Nevada, Texas, Delaware Corporate Law Panel

Panelists

The Honorable Sofia Adrogué, Judge | Texas Business Court, Eleventh Division

The Honorable Lidia S. Stiglich, Justice | Supreme Court of Nevada

Catherine Dearlove, Director | Richards, Layton & Finger

Moderator

Ethan Klingsberg, Partner & Co-Head of US Corporate/M&A Freshfields

1. Overview and discussion of Nevada corporate law and court system
2. Overview and discussion of Texas corporate law and court system
3. Overview and discussion of recent amendments to the Delaware corporate law
4. Assessment of degree to which Nevada corporate law is indeterminate or comprehensively codified, with special focus on the laws applicable to transactions between controlling stockholders and the corporation
5. Assessment of degree to which Texas corporate law is indeterminate or comprehensively codified, with special focus on the laws applicable to transactions between controlling stockholders and the corporation
6. Analysis of what the forces behind recent amendments to the Delaware corporate law

7. Assessment of Nevada's statute on exclusion of directors from meetings and a comparison of the rights of shareholders to demand access to books and records under Nevada, Texas and Delaware corporate law
8. Advice on board determinations on moving a state's jurisdiction of incorporation

Reading materials:

- Trade Desk, Inc. Proxy Statement on Proposal to Move the State of Incorporation from Delaware to Nevada, including a special report by Professor Steven Davidoff Solomon
- Tesla Inc. Proxy Statement on Proposal to Move the State of Incorporation from Delaware to Texas, including a special report by Professor Anthony Casey
- Delaware Enacts Landmark Amendments to Delaware General Corporation Law by Richards Layton & Finger
- Texas Business Litigation, Hon. Sofia Adrogue

The Business Court of Texas
Eleventh Division

Hon. Sofia Adrogué

The 2025 Berkely Forum M&A and the Boardroom

April 23, 2025

HON. SOFIA ADROGUÉ

Governor Greg Abbott appointed Sofia Adrogué to be one of the inaugural judges of the Eleventh Business Court Division, effective September 1, 2024. The Eleventh Business Court Division is composed of the counties of Brazoria, Fort Bend, Galveston, Harris, Matagorda, & Wharton. A native of Argentina, Sofia is a former Senior Trial Partner with Diamond McCarthy LLP, a 10-year+ *Texas Super Lawyer*, *Best Lawyer*, & *Latino Leaders* "U.S. 25 Most Influential Hispanic Lawyer" & "Most Powerful Woman in Law." She envisioned & serves as the Editor of the TEXAS BUSINESS LITIGATION treatise (5th Edition) & has published and/or spoken on over 250 occasions. She is a graduate of Harvard Business School Owner/President Management Program, an alumna of HBS (U.S. Keynote Graduation Speaker for HBS OPM 37, ostensibly the first woman, & U.S. Class Representative), & a graduate of the University of Houston Law Center, *magna cum laude*, & Rice University, *magna cum laude*, Phi Beta Kappa, both on full academic scholarships.

Having handled matters arising in Texas, across the U.S. as well as in Buenos Aires, Mexico City, Puerto Rico, among other venues, she has obtained favorable judgments and settlements on behalf of both plaintiffs and defendants in U.S. state and federal courts and in alternative dispute resolution (ADR—mediation & arbitration) proceedings. Sofia has served on THE ADVOCATE Editorial Board, the Texas Supreme Court Advisory Committee, the CLE, Mentor & Professionalism Committees of the State Bar of Texas as well as the CLE, HOUSTON LAWYER & the Professionalism Committees of the Houston Bar Association, among others. She is a fellow of the American Bar Foundation, the Texas Bar Foundation & the Houston Bar Foundation. She has also served as a Member of the Houston First Board of Directors as well as the City of Houston Mayor's Hispanic Advisory Board.

She has received over 40 awards, including the 2024 L.I.F.E. Mother's Day Award; the 2023 UHLC Hispanic Law Heritage Wall of Honor recognition; the 2022 Top 30 Women in Houston Award; 2021 World Affairs Council of Greater Houston Global Leader of Influence; 2020 Comcast Hispanic Heroes Award; a Greater Houston Women's Chamber "Hall of Fame" Inductee; a HOUSTON CHRONICLE Channel 11 "Texas Legend" & 10 "Extraordinary Latinos" (Inaugural List) ; National Diversity Council "Most Powerful and Influential Woman of Texas" & one of the "Top 50 Women Lawyers"; a UH Law Center Immigration Clinic Arrival Award & a Houston Jaycees "Outstanding Houstonian"; a Texas Jaycees "Outstanding Texan"; and a U.S. Jaycees "Outstanding Young American"; among others. Sofia has been recognized for her public service by the City of Houston with a proclamation of July 10, 2004 & December 18, 2018, as "Sofia Adrogué Day."

The Texas Business Court

Hon. Sofia Adrogué
Texas Business Court, Eleventh Division

The 2025 Berkely Forum M&A
and the Boardroom
April 23, 2025

Texas Business Litigation

2022

SOFIA ADROGUÉ, EDITOR
CAROLINE BAKER, CO-EDITOR

DEDICATED TO
STEPHEN D. SUSMAN

TEXAS LAWYER
An ALM Publication

TEXAS BUSINESS LITIGATION, 2022

Sofia Adrogué, Editor, Caroline Baker, Co-Editor

Any attorney who has been licensed for a few years should appreciate the fact, and any seasoned practitioner will agree, that the practice of law in the 21st century bears little resemblance to that of the 1900's and it is not entirely due to the technology age. To some degree, it requires almost a re-education process. There is no doubt that it requires a new approach.

The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick "go to" work for those who "enjoy" an active practice, whatever the area.
—Hon. Ruby Kless Sondock

Modern complex business litigation presents a witches' brew of risks to both sides. Controlling legal standards vary across possible venues. Discovery costs are potentially exorbitant. The challenge of persuasively communicating to courts and juries on issues which are foreign to them requires great imagination and skill. Realistic assessment of settlement values is a critical and difficult art.

The Editors have assembled a galaxy of some of the best trial lawyers in the nation to address the myriad issues raised. This work will be an invaluable resource for both trial lawyers and corporate counsel.
—Harry Reasoner, Senior Partner, Vinson & Elkins LLP

Sofia Adrogué, Editor, a native of Argentina and commercial litigator for over 25 years, is a trial partner with the Houston office of Diamond McCarthy LLP.

Caroline Baker, Co-Editor, a fifth-generation Texan, served the citizens of Harris County as a senior state district judge for 21 years and now sits by assignment and is in charge of a Multidistrict Litigation.

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About this Book

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The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick 'go to' work for those who 'enjoy' an active practice, whatever the area."

—Hon. Ruby Kless Sondock

"Modern complex business litigation presents a witches' brew of risks to both sides. Controlling legal standards vary across possible venues. Discovery costs are potentially exorbitant. The challenge of persuasively communicating to courts and juries on issues which are foreign to them requires great imagination and skill. Realistic assessment of settlement values is a critical and difficult art.

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—Harry Reasoner, Senior Partner, Vinson & Elkins LLP

NAVIGATING COVID-19

The April 2020 Newsletter of Stephen D. Susman's brainchild and legacy, the Civil Jury Project at NYU School of Law, commenced with a few poignant and prescient remarks.

> The Covid-19 pandemic has accelerated courts' turning to technology in order to deliver justice. Until our events start back up in autumn, we will be working on analyzing how a virtual trial would work. Are there any Constitutional concerns of having jurors deliberate remotely? Would this decrease or increase costs for an already burdened system? How would you pick a jury? Would a virtual trial deliver the same quality of justice? The list of considerations of moving from the physical courtroom to a courtroom in cyberspace is long.[1]

No doubt, "the year 2020 will be remembered as a galvanizing moment in the maturity of legal systems across America."[2] And, not surprisingly, within our profession, COVID-19 has presented complex challenges to the American delivery of justice. Our industry, like many others, has been indelibly impacted and it is an open question whether this new "virtual reality" will be a long-term game changer. There has been a "sea change" in the practice of law—virtual meetings, depositions, and/or hearings are here to stay in one way, shape or form. There is no true "going back to the way things were before."

Texas Chief Justice Nathan L. Hecht, President of the Conference of Chief Justices and Co-Chair of the National Center for State

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[1.] Stephen D. Susman, *Opening Statement,* Civil Jury Project at NYU School of Law, Vol. 5 Issue 4 (Apr. 2020), *available at* https://myemail.constantcontact.com/April-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=gdpEH5xV60Q.

[2.] Mitchell A. Chester, *The Dynamic Opportunities and Responsibilities of Virtual Jury Trials,* Civil Jury Project at NYU School of Law, Vol. 5 Issue 10 (Oct. 2020), *available at* https://myemail.constantcontact.com/October-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=Kq-BgL3cTfQ ("The year 2020 will be remembered as a galvanizing moment in the maturity of legal systems across America. How we deliver legal services and make court appearances will not be the same, nor should they remain mired within inefficient and outdated practices.").

Courts Pandemic Rapid Response Team, powerfully articulated the following.

> Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff . . . and the public from the risks of disease. We are learning new technology and practices together.[3]
>
> State courts are the heart of the American system of justice. Collectively we are working together to protect public health while also finding innovative ways to keep the courts open for business.[4]
>
> A hallmark of our justice system is the right to a jury trial.[5] The pandemic has challenged our ability to safely deliver on that promise, but through the efforts of many Texas judges, clerks, court staff, and attorneys over the past few months, today we have a roadmap to resuming those jury trials, even if that roadmap will be restricted to ensure the health and safety of the public.[6]

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[3] *Rapid Response Team: Pandemic Roadmap to Guide State Courts Forward*, State Justice System, *available at* https://www.sji.gov/rapid-response-team-pandemic-roadmap-to-guide-state-courts-forward/ ("The Pandemic Rapid Response Team (RRT), a group of chief justices and state court administrators established in March 2020, has created a roadmap to help state courts move forward during the pandemic—and after it ends . . . . The RRT was created by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) and is supported by National Center for State Courts (NCSC). The State Justice Institute (SJI) is providing funding for this initiative.").

[4] *State courts lead national effort to maintain access to justice despite COVID-19 pandemic*, Apr. 2020, *available at* https://www.ncsc.org/newsroom/news-releases/2020/state-courts-lead-national-effort-to-maintain-access-to-justice. *See also Pandemic lessons learned,* Mar. 2021, *available at* https://www.ncsc.org/newsroom/public-health-emergency/newsletters/pandemic-one-year-later.

[5] *Report details Texas jury trials during COVID-19 pandemic*, Aug. 31, 2020, *available at* https://blog.texasbar.com/2020/08/articles/coronavirus/report-details-texas-jury-trials-during-covid-19-pandemic/.

[6] *Report details Texas jury trials during COVID-19 pandemic*, Aug. 31, 2020, *available at* https://blog.texasbar.com/2020/08/articles/coronavirus/report-details-texas-jury-trials-during-covid-19-pandemic/.

Chief Justice Hecht also predicted and pronounced that "[w]e're going to be doing court business remotely forever."[7] Indeed, within our state, "[t]he Texas judiciary has led the country and world in developing methods to safely host in-person jury trials and conduct them effectively virtually."[8] Jury trials did, in fact, occur in counties such as Harris County, where extensive COVID protocols were put in place, voir dire was conducted at NRG Stadium with positive juror turnout, and trials were completed successfully at the courthouse.

However, despite all of the tremendous efforts, jury trials unquestionably were drastically affected. According to David Slayton, the Administrative Director of the Texas Office of Court Administration, as of August, 2020, there were only 1,554 civil jury trials and 2,695 criminal district court trials.[9] Courts accepted the challenges presented by the pandemic and pivoted to innovative solutions such as virtual summary jury trials and virtual bench trials to seek to deliver justice safely.[10]

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7. *The future of virtual court hearings – why are they going to stay?*, Mar. 15, 2021, *available at* https://casedoc.com/future-virtual-court-hearings/. *See* Dr. Ken Broda-Bahm, *The Virtual Trial: Be Conscious of What is Lost and What is Found*, Persuasive Litigator, Mar. 18, 2021, *available at* https://www.persuasivelitigator.com/2021/03/the-virtual-trial-be-conscious-of-what-is-lost-and-what-is-found.html. *See also Zoom courts will stick around as virus forces seismic change,* July 30, 2020, *available at* https://www.ndcourts.gov/news/national/legal-issues/zoom-courts-will-stick-around-as-virus-forces-seismic-change ("Courts forced to accelerate years of innovation into weeks may never go back to how they did business before the pandemic, according to interviews with more than 30 state and federal judges, lawyers and court staff in 16 U.S. states and the District of Columbia. The embrace of technology is a revolution for many courts that have historically resisted it.").

8. David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task,* The Advocate, Vol. 94, p. 9 (Spring 2021).

9. *See* Office of Court Administration, *Jury Trials During the COVID-19 Pandemic: Observations and Recommendations*, at p. 13 (Aug. 28, 2020), *available at* https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf. *See also* Sarah Jarvis, *Coronavirus: The Latest Court Closures And Restrictions*, Law 360, Apr. 15, 2021, *available at* https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions?nl_pk=83644f7e-3e9e-490e-b781-e09d36393c3d&utm_source=newsletter&utm_medium=email&utm_campaign=special.

10. David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task,* The Advocate, Vol. 94, p. 11 (Spring 2021). *See* www.litigationsection.com.

Undoubtedly, during the pandemic, litigants, as well as courts (state and federal), continued to balance the various interests, including the extraordinary legal (constitutional, practical and ethical) issues that must be considered in moving a trial from a physical courtroom to a virtual courtroom. Such considerations include as follows: the permissibility and constitutionality of a jury trial by videoconference; potential reduction of ability to obtain an adequate spectrum of jurors (no access to the internet); commensurate technology costs; and whether a virtual trial delivers the same quality of justice (including ethical concerns about whether jurors will follow court instructions when they are attending trial remotely and whether witnesses will follow "The Rule" and how it can be enforced—in other words, how do you know "who's in the room?").

While virtual jury trials have been explored, there is a strong sense that safely and successfully returning to in-person jury trials is the overarching goal of courts, attorneys, and litigants. Jury trials by their very nature are "innately human experiences"[11] and those who have been participants in a jury trial—judges, lawyers, litigants, and jurors—understand and appreciate that often what is communicated in a courtroom non-verbally can be as important as (if not more important than) what is communicated verbally.[12] Many judges and practitioners have expressed concerns during the pandemic that "the remote, sterile, and disjointed reality of virtual proceedings,"[13] as well as the "casualness" of Zoom, not only cannot "replicate the totality of the human experience"[14] and guarantee the constitutional rights and protections afforded

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11. *The Jury Returns*, Nov. 24, 2020, *available at* https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/ (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order).

12. *The Jury Returns*, Nov. 24, 2020, *available at* https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/ (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order).

13. *The Jury Returns*, Nov. 24, 2020, *available at* https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/ (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order). *See also* Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, Texas Lawyer, Aug. 30, 2020.

14. *The Jury Returns*, Nov. 24, 2020, *available at* https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/(citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order).

by the Sixth and Seventh Amendments,[15] but also virtual proceedings inevitably sacrifice the formality and solemnity in which court proceedings traditionally are and must be conducted.[16]

There has been serious debate as to whether virtual jury trials will or should continue post-pandemic, however, clearly lessons have been learned from trying to navigate trials during COVID-19.[17]

As we ideally transition into a post-pandemic world, it is evident that courts, lawyers, litigants, and jurors will continue to adjust to the "new normal", all the while navigating and innovating in ways to ensure that justice is delivered in a safe and efficient manner, and that access to justice and access to participation in the process is protected. It is no small task, but our commitment to the Sixth and Seventh Amendments demands it; we will not waiver in facing the task and delivering. [18]

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15. *The Jury Returns*, Nov. 24, 2020, *available at* https://www.jdsupra.com/legalnews/jury-trials-are-innately-human-89547/ (citing Hon. Rodney Gilstrap, Chief Judge, U.S. District Court Eastern District of Texas, Nov. 20, 2020 Order). *See also* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275 (2020), *available at* https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss5/1.

16. *See, e.g.*, Dr. Ken Broda-Bahm, *The Virtual Trial: Be Conscious of What is Lost and What is Found*, Persuasive Litigator, Mar. 18, 2021, *available at* https://www.persuasivelitigator.com/2021/03/the-virtual-trial-be-conscious-of-what-is-lost-and-what-is-found.html. *See also* Quentin Brogdon, *Mandatory Online Jury Trials: An Idea Whose Time Has Not Come*, Texas Lawyer, Aug. 30, 2020.

17. David Slayton posits as follows:

> For instance, with the increased participation rate of virtual jury selection, should we consider the barriers to in-person jury service and retain this method of selection? Should we retain the increased flexibility for jurors provided through technology to alert the court of its issues to appearing for jury service? I believe the answer to these is yes, but more study is necessary before the final verdict is in.

David Slayton, Administrative Director of the Texas Office of Court Administration, *Preserving the Right to Jury Trial During a Pandemic: A Daunting Task,* The Advocate, Vol. 94, p. 12 (Spring 2021), *available at* www.litigationsection.com.

18. Jessica Arden Ettinger, David Gerger, & Barry J. Pollack, *Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?,* The Champion, *2020 National Association of Criminal Defense Lawyers* ®, Inc., *available at* https://www.nacdl.org/Article/May2020-AintNothingLiketheRealThingWillCoronavirus. *See also* Richard Emery and Daniel Cooper, *COVID-19 Cannot Be the Death Knell for the American Jury Trial*, N.Y.L.J. (Apr. 20, 2020), *available at* https://www.law.com/newyorklawjournal/2020/04/20/covid-19-cannot-be-the-death-knell-for-the-american-jury-trial/.

DEDICATION

Stephen D. Susman—An Incomparable Innovator

**Epic/Warrior/Legendary/
Trailblazer & Trial Legend/
Visionary & Innovator/
Fearless/Peerless Texas
Pioneer/Egalitarian/
Entrepreneur/Charismatic &
Fun/Larger than Life with
a Heart of Gold/Hope
Diamond/Not a Man of Half-
Measures/Outsized Influence/
Advocate of High Risk/High
Reward/Susman Godfrey's
Founding Partner/Big
Daddy/Not "Mr. Susman"/
Institution-Builder/Not a Cult
Leader/Professor/Friend/
Son/Father/Grandfather/Papa &
Champion of the Civil Jury
System**[19]

[19] Sofia Adrogué, *Litigating Through Crisis, The Sui Generis "Super Sus"—Stephen D. Susman*, The Advocate, Vol. 93, p. 45 (Winter 2020), *available at* www.litigationsection.com.

A Tribute to SDS - Veni, Vidi, Vici!

So when a great man dies,
For Years beyond our ken,
The Light he leaves behind lies
Upon the paths of men[20]

This Fifth Edition of our *Texas Business Litigation* treatise is dedicated to Stephen D. Susman. Cognizant there are no words to describe the loss for many, personally and professionally, we sought to capture his irrepressible spirit via an amalgamation of descriptive words for truly a *sui generis* fellow lawyer. Further, we articulate below why his April 2020 inquiries about innovating, navigating and litigating through the novel COVID-19 virus in his Civil Jury Project at NYU School of Law Newsletter were the impetus for the special aspect added to this Edition—each contributing author's assessment of the impact of the COVID-19 pandemic on their area of expertise. Moreover, we explore two select arenas, of the many others not feasible to address in this dedication, where Steve's legacy and imprimatur are palpable and everlasting.

Sofia had the luxury of meeting Steve 30 years ago, working for and learning from him at Susman Godfrey, trying a case with him in federal court in Puerto Rico, having the honor of preparing with him as he participated in the Trial of Hamlet in federal court, and, most impactfully and unforgettably, benefitting from his encouragement and guidance in her role as she envisioned and serves as the Editor of this treatise, *Texas Business Litigation,* with fellow Co-Editor, Hon. Caroline Baker.

Caroline has had the honor and privilege of serving as a Judicial Advisor to the Civil Jury Project at NYU School of Law and working with Steve to fully develop another brainchild of his—the Young Lawyers in the Courtroom Program, which was designed to provide young lawyers meaningful and substantive speaking opportunities in the courtroom. Thankfully, Steve was able to see

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[20] Hon. Mark A. Drummond (ret.), *Opening Statement,* Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020), *available at* https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=o0MI22a82UQ.

this invaluable program come to fruition. The Young Lawyers in the Courtroom Program, in conjunction with the Houston Young Lawyers Association and with the full support of the Houston Bar Association, was implemented in the Harris County district courts in 2018.[21]

Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

In paradigmatic Susman form, the legendary trial lawyer dedicated countless hours and commensurate resources to address why jury trials are vanishing. He sought to give fellow lawyers, the judiciary, and, indeed, society, a roadmap to keep jury trials from becoming extinct,[22] aware of the numbers taking a precipitous decline across state and federal courts nationwide. In point of fact, during the last fiscal year, in Texas state courts, 0.11% or less of the cases were disposed of by jury trial.[23]

Aware that litigation in the 21st century remains the subject of vigorous substantive debate and commensurate study, Steve envisioned, led and funded the Civil Jury Project in 2015 at NYU School of Law—a "collaborative effort between law students, lawyers, judges and political bodies across the nation" to "examine the factors leading to decline in civil jury trials and educate the legal community and the public on methods to revitalizing the dying system."[24]

To date, the Civil Jury Project at NYU School of Law has engaged over 335 Judicial Advisors, 67 Judicial Advisors Emeritus, 73 Academic Advisors, and 45 Jury Consultant Advisors, who are focusing on educating the public on their right to a jury trial; informing the public that jury trials are declining at an alarming rate; and advocating for the utilization of tools to reduce the costs

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21. *See, e.g.,* 2021 Civil Jury Project at NYU School of Law, *available at* https://civiljuryproject.law.nyu.edu/young-lawyers-in-the-courtroom-program/.

22. Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About this Book (2019 Ed.). *See also generally* https://civiljuryproject.law.nyu.edu/.

23. *See* Office of Court Administration, *Jury Trials During the COVID-19 Pandemic: Observations and Recommendations* (Aug. 28, 2020), *available at* https://www.txcourts.gov/media/1449660/jury-report-to-scotx-final.pdf.

24. *See* https://www.susmangodfrey.com/news-awards/sg-news/benchmark-litigation-names-three-susman-godfrey-attorneys-to-top-100-trial-lawyers-of-2016/. *See also generally* https://civiljuryproject.law.nyu.edu/ & https://civiljuryproject.law.nyu.edu/about/directors/.

of trial such as time limits and jury innovations, including juror questions, early instructions to the jury, and interim arguments.

Of interest, Steve's commitment to addressing commercial litigation trial work in the 21st century and the aftermath of the vanishing trial was not new. He developed a set of Pretrial Agreements that his namesake firm, Susman Godfrey, proposed to opposing counsel.[25] Steve's initial inspiration merits repetition.

> Because I was blessed by being involved only in complex commercial cases and with good opposing counsel, I was able to develop a set of Pretrial Agreements that my firm has been proposing to opposing counsel for over a decade . . . .
>
> ***
>
> The key to the efficacy of such a Pretrial Agreement has always been to attempt to reach agreement on as many of these items as possible before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other; therefore, it is hard to reach agreement at that point.[26]

Steve's Pretrial Agreements were so effective that the concept continued to evolve and he created a list of possible Trial Agreements,[27] which culminated in a working website appropriately named Trial By Agreement,[28] where these agreements can be found and debated among trial lawyers. Trial by Agreement is a way of "reduc[ing] expense, stress and many of the uncertainties that are associated with pretrial rulings and jury trials."[29]

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25. Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About This Book (2019 Ed.).

26. *See* https://trialbyagreement.com/category/pretrial-agreements/. *See also* Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, The Advocate, Vol. 56, p. 16 (Fall 2011), *available at* www.litigationsection.com.

27. *See* https://trialbyagreement.com/agreements/trial-agreements-made-easy/.

28. *See* https://trialbyagreement.com/.

29. *See* https://trialbyagreement.com/about/about-trial-agreements/.

Steve's approach to litigation was principled, competitive, and pragmatic.

> I truly believe that Trial Agreements are worthy of full discussion among experienced trial lawyers and judges well in advance of pretrial. My attitude is to take whatever agreements I can get—the idea being that any such agreements advance the ball and make pretrial and trial more professional and efficient, not to mention making trial more understandable to the jury. Trial by Agreement is a way of reducing expense, stress and the uncertainty of pretrial rulings and a jury trial.[30]

Training Young Lawyers in an Era of Fewer Jury Trials

Another arena of his imprimatur is the teaching and training of young lawyers; indeed, he mentored and sponsored even before such terms were in vogue. State-of-the-art programs like the Young Lawyers in the Courtroom Program perfectly demonstrate that, as always, what Steve promoted, he delivered—he walked his talk.

> In this time of 'vanishing' trials, I feel like an old dinosaur hunter. There is no need to teach those skills to youngsters if there are no dinosaurs around. That said, I do think there are many opportunities for young lawyers to practice their litigation skills by participating in mock trials. We also have a rule at our firm that any lawyer that works on a case is entitled to stand-up time at the trial. We can only teach by sharing the limited trial experiences that we have. Jurors love to see a young lawyer get opportunities to question witnesses.[31]

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30. Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, The Advocate, Vol. 56, p. 16 (Fall 2011), *available at* www.litigationsection.com.

31. Sofia Adrogué & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, The Training & The Experts—Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, The Advocate, Vol. 56, p. 16 (Fall 2011), *available at* www.litigationsection.com.

Steve advanced the much debated and scrutinized "roadmap for reform"[32] for our 21st century civil justice system. As his colleagues so poignantly noted in the August Newsletter of the Civil Jury Project at NYU School of Law, "[h]e crisscrossed the country at his own expense to talk to trial attorneys, trial judges, and most importantly, jurors."[33] He "advanced jury innovations" and "was a champion of and a cheerleader for . . . 'the purest, fairest, most inclusive and robust expression of direct democracy that the world has ever seen.'" [34]

Aware of these enigmatic times, the April 2020 Newsletter of the Civil Jury Project at NYU School of Law, opened with Steve's strikingly prophetic observations. "The Covid-19 pandemic has accelerated courts' turning to technology in order to deliver justice. It will have far reaching effects for all of us—and for our justice system." Steve also appropriately remarked that the list of considerations of "moving from the physical courtroom to a courtroom in cyberspace is long," including the following brilliant Susmanesque inquiries: (i) constitutional concerns of having jurors deliberate remotely; (ii) would this decrease or increase costs for an already burdened system?; and (iii) would a virtual trial deliver the same quality of justice?

Steve vehemently believed that juries are the views of the community and sacrosanct; thus, he invited his team, including his Judicial Director Mark A. Drummond (ret.) to survey and analyze how a virtual trial would work. As a result, the Civil Jury Project at NYU School of Law, armed with several hundred judicial and academic advisors and Steve's gravitas, turned the focus to best practices for virtual jury trials.

To be clear, a virtual trial for Steve, Judge Drummond and the Civil Jury Project at NYU School of Law, like for all of us, is not

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32. Sofia Adrogué & Hon. Caroline Baker, *Texas Business Litigation*, About This Book (2019 Ed.).

33. Hon. Mark A. Drummond (ret.), *Opening Statement,* Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020)*, available at* https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=o0MI22a82UQ.

34. Hon. Mark A. Drummond (ret.), *Opening Statement,* Civil Jury Project at NYU School of Law, Vol. 5 Issue 8 (Aug. 2020), *available at* https://myemail.constantcontact.com/August-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=o0MI22a82UQ.

the same as being there. Steve created his legacy being there; now the mission is to anticipate what is next and determine how best to move efficiently and safely through this global pandemic and beyond.

We have no other option. Preservation of the right to jury trial is the key. Regardless of how individual states decide to tackle the challenges of this new world, it is clear that proactive communication and consistent reassurance will be necessary to maintain public confidence and maximize participation in the jury process.

Here's to authentic, empathetic, realistic, belligerent optimism as we seek to navigate, innovate, and litigate in this "new normal" emulating the joie de vivre of Steve. Speaking about Susman Godfrey's democratic structure and culture as well as his professional legacy, Steve's words are immensely moving and spot on.

> I want them to say. He was very fair. He was very honest. He loved to play . . . And he was very proud of doing things the right way. The moral way. The ethical way. And I have been. I have been.

Here's to our Super Sus, our *Sui Generis* Stephen D. Susman. He epitomized ***Carpe Diem***.

May he rest in peace.

Sofia Adrogué, Editor & Caroline Baker, Co-Editor
July 2021

Court Structure of Texas

January 2025

State Highest Appellate Courts

Supreme Court
(1 Court – 9 Justices)

- Final appellate jurisdiction in civil and juvenile cases

Court of Criminal Appeals
(1 Court – 9 Judges)

- Final appellate jurisdiction in criminal cases

State Intermediate Appellate Courts

15th Court of Appeals
(1 Court – 3 Justices)

- Statewide jurisdiction
- Intermediate appeals in civil cases
- Exclusive jurisdiction of intermediate appeals in cases brought by or against the state, state entities and state officers and employees
- Exclusive jurisdiction over intermediate appeals from the Texas Business Court

Civil Appeals

1st – 14th Courts of Appeals
(14 Courts – 80 Justices)

- Regional jurisdiction
- Intermediate appeals from trial courts in their respective courts of appeals districts

Criminal Appeals

Office of Court Administration

Administrative Judicial Regions

State Trial Courts of General and Special Jurisdiction

Business Court
(5 Divisions – 10 Judges)

- Concurrent civil jurisdiction with district courts in certain complex business disputes when the amount in controversy exceeds $5 million and $10 million
- Concurrent civil jurisdiction with district courts in actions in which one of the parties is a publicly traded company
- Supplemental jurisdiction over any claim related to a case or controversy within the courts jurisdiction that forms part of the same case or controversy (subject to certain exceptions in Tex. Gov't Code § 22.220(d))
- No jurisdiction over: claims arising out of Chapter 74, Civil Practice and Remedies Code; claims in which a party seeks recovery of monetary damages for bodily injury or death; or claims of legal malpractice

District Courts
(504 Courts – 504 Judges)

- Original jurisdiction in civil actions over $200, divorce, title to land, contested elections
- Original jurisdiction in felony criminal matters
- Juvenile matters
- 13 district courts are designated *criminal district courts;* some others are directed to give preference to certain specialized areas
- 407 districts containing one county and 97 districts containing more than one county

Appeals of Death Sentences

County Trial Courts of Limited Jurisdiction

County-Level Courts
(538 Courts – 538 Judges)

Constitutional County Courts (254)
(1 in each county)

- Original jurisdiction in civil actions between $200 and $20,000
- Probate, mental health and guardianship (contested matters may be transferred to District Court)
- Exclusive original jurisdiction over misdemeanors with fines greater than $500 or jail sentence
- Juvenile matters
- Appeals *de novo* from lower courts or on the record from municipal courts of record

Statutory County Courts (260)
(in 91 counties plus 2 multi-county courts covering 6 counties)

- All civil, criminal, original and appellate actions prescribed by law for constitutional county courts
- In addition, jurisdiction over civil matters between $200 and $250,000 (some courts may have higher maximum jurisdiction amount)

Statutory Probate Courts (24)
(in 12 counties)

- Limited primarily to probate, mental health and guardianship matters

Local Trial Courts of Limited Jurisdiction

Justice Courts[1]
(796 Courts – 797 Judges)

- Civil actions of not more than $20,000
- Small claims
- Evictions
- Criminal misdemeanors punishable by fine only (no confinement)
- Magistrate functions

Municipal Courts[1]
(954 Courts – 1,261 Judges[2])

- Criminal misdemeanors punishable by fine only (no confinement)
- Exclusive original jurisdiction over municipal ordinance criminal cases[3]
- Limited civil jurisdiction
- Magistrate functions

1. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial *de novo* in the county-level courts, and in some instances in the district courts.
2. Some municipal courts are courts of record—appeals from the courts are taken on the record to the county-level courts. As of May 2024, 205 courts indicated that they were a court of record; a list is posted at http://www.txcourts.gov/about-texas-courts.aspx.
3. An offense that arises under a municipal ordinance is punishable by a fine not to exceed: (1) $2,000 for ordinances that govern fire safety, zoning, and public health, (2) $4,000 for dumping of refuse or (3) $500 for all others.

The Business Court of Texas
Brief Overview

Established September 1, 2024

11 Divisions (Same as existing Administrative Judicial Regions; 5 currently operating):

- First (Dallas): Judge Andrea K. Bouressa, Judge Bill Whitehill
- Third (Austin): Judge Melissa Davis Andrews, Judge Patrick K. Sweeten
- Fourth (San Antonio): Judge Marialyn Barnard, Judge Stacy Sharp
- Eighth (Fort Worth): Judge Jerry D. Bullard, Judge Brian Stagner
- Eleventh (Houston): Judge Sofia Adrogué, Judge Grant Dorfman

What Can the Business Court Do?

- Hear actions with more than $5 million in controversy or involving a publicly-traded company, including: derivative proceedings; internal governance disputes; securities or trade law claims; breach of fiduciary duty claims against an organization's controlling person; corporate veil-piercing claims; or disputes under the Business Organizations Code
- Hear actions with more than $10 million in controversy including: a qualified transaction (contract for consideration of $10+ million); a non-insurance contract where the parties agree to the Business Court's jurisdiction; and claims of violations of the Finance Code or Business and Commerce Code by an organization or its governing person, except banks, credit unions, and savings and loan associations
- Issue writs and grant other relief available in district court, including injunctive or declaratory relief if the dispute is based on a claim the Court can hear

What Can't the Business Court Do?

- Hear medical or legal malpractice claims or bodily injury or death claims
- Hear claims by or against the government; claims to foreclose on property; claims under the Estates, Family, or Insurance Codes, or parts of the Business and Commerce Code and Property Code; claims concerning production or sale of farm products; claims related to certain consumer transactions, and claims under an insurance policy—unless related to an action the Court can hear, and everyone consents

This summary provides only a cursory view of the Business Court. For further details, see the following statutes and rules: TEX. GOV'T CODE § 25A.001, *et seq.*; TEX. R. CIV. P. 352-360.

For local rules, opinions, and more, we welcome you to visit: https://txcourts.gov/businesscourt/.

Hon. Andrea K. Bouressa, First Business Court Division
Hon. Bill Whitehill, First Business Court Division
Hon. Melissa Andrews, Third Business Court Division
Hon. Patrick K. Sweeten, Third Business Court Division
Hon. Marialyn Barnard, Fourth Business Court Division

Hon. Stacy Sharp, Fourth Business Court Division
Hon. Jerry D. Bullard, Eighth Business Court Division
Hon. Brian Stagner, Eighth Business Court Division
Hon. Sofia Adrogué, Eleventh Business Court Division
Hon. Grant Dorfman, Eleventh Business Court Division

LOCAL RULES OF THE TEXAS BUSINESS COURT
Effective March 1, 2025

Rule 1: Purpose, Scope, and Compliance

The Texas Business Court is dedicated to the fair, efficient, and timely resolution of business disputes. These rules supplement and clarify the application of the Texas Rules of Civil Procedure (TRCP) in the Business Court. Citations to these rules must follow the citation format BCLR [Number], such as BCLR 3.

The Local Rules will be uniformly applied in the Texas Business Court. However, parties must familiarize themselves with the Court's website (TJB | About Texas Courts | Business Court (txcourts.gov)) and the information available there, including any judge- or division-specific practices, standing orders, the fee schedule, and various forms provided for the parties' convenience and use.

The Business Court Clerk will monitor documents for compliance with the TRCP and the BCLR as to form. If a document is deficient as to form, the Clerk will make a docket entry identifying the deficiency and notify the filer of the deficiency. If the filer does not cure the deficiency within two business days of the docket entry, the Court may strike the document or order other relief.

Rule 2: Assignment, Severance, and Consolidation

Under Texas Government Code § 25A.009, to promote the orderly and efficient administration of justice, the Business Court judges may exchange benches and sit and act for each other in any matter pending before the Court.

A party is deemed to agree to this Court's supplemental jurisdiction of any claim, including a counterclaim, cross-claim, or third-party claim, unless that party moves to sever or otherwise objects within 30 days after the later of (1) the moving party's appearance in this Court; or (2) the filing of the first pleading or removal notice containing fair notice of the claim.

A motion to consolidate cases must be filed in the first-filed case.

Rule 3: Case Information Sheet

A Business Court Case Information Sheet must be filed concurrently with any filing that initiates a new Business Court case.

Rule 4: Case Management and Discovery

(a) **Scheduling Orders.** Every case will be governed by a scheduling order. Parties must confer on and jointly file a proposed scheduling order using the form provided on the Business Court's website for the assigned judge: (i) within 30 days from the first appearance of any defendant, or (ii) if the action was removed or transferred to the Business Court, within 30 days from the filing of the notice of removal or the order of transfer.

(b) **Corporate Disclosure Obligations.** The proposed scheduling order must be accompanied by each party's corporate-disclosure statement, identifying all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Later-joined parties must file corporate-disclosure statements within 14 days after their first appearance. Each corporate-disclosure statement must also list the names of opposing law firms and/or counsel in the case. **Governmental entities need not file a corporate-disclosure statement.**

(c) **Discovery Disputes.** Motions under TRCP 190 through 215, or otherwise related to discovery disputes, are governed by the procedures below. This rule does not preclude parties from seeking an immediate ruling by telephone on any dispute that arises during a deposition that justifies such a conference with the Court. The procedures below are a prerequisite to filing any discovery motion, except motions to quash under TRCP 199.4.

(d) **Discovery-Motion Prerequisite.**

1. *Summary of Dispute.* Before filing a discovery-related motion, a party must engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must file a letter summarizing the dispute. Each such letter must contain a certification that, before filing the letter, the party engaged in personal consultation with the other parties and diligent attempts to resolve or further narrow the dispute. The certificate must specify the date(s) of such conference, which parties participated, the specific results achieved, and whether the parties discussed cost-shifting, proportionality, or alternative discovery methods that might resolve or narrow the dispute. **Except by leave of Court, the**

summary must not exceed 700 words, excluding the certificate; the certificate must not exceed 300 words.

2. *Response.* Within 7 days after a letter summarizing a discovery dispute, any other party may file a response letter, which may include a certification responding to the certification in the summary letter. **Except by leave of Court, the response must not exceed 700 words, excluding the certificate; the certificate must not exceed 200 words.**

3. *Replies.* No replies or further written arguments are permitted absent leave of Court.

4. *Further Action.* After the summary and any response is submitted, the Court may schedule a telephone conference with counsel, order a motion and briefing on the dispute, provide further instruction, or issue an order if the Court, in its discretion, determines no further briefing is necessary. If the parties' discovery dispute is not resolved after satisfying this discovery-motion prerequisite, a party may file a discovery motion.

(e) **Cost Shifting.** If a party requests cost shifting, the party's motion or response must state the amount of costs that should be shifted, how that amount was determined, and the basis for the requested cost shifting.

Rule 5: Motions

(a) **Word Limits.** Except upon leave of court, the following word limits apply:

- Discovery motions and responses: 3000 words
- Discovery replies: 1250 words
- All other motions and responses: 7500 words
- All other replies: 3000 words.

These word limits include footnotes and endnotes but do not include the case caption, any index, table of contents or table of authorities, signature blocks, attached evidence, or any required certificates. Each such document must provide a certificate of compliance following the signature block(s). Leave of court is required for any further briefing.

(b) **Form.** Motions and responses must be in writing and must include all supporting arguments and authorities. A proposed order is required and must be filed as a separate instrument concurrently with the motion or response.

(c) **Citations.** Provide pinpoint citation for all legal authority. Do the same for evidence. For instance, cite to page and line for depositions, to page and paragraph number for affidavits and pleadings, and to page and section number for contracts and similar documents.

(d) **Appendices.** The Court prefers that parties:

- Combine the main document and any appendices into a single PDF to file as few separate PDF attachments as possible. If more than one PDF must be filed, separate the PDFs by complete documents. That is, do not split a single document across two PDFs.

- Number every page in the filing, including the main document and any appendices, with continuous page numbers, such that the document page number matches the PDF page number.

- Provide a table of contents that enumerates each document in the appendix.

- Bookmark each appendix document.

- Scale images that exceed 8.5 x 11 to fit an 8.5 x 11 page.

(e) **Unopposed Motions.** Unopposed motions must be labeled "Unopposed" in the caption. These will be considered and ruled upon as soon as practicable.

(f) **Extension of Certificates of Conference.** Certificates of conference are required for all requests for relief except dispositive motions unless otherwise provided herein. The conference must be a meaningful, good-faith effort to resolve or narrow the dispute without the necessity of court intervention. For written discovery disputes, the parties must confer on each individual request at issue.

Rule 6: Mediation and Settlement

(a) **The Mediation Wheel.** A court may refer a pending dispute to mediation, either on its own or at a party's request. Additionally, the Business Court Clerk shall maintain a mediation wheel (the "Wheel") of qualified Texas mediators by case-category type for the Court's selection. Parties may agree to use a mediator not on the Wheel, subject to approval by the judge presiding over the lawsuit (the "Judge"). If parties cannot agree, the Judge will select a qualified mediator from the Wheel on a rotating basis. The Judge may select out of rotation by providing a brief written explanation to the parties and the Business Court Clerk. Parties may also request any mediator on the Wheel, regardless of sequential order.

Qualified mediators wishing to join the Wheel must contact the Business Court Clerk and submit the form application found on the Court's website. The Business Court judges shall annually review Wheel applicants for approval. Not every mediator who applies will automatically be selected for the Wheel. Approved mediators must reapply each year to avoid removal.

(b) **Settlement.** Counsel must notify the Court immediately of settlements or other agreements that obviate court settings, trials, or rulings on pending motions.

Rule 7: Emergency Relief

(a) Prior to or immediately upon filing an application for a temporary restraining order or other *ex parte* relief, the applicant must notify the Business Court Clerk.

(b) The applicant shall file a proposed order with an application for emergency relief.

(c) Upon filing the application or no later than two (2) hours before requesting a hearing, the applicant must file a certificate signed by the filing attorney or party either (a) stating that the application contains detailed and specific grounds supporting a request for *ex parte* relief or (b) setting forth the date, time, and manner of notice to opposing parties. Notice shall include delivery to the opposing parties, or their counsel if known, of the application and proposed order.

Rule 8: Removal and Remand

Removal does not alter any deadline imposed by the Texas Rules of Civil Procedure. Deadlines under an existing scheduling order remain in place until a new scheduling order is entered by the Business Court. All court settings are vitiated upon removal; however, the removing party must apprise the Business Court of any existing court settings in the removal notice filed under TRCP 355.

Rule 9: Sealing Court Records

(a) Parties shall not file unredacted trade secret or other confidential information unless they want it to become a public court record. The court expects parties to draft their submissions in a manner that does not disclose confidential information, redacting any confidential information not critical to the filing.

(b) Absent an emergency, a party seeking *in camera* review before a TRCP 76a(4) hearing on a motion to seal court records shall send to the Court (not file) unredacted copies of the records sought to be sealed. Papers submitted *in camera* for this purpose are not "court records" that are presumed to be open to the general public. *See* TRCP 76a(2)(a).

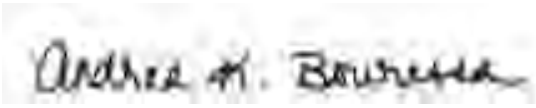
Rule 10: Miscellaneous

(a) **Pro Hac Vice Applications by Nonresident Attorneys.** A nonresident licensed attorney who wishes to appear in a case in the Court but is not licensed in Texas must comply with Rule 19 of the Rules Governing Admission to the Bar of Texas and Tex. Gov't Code §82.0361. *See* https://ble.texas.gov/non-resident-attorney-fee-info.

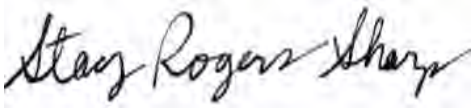
(b) **Vacation Letters.** An attorney or self-represented litigant may file, in each case where the litigant or attorney is appearing, a vacation letter reserving a reasonable number of days, not to exceed four weeks within a calendar year, during which no hearings, depositions, or trials are requested to be set. A vacation letter does not vitiate any existing setting. If a matter is set in conflict with a previously filed vacation letter, the affected person should bring the issue to the Court's attention.

(c) **Artificial Intelligence.** Use of artificial intelligence is not prohibited, but the filing attorney or party is independently responsible for the accuracy of all filings and must comply with all legal and ethical duties, including TRCP 13 and Civil Practice and Remedies Code, Chapters 9–10.

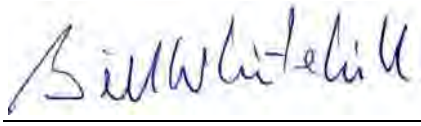
APPROVED AND EFFECTIVE AS OF MARCH 1, 2025:



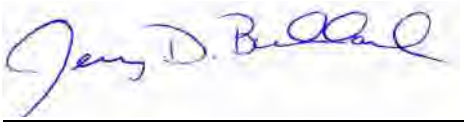
Andrea K. Bouressa, First Division



Stacy Sharp, Fourth Division



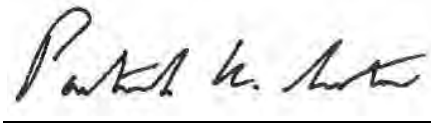
Bill Whitehill, First Division



Jerry D. Bullard, Eighth Division

Melissa Andrews, Third Division

Brian Stagner, Eighth Division



Patrick K. Sweeten, Third Division

Sofia Adrogué, Eleventh Division

Marialyn Barnard, Fourth Division

Grant Dorfman, Eleventh Division &
Administrative Presiding Judge

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

[Plaintiff(s)],	§	
Plaintiff(s),	§	
v.	§	Cause No. _____
[Defendant(s)],	§	
Defendant(s).	§	

PROPOSED SCHEDULING & CASE MANAGEMENT ORDER

[Instructions: Pursuant to Business Court Local Rule [BCLR] 4, the parties must confer on and jointly file this Proposed Scheduling Order. Please fill in the bracketed material as indicated below, based on available information. Parties must make a thorough and good-faith effort to reach agreement, but if the parties cannot agree, they may specify separate answers—without argument—as demonstrated below. Please delete all instructions (in red font) before filing.]

In addition to the Court order contained herein, the Local Rules of the Business Court are applicable to this cause of action. They can be found here.

I. BCLR 4 Meeting

[Instructions: State where and when the parties met and conferred.]

II. Jurisdiction & Venue

[Instructions: This section provides the Court with early notice of known disputes about the Court's jurisdiction or the trial venue. It does not constitute a challenge to venue or a plea to the jurisdiction; nor does it preclude future such challenges.

If the parties disagree on jurisdiction or venue, they may specify separate answers, such as: "Plaintiff contends the Court has jurisdiction over this action under Section …." "Defendant contends the Court lacks jurisdiction over Plaintiff's claim for … under Section …."]

The Court [has/lacks] jurisdiction over [this action / list specific claim] under Section(s) 25A.004(__)(__) of the Texas Government Code.

Venue [is / is not] proper in a county in the Eleventh Division of the Business Court as provided [by law / by written contract].

[If case will be tried to a jury:] Jury trial of this action should be held in [_____] County under Section(s) 25A.015(__) of the Texas Government Code.

III. Parties

Identify any unserved parties or anticipated additional parties, and their relationship to the parties and claims in the case. List and briefly explain any anticipated interventions. Describe class-action or collective-action issues, if any; and provide the proposed class definition and any disagreement regarding same.

Please certify that all parties have filed the Corporate Disclosure form required by BCLR 4(b).

IV. Applicable Law

[Instructions: This section provides the Court with early notice of known choice-of-law issues. The parties' positions may change as the case develops.]

The substantive laws of [the State of Texas / specify other jurisdiction] govern [this action / list specific claims]. Texas procedural law governs this action.

V. Deadlines & Discovery

[Instructions: The parties should submit proposed dates and numbers in the brackets below. If the parties cannot agree on the proposed dates or numbers, they may provide separate proposals. For example, if Plaintiff proposes March 1, 2025, and Defendant proposes April 1, 2025, the parties may fill in the brackets as follows: "P: 3/1/25, D: 4/1/25." After the parties file the proposed order, the Court will set a scheduling conference to discuss the proposed dates and other matters. Following the conference, the Court will issue the Scheduling Order for the case.]

	Discovery Commencement & Limitations Pursuant to Texas Rule of Civil Procedure ("TRCP") 192.2(a)(1), the discovery period begins when the first initial disclosures are due under TRCP 194.2. The following discovery limits apply, incorporating TRCP 190.3(b)'s definitions and rules for subparts:

[# hrs.] **[#]**	Each side is limited to this number of total hours for oral depositions. Each party is limited to serving this number of interrogatories on another.
[date]	**Electronically Stored Information (ESI) Protocol** By this date, the parties must meet and confer on an ESI protocol, including the parameters for preservation of ESI and the procedures the parties will employ to determine search terms and methodology for identifying ESI in response to a discovery request calling for such information. The parties should be prepared to discuss the ESI protocol at the scheduling conference. ESI will be produced in **[PDF/ TIFF/ Native/ Paper]** format, except when the parties may agree upon a different format. Except as necessitated by the chosen format, the parties will not degrade the searchability of documents as part of the production process. The parties may modify their ESI protocol by agreement at any time, without Court involvement.
[date]	**Joinder** All parties must be added and served, whether by amendment or third-party practice, by this date. The party causing the joinder must provide a copy of the Scheduling Order at the time of service. All joinder must also comply with TRCP 37–41.
[date] **[date]** **[date]**	**Expert Witness Designations** Expert witness designations must include the information listed in Rule 195.5(a). Rule 193.6 will govern any failure to timely make, amend, or supplement a designation. By this date, parties seeking affirmative relief must serve their expert witness designations. By this date, all other parties must serve expert witness designations. By this date, all parties must designate any rebuttal experts.

	Pleading Amendments
[date]	All pleading amendments must be filed by this date, absent leave of Court or the exception provided immediately below.
[date]	If a party adds a claim or cause of action on or near the date above, other parties may add only defensive pleadings in response to the new claim or cause of action by this date. These deadlines are outer limits and do not relieve the parties of any obligations to act promptly or timely.
[date]	**End of Discovery** Fact discovery must be completed by this date. Expert discovery may continue until the deadline for completing expert witness depositions, below. Parties must serve discovery requests early enough that the response is due within the relevant discovery period.
	Expert Witness Depositions A party seeking affirmative relief must make its expert(s) available for deposition by the following deadlines:
[date]	If no expert report is furnished under TRCP 195.3, or [Instructions: This date must be at least 15 days before the deadline for designating other experts. *See* TRCP 195.3.]
[date]	If an expert report is furnished under TRCP 195.3.
[date]	A party not seeking affirmative relief must make its expert(s) available for deposition by this date.
[date]	All rebuttal expert(s) must be made available for deposition by this date.
	Alternative Dispute Resolution
[date]	By this date the parties must file either (1) an agreement for ADR stating the form of ADR requested and the name of an agreed mediator, if applicable; or (2) a statement that one or more parties do not agree to ADR at this time.
[date]	ADR conducted pursuant to the agreement of the parties must be completed by this date. The parties may modify this date by agreement.

[date]	**Dispositive Motions & Pleas** Dispositive motions and pleas, including motions for summary judgment or partial summary judgment, must be scheduled for an oral hearing or written submission not later than this date.
[date]	**Challenges to Expert Testimony** All *Daubert/Robinson* motions or other motions to exclude, limit, or otherwise challenge expert testimony must be filed by this date.
	Proposed Jury Charges In a jury trial case, parties must exchange, confer about, and file proposed jury charges as follows:
[date]	By this date, each party must exchange its proposed jury questions and instructions, if any, with the other parties.
[date]	By this date, each party must inform the other parties, in writing, whether it agrees or objects to each question and instruction proposed by another party.
[date]	By this date, all parties must meet and confer, in a good faith effort to reach agreement on jury questions and instructions.
[date]	By this date, the parties will file: (a) a Joint Proposed Jury Charge that includes all stipulated facts and proposed jury questions and instructions on which all parties agree, and (b) if a party wishes to propose jury questions or instructions that were not agreed to by the other parties, that party must file a Disputed Proposed Jury Charge containing any such proposed jury questions or instructions. Upon filing, the parties must email the submissions in (a) and (b) to the Court at *BCDivision11A@txcourts.gov* (for Judge Adrogué) or *BCDivision11B@txcourts.gov* (for Judge Dorfman) in a Word format, copying the other parties. This process is a precursor to, and not in place of, the charge conference that will be held at trial.

<table>
<tr>
<td>[date]</td>
<td>
Witness & Exhibit Lists

By this date, the parties must exchange lists of the witnesses and exhibits they expect to call/offer at trial.

Exhibit lists should be formatted as follows:
<table>
<tr><th>Exhibit #</th><th>Admitted</th><th>Description</th></tr>
<tr><td>1</td><td></td><td>Letter from A to B dated 9/1/2024</td></tr>
<tr><td>2</td><td></td><td>Photograph of land taken 9/1/2024</td></tr>
</table>
</td>
</tr>
<tr>
<td>[date]</td>
<td>
Deposition Excerpts

By this date, the parties must exchange any deposition excerpts they intend to use at trial; cross-designations must be exchanged within 7 days after this date.

For audio/video excerpts, a party must provide both the audio/video cuts the party intends to play and the transcript page and line designations. If a party intends to read the deposition testimony from the transcript, the party need only provide page and line designations.
</td>
</tr>
<tr>
<td>[date]</td>
<td>
Exhibit Binders

By this date, each party must provide the Court with [physical / PDF] binder(s) containing bates-stamped copies of all exhibits the party intends to offer at trial. In the case of physical items offered as exhibits, a photograph or other reproduction of the physical item may be used.

The [physical / PDF] binders must begin with the party's exhibit list and the exhibits should be tabbed and numbered sequentially, consistent with the exhibit list.
</td>
</tr>
<tr>
<td>[date]</td>
<td>
Motions in Limine / Motions to Exclude

By this date, all parties will file any motions in limine or motions to exclude or otherwise limit the admission of non-expert evidence.
</td>
</tr>
<tr>
<td>[date]</td>
<td>
Proposed Pretrial Order

By this date, the parties must, jointly or individually, file a Proposed Pretrial Order.
</td>
</tr>
</table>

	Pretrial Conference The Court will set a pretrial conference to discuss all aspects of the case, including ADR.
[date] **[#]**	**Trial** [Per Texas Rule of Judicial Administration 6.1(a), a jury trial must commence no later than 18 months after suit was filed; and within 12 months for a bench trial.] Barring further order of the Court, trial will commence on this date. The parties preliminarily estimate the trial will last _____ days.

VI. Sealing & Protective Orders

For the convenience of the parties, the Court has provided a form protective order on its website. Proposed protective orders that substantially adopt the form provided will typically be approved by the Court. However, the parties are free to modify or vary the form order as they deem appropriate. **A protective order must comply with, and cannot supersede or displace TRCP 76a**, which will govern all evidence used as a "court record," as that term is defined therein.

VII. Settlement

In their meeting, the parties should discuss the possibility for prompt, agreed resolution of the case, and whether they are amenable to an early mediation or other settlement efforts.

VIII. Trial & Pretrial Conference

The parties must file a Proposed Pretrial Order (see deadline above). The Proposed Pretrial Order will address trial issues such as the procedures for voir dire, motions in limine, handling evidence, the time needed for trial, notice of daily witness expectations, court reporting, and conducting trial. The parties and the Court may discuss these issues and any other outstanding matters at the pretrial conference, after which the Court will issue its Pretrial Order.

IX. Consideration of Expedited/Streamlined Procedures

The parties are directed to discuss appropriate measures to simplify thee issues, eliminate frivolous or unsupported claims or defenses, and streamline discovery and/or the presentation of proof at trial, including without limitation the following:

- Seeking admissions or stipulations as to facts and documents, and obtaining advance rulings on the admissibility of disputed evidence;
- Narrowing factual issues to eliminate or avoid unnecessary or cumulative presentation of evidence, disproportionate discovery burdens, or needless delay or repetition at trial;
- Whether periodic case management conferences with the Court would be beneficial and, if so, the proposed frequency of those conferences;
- Whether discovery might benefit from being conducted in phases, limited to particular issues, or from the appointment of a special master or discovery referee;
- Whether legal issues or disputes can be narrowed by agreement, by summary judgment or other motion, by separate trial (whether summary, bench, or mini-) of an issue or claim; and, if so, whether these measures can be employed at an early stage of the proceeding;
- Whether supplemental jurisdiction under Texas Government Code Section 25A.004(f) exists over any claim(s); and, if so, whether the parties will agree to try them in the Business Court proceeding;
- Whether time limits at trial would facilitate the parties to ensure an orderly presentation of evidence and efficient use of the Court's time, within the time estimate the parties have provided for final trial; and
- Whether the parties can agree to any of the "Susman Rules" (please review the **"Trial by Agreement"** article and checklist).

X. Modification of Scheduling Order

The parties may move, jointly or individually, to modify this order at any time. However, modifications of the order cannot be used to justify postponement of trial. Requests to postpone trial are disfavored.

ENTERED: _____ _____

PRESIDING JUDGE

AGREED:

[Insert Signature Blocks and Certificates]

The Business Court of Texas,
[__] Division

[Plaintiff(s)],	§	
Plaintiff(s),	§	
	§	
v.	§	Cause No. [_____]
[Defendant(s)],	§	
	§	
Defendant(s).	§	

[Party's Name]'s Corporate Disclosure Statement

[Party's Name] provides the following information under Business Court Local Rule 4(b):

1. [Party's Name] has [no / the following] affiliates, parent companies, and/or subsidiaries[: list any affiliates, parent companies, and subsidiaries; please underline the names of any corporation or entity with publicly traded securities].

2. Other than those listed in the paragraph above, [no / the following] public companies own 10% or more of [Party's Name]'s stock, if any[: list any public companies that own 10% or more of the party's stock].

3. Other than those identified in the paragraphs above, [no / the following] persons, associations of persons, firms, partnerships, companies, guarantors, insurers, or other legal entities are financially interested in the

outcome of this litigation[: list individually, or by group if a large group of persons or entities can be specified by generic description].

4. [Party's Name] is represented by the following counsel in this case: [list].

5. To [Party's Name]'s knowledge, opposing parties are represented by the following counsel in this case: [list if known].

6. [Party's Name] acknowledges and accepts the duty to promptly supplement this Disclosure Statement whenever the information that must be disclosed changes.

[signature block]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Civil Procedure on [date].

[Counsel's Name]
[FIRM NAME]
[Street Address]
[City, State Zip Code]
[Email address]
***Counsel for* [*Party Name*]**

/s/ [Counsel's Name]
[Counsel's Name]

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

[Plaintiff(s)],	§	
Plaintiff(s),	§	
v.	§	Cause No. _____
[Defendant(s)],	§	
Defendant(s).	§	

Joint Proposed Pretrial Order

The Parties, by and through undersigned counsel, hereby submit the following Joint Proposed Pretrial Order.

1. Appearance of Counsel

List the names of all Parties and their respective counsel. Provide the addresses, telephone numbers, and email addresses of counsel.

2. Statement of the Case

Give a concise joint summary (one or two short paragraphs) of the case and the Parties' claims and defenses. In a jury trial, the Court may read this statement aloud during voir dire.

3. Relief Sought

An itemization of the damages and other relief sought.

4. Jurisdiction and Venue

Identify any unresolved jurisdictional or venue questions.

5. Motions

Identify any pending motions that require a decision by the Court.

6. Admissions of Fact

Provide a concise, numbered list of admitted or otherwise undisputed facts that require no proof and are relevant to the disposition of the case.

7. Disputed Facts

Provide a concise, numbered list of disputed facts that are relevant to the disposition of the case.

8. Agreed Applicable Propositions of Law

Provide a concise, numbered list of the undisputed legal propositions that are relevant to the disposition of the case.

9. Contested Issues of Law

Provide a concise, numbered list of the disputed legal issues that are relevant to the disposition of the case and need to be decided by the court. A memorandum of law with authorities addressing only these issues must accompany this Order.

10. Settlement Discussions

Include a short, non-argumentative statement on the status of any settlement negotiations and the outcome of mediation.

11. Trial

A. State whether the trial will be jury or nonjury.

B. Give a realistic estimate of how long trial would last if the Court did not impose time limits. A typical trial day begins at 9:00 a.m. and ends at

4:30 or 5:00 p.m., with 60 to 75 minutes for lunch and 15-minute breaks mid-morning and mid-afternoon.

C. Using the categories below, list the names and addresses of all witnesses, including experts, that each party intends to call in its case-in-chief. Include potential rebuttal witnesses if, before trial, the need for their testimony can reasonably be anticipated:

1. witnesses who will be called;
2. witnesses who may be called; or
3. witnesses whose deposition will be used.

D. State the Parties' agreement as to how and when they will provide notice of daily witnesses.

E. State whether the Parties intend to arrange for real-time reporting or other expedited transcripts.

F. Describe any foreseeable logistical problems, including the availability of witnesses or unusual exhibits.

12. Required Attachments

Parties must file as a separate document and attach to the Joint Proposed Pretrial Order the following attachments:

A. any motions in limine, with a proposed order or space to make rulings;

B. each party's exhibit list[1];

C. each party's proposed jury charge or, for nonjury trials, proposed findings of fact and conclusions of law; and

D. each party's memorandum of law (see No. 9, Contested Issues of Law).

13. Other Matters

Describe any additional matters or concerns that any party wishes the Court to know

[1] The Court encourages counsel to agree upon joint exhibits to avoid duplication and to simplify trial.

before trial.

SIGNED this _____day of _____.

_____
JUDGE, TEXAS BUSINESS COURT
ELEVENTH DIVISION

[Signature blocks for counsel]

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

[Plaintiff(s)],	§	
Plaintiff(s),	§	
v.	§	Cause No. _____
[Defendant(s)],	§	
Defendant(s).	§	

PROTECTIVE ORDER

Based on the Parties' representations, the materials on file in this case, and the nature of the Parties' alleged causes of action and defenses, the Court finds and concludes that these terms are fair, just, and proper. Accordingly,

It is ORDERED that:

I. DEFINITIONS

As used in this Order:

1. **"Party" or "Parties"** means (i) any named party to this lawsuit or (ii) any non-party that provides Information in this Lawsuit pursuant to subpoena or by consent. Party includes a Party's counsel, officers, directors, employees, agents, representatives, and service providers.

2. **"Producing Party"** means a Party that Produces Information in this Lawsuit.

3. **"Receiving Party"** means a Party that receives Information in this Lawsuit.

4. **"Produce"** means to provide in (i) discovery; (ii) sworn testimony, affidavit, or declaration; or (iii) court filings.

5. **"Information"** means any written or oral communication or reduction of facts or data to written form or oral testimony.

6. **"Confidential Information (CI)"** means Information that a Producing Party determines in good faith is a trade secret or reveals confidential, proprietary, sensitive, financial, or other Information. CI does not include public domain Information.

7. **"Attorney's Eyes Only (AEO)"** means any CI that a Producing Party in good faith determines is especially sensitive and entitled to highly confidential treatment.

8. **"Matter"** means all asserted or unasserted causes of action or affirmative defenses that arise from the facts, circumstances, transactions, or occurrences giving rise to this Lawsuit, regardless of whether those causes of action or affirmative defenses are asserted in this Lawsuit or in another forum.

9. **"Lawsuit"** means the proceeding under this cause number and its related proceedings that result from this proceeding such as by severance, consolidation, appeal, or remand from this Court.

10. **"Expert"** means a person who is retained to assist a Party in handling this Lawsuit. Expert includes those firm owners, employees, or agents who assist the Expert in his or her tasks.

11. **"Subpoena"** means any civil, criminal, or arbitration subpoena; civil demand; administrative inquiry or request; order, or other process.

II. SCOPE

12. General Scope. This Order applies to Information a Party Produces in this Lawsuit. This Order does not alter any confidentiality obligations a Party may have at law or under another Order or agreement.

13. Ability to Challenge. A Party may challenge a Producing Party's CI or AEO designations.

14. Ability to Object. A Party may object to the admissibility of any Produced Information.

15. Non-Waiver. Producing CI or AEO does not waive any privilege or right to claim the trade secret or confidential status of the Produced Information.

III. DESIGNATION PROCEDURES

A. Marking Documents

16. Producing Party's Own Information. A Party designating documents as containing CI or AEO must (i) mark each page of that document "Confidential," "Attorney's Eyes Only" or (ii) identify to each other Party in writing the document(s) by Bates number or other unequivocal identifier the CI or AEO Information.

17. Information Produced by Someone Else. A Party may designate Information Produced by a different Party (including a non-litigant) as the designating Party's Cl or AEO by complying with this Order within fourteen (14) days after receiving that Information and notifying all other Parties. The notice must describe with particularity the Information being designated as CI or AEO. Upon receiving that notice, counsel for all other Parties must treat that designated Information as CI or AEO according to this Order.

18. Late Designation. A Producing Party may in a written notice emailed to all Receiving Parties designate Information as CI or AEO within seven (7) days after its production. Thereafter, the Producing Party must provide correctly designated copies of such Information within seven (7) days of the Producing Party's Notice, and the Receiving Party must replace the previously undesignated Information with the newly designated Information. Upon receiving the Producing Party's notice, a Party must treat late designated CI or AEO as subject to this Order.

19. Marking Impractical. If marking is impractical, such as documents or ESI produced in native format, like audio, video, database, and spreadsheet-type files (*e.g.* Microsoft Excel), the Producing Party must designate in writing the Information it asserts is CI or AEO by including a single-page Bates-stamped slip-sheet with each document Produced in native format. The slip-sheets must display the Bates number of the native file, the Confidential or AEO designation, and this endorsement "File Produced Natively."

B. Deposition Testimony and Exhibits

20. Designation Procedures. A Party (including non-litigants) wishing to designate deposition testimony as CI or AEO must do so by stating that designation on the record during the deposition testimony that includes that CI or AEO. A Party may later designate additional deposition testimony as CI or AEO if that Party provides written notice to all Parties of record within fourteen (14) days after the designating Party receives a transcript.

C. Court Filings

21. Filing Requirements. A Party wishing to include CI or AEO in a court filing, declaration, affidavit, attachment, exhibit, or appendix must:

- Include in the filing's caption a parenthetical stating that the filing contains CI or AEO;
- Redact the CI or AEO from the publicly filed document; and
- Provide the Court with an unredacted electronic copy of the filing.

22. Rule 76a. The Court Clerk will make redacted CI or AEO available for public viewing thirty (30) days following a non-Party's written request filed with the Clerk unless a Party obtains a sealing order pursuant to TEX. R. CIV. P. 76a. Provided, however, this paragraph does not apply to documents containing unredacted CI or AEO that were submitted for in camera inspection solely to obtain a ruling on their discoverability (*see* TEX. R. CIV. P. 76a(2)(a)(1)).

23. Other Protections Preserved. This Order does not authorize or require the disclosure of personal or other Information that the rules of procedure or a statute otherwise permit or require to be redacted.

D. Non-Litigants

24. Ability to Designate. A non-Party who signs the agreement attached as Exhibit "A" may designate its Produced Information as CI or AEO. A requesting Party must serve the non-litigant with a copy of this Order when the requesting party makes the request by subpoena or otherwise.

E. Mass Designations Prohibited

25. Mass Designation. Mass, indiscriminate, or routinized designations are prohibited.

26. Duty to Support. A designating Party must be prepared to explain the rationale for each CI or AEO designation.

IV. CI PROTECTIONS

27. Limited Disclosure. Except as this Order otherwise provides a Party must not disclose CI to anyone other than:

- Signing Parties;
- Attorneys working on this Lawsuit on a Party's behalf and those attorneys' employees, agents, and signing contractors who provide assistance in this Lawsuit;
- Experts retained regarding this Lawsuit;
- The Court, its personnel, and jurors;
- Qualified court reporters and videographers participating in this Lawsuit;
- Any mediator serving in connection with this Lawsuit;
- Persons who in the ordinary course of business authored or received the subject CI; and
- Persons who otherwise are permitted access to the CI by Court order or stipulation of the Party that produced or disclosed the CI, after notice to all Parties and an opportunity to object.

V. AEO PROTECTIONS

28. More Limited Disclosure. AEO must not be disclosed or shown to anyone other than:

- Attorneys working on this Lawsuit on a Party's behalf and those attorneys' employees and agents assisting in this Lawsuit;

- Expert witnesses retained to assist in this Lawsuit. If a Party is designated as an expert witness, AEO material may only be disclosed to that individual after a good faith conference between legal counsel for the Party designating the expert witness and the designating Party. That conference must occur before any AEO is shared with that Expert;
- The Court, its personnel, and jurors as necessary to conduct the Lawsuit;
- Qualified court reporters and videographers participating in this Lawsuit;
- Any mediator serving in connection with this Lawsuit;
- Persons who in the ordinary course of business authored or received the subject AEO; and
- Any other person to whom the Parties agree in writing or the Court grants leave for disclosure.

VI. GENERAL PROTECTIONS

29. Limited Use. CI and AEO must be used by the Receiving Party solely for the purposes of the Lawsuit and only as this Order provides.

30. Notice of Intended Use. No person may disclose CI or AEO to any non-Party or non-authorized person without providing ten (10) days' written notice to the Producing Party and (i) that Party consents to the disclosure; or (ii) the Court resolves any objections to the disclosure.

31. Objection to Use. The Producing Party must object to the requested disclosure in writing within five (5) days after receiving notice of any intent to disclose.

32. Producing Party's Use. Regardless of whether a Producing Party designates such Information as CI or AEO, any Party may use without restriction:

- its own documents or Information; and
- documents or Information independently developed or obtained by that Party.

33. Duty to Advise Recipients. Each person receiving access to CI or AEO designated Information must be advised that the Information is disclosed subject to this Order and may not be disclosed other than as this Order permits.

34. Non-Party Duty to Acknowledge Order. If such persons are not a Party, that person must sign an agreement to be bound in the form attached hereto as Exhibit "A" before accessing any CI or AEO designated Information. If the CI or AEO designated Information is disclosed in a deposition or in trial of this Lawsuit, it is sufficient for the witness to agree on the record to be bound to this Order's terms and the attached Exhibit "A".

35. Non-Party Subpoenas. Any Receiving Party that receives a Subpoena seeking Information that includes CI or AEO must within seven (7) days provide the Producing Party with a copy of that Subpoena.

VII. INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION

36. Non-Automatic Waiver. A Producing Party's inadvertent production of Information protected by the attorney-client privilege, work product privilege, or any other applicable privilege will not alone waive any such privilege or protection.

37. Duty to Notify. A Receiving Party that discovers it has received Information that reasonably appears to be privileged must promptly inform the Producing Party.

38. Duty to Return. Upon the Producing Party's request, the Receiving Party must promptly return any such Information that Producing Party then asserts is privileged. However, the Receiving Party may retain a copy for the limited purpose of contesting by motion to compel the Producing Party's privilege claim.

39. Non-Use. No inadvertently Produced Information may be offered or submitted as evidence unless the Producing Party consents or the Court rules the Information is not protected or that the Producing Party waived the asserted privilege.

VIII. INADVERTENT PRODUCTION OF CI OR AEO

40. Non-Waiver. A Producing Party's inadvertent disclosure of CI or AEO, regardless of whether the Information was so designated when disclosed, does not waive that Party's confidentiality claim, either as to the specific Information disclosed or as to any other related Information if the Producing Party identifies the subject Information and amends the designation.

41. Duty to Correct Disclosure. The Parties must treat the amended designated Information according to this Order and make reasonable efforts to correct any disclosure of such Information contrary to the designation.

IX. MODIFICATION

42. The Lawsuit Parties may modify this Order by Rule 11 agreement combined with Court approval. When doing so, the Parties must submit with their filed Rule 11 agreement a proposed Amended Protective Order for the Court to consider.

X. LOCAL RULES

43. Parties must comply with the Local Rules of the Texas Business Court regarding all contested non-dispositive motions.

XI. END OF CASE

44. Duty to Destroy or Return. Upon a Producing Party's request, within thirty (30) days after the settlement or final adjudication, including appeals, of this Lawsuit, a

Receiving Party will destroy or permanently delete a Producing Party's CI or AEO. The Receiving Party must then provide the Producing Party with a written confirmation that the destruction or deletion has occurred. Alternatively, the Receiving Party may return the Producing Party's CI or AEO and certify that all such Information has been returned.

SIGNED this _____day of _____.

_____
JUDGE, TEXAS BUSINESS COURT
ELEVENTH DIVISION

[Signature blocks for counsel]

EXHIBIT A

I have read the Protective Order entered in the case styled [xx-xxxx] ("Lawsuit") and I understand that Order's terms.

I agree not to use the Confidential or Attorney's Eyes Only Information defined in the Order for any purpose other than in connection with this Lawsuit, including the investigation, prosecution, or defense of the claims in this Lawsuit.

I will not disclose materials designated Confidential or Attorney's Eyes Only Information except as permitted by that Order, and I will otherwise comply with the Order's terms.

I understand that my failure to comply with this Order may subject me to a claim for damages, injunctive relief, and attorney's fees.

SIGNATURE: _____

PRINTED NAME: _____

DATE: _____

Towards Trial By Agreement

Selections from Pretrial and Trial Agreements found at
www.trialbyagreement.com

Presented at
Workshop for Judges of the Fifth Circuit
Santa Fe, New Mexico
May 9, 2012

Originally compiled and edited by

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How "Trial By Agreement" Came About

by Steve Susman

In the mid-90s, as a member of the Texas Supreme Court Advisory Committee, I served as the chair of the Discovery Subcommittee that completely rewrote the Texas discovery rules. I learned then about the inefficiency of the rule-making process. First, it is very difficult to come up with a procedural rule that fits every civil case, both simple and complex. Second, rule-making requires the consensus of large numbers of judges and trial lawyers, most of whom are reluctant to change the way they have done business. This typically results in the adoption of a rule that is both the lowest common denominator and not very innovative. Frustrated with the rule-making process, I asked myself why opposing counsel couldn't make their own rules by agreement: rules that fit their particular case and were intended to make litigating less expensive and stressful for both sides. For over a decade now, the lawyers in my firm have been producing and refining agreements to suggest to the other side.

At first, we began with Pretrial Agreements directed at the discovery phase of litigation. We tried to come up with ideas that would not inherently benefit either the plaintiff or defendant, and so would likely be acceptable to both sides. We learned immediately that our chance of striking an agreement depended on having the other side consider these ideas in the abstract, before a dispute arose. Thus, our practice is to send these to opposing counsel as soon as all counsel on both sides make an appearance. Some of our agreements (*e.g.*, no letter writing, or numbering of deposition exhibits) are so obvious that we rarely had anyone disagree. Some (*e.g.*, making expert drafts and expert/counsel communications undiscoverable) have found their way into recently adopted federal or state rules.

Several years ago, we realized that this same approach towards agreement would work when it comes to the trial. So we began developing and proposing to opposing counsel, before the trial began, a series of Trial Agreements (or at least subjects for agreement) that would govern the trial. These Trial Agreements require the cooperation of the trial judge even more so than our Pretrial Agreements. Nonetheless, we have been amazed at how willing most judges are to trying something that counsel agrees upon.

Over the years, I have spoken and written about the benefits of Pretrial and Trial Agreements. My colleagues in the trial bar and most judges have been very receptive to the idea. Lawyers in my firm have obviously made a record in each case of what has been agreed to. I established my website—www.trialbyagreement.com—to create a forum where trial lawyers, in-house counsel, clients and judges can discuss improvements, agreements covering other subjects, and keep some record of what has and hasn't worked.

There is always a way to build a better mousetrap the years, and so the agreements undergo constant modification and fine-tuning. I hope you will join us in this ongoing project.

Better Litigating Through Pretrial Agreements

by Charles Eskridge

Clients and commentators often criticize the pace, burden, and expense of litigation, principally discovery. They are right. Many lawyers seem to engage in discovery for the sake of engaging in discovery. Opposing counsel fight bitter fights over discovery issues that have no bearing on the results of the case. All too often, the fruits of discovery turn out to be wasted – unused or unusable at trial.

Too often, at the beginning of a new case, lead counsel will turn over discovery and other pretrial work to junior attorneys who do not have the judgment to know what is important, or who are afraid of not turning over every rock. The junior attorneys will mechanically go about the task of asking for every document, noticing the deposition of every witness, and asking every conceivable question at the depositions. They will get cross-wise with their opposing counsel, and silly discovery disputes will abound.

This is a problem for everyone involved in litigation.

For the client which is paying its attorneys by the hour, the cost of inefficient discovery comes right out of its pocket. For corporate defendants, the burden and cost of discovery can contribute to the desire to settle, even when settlement is not warranted.

The cost of inefficient discovery can be an enormous burden for contingent-fee attorneys. Time-consuming discovery disputes are – or at least should be – anathema to the contingent-fee lawyer who profits from handling cases efficiently.

For the hourly lawyer, protracted and costly pre-trial proceedings may seem like a boon. But it's not. Hourly clients first and foremost look for attorneys who can efficiently handle their cases. They are not likely to rehire the lawyer who bills hundreds of hours towards taking dozens of depositions which are left on the cutting room floor when trial arrives.

Some commentators have suggested that discovery is inherently burdensome under the rules as they exist in American courts. They assert that the court system can be "fixed" only by radical alteration of the rules which permit "runaway discovery." That's wrong. The Rules of Civil Procedure do not require attorneys to take dozens of depositions or to file motions to compel over every document. And lawyers can make their own rules – pre-trial agreements – which enhance the efficiency of each case.

And of course, in negotiating pre-trial agreements at the beginning of the case, counsel should be thinking about pre-trial motion practice and trial, not just discovery. Lead counsel (not junior associates) should discuss pre-trial agreements at the very beginning of the case, before discovery picks up steam. At Susman Godfrey, our experience has shown that early agreements work to reduce the cost and burden of litigation while keeping the focus on the eventual trial of the case. The key has always been to attempt to reach agreement on as many of these items before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other – making it hard to reach an agreement.

❖ COMMUNICATION

1. Discovery disputes will be resolved with a phone call between lead counsel.

One of the most counter-productive litigation activities is the discovery dispute letter. Lawyers write these multi-page, single-spaced tomes not for the purpose of working out discovery disputes, but to create a record for an eventual motion to compel. Such a letter typically generates a response in kind from opposing counsel, and then a reply, then a sur-reply. In short, the parties draw battle lines instead of working toward an agreement.

Counsel should not engage in discovery disputes for the purpose of engaging in discovery disputes. Instead, counsel should raise a discovery issue with the other side only when it involves documents or testimony which are really needed for trial of the case. It is always more efficient to obtain such evidence by agreement than by motion. An agreement is also a quicker and more certain method of obtaining evidence.

If your goal is to get evidence quickly and efficiently, then you should eschew letter-writing and the posturing that goes with it. A phone call typically will bring much better communication, more civility, and better results than an exchange of letters.

The phone call should be between lead counsel. More experienced lawyers are simply more capable of quickly sorting out what's important from what is not.

2. Papers will be served by e-mail on all counsel.

Some lawyers still do not serve papers by e-mail unless required by the rules. Their reluctance may in some circumstances be motivated by misguided tactical considerations; they want their opposing counsel to go a few days without realizing that an important motion has been filed. This is particularly a problem in state-court jurisdictions where there is no e-filing.

Such tactical maneuvering does not yield a better outcome at trial. It is unnecessary and counter-productive. The parties should agree at the beginning of every case that all papers will be served by e-mail as soon as they are filed.

It also is a good idea to agree at the beginning of the case that all filings will be served by e-mail on all counsel and legal assistants. It is more efficient for everyone on the trial team to learn immediately of any filings. Moreover, if the parties agree at the beginning to send all emails to all members of the other side's team, lead counsel can spot a fight brewing and intervene to resolve it before it gets out of hand.

❖ **DOCUMENTS**

3. The parties will ask the court to choose a protective order.

Sometimes discovery is bogged down from the very beginning when the parties cannot agree on the form of a protective order. This is particularly a problem in patent infringement cases and other big-stakes matters involving sensitive business information.

Sometimes the parties will negotiate a month or two trying to reach agreement on the language of a protective order, to no avail. When that occurs, the parties have wasted several weeks and their clients', or their own, time and money.

Most judges have a good sense of what they think should and should not be in a protective order. Rather than negotiate for weeks then submitting the dispute to the judge, the parties should put a 48-hour limit on protective order negotiations.

The parties should exchange protective order proposals. Then, they should negotiate. If agreement cannot be reached on the form of a protective order within 48 hours of the time when the proposals are exchanged, both sides will write a letter to the Court including each side's preferred version and, without argument, ask the Court to select one or the other as soon as possible.

Agreed protective orders, like most agreements, tend to get done if there is some pressure to get them done. The 48-hour deadline puts maximum pressure on the parties to reach an agreement and begin the real work of putting together their case. If the parties fail to reach such an agreement, the Court can quickly decide which form of order is best without enduring tedious argument from counsel.

Each court can reduce the time spent on protective orders if it will have a standard protective order which it presumptively enters in each case. The Court can make it clear that there is a very high burden on anyone who wants something different.

4. Documents will be produced on a rolling basis.

There is no real advantage to be gained for either side in posturing over when documents will be produced. And delays in document production can only lead to inefficiencies and fights about collateral issues.

The parties should agree to produce documents on a rolling basis as soon as they have been located and copied. If copies are produced, the originals should be made available for inspection upon request.

One commendable procedure is used in the United States District Court for the Eastern District of Texas. In that district, judges expect the parties to produce all relevant documents at the beginning of the case as part of initial disclosures. The parties can of course exchange additional requests and produce additional documents as the case moves along, but this early production of

the key documents in the case helps the parties to focus on the important issues and conduct more efficient discovery.

5. Each side will pick five custodians for production of electronically-stored records, and produce electronically stored information in native, searchable form.

Electronic discovery has become the most expensive and time-consuming part of the pre-trial practice in most cases. But pre-trial agreements can help to reduce the burden.

Electronic discovery is so burdensome because requesting parties seek overbroad production of electronic documents, and because producing parties try to conduct a relevance and privilege review of every single electronic document. In some large cases, each side will end up having several young lawyers spend weeks on end conducting relevance reviews of dozens of custodians' electronic files. This is extremely expensive, and not terribly useful.

Parties can greatly reduce the burden and hassle of producing electronically stored information by focusing only on those custodians who really matter. Moreover, the parties can agree not to conduct a time-consuming relevance review prior to production.

In our cases, we like to propose that each side must initially produce electronically stored information from the files of five custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production, and only then if they are actually privileged. Production does not waive any privilege, and documents can be snapped back whenever the producing party recognizes that they are privileged. After analyzing the initial production, each side can request electronic files from five other custodians. Beyond that, good cause must be demonstrated.

This procedure gives both sides the assurance that, in all likelihood, they will not have to gather electronic documents from more than ten custodians. It also gives both sides the assurance that the other side cannot withhold documents because of obscure or unfounded relevance objections. The parties will simply screen out electronic documents that list lawyer names, determine whether the screened-out documents are actually privileged, then produce what is not privileged.

One objection we sometimes hear is that some cases have more than ten relevant custodians per side. The parties can always ask the Court for electronically stored documents from more custodians. But from our experience, that rarely is necessary. When is the last time that the key email in your case was neither sent to nor received by one of the top ten most important witnesses on either side of the case? In our experience, ten custodians will usually be more than enough to capture the relevant documents.

The parties should work in good faith to make sure that their electronically stored information (ESI) is useable by the other side. To that end, the parties should agree at the beginning of the case that, whether in federal court or not, they will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook / PST, Concordance, or Summation, so that it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made

available to the other side. The parties will produce a Bates-numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail – so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from which it came, (2) the director or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.

6. Production does not waive the privilege.

One of the major hindrances to quick and efficient production of documents is most attorneys' fear of producing privileged documents. This fear can lead to overly long and detailed privilege reviews and production of massive privilege logs.

The case law on waiver of privilege can be an obstacle to efficient document production. Counsel fear that if they let one potentially privileged document slip into their document production, they will then be faced with an argument for a very broad waiver.

Some jurisdictions permit snap back of privileged documents, but snap back rules sometimes are structured in a way that limits protection against waiver arguments. For example, in some jurisdictions, privileged documents can be snapped back only if their production is "inadvertent." Sometimes counsel are over-inclusive when claiming privilege, because they do not want to later bear the burden of showing that production was inadvertent.

To deal with these concerns, the parties can agree at the beginning of a lawsuit that the production of a privileged document does not waive the privilege as to other privileged documents, and that documents can be snapped back as soon as it is discovered they were produced without any need to show that the production was inadvertent.

For additional protection, if the case is in federal court, the parties can request an order at the beginning of the case under Fed. R. Evid. 502(d), which provides that "a Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding."

7. Each side may select up to 20 documents from the other side's privilege log for in camera inspection.

As document productions have gotten larger in complex cases, so have privilege logs. It is not all that unusual anymore to see privilege logs in excess of 100 pages. When faced with such a log, we have found that the best practice is to select 20 documents which, based on the log descriptions, appear to be the most relevant documents to which there potentially is not an applicable privilege, and request the Court to determine whether there is an applicable privilege. Therefore, we suggest agreeing at the beginning of the case that each side has the right to select 20 documents from the other side's privilege log for submission to the Court for in camera

inspection. This agreement tends to keep both sides honest regarding what each logs, and courts typically will agree to take up such a limited number of documents for review.

❖ **DEPOSITIONS**

8. Limiting the length of trial.

Lawyers who have participated in time-limited trials usually applaud being disciplined to plan who will really testify and for how long. Most actually give time back. Jurors and courts certainly appreciate this. Yet an agreement on length should ideally be made at the start of discovery, and certainly before depositions commence. Such an agreement allows the Court to provide a firm trial date, while also removing any incentive to seek unbridled document production, or to take too many depositions, or to otherwise engage in a fishing expedition (whether for plaintiff or defense purposes) that is costly and inefficient for both sides.

9. Depositions will be taken by agreement, and will be limited in number and length.

Lawyers tend to take too many depositions and spend too long with each witness. In a typical commercial case, 99% of deposition testimony ends up on the cutting room floor by the time of trial. There rarely are more than a handful of truly important witnesses in any case. And there is almost never a need to spend more than six hours questioning a witness. So, we typically propose at the beginning of the case that the parties agree to limit themselves to ten depositions each, with each deposition no more than three hours in length.

Some counsel try to gain an advantage by unilaterally noticing depositions or by overstrategizing the issue of whose witnesses will be deposed first. These issues tend to waste time while having no impact on the outcome of a case. As such, the parties should agree at the beginning of the case that depositions will be taken by agreement, with no unilateral deposition notices. Moreover, the parties should agree to alternate witnesses—plaintiffs' witness first, defendants' second, plaintiffs' third, defendants' fourth etc. Depending on the case, it can also make sense to do depositions in agreed blocks—two by plaintiffs, then two by defendants, or three-and-three, etc.

Many jurisdictions are moving towards limiting deposition length. In the late 1990's, Texas changed its rules to adopt a limit of six hours of questioning per side. The result has been more efficient and more focused litigation. But even six hours is unnecessarily long for most witnesses. For most witnesses, there simply is no reason to question them for more than half a day. An agreement that deposition of any witness will not last longer than three hours has tended to work. The parties could also agree at the outset that a small number—one or two—can proceed up to six hours. There are rarely more than two witnesses per side that are so central to the narrative that more deponents need to exceed three hours.

An agreement we haven't reached yet, but would like to try, is one that mirrors a frequent trial limitation—time limits. The parties could agree that only a certain number of hours of deposition time will be available, to be used with witnesses in lengths as each side sees fit.

10. No objections at depositions.

Many jurisdictions are moving towards rules that prohibit counsel from asserting deposition objections other than privilege objections and "objection, form." These rules have had the very positive effect of cutting down on speaking objections. Speaking objections waste time, frustrate the questioner, make litigation more contentious, and make the witness and his counsel look bad.

We like to go one step beyond the limitations in the rules. At the beginning of the case, the parties should agree that at depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation, or to the form of the question will be reserved until trial. There will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments or objections to the jury at trial.

This agreement is subject to occasional modification. For instance, some counsel taking depositions prefer to know if an objectionable exists to challenge a question. This permits the questioner to consider whether the question should be modified to avoid the risk of is being struck at a later time. Counsel can easily accommodate such practice.

11. Exhibits will be numbered sequentially.

It becomes apparent that many litigators are not thinking about trial when they start numbering deposition exhibits. It is a particularly annoying practice to number exhibits separately for each deposition. When this is done, the same document can end up being Smith-1, Jones-4, and Johnson-14 once the parties get to trial. Alternatively, the plaintiffs and defendants can continue the numbering from deposition to deposition but have a separate set of plaintiffs' exhibits and defendants' exhibits. Plaintiffs-14 and defendants-14 then will be different documents.

Exhibits should be numbered at deposition with the ultimate goal in mind – trial. Each exhibit should have one and only one number, which it will carry through trial. This practice greatly reduces confusion over exhibit numbering. It also allows the parties to more easily play at trial the deposition excerpts in which exhibit numbers are referenced.

12. The parties will share the same court reporter and videographer.

Counsel often fail to cooperate on the selection and negotiations with a court reporting firm. This is a mistake. The parties can easily cooperate to choose a court reporting firm at the beginning of the litigation. If counsel can promise the firm that it will handle court reporting and videography for every deposition in the case, the firm should be willing to provide a discount in return for the right to transcribe all depositions. Counsel can also cooperate to solicit competitive bids from multiple court reporting firms. This cooperation at the beginning of the lawsuit can save considerable money for clients.

13. The parties will share the expense of imaging deposition exhibits.

Just as the parties should cooperate in selecting a court reporting firm, they should cooperate and share the cost of imaging all deposition exhibits. There is no advantage to anyone – except perhaps companies which image documents – of the parties failing to share costs in this manner.

❖ EXPERTS

14. Neither side will be entitled to discovery of communications with counsel or draft expert reports.

The parties can greatly reduce the cost of expert work and discovery by agreeing that communications between experts and counsel, as well as draft expert reports, are not discoverable. The preparation of expert reports is not nearly as time-consuming when experts and attorneys can freely communicate in writing.

We have been proposing this agreement for years, and the federal rules are now catching up. Under new Fed. R. Civ. P. 26(b)(4)(B), effective December 1, 2010, draft reports are protected as work product unless they are otherwise discoverable under the catch-all discovery "scope" provision of Rule 26(b)(1) or, under Rule 26(b)(3)(A)(ii), the party seeking production shows that it has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." And under new Rule 26(b)(4)(C), attorney-expert communications are protected except to the extent that they (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Many state court systems do not yet have equivalent rules, but in the few months since the new federal rule became effective, we have found that state-court litigants often are willing to agree by stipulation to apply the common-sense federal rule to their cases.

Even with the federal rule in place, it may make sense in some cases to get a broad stipulation that draft reports and attorney-expert communications are not discoverable. Such a stipulation can give the parties more assurance that the opposing side will not prevail with an argument of "substantial need" to see communications or drafts, and that the opposing side will not seek production based on a broad reading of the exception for communications that identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.

15. No expert depositions.

If a case is in federal court, and parties provide expert reports in the manner that is required by FRCP 26(a)(2)(B), there should be no need to depose experts. It is more efficient to use the opinions and other information provided in the report to prepare to cross-examine the experts once – at trial. Moreover, it is often strategically advantageous to save the questioning for trial.

Depositions often serve only to alert experts and opposing counsel to problems which can then be fixed prior to trial.

Sometimes parties do not comply with FRCP 26(a)(2)(B). The rule requires detailed and complete reports, including (among other things) "a complete statement of all opinions the witness will express and the basis and reasons for them," "the facts or data considered by the witness in forming them," and "any exhibits that will be used to summarize or support them." If a report is incomprehensible or incomplete, the parties should reserve the right to depose the expert. However, the parties should agree that the party seeking clarification is required to establish its entitlement to a deposition through a motion filed with the Court.

Given today's practice, a frequent modification here is to permit depositions of a delimited nature. Three hours should be more than sufficient to test the boundaries of an expert's reports, and to confirm the materials upon which he or she relied.

❖ MOTION PRACTICE

16. The parties should agree upon a briefing schedule and page limits for all pre-trial motions.

When it is not otherwise set by rule or court order, the parties should agree in advance for a pre-trial motion schedule and page limits. Most consequential pre-trial issues can be resolved with short briefs filed in a timely way that set out the key arguments. It is typically a waste of time to bury the Court in paper, especially with motions filed shortly before trial.

Better Trials Through Trial Agreements

Litigants, judges, juries, and lawyers all win when counsel can work together and agree on some simple rules at the beginning of a case to streamline discovery and trial. These agreements can reduce expense, stress, and many of the uncertainties that are associated with pretrial rulings and jury trials. We hope that these agreements can prove to be as beneficial in your cases as they have been in ours.

❖ TRIAL BUILD-UP

1. Limiting the length of trial, and of opening argument.

If the Pretrial Agreements above are used, the length of trial will already have been established during discovery. The necessary length may be modified in light of the close of discovery, but regardless, the parties should agree to limit the length of trial. Jurors and courts certainly appreciate such boundaries, as do lawyers who have participated in time-limited trials and appreciate the discipline to play for who will really testify and for how long. Openings should not normally last more than an hour per side and closing, not more than two hours per side.

2. Real witnesses may be deposed once disclosed.

Though this governs what may happen in the month before trial, it is an agreement that should be made at the start of discovery. Depositions are typically taken to discover facts and to pin down witnesses who will testify at trial so that there is no surprise. In taking depositions for the latter reason, counsel feel compelled to depose any possible fact witness. If, instead, counsel knows that he can wait until he sees the other side's real witness list to depose a witness, many unnecessary depositions can be avoided.

3. The use of an agreed form motion in limine.

Exhibit A covers things that most lawyers would agree should not be mentioned in the presence of the jury.

4. Limit exhibit lists to documents counsel intend to show to the jury.

Exhibit lists appended to pretrial orders frequently include the kitchen sink. Delegated to young attorneys, they include hundreds of documents that will never be shown to the jury, but that are included just "for the record." Experienced trial lawyers recognize that this is a waste and unnecessary. That's why is important that lead counsel commit to personally meet to try to resolve exhibit objections.

5. Stipulation that what you produce is authentic.

Almost all authenticity objections can be cured by deposition testimony if given fair warning. This agreement prevents either side from sandbagging its opponent with scores of such objections on the eve of trial when it is too late to cure the problems.

6. Agreed jury questionnaires.

In order to streamline jury selection, the parties should agree up front on a jury questionnaire to be filled out by potential jurors. Even judges that would not normally permit it are hard-pressed to deny an agreed motion to submit a jury questionnaire. Given the restrictions on lawyer voir dire in many courts, this is about the only effective way to identify jurors that should be subject to a preemptory strike.

❖ TRIAL MANAGEMENT

7. Court reporting needs.

Almost anything can be arranged if requested in advance. With many court reporters competent at real-time reporting, the parties should request this as an inexpensive substitute for daily copy.

8. "Just in time" deposition designations.

One of the most wasteful exercises required by most pretrial orders is the designation in advance of deposition testimony. In most cases, counsel over-designate and end up playing only a tiny portion of what they have designated. Unnecessary designations require unnecessary objections and counter-designations. Because of the speed with which video clips can be edited on the fly, it saves the parties and the court lots of work if deposition testimony need only be designated 48 hours before it is intended to be used.

9. How to count deposition time.

Disagreements over how to count deposition time and incentives to over counter-designate can be avoided by agreeing that only optional completeness counters count against the party who plays video clips during its case.

10. Admission upon mention of unobjected-to exhibits.

In spite of everyone's best intentions, there are always exhibits on the Trial Exhibit List that counsel decides are not important enough to display to the jury. Pre-admission of all unobjected to exhibits has the effect of cluttering up the record with these unused exhibits. The better practice is to agree that once either side mentions an unobjected to exhibit, whether in questioning a witness or making the opening statement, the exhibit is admitted. The court reporter can easily provide the clerk and parties of a daily list of mentioned and hence admitted exhibits. This agreement allows unobjected to exhibits to be used during openings and dispenses with formal offers that require "no objection" statements by opposing counsel and "admitted" rulings by the Court.

11. Fair notice of order of witnesses.

Both sides are able to assign and prepare their crosses by knowing, the weekend before the witnesses are called, of the order in which they will be called. The second, 36-hour notice, is useful if there are any unexpected changes in the order.

12. Demonstratives need not be listed on exhibit lists and need only be disclosed at the last minute.

If a chart is to be admitted into evidence and can be consulted by the jury during deliberations, it is to be listed on the Trial Exhibit list just like all other documents. But charts or power point slides prepared by counsel and intended to be teaching aids but not intended to be taken into the jury room need not be so listed. Both sides are likely to use them during openings and on direct and since they are not admitted into evidence, the only real objection would be that they violate a limine order. Because counsel prepare these up to the last minute and because the ground for objection is so limited, counsel should agree to disclose them to the other side immediately before they are displayed. There should be no need to disclose in advance those used during cross.

13. Sharing equipment and PowerPoint slides.

Most courts will require the joint use of equipment because of space limitations. Effective cross or redirect requires that you have available any demonstratives that opposing counsel just used with the witness.

❖ JUROR COMPREHENSION

14. The use and content of juror notebooks.

In our experience judges and jurors appreciate these aids to comprehension. As long as they do not become argumentative, opposing counsel can readily agree on a glossary of terms, a cast of characters, and a short chronology. There will be disagreements about what exhibits, if any, should go into the Juror Notebook, but these can be handled by an agreement that each side gets to pick 5 or 6.

15. Note-taking by jurors.

Note-taking is well accepted, although there are some courts that refuse to allow jurors to take their notes into deliberations. This defeats one purpose of allowing note taking—allowing jurors to rely upon their own notes in addition to their memories. Providing the jurors with a photo of each witness helps them remember testimony.

16. Questions by jurors.

Allowing the jurors to ask questions is an innovation that courts are increasingly allowing in order to make jurors more attentive and engaged. Because it improves juror comprehension, both sides should welcome it.

17. The use of preliminary substantive instructions and pattern instructions.

Waiting until the end of the case to tell jurors about the substantive law and what to look for is akin to asking a person to assemble a complicated piece of equipment before reading the

instructions. Increasingly courts are willing to consider some preliminary substantive instructions, particularly if the parties agree that they should be given. At some point in time, the parties should ask the Court when it wants them to submit final jury instructions—filing them with the pretrial order is usually much earlier than the Court needs them. The parties can save themselves a lot of aggravation if they will agree to use pattern instructions where they exist. If one side insists on preparing a tailor-made instruction by lifting helpful language from decisions, the other side will obviously do the same and the end result is an instruction that is too long, incomprehensible and a likely candidate for reversal.

18. Interim arguments.

Interim arguments improve jury comprehension and therefore should be encouraged. But there should be an overall time limit (e.g., each side gets an hour) and an agreement that the arguments will be made in units of a certain amount of time (e.g., 5 minutes) and be made only before or after a witness takes the stand.

19. Final instructions should be given before final arguments.

This is the case in many state courts, but the Federal Rules, for some reason, provide for the court to instruct the jury after the lawyers argue. This makes for a very awkward argument, with the lawyers having to argue the charge without having the court first give it.

(Style of Case)

PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of pretrial agreements we try to reach with the other side before discovery begins. These agreements will make life easier for both sides and should not advantage one side over the other at the outset. If we wait until we are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged.

Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
	COMMUNICATION		
1.	As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. Each side will copy all of its emails to the email group distribution list provided by the other side.		
2.	All papers will be served on the opposing party by e-mail. For purposes of calculating the deadline to respond, email service will be treated the same as hand–delivery.		
	DOCUMENTS		
3.	If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.		
4.	Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.		
5.	If the case is in federal court, the parties will seek an order from the court, under FRE 502(d), providing: Each side must initially produce		

Item No.	Description	Agreed	Source of Agreement
	electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated. Whether in federal court or not, the parties will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. The parties will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.		
6.	The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.		

Item No.	Description	Agreed	Source of Agreement
7.	Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.		
	DEPOSITIONS		
8.	Before depositions begin, we will try to agree on how long the trial will last and ask the Court to give us a firm trial setting and to establish the length of the trial. Whatever time is allotted will be divided equally.		
9.	Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. Each side gets 10 depositions lasting for 3 hours each.		
10.	At depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation or to the form of the question will be reserved until trial, so there will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments/objections to the jury.		
11.	All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.		
12.	The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions.		
13.	The parties will share the expense of imaging all deposition exhibits.		

	EXPERTS		
14.	We will exchange expert witness reports that provide the disclosures required by the Federal Rules. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports.		
15.	There will be no depositions of experts unless an expert's report is incomprehensible or incomplete, in which case the party seeking clarification is required to establish the same by motion filed with the Court.		
	MOTION PRACTICE		
16.	We will agree to a briefing schedule and page limitations for all pretrial motions.		

(Style of Case)

TRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of trial agreements we try to reach with the other side before the final pretrial conference. These agreements will make life easier for both sides at trial, will aid juror comprehension, and should not advantage one side over the other.

Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
	TRIAL BUILD-UP		
1.	The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___hours to open and ___ hours to close.		
2.	Real live witness lists will be exchanged on _____. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial.		
3.	An agreed Motion in Limine (see Exh. A) plus a briefing schedule for contested limine motions.		
4.	We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on ___ that will be limited to exhibits we in good faith intend to show to the jury during trial. Deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them.		
5.	All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic.		
6.	The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference.		

Item No.	Description	Agreed	Source of Agreement
	TRIAL MANAGEMENT		
7.	The parties will jointly request real-time reporting.		
8.	Deposition designations will be deferred until 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.		
9.	Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.		
10.	All unobjected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial.		
11.	The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The parties shall further notify opposing parties 36 hours before any particular witness is called live.		
12.	Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.		
13.	The parties will share any courtroom audio-visual equipment, and will provide each other electronic versions of whatever they display immediately after the display.		

	JUROR COMPREHENSION		
14.	An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents.		
15.	The jurors can take notes, can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of looseleaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.		
16.	Jurors can direct, through the judge, questions to each witness before he leaves the stand. Attached as Exhibit B is a protocol of doing this.		
17.	The parties will exchange proposed preliminary and final jury instructions on _____ and ____, respectively; will ask the Court to give preliminary instructions; and will try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.		
18.	Each side will be allowed ____ minutes of interim argument that can be used in increments no greater than ___ minutes when no witness is on the stand.		
19.	The parties will ask the court to instruct the jury before final arguments.		

EXHIBIT A

AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401-403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401-403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401-403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401-403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401-403.

9. Pre-trial motions or matters.

Any pre-trial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401-403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401-403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401-403.

13. References to any anyone sitting in the courtroom.

Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401-403.

14. Reference to other suits.

Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.

Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.

Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.

Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party

Any reference to the wealth, religious or political beliefs or sexual preferences of any party.

OFFICE OF COURT ADMINISTRATION

MEGAN LAVOIE
Administrative Director

TO: Texas District and County Clerks

DATE: August 13, 2024

RE: Creation of the Business Court of Texas, Effective September 1, 2024

The purpose of this memo is to make you aware of the creation of the Business Court of Texas and to provide general information and instruction on the proceedings of the court and how it may affect your offices. Passed during the 88th Legislature, House Bill 19 goes into effect on September 1, 2024.

General Information

The Texas Business Court is a statewide, specialized trial court created to resolve certain complex business disputes. The business court is composed of eleven divisions. Each division is made up of the counties that compose the existing eleven Administrative Judicial Regions. (Please see Attachments A and B for a map of the business court divisions and a list of the counties composing them.) Divisions 1, 3, 4, 8 and 11 will be operational beginning September 1, 2024, and will each have two judges that are appointed by the Governor. The remaining six divisions will be abolished unless reauthorized by the Texas Legislature during the 2025 legislative session and funded through legislative appropriations.

Business Court Clerk

The administrative presiding judge of the Business Court will appoint a business court clerk, whose office will be in Austin at the William P. Clements Building at 300 W. 15th Street, Austin, Texas 78701. The clerk shall accept all filings for the business court and fulfill the legal and administrative functions of a district clerk.

If you have questions prior to the appointment of the clerk, please direct them to Interim Clerk, Beverly Crumley via email at BCClerk@txcourts.gov or by phone at (737) 710-279[redacted]

[redacted]

Filing Fees

In the Business Court:

filing fee for action originally filed in the business court..... $2500
additional filing fee for action originally filed in the business court $137
filing fee for action removed to the business court $2500
any action listed in Loc. Gov't Code § 133.151(a)(2) $80
any other motion $50
fees for services performed by the clerk ..... same as fees in Gov't Code §§ 51.318–.319
jury fee ..... as ordered by the business court

Original Filings in Business Court

An original case filed in the business court shall be filed through eFileTexas to the business court clerk. The filer shall determine the proper jurisdiction by selecting the proper division within the process developed in the e-file system. If a business court division has multiple courts, the clerk will rotate assignment of the cases between the courts in the division.

If the business court or assigned division of a business court does not have jurisdiction of the action, at the option of the party filing the action, the court shall:

(1) Transfer the action to the proper division within the business court;
(2) Transfer the action to the proper district or county court at law in the county of proper jurisdiction; or
(3) Dismiss the action without prejudice to the party's rights.

Removals to Business Court – ***Applies only to actions filed after 9/1/2024***

A party to an action filed in district court or county court at law that is within the jurisdiction of the business court may agree to remove the action to the business court.

Notice of Removal Required A party to an action originally filed in a district court or county court at law may remove the action to the business court by filing a notice of removal with:

(1) the court from which removal is sought; and
(2) the business court.

Notice Deadline

(1) When Agreed. A party may file a notice of removal reflecting the agreement of all parties at any time during the pendency of the action to have the case "transferred" to business court.
(2) When Not Agreed. The notice of removal **must** be filed:
    (A) Within 30 days after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action; or
    (B) If an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business

court's authority to hear the action, within 30 days after the date the application is granted, denied, or denied by operation of law.

Clerk Duties On receipt of the notice of removal, the clerk of the court from which removal is sought **must** immediately transfer the action to the business court as a subsequent filing, using the same procedures as a transfer of venue and include the Notice of Removal with all other file documents of the file including a docket sheet and/or case summary or index of all pleadings, service documents, and orders in the case file. A transfer certificate should be used which is provided at this link: transfer certificate and attached to this memo. If the party has not filed a notice of removal with the business court, the clerk of the original court of jurisdiction should inform the party so that they may file the required notice with the business court and the clerk of the original court of jurisdiction may transfer the case to the business court under the case number issued upon receiving the notice of removal. The business court clerk will notify the parties and original court of jurisdiction of the receipt of notice of removal and business court cause number upon the filing of the notice from the party.

Customary fees for transferring a case would apply and be paid by the party requesting the transfer.

Remand Process

If the business court does not have jurisdiction of the action, the business court shall remand the action to the court in which the action was originally filed.

(1) When required. If the business court determines, on motion or its own initiative, that the filing of the case in the business court was improper, the business court must remand the action to the court from which the action was removed.
(2) Motion To Remand.
    (A) A party may file a motion to remand the action in the business court on improper filing in the business court jurisdiction, except as provided in (B), the motion must be filed within 30 days after the notice of removal is filed.
    (B) If a party is served with process after the notice of removal is filed, the party seeking remand must file a motion to remand within 30 days after party enters an appearance.
(3) On Business Court's Own Initiative. The business court must provide the parties 10 days' notice of its intent to remand on its own initiative providing an opportunity to be heard on any objection.

Clerk Duties On receipt of the notice of remand, the clerk of the business court ***must*** transfer the action to the original court of jurisdiction, using same procedures as a transfer of venue. Customary fees for transferring a case would apply and be paid by the party requesting the transfer. The business court clerk will transfer all documents filed with the business court during the pendency of the case in the business court.

Actions Transferred to the Business Court

Transfer Request On its own initiative, a court may request the presiding judge for the administrative judicial region in which the court is located to transfer an action pending in the court to the business court

if the business court has the authority to hear the action. In this rule, the "regional presiding judge" means the presiding judge for the administrative judicial region in which the court is located.

Notice and Hearing The court must notify all parties of the transfer request and, if any party objects, must set a hearing on the transfer request in consultation with the regional presiding judge. The regional presiding judge must self-assign to the court, conduct a hearing on the request, and rule on the request.

Transfer The regional presiding judge may transfer the action to the business court if the regional presiding judge finds the transfer will facilitate the fair and efficient administration of justice. A party may challenge the regional presiding judge's denial of a motion to transfer by filing a petition for writ of mandamus in the court of appeals district for the requesting court's county.

Remand A party may seek remand from the business court under Rule 355 within 30 days after transfer of the case.

Clerk Duties The clerk of original jurisdiction must transfer the case using efiletexas.gov and with guidance from the parties determine the proper region of the business court to transfer to. The business clerk must review and determine the transfer was assigned to the appropriate operating division of the business court. If the division has more than one judge, then the business clerk must alternate assignment of the case within the division.

Jury Practice and Procedure; Venue for Jury Trial

A jury trial in a case filed initially in business court shall be held in any county in which the case could have been filed, as chosen by the plaintiff. If a case were removed to the business court, the jury trial shall be held in the county in which the action was originally filed. The business court and/or clerk will contact the district court and/or clerk of the appropriate county to make arrangements for the jury trial to be scheduled. The local county will follow usual procedures for summonsing jurors, creating a list of available jurors, and compensating jurors for the business court.

The practice would be like a change of venue proceeding.

The business court will set the jury fee in an order. The local jurisdiction providing the jury service must submit an invoice to the business court providing the information necessary to issue a jury fee order. The fee will include a $300.00 fee for staff time in summonsing jurors and the use of a jury summons system; a fee for any needed security; a fee for juror pay and a fee for actual processing costs related to summonsing jurors, including postage, printing costs, and copy costs. The business court will allocate these fees between the parties, and the fees will be paid directly to the jurisdiction providing the services.

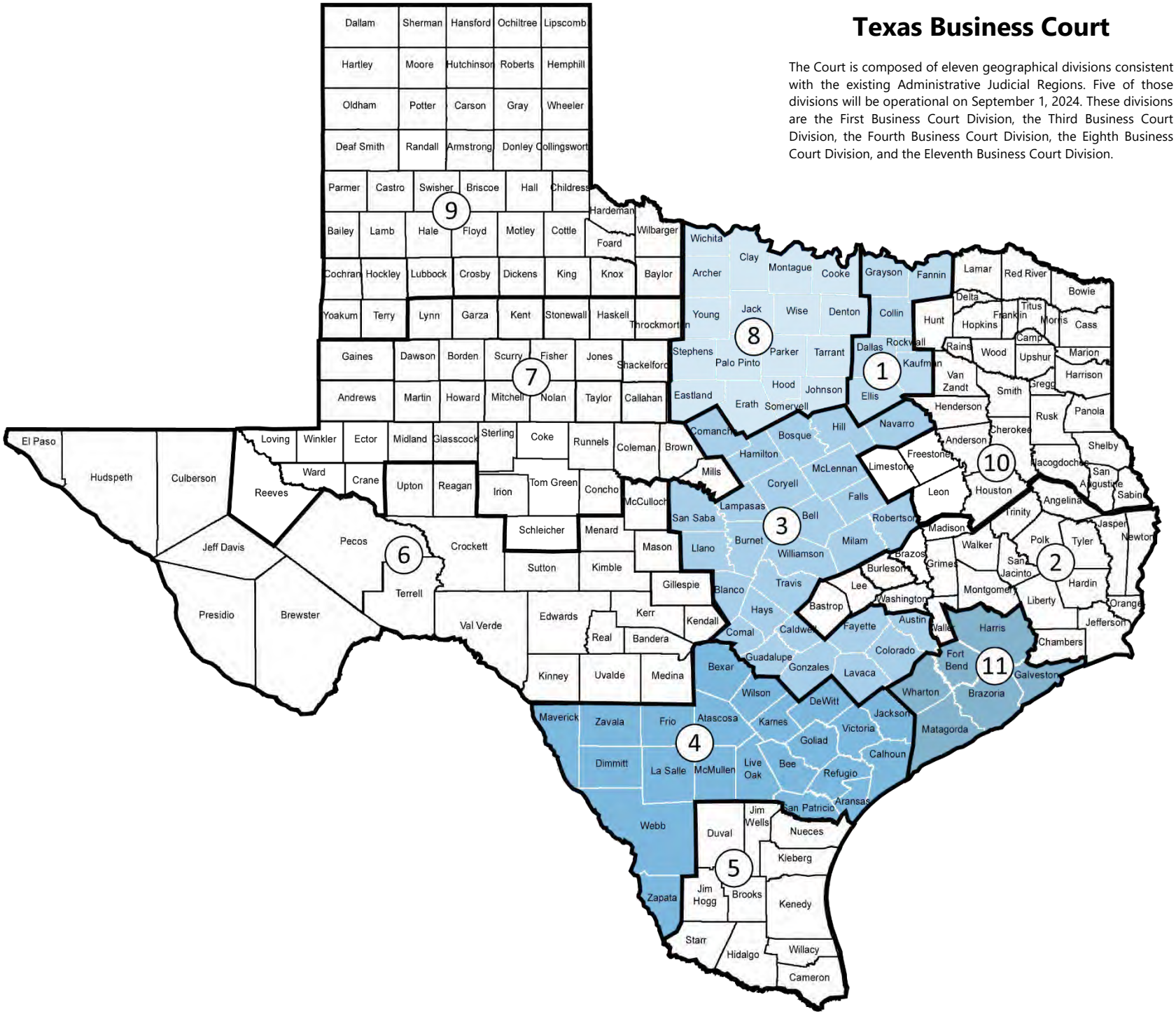
Rules Adopted by Supreme Court regarding Business Court

Supreme Court Rules for the Business Court

Supreme Court Order for Filing Fees

Texas Business Court

The Court is composed of eleven geographical divisions consistent with the existing Administrative Judicial Regions. Five of those divisions will be operational on September 1, 2024. These divisions are the First Business Court Division, the Third Business Court Division, the Fourth Business Court Division, the Eighth Business Court Division, and the Eleventh Business Court Division.



TEXAS BUSINESS COURT

Counties served by Business Court Division

1st Division	3rd Division	4th Division	8th Division	11th Division
Collin	Austin	Aransas	Archer	Brazoria
Dallas	Bell	Atascosa	Clay	Fort Bend
Ellis	Blanco	Bee	Cooke	Galveston
Fannin	Bosque	Bexar	Denton	Harris
Grayson	Burnet	Calhoun	Eastland	Matagorda
Kaufman	Caldwell	De Witt	Erath	Wharton
Rockwall	Colorado	Dimmit	Hood	
	Comal	Frio	Jack	
	Comanche	Goliad	Johnson	
	Coryell	Jackson	Montague	
	Falls	Karnes	Palo Pinto	
	Fayette	La Salle	Parker	
	Gonzales	Live Oak	Somervell	
	Guadalupe	Maverick	Stephens	
	Hamilton	McMullen	Tarrant	
	Hays	Refugio	Wichita	
	Hill	San Patricio	Wise	
	Lampasas	Victoria	Young	
	Lavaca	Webb		
	Llano	Wilson		
	McLennan	Zapata		
	Milam	Zavala		
	Navarro			
	Robertson			
	San Saba			
	Travis			
	Williamson			

CAUSE NO. _____

<Style of case>	§	IN THE <district/county> COURT FOR
vs.	§	THE <court number/judicial district>
	§	<your county> COUNTY, TEXAS

TRANSFER CERTIFICATE

THE STATE OF TEXAS §
§
COUNTY OF <your county> §

I, <Clerk's name and title>, in and for <your county> County, Texas do hereby certify that the following are true and correct electronic copies of each final order, the order to transfer, bill of costs, and any other documents requested, including previous transfer certificates (if applicable), in the transfer of this cause to (transferred county) County, Texas:

INDEX

File Date Document

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, <_CurrDate_>.

<affix court seal>

<Clerk's name, title>

<your county> COUNTY, TEXAS

By: _____ Deputy
<_UserLogged_>

STATEMENT OF RECEIPT

Transfer received from <transferring county> County, Texas, Cause No. <_CaseNum_> and filed into the <court number/judicial district> <county/district> Court of <Transferred county> County, Texas to Cause No.<CaseNum> on this the _____ day of _____, 20_____.

<affix court seal>

<Clerk's name, title>

<transferred county> COUNTY, TEXAS

By: _____ Deputy
<_UserLogged_>

Supreme Court of Texas

Misc. Docket No. 24-9037

Final Approval of Rules for the Business Court

ORDERED that:

1. On February 6, 2024, in Misc. Dkt. No. 24-9004, the Court preliminarily approved Texas Rules of Civil Procedure 352-359 and amendments to Texas Rule of Civil Procedure 2, Canon 6 of the Code of Judicial Conduct, and Texas Rules of Judicial Administration 2, 3, 4, 6.1, and 7, and invited public comment.

2. Following the public comment period, the Court made revisions to the rules. Except as provided in paragraph 3, this Order incorporates the revisions and contains the final version of the new and amended rules, effective September 1, 2024. The new rules are shown in clean form, whereas the amendments are demonstrated in redline form.

3. Amendments to Rule of Judicial Administration 7, including the proposed changes in Misc. Dkt. No. 24-9004, were finalized on February 20, 2024, in Misc. Dkt. No. 24-9006. Accordingly, those changes are not included in this Order.

4. The Clerk is directed to:

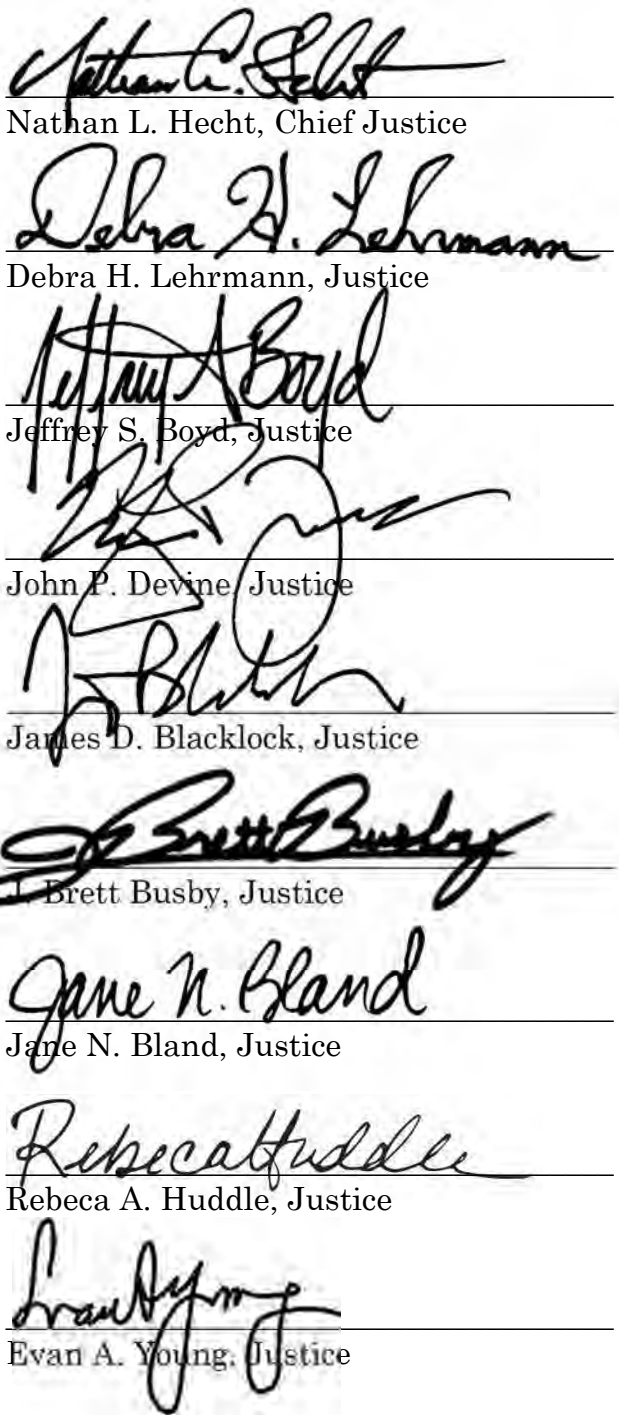
    a. file a copy of this Order with the Secretary of State;

    b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

    c. send a copy of this Order to each elected member of the Legislature; and

    d. submit a copy of this Order for publication in the *Texas Register*.

Dated: June 28, 2024.



Nathan L. Hecht, Chief Justice

Debra H. Lehrmann, Justice

Jeffrey S. Boyd, Justice

John P. Devine, Justice

James D. Blacklock, Justice

J. Brett Busby, Justice

Jane N. Bland, Justice

Rebeca A. Huddle, Justice

Evan A. Young, Justice

Misc. Docket No. 24-9037

TEXAS RULES OF CIVIL PROCEDURE

RULE 2. SCOPE OF RULES

These rules ~~shall~~ govern the procedure in the justice, county, ~~and~~ district, and business courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. ~~Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.~~

Notes and Comments

Comment to 2024 change: Rule 2 is revised to modernize the rule and clarify that the Texas Rules of Civil Procedure govern the procedures in the business court.

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Misc. Docket No. 24-9037

PART III – RULES OF ~~PROCEDURE FOR THE COURTS OF APPEALS~~PRACTICE IN THE BUSINESS COURT

***

RULE 352. THE BUSINESS COURT GENERALLY

Chapter 25A, Government Code, and Parts I, II, III, and VI of these rules govern the procedures in the business court. If there is any conflict between Parts I, II, and VI and Part III, Part III controls.

Notes and Comments

Comment to 2024 change: Part III of these rules is adopted to implement Texas Government Code Chapter 25A.

RULE 353. FEES FOR BUSINESS COURT ACTIONS

The Office of Court Administration and the business court must publish a schedule of business court fees. Parties must pay the fees as specified in the schedule, except the business court must waive fees for inability to afford payment of court costs, consistent with Rule 145, and may otherwise waive fees in the interest of justice.

Notes and Comments

Comment to 2024 change: Rule 353 is adopted to implement Texas Government Code Section 25A.018.

RULE 354. ACTION ORIGINALLY FILED IN THE BUSINESS COURT

(a) *Pleading Requirements.* For an action originally filed in the business court, an original pleading that sets forth a claim for relief—whether an original petition, counterclaim, cross-claim, or third party claim—must, in addition to the pleading requirements specified in Part II of these rules, plead facts to establish the business court's authority to hear the action. An original petition must also plead facts to establish venue in a county in an operating division of the business court.

(b) *Clerk Duties*. The business court clerk must assign the action to a division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(c) *Challenges.*

(1) To Venue. A motion challenging venue must comply with Rules 86 and 87.

(2) To Authority. A motion challenging the business court's authority to hear an action must be filed within 30 days of the movant's appearance.

(d) *Transfer or Dismissal.*

(1) Venue Transfer. If the business court determines, on a party's motion, that the division's geographic territory does not include a county of proper venue for the action, the business court must:

(A) if an operating division of the business court includes a county of proper venue, transfer the action to that division; or

(B) if there is not an operating division of the business court that includes a county of proper venue, at the request of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

(2) Authority. If the business court determines, on a party's motion or its own initiative, that it does not have the authority to hear the action, the business court must:

(A) if the determination was made on its own initiative, provide at least 10 days' notice of the intent to transfer or dismiss and an opportunity to be heard on any objection; and

(B) at the request of the party filing the action:

(i) transfer the action to a district court or county court at law in a county of proper venue; or

(ii) dismiss the action without prejudice to the parties' claims.

Notes and Comments

Comment to 2024 change: Rule 354 is adopted to implement Texas Government Code Sections 25A.006(a)-(c) and 25A.020(a)(2). Texas Government Code Section 25A.004 specifies the business court's authority to hear an action.

Misc. Docket No. 24-9037

RULE 355. ACTION REMOVED TO THE BUSINESS COURT

(a) *Notice of Removal Required.* A party to an action originally filed in a district court or county court at law may remove the action to the business court by filing a notice of removal with:

(1) the court from which removal is sought; and

(2) the business court.

(b) *Notice Contents.* The notice must:

(1) state whether all parties agree to the removal;

(2) plead facts to establish:

(A) the business court's authority to hear the action; and

(B) venue in a county in an operating division of the business court; and

(3) contain a copy of the district court's or county court at law's docket sheet and all process, pleadings, and orders in the action.

(c) *Notice Deadline.*

(1) When Agreed. A party may file a notice of removal reflecting the agreement of all parties at any time during the pendency of the action.

(2) When Not Agreed. If all parties have not agreed to remove the action, the notice of removal must be filed:

(A) within 30 days after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action; or

(B) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action, within 30 days after the date the application is granted, denied, or denied by operation of law.

Misc. Docket No. 24-9037

(d) *Effect of Notice.* A notice of removal to the business court is not subject to due order of pleading rules. Filing a notice of removal does not waive a defect in venue or constitute an appearance waiving a challenge to personal jurisdiction.

(e) *Clerk Duties.* On receipt of a notice of removal, the clerk of the court from which removal is sought must immediately transfer the action to the business court. The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

(f) *Remand.*

(1) When Required. If the business court determines, on motion or its own initiative, that removal was improper, the business court must remand the action to the court from which the action was removed.

(2) Motion to Remand.

(A) A party may file a motion to remand the action in the business court based on improper removal. Except as provided in (B), the motion must be filed within 30 days after the notice of removal is filed.

(B) If a party is served with process after the notice of removal is filed, the party seeking remand must file a motion to remand within 30 days after the party enters an appearance.

(3) On Business Court's Own Initiative. The business court must provide the parties 10 days' notice of its intent to remand on its own initiative and an opportunity to be heard on any objection.

Notes and Comments

Comment to 2024 change: Rule 355 is adopted to implement Texas Government Code Section 25A.006(d)-(g), (i)-(j) and Section 25A.020(a).

RULE 356. ACTION TRANSFERRED TO THE BUSINESS COURT

(a) *Transfer Request.* On its own initiative, a court may request the presiding judge for the administrative judicial region in which the court is located to transfer an action pending in the court to the business court if the business court has the authority to hear the action. In this rule, the "regional presiding judge" means the presiding judge for the administrative judicial region in which the court is located.

Misc. Docket No. 24-9037

(b) *Notice and Hearing.* The court must notify all parties of the transfer request and, if any party objects, must set a hearing on the transfer request in consultation with the regional presiding judge. The regional presiding judge must self-assign to the court, conduct a hearing on the request, and rule on the request.

(c) *Transfer.* The regional presiding judge may transfer the action to the business court if the regional presiding judge finds the transfer will facilitate the fair and efficient administration of justice. A party may challenge the regional presiding judge's denial of a motion to transfer by filing a petition for writ of mandamus in the court of appeals district for the requesting court's county.

(d) *Remand.* A party may seek remand from the business court under Rule 355 within 30 days after transfer of the case.

(e) *Clerk Duties.* The business court clerk must assign the action to the appropriate operating division of the business court. If the division has more than one judge, then the clerk must randomly assign the action to a specific judge within that division.

Notes and Comments

Comment to 2024 change: Rule 356 is adopted to implement Texas Government Code Section 25A.006(k).

RULE 357. EFFECT OF DISMISSAL OF AN ACTION OR CLAIM

If the business court dismisses an action or claim and the same action or claim is filed in a different court within 60 days after the dismissal becomes final, the applicable statute of limitations is suspended for the period between the filings.

RULE 358. APPEARANCE AT BUSINESS COURT PROCEEDINGS

Rule 21d governs remote proceedings in the business court, except:

(a) the business court must not require a party or lawyer to appear electronically for a proceeding in which oral testimony is heard absent agreement of the parties; and

(b) the business court must not allow or require a participant to appear electronically for a jury trial.

Notes and Comments

Comment to 2024 change: Rule 358 is adopted to implement Texas Government Code Section 25A.017.

RULE 359. MAKING A RECORD

Each judge of the business court must appoint an official court reporter from a pool selected by the Office of Court Administration. A court reporter for the business court may serve more than one judge. Unless otherwise requested by the parties, a court may make a record by electronic recording consistent with Texas Rule of Appellate Procedure 13.

RULE 360. WRITTEN OPINIONS IN BUSINESS COURT ACTIONS

(a) *When Required.* A business court judge must issue a written opinion:

(1) in connection with a dispositive ruling, on the request of a party; and

(2) on an issue important to the jurisprudence of the state, regardless of request.

(b) *When Permitted.* A business court judge may issue a written opinion in connection with any order.

Notes and Comments

Comment to 2024 change: Rule 359 is adopted to implement Texas Government Code Section 25A.016.

TEXAS CODE OF JUDICIAL CONDUCT

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts,

(f) statutory county courts, ~~and~~

(g) statutory probate courts~~.~~, and

(h) the business court.

***

TEXAS RULES OF JUDICIAL ADMINISTRATION

Rule 2. Definitions

In these rules:

a. "Chief Justice" means the Chief Justice of the Supreme Court.

b. "Presiding Judge" means the presiding judge of an administrative region.

c. "Administrative region" means an administrative judicial region created by Section 74.042 of the Texas Government Code.

d. "Statutory county court" means a court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but not including statutory probate courts as defined by Section 3(ii) of the Texas Probate Code.

e. "Business court" means a court created by Section 25A.002 of the Texas Government Code.

Rule 3. Council of Presiding Judges

a. There is hereby created the Council of Presiding Judges, composed of the Chief Justice as chairman and the ~~nine~~eleven presiding judges of the administrative regions.

***

Rule 4. Council of Judges

a. There is hereby created in each of the administrative regions a Council of Judges, composed of the Presiding Judge as Chairman, judges of the district courts, ~~and~~ statutory county courts, and business court within the region, senior judges, and former district and statutory county court judges residing in the region who have qualified to serve as judicial officers under the provisions of Section 74.055 of the Texas Government Code.

b. The Presiding Judge shall call at least one meeting each year of the Council of Judges of the administrative region, at a time and place designated by the Presiding Judge, for consultation and counseling on the state of the dockets and the civil and criminal business in the district and statutory county courts of the

administrative region and arranging for the disposition of cases and other business pending on the court dockets. At the meeting, the Council shall study and act upon the matters listed in Rule 3.e and such other matters as may be presented to the meeting by the judges in attendance.

c. The Council of Judges shall adopt rules for the administration of the affairs of the ~~district and statutory county~~ courts within the administrative region, including, but not limited to, rules for:

(1) management of the business, administrative and nonjudicial affairs of the courts;

(2) docket management systems to provide the most efficient use of available court resources;

(3) the reporting of docket status information to reflect not only the numbers of cases on the dockets but also the types of cases relevant to the time needed to dispose of them;

(4) meaningful procedures for achieving the time standards for the disposition of cases provided by Rule 6;

(5) such other matters necessary to the administrative operations of the courts; and

(6) judicial budget matters.

d. The expenses of judges attending meetings of the Council of Judges may be paid from funds provided by law.

***

Rule 6. Time Standards for the Disposition of Cases.

Rule 6.1 District, ~~and~~ Statutory County, and Business Courts.

District ~~, and~~ statutory county ~~court~~, and business court judges ~~of the county in which cases are filed~~ should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standards:

***

Supreme Court of Texas

Misc. Docket No. 24-9047

Fees Charged in the Supreme Court, in Civil Cases in the Courts of Appeals, Before the Judicial Panel on Multi-District Litigation, and in the Business Court

ORDERED that:

Effective September 1, 2024, the following fees apply except to persons exempt by law.

In the Supreme Court:

petition for review	$155
additional fee if petition for review is granted	$75
original proceeding	$155
additional fee if original proceeding is granted	$75
certified question from a federal court of appeals	$180
direct appeal to the Supreme Court	$205
any other proceeding filed in the Supreme Court	$180
administering an oath with sealed certificate of oath	$5
certified copy including certificate and seal	$0.50 per page, $5 minimum
comparing and certifying copy of document	$0.50 per page, $5 minimum
motion for rehearing	$15
motion not otherwise listed	$10
exhibit tendered for oral argument	$25

In the Courts of Appeals:

appeal from a district or county court	$205
original proceeding	$155
administering an oath with sealed certificate of oath	$5
certified copy including certificate and seal certification	$1.00 per page, $5 minimum
comparing and certifying copy of document	$1.00 per page, $5 minimum
motion for rehearing or for en banc reconsideration	$15
motion not otherwise listed	$10

exhibit tendered for oral argument..... $25

In the Supreme Court and the Courts of Appeals:

paper copy, no certificate or seal[1]..... $0.10 per side of page or part of side of page
audio tape or oral argument (if available)[1].....$1 per tape
VHS video tape of oral argument (if available)[1].....$2.50 per tape
digital video disc of oral argument (if available)[1].....$3 per DVD
personnel, overhead, and document retrieval charges ..... *see* 1 Admin. Code § 70.3

[1] A Court may authorize additional, reasonable charges for personnel, overhead, or document retrieval for services provided by the clerk or by contract with an outside entity.

Before the Judicial Panel on Multi-District Litigation:

motion to transfer to pretrial court..... $275
appeal of a pretrial court order by motion for rehearing $275
any other motion or document $50

In the Business Court:

filing fee for action originally filed in the business court[2] $2500
additional filing fee for action originally filed in the business court[3] $137
filing fee for action removed to the business court[2] $2500
any action listed in Loc. Gov't Code § 133.151(a)(2)[4] $80
any other motion[2]..... $50
fees for services performed by the clerk[2] ... same as fees in Gov't Code §§ 51.318–.319
jury fee[5] ..... as ordered by the business court

[2] This fee will be distributed to the fund to cover the costs for administering the business court.

[3] This fee stems from Loc. Gov't Code § 133.151 and will be distributed to the various state funds that would normally receive the fee as set out in that section.

[4] This fee stems from Loc. Gov't Code §§ 133.151 and 135.101 and will be distributed as follows: $45 to the various state funds that would normally receive the fee as set out in § 133.151 and $35 to the fund to cover the costs for administering the business court.

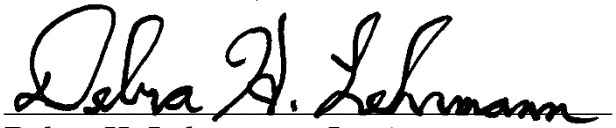
[5] The business court will set the jury fee in an order. The fee will include a $300 fee for staff time in summonsing jurors and the use of a jury summons

system; a fee for any needed security; a fee for juror pay pursuant to Gov't Code §§ 61.001, 61.002, and 61.0015; and a fee for actual processing costs related to summonsing jurors, including postage, printing costs, and copy costs. The jurisdiction providing the jury services must submit an invoice so that the business court will have the information necessary to issue the jury fee order. The business court will allocate these fees between the parties, and the fees will be paid directly to the jurisdiction providing the services.

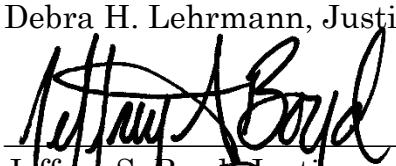
The fees for filings and actions in the business court have been adopted pursuant to H.B. 19. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 1 (H.B. 19) (adopting TEX. GOV'T CODE § 25A.018). The order supersedes the fee provisions in Misc. Docket Nos. 15-9158 (August 28, 2015), 13-9127 (August 16, 2013), 07-9138 (August 28, 2007), 03-9151 (September 10, 2003), and 98-9120 (July 21, 1998).

Dated: July 26, 2024.

Nathan L. Hecht, Chief Justice



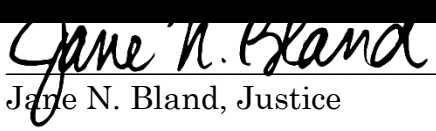
Debra H. Lehrmann, Justice



Jeffrey S. Boyd, Justice

John P. Devine, Justice

[redacted]



Jane N. Bland, Justice

Rebeca A. Huddle, Justice

Evan A. Young, Justice

inside...

THE HOUSTON lawyer

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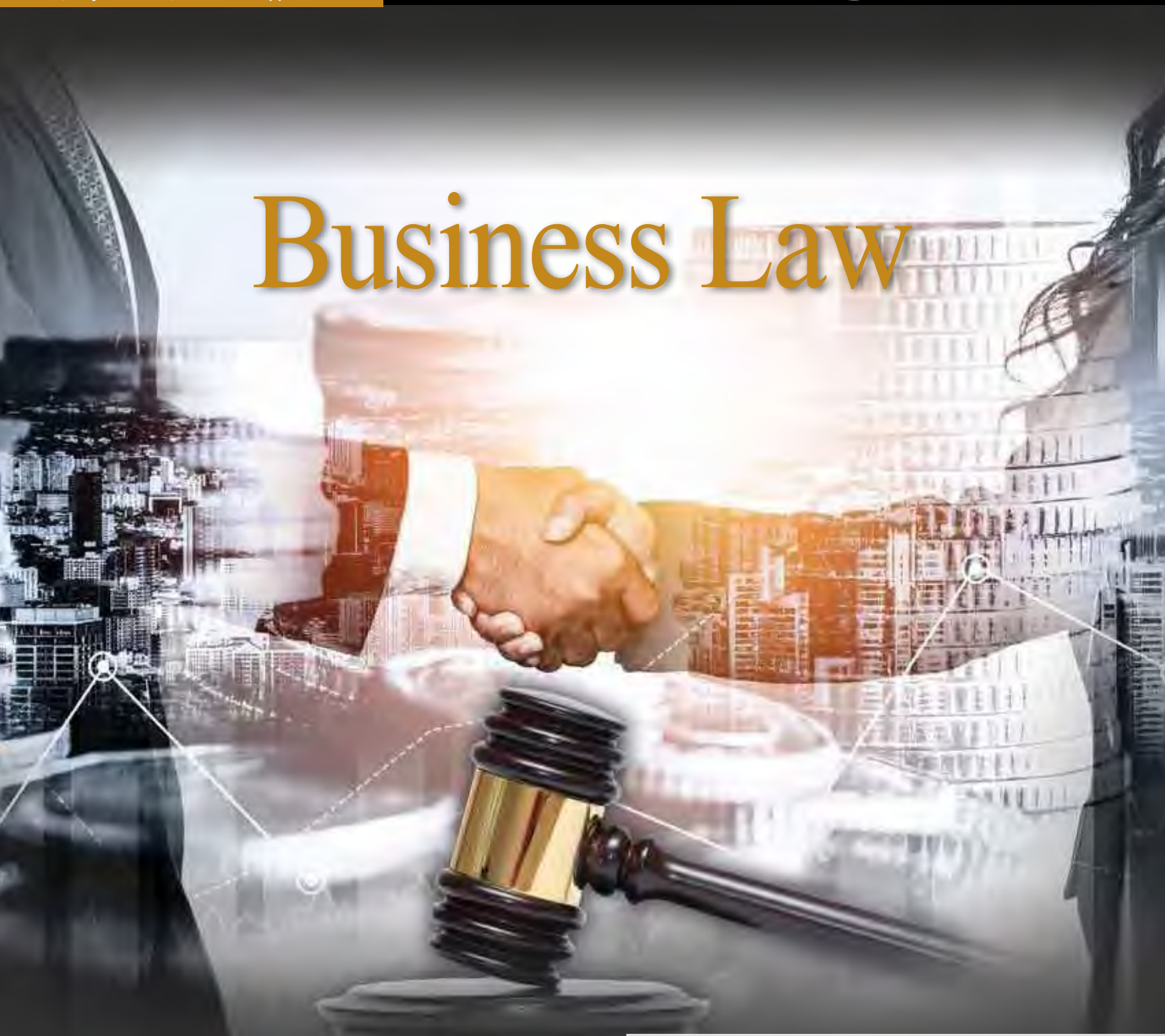
Business Law



By DAVID HARRELL

A New Texas Court Opens for Business

During Texas' 2023 legislative session, House Bill 19 created the Texas Business Court (the "Business Court") under the authority of Section 1, Article V of the Texas Constitution.[1] The bill established the court's jurisdiction to address disputes between businesses, and among businesses and their owners, directors, and management. The statute focuses on disputes such as breach of contract, breach of fiduciary duty, governance and control disputes, and violations of securities and trade regulation laws. The Business Court opened September on 1, 2024.

Where Will the Business Court Operate?

Although the Business Court has statewide jurisdiction, it will first operate in only 80 of Texas' 254 counties. Texas is divided into 11 administrative judicial regions. Though the Texas Legislature created the Business Court in all 11 regions, the court will initially operate in only five of the administrative judicial regions, including: the first (Collin, Dallas, Ellis, Fannin, Grayson, Kaufman, and Rockwall counties), third (26 counties surrounding Austin), fourth (22 counties surrounding San Antonio), eighth (18 counties surrounding Fort Worth) and eleventh (Harris, Galveston, Fort Bend, Brazoria, Matagorda, and Wharton counties).[2] Each of those five business court divisions currently has two judges.[3] The remaining six divisions will begin operations September 1, 2026, if the Texas Legislature elects to fund a court in those respective judicial regions,[4] and those six divisions will have one judge each.[5] Interestingly, three Texas counties have populations of over 500,000 residents but will not have operative business courts until 2026, if at all: Montgomery County (Second Administrative Judicial Region); Hidalgo County (Fifth Administrative Judicial Region), and El Paso County (Sixth Administrative Judicial Region).

Unlike Texas district and county courts, the Business Court judges are appointed by the governor, with advice and consent from the Texas State Senate.[6] The judges each serve two-year terms.[7] Each judge must be a licensed attorney in Texas who has 10 or more years of experience in practicing complex civil business litigation, business transaction law, and/or serving as a judge in Texas with civil jurisdiction, or any combination of those.[8] During the summer, the Texas Supreme Court adopted rules of civil procedure specific to the Business Court.[9] Meanwhile, Governor Greg Abbott appointed 10 inaugural judges to fill the following divisions of the Business Court:

Eleventh (Houston): Sofia Adrogué and Grant Dorfman
First (Dallas): Andrea Bouressa and William "Bill" Whitehill
Third (Austin): Melissa Andrews and Patrick Sweeten
Fourth (San Antonio): Marialyn Barnard and Stacy Sharp
Eighth (Fort Worth): Jerry Bullard and Brian Stagner

These judges have all the powers, duties, immunities, and privileges of a district judge.[10] Unlike district court judges, however, a Business Court must issue

written opinions in connection with dispositive rulings, if requested by a party,[11] and on an "issue important to the jurisprudence of the state," regardless of whether a party requests the written opinion.[12]

What Powers Does the Business Court Have?

Subject to the limited jurisdiction created in the new statute, the Business Court has powers similar to those enumerated for district courts by Chapter 24 of the Texas Government Code.[13] This includes the power to issue writs of mandamus, sequestration, attachment, garnishment, and supersedeas, as well as to grant any relief that may be granted by a district court. The Business Court can also preside over jury trials.[14]

What Claims Are Within the Business Court's Jurisdiction?

The Business Court has original jurisdiction, concurrent with district courts, over the following actions, subject to a $5 million minimum amount in controversy:

- derivative actions;
- disputes over an organization's governance, governing documents, or internal affairs;
- claims arising from state and federal securities or trade regulation laws against an organization or the organizations auditor, securities underwriter, or control person or managerial official for acts or omissions in that capacity;
- actions by an owner or organization against an owner, control person, or managerial official of the organization acting in that capacity;
- actions alleging that an owner, controlling person, or managerial official breached a duty owed to the organization or its owner, including breach of a duty of loyalty or good faith;
- actions alleging an owner's liability for an organization's debts (other than a contractual agreement to pay the debt); and,
- actions arising under the Texas Business Organizations Code.[15]

If a party to one of these actions is a publicly traded company, the amount in controversy requirement does not apply.[16] Subject to a minimum amount in controversy of $10 million, the Business Court also has original jurisdiction over qualified transactions, contracts agreeing to Business Court jurisdiction (excluding insurance contracts), and actions alleging violations of the Texas Finance Code or Texas Business Organizations Code by an organization other than a bank, credit union, or savings and loan association.[17] For purposes of applying this provision, a "qualified transaction" means a transaction, other than a loan or advance of money or credit by certain financial institutions, in which a person pays or lends $10 million or more.[18]

The Business Court's original concurrent jurisdiction also includes actions seeking injunctive relief or declaratory judgments involving a dispute that otherwise falls within the court's original jurisdiction.[19]

The Business Court may also exercise supplemental jurisdictions, subject to statutory restrictions, over any other claim or controversy within the court's jurisdiction that forms part of the same case or controversy. The Business Court may exercise supplemental jurisdiction only if all parties to the claim and the Business Court judge agree.[20] If the parties do not agree to the court exercising supplemental jurisdiction, the supplemental claim may proceed in a court of original jurisdiction concurrently with the Business Court proceeding. Regardless of whether all parties agree, the Business Court may not exercise supplemental jurisdiction over claims involving personal injury or death, legal malpractice, or medical liability.[21] Moreover, there are several categories of cases of which the Business Court does not have jurisdiction, unless the claim falls within the court's supplemental jurisdiction:

- civil actions by or against governmental entities;
- lien foreclosures involving real or personal property, or Mechanics, Contractors, or Materialmen's liens;
- actions involving covenants not to compete or the Deceptive Trade Practices Act;
- actions under the Texas Estates Code, Family Code, Trust Code, or Insurance Code;
- claims arising out of the production or sale of farm products;
- claims related to consumer transactions arising out of state or federal law, if the consumer in Texas is a party; and,
- actions related to the duties and obligation under an insurance policy.[22]

How Do Cases Reach the Business Court?

Parties seeking to invoke the Business Court's jurisdiction must plead facts establishing jurisdiction and proper venue in a county in one of the Business Court's operating divisions.[23] Once venue is established, the Business Court shall enter an order declaring the county in which any jury trial of the matter shall take place;[24] this statutory requirement does not appear to apply for bench trials, although the statute references "any jury trial" as opposed to cases in which a jury is demanded. Appeals from a Business Court will be to the newly-created Fifteenth Court of Appeals (which was also established by TX House Bill 19).[25]

> **"The Business Court may also exercise supplemental jurisdictions, subject to statutory restrictions..."**

There are a variety of avenues for a dispute to reach the Business Court. Plaintiffs can file an original petition in the Business Court.[26] Parties may also remove actions to the Business Court from the district court or the county court.[27] Finally, district and county courts can request that the presiding judge of an administrative region transfer a case to the Business Court to "facilitate the fair and efficient administration of justice."[28] Removal to a Business Court does not constitute an appearance that waives a special appearance to contest personal jurisdiction,[29] nor is it subject to "due order of pleadings."[30]

Looking Forward

Companies, organizers, owners, and managers should be aware of the new opportunities to have cases heard in the Business Court and should consider planning company formation and transactions to take advantage of this court. The Business Court opened September 1, 2024, with five cases filed during the first week. Four of the cases fell under the court's "qualified transaction" jurisdiction (one oil and gas dispute, two contract disputes, and a cloud on title), while the fifth is a corporate governance dispute in excess of $5 million for a private company.

Looking to the 2025 legislative session, at least two potential issues loom: (1) will the Texas Legislature fund some or all of the remaining six divisions of the Business Court, and (2) will the Texas Legislature take steps to shape how the Business Court and other courts of original jurisdiction administer cases in which the Business Court did not exercise its supplemental jurisdiction to avoid issues that may arise when overlapping claims are pending in two courts. The legal community will be confronted with these and other novel issues as we navigate this new judicial landscape. We look forward, however, to witnessing how these courts will transform the future of civil litigation.

***David Harrell** is the current president of the Houston Bar Association, co-chair of Locke Lord's Litigation Department, and chair of the firm's International Arbitration practice group.*

Endnotes

1. TEX. GOV'T CODE § 25A.002.
2. *Id.* at § 25A.003(a)(c), (e), (f), (j), and (m).
3. *Id.* at § 25A.009(a)(1).
4. *Id.* at § 25A.003(d), (g), (h), (i), (k), and (l).
5. *Id.* at § 25A.009(a)(2).
6. *Id.* at § 25A.009(a).
7. *Id.* at § 25A.009(b).
8. *Id.* at § 25A.008(a).
9. TEX. R. CIV. P. 352-360.
10. Tex. Gov't Code § 25A.005.
11. TEX. R. CIV. P. 360(a)(1).
12. TEX. R. CIV. P. 360(a)(2).
13. *Id.* at § 25A.004(a).
14. *Id.* at § 25A.015.
15. *Id.* at § 25A.004(b).
16. *Id.* at § 25A.004(c).
17. *Id.* at § 25A.004(d).
18. *Id.* at § 25A.001(14).
19. *Id.* at § 25A.004(e).
20. *Id.* at § 25A.004(f).
21. *Id.* at § 25A.004(h).
22. *Id.* at § 25A.004(g).
23. *Id.* at § 25A.006(a); TEX. R. CIV. P. 354(a).
24. *Id.* at § 25A.006(l).
25. *Id.* at § 25A.007(a).
26. *Id.* at § 25A.006(a).
27. *Id.* at § 25A.006(d); TEX. R. CIV. P. 355(a).
28. *Id.* at § 25A.006(k); TEX. R. CIV. P. 356(a).
29. *Id.* at § 25A.006(i).
30. *Id.* at § 25A.006(j).

TEXAS BUSINESS COURT

By

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16TH ANNUAL TEXASBARCLE

ESSENTIALS OF BUSINESS LAW

MARCH 20, 2025

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TEXAS BUSINESS COURT

BY

BYRON F. EGAN*

I. INTRODUCTION

Texas in 2023 created a new system of specialty trial courts (the "***Business Court***") to hear significant business related disputes and a special intermediate court of appeals to hear appeals from the Business Court. Legislation to create the Business Court was passed by the 88th Texas Legislative Session, which ended on May 29, 2023, and was signed on June 9, 2023 by Governor Greg Abbott. The Business Court was created by House Bill 19 ("***HB 19***")[1] as a new chapter 25A ("***§ 25A.001 et seq***" or "***Chapter 25A***") to the Texas Government Code (the "***Government Code***" or "***Gov. Code***") with judges to be appointed by the Governor with the consent of the Senate. A separate bill ("***SB 1045"***) amended § 22.201 of the Government Code to create a Fifteenth Court of Appeals ("***15th Court of Appeals****"*) to hear appeals from the Business Court.

Both HB 19 and SB 1045 became effective September 1, 2023, but became operational only for actions commenced on or after September 1, 2024, which allowed time for appointing judges, arranging facilities, retaining staff and adopting procedural rules. Cases commenced before September 1, 2024, may not be removed to the Business Court.[2]

The Business Court is initially seated in the major metropolitan areas of Texas (*see* map attached as ***Appendix A***) with the expectation that the Texas Legislature will ultimately expand the Business Court for the rest of Texas. The creation of the Business Court followed a long and winding road that commenced in 2015,[3] and has from the beginning been strongly supported by the Texas Business Law Foundation ("***TBLF***").[4] Prior efforts stalled in previous legislative sessions due largely to opposition from trial lawyer-focused organizations. HB 19, which ultimately garnered bipartisan support, addresses the growing need for specialized Texas state courts to handle complex business litigation.

Byron F. Egan is a partner of Jackson Walker L.L.P. in Dallas, Texas. Mr. Egan is Senior Vice Chair and Chair of the Executive Council of the ABA Business Law Section's Mergers & Acquisitions Committee and former Chair of its Asset Acquisition Agreement Task Force, and a member of the American Law Institute. Mr. Egan is a former Chairman of the Texas Business Law Foundation and is also former Chairman of the Business Law Section of the State Bar of Texas and of that Section's Corporation Law Committee.

The author wishes to acknowledge the contributions of his Jackson Walker LLP colleagues Michael Attaway, Christopher R. Bankler and J. Scott Rose and Business Court Judge William G. Whitehill.

[1] The final enrolled version of HB 19 as signed into law by Governor Greg Abbott and its legislative history can be found at: https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=HB19.

[2] *Energy Transfer LP,* 2024 WL 4648110; *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.,* No. 24-BC01B-0007, 2024 TEX. BUS. 2; *Tema Oil and Gas Co. v. ETC Field Servs., LLC,* No. 24-BC08B-0001, 2024 TEX. BUS. 3; *Morningstar Winans,* No. 24-BC04-0002, 2024 TEX. BUS. 5; and *XTO Energy Inc. v. Houston Pipeline Company, et al,* No. 24-BC11B-0006, 2024 TEX. BUS. 6.

[3] *See* Byron F. Egan, Texas Chancery Courts: The Missing Link to More Texas Entities, *Texas Bar Journal*, Vol. 79, No. 2 at 98 (Feb. 2016).

[4] For further information on the TBLF, see: https://www.jw.com/wp-content/uploads/2016/09/1239.pdf.

The Business Court is designed to handle a wide range of business disputes, including contract disputes, fiduciary duty claims, and other corporate governance issues. In creating a dedicated venue for resolving business disputes, the Legislature sought to expedite proceedings, install judges with specialized expertise, deliver more predictable outcomes for business disputes, and ultimately attract more businesses to Texas. Any challenges to the constitutionality of the Business Court will be decided by the Texas Supreme Court, which has been given exclusive and original jurisdiction over any such disputes.[5]

The major components of HB 19 and SB 1045 include:

II. JUDGES WITH EXPERTISE AND TRAINING IN COMPLEX BUSINESS MATTERS

2.1 The Business Court is staffed with judges appointed by the Governor who possess specialized knowledge and expertise in handling complex business disputes. Judges are appointed for a two year initial term and may be reappointed by the Governor.[6] By fostering a high level of expertise among the judiciary, the objective is to provide a dedicated forum with a specialized judiciary that mirrors that of other popular venues for business disputes, while at the same time applying established Texas law.

2.2 A Business Court judge must be at least 35 years of age, a United States citizen and have been a resident of a county within the Division of the Business Court to which the judge is appointed for at least five years before appointment and must be a licensed attorney in Texas who has 10 or more years of experience in: (a) practicing complex civil business litigation; (b) practicing business transaction law; (c) serving as a judge of a court in Texas with civil jurisdiction; or (d) any combination of such experience.[7] A Business Court judge may not have had his or her license to practice law revoked, suspended or subject to a probated suspension.[8]

III. OPINIONS, PROCEDURES AND POWERS

3.1 The Supreme Court has adopted rules for the issuance of written opinions by the Business Court and set fees for filings and actions in the Business Court in accordance with HB19.[9] The Supreme Court and the Court of Criminal Appeals have approved rules of civil and appellate procedure for the Business Court and the 15th Court of Appeals, including rules providing for the removal and remand of cases to and from the Business Court and the assignment of cases to judges of the Business Court.[10] The Business Court itself has adopted rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.[11] Except as

[5] *See infra* Sections 11.1-11.3.
[6] HB 19 § 6; §§ 25A.008, 25A.009.
[7] § 25A.008(a).
[8] § 25A.008(b).
[9] § 25A.016.
[10] Supreme Court of Texas Misc. Docket Nos. 24-9004 and 24-90051 (Feb. 6, 2024) and Court of Criminal Appeals of Texas Misc. Docket No. 24-002 (Feb. 6, 2024); § 25A.020.
[11] See Local Rules of the Texas Business Court, which can be found on the website of the Business Court local-rules-of-the-business-court-of-texas.pdf (txcourts.gov), and which provides: The Local Rules will be uniformly applied in the Texas Business Court. However, parties must familiarize themselves with the Court's website (TJB | About Texas Courts | Business Court (txcourts.gov)) and the information available there, including any judge-or-division-specific practices, standing

otherwise provided in Chapter 25A, the practices, procedures, rules of evidence, issuance of process and writs and all other matters pertaining to the conduct of trials, hearings and other business in the Business Court are governed by the laws and rules prescribed for Texas district courts.

3.2 Business Court judges issue written opinions explaining their decisions, which is a departure from the standard practice of most Texas civil district courts. These opinions are intended to enhance the predictability of legal issues for Texas businesses by providing concrete guidance for critical issues of Texas corporate governance, fiduciary duties of officers, directors and managers, and interpretation of complex business transactional documents.

3.3 The Business Court adopted simplified filing requirements, expedited scheduling, and enhanced case management techniques tailored to the unique needs of commercial litigation. The expectation is that such measures will reduce delays, improve efficiency, and provide litigants with a more predictable and timely resolution of their disputes.

3.4 The Business Court has the powers provided to Texas district courts by Chapter 24 of the Government Code, including the power to issue writs of injunction, mandamus, sequestration, attachment, garnishment and supersedeas, and to grant any relief that may be granted by a district court.[12] A Business Court judge has all the powers, duties, immunities and privileges of a Texas district judge.[13]

IV. JURIES.

4.1 HB 19 provides that a party in an action pending in the Business Court has the right to a trial by jury "when required by the constitution."[14]

4.2 A jury trial in a case filed initially in the Business Court must be held in a county in which the case could have been filed under Texas Civil Practice and Remedies Code § 15.002.[15] A jury trial in a case removed to the Business Court must be held in the county in which the action was originally filed.[16] However, a jury trial for a case in which a written contract specifies a county as venue for lawsuits must be held in that county.[17] The parties and the Business Court judge may agree to hold the jury trial in any other county, but a party may not be required to agree to hold the jury trial in a different county.[18] The drawing of jury panels, selection of jurors and other jury-related practice and procedure in the Business Court are to be the same as for the district court in the county in which the trial is held.[19]

orders, the fee schedule, and various forms provided for the parties' convenience and use. These Local Rules are effective from the date of adoption through February 28, 2025, unless earlier revised by the Court.

[12] § 25A.004.
[13] § 25A.005.
[14] § 25A.015((a).
[15] § 25A.015(b).
[16] § 25A.015(c).
[17] § 25A.015(d).
[18] § 25A.015(3).
[19] § 25A.015(f) and (g).

V. GEOGRAPHIC DIVISIONS

5.1 HB 19 creates a statutory court under § 1, Article V of the Texas Constitution and calls the new court a "business court."[20]

5.2 New Chapter 25A of the Government Code specifies that the judicial district of the Business Court is composed of all counties in Texas and has eleven geographic Divisions ("***Divisions***"),[21] five of these Divisions are in main metropolitan areas, have no subsequent conditions to their creation, and began to hear cases commencing September 1, 2024.[22] The five initial Divisions that began operations on September 1, 2024 are: the First Business Court Division [Dallas], Third Business Court Division [Austin], Fourth Business Court Division [San Antonio], Eighth Business Court Division [Fort Worth] and Eleventh Business Court Division [Houston].[23]

[20] § 25A.002.

[21] The Business Court Divisions are defined to match their correspondingly numbered Administrative Judicial Regions, as defined in Section 74.042 of the Government Code (§ 25.003).

[22] § 25A.003.

[23] The five Divisions are:

(a) First Administrative Judicial Region is composed of the counties of Collin, Dallas, Ellis, Fannin, Grayson, Kaufman, and Rockwall;

(b) Third Administrative Judicial Region is composed of the counties of Austin, Bell, Blanco, Bosque, Burnet, Caldwell, Colorado, Comal, Comanche, Coryell, Falls, Fayette, Gonzales, Guadalupe, Hamilton, Hays, Hill, Lampasas, Lavaca, Llano, McLennan, Milam, Navarro, Robertson, San Saba, Travis, and Williamson;

(c) Fourth Administrative Judicial Region is composed of the counties of Aransas, Atascosa, Bee, Bexar, Calhoun, DeWitt, Dimmit, Frio, Goliad, Jackson, Karnes, LaSalle, Live Oak, Maverick, McMullen, Refugio, San Patricio, Victoria, Webb, Wilson, Zapata, and Zavala;

(d) Eighth Administrative Judicial Region is composed of the counties of Archer, Clay, Cooke, Denton, Eastland, Erath, Hood, Jack, Johnson, Montague, Palo Pinto, Parker, Somervell, Stephens, Tarrant, Wichita, Wise, and Young;

(e) Eleventh Administrative Judicial Region is composed of the counties of Brazoria, Fort Bend, Galveston, Harris, Matagorda, and Wharton.

5.3 The remaining six Business Court Divisions[24] will be abolished on September 1, 2026, unless reauthorized by the 2025 Texas Legislature and funded through additional legislative appropriations at that time.[25]

VI. JURISDICTION OF THE BUSINESS COURT

6.1 The Business Court has civil jurisdiction concurrent with district courts in two different sets of specified actions in which the amount in controversy exceeds (1) $5,000,000 and (2) $10,000,000. In each case, the minimum amount in controversy excludes interest, statutory damages, exemplary damages, penalties, attorneys' fees and court costs.

6.2.1. The specified $5 million-minimum actions[26] include a (1) a derivative proceeding, (2) an action regarding the governance, governing documents or internal affairs of an organization, (3) an action in which a claim under a state or federal securities or trade regulation law is asserted against (a) an organization, (b) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person 's capacity as such, (c) an underwriter of securities issued by the organization or (d) the auditor of an organization, (4) an action by an organization, or an owner of an organization, if the action is brought against an owner, controlling person or managerial official of the organization and alleges an act or omission by that person in the person's capacity as such, (5) an action alleging that an owner, controlling person or managerial official breached a duty owed to an organization or an owner of an organization, including breach of a duty of loyalty or good faith, (6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by that person in a capacity other than as an owner or governing person, and (7) an action arising out of the Texas Business Organizations Code ("***TBOC***").[27]

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[24] The six remaining Business Court Divisions (which did not become operational in 2024) (§ 25A.003(n)) are:

(a) Second Administrative Judicial Region is composed of the counties of Angelina, Bastrop, Brazos, Burleson, Chambers, Grimes, Hardin, Jasper, Jefferson, Lee, Liberty, Madison, Montgomery, Newton, Orange, Polk, San Jacinto, Trinity, Tyler, Walker, Waller, and Washington;

(b) Fifth Administrative Judicial Region is composed of the counties of Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Nueces, Starr, and Willacy;

(c) Sixth Administrative Judicial Region is composed of the counties of Bandera, Brewster, Crockett, Culberson, Edwards, El Paso, Gillespie, Hudspeth, Jeff Davis, Kendall, Kerr, Kimble, Kinney, Mason, McCulloch, Medina, Menard, Pecos, Presidio, Reagan, Real, Sutton, Terrell, Upton, Uvalde, and Val Verde;

(d) Seventh Administrative Judicial Region is composed of the counties of Andrews, Borden, Brown, Callahan, Coke, Coleman, Concho, Crane, Dawson, Ector, Fisher, Gaines, Garza, Glasscock, Haskell, Howard, Irion, Jones, Kent, Loving, Lynn, Martin, Midland, Mills, Mitchell, Nolan, Reeves, Runnels, Schleicher, Scurry, Shackelford, Sterling, Stonewall, Taylor, Throckmorton, Tom Green, Ward, and Winkler;

(e) Ninth Administrative Judicial Region is composed of the counties of Armstrong, Bailey, Baylor, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hutchinson, King, Knox, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Terry, Wheeler, Wilbarger, and Yoakum; and

(f) Tenth Administrative Judicial Region is composed of the counties of Anderson, Bowie, Camp, Cass, Cherokee, Delta, Franklin, Freestone, Gregg, Harrison, Henderson, Hopkins, Houston, Hunt, Lamar, Leon, Limestone, Marion, Morris, Nacogdoches, Panola, Rains, Red River, Rusk, Sabine, San Augustine, Shelby, Smith, Titus, Upshur, Van Zandt, and Wood.

[25] § 25.003(n).

[26] § 25A.004(b)

[27] § 25A.004(b).

6.2.2. For purposes of the foregoing list of specified actions with a $5,000,000 minimum amount in controversy: (i) "***controlling person***" means a person who directly or indirectly controls a governing person, officer or organization, so in theory there could be a controlling person of an individual director or officer; (ii) "***derivative proceeding***" means a civil action brought in the right of a domestic or foreign corporation, a domestic or foreign limited liability company, or a domestic or foreign limited partnership, to the extent provided by the TBOC; (iii) "***governing person***," "***governing documents***," "***internal affairs***," "***managerial official***," "***officer***," and "***owner***" are defined in Chapter 25A in a substantively similar manner to their definitions in the TBOC; and (iv) "***organization***" is defined to mean a foreign or domestic entity or association, regardless of whether the organization is for profit or nonprofit, including: (A) a corporation; (B) a limited partnership; (C) a general partnership; (D) a limited liability partnership; (E) a limited liability company; (F) a business trust; (G) a real estate investment trust; (H) a joint venture; (I) a joint stock company; (J) a cooperative; (K) a bank; (L) a credit union; (M) a savings and loan association; (N) an insurance company; and (O) a series of a limited liability company or of another entity.[28]

6.2.3. The $5,000,000 minimum for the amount in controversy does not apply if a party to the action is a "***publicly traded company,***" which is defined as an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6 of the Securities Exchange Act of 1934 and any entity that is majority owned or controlled by such an entity.[29]

6.3 The specified $10 million-minimum actions[30] include: (l) an action arising out of a "***qualified transaction***";[31](2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the Business Court has jurisdiction of the action, except an action that arises out of an insurance contract; and (3) an action that arises out of a violation of the Texas Finance Code or Texas Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization, other than a bank, credit union or savings and loan association. The phrase "***qualified transaction***" is defined in Chapter 25A to mean a transaction under which a party: (A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least $10 million; or (B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $10 million, but excludes a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution;[32] provided that the jurisdictional exclusion of banks, credit unions, and savings and loan associations does not apply where Business Court jurisdiction and venue are selected by a forum and venue selection provision in a contract that is the subject of the dispute or a subsequent agreement. [33]

6.4 The Business Court has civil jurisdiction concurrent with district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37 of the Texas Civil Practice and

[28] § 25A.001.
[29] §§ 25.001(13) and 25.004(c).
[30] § 25.003(d).
[31] As defined in § 25.001(14).
[32] § 25A.001(14).
[33] § 25A.004(d)(2); *see EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas* (4th Ed. 2023) § 2.2.2(c).

Remedies Code involving a dispute based on a claim within the court's jurisdiction described above.[34]

6.5 The Business Court also has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy, provided such supplemental claims may proceed in the Business Court only on the agreement of all parties to the claim and a judge of the Business Court Division in which the action is pending.[35] If the parties involved do not agree on the claim proceeding in the Business Court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the Business Court.[36]

6.6 Notwithstanding the foregoing, the Business Court does not have jurisdiction over the following claims: (l) a health care liability claim arising under Chapter 74 of the Texas Civil Practices and Remedies Code, (2) a claim in which a party seeks recovery of monetary damages for bodily injury or death, or (3) a claim of legal malpractice.[37] In addition, unless the claim falls within the Business Court's supplemental jurisdiction, the Business Court does not have jurisdiction over (1) a civil action brought by or against a governmental entity or to foreclose on a lien on real or personal property, (2) a claim arising out of Subchapter E of Chapter 15 (which governs covenants not to compete) and Chapter 17 (relating to deceptive trade practices) of the Texas Business & Commerce Code ("***TBCC***"), the Texas Estates Code, the Texas Family Code, the Texas Insurance Code or Chapter 53 (which governs mechanic's liens) and Title 9 (which governs trusts) of the Texas Property Code, (3) a claim arising out of the production or sale of a farm product as defined in TBCC § 9.102, (4) a claim related to a consumer transaction, as defined in TBCC § 601.001, to which a consumer in Texas is a party arising out of a violation of federal or state law, or (5) a claim related to the duties and obligations under an insurance policy.[38]

VII. APPOINTMENT AND TERMS OF BUSINESS COURT JUDGES

7.1 As required by Chapter 25A, the Governor has appointed two judges to each of the First, Third, Fourth, Eighth and Eleventh Business Court Divisions.[39] Between July l, 2026 and September 1, 2026, and if the Legislature provides the funding, the Governor is required to appoint one judge to each of the remaining six Divisions of the Business Court.[40]

7.2 A Business Court judge is appointed to serve for a term of two years beginning on September 1 of every even-numbered year. Business Court judges may be reappointed.[41] Any appointments by the Governor are with the advice and consent of the Texas Senate.[42] If a Business Court judge

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[34] § 25.004(e).
[35] § 25A.004(f); Rule 2 of the Local Rules of the Texas Business Court provides: A party is deemed to agree to this Court's supplemental jurisdiction of any claim, including a counterclaim, cross-claim, or third-party claim, unless that party moves to sever or otherwise objects within 30 days after the later of (1) the moving party's appearance in this Court; or (2) the filing of the first pleading or removal notice containing fair notice of the claim.
[36] *Id.*
[37] § 25.004(h).
[38] § 25A.004(g).
[39] § 25A.009(a)(1).
[40] §§ 25A.001(a)(2) and 25A.003.
[41] § 25A.009(b).
[42] § 25A.009(a).

vacancy occurs, the Governor, with the advice and consent of the Senate, must appoint another person to serve for the remainder of the unexpired term.[43]

7.3 A Business Court judge may be removed from office in the same manner and for the same reasons as a state district judge.[44] A Business Court judge is disqualified and subject to mandatory recusal for the same reasons a state district judge is subject to disqualification or recusal in a pending case, pursuant to the same procedures as used for a district judge. [45]

7.4 Being a Business Court judge is a full-time job. A Business Court judge may not engage in the private practice of law.[46]

7.5 The Chief Justice of the Texas Supreme Court can assign to serve, as a visiting judge of a Division of the Business Court, a retired or former judge or justice who satisfies the qualifications required of a Business Court judge.[47] A visiting judge on the Business Court is subject to objection, disqualification or recusal in the same manner as a visiting district judge.[48]

VIII. INITIAL FILING, REMOVAL AND REMAND

8.1 An action within the jurisdiction of the Business Court may be filed in the Business Court. The party filing the action must plead facts to establish Business Court subject matter jurisdiction and venue in a county in a Division of the Business Court, and the Business Court is required to assign the action to that Division.[49] Venue may be established as provided by law or, if a written contract specifies a county as venue for the action, as provided by the contract.[50]

8.2 If the Business Court does not have jurisdiction of the action, the court must, at the option of the party filing the action, either transfer the action to a district court or county court at law (in a county of proper venue) or dismiss the action without prejudice to the party's rights.[51] After an action is assigned to a Division of the Business Court, if the Business Court determines that the Division's geographic territory does not include a county of proper venue for the action, the court must: (l) if an operating Division of the Business Court includes a county of proper venue, transfer the action to that Division; or (2) if there is not an operating Division of the Business Court that includes a county of proper venue, at the option of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.[52]

8.3 A party to an action filed in a district court or county court at law that is within the jurisdiction of the Business Court may remove the action to the Business Court.[53] If the Business Court does not have jurisdiction of the action, the Business Court must remand the action to the court in which

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[43] § 25A.010.
[44] § 25A.012(a).
[45] § 25A.012(b).
[46] § 25A.013.
[47] § 25A.014(a).
[48] *Id.*
[49] § 25A.006(a).
[50] *Id.*
[51] § 25A.006(b).
[52] § 25A.006(c).
[53] § 25A.006(d).

the action was originally filed.[54] A party to an action filed in a district court or county court at law in a county of proper venue that is not within an operating Division of the Business Court in which the action is filed may not remove or transfer the action to the Business Court.[55]

8.4 The right to remove an action to the Business Court has time deadlines. A party may file an agreed notice of removal at any time during the pendency of the action.[56] If all parties to the action have not agreed to remove the action, the notice of removal must be filed: (1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the Business Court's jurisdiction over the action; or (2) if an application for temporary injunction is then pending, not later than the 30th day after the date such application is granted, denied, or denied as a matter of law. The notice of removal must be filed with the Business Court and the court in which the action was originally filed.[57] On receipt of the notice, the clerk of the court in which the action was originally filed is required immediately to transfer the action to the Business Court in accordance with rules adopted by the Texas Supreme Court, and the Business Court clerk must assign the action to the appropriate Division of the Business Court.[58]

8.5 The judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the Business Court if the action is within the Business Court's jurisdiction.[59] The judge is required to notify all parties of the transfer request and request a hearing on the transfer request.[60] After a hearing on the request, the presiding judge may transfer the action to the Business Court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice.[61] The Business Court clerk must assign an action that is so transferred to the appropriate Division of the Business Court.[62]

8.6 Upon establishment of jurisdiction and venue over an action, the Business Court judge must by order declare the county in which any jury trial for the action will be held as determined under Section 25A.015.

IX. APPEALS

Except in instances when the Texas Supreme Court has concurrent or exclusive jurisdiction, the Fifteenth Court of Appeals has exclusive intermediate jurisdiction over an appeal from an order or judgment of the Business Court or an original proceeding relating to an action or order of the Business Court.[63] It also has intermediate jurisdiction over civil cases brought by or against the State or any of its instrumentalities other than various criminal, family law and tort matters.[64] The 15th Court of Appeals has statewide jurisdiction, is located in Austin, Texas, and has a chief justice

[54] *Id.*
[55] § 25A.006(e).
[56] § 25A.006(f).
[57] *Id.*
[58] § 25A.006(g).
[59] § 25A.006(k).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] § 25A.007; Gov. Code § 22.220(d).
[64] Gov. Code §§ 22.201 and 22.2151.

and four other justices.[65] The procedures governing an appeal or original proceeding from the Business Court are generally the same as the procedures for an appeal or original proceeding from a district court.

X. ADMINISTRATION OF THE BUSINESS COURT

10.1 The appointed Business Court judges, by majority vote, not later than the seventh day after the first day of a term, must select one of their members to serve as administrative presiding judge for the duration of the term.[66] If a vacancy occurs in the position of administrative presiding judge, the remaining Business Court judges must select as soon as practicable a judge of the court to serve as administrative presiding judge for the remainder of the unexpired term.[67]

10.2 The administrative presiding judge of the Business Court must manage administrative and personnel matters on behalf of the Business Court and must appoint a clerk whose office is to be located in Travis County in facilities provided by the State of Texas.[68] The clerk must accept all filings in the Business Court and fulfill the legal and administrative functions of a district clerk.

10.3 Each Business Court judge must maintain chambers in the county the judge selects within the geographic boundaries of the Division to which the judge is appointed in facilities provided by the State of Texas.[69] A Business Court judge may hold court at any courtroom within the geographic boundaries of the Division to which the judge is appointed as the court determines necessary or convenient for a particular civil action.[70] To the extent practicable, a county using existing courtrooms or facilities must accommodate the Business Court in the conduct of the court's hearings and other proceedings.

10.4 Remote proceedings, other than a jury trial, may be conducted in the Business Court to facilitate the resolution of a matter before the court.[71] However, the Business Court may not require a party or attorney to remotely attend a court proceeding in which oral testimony is heard unless the parties agree.[72] The Business Court must provide reasonable notice to the public that a proceeding will be conducted remotely and an opportunity for the public to observe the remote proceeding.[73]

10.5 In a county in which a Business Court Division sits, the sheriff, in person or by deputy, must attend the Business Court as required by the court.[74] The sheriff or deputy is entitled to reimbursement from the State of Texas for the cost of attending the Business Court.[75] The Business Court has authority to appoint personnel necessary for the operation of the court, including personnel to assist the clerk of the court, staff attorneys for the court, staff attorneys for each judge

[65] Gov. Code §§ 22.201, 21.2151 and 22.216.
[66] § 25A,009(d).
[67] *Id.*
[68] § 25A.017(c).
[69] § 25A.017(d).
[70] § 25A.017(d).
[71] § 25A.017(a).
[72] *Id.*
[73] § 25A.017(g).
[74] § 25A.017(h).
[75] *Id.*

of the Business Court, court coordinators and administrative assistants.[76] All personnel, including the Business Court clerk, are employees of the Office of Court Administration of the Texas Judicial System and are state employees for all purposes, including accrual of leave time, insurance benefits, retirement benefits, and travel regulations.[77] The Business Court is administratively attached to the Office of Court Administration of the Texas Judicial System, but that Office does not have any authority or responsibility related to the duties of the Business Court.[78] That Office must provide administrative support to the Business Court as necessary to enable the Business Court to carry out its duties under Chapter 25A and may employ personnel necessary to provide administrative support to the Business Court.

10.6 To promote the orderly and efficient administration of justice, the Business Court judges may exchange benches and sit and act for each other in any matter pending before the court.[79]

10.7 The Office of Court Administration of the Texas Judicial System is required to submit to the Texas Legislature a report on the number and types of cases heard by the Business Court in the preceding year no later than December 1 of each year with respect to the preceding year.[80]

XI. CHALLENGES TO CONSTITUTIONALITY OF BUSINESS COURT

11.1 As HB 19 was being debated in the Legislature, some opponents suggested that they would challenge its constitutionality in the courts. As a consequence, Section 4 of HB 19 provides that "The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act and may issue injunctive or declaratory relief."[81]

11.2 Chapter 25A of the Government Code provides that the Business Court is a statutory court created by the Texas Legislature under Article 5, Section 1 of the Texas Constitution:

> Sec. 1. JUDICIAL POWER VESTED IN COURTS; LEGISLATIVE POWER REGARDING COURTS. The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Legislature's authority to create new courts and provide for the selection of their judges was upheld by the Texas Supreme Court in *Jordan v. Crudgington*, 149 Tex. 237, 231 S.W. 2d 641 (Tex. 1950). Some opponents of the Business Court have claimed that the Business Court is unconstitutional because its structure and powers are comparable to those of a state district court, making it a *defacto* state district court without complying with other provisions of the Texas Constitution applicable to state district courts. These arguments track the dissenting opinion in *Jordan*, which was not persuasive to the Texas Supreme Court majority in 1950, or to the Texas Legislature in 2023.

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[76] § 25A.017(i).
[77] § 25A.017(i).
[78] § 25A.0171.
[79] § 25A.009(f).
[80] § 21.0171(a).
[81] HB 19 § 4(a).

The constitutionality of the 15th Court of Appeals was challenged, and upheld, by the Texas Supreme Court in *In Re Dallas County Texas and Marian Brown in her official capacity as Dallas County Sheriff*, 697 S.W. 3d 142 (Tex. 2024), in which the Supreme Court wrote:

> We hold that the Fifteenth Court is a constitutional court of appeals, that the jurisdictional provisions in S.B. 1045 do not violate Article V, § 6(a) of the Constitution, and that the appointment of the new court's justices complies with Article V. § 28(a) of the Constitution and applicable statutes. Without hearing oral argument, we construe the County's injunction request as a petition for writ of mandamus and deny all requested relief.

11.3 If the appointment of judges by the Governor to the Business Court is held by the Texas Supreme Court to be unconstitutional, the Business Court will instead be staffed by retired or former judges or justices who are appointed to the Business Court as provided for visiting judges and justices in Chapter 25A. Such appointments would be made by the Chief Justice of the Supreme Court and not the Governor.

XII. SAMPLE FORUM SELECTION PROVISIONS

Parties can insert forum selection clauses in their governing documents and contracts that specify that qualifying disputes will be adjudicated in Business Court.[82]

12.1 A forum selection clause for a contract could read as follows:

> Any claim, charge, allegation, demand, suit, cause of action, action, complaint, dispute or controversy ("***Claim***") arising out of, relating to, or in connection with, this Agreement or any conduct related to, arising out of, or in connection with, the performance or nonperformance of this Agreement, including an action or claim regarding the interpretation, inducement, performance or nonperformance of this Agreement, whether in law or in equity, shall exclusively be brought in the [First] Business Court Division of the State of Texas ("***Texas Business Court")*** (and [, if the Claim would be within the Court's supplemental jurisdiction][83] the parties shall have an affirmative obligation to seek any needed consent of a judge of the Texas Business Court to include the Claim), if the matter meets the jurisdictional requirements of the Texas Business Court and the Texas Business Court is then accepting new case filings; and, if the Claim does not meet the jurisdictional requirements of the Texas Business Court or it is not then accepting new filings, then the matter shall be exclusively brought in a federal district court in the [Northern District of Texas, Dallas] Division (the "***Federal Court***") or, if the Federal Court does not have jurisdiction, in a Texas state district court or federal district court in Dallas County, Texas.

12.2 A forum selection clause for bylaws of a Texas corporation could read as follows:

> Unless the corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim for or based on a breach of a fiduciary duty owed by any current or former director or officer or other employee of the corporation to

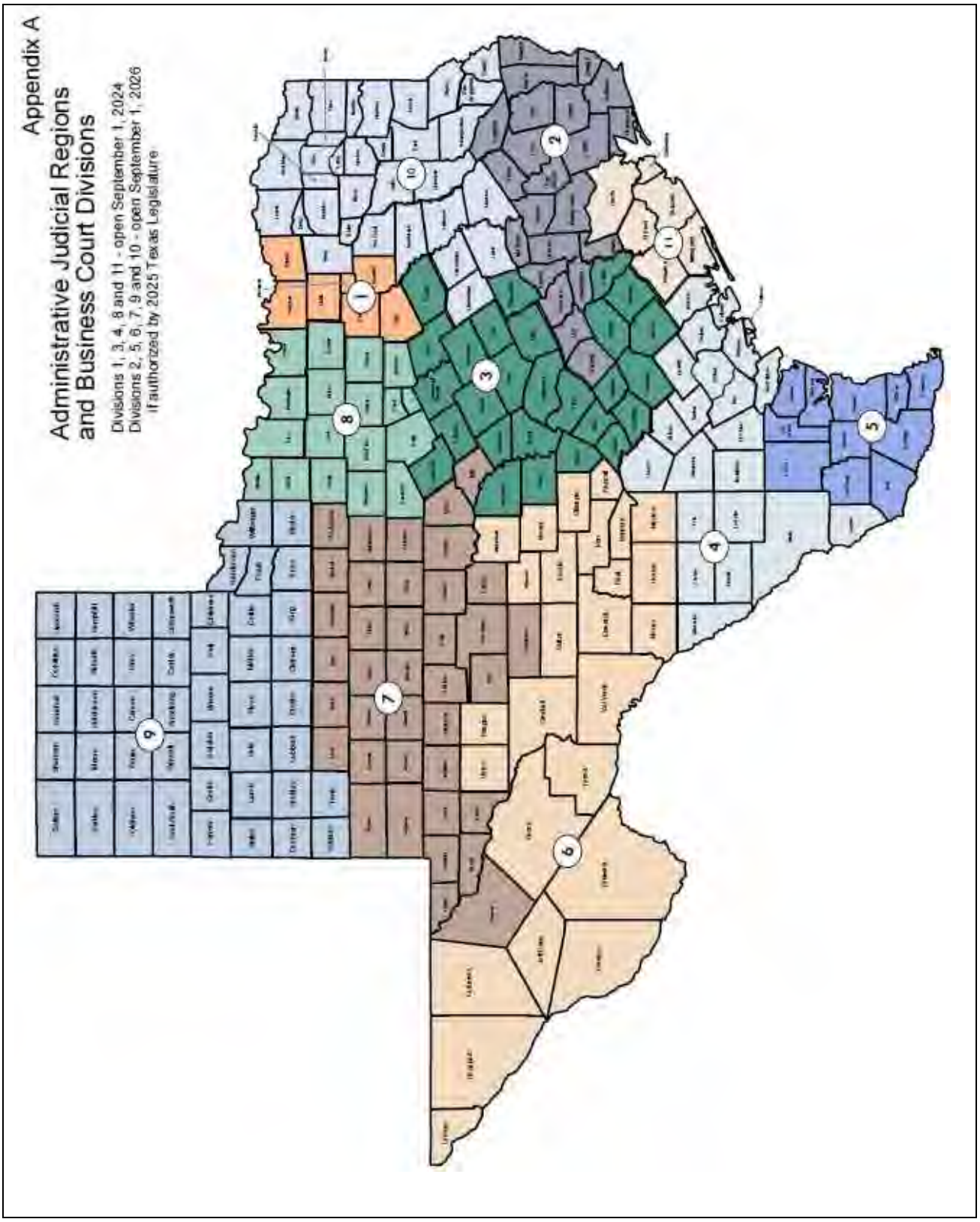
[82] *See EGAN ON ENTITIES Corporations, Partnerships and Limited Liability Companies in Texas* (4th Ed. 2023) §2.2.2(c).
[83] *See* sections 6.3 and 6.5 above.

the corporation or the corporation's shareholders, including a claim alleging the aiding and abetting of such a breach of fiduciary duty, (iii) any action asserting a claim against the corporation or any current or former director or officer or other employee of the corporation arising pursuant to any provision of the TBOC or the certificate of formation or these bylaws (in each case, as they may be amended from time to time), (iv) any action asserting a claim related to or involving the corporation that is governed by the internal affairs doctrine, or (v) any action asserting an "internal entity claim" as that term is defined in Section 2.115 of the TBOC, shall be the Texas Business Court in the [First] Business Court Division ("***Texas Business Court***") of the State of Texas; provided that if the Texas Business Court is not then accepting filings or determines that it lacks jurisdiction for such action, the United States District Court for the [Northern] District of Texas, [Dallas] Division (the "***Federal Court***") or, if the Federal Court lacks jurisdiction for such action, a Texas state district court of [Dallas] County, Texas; and provided further this Article shall not apply to any direct claims under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended.

XIII. CONCLUSION

By offering a specialized forum for resolving significant business disputes, Texas is enhancing its capacity to address the needs of its business community.

XIV. EXHIBIT A



A Primer on the Texas Business Court

by Jack Buckley DiSorbo*

On June 9, 2023, Governor Greg Abbott signed House Bill 19 and Senate Bill 1045, accomplishing what governors and legislatures have been trying to do for decades: establish a Business Court of Texas and an accompanying court of appeals. The most sweeping change to the state judiciary since the early 2000s tort reform, the Business Court is poised to revolutionize sophisticated commercial litigation in the State of Texas. This Article explains the mechanics of the new court, including jurisdiction, removal procedure, and more. It also recounts the history of the bills' passage, with consideration of why these bills succeeded where past bills failed. And finally, the Article previews the central obstacle to the Business Court's implementation: constitutional challenges to the courts' organization and procedure for selecting judges.

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INTRODUCTION

The State of Texas is known for business. In 2023, the Texas economy generated $2.4 trillion, which places it as the eighth largest economy in the world.[1] It's also known for litigation. According to recent estimates, roughly 1.58 million civil lawsuits were filed in Texas state court in 2022, 36% more than the second-most litigious state (Florida).[2] And nearly 100,000 active lawyers practice before the state bar, which is the third most in the country.[3]

But Texas is not necessarily known for its *business litigation*. The court best known for that genre is the Delaware Court of Chancery, which recently has heard highly publicized commercial disputes such as *Twitter, Inc. v. Musk*—the lawsuit filed in response to Elon Musk's threat to terminate his contract to acquire X.[4] Even so, that commercial litigation supremacy might be challenged with the genesis of a new Texas business court. Many have billed the State's new court as an alternative for business leaders and

[1] *Top Texas Touts: Economy*, TEXAS OFFICE OF THE GOVERNOR, https://gov.texas.gov/top-texas-touts-economy (last visited Feb. 16, 2024); *GDP By State*, BUREAU OF ECONOMIC ANALYSIS, https://www.bea.gov/data/gdp/gdp-state (last visited Feb. 16, 2024).

[2] *See Civil Caseload Detail*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview (Oct. 9, 2023).

[3] *See Profile of the Legal Profession 2023*, A.B.A., https://www.abalegalprofile.com/demographics.html (last visited Feb. 16, 2024).

[4] Twitter, Inc. v. Musk, No. 2022-0613-KSJM, 2022 WL 4140502 (Del. Ch. Sept. 13, 2022); Ann M. Lipton & Eric L. Talley, Twitter v. Musk*: The "Trial of the Century" That Wasn't*, 40 DEL. LAW. 8, 9 (2022).

entrepreneurs who are dissatisfied with results from the Delaware Court of Chancery.[5] Prominent examples—such as Musk's pledge to reincorporate SpaceX and Tesla in Texas in the wake of the Chancery's decision to invalidate his $55.8 billion compensation package—could suggest an untapped demand for an alternative businesses-litigation forum.[6]

For almost twenty years, Texas has tried to create that kind of alternative forum.[7] After considerable discussion with the bench, bar, and other stakeholders, and with real bipartisan support, the Texas Legislature accomplished that goal in the 2023 legislative session.[8] Two bills, House Bill 19[9] and Senate Bill 1045,[10] establish a new trial court with an array of jurisdiction over sophisticated business cases and a court of appeals with exclusive jurisdiction over business court judgments. When the doors open on September 1, 2024, the courts will begin a project to revolutionize high stakes litigation, making it faster, simpler, and more predictable.

The purpose of this Article is to introduce how those courts work, with emphasis on the Business Court. Part I offers a detailed summary of the nuts and bolts of the new court. The summary centers on the Business Court's complicated jurisdictional rules, explaining which claims may be heard before the court, and which may not. This Part also includes a discussion of the court's novel system of organization, how its judges obtain office, and who the first ten judges are. And it addresses some of the court's major

[5] *See, e.g.*, Sujeet Indap, *Texas is Throwing Down a Legal Challenge to Delaware*, FIN. TIMES (Jan. 28, 2024), https://www.ft.com/content/a02b96df-9ee1-4b3b-a31e-087b734840a1; Shauneen Miranda, *Musk's Threat to Re-Incorporate Tesla Boosts Texas' Challenge to Delaware*, AXIOS (Feb. 1, 2024), https://www.axios.com/2024/01/31/elon-musk-tesla-delaware-court-texas-law.

[6] *See* Tornetta v. Musk, No. 2018-0408-KSJM, 2024 WL 343699, at *84 (Del. Ch. Jan. 20, 2024); *Musk Says SpaceX has Moved its Incorporation to Texas from Delaware*, REUTERS (Feb. 14, 2024, 6:54 PM), https://www.reuters.com/technology/space/musk-says-spacex-has-moved-its-incorporation-texas-delaware-2024-02-15/.

[7] The Legislature has considered some form of a business court bill nearly every legislative session since 2007. *See* Tex. S.B. 1204, 80th Leg., R.S. (2007); Tex. H.B. 2906, 80th Leg., R.S. (2007); Tex. S.B. 992, 81st Leg., R.S. (2009); Tex. H.B. 1603, 84th Leg., R.S. (2015); Tex. H.B. 2594, 85th Leg., R.S. (2017); Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. H.B. 1875, 87th Leg., R.S. (2021); *see also* TEXANS FOR LAWSUIT REFORM FOUND., THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS 11–14 (2023), https://www.tlrfoundation.org/wp-content/uploads/2021/12/The-Case-for-Specialized-Business-Courts-in-Texas-2.pdf (giving an overview of the history of past business court bills).

[8] *See infra* note 143 (describing the vote breakdown).

[9] Tex. H.B. 19, 88th Leg., R.S. (2023).

[10] Tex. S.B. 1045, 88th Leg., R.S. (2023).

procedural characteristics, including filing, removal, venue, jury pools, written opinions, and appeals.

Part II considers the legislative process that led to the passage of H.B. 19 and S.B. 1045. It briefly reviews the history of specialized business courts, noting the different states that have enacted such courts. It then evaluates the past failed attempts by the Texas Legislature to pass a business court bill, which include the Judicial Panel on Complex Cases, the Texas Court of Chancery, the Business District Court, and the Court of Business Appeals.[11] Aided by insight from multiple stakeholders who helped pass H.B. 19, this Part offers an account of the legal and political obstacles to prior bills and describes the legislative process relating to the bill's passage.

Last, Part III addresses a significant obstacle to implementation of the two new courts: a constitutional challenge to the Business Court and the Fifteenth Court of Appeals. Since H.B. 19 and S.B. 1045 were introduced, supporters and opponents have argued over whether the courts' unique organization is consistent with the Texas Constitution.[12] Unlike any other trial court, the Business Court is organized as a court whose district is composed of the entire state.[13] It is divided into eleven "divisions," and, despite Texas's long tradition of choosing judges via partisan election,[14] its judges are appointed by the Governor and confirmed by the Senate.[15] And the Fifteenth Court of

[11] *See* TEXANS FOR LAWSUIT REFORM FOUND., *supra* note 7, at 13–14.

[12] *See, e.g.*, Scott Brister, *The Constitution Allows for Creating a New Statewide Appeals Court*, AUSTIN AM.-STATESMAN (May 12, 2023, 6:50 AM), https://www.statesman.com/story/opinion/columns/your-voice/2023/05/12/opinion-the-constitution-allows-for-a-new-statewide-appeals-court/70196694007/; David Coale, *Proposed 'Business Court' Isn't Worth the Constitutional Risk*, DALL. MORNING NEWS (Apr. 22, 2023, 12:01 PM), https://www.dallasnews.com/opinion/commentary/2023/04/22/proposed-business-court-isnt-worth-the-constitutional-risk/; Jason Villalba, *Why Texas Needs Business Courts*, DALL. MORNING NEWS (Mar. 21, 2023, 6:50 AM), https://www.dallasnews.com/opinion/commentary/2023/03/21/why-texas-needs-business-courts/; Steve Vladeck, *The Legislature's Shameless and Unconstitutional Court-Packing Plan*, AUSTIN AM.-STATESMAN (Mar. 19, 2023, 6:53 AM), https://www.statesman.com/story/opinion/columns/your-voice/2023/03/19/opinion-the-legislatures-shameless-and-unconstitutional-court-packing-plan/70015627007/.

[13] TEX. GOV'T CODE ANN. § 25A.003(a)–(b).

[14] For literature on the history of Texas's method of selecting judges, see generally ANTHONY CHAMPAGNE & KYLE CHEEK, JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS (2005); Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L. REV. 53 (1986); and Warren Burnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098 (1966).

[15] TEX. GOV'T CODE ANN. § 25A.009(a).

Appeals, unlike any other intermediate court of appeals, has statewide jurisdiction and its judges are elected by statewide popular vote.[16] This Part introduces the arguments made for and against the constitutionality of the two courts (but does not take a position on them).

As a whole, this Article is intended as an introduction to the new Business Court, with the bulk of the material told from a practitioner's perspective. The court, still in its infant stages, will no doubt develop its own body of procedure and law. But the overview given here hopes to provide practicing lawyers with the basics.

I. Mechanics of the Business Court

The stated purpose of H.B. 19 is to create a "specialty trial court" to hear certain sophisticated business disputes.[17] To that end, the law establishes a new statutory[18] court, with complex jurisdictional rules designed to ensure that the court hears only certain types of commercial lawsuits. The focus of this Part is to explain the Business Court's mechanics, with special attention to those jurisdictional rules. Also treated are how the court is organized, how its judges are selected, how to remove a case, general case procedure, and appeals.

Like most judicial reforms, H.B. 19 left gaps for how certain provisions would be implemented, intended to be filled either by new rules of civil procedure or local rules of the Business Court. In some places, the bill specifically directs the Texas Supreme Court to adopt new procedural rules, such as rules relating to removal.[19] The Legislature assigned the task of designing those rules to the Supreme Court Advisory Committee,[20] and the Committee presented its initial recommendations on October 13, 2023.[21] The

[16] *Id.* § 22.201(p); Tex. S.B. 1045, 88th Leg., R.S. § 1.14(b) (2023).

[17] Tex. H.B. 19, 88th Leg., R.S. 1:2–3 (2023).

[18] Tex. Gov't Code Ann. § 25A.002 ("The business court is a statutory court created under Section 1, Article V, Texas Constitution."); *but see infra* Part III.B. (discussing the argument that the Business Court is a *de facto* district court). Where possible, citation is made directly to the newly enacted statute as codified in the Texas Government Code instead of to H.B. 19 or S.B. 1045.

[19] Tex. Gov't Code Ann. § 25A.020(a)(1).

[20] *See* Memorandum from C.J. Nathan Hecht to Charles L. Babcock, Chair of Sup. Ct. Advisory Comm. 3 (June 3, 2023) (Referral of Rules Issues) *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, Texas Jud. Branch, 5–8 (Aug. 18–19, 2023), https://www.txcourts.gov/scac/meetings/2021-2030.

[21] The Committee discussed proposed rules for the Business Court and Fifteenth Court of Appeals on June 16, August 18–19, and October 13 of 2023. Transcripts of those meetings and

Texas Supreme Court gave its preliminary approval to the proposed rules on February 6, 2024, and invited public comment.[22] These rules are discussed below along with relevant statutory provisions.

A. Structure and Organization

The Business Court is organized as having one central "district" (composed of the entire state) and eleven geographic "divisions."[23] The divisions are the same as the Administrative Judicial Regions created to report to the Office of Court Administration, the administrative agency of the Texas judiciary.[24] Administrative and personnel affairs of the Business Court are managed by the presiding judge, who is elected by a majority vote of the business court judges.[25]

materials used in them may be found here: SUP. CT. ADVISORY COMM., *Meetings: 2021–2030*, https://www.txcourts.gov/scac/meetings/2021-2030/ (last visited Feb. 16, 2024). *See generally* Memorandum from Bus. Ct. Subcomm. to Sup. Ct. Advisory Comm. (Oct. 2, 2023) (Proposed Amendments to the TRCP Rules for the Business Court) [hereinafter, "Business Court Subcommittee Memorandum"] *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, TEXAS JUD. BRANCH, 4 (Oct. 13, 2023), https://www.txcourts.gov/scac/meetings/2021-2030; Memorandum from Fifteenth Ct. App. Subcomm. to Sup. Ct. Advisory Comm. (Oct. 2, 2023) (Proposed Amendments to the TRAP Rules for the Fifteenth Court of Appeals) [hereinafter, "Fifteenth Court of Appeals Subcommittee Memorandum"] *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, TEXAS JUD. BRANCH, 47 (Oct. 13, 2023), https://www.txcourts.gov/scac/meetings/2021-2030.

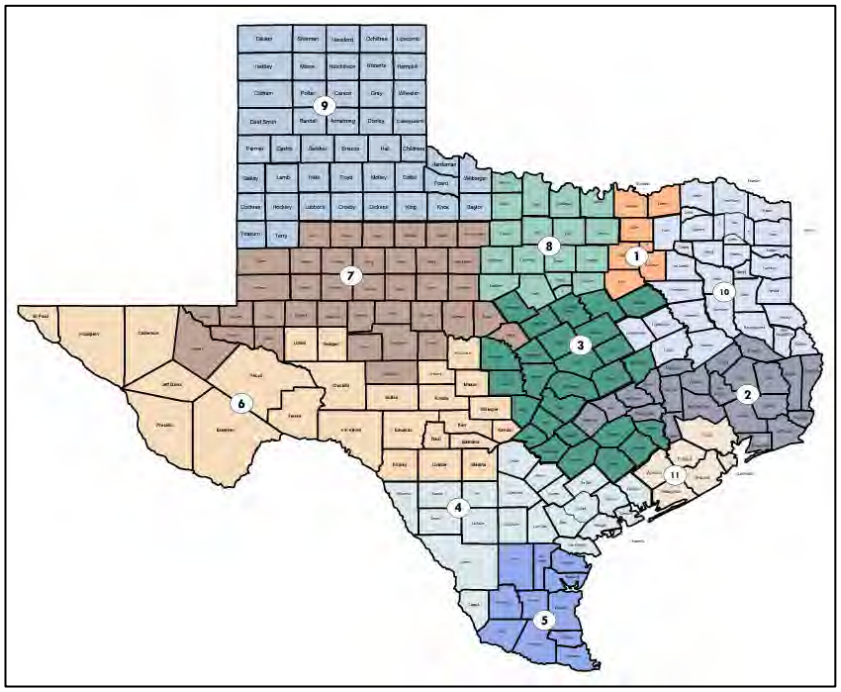
[22] *See* Order, Misc. Doc. No. 24-9004 (Tex. Feb. 6, 2024) (Preliminary Approval of Rules for the Business Courts); Order, Misc. Doc. No. 24-9005 (Tex. Feb. 6, 2024) (Preliminary Approval of Amendments to the Texas Rules of Appellate Procedure Related to the Fifteenth Court of Appeals). The rules are expected to be finalized in the summer or early fall of 2024.

[23] TEX. GOV'T CODE ANN. § 25A.003(a)–(m).

[24] *Id.* § 25A.003(b)–(m); *see also id.* § 74.004 (creating the Office of Court Administration); *id.* § 74.042 (defining the administrative judicial regions).

[25] TEX. GOV'T CODE ANN. § 25A.009(d); *id.* § 25A.017(b).

Figure 1: Administrative Judicial Regions[26]



Although H.B. 19 creates eleven business court divisions, not all of those divisions will become active when the court takes effect. Instead, only the divisions with major metropolitan areas—the First Division (Dallas), the Third Division (Austin), the Fourth Division (San Antonio), the Eighth Division (Fort Worth), and the Eleventh Division (Houston)—will begin hearing cases on September 1, 2024. These divisions are also entitled to two business court judges, whereas the other divisions are only entitled to one.[27] And although the other divisions technically exist, the Governor may not appoint a judge to those divisions until July 1, 2026, and they will be abolished as a matter of law on September 1, 2026 unless the Legislature reauthorizes them.[28] The first two years thus function as a trial run; if the Business Court is successful in the big cities, H.B. 19 reserves the option to expand the court to more rural areas.

[26] *Administrative Judicial Regions* (illustrated map), *in* TEX. JUD. BRANCH, https://www.txcourts.gov/media/1453885/ajr-map-2017.pdf (last visited Feb. 16, 2024).

[27] TEX. GOV'T CODE ANN. § 25A.009(a)(1)–(2).

[28] *Id.* § 25A.003(d), (g), (h), (i), (k), (l), (n); Tex. H.B. 19, 88th Leg., R.S. § 6(b) (2023).

B. Qualification and Selection of Judges

One of the central features of the Business Court is the promise of judges with greater commercial experience than the standard district judge. To fulfill that promise, H.B. 19 sets forth specific qualifications for business court judges, and selects appointment, rather than election, as the method of selecting judges who meet those qualifications. As promoted by bill sponsor Sen. Bryan Hughes:

> [O]nce business cases do get heard, they're often highly complicated and require a judge with deep background in commercial transaction law . . . . House Bill 19 lays out specific qualifications to make sure the judges who are appointed to these courts have the relevant experience to handle complex business cases. Now, the way to ensure that is through appointment by the Governor and confirmation by this body with a two-thirds vote.[29]

1. Qualifications

The qualifications for a business court judge are greater than that apply to an ordinary district judge. District judges need only: be twenty-five years of age and less than seventy-four; be a citizen of the United States and a resident of Texas; be licensed to practice law in Texas; have practiced law (or served as a judge) for eight years; have resided in the relevant judicial district for two years prior to election or appointment; and reside in the district for the duration of the term of office.[30]

The requirements for a business court judge are higher in most of those categories. Most notably, a business court judge must have ten years of legal experience, and specifically in the field of complex commercial litigation or transactional law.[31] The age and residency requirements are also heightened; a business court judge must be at least thirty-five years of age and must have resided within the business court division for at least five years prior to appointment.[32]

[29] S.J. of Tex., 88th Leg., R. S. 1–2 (May 12, 2023) (51st Addendum).

[30] TEX. CONST. art. V, § 7(b); TEX. GOV'T CODE ANN. § 24.001.

[31] TEX. GOV'T. CODE ANN. § 25A.008(a)(4).

[32] *Id.* § 25A.008(a)(1), (a)(3).

In June, the Governor announced the nominations of the first ten business court judges.[33] The majority of the nominees appear primarily to have experience in commercial litigation, although a significant percentage have experience as a judge or in other government work. Seven of the nominees are or were partners at law firms; four of the nominees are or were either a district judge or a court of appeals justice; two of the nominees oversaw complex litigation divisions within the Texas Attorney General's Office; and two of the nominees are also adjunct law professors. Before these judges' nominations, some argued that the $140,000 base salary of business court judge—which is the same as the salary for district court judges[34]—would detract from the State's ability to recruit qualified judges.[35] In that vein, the House passed a bill during the last legislative session that would have

[33] *Governor Abbott Announces Appointments to New Austin Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 11, 2024), https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-austin-business-court-division; *Governor Abbott Announces Appointments to New Dallas Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 12, 2024), https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-dallas-business-court-division; *Governor Abbott Announces Appointments to New Fort Worth Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 12, 2024), https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-fort-worth-business-court-division; *Governor Abbott Announces Appointments to New San Antonion Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 13, 2024), https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-san-antonio-business-court-division; *Governor Abbott Announces Appointments to New Houston Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 14, 2024), https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-houston-business-court-division.

[34] *See* TEX. GOV'T. CODE ANN. §§ 25A.005, 25A.011, 659.012(a)(1).

[35] *See, e.g.*, Ryan Autullo, *Low Pay Plagues Judicial Recruitment in New Texas Business Court*, BLOOMBERG L. (Dec. 14, 2023, 4:00 AM), https://news.bloomberglaw.com/litigation/low-pay-plagues-judicial-recruitment-in-new-texas-business-court; Jolie McCullough, *Texas Supreme Court Chief Justice Calls for Higher Judicial Salaries, Business Courts*, TEX. TRIB. (Apr. 5, 2023), https://www.texastribune.org/2023/04/05/texas-judiciary-business-courts/; Maria Lenin Laus, *Challenges Mount for Texas Business Court as Judges' Salaries Remain Unchanged*, JD J. (Dec. 14, 2023), https://www.jdjournal.com/2023/12/14/challenges-mount-for-texas-business-court-as-judges-salaries-remain-unchanged. Chief Justice Hecht is not the first chief justice to raise the compensation issue. The Texas Supreme Court has long been concerned about the judiciary's ability to attract top talent to the bench. *See, e.g.*, Chief Justice Wallace Jefferson, *The State of the Judiciary in Texas* (Feb. 23, 2005), *reprinted in* 68 TEX. B.J. 300, 301 (2005) ("The challenge is to fund the judiciary at a level sufficient to retain our most capable and experienced judges. Texas is losing judges at all levels of the judiciary due, at least in part, to salaries that have not kept pace with the times . . . . All too often, our brightest and most experienced judges are leaving the bench, moving on to other opportunities outside the judiciary.").

increased the annual district court judge salary to $155,400 in 2024 and then $172,494 in 2025,[36] but it stalled after the Senate countered with significantly lower wage increases.[37] It remains to be seen whether a subsequent Legislature will raise judicial salaries—or if the level of compensation proves to be a problem for future appointments.

2. Appointment

Unlike many judges in Texas, business court judges are appointed by the Governor, with advice and consent of the Texas Senate.[38] As addressed below, this provision is one of the more controversial features of H.B. 19, with some arguing that it violates Article V of the Texas Constitution.[39] In any event, business court judges are appointed to two-year terms that always begin on September 1 of an even-numbered year, and judges may be reappointed without limit.[40] Vacancies are filled through the same appointment process described above.[41] And the Chief Justice may assign a retired or former judge as a visiting judge on the Business Court if that judge otherwise meets the requirements for a business court judge.[42] Retired and former judges also serve an important backstop function; in the event that the Texas Supreme Court determines that the appointment provision of H.B. 19 is unconstitutional, H.B. 19 specifies that appointed visiting judges are to staff the Business Court.[43]

As introduced above, business court judges are appointed to a particular division. And each judge must maintain chambers in a county (of the judge's choice) within the division to which the judge was appointed.[44] Even so, a

[36] *See* Tex. H.B. 2779, 88th Leg., R. S. (2023).

[37] *See* H.J. of Tex., 88th Leg., R. S. 5875 (2023) (House refusing to concur in the Senate's amendments).

[38] TEX. GOV'T CODE ANN. § 25A.009(a); *see also supra* note 14.

[39] *Infra* Part III.

[40] TEX. GOV'T CODE ANN. § 25A.009(a)–(c). The two-year term limit is prescribed by the Constitution. *See* TEX. CONST. art. XVI, § 30 ("The duration of all offices not fixed by this Constitution shall never exceed two years.").

[41] TEX. GOV'T CODE ANN. § 25A.010.

[42] *Id.* § 25A.014(a).

[43] Tex. H.B. 19, 88th Leg., R.S. (2023) (enrolled version).

[44] TEX. GOV'T CODE ANN. § 25A.017(c). Similarly, although the Clerk of the Business Court must reside in Travis County, *id.* § 25A.017(b), it appears that filings may also be made with deputy clerks or case managers, who will presumably maintain their office in the same county as the relevant business court judge. Although the Texas Supreme Court ultimately did not adopt a rule

judge may hold court in any county within his or her appointed division to the extent "necessary or convenient for a particular civil action."[45] But, as is the case for most other trial judges, to "promote the orderly and efficient administration of justice," judges have discretion to sit in other divisions in any matter before the court.[46]

3. Law Clerks

House Bill 19's primary methods for ensuring that commercial disputes are heard in a timely and expert manner are those addressed above: appointment of judges who meet heightened qualifications.[47] But the law also authorizes each business court judge to hire a permanent law clerk (or staff attorney), a benefit that most district or county judges do not have.[48] By law, the Legislature is not required to appropriate funds for each district or county judge to have his or her own staff attorney. In fact, according to the State's most recent data, only twelve of the over 450 district judges have hired a personal law clerk.[49] Clerks will further help business court judges, already familiar with this body of law, to address complicated legal questions that arise in largescale commercial litigation.[50]

clarifying this power, the Advisory Committee debated the subject extensively. *See* Transcript of Meeting at 35471–91, Sup. Ct. Ad. Comm. (Oct. 13, 2023), https://www.txcourts.gov/media/1457501/23-10-13-scac-transcript.pdf.

[45] TEX. GOV'T CODE ANN. § 25A.017(d).

[46] *Id.* § 25A.009(f); *see also id.* § 24.003(b)(4) (allowing district courts to temporarily exchange benches); *id.* § 74.121 (same, as to constitutional county courts, statutory county courts, justice courts, and small claims courts).

[47] Another point raised during the legislative process in favor of the efficiency of the Business Court is that, unlike district court judges, business court judges will not be required to give preferential settings to certain types of cases, such as criminal actions, election contests, family protective order issues, etc. *See* TEX. GOV'T CODE ANN. §§ 23.101–23.103.

[48] *Id.* § 25A.017(i)(3).

[49] *See* Trial Courts by County, *District, County, and Justice Court Judges, and Personnel by County*, TEX. JUD. BRANCH (last updated June 12, 2023), https://www.txcourts.gov/media/1456631/trial-court-judges-personnel.pdf. Some counties, however, hire staff attorneys that assist all of the district judges within county. For instance, the Administrative Office of the District Courts in Harris County employs three staff attorneys. *See Administrative Office of the District Courts*, DIST. CTS. OF HARRIS CNTY. (last visited Feb. 16, 2024), https://www.justex.net/office/admin. But these staff attorneys serve dozens of judges at a time and cannot have as great an impact as an attorney specifically assigned to one judge.

[50] On the well documented impact that law clerks have a on judges' work, see, e.g., TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 38–144 (2006) (examining law clerks' influence on Supreme Court Justices'

C. Jurisdiction

Perhaps the most important features of H.B. 19 are the categories of jurisdiction established for the Business Court. The rules that govern the types of cases that may be heard by the court are divided into several categories. To start more generally, the court has all the same powers of a district court; the Business Court may issue final judgments, injunctions, writs of mandamus, etc.[51] The court may also hear claims seeking injunctive or declaratory relief, so long as the case otherwise falls within the court's jurisdiction.[52] And in all cases, the court's jurisdiction is concurrent with the district courts, meaning that any action that could be brought before the Business Court can still be heard by a district court, should the parties so choose.[53]

1. Amount in Controversy Exceeds Five Million Dollars

The first category of cases that fall within the Business Court's jurisdiction are those in which the amount in controversy exceeds $5 million and the subject concerns at least one of several subjects.[54] The covered subjects include: (i) a derivative proceeding; (ii) a corporate-governance action; (iii) an action involving state or federal securities laws or regulations; (iv) an action brought by an organization against an owner, controlling person, or managerial official (interchangeably referred to as a "senior officer");[55] (v) a claim alleging that a senior officer breached a duty to the

writing and legal arguments); Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 41–43 (2008) (same, as to state supreme courts). And although there tend to be less law clerks or staff attorneys in the state courts as compared to federal courts, the state courts, including Texas specifically, have expanded the practice considerably since the beginning of the 21st Century. *See* Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. RICH. L. REV. 277, 325–34 (2020) (surveying the market for state district court law clerks and arguing for expended access to such law clerks); James. T. Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas*, 46 S. TEX. L. REV. 33, 47–55 (2004) (describing the origin and use of law clerks and staff attorneys in the Texas courts of appeals).

[51] TEX. GOV'T CODE ANN. § 25A.004(a).

[52] *Id.* § 25A.004(e).

[53] *Id.* § 25A.004(b), (c), (d), (e); *see also infra* text accompanying note 180 (explaining the constitutional implications of authorizing concurrent jurisdiction).

[54] TEX. GOV'T CODE ANN. § 25A.004(b).

[55] As defined by H.B. 19, these terms, as well as "governing person" and "governing official" have different meanings and apply to slightly different circumstances. *See id.* § 25A.001(1), (5), (8), (9), (11). But for purposes of understanding the basic limits of the Court's jurisdiction, it is enough

organization, including a breach of a duty of loyalty or good faith; (vi) a claim seeking to hold a senior officer liable for an obligation held by the organization; and (vii) an action arising out of the Business Organizations Code.[56]

Together, these categories cover most forms of *internal* business disputes; *i.e.*, disputes about the business's management, claims between shareholders and the company, and so on. *External* business disputes, *i.e.*, actions involving a company and a separate person or business, are reserved for the next category of jurisdiction, where the amount in controversy is heightened to $10 million. Any claim that falls within one of the seven categories described above may be heard by the Business Court—regardless of the amount in controversy—if one of the parties is a publicly traded company.[57]

2. Amount in Controversy Exceeds Ten Million Dollars

The Business Court also has jurisdiction over certain high-dollar external disputes. In particular, provided that the amount in controversy exceed $10 million, the court may hear: (i) an action arising out of a "qualified transaction";[58] (ii) a case involving a contract in which the parties agreed that the Business Court would have jurisdiction (except an insurance dispute); and (iii) an action concerning a violation of the Finance or Business & Commerce Codes by an organization or officer acting on the organization's behalf (except a bank, credit union, or savings and loan association).[59] The first subcategory—a case involving a qualified transaction—will likely cover all bread-and-butter commercial cases where the plaintiff alleges a breach of contract or some similar claim, as long as the dispute satisfies the amount in controversy.

to recognize that these terms intend to capture a personal or official who exerts significant control over the business at issue. For ease of reference, this Article refers to such a person as a "senior officer."

[56] *Id.* § 25A.004(b)(1)–(7).

[57] *Id.* § 25A.004(c).

[58] A qualified transaction essentially means any agreement (except for a loan or advance of money or credit by a bank, credit union, or savings and loan institution) in which the aggregate value of the sale, loan, etc., is at least $10 million. *Id.* § 25A.001(14)(A).

[59] *Id.* § 25A.004(d)(1)–(3).

3. Supplemental Jurisdiction

House Bill 19 expands the Business Court's jurisdiction by providing for broad supplemental jurisdiction. Specifically, the court may hear any claim "related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy."[60] This language mirrors the federal supplemental-jurisdiction statute, and presumably incorporates the same standard that applies in federal court.[61]

However, a claim that falls within the Business Court's supplemental jurisdiction may proceed only if all of the parties and the judge agree.[62] This important compromise preserves a plaintiff's ability to pursue ordinary claims in district or county court. If any party or the judge disagrees, the claim must be brought in a separate action. In that event, H.B. 19 specifies that the related claim may proceed concurrently in a court of original jurisdiction.[63]

4. Cases Excluded from the Business Court's Jurisdiction

Finally, H.B. 19 explicitly removes certain cases from the Business Court's jurisdiction. These are: (i) civil actions brought by or against governmental entities; (ii) civil foreclosure actions; (iii) certain claims arising under the Business and Commerce Code (involving non-competes and deceptive trade practices); (iv) certain claims arising under the Property Code (involving mechanics liens and trusts); (v) claims arising under the Estates, Family, or Insurance Codes; (vi) sales of farm products; (vii) consumer transactions; (viii) and insurance disputes.[64] But the claims listed above may be asserted if they fall within the Business Court's

[60] *Id.* § 25A.004(f).

[61] 28 U.S.C. § 1367(a) (authorizing district courts to hear claims where they are "so related to claims in the action within such original jurisdiction that they *form part of the same case or controversy* under Article III of the United States Constitution") (emphasis added). *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (holding that a district court may exercise supplemental jurisdiction where the claims to be asserted are so related to the original claims that they "derive from a common nucleus of operative fact"). Indeed, House bill author Rep. Andrew Murr promoted H.B. 19 as incorporating federal standards on supplemental jurisdiction. *See* Hearing on H.B. 19 Before the H. Comm. on Judiciary & Civ. Juris., 88th Leg., R.S. (Mar. 22, 2023) (acknowledging that the bill "borrowed the supplemental jurisdiction language from federal law") (digital recording available through https://house.texas.gov/video-audio/committee-broadcasts/88/).

[62] TEX. GOV'T CODE ANN. § 25A.004(f).

[63] *Id.*

[64] *Id.* § 25A.004(g)(1)–(5).

supplemental jurisdiction, and all parties and the judge agree to allow the claim to proceed.[65]

There are some claims, though, that may not be asserted in the Business Court even if the court would otherwise have supplemental jurisdiction. These are claims for: (i) medical liability (including malpractice); (ii) personal injury; and (iii) legal malpractice.[66] For the trial bar, it was essential that these ubiquitous claims be allowed to proceed in district or county court.

D. Filing and Removal of Cases

The Legislature gave considerable attention to the procedure for bringing a case before the Business Court, which makes sense given the fact that the court's jurisdiction was so central to the bill. A case may be filed in the Business Court in the first instance if the matter falls within the court's jurisdiction.[67] To do so, the plaintiff must plead facts establishing the court's jurisdiction, as well as venue in a county that is which a particular division of the court.[68] It is not immediately clear what level of detail is required for the jurisdictional and venue pleading, though the Advisory Committee appears to understand the statute and rules as requiring more than notice pleading.[69]

Should the plaintiff fail to plead jurisdiction or venue, the case will be disposed in one of several ways. If the court determines that it lacks jurisdiction over the dispute, the plaintiff has the option of requesting transfer to a district or county court in which venue is proper, or dismissal without

[65] *Id.* § 25A.004(f).

[66] *Id.* § 25A.004(h)(1)–(3).

[67] *Id.* § 25A.006(a).

[68] *Id.* With respect the venue, H.B. 19 provides that venue may be established by the ordinary method (i.e., by using Texas venue rules) or by agreement via a forum selection clause. *See id.*

[69] *See* Subcommittee Business Court Memorandum, *supra* note 21, at 2 ("While recognizing that this recommendation may depart from Texas' notice pleading standards in some cases, the Subcommittee considers it necessary to assist the court and practitioners in navigating these threshold matters and potentially avoiding disputes about jurisdiction and venue."); Transcript of Meeting at 35202–08, Sup. Ct. Ad. Comm. (Aug. 18, 2023) (debating the applicable standard of review), https://test.txcourts.gov/media/1457110/scac23-08-18.pdf; Sup. Ct. Ad. Comm., *supra* note 44, at 35507–08 ("[S]ome of the significant provisions here include an expectation that parties will plead with sufficient facts to make it clear that the business court has jurisdiction, and that would be a departure from our notice and pleading rules so that a failure to appropriately plead would be the basis for a challenge to, in effect, to the jurisdiction of the court.") (Statement of Business Court Subcommittee member Robert Levy).

prejudice.[70] The defendant may also move to dismiss or transfer based on lack of jurisdiction, but any motion must be filed within thirty days after the answer is due or thirty days after the defendant's notice of appearance.[71] And if the court determines that venue is not proper in any county within the division, it must transfer the case to an operating division[72] of the business court in which venue is proper, if there is one.[73] If there is not, the court must transfer the case to a district or county court of proper venue of the plaintiff's choice.[74]

But if, as is the pattern in most cases as it pertains to federal-court removal, the plaintiff first files suit in a district or county court, any party to the action may remove the case to the Business Court if the case falls within the court's jurisdiction and venue is proper within an operating division.[75] Borrowing from federal law, the notice must contain "a short and plain statement of the grounds for removal, including the basis for the jurisdiction of the business court and a statement whether all parties agree to the removal of the action."[76]

In terms of timing, as in federal court, the notice of removal must be filed within thirty days of when the removing party discovers (or should have discovered) facts supporting the Business Court's jurisdiction.[77] A party can remove without fear of waiving certain defenses because removal is not

[70] TEX. GOV'T CODE ANN. § 25A.006(b)(1)–(2). In the event that the case is dismissed without prejudice, the statute of limitations is tolled for the duration of time between filing in the Business Court and dismissal. *See* TEX. R. CIV. P. 357 (proposed Feb. 6, 2024); *see generally* Sanders v. Boeing Co., 680 S.W.3d 340, 348–49 (Tex. 2023) (explaining the meaning of Texas Civil Practice and Remedies Code § 16.003, which tolls the applicable statute of limitations when a case is dismissed for "lack of jurisdiction").

[71] *See* TEX. R. CIV. P. 354(c)(2) (proposed Feb. 6, 2024).

[72] The phrase "operating division" means a division that is presently in effect and refers to the fact that the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions will begin to operate until September 2026, and unless reauthorized by the Legislature. *Supra* note 28 and accompanying text.

[73] TEX. GOV'T CODE ANN. § 25A.006(c)(1).

[74] *Id.* § 25A.006(c)(2).

[75] *Id.* § 25A.006(d)–(e).

[76] TEX. R. CIV. P. 354(d)(2)(B) (proposed Feb. 6, 2024); *see also* Business Court Subcommittee Memorandum, *supra* note 21, at 3 ("This language tracks the federal statute on removal, *e.g.*, 28 U.S.C. § 1446(a).").

[77] TEX. GOV'T CODE ANN. § 25A.006(f)(1). In addition, if a motion for temporary injunction is pending on the date the removing party discovered (or should have discovered) facts supporting the Business Court's jurisdiction, the notice of removal must be filed within thirty days after the motion for temporary injunction is ruled upon. *Id.* § 25A.006(f)(2).

subject to the due-order-of-pleading rule, and does not waive a defect in venue or constitute an appearance for purposes of personal jurisdiction.[78] If, however, the removing party does not meet the thirty-day deadline, it may nonetheless remove the case if it obtains the agreement of all other parties.[79]

Procedurally, the removing party must file the notice of removal both with the Business Court and the court in which the case was originally filed. At that point, the clerk of the originally filed court transfers the action to the Business Court. The Business Court clerk then dockets the case and assigns it to a random judge within the appropriate division.[80] But, as in federal court, a plaintiff may challenge removal by filing a motion to remand within thirty days after the filing of the notice of removal or thirty days after its answer is due.[81]

To ensure that defendants do not abuse the removal process or the Business Court's jurisdiction, H.B. 19 clarifies that Section 10.001 of the Civil Practice and Remedies Code—which requires attorneys to verify that all pleadings are, to the best of the attorney's knowledge, supported as a matter of fact and law—applies to the filing of a notice of removal.[82] Consequently, an attorney may be sanctioned if he or she removes a case to the Business Court without a good-faith basis.[83]

[78] *Id.* § 25A.006(i)–(j); *see generally* 58 Tex. Jur. 3d *Pleading* § 130, (Westlaw database updated Jan. 2024) (explaining rules on due order of pleadings). Motions challenging venue must be brought within the same time limits as those that apply to district court proceedings. *See* TEX. R. CIV. P. 354(c)(1) (proposed Feb. 6, 2024).

[79] TEX. GOV'T CODE ANN. § 25A.006(f).

[80] *Id.* § 25A.006(g); *accord* TEX. R. CIV. P. 354(b) (proposed Feb. 6, 2024). There is a further method for transferring a case to the Business Court: a request by the judge who is assigned to the case as it was originally filed. TEX. GOV'T CODE ANN. § 25A.006(k). This provision appears designed to allow a district or county court, particularly one in a smaller jurisdiction, to prevent a complex business-court case from overwhelming its highly local docket. According to this procedure, the judge may request that the presiding judge of the court's administrative judicial region transfer the case to the Business Court if the case falls within the court's jurisdiction and that transfer would otherwise "facilitate the fair and efficient administration of justice." *Id.* In the event of such a request, the presiding judge must notify the parties and hold a hearing. H.B. 19 therefore contemplates the possibility of a case being transferred to the Business Court even if neither party moves for the case to be heard there.

[81] *See* TEX. R. CIV. P. 356(d) (proposed Feb. 6, 2024).

[82] TEX. GOV'T CODE ANN. § 25A.006(h).

[83] TEX. CIV. PRAC. & REM. CODE ANN. § 10.002(a). For an examination of bad-faith removal in federal court and the effectiveness of sanctions, see Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 99–103 (2021).

E. Case Procedure

As with any new court, there must be rules to govern how the court will operate in practice. In general, the Texas Rules of Civil Procedure and Rules of Evidence that govern district court proceedings also govern business court proceedings, except to the extent that other, specific rules control.[84] On the latter point, H.B. 19 instructs the Texas Supreme Court to adopt rules needed to fill in the procedural details and authorizes the Business Court to establish local rules to the same effect.[85] Several aspects of the prescribed case procedure warrant discussion here.

First, the law requires the Texas Supreme Court to adopt rules concerning the issuance of written opinions.[86] During the legislative process, many witnesses and legislators expressed the need to develop a body of trial-level caselaw in order to make high-stakes litigation more predictable.[87] Since the bill was passed, the Texas Supreme Court has adopted Rule 359 of the Texas Rules of Civil Procedure, which concerns the issuance of opinions in business court cases. The rule requires a business court judge to issue a written opinion on any "issue important to the jurisprudence of the state," or, if a party requests, on any "dispositive ruling."[88]

Another major topic of concern during the legislative session was whether jury trials would be available for Business Court cases, and from where the jury would be drawn. For avoidance of doubt, H.B. 19 specifies that "[a] party

[84] TEX. GOV'T CODE ANN. § 25A.015(g).

[85] *See id.* § 25A.020(a), (b).

[86] *Id.* § 25A.016.

[87] *See, e.g.*, Hearing on Tex. H.B. 19 Before the H. Comm. on Judiciary & Civ. Juris., 88th Leg., R. S. Part I at 23:50 (Mar. 23, 2023) ("Also . . . the other aspect of efficiency that comes through with the Business Court is you start getting written opinions. Ninety percent or more of the business cases that get decided in Texas get decided at the trial level and . . . there's never an opinion issued out of those trial courts so nobody knows what the judge says the law was and the Business Court will know what the law is.") (statement of Mike Tankersley, on behalf of the Texas Business Law Foundation) (digital recording available through https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=24840).

[88] TEX. R. CIV. P. 359(a)(1)–(2) (proposed Feb. 6, 2024). Although the rule does not define when an issue is important to the jurisprudence of the state, discussion within the Advisory Committee generally compared the standard to Rule 47.4 of the Texas Rules of Appellate Procedure, which help courts of appeals to determine whether an opinion should be published or unpublished. *See* Business Court Subcommittee Memorandum, *supra* note 21, at 25; TEX. R. APP. P. 47.4. The Committee proposed requiring the issuance of an opinion if the decision involved (i) a new or modified rule of law, (ii) an issue of constitutional or otherwise special importance, (iii) a ruling criticizing existing law, or (iv) a decision that resolving an existing conflict of authority. *Id.*

in an action pending in the business court has the right to a trial by jury when required by the constitution."[89] As to venue, a plaintiff who files an action with the Business Court has the right to choose to demand a jury trial in any county within the division to which the case is assigned in which the case could have been filed.[90] This is a powerful jury-selection tool, especially given that juries in large metropolitan areas (where the majority of Business Court cases will presumably come from) will typically differ greatly from adjacent suburban or rural counties.[91] But if a case is removed to the Business Court, the trial must be held in the county where the case was originally filed.[92] However, the parties may agree, either *ex ante* by contract, or during the litigation itself, to hold the trial in any county of their choosing.[93]

In any event, after determining jurisdiction and venue, the Business Court is required to "declare" the county in which a jury trial will be held.[94] Rules governing jury selection and other "jury-related practice and procedure" are the same as those that apply for the district court in the county where the trial is held.[95]

House Bill 19 also provides several details concerning where judges may take their chambers and where proceedings may be conducted. To start, business court judges are allowed to maintain chambers in any county within the division to which they are assigned.[96] But they may hold court in any courtroom within the division, including borrowing from existing county courtrooms to the extent possible.[97] With respect to remote proceedings, the bill allows the Business Court to hold any proceeding remotely, subject to several exceptions: The court must hold jury trials in person,[98] and it must

[89] TEX. GOV'T CODE ANN. § 25A.015(a).

[90] *Id.* § 25A.015(b).

[91] For literature considering the differences between urban and rural jurors, see, e.g., Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941, 964–67 (2006); Craig C. New & Chris Dominic, *Us and Them*, 64 OR. ST. BAR BULL. 13, 16–17 (2003); Mary R. Rose & Neil Vidmar, *The Bronx "Bronx Jury": A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1896–98 (2002); Roselle L. Wissler et al., *Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 756, 783–84, 807–08 (1999); PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 74–75 (1985).

[92] TEX. GOV'T CODE ANN. § 25A.015(c).

[93] *Id.* § 25A.015(d)–(e).

[94] *Id.* § 25A.006(l).

[95] *Id.* § 25A.015(f).

[96] *Id.* § 25A.017(c).

[97] *Id.* § 25A.017(d).

[98] *Id.* § 25A.017(e).

also hold any hearing in which it will hear oral argument in person unless all parties consent.[99]

F. Appeals of Business Court Actions

All the above describes the mechanics of trial-court level proceedings before the Business Court. But H.B. 19 and S.B. 1045 also provide a specific appellate process for business court cases. S.B. 1045 established a new intermediate court of appeals: The Court of Appeals for the Fifteenth Appeals District, which sits in the City of Austin.[100] The Fifteenth Court of Appeals has exclusive jurisdiction over appeals from the Business Court (and original proceedings relating to the Business Court, such as mandamus petitions).[101]

The Fifteenth Court of Appeals differs from the other intermediate courts of appeals in several significant respects. Perhaps most importantly, it is the only court of appeals to have both limited and exclusive jurisdiction.[102] As to the former, unlike the other courts of appeals, which have general jurisdiction over civil and criminal appeals filed within each appellate district, the Fifteenth Court of Appeals has no criminal jurisdiction and has jurisdiction over only certain civil cases.[103] And as to the latter, the Fifteenth Court of Appeals has exclusive jurisdiction over appeals from the Business Court.[104] The court's jurisdiction also includes: (i) a matter brought by or against the State or a state agency[105] and (ii) a case in which any party files a pleading

[99] *Id.* In addition, any remote hearing must be conducted from state facilities, and the court must give the public reasonable notice and an opportunity to attend. *Id.* § 25A.017(e)–(g); *accord* TEX. R. CIV. P. 358 (proposed Feb. 6, 2024) (to be effective Sept. 1, 2024).

[100] *Id.* § 22.2151(a).

[101] *Id.* § 25A.007(a). H.B. 19 also provides that, should the Legislature fail to create the Fifteenth Court of Appeals, appeals are taken from the preexisting court of appeals with jurisdiction over the county in which the case proceeded in the Business Court. *Id.* § 25A.007(b). But that provision has no effect because the Legislature did in fact create the Fifteenth Court.

[102] *Cf. id.* § 22.220(a), (d) (providing that, except as to the Fifteenth Court of Appeals, intermediate courts of appeals have "appellate jurisdiction of all civil cases within its district" of which the lower court had jurisdiction and the amount in controversy exceeded $250).

[103] TEX. CRIM. PROC. CODE ANN. §§ 4.01(2), 4.03, 44.25.

[104] TEX. GOV'T CODE ANN. § 25A.007(a); *see also id.* § 22.220(d)(3) (providing that the Fifteenth Court of Appeals shall have exclusive civil jurisdiction over "any other matter as provided by law").

[105] Subject to the following exceptions: A proceeding under the Family Code, an action concerning a sexual assault protective order, a proceeding against a district or county attorney, a mental health commitment matter, a civil asset forfeiture case, an eminent domain proceeding, a tort claim brought pursuant to the Texas Tort Claims Act, a personal injury or wrongful death action,

challenging the constitutionality of a state law or regulation and in which the Attorney General is a party.[106] In the event that a case is incorrectly appealed to the Fifteenth Court of Appeals or a case within the Fifteenth Court's jurisdiction is appealed to a different court of appeals, the court (either on its own initiative or in response to a party's motion) will transfer the case to the appropriate court.[107]

As with the Business Court, the Fifteenth Court of Appeals comes into legal existence on September 1, 2024.[108] For the first three years, the court will be staffed by a chief justice and two associate justices, with two additional associate justices to be added beginning on September 1, 2027.[109] The court will decide cases in three-judge panels, and may hold court in any county within the state to the extent necessary.[110]

Regarding the selection of judges, S.B. 1045 provides that "the initial vacancies in the offices of chief justice and justices of the court" are to be filled by appointment.[111] After that, justices must run for election, to be decided by statewide popular vote.[112]

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a nuisance claim, an action to expunge criminal records or obtain an order of nondisclosure, appeals from a special three-judge district court (such as state redistricting cases), employment discrimination, an action to remove a local government official, or a civil commitment proceeding for a sexually violent predator. *Id.* § 22.220(d)(1)(A)–(O).

[106] *Id.* § 22.220(d)(1)–(2). S.B. 1045 also transfers jurisdiction to hear certain special cases as a district court and to hear certain appeals from administrative decisions from the Third Court of Appeals (the court that hears appeals from the City of Austin and surrounding areas) to the Fifteenth Court of Appeals. *Id.* §§ 2001.038(f), 2001.176(c); TEX. OCC. CODE ANN. § 2301.751(a); TEX. UTIL. CODE ANN. § 39.001(e).

[107] TEX. GOV'T CODE ANN. § 73.001(c); *accord* TEX. R. APP. P. 27A(b) and (c)(1)–(2) (to be effective by Sept. 1, 2024).

[108] Tex. S.B. 1045, 88th Leg., R.S. § 1.14(a) (2023).

[109] TEX. GOV'T CODE ANN. § 22.216(n-1), (n-2).

[110] *Id.* §§ 22.2151(b), 22.222(a); TEX. CONST. art. V, § 6(a).

[111] Tex. S.B. 1045, 88th Leg., R.S. § 1.14(b) (2023). The Governor has nominated Scott Brister, former justice of the Supreme Court of Texas and Chief Justice of the Fourteenth Court of Appeals, to be the first Chief Justice of the Fifteenth Court of Appeals. He has also nominated Judge Scott Field of the 480th Judicial District Court of Williamson County (and former justice of the Third Court of Appeals) and Justice April Farris of the First Court of Appeals to be the two associate justices. *Governor Abbott Appoints Inaugural Members to Fifteenth Court of Appeals*, TEXAS OFFICE OF THE GOVERNOR (June 11, 2024), https://gov.texas.gov/news/post/governor-abbott-appoints-inaugural-members-to-fifteenth-court-of-appeals.

[112] TEX. CONST. art. V § 6(b). S.B. 1045 neither addresses how the two additional judges are to obtain office or whether appointed judges may continue in office via reappointment. Given this silence, the default provisions of the Texas Constitution apply, meaning that justices of the Fifteenth

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As the Business Court's promoters have repeated, the court is designed to offer quicker, more predictable decisions to high-stakes commercial disputes.[113] To that end, the Legislature has created a specialized court with specific jurisdictional requirements, and a filing-removal regime similar to that of federal court.[114] It also has attempted to provide for highly competent decision-makers, establishing heightened requirements for judges and providing them with law clerks and other essential resources.[115] Time will tell whether the court lives up to the billing.

II. History and Passage of the Business Court Bill

For nearly two decades, the Texas Legislature tried and failed to create some form of a business court. It first considered a business court bill during the 2007 legislative session, and did so almost every session for the next sixteen years.[116] Each time, the bill failed.[117] This Part surveys the history of those failed bills and provides an overview of the legislative process during the most recent session, where the Legislature finally succeeding in passing such a bill.

A. History of Business Court Bills

The Business Court of Texas is the next in an increasing number of specialized commercial courts across the United States. Since the Delaware Court of Chancery's inception in 1792, it has been considered the center of gravity for American business litigation.[118] But although the Court of

Court of Appeals are to serve six-year terms, and must be elected besides the initial three appointments. *See id.* (providing that courts of appeals justices shall be elected "by the qualified voters of their respective districts"); Tex. Gov't Code Ann. § 22.201(p) (explaining that the Fifteenth Court of Appeals District is "composed of all counties in th[e] state").

[113] *See supra* note 87 and accompanying text.

[114] *See supra* Part I.C. and text accompanying notes 75−77, 81.

[115] *See supra* Part I.B.

[116] *See supra* text accompanying note 7.

[117] *See infra* Part II.A. History of Business Court Bills.

[118] *See* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 Del. J. Corp. L. 819, 840–65 (1993) (examining the Delaware Court of Chancery's impact on corporate litigation, especially in the 20th Century); Jack Jacobs, *The Delaware Court of Chancery: A 225-Year Retrospective*, LAW360 (Sept. 27, 2017), https://www.law360.com/articles/968498/the-delaware-court-of-chancery-a-225-year-retrospective.

Chancery developed an expertise for deciding complex commercial disputes, its jurisdiction is not actually limited to such cases.[119] The first courts with jurisdiction limited to certain business disputes came into existence in the early 1990s, when the original states to implement the concept—Illinois, New York, New Jersey, and North Carolina—created business courts "as specialized dockets in existing courts for complex cases."[120] Many states followed suit thereafter; to date, twenty-nine states[121] have adopted some form of a business court, and there is ample literature promoting their benefits.[122]

And so it was that Texas set out to join these states and adopt a business court of its own.[123] The first proposal came in 2007, in the form of a Judicial

[119] *See* Lee Applebaum et al., *Through the Decades: The Development of Business Courts in the United States*, 75 BUS. LAW. 2053, 2058 (2020). Although Delaware has historically not operated a business-specific court, it does now. In 2010, the Delaware Superior Court created a special division for special business cases—the Complex Commercial Litigation Division of the Superior Court. *See* DEL. SUPER. COURT, ADMIN DIR. NO. 2010-3 (Apr. 26, 2010), https://www.courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf.

[120] *See* Dimarie Alicea-Lozada, *Business Courts Expanding Across the States*, NAT'L CTR. FOR STATE CTS. (Aug. 9, 2023), https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/business-courts-expanding-across-the-states.

[121] Besides Texas, these states are Illinois, New York, New Jersey, North Carolina, Wisconsin, Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Florida, Georgia, Maine, South Carolina, New Hampshire, Ohio, Delaware, West Virginia, Michigan, Iowa, Tennessee, Arizona, Indiana, Wyoming, Kentucky, Utah. *See* Applebaum et al., *supra* note 119, at App. A (cataloging all American state and local business courts). Colorado and Alabama once operated a specialized commercial dockets, but those programs are longer operational. *Id. See also* THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS, *supra* note 7, at 3–4 tbl. 1.

[122] *See generally, e.g.*, Douglas L. Toering & Ian Williamson, *Michigan's Business Courts: A Decade of Success*, 102 MICH. BUS. J. 28 (2023); Tyler Moorhead, Note, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397 (2016); Sharon Lee & Justin Seamon, *Tennessee is Open for Business*, 51 TENN. BUS. J. 14 (2015); Joseph R. Slights III & Elizabeth A. Powers, *Delaware Courts Continue to Excel in Business Litigation with the Success of the Complex Commercial Litigation Division of the Superior Court*, 70 BUS. LAW. 1039 (2015); Andrew R. Jones, Note, *Toward a Stronger Economic Future for North Carolina: Precedent and the Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189 (2014); Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. STATE UNIV. L. REV. 477 (2007); ABA Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947 (1997).

[123] For additional history on this subject, *see* THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS, *supra* note 7, at 10–13.

Panel on Complex Cases.[124] Under this proposal, parties would have been allowed to petition the Panel to transfer certain complex cases to particular judges deemed to have sufficient experience and availability.[125] The bill was generally well received, and passed the Senate on a 25-5 vote,[126] but died in the House in the closing days of the session.[127] A similar bill, that would have provided additional funding for cases deemed to be complex, rather than transferring them to a different judge, was proposed the next session, in 2009, but also failed.[128]

The business court project lay dormant until 2015, when it was revived and began to resemble the version of the court that was ultimately enacted.[129] In the 2015 legislative session, and then again in 2017, the House considered a bill that would have created the Texas Chancery Court and Court of Chancery Appeals.[130] The basic characteristics of the courts were similar to the current Business Court and Fifteenth Court of Appeals.[131] Namely, the jurisdiction of the Chancery Court would have had been limited to certain commercial disputes such as derivative actions, securities claims, and qualified transactions where the amount in controversy exceeded $10 million.[132] Judges, both of the Chancery Court and Court of Chancery Appeals, were to be appointed by the Governor and confirmed by the Senate.[133] But there was insufficient interest in the project at the time, and neither bill made it out of the House.[134]

[124] *See* Tex. S.B. 1204, 80th Leg., R.S. (2007).

[125] *Id.* § 8.02.

[126] S.J. of Tex., 80th Leg., R.S. 1609 (2007) (Committee Substitute Senate Bill 1204 on Third Reading).

[127] H.J. of Tex., 80th Leg., R.S. 4838 (2007) (CSSB 1204 Second Reading).

[128] *See* Tex. S.B. 992, 81st Leg., R.S. § 7.04 (2009).

[129] *See* H. Comm. on Bus. & Indus., Bill Analysis, Tex. C.S.H.B. 1603, 84th Leg., R.S. (2015) (explaining that bill would create a chancery court that has statewide jurisdiction over cases arising out of business transactions and other commercial matters).

[130] *See* Tex. H.B. 1603, 84th Leg., R.S. (2015); Tex. H.B. 2594, 85th Leg., R.S. (2017).

[131] *See, e.g.*, Tex. H.B. 2595 §§ 24A.055(a), 24A.051(a)(1)–(10) (bills providing that judges to be appointed to the chancery court must meet certain qualifications, and that the chancery court has statewide jurisdiction over certain commercial matters).

[132] Tex. C.S.H.B. 1603, 84th Leg., R.S. § 24A.051(a) (2015) (providing for the court's jurisdiction).

[133] *Id.* §§ 24A.055(a), 24A.101(b).

[134] H.J. of Tex., 84th Leg., R.S. 2267 (2015) (final Legislative action on H.B. 1603); H.J. of Tex., 85th Leg., R.S. 970 (2017) (final Legislative action on H.B. 2594).

In the following two legislative sessions, the Legislature considered substantively similar bills, except that this time the proposed court was restyled as a "business district court" rather than a "chancery court."[135] Although the committee hearings began to receive more attention, including testimony by major state organizations such as the Texas Business Law Foundation, Texas Trial Lawyers Association, and the American Board of Trial Advocates, neither bill ultimately progressed beyond the committee stage.[136]

Despite failure during the 2021 session, the business-court concept began to gather momentum. In September of 2022, the Texas Judicial Council announced a formal recommendation that the Texas Supreme Court adopt a business-court pilot program.[137] And during the legislative interim, the Texas House Committee on the Judiciary and Civil Jurisprudence—having been charged to study the business-court concept—also recommended that the Court adopt some initial form of a business court.[138] And so as the 2023 legislative session approached, businesses and lawmakers were beginning to coalesce around the notion of passing a business-court bill.

B. Passage of H.B. 19 and S.B. 1045

The business court project received greater attention during the 88th Legislative Session than it ever had before. Showing coordinated support, the Governor, Lieutenant Governor, and Speaker all designated the business court a legislative priority.[139] This coordination extended to proponents, who

[135] *See* Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. H.B. 1875, 87th Leg., R.S. (2021).

[136] *See* H. Comm. on Judiciary & Civ. Juris. Witness List, 87th Leg., R.S. (Apr. 6, 2021),https://capitol.texas.gov/tlodocs/87R/witlismtg/pdf/C3302021040608001.PDF.

[137] *See* CIV. JUSTICE COMM., TEX. JUD. COUNCIL, REPORT AND RECOMMENDATIONS (2022), https://www.txcourts.gov/media/1455006/2022_civil-justice-report-recommendations.pdf.

[138] *See* TEX. H.R., INTERIM COMM. CHARGES, 87th Leg., R.S., at 19 (2022), https://house.texas.gov/_media/pdf/interim-charges-87th.pdf; H. COMM. ON JUDICIARY & CIV. JURIS., INTERIM REPORT, 88th Leg., R.S., at 29–30 (2022), https://house.texas.gov/_media/pdf/committees/reports/87interim/Judiciary-&-Civil-Jurisprudence-Committee-Interim-Report-2022.pdf.

[139] *See* Interview by Shelly Brisbin with John Moritz, *Texas' 'Big Three' Lawmakers Want to Create a Specialty Business Court*, TEXAS STANDARD (Mar. 6, 2023, 2:20 PM), https://www.texasstandard.org/stories/texas-top-lawmakers-want-specialty-business-court-legislature-2023/; Press Release, Greg Abbott, Governor Abbot Delivers 2023 State of the State Address, OFFICE OF TEX. GOVERNOR (Feb. 16, 2023), https://gov.texas.gov/news/post/governor-abbott-delivers-2023-state-of-the-state-address ("To keep Texas the best state for business, our local communities need new economic development tools this session. And local businesses will flourish

organized dozens of business groups to testify in support of the bills, including, among others, major Texas employers such as Energy Transfer Partners, IBC Bank, CenterPoint Energy, and Occidental.[140] This level of engagement had not been present in prior efforts to pass a business court bill.[141]

Despite the increased support, the bill faced several obstacles during the legislative process. Most prominently, opponents argued that business court judges were constitutionally required to be elected instead of appointed.[142] Those arguments are introduced below, but it suffices to say that the subject was a point of severe contention. Amendments that would have replaced appointment with district-by-district election were offered in the House and the Senate, but both were ultimately defeated.[143]

The bill also experienced pushback from rural constituencies, that were unpersuaded that their less populous districts needed a specialized court for commercial disputes.[144] As initially introduced, the Business Court consisted

even more if we reduce the gridlock in our courts by creating specialized courts with the expertise to deal with complex commercial litigation."); Press Release, Dan Patrick, Lt. Gov. Dan Patrick Announces Top 30 Priorities for the 2023 Legis. Sess., OFFICE OF LIEUTENANT GOVERNOR OF TEX. (Feb. 13, 2023) https://www.ltgov.texas.gov/2023/02/13/lt-gov-dan-patrick-announces-top-30-priorities-for-the-2023-legislative-session/; Monica Madden, *Speaker Phelan Unveils Second Batch of Priorities Focused on Economy, Workforce*, KXAN (Mar. 1, 2023), https://www.kxan.com/news/texas-politics/speaker-phelan-unveils-second-batch-of-priorities-focused-on-economy-workforce/.

[140] Various chambers of commerce and business coalitions also testified, including the Greater Houston Partnership, San Antonio Chamber of Commerce, Texas Business Law Foundation, and Texas Association of Business. *See* Tex. H. Comm. on the Judiciary & Civ. Juris. Witness List, 88th Leg., R.S. H.B. 19 (Mar. 22, 2023), https://capitol.texas.gov/tlodocs/88R/witlistmtg/html/C3302023032208001.htm; Tex. S. Comm. on Juris. Witness List, 88th Leg., R.S. S.B. 1045 (Mar. 22, 2023) https://capitol.texas.gov/tlodocs/88R/witlistmtg/pdf/C5502023032209001.PDF.

[141] Compare *supra* note 140 with Tex. S. Comm. on State Affairs Witness List, 80th Leg., R.S. (March 26, 2007), https://www.capitol.state.tx.us/tlodocs/80R/witlistmtg/html/C5702007032609001.HTM, and Tex. H. Comm. on Bus. & Indus., Witness List, 84th Leg., R.S. (March 24, 2015), https://www.capitol.state.tx.us/tlodocs/84R/witlistmtg/pdf/C0402015032411301.PDF.

[142] *See infra* Part III.B.

[143] Both proposed amendments attracted significant attention, but in the end did not threaten the threshold needed to garner a majority. *See* H.J. of Tex., 88th Leg., R.S. 2573 (2023) (House Floor Amendment No. 8, failing 63–81); S.J. of Tex., 88th Leg., R.S. 1842 (2023) (Senate Floor Amendment No. 3, failing 11–19).

[144] *See* S.J. of Tex., 88th Leg., R. S. A-7 (2023) (Statement of Senator Hughes, explaining that bill was amended to postpone the activation of the rural divisions after receiving "input" from stakeholders).

of one district (the entire state) with no divisions.[145] In that form, business court cases could be filed or removed from anywhere in the state, including in more rural areas.[146] To address the concerns of these constituencies, the bill was amended to create the eleven-division system described above.[147] The compromise being that the divisions in more rural areas are presently inactive, and will not go into effect unless reauthorized by the Legislature in the 2025 session.[148]

Finally, the bill experienced considerable tweaking and haggling over the scope of the Business Court's jurisdiction. Although the final form of the bill is fairly narrowly tailored to capture sophistical commercial litigation, concerns were expressed that the court's jurisdiction would subsume many ordinary legal claims.[149] The bill was amended on several occasions to address these concerns.[150] To ensure that certain common claims remained in district or county court, representatives on both sides of the aisle offered amendments that removed insurance claims from the Business Court's jurisdiction.[151] Similar amendments were offered and adopted with respect to personal injury claims, medical and legal malpractice claims, and claims relating to banking and loan institutions.[152] And the supplemental-jurisdiction provision was also modified, clarifying that a claim not falling within the Business Court's jurisdiction may proceed in district or county court concurrently with the business-court claim; this ensured that ordinary claims

[145] *See* Tex. H.B. 19, 88th Leg., R.S. § 24A.004 (introduced Feb. 28, 2023). The different versions of the bill are available on the Legislature's website. *See generally* Tex. H.B. 19, 88th Leg., R.S. (2023), TEXAS LEGISLATURE ONLINE (last visited Feb. 16, 2024), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB19.

[146] Tex. H.B.19 (Feb. 28, 2023) at 7.

[147] *Supra* Part I.A; *see also* Tex. C.S.H.B. 19, 88th Leg., R.S. § 25A.003 (2023).

[148] TEX. GOV'T CODE ANN. § 25A.003(d), (g)–(i), (k)–(l).

[149] *See* S.J. of Tex., 88th Leg., R.S. A-2 to A-3 (2023) ("It' s my understanding that the intent of this bill is for the court, this court, to be one of limited original jurisdiction for business disputes only. Is it still your intent that these cases will be limited to large corporate transactions and will not cover typical consumer claims? . . . The vast majority of the claims brought by many of our constituents will not fall under the original jurisdiction of this court. . . . So, or in other words, the state district courts will continue to be the primary venue for our constituents 'everyday disputes.") (statement of Sen. Carol Alvarado).

[150] *See infra* notes 151–153 and accompanying text.

[151] *See* H.J. of Tex., 88th Leg., R.S. 2569 (2023) (adopting Floor Amendment No. 2, offered by Rep. Julie Johnson); *id.* at 2569–70 (adopting Floor Amendment No. 3, offered by Rep. Dustin Burrows).

[152] *See id.* at 2567–69.

would not be forced to wait in line until the end of a business court proceeding.[153]

In the end, H.B. 19 received bipartisan, though not unanimous, support. Each bill passed the House and Senate with large margins, including votes from both parties, especially in the Senate.[154] And there are indications that the margins of support would have been even greater if not for the dispute regarding the appointment versus election of judges.[155] The Governor signed both bills on June 9, 2023.[156]

* * *

Since the concept of a Texas business court was first proposed in 2007, the idea was raised and rejected many times.[157] Over that time, the demand for a specialized court to handle commercial disputes grew, and gradually evolved into a broad coalition of support from businesses and lawmakers.[158] That coalition finally pushed the bills over the finish line and saw them enacted into law.[159] But even before the Business Court and Fifteenth Court of Appeals began hearing cases, a challenge to their constitutionality was mounting.

[153] *See id.* at 2568–69; *cf.* Tex. C.S.H.B. 19, 88th Leg., R.S. § 25A.004(b) (2023). These and other amendments were adopted during debate on the House Floor. To view these exchanges, see Hearing on Tex. H.B. 19 Before the Tex. H.R., 88th Leg., R.S. at 4:32:00 (May 1, 2023) (digital recording available through https://tlchouse.granicus.com/MediaPlayer.php?view_id=80&clip_id=24739).

[154] The House passed H.B. 19 90-51, with 83 Republicans and 7 Democrats voting in favor. H.J. of Tex., 88th Leg., R.S. 2637 (2023). The bill then passed the Senate 24-6, with 19 Republicans and 5 Democrats voting in favor, and the House concurred in the Senate's version of the bill 86-53, with 83 Republicans and 3 Democrats voting in favor. S.J. of Tex., 88th Leg. R.S. 1842 (2023); H.J. of Tex., 88th Leg., R.S. 5337 (2023).

[155] *See* Hearing on Tex. H.B. 19 Before the Tex. H.R., 88th Leg., R.S. at 4:40:20, 5:00:30 (May 1, 2023) (statement of Rep. Joe Moody) ("I agree with the concept of higher qualifications for [business court] judges. . . . Here's the thing: I agree with this concept. I think we should have business courts in Texas. But if we're going to do them, we should do them correctly. And the correct way to do it is to amend our constitution [to allow for the appointment of business court judges].") (digital recording available through https://tlchouse.granicus.com/MediaPlayer.php?view_id=80&clip_id=24739).

[156] H.J. of Tex., 88th Leg., R.S. 6490 (2023).

[157] *See infra* Part II.A.

[158] *See infra* notes 140−141, 154, and accompanying text.

[159] *See infra* note 154.

III. Preview of Constitutional Challenges

Beginning with the introduction of H.B. 19 and S.B. 1045 , opponents of the bills have argued that the Business Court and the Fifteenth Court of Appeals violate the Texas Constitution.[160] They understand the Business Court to be unlawful because its judges are appointed instead of elected, and the Fifteenth Court to be unlawful because its jurisdiction is statewide, rather than be limited to a subset of the state .[161] These arguments were raised during the legislative process, including directly by Members and Senators, by witnesses, and in the media—and they will undoubtedly be raised in litigation before the Texas Supreme Court, which has exclusive and original jurisdiction over a challenge to the constitutionality of any part of either Act.[162] This Part introduces the details of those arguments, both in favor and against.

A. Constitutional History

The specific arguments for and against the Business Court and Fifteenth Court of Appeals are grounded on a 1891 amendment to the Texas Constitution.[163] Prior to that amendment, the Texas Supreme Court took a narrow view of the Legislature's authority to establish new courts.[164] As a consequence, the Texas Supreme Court refused to recognize multiple attempts by the Legislature to create new courts.[165] This, in turn, led to a concerning backlog of cases (typically in urban areas), especially with

[160] *See* Jane Elliott, *Backlash to Business Court Bill Unites Litigators from Both Sides of the Docket*, THE TEXAS LAWBOOK (April 20, 2023), https://texaslawbook.net/backlash-to-business-court-bill-unites-litigators-from-both-sides-of-the-docket/.

[161] *Id.*

[162] Tex. H.B. 19 § 25.004(a).

[163] Tex. S.J. Res. 16, 22nd Leg., R.S. (1891) ("The Legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.").

[164] Specifically, the Court held that, for inferior statutory courts, the Legislature could not grant such courts jurisdiction over matters that could already be heard by a constitutional court. *See, e.g.*, Ginnochio v. State, 18 S.W. 82, 85–6 (Tex. App. 1891, no pet.); Gibson v. Templeton, 62 Tex. 555, 556 (1884); *see also* M.L. Cook, *Texas Courts of Exceptional Jurisdiction and Organization—Constitutionality—Small Claims Courts*, 9 TEX. L. REV. 388, 389–90 (1931) (describing pre-1891 caselaw on the Legislature authority to establish new courts).

[165] On multiple occasions, the Court of Criminal Appeals held that municipal courts (designed to hear cases concerning local criminal offenses) were unconstitutional. Cook, *supra* note 164, at 391 n.16–17 (collecting cases).

criminal prosecutions.[166] In this context, the Texas Constitution was amended to give the Legislature greater flexibility over the creation and amendment of courts, specifically adding the following language to Article V, Section 1:

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. *The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto*.[167]

The Texas Supreme Court came to understand the amendment as vesting broad power in the Legislature to create new judicial bodies:

> Authority is expressly given to create and organize other courts, and to confer upon them such jurisdiction as may be deemed necessary; and, to enable the legislature to accomplish this, power is conferred to conform the jurisdiction of the district and other inferior courts to that of the courts created and organized by the legislature; that is, the courts created by the legislature might be invested with jurisdiction concurrent with the district or other inferior courts, or they might be empowered to exercise the judicial functions which, by the constitution, were conferred upon the district or other inferior courts, within a given territory, to the exclusion of the constitutional courts. In other words, the effect of the language is to place the subject at the complete disposal of the legislature so far as inferior courts are concerned.[168]

[166] *Id.* at 391.

[167] TEX. CONST. art. V, § 1 (emphasis added). *See also* Harris County v. Stewart, 41 S.W. 650, 653–56 (Tex. 1897) (addressing the meaning of the 1891 amendment); Cook, *supra* note 164, at 391.

[168] *Stewart*, 41 S.W. at 655; *see also* Carter v. Missouri, K. & T. Ry. Co. of Texas, 157 S.W. 1169, 1172 (1913) ("It would be difficult to express more definitely the authority conferred in that clause of the Constitution-to 'establish such other courts as it may deem necessary'-which places in the discretion of the Legislature the character and number of courts that may be created as well as

During the same constitutional amendment, the State adopted its present structure of appellate courts.[169] Prior to 1891, the State did not have an intermediate court of appeals.[170] The Texas Supreme Court (with assistance from the Commission of Appeals) heard most civil appeals, whereas the Court of Appeals heard criminal appeals and civil appeals from county courts.[171]

As with the trial courts, these appellate courts were substantially overburdened.[172] To alleviate these burdens, the 1891 constitution provided for court of appeals districts, and the Legislature thereafter enacted three courts of appeals, whose districts were headquartered in Austin, Galveston, and Fort Worth.[173] The Texas Supreme Court has interpreted the 1891 amendment as granting the Legislature discretion in designing specific components of the appellate courts' jurisdiction, such as whether counties may be included in multiple courts of appeals districts.[174] The Court has gone so far as to say that the Legislature has complete control over the courts' jurisdiction in civil cases: "[T]he appellate jurisdiction of the Courts of Civil Appeals in 'civil cases' is not unlimited or absolute, but is subject to control by the Legislature. This must be so because it is provided that such jurisdiction is under such restrictions and regulations as may be prescribed by law."[175]

the manner in which the officers shall be chosen. The territory over which the jurisdiction of such court may be exercised and the subjects upon which its authority may be exerted are at the discretion of the Legislature.").

[169] Catherine K. Harris, *A Chronology of Appellate Courts in Texas*, 67 TEX. B.J. 668, 670 (2004).

[170] *Id.*

[171] TEX. CONST. art. V, §§ 1–6 (1876).

[172] *See* W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269, 324–25 (1961) (providing an historical overview of the Texas courts of appeals); TEXANS FOR LAWSUIT REFORM FOUND., INTERMEDIATE APPELLATE COURTS IN TEXAS: A SYSTEM NEEDING STRUCTURAL REPAIR 3–17 (2020).

[173] Tex. Const. art. V, § 6 (1891); Act of Apr. 13, 1892, 22d Leg., 1st C.S., J.C.S.S.B. 32 & H.B. 11, ch. 15, §§ 1–4, 1892 Tex. Gen. Laws 25; TEXANS FOR LAWSUIT REFORM FOUND., *supra* note 172, at 3–17.

[174] *See, e.g.*, Miles v. Ford Motor Co., 914 S.W.2d 135, 137 n.3 (Tex. 1995) (*per curiam*) (recognizing the overlapping jurisdiction of several courts of appeals districts) ("Even though the Constitution provides that '[t]he state shall be *divided* into courts of appeals districts,' twenty-two counties are located in two appellate districts and one, Brazos County, is located in three.") (quoting TEX. CONST. art. V, § 6(a)) (emphasis in original).

[175] Harbison v. McMurray, 158 S.W.2d 284, 287 (Tex. 1942).

It is against this historical backdrop that the supporters and opponents of the Business Court and Fifteenth Court of Appeals make their arguments regarding the courts' constitutionality.

B. Challenge to the Business Court

Starting with the Business Court, the primary objection raised is that the court, though nominally a statutory court, is *de facto* a constitutional district court, which judges must therefore be elected rather than appointed.[176] As an initial matter, it is generally uncontroversial that a judge of a constitutional district court must be elected and a judge of an inferior, statutory court may be appointed.[177] The issue, then, is whether a business court judge is a district judge for purposes of the constitution.

According to H.B. 19's proponents,[178] the Business Court is an inferior court, not a constitutional district court. The bill itself describes the court as "a statutory court created under Section 1, Article V, Texas Constitution."[179] And the court's jurisdiction is inferior to a district court's general jurisdiction

[176] Opponents also object on the basis that the Business Court is not divided into geographic districts, as is arguably required for district courts. *See* TEX. CONST. art. V, § 7(a) ("The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution."). This objection is essentially the same as the argument raised with respect to the Fifteenth Court of Appeals and is summarized in the section addressing that court. *Infra* Part III.C.

[177] *See, e.g.*, Jordan v. Crudgington, 231 S.W.2d 641, 645 (Tex. 1950) (approving the creation of the statutory Court of Domestic Relations, whose judges were appointed by the Governor); Tex. Sen. Journal at A-11, 88th Leg., Reg. Sess. (May 12, 2023) (Bill sponsor Sen. Bryan Hughes agreeing with Sen. Royce West, who opposed the bill, that Texas district judges must be elected).

[178] For a comparison of positions during the legislative session regarding the constitutionality of the Business Court, see Memorandum from Texans for Lawsuit Reform (Mar. 2, 2023) ("Legislative Authority to Create Specialized Courts"); Memorandum from Texas Trial Lawyers Association (Mar. 22, 2023) ("S.B.27/HB19 – Jordan v. Crudgington – It Doesn't Mean What You Think it Means").

[179] TEX. GOV. CODE § 25A.002; *see also* TEX. CONST. art. V, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."). This provision did not appear in the initial version of the bill, and was specifically added to address the constitutional issue. *Compare* H.B. 19 (Introduced), *with* H.B. 19 at § 1 p.4 ll. 24–25 (Committee Substitute).

in the sense that it is limited to the narrow subset of complicated commercial disputes described in the bill.[180]

This distinction is arguably in line with the seminal case on the subject, *Jordan v. Crudgington*, where the Texas Supreme Court explained that a statutory court does not become a district court "merely because it exercises some of the jurisdiction of district courts."[181] And with statutory courts, the Court held, there are no restrictions with respect to how judges may obtain office: "There is no provision as to the mode of selecting judges for courts of that nature. The absence of any such provision evidences an intent to leave the power of appointment within the discretion of the Legislature."[182]

But the bill's opponents respond that, though a statutory court in name, the Business Court is substantively a district court.[183] Although the Texas

[180] *See* Part I.C, *supra*; *cf.* TEX. CONST. art. V, § 8 (providing that district courts have "original jurisdiction of all actions, proceedings, and remedies" except as provided for by law). The bill does not grant exclusive jurisdiction to the Business Court in any respect. *See supra* note 53 and accompanying text (explaining that Business Court jurisdiction is concurrent with the district courts). This would likely have raised additional constitutional issues, seeing as the State's highest courts have consistently understood Article V, Section 1 as prohibiting the Legislature from depriving a district court of the jurisdiction the constitutional grants them. *See* Kelly v. State, 724 S.W.2d 42, 46 (Tex. Crim. App. 1987) ("The amendment [to the Texas constitution] not only authorizes the Legislature to create 'other such courts,' it may grant to newly created district courts the constitutional jurisdiction set out in Section 8 of Article I, thus causing them to be equals among all of the constitutional district courts. However, the amendment does not give the Legislature the authority to deprive any other district court of, or to detract from, the jurisdiction specifically granted them by the constitution."); Lord v. Clayton, 352 S.W.2d 718, 721 (Tex. 1961) ("It is enough to say that we held invalid a provision of an act creating a Criminal District Court which undertook to give the court jurisdiction of divorce cases to the exclusion of other constitutional district courts. We specifically held that while the Legislature could create special courts under authority of an 1891 amendment to Section 1, Article 5 of the Constitution, and could confer on such courts concurrent jurisdiction over subjects mentioned in Section 8 of Article 5 of the Constitution, it could not deprive regular district courts of the jurisdiction conferred on them by the Constitution.") (citing Reasonover v. Reasonover, 58 S.W.2d 817 (Tex. 1933)).

[181] *Jordan*, 231 S.W.3d at 645.

[182] *Id.* at 646; *see also id.* ("The authority given by the amendment [of the Texas Constitution] under review to the Legislature to prescribe the organization of courts created by it certainly is authority to provide it with a judge.").

[183] *See, e.g.*, Hearing of the Tex. H. Comm. on the Judiciary and Civil Jurisprudence at 1:18:30 (Mar. 22, 2023) (statement of Rep. Julie Johnson) ("This is one of the fundamental problems of this bill. We're calling it a district [court], but . . . we're going to call it something else to meet some perceived constitutional exception to Texas's longstanding principle of electing judges."); *id.* at 1:16:00 (statement of witness Brian Blevins) ("Just the fact that you call it a business court doesn't make it a specialty court. . . . [L]ook at how many times this bill grants the powers and the ability

Supreme Court in *Jordan* acknowledged that statutory courts are not subject to the same constitutional requirements as district courts, it also appeared to hold that the line between statutory and district courts is functional, not nominal.[184] And the business court bears several functional similarities to a district court; it has the same powers as district courts, business court judges have the same powers, privileges, immunities, and salary as a district court judge (and are subject to the same standards of removal and disqualification), the business court clerk has the same duties as a district court clerk, and the rules for the Business Court large track the rules that apply in district court.[185] *Jordan* did not identify specific guidelines for whether a statutory court is functionally a district court, but these similarities lend themselves to such an argument with respect to the Business Court.[186]

C. Challenge to the Fifteenth Court of Appeals

Turning to the designated court of appeals for the Business Court, the primary argument levied against the Fifteenth Court of Appeals is that its jurisdiction is statewide, rather than being limited to a subset of the state. Article V, Section 6 of the constitution addresses the organization of intermediate courts of appeals, and arguably contemplates that such courts must be territorially subdivided:

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and the jurisdiction of a district court. And so therefore, it is a constitutional district court."); Tex. Sen. Journal at A-20 to A-21, 88th Leg., Reg. Sess. (May 12, 2023) (statement of Sen. Royce West) (arguing that the Business Court is unconstitutional on the basis that it is *de facto* a district court); Memorandum from Professor Stephen Vladeck at 4–6 (Apr. 5, 2023) (Constitutionality of Second Committee Substitute to HB19/SB27) (submitted in conjunction with testimony given in opposition to H.B. 19) [hereinafter Vladeck Memorandum].

[184] *Jordan*, 231 S.W.3d at 645 (explaining that the constitutional requirements for district courts apply to courts that "in fact, though not in name, are district courts").

[185] TEX. GOV. CODE §§ 25A.004(a), 25A.005, 25A.011, 25A.012, 25A.017(a)(2), 25A.015(f)–(g).

[186] *See Jordan*, 231 S.W.3d at 645–47 (not specifically analyzing the question of when a statutory court is *de facto* a district court). At least one commentator has argued that the Business Court's organization—one district divided into eleven divisions—is further evidence that the court is not inferior to a district court (which, at most, have jurisdiction over a particular county). *See* Vladeck Memorandum, *supra* note 183, at 3, 4–5. It is true that most statutory courts tend to be limited to a subset of cases within a particular geographic area, most typically a county. *See* Kelly v. State, 724 S.W.2d 42, 46 (Tex. Crim. App. 1987) (in the context of holding that the Dallas County Magistrates' Act is constitutional, collecting cases regarding statutory courts such as the Probate Court of Harris County or the Domestic Relations Court of Potter County). But *Jordan* did not consider the geographic scope of the statutory court in reaching its holding, 231 S.W.3d at 647, and subsequent cases do not appear to have drawn a territorial distinction.

> The state *shall be divided into courts of appeals districts*, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. . . . Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law.[187]

Since their creation in 1891, the courts of appeals have been divided into geographical districts, and have had jurisdiction over appeals from district and county courts within their district.[188] S.B. 1045 assigns a district to the Fifteenth Court of Appeals, but unlike other appellate courts, its district includes all the counties in the state.[189] As such, after the first three justices are appointed, all future justices are elected by statewide vote.[190]

Opponents of S.B. 1045 read Article V, Section 6 to mean that a court of appeals must be subdivided.[191] For them, the requirement that that the state be "divided" into districts and the provision that the jurisdiction extends to the "limits" of each district imply that a district may not include the entire state.[192] But proponents of the court take a broader view of the Legislature's authority to craft courts of appeals districts.[193] For them, the 1891 amendments to the constitution stress the Legislature's discretion to create

[187] TEX. CONST. art. V, § 6(a) (emphasis added).

[188] Murray, *supra* note 172 at, 270, 324; INTERMEDIATE APPELLATE COURTS IN TEXAS, *supra* note 172, at 3; *see also* Clarence Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 550–54 (1983) (providing historical background on changes to the Texas Constitution that granted jurisdiction to appellate courts over criminal appeals).

[189] TEX. GOV. CODE § 22.201(p).

[190] *Supra* notes 111–112 and accompanying text.

[191] Vladeck Memorandum, *supra* note 183, at 1–2.

[192] *See* Hearing of the Tex. Sen. Comm. on Jurisprudence at 29:00 (Mar. 22, 2023) (statement of witness Jim Perdue) ("The constitution lays out the very concept of division of the appellate courts. But fundamentally, the constitution of the state of Texas provides for electing our judges."); Vladeck Memorandum, *supra* note 183, at 2, 6.

[193] *See* Brister, *supra* note 12 ("Our Constitution was amended 132 years ago for this very purpose, giving the Legislature authority to create new courts of appeals, modify their districts, and expand or restrict their jurisdiction.").

new courts, and to specify those courts' scope and jurisdiction, including creating a district that composes all the counties in the state.[194]

* * *

It remains to be seen whether the Texas Supreme Court will uphold the Business Court and Fifteenth Court of Appeals, or if it will enjoin those courts before they can begin hearing cases in earnest. (Although interestingly, at least one Justice has previously opined that a substantially similar version of the Business Court would be constitutional.)[195] Either way, the future of Texas's judicial project will depend on the resolution of the constitutional and historical questions introduced above.

CONCLUSION

The Business Court is the product of nearly twenty years of unsuccessful attempts to create a specialty commercial court in Texas. The 88th Legislature succeeded where past legislatures failed in large part due to increased political attention by Texas lawmakers and largescale, coordinated support by industry groups. The result is a new specialized court that aims to bolster Texas's pro-business credentials, seeking to challenge other states' supremacy in adjudicating high-dollar disputes, and promising an efficient and predictable tribunal to hear cases from the many groups that do business in the state. The Legislature has attempted to fulfill that promise by offering judges with heightened business experience, a trial court with a docket of cases limited to certain sophisticated commercial cases, and a statewide court of appeals to hear appeals from Business Court decisions.

[194] *See* Hearing of the Tex. Sen. Comm. on Jurisprudence at 10:52 (Mar. 22, 2023) (statement of S.B. 1045 author Sen. Joan Huffman) ("I don't think the Legislature has ever read Section 6 as requiring the counties to be divided evenly."); Brister, *supra* note 12 ("The Constitution requires that state government "be divided into three distinct departments," but it does not require that appellate districts be distinct, and for nearly 60 years two courts of appeals in Houston have had identical districts. Given the Legislature's broad power to organize new courts and the state's long practice of overlapping appellate districts, nothing appears to prevent the Legislature from creating a district containing all 254 counties.").

[195] Before he became a member of the Texas Supreme Court, Justice Evan Young testified in favor of the 2021 iteration of the business court bill, House Bill 1875. *See* Tex. H.B. 1875, 87th Leg., R.S. (2021). Regarding the constitutionality of that bill, he said: "I'm confident that it's constitutional. The Supreme Court of Texas resolved that you know over half a century ago. The first provision of the judicial article of the Constitution allows the legislature to create new kinds of Courts, and it expressly States the kinds of courts that do require election." Hearing of the Tex. H. Comm. on the Judiciary and Civil Jurisprudence at 4:28:30 (Apr. 6, 2021).

The new court faces many questions. Not least of which is whether the Business Court (and its cousin, the Fifteenth Court of Appeals) will go into effect at all. Litigation concerning the constitutionality of those courts should begin as soon as the courts open their doors, and will turn on the meaning of the 1891 amendment to the Texas Constitution and the extent of the Legislature's power to create new court systems. And even if the courts are upheld, many uncertainties remain, such as how much demand the court will experience, whether cases really will be decided quicker and more predictably, and whether the court can attract top-quality judges who are up to the task.

As the Business Court attempts to cement its status as a critical judicial body and develops its own body of jurisprudence, this Article hopes to introduce the fundamentals. Bearing in mind the basic components of the court's procedure and history, the practitioner will be well placed to appear before the State of Texas's brand new court.

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STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

The New Business Courts in Texas: Anticipating Questions; Suggesting Answers

NAVIGATING THE NEW LANDSCAPE: AN OVERVIEW OF THE TEXAS BUSINESS COURT

BY AMY PRUEGER

ON MAY 25, 2023, AFTER NEARLY A DECADE of proposals, the Texas Legislature finally passed legislation creating a specialized business litigation court. Chapter 25A of the Texas Government Code became effective on September 1, 2023, and applies to civil actions commenced beginning September 1, 2024.

Not all aspects of the new court are known at this time as the Legislature left certain procedural matters to be addressed by the Texas Supreme Court, including removal, remand, payment of fees, and the issuance of written opinions. The Court received proposed rules and recommendations from the Texas Supreme Court Advisory Committee on October 13, 2023, and by the time this article is published will have issued its proposed rules for public comment. Following that comment period, the Court will promulgate final rules, likely in the summer of 2024.

Divisions and Judges

The Business Court, authorized under Texas Constitution Section 1, Article V, is a single statewide statutory court with eleven "divisions." Tex. Gov't Code §§ 25A.002, .003. These divisions encompass the same counties as the current administrative judicial regions (*Id.* § 74.042), i.e., "[t]he First Business Court Division is composed of the counties composing the First Administrative Judicial Region…." *Id.* § 25A.003(c). The map below shows the eleven administrative judicial regions/Business Court divisions. A list of counties and their administrative judicial region designation is available at https://www.txcourts.gov/media/1442723/counties-by-ajr-sept-2017.pdf.

The governor will appoint sixteen judges to serve on the Business Court: two judges in the First, Third, Fourth, Eighth, and Eleventh Divisions (primarily urban areas) and one judge sitting in the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions (rural areas). *Id.* § 25A.009(a).

Business Court judges must be licensed attorneys, 35-years old, U.S. citizens, reside within their division for at least five years, and may not have had their license revoked, suspended, or have received a probated suspension. *Id.* §§ 25A.008. Notably, a judge must have at least ten years' experience in "complex civil business litigation, in business transaction law, as a Texas judge with civil jurisdiction" or some combination of those three. *Id.* § 25A.008(a)(4).

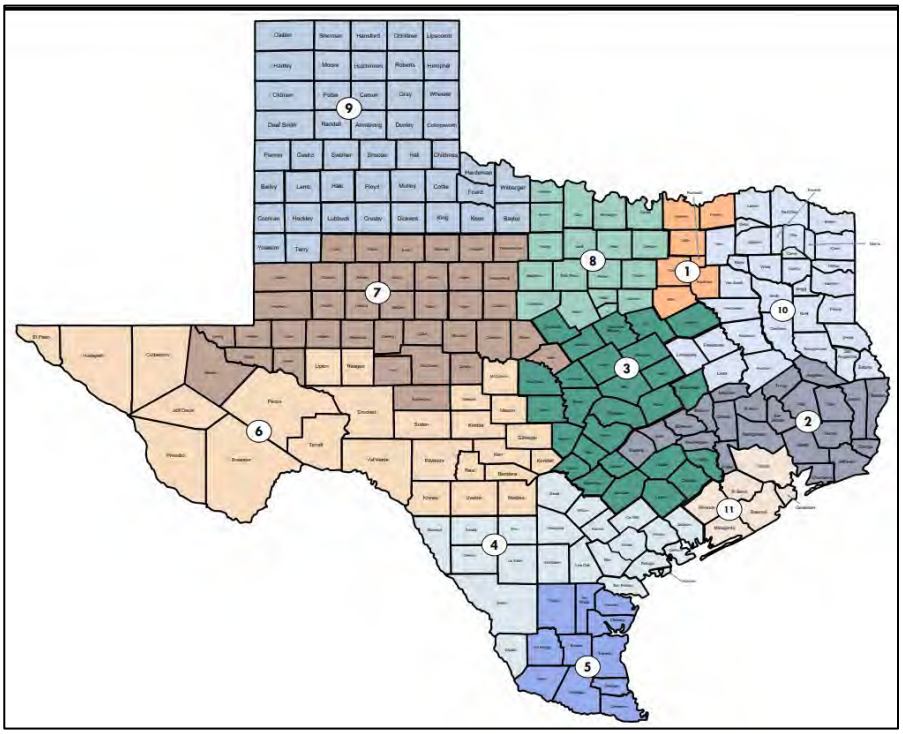

Figure 1 Administrative Judicial Regions, available at www.txcourts.gov/media/1453885/ajr-map-2017.pdf

In comparison, Texas Constitution Article V, § 7 imposes no practice-area requirement on district judges. District judges must be U.S. citizens; have been a practicing lawyer or a Texas judge (or combination thereof) for eight years; not have had their law licenses revoked, suspended, or subject to a probated suspension. A district judge must only have resided in the district where that judge was elected for two years before her election and must reside in that district during the judge's term of office.

Business Court judges have all powers, duties, immunities, and privileges of district court judges. *Id.* § 25A.005. And, like other judges, Business Court judges may not practice law while serving and are subject to recusal and disqualification. *Id.* §§ 25A.012-013.

Visiting judges can serve on the Business Court, as assigned by the Supreme Court's Chief Justice, but must have the same qualifications as Business Court judges. Like visiting district court judges, Business Court visiting judges are subject to objection, disqualification, or recusal. *Id.* § 25A.014.

Business Court judges are paid an annual base salary of at least $140,000, the same as district court judges. *Id.* § 659.012.

One striking difference between district court judges and Business Court judges is that Business Court judges are appointed to two-year terms by the governor, with the advice and consent of the Senate. *Id.* § 25A.009(a)-(c). Vacancies are filled in the same manner. *Id.* § 25A.010. Business Court judges are never elected.

While the urban divisions were funded with the 2023 legislation, the rural divisions are subject to funding in the 89th legislative session. *Id.* §§ 25A.003(d), (g), (h), (i), (k), & (l). Thus, on September 1, 2024, only the First, Third, Fourth, Eighth, and Eleventh divisions will be operating.
If the rural divisions are funded, the governor must appoint the remaining judges after August 31, 2026, but before September 2, 2026. *See* S. RSCH. CTR., Enrolled Bill Analysis, Tex. S.B. 1045, 88th Leg., R.S., at Sec. 6(b) (2023).

Jurisdiction
The Business Court has concurrent jurisdiction with civil district courts over these specific business disputes:

- when the amount at stake exceeds **$5 million** (excluding certain additional damages and fees) in the following:
  - derivative proceedings;
  - actions related to the governance, governing documents, or internal affairs of an organization;
  - actions involving claims under state or federal securities or trade regulation laws against organizations, controlling persons, managerial officials, underwriters of securities, or auditors;
  - actions by organizations or owners against owners, controlling persons, or managerial officials, alleging acts or omissions in their capacity as such;
  - actions alleging breaches of duty by owners, controlling persons, or managerial officials owed to an organization or its owners;
  - actions seeking to hold owners or governing persons of an organization liable for the organization's obligations, excluding those arising from specific written contracts; and
  - actions arising from the Business Organizations Code.

- when the amount exceeds **$10 million** (excluding certain additional damages and fees) in the following:
  - actions arising from qualified transactions (as defined in section 25A.001, a qualified transaction is a transaction involving loans or advances between parties with an aggregate value of at least $10 million, but excluding more formal loans or advances from banks, credit unions, or savings and loan institutions);
  - actions arising from contracts or commercial transactions where the parties agreed in the contract or a subsequent agreement that the Business Court has jurisdiction (excluding actions related to insurance contracts);
  - actions arising from violations of the Finance Code or Business & Commerce Code by an organization or its officers or governing persons, excluding banks, credit unions, or savings and loan associations.

Id. §§ 25A.004(b), (c), & (d).

The Business Court also has concurrent jurisdiction with district courts, regardless of the amount in controversy, if a party to the action is a publicly traded company.

In actions seeking injunctive relief or a declaratory judgment under Civil Practice and Remedies Code Chapter 37, the Business Court has concurrent jurisdiction with district courts

for disputes related to claims falling within the Business Court's jurisdiction. *Id.* § 25A.004(e).

The Business Court has supplemental jurisdiction over claims that form part of the same case or controversy as a case within the court's primary jurisdiction. *Id.* § 25A.004(f). However, it may only exercise that supplemental jurisdiction with the agreement of all parties to the claim. *Id.* If the parties cannot agree, then the claim will be heard in the court of original jurisdiction alongside the claims considered in the Business Court. *Id.* This could result in conflicting findings or rulings concerning the same underlying dispute.

Some actions are excluded from the Business Court's jurisdiction. First, certain actions, even if within the Business Court's primary jurisdiction, are expressly excluded **unless** the actions fall within the Business Court's supplemental jurisdiction:

- actions against or by a governmental entity;
- actions to foreclose on real or personal property liens;
- claims arising out of Texas Business & Commerce Code Chapter 15 (monopolies, trusts, and conspiracies in restraint of trade) and Chapter 17 (Deceptive Trade Practices Act), Property Code Chapter 53 (mechanic's, contractor's, and materialman's liens) and Title 9 (trusts), and any claims arising out of the Estates, Family, or Insurance Codes;
- claims related to consumer transactions ("a transaction between a merchant and one or more consumers," as defined by Tex. Bus. & Com. Code § 601.001); and
- claims related to the duties and obligations under an insurance policy.

Id. § 25A.004(g).

Certain actions are never permitted in Business Court, even under supplemental jurisdiction:

- claims arising under Chapter 74, Civil Practice and Remedies Code (medical malpractice);
- claims for monetary damages for bodily injury or death; or
- claims of legal malpractice.

Id. § 25A.004(h).

Filing and Removal

An action may be filed directly in the Business Court provided the court has jurisdiction and venue (under state law or as specified in a contract). Once filed, the Business Court will assign the action to the division where venue is proper. Should the Business Court determine after division assignment that the division assigned does not include a county of proper venue, the court can transfer the case to another division or, if there is not an operating division that includes the proper county, at the option of the filing party, transfer to a district court or county court at law with proper venue.

A case can be removed to the Business Court if it falls within the court's primary jurisdiction. If the Business Court determines it does not have jurisdiction, it can remand to the court where the action was originally filed. The parties can agree to remove the case to Business Court any time during the pendency of the case. *Id.* § 25A.006(f). If the parties do not agree, the timeframe for removal is similar to that in federal court: "not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the Business Court's jurisdiction over the action." *Id.* § 25A.006(f)(1).

A case can be transferred out of the Business Court if the court lacks jurisdiction. *Id.* § 25A.006(b).The party filing the action can choose to transfer to the district court or county court at law with proper venue or to dismiss without prejudice. *Id.*

Not every qualifying case can be removed: an action filed in a district or county court that is not within the operating division of the Business Court cannot be removed. *Id.* § 25A.006(e).

This means that for actions properly raised in counties that fall within the rural divisions not yet funded, there is no operating court for those claims to go to until the Legislature funds the remaining divisions (Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions). So those parties with actions where venue is proper in those counties would, at the earliest, be able to file in the Business Court in 2026.

Courtrooms, Venue, Remote Proceedings

The Business Court is one court with eleven divisions, each including multiple counties. Each Business Court judge must maintain chambers in one of the counties within the division to which the judge is appointed. *Id.* § 25A.017(c). However, a judge may hold court in any courtroom within that division, as necessary or convenient. *Id.* A judge can also

conduct remote proceedings as needed but may not require a party or attorney to attend remotely a court proceeding in which oral testimony is heard unless the parties agree otherwise. *Id.* § 25A.017(a), (e). Remote jury trials are not authorized under Chapter 25A. *Id.* § 25A.017(e).

Currently, it is not clear where the Business Court will be physically. The statute does not contemplate separate Business Court buildings. The Business Court is administratively attached to the Office of Court Administration of the Texas Judicial System (OCA), and thus all Business Court personnel are state employees. *Id.* § 25A.017(k) OCA may contract for the use of facilities with a county, so potentially Business Court judges will sit in district court buildings, but those arrangements have not yet been established. *Id.* §§ 25A.017(k), 25A.0171.

The Business Court is administratively attached to the Office of Court Administration of the Texas Judicial System (OCA), and thus all Business Court personnel are state employees.

The Business Court clerk's office will be in Travis County in state facilities, which have not yet been determined. *Id.* § 25A.017(b).

Jury Trials

As in district court, parties in Business Court have a right to a jury trial. *Id.* § 25A.015. If a jury trial is requested, the presiding Business Court judge will decide the county in which the trial will take place, based on certain factors:

- If the case was initially filed in the Business Court, the jury trial must occur in a county where the case could have been filed under the general venue rules.
- If the case was removed from another court, the jury trial must be conducted in the county where the action was originally filed.
- If a written contract specifies a particular county for the trial, the jury trial must be held in that specified county.

Id. § 25A.015(b)-(d). However, the parties and the Business Court judge may agree to hold the jury trial in a different county, but no party can be compelled to agree to a different county. *Id.* § 25A.015(e). The handling of jury calls, juror selection, and other related practices, rules, and procedures are the same as in district court of the respective county. *Id.* § 25A.015(f).

Appeals

Appeals from the Business Court (among a number of other types of appeals) will be exclusively within the jurisdiction of the new statewide Fifteenth Judicial District Court of Appeals, headquartered in Austin. *See id.* §§ 22.201(p), .2151, .220. Details concerning this new court of appeals are addressed in two other articles in this issue of *The Advocate*.

New Rules

The Legislature tasked the Texas Supreme Court with adopting rules of procedure for the Business Court, including removal, remand, payment of fees, and the issuance of written opinions. *Id.* § 25A.220. The Texas Supreme Court Advisory Committee has been working on those rules for many months and submitted proposed rules and recommendations to the Court on October 13, 2023 (available at https://www.txcourts.gov/scac/meetings/2021-2030/).

The Committee's current proposal does not address Business Court filing fees. Chapter 25A directs the Texas Supreme Court to set filing fees "in amounts sufficient to cover the costs of administering" the Business Court. *Id.* § 25A.218. As discussed in the legislation's final fiscal note, the amount of the fees is intended to be "sufficient to cover the costs of administering the new chapter's provisions," but since the Business Court's caseload is unknown, it is also unknown if any fees set would support operating the court. *See* Legislative Budget Board, 88th Leg., R.S., Tex. H.B. 19, Enrolled Fiscal Note (May 16, 2023). With that caveat, the Legislative Budget Board estimated there would be a $0 net impact to General Revenue Related Funds for the Business Court in the next two years. *Id.*

After the judges have been appointed for the Business Court, they will need to develop local rules for the Business Court. *See Id.* § 25A.020(b).

Constitutional Challenges

The Legislature anticipated constitution challenges to the new court. The Texas Supreme Court has exclusive and original jurisdiction over any constitutional challenges, and the Court may issue injunctive or declaratory relief, as necessary. Acts 2023, 88th Leg., R.S., ch. 380, sec. 4 (H.B. 19). If the appointment of judges by the governor is held unconstitutional by the Court, then the Business Court will be staffed by retired or former judges