to prevent [Plaintiffs] from benefiting from the sale of the Property."[183]

179 ECF No. 32 at 23-24.

180 *Id*. (citing TEX. PROP. CODE § 41.001(c) ("The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.")).

181 ECF No. 32 at 23.

182 *Id*. at 23-24.

183 ECF No. 45 at 6-7. Plaintiffs refer to the approximately $200,000 difference between the market value of the Property, $495,160, and the sales price, $298,300, as the "Deep Discount".

As a preliminary matter, the Court must decide whether the "proceeds" Plaintiffs believe themselves entitled to qualify as proceeds under controlling law. Texas Property Code section 41.001(c) provides, ". . . proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale." Proceeds are defined by Black's Law Dictionary as "[t]he value of land, goods, or investments when converted into money; the amount of money received from a sale."[184] While Texas case law does not define "proceeds" for purposes of real estate transactions, it does define "gross sales proceeds" as the monies received before costs are deducted and "net sales proceeds" as the money remaining from a sale once all liens, claims, and encumbrances are paid.[185] The Court will consider each category Plaintiffs claim to be "proceeds," in turn.

184 *Proceeds*, BLACK'S LAW DICTIONARY (11th ed. 2019).

185 *See*, *e.g*., *Wiggains v. Reed (In re Wiggains)*, 535 B.R. 700, 702 (Bankr. N.D. Tex. 2015) ("The Texas Homestead was sold by the Trustee during the early part of the above-referenced bankruptcy case for $3.4 million, netting $568,668.41 of cash proceeds after payment of all liens, claims, and encumbrances."); *In re SCC Kyle Partners*, *Ltd*., 2013 Bankr. LEXIS 2439, at *18 (Bankr. W.D. Tex. 2013) ("The gross sales proceeds from the Avail sale was approximately $1.5 million, and Whitney Bank received the net sales proceeds after payment of closing costs and property taxes."); *In re Dupuy*, 2004 Tex. Dist. LEXIS 2684, at *44 (410th Dist. Ct., Montgomery County, Tex. May 13, 2004) ("The net sales proceeds shall be defined as the gross sales prices less the cost of sale and full payment of any mortgage indebtedness or liens on the property.").

i. Whether Plaintiffs' judgment lien attached to the $33,613.49 cash payment

It is undisputed that when Laughlin conveyed the Property to the Farrises, the Farrises paid a portion of the
29 $298,300 sales price with a cash payment of $33,613.49.[186] Plaintiffs contend, *29 and Defendant Penney Farris's deposition testimony reveals, that Laughlin never intended to purchase a new homestead with the monies he received from the sale of the Property.[187] Penney Farris testified that Laughlin intended to purchase a car hauler and use that as his living quarters.[188] In their Motion, Defendants concede that "Laughlin may have waived the homestead nature of the proceeds from the sale of the Property if he did not utilize the proceeds in 180 days to purchase a new homestead."[189] That, however, Defendants continue, does not cause the Property to retroactively lose its homestead character.[190]

186 *See* ECF No. 35 at 5, ¶ 16; ECF No. 44 at 2, ¶ 16.

187 ECF No. 45 at 5 (citing ECF No. 34 Ex. 21, at 12:16-13:7).

188 ECF No. 34 Ex. 21, at 12:16-13:7.

189 ECF No. 27 at 12.

190 *Id.*

Defendants are correct. Any claim Plaintiffs have to the $33,613.49 in cash proceeds in no way affects the homestead character of the Property. As held above, the Property was Laughlin's homestead and under Texas law, the Farrises can assert Laughlin's homestead exemption against Plaintiffs' claim. Additionally, any recourse for the $33,613.49 Plaintiffs may be entitled to is against Laughlin, the receiver and possessor of the proceeds, not Defendants. Laughlin was named as a defendant in this adversary, but never appeared or filed an answer.[191] His failure to respond does not somehow make Defendants liable for the cash proceeds. Plaintiffs' request for turnover of the $33,613.49 in cash proceeds is dismissed with prejudice.

191 ECF No. 4.

ii. Whether Plaintiffs' judgment lien attached to the $237,008.42 Farris Note

Plaintiffs claim that the Farris Note represents proceeds of the sale of the Property and that because the note was never paid by the Farrises, Plaintiffs now have the right to demand turnover of the $237,008.42 plus interest.[192] Defendants contend that at the time of the State Court Receivership Suit, when Williams sought turnover of the Farris Note, the note had already been paid in *30 full.[193] Defendants bear the initial burden to show an absence of evidence proving that the Farris Note was not paid.

30

192 ECF No. 24 at 34.

193 ECF No. 27 at 12.

Defendants point to a release of lien executed on October 12, 2015, by CitiMortgage, Inc., as proof that the Farris Note was paid.[194] That release lists Gary and Melanie Laughlin as the original borrowers and describes the Property, but makes no mention of the Farrises.[195] All it demonstrates is that Laughlin's mortgage was paid off, not that the Farris Note was satisfied.[196] Defendants explain that under the Farris Note, the Farrises were permitted to make payments directly to Laughlin's mortgage servicer and any such payments were credited against the Farris Note.[197] The relevant portion of the Farris Note states:

194 ECF No. 26 Ex. 14.

195 *Id.*

196 *See id.*

197 *See* ECF No. 26 Ex. 12.

> [Laughlin] shall, from time to time, upon the request of [the Farrises], provide [the Farrises] with proof of payment of the installments on the ABN AMRO MORTGAGE GROUP, note. In the event [Laughlin] fails to timely make such payments, [the Farrises] may elect to pay the installments on the said note directly to ABN AMRO MORTGAGE GROUP, and, if so elected, [the Farrises] shall be entitled to a credit of such amounts paid against the payment on the herein described note.[198]

Defendants' argument at the summary judgment hearing was that the Farrises made payments directly to Laughlin's mortgage servicer, in satisfaction of the Farris Note. Defendants directed the Court to an incomplete

and ambiguous portion of Penney Farris's deposition testimony to demonstrate that the Farris Note was paid. Defendants' exhibit captures the following exchange between Penney Farris and the state court receiver, Stephen Mendel:

> Mr. Mendel: After the sale in April of 2015, did you and your husband make any payments to the lender of that property?
>
> Ms. Farris: Yes.

31 *31

> Mr. Mendel: And what is it that you recall about payments to the lender?
>
> Ms. Farris: My understanding is we paid the note until we had the full money to pay it off.
>
> Mr. Mendel: So what had to happen between April when you acquired it from Mr. Laughlin and until the time that you paid off the lender? What is it that transpired to acquire these extra dollars to pay off the note?
>
> Ms. Farris: We had money to make the monthly payments, so we made the monthly payments.
>
> Mr. Mendel: Right. But at some point you paid off the balance of the note. Can't shake your head for the court reporter.

Defendants' exhibit ends there, cutting off the remainder of the exchange between Mr. Mendel and Penney Farris. Viewing the evidence in the light most favorable to Plaintiffs, this exchange does not satisfy Defendants' burden to show that the Farris Note was paid in full, either through payments to Laughlin or his mortgage servicer.

[198] *Id.*

The exchange does not identify which note Penney Farris speaks of, to whom "monthly payments" were made, or what the "extra dollars to pay off the note" refers to. Moreover, at the end of the provided exchange, Mr. Mendel says "[b]ut at some point you paid off the balance of the note." Penney Farris's response was shaking her head. The Court cannot determine whether that head shake meant "no, we didn't pay it off" or "yes, we did pay it off." The exchange is too cryptic for this Court to find that no genuine dispute regarding payment of the Farris Note exists.

If Defendants never paid the Farris Note in full, then the obligation to pay those funds to Laughlin remain Defendants' obligation. That obligation, by now, has rendered all unpaid funds non-exempt pursuant to Texas Property Code section 41.001(c), allowing Plaintiffs' judgment lien to attach to such proceeds, if any. Therefore, Plaintiffs' cause of action for turnover pursuant to 11 U.S.C. § 542(a) of the funds owed pursuant to the Farris Note will proceed to trial.

32 iii. Whether Plaintiffs' judgment lien attached to the "deep discount" ($200,000) *32

Lastly, Plaintiffs posit that the deeply discounted sales price, approximately $200,000, constitutes proceeds of the sale of the Property. This argument is a non-starter. Based on the definitions expounded above, the difference between the market value of the Property and the sales price is not proceeds of a sale of real property.[199] Neither definition of "proceeds" encompasses the difference between the fair market value of

property and the price a seller sells it for,[200] and Plaintiffs offer no support to prove otherwise.[201] Thus, no genuine dispute exists as to whether Plaintiffs' judgment lien attached to the deep discount, because that discount is not proceeds.

199 See *supra* Section V(A)(1)(c), for a discussion on the definition of proceeds.

200 See *supra* Section V(A)(1)(c).

201 ECF No. 43 at 6.

Even if the deep discount of $200,000 is proceeds, Plaintiffs' argument still fails because it is grounded in pure speculation, not competent evidence. Plaintiffs speculate that the deep discount was given to satisfy a debt Laughlin owed to Ken Farris.[202] Any such argument is foreclosed by Defendant Penney Farris's uncontroverted deposition testimony that the discounted sales price was all the Farrises could afford at the time and that as far as Penney Farris was aware, Laughlin's indebtedness to Ken Farris was only in the amount of a house payment or two for the Property as reflected by the HUD settlement statement.[203] The HUD settlement statement reflects that one "March house payment" in the amount of $1,712.92 was deducted from the $298,300 sales price of the Property.[204] That $1,712.92 debt does not prove that there is a genuine dispute of material fact as to whether Laughlin sold the Property to the Farrises for approximately $200,000 less than its fair market value to satisfy a debt owed to Ken Farris. If the discounted sales price was in exchange for debt owed, the house payment would not have been deducted from the sales price as the deep discount would have covered it under Plaintiffs' theory.

33 *33

202 ECF No. 32 at 19.

203 ECF No. 34 Ex. 21, at 8:8-10:22, 14:5-17.

204 *Id*. Ex. 14, at line 508.

Lastly, Plaintiffs' unsupported argument that the deep discount was to satisfy a debt owed does not make Penney, Matthew, and Patrick Farris the proper parties to sue because Laughlin was the recipient of the benefit from that discount, not Penney, Matthew, and Patrick Farris. Laughlin is the proper party to sue, but again, Laughlin did not appear or file an answer in this suit despite being named a defendant. Laughlin's absence does not make Defendants liable for the sales proceeds. No genuine dispute of material fact remains as to whether the deep discount constitutes proceeds to which Plaintiffs' judgment lien attached. The deep discount is not proceeds, and Plaintiffs' judgment lien did not attach to same. Accordingly, Plaintiffs' request for turnover of the $200,000 "deep discount" is dismissed with prejudice.

2. Fraudulent transfer pursuant to 11 U.S.C. §§ 544(b)(1) and 548 and Texas Business and Commerce Code sections 24.005(a) and 24.006(a)-(b)

Before diving into the parties' arguments and evidence regarding Plaintiffs' causes of action for fraudulent transfer, the Court addresses a glaring, yet unidentified issue with Plaintiffs' claims. Sections §§ 544(b)(1) and 548 and Texas Business and Commerce Code, more commonly known as the Texas Uniform Fraudulent Transfer Act ("*TUFTA*"), sections 24.005(a) and 24.006(a)-(b) all apply in circumstances where a claimant is seeking to avoid a fraudulent transfer of an interest of the debtor.[205] Here, Laughlin was the transferor of the Property, but Williams is the debtor. Unless the Property was somehow an interest of Williams, which the Court found above that it was not, then the statutes under which Plaintiffs bring their fraudulent transfer claims are

inapplicable. In response to Plaintiffs' § 542 claim, Defendants challenge whether the Property is property of
34 Williams's bankruptcy estate, but Defendants never contest the applicability of these *34 fraudulent transfer statutes. Because Defendants did not contest the applicability of these fraudulent transfer statutes, the Court will nevertheless consider the arguments and evidence raised in Defendants' Motion as if such statutes are applicable.

205 11 U.S.C. § 544(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property); 11 U.S.C. § 548 ("The trustee may avoid any transfer . . . of an interest of the debtor in property"); TEX. BUS. & COM. CODE § 24.005(a) ("A transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . ."); TEX. BUS. & COM. CODE § 24.006(a) ("A transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . ."); TEX. BUS. & COM. CODE § 24.006(b) ("A transfer made by a debtor is fraudulent as to a creditor . . . .").

a. Whether the Property was an "asset" under the Texas Uniform Fraudulent Transfer Act

Plaintiffs' second count alleges that Laughlin's sale of the Property to the Farrises for less than reasonably equivalent value was a fraudulent transfer and is voidable pursuant to 11 U.S.C. § 544(b)(1) and TUFTA.[206] Section 544(b)(1) of the Bankruptcy Code declares, ". . . a trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable . . . ." The "applicable law" here is TUFTA sections 24.005(a) and 24.006(a)-(b). Those sections spell out the elements a claimant must satisfy to prove a transfer is fraudulent as to a present or future creditor under Texas law.[207] Section 24.002 provides the definitions governing those sections. A transfer is "every mode . . . of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or encumbrance."[208] Section 24.002(2)(B) defines an asset as "property of a debtor, but the term does not include: . . . property to the extent it is generally exempt under nonbankruptcy law."[209] Property that is exempt under non-bankruptcy law is explicitly excluded.[210]

206 ECF No. 4 at 9-10.

207 *See* TEX. BUS. & COM. CODE §§ 24.005(a), 24.006(a)-(b).

208 *Id*. § 24.002(12).

209 *Id*. § 24.002(2)(B).

210 *In re Villareal*, 2019 Bankr. LEXIS 56, *6 (Bankr. N.D. Tex. Jan. 8, 2019) (quoting *Duran v. Henderson*, 71 S.W.3d at 842 (citing TEX. BUS. & COM. CODE §§ 24.002(2), 24.002(12), 24.005)).

As movants, Defendants bear the initial burden to show the court that evidentiary support for one or more
35 material elements of Plaintiffs' claim for fraudulent transfer pursuant to 11 U.S.C. *35 §§ 544(b)(1) and 548 and TUFTA sections 24.005(a) and 24.006(a)-(b) is lacking.[211] Defendants point out that the relevant sections of TUFTA apply to transfers of "assets" and that the definition of assets explicitly excludes property exempt under non-bankruptcy law.[212] Defendants continue, "it is well settled case law that a conveyance of exempt property may not be attacked on the ground that it was made in fraud of creditors."[213] Quoting *Duran*, Defendants assert that "[t]he rational [sic] for this rule is that because the law already has removed the homestead property from

the reach of creditors, the conveyance of the property, whether fraudulent or not, does not deprive the creditors of any right they had against the property."[214] They conclude that because the Property was Laughlin's homestead, it was not an asset pursuant to TUFTA.[215]

211 *See Celotex Corp.*, 477 U.S. at 325.

212 ECF No. 27 at 14.

213 *Id.*

214 *Id.* (quoting *Duran v. Henderson*, 71 S.W.3d 833, 843 (Tex. App.—Texarkana 2002, pet. denied)).

215 *Id.*

Defendants correctly quote the *Duran* case, which summarizes Texas law.[216] A debtor's conveyance of exempt property causes no detriment to creditors because that property was already removed from the reach of creditors.[217] "It follows that a debtor may sell exempt property or give it away and pass title against his creditors."[218] An exception to this general rule exists, however. A transfer of exempt property to a creditor may be challenged where the property transfer is a sham transaction that allows the debtor to retain rights in the property while ending its homestead use.[219]

216 *Duran*, 71 S.W.3d at 843.

217 *Id.*

218 *Id.*

219 *Id.*

This Court already found that the Property was Laughlin's homestead pursuant to Texas law. The Court also found that the Property was Laughlin's homestead until he sold it to the Farrises and, as a matter of law, that the
36 Farrises can assert Laughlin's title against Plaintiffs' *36 claims. Due to the homestead nature of the Property, the Property was not an "asset" under TUFTA when it was conveyed[220] and Laughlin was free to convey it to whomever[221] as successfully demonstrated by Defendants. The burden shifts to Plaintiffs to show that the sale to the Farrises was a sham transaction and that Laughlin retained rights in the Property despite ending its homestead use, to prove that the sale of the Property to the Farrises falls within the exception to the general rule.[222]

220 See *supra* section V(A)(1)(a).

221 *See Duran*, 71 S.W.3d at 843.

222 *See id.*

Plaintiffs make no such effort. Plaintiffs neither claim nor submit any evidence that Laughlin retained rights in the Property after its conveyance to the Farrises. Plaintiffs instead make the bald assertion that "Laughlin's sale of the Property to the [Farrises was] a sham transaction."[223] Plaintiffs provide no competent summary judgment evidence to support their claim. Accordingly, the Property was not an "asset" under TUFTA and its conveyance to the Farrises was lawfully within Laughlin's sole discretion.

223 ECF No. 32 at 21.

b. Whether the TUFTA statutes of limitation apply to Plaintiffs' fraudulent transfer claim

Defendants maintain that even if this Court finds that a fact issue remains as to the homestead status of the Property, Plaintiffs' fraudulent transfer cause of action pursuant to TUFTA fails because it is barred by the statute of limitations.[224] Defendants offer the deed of trust to the Farrises as evidence that the Property was sold to them on April 14, 2015,[225] and Plaintiffs' Complaint filed November 24, 2019,[226] in asserting that pursuant to
37 TUFTA section 24.010, Plaintiffs had four *37 years from the sale to bring a fraudulent transfer claim and did not do so until 224 days after the statute of limitations ran.[227]

224 ECF No. 27 at 15.

225 ECF No. 26 Ex. 11.

226 ECF Nos. 1, 4.

227 ECF No. 27 at 15 (citing TEX. BUS. & COM. CODE § 24.010).

To be clear, TUFTA section 24.010 sets out various statutes of limitations based on which TUFTA section a claim falls under. For claims under section 24.005(a)(1), a claimant has four years after the transfer to bring the claim or one year after the transfer could reasonably have been discovered. Under sections 24.005(a)(2) and 24.006(a), a claimant has four years from the date of transfer. Lastly, under section 24.006(b), a claimant has one year from when the transfer was made.

It is unnecessary for the Court to consider Defendants' statute of limitations argument or Plaintiffs' response to that argument because Defendants satisfied their burden to prove that the Property is not an "asset" of Williams's bankruptcy estate, a critical element of Plaintiffs' fraudulent transfer claim. Plaintiffs were unable to overcome Defendants' summary judgment evidence. Therefore, the statute of limitations argument is moot because TUFTA does not apply to Laughlin's transfer of the Property. The Property is not an asset of Williams's bankruptcy estate and Laughlin was free to transfer the Property to the Farrises, taking its conveyance outside the realm of 11 U.S.C. § 544(b)(1) and TUFTA sections 24.005(a) and 24.006(a)-(b).

However, even if the Property were an asset of Williams's bankruptcy estate, Defendants still prevail. Defendants' evidence demonstrates that Plaintiffs brought their fraudulent transfer claim after the statute of limitations ran under TUFTA.[228] The burden shifts to Plaintiffs to identify specific evidence in the record that Plaintiffs' claim was brought before the statute of limitations expired. Plaintiffs argue that the state court receiver filed a cause of action for fraudulent transfer in state court on April 11, 2019, before the four year
38 statute of limitations ran, and when Williams *38 filed for bankruptcy, that cause of action became property of the estate.[229] Plaintiffs provide no evidence of that state court suit; they merely allege that it was filed.[230] Thus, even if Plaintiffs are correct that the action filed in the state court by the receiver became property of Williams's bankruptcy estate, which this Court does not decide, Plaintiffs have not satisfied their summary judgment burden to raise specific evidence establishing that a genuine dispute of material fact exists as to whether Plaintiffs' fraudulent transfer cause of action was filed after the TUFTA statute of limitations. Accordingly, Plaintiffs' fraudulent transfer cause of action pursuant to 11 U.S.C. § 544(b)(1) and TUFTA sections 24.005(a) and 24.006(a)-(b) is dismissed with prejudice.

228 ECF No. 26 Ex. 11; ECF No. 4.

229 ECF No. 32 at 30.

230 *Id.*; *see also* ECF No. 35 at 7.

c. Whether Plaintiffs' claim pursuant to 11 U.S.C. § 548 is time barred

Defendants contend they are entitled to summary judgment as a matter of law on Plaintiffs' fraudulent transfer claim under § 548 because Plaintiffs' claim was not filed within two years after the Property was transferred to the Farrises.[231] Defendants again offer the deed of trust to the Farrises[232] and Plaintiffs' Complaint[233] to establish that Plaintiffs' Complaint was filed 954 days after the two year statute of limitations ran.[234] Defendants incorrectly interpret § 548.

231 ECF No. 27 at 17.

232 ECF No. 26 Ex. 11.

233 ECF Nos. 1, 4.

234 ECF No. 27 at 17.

Section 548 permits a trustee to "avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, *that was made or incurred within 2 years before the date of the filing of the petition* . . . ."[235] Defendants are not correct that a claim under § 548 must come within two years of the transfer. Rather, the transfer must have occurred in the two years preceding the debtor's bankruptcy petition.[236]
39 Williams's bankruptcy was filed on May *39 16, 2019.[237] The Property was sold to the Farrises on April 14, 2015.[238] Only transfers made on or after May 16, 2017, could be avoided under § 548.

235 11 U.S.C. § 548(a)(1) (emphasis added).

236 *Id.*

237 Bankr. ECF No. 1.

238 ECF No. 34 Ex. 11.

The Property was transferred seven hundred and sixty-two days before May 16, 2017, far outside the time limitation in § 548. The burden shifts to Plaintiffs to show that a genuine dispute as to whether the transfer was in fact made on or after May 16, 2017. Plaintiffs offer no evidence or support, but argue that "§ 548 permits the Trustee to avoid only those transfers that occurred within two (2) years before the bankruptcy filing date, it has no effect on transfers that occurred earlier that might otherwise have qualified as fraudulent transfers."[239] Plaintiffs' own argument and lack of summary judgment evidence forecloses their own cause of action under § 548 because Plaintiffs agree with Defendants that transfers occurring more than two years before a bankruptcy filing cannot be reached under § 548. Plaintiffs fail to satisfy their burden. Plaintiffs' § 548 action is time barred and thus, no genuine issue of material fact remains for trial. Accordingly, Kyle Kincaid Williams and Renee Arcemont Williams' cause of action for voidance of a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b)(1) and 548, and Texas Business and Commerce Code sections 24.005(a) and 24.006(a)-(b) is dismissed with prejudice.

239 ECF No. 32 at 31.

3. Claim objection

A creditor may file a proof of claim under section 501 of the Bankruptcy Code. [240] A creditor holds a "claim" against a debtor if it has a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or
40 unsecured."[241] A claim is deemed allowed unless a party *40 in interest, including a debtor, objects to the claim.[242] Indeed, the timely filing of a proof of claim is *prima facie* evidence of its validity.[243]

240 *See* 11 U.S.C. § 501; *see also* FED. R. BANKR. P. 3003.

241 11 U.S.C. § 101(5)(A).

242 *See id*. § 502(a).

243 FED. R. BANKR. P. 3001(f).

In their Complaint, Plaintiffs object to Defendants proof of claim in the amount of $92,589.30.[244] Plaintiffs object to the claim's enforceability alleging that it is contingent or unmatured.[245] Defendants' Motion makes no arguments addressing Plaintiffs' claim objection, but in their first argument section heading, Defendants write "[Plaintiffs'] claims for turnover, fraudulent transfer, and *claim objection* all fail because the Property was Gary Laughlin's homestead when he conveyed it to the Farrises."[246] Likewise, Plaintiffs do not address the claim objection in their response to Defendants' Motion. Since neither party submitted any competent summary judgment either way, factual issues remain. Thus, Plaintiffs' claim objection is reserved for trial.

244 ECF No. 4 at 11.

245 *Id*. (citing 11 U.S.C. § 502(b)(1)).

246 ECF No. 27 at 6 (emphasis added).

B. Whether Defendants are entitled to summary judgment on their counterclaims to quiet title and for declaratory judgment.

In their original answer to Plaintiffs' Complaint, Defendants asserted four counterclaims: (1) quiet title; (2) slander of title; (3) tortious interference with contractual relations; and (4) declaratory judgment.[247] In their Motion for Partial Summary Judgment, Defendants seek summary judgment as to claims 1 and 4.[248] Defendants bear the burden of proof at trial as to their claims for quiet title and declaratory judgment. Because Defendants are the movants herein, they "must establish beyond peradventure *all* of the essential elements of
41 their claim[s],"[249] to warrant judgment in their favor. *41

247 ECF No. 17 at 15-18.

248 ECF No. 27 at 17-18.

249 *Fontenot v. Upjohn Co*., 780 F.2d 1190, 1194 (5th Cir. 1986).

To prevail on their quiet title action, Defendants must prove that Plaintiffs: (1) created a hindrance to Defendants' title, having the appearance of a better right to title than Defendants own, that (2) appears to be valid on its face, and that (3) for reasons not apparent on its face, is not valid.[250] To prevail on their declaratory judgment action, Defendants must prove the elements of their quiet title claim and show that the instruments

recorded by Plaintiffs or the state court receiver in Chambers County, Texas, are invalid.[251] If Defendants satisfy their burden of establishing all elements of their claims beyond peradventure, the burden then shifts to Plaintiffs to identify "specific facts showing there is a genuine issue for trial."[252]

250 *Martinez v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 16846, at *17 (citing *Ellis v. Buentello*, 2012 Tex. App. LEXIS 6803, at *3 (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, no pet.)).

251 *See Rex-Tech Int'l, LLC v. Rollings (In re Rollings)*, 451 Fed. App'x. 340, 345 (5th Cir. 2011) (finding that in a declaratory action, the party seeking relief bears the burden of proof); *see also In re Wiggains*, 2015 Bankr. LEXIS 1121, at *26 (Bankr. N.D. Tex. Apr. 6, 2015) (finding that the burden of proof as to issues of property interests was on the party seeking declaratory judgment as the party raising an affirmative assertion on an issue).

252 FED. R. CIV. P. 56(e).

1. Quiet title

Defendants assert that they are entitled to judgment as a matter of law that the Farrises took the Property free and clear of Plaintiffs' judgment lien when they purchased the Property from Laughlin because the Property was Laughlin's homestead when conveyed.[253] The "Notice of Appointment of Receiver, Including Receiver's Exclusive Right to Note Proceeds" ("*Notice of Receiver*") that was filed in the Chambers County Property Records, clouding Defendants' title to the Property, Defendants continue, was based on an invalid claim resulting in a wrongful cloud on title.[254] A suit to quiet title is used to declare invalid or ineffective an adverse party's claim to title.[255] The Court must address both Plaintiffs' judgment lien and the Notice of Receiver.

253 ECF No. 27 at 18.

254 *Id.* (citing ECF No. 26 Ex. 17).

255 *Gordon v. W. Houston Trees, Ltd.*, 352 S.W.3d 32, 42 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

42 **a. Whether Plaintiffs' judgment lien in an invalid or ineffective claim to the Property** *42

Plaintiffs' Abstract of Judgment, submitted as an exhibit by both parties, was recorded in Chambers County, Texas, on July 20, 2009.[256] That Abstract made no mention of the Property and the lien created thereby could not have attached to the Property because such a lien attaches only to non-exempt property of the judgment debtor.[257] Only property in the county where the abstract is recorded and indexed is subject to the lien.[258]

256 ECF No. 26 Ex. 4; ECF No. 34 Ex. 4.

257 TEX. PROP. CODE § 52.001.

258 *Id.*

The Abstract of Judgment created a lien on only non-exempt property in Chambers County when filed.[259] Defendants offer the Abstract of Judgment and the evidence discussed above that the Property was exempt as Laughlin's homestead, to show that the Abstract of Judgment did not create a valid lien on the Property by operation of law.[260] In Texas, judgment liens on homesteads are generally invalid, unless a homestead ceases to

be, such as by abandonment, death, or alienation.[261] As found above, the Property was Laughlin's homestead at the time he conveyed it to the Farrises and that homestead was not forfeited by abandonment, alienation, or death.[262]

259 *See id*.

260 ECF No. 26 Ex. 4; see *supra* Part V(A)(1)(a)-(b), for a discussion on the evidence establishing the homestead character of the Property and Plaintiffs' failure to prove forfeiture of that character by abandonment or alienation.

261 *Johnson*, 160 F.3d at 1064 (quoting TEX. CONST. art. XVI § 50).

262 See *supra* Part V(A)(1)(a)-(b), for a discussion on the homestead character of the Property and Plaintiffs' failure to prove forfeiture of that character by abandonment or alienation.

b. Whether the Notice of Receiver is an invalid or ineffective claim to the Property

The Notice of Receiver, submitted by both parties as an exhibit, was filed in Chambers County on December 15, 2015, eight months after the Farrises purchased the Property.[263] The Notice names both Laughlin and the Farrises, describes the Property and the Farris Note, and indicates that the state receiver "has the exclusive
43 power and authority to take possession of all non- *43 exempt property of [Laughlin] that is in the actual or constructive possession or control of [Laughlin], including notes receivables, promissory notes, all real property and deeds to real property."[264]

263 ECF No. 26 Ex. 17; ECF No. 34 Ex. 20.

264 *Id*.

The Notice would turn up in any title search, be it by grantor-grantee or tract description because it was filed in Chambers County, identifies the Property, and names the parties listed in the deed to the Property. And where "a purchaser is bound by *every* recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims,"[265] the Notice of Receiver, which evidences an outstanding claim, creates a hinderance on Defendants' title.[266] Defendants contend that at the time the Notice of Receiver was filed, the Farris Note had already been paid.[267] Defendants state that payments made to AmCap Mortgage were credited against the Farris Note and the release of lien signed by Laughlin was held in escrow until the AmCap Mortgage was paid.[268] Defendants' Motion indicates that the release was never recorded in Chambers County.[269]

265 *Westland Oil Dev. Corp*., 637 S.W.2d at 908 (emphasis in original).

266 *See Martinez*, 2013 U.S. Dist. LEXIS 16846, at *17 (citing *Ellis*, 2012 Tex. App. LEXIS 6803, at *3).

267 ECF No. 27 at 12 (citing ECF No. 26 Exs. 14, 15).

268 ECF No. 44 at 3, ¶ 22.

269 ECF No. 27 at 19-20 (asking this Court to enter an order permitting the escrow officer to record the Release of Lien in Chambers County).

The only evidence Defendants offer to show the Farris Note was paid is a release of lien executed by CitiMortgage, Inc. on October 12, 2015, solely naming the original borrowers, Melanie and Gary Laughlin.[270] As previously discussed, that release does not prove that the Farris Note was paid.[271] Nevertheless, the Notice of Receiver is an ineffective claim to the Property because it creates a lien solely on Laughlin's non-exempt property and the Property was never non-exempt because of its homestead character. Also, at the time the
44 Notice of Receiver was filed, the Farrises *44 owned the Property, so it was no longer property of Laughlin, exempt or non-exempt. Significantly, the Notice itself lays claim to "note proceeds" and identifies the Farris Note by instrument number and amount. It does not create a valid claim to the Property for Plaintiffs. No genuine issue of material fact remains as to Defendants' ownership of the Property, free and clear of any legal or equitable interest claimed by Plaintiffs.

270 ECF No. 26 Ex. 14.

271 See *supra* Part V(A)(1)(c)(ii), for a discussion of the release of lien signed by CitiMortgage, Inc. and the effect of that release of lien.

Accordingly, Penney Elaine Farris, Matthew Farris, and Patrick Farris's counterclaim for suit to quiet title to the real property located at 9706 Ellen Drive, Baytown, Texas 77521 is granted. The lien created by Kyle Kincaid Williams and Renee Arcemont Williams's Abstract of Judgment in the amount of $477,380.47, plus pre-judgment interest at a rate of 5% per annum commencing on December 6, 2006, and attorney's fees in the amount of $35,000, filed for record in Chambers County on July 20, 2009, with the County Clerk of Chambers County, under document number 2009-46382, is invalid and unenforceable as to the real property located at 9706 Ellen Drive, Baytown, Chambers County, Texas 77521, and title is quieted in Penney Elaine Farris, Matthew Farris, and Patrick Farris. Kyle Kincaid Williams and Renee Arcemont Williams, and any person claiming under them has no estate, right, title, lien, or interest in or to the real property or any part of such property.

2. Declaratory judgment

Defendants' Motion also seeks a declaratory judgment under the Texas Declaratory Judgment Act ("*TDJA*") holding that: (a) Defendants own the Property free and clear of all claims asserted by Plaintiffs and that Plaintiffs have no legal or equitable interest in the Property whatsoever; (b) all notices or other instruments that Plaintiffs and their court appointed receivers recorded in the Official Public Records of Real Property of Chambers County, Texas and served on Stewart Title Company, the escrow officer, and any other persons
45 relating to the Property are null and void *45 for all purposes; and (c) the escrow officer may proceed to record the Release of Lien executed by Laughlin in the Official Public Records of Real Property of Chambers County, Texas.[272] Defendants seek this judgment based on their assertion that the Property passed free and clear of Plaintiffs' judgment lien to the Farrises.[273]

272 ECF No. 27 at 19-20.

273 *Id*. at 19.

As a preliminary matter, the Court must sua sponte address whether the TDJA applies in federal court. The TDJA creates no substantive rights; it is a procedural vehicle for resolving substantive issues.[274] The TDJA's purely procedural nature makes it inapplicable in federal court.[275] Instead, its federal counterpart 28 U.S.C. § 2201, the Declaratory Judgment Act, applies.[276] When cases invoking the TDJA are removed to federal court,

those cases are treated as if they were originally filed under the federal DJA.[277] The issue presented by this case is that it was not removed to this Court, it originated here.[278] This Court finds that at the summary judgment stage where a party seeks a declaratory judgment pursuant to the TDJA in a proceeding originally filed in the
46 bankruptcy court, this Court will treat that case as if it was filed under the federal DJA.[279] *46

274 *Utica Lloyd's v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998) (citing *Housing Authority v. Valdez*, 841 S.W.2d 860, 864 (Tex. App.—Corpus Christi 1992, writ denied)).

275 *E.g.*, *Utica Lloyd's*, 138 F.3d at 210; *United Prop. & Cas. Ins. Co. v. Davis*, 2019 U.S. Dist. LEXIS 146330, at *18 (S.D. Tex. Aug. 28, 2019); *Sims v. RoundPoint Mortg. Servicing Corp.*, 2018 U.S. Dist. LEXIS 40978, at *28 (E.D. Tex. Mar. 13, 2018); *Amaya v. City of San Antonio*, 980 F. Supp. 771, 784 (W.D. Tex. 2013).

276 See cases cited *supra* note 275. Defendants erroneously cite *Garza v. Coates Energy Tr. (In re Garza)*, 90 F. App'x 730, 733 (5th Cir. 2004) to support their declaratory judgment action. *In re Garza* is an unpublished opinion with no precedential value pursuant to Fifth Circuit Rule 47-5. As explained in *Durrschmidt v. Frost Nat'l Bank (In re R&K Fabricating)*, 2012 Bankr. LEXIS 5459, at *7, *In re Garza* conflicts with the Fifth Circuit's result in *Utica* that the TDJA is procedural and does not apply in federal court. *Utica* controls because it was the earliest of conflicting panel decisions. *Id.* (citing *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 410 (5th Cir. 2006)).

277 *Harmon v. Lighthouse Capital Funding, Inc. (In re Harmon)*, 2011 Bankr. LEXIS 1443, *12 (Bankr. S.D. Tex. Apr. 14, 2011) (citations omitted).

278 ECF No. 17.

279 *See In re R&K Fabricating*, 2012 Bankr. LEXIS 2636 (Bankr. S.D. Tex. June 11, 2012) In *In re R&K Fabricating*, the trustee filed a declaratory judgment action pursuant to 11 U.S.C. §§ 362, 502, 506, 547, 549, and 550, the TDJA, and Federal Rules of Bankruptcy Procedure 3007 and 7001(2) "seeking to establish the extent, priority and validity of [the defendants'] liens" and legal fees. Case No. 12-03177, ECF No. 45 at 1-2. The trustee sought summary judgment on his declaratory action against one defendant. *Id.* ECF No. 42. Although the trustee never invoked 28 U.S.C. § 2201, the court held that "[a] declaratory judgment action in federal court is governed by the Federal Declaratory Judgment Act" and granted the trustee's motion to summary judgment against the defendant as to the trustee's claim for declaratory judgment but denied the trustee's claim for legal fees and his request for disallowance of the defendant's claim. *In re R&K Fabricating*, 2012 Bankr. LEXIS 2636, at *26, *28.

28 U.S.C. § 2201(a) provides "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." For a declaratory judgment action to survive, a justiciable substantive claim must exist.[280] Courts wield great discretion in determining whether to entertain an action under the federal DJA.[281] In the Fifth Circuit, courts "typically dismiss declaratory judgment counterclaims that are mirror images of claims or that raise issues that turn on disputed fact that will be resolved in the underlying suit."[282]

280 *Sims*, 2018 U.S. Dist. LEXIS 40978, at *28 (citing *Collin County, Texas v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN)*, 915 F.2d 167, 171 (5th Cir. 1990); *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003); *Johnson v. Citigroup Mortg. Loan Trust, Inc.*, 2017 U.S. Dist. LEXIS 123411 (W.D. Tex. Aug. 3, 2017); *Ayers v. Auror Loan Servs., LLC*, 787 F. Supp. 2d 451, 457 (E.D. Tex. May 27, 2011)).

281 *United Prop. & Cas. Ins. Co.*, 2019 U.S. Dist. LEXIS 146330, at *19 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)).

282 *Id*. (citing several cases within the Fifth Circuit where courts dismissed declaratory judgment actions because the issues would be resolved as part of the case regardless).

Here, Defendants' declaratory judgment action is based on their quiet title claim and the controversy between the parties as to the validity of the Notice of Receiver.[283] A genuine issue of material fact exists as to whether the Farris Note was paid.[284] In Texas, proceeds from the sale of a homestead property are exempt for only six months following the sale.[285] An order was issued by the 129th District Court in Harris County, Texas, ordering turnover of Laughlin's non-exempt assets and appointing a receiver.[286] Those non-exempt assets included the Farris Note. Any interest Plaintiffs have in funds due under the Farris Note encumber those funds, not the
47 Property. *47 Therefore, the Notice of Receiver as it relates to the Property is invalid. Likewise, as detailed above, Plaintiffs' judgment lien is invalid as it relates to the Property. Accordingly, Plaintiffs action seeking declaratory judgment that "all notices or other instruments that Plaintiffs and their court appointed receivers recorded in the Official Public Records of Real Property of Chambers County, Texas and served on Stewart Title Company, the escrow officer, and any other persons relating to the Property are null and void for all purposes" is granted. The Court finds that neither Plaintiffs' judgment lien nor the Notice of Receiver have any legal validity as to the Property.

283 *See* ECF No. 27 at 19-20.

284 See *supra* Part V(A)(1)(c)(ii), for a discussion on the evidence provided by Defendants regarding the Farris Note.

285 TEX. PROP. CODE § 41.001(c) (declaring that ". . . proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.").

286 ECF No. 26 Ex. 16.

However, the Court does not find that Defendants declaratory judgment request that "the escrow officer may proceed to record the Release of Lien executed by Laughlin in the Official Public Records of Real Property of Chambers County, Texas" should be granted at the summary judgment stage. As stated, there remains a genuine dispute as to whether the Farris Note was paid in full. That issue will be resolved at trial. Accordingly, Defendants' request that "the escrow officer may proceed to record the Release of Lien executed by Laughlin in the Official Public Records of Real Property of Chambers County, Texas" is denied and the issue of whether the escrow officer can record the release of lien executed by Laughlin will proceed to trial.

Lastly, Defendants' action seeking declaratory judgment that Defendants own the Property free and clear of all claims asserted by Plaintiffs and that Plaintiffs have no legal or equitable interest in the Property whatsoever is granted. Defendants satisfied their summary judgment burden to prove they hold superior interest in the Property by offering evidence, discussed thoroughly above, that the Property was Laughlin's homestead until it was conveyed to the Farrises and that under Texas law, a purchaser may assert a homestead claimants title against a judgment lien creditor. Plaintiffs have no legal or equitable interest in the Property because (1) Plaintiffs' judgment lien never attached to the Property and (2) any interest Plaintiffs may have in funds due
48 under the *48 Farris Note encumber only those funds, not the Property. The Court finds that Penney Elaine Farris, Matthew Farris, and Patrick Farris own the Property free and clear and that Kyle Kincaid Williams and Renee Arcemont Williams have no legal or equitable interest in the Property.

VI. Conclusion

An order consistent with the Memorandum Opinion will be entered on the docket simultaneously herewith.

SIGNED April 6, 2021

/s/_____

Eduardo Rodriguez

United States Bankruptcy Judge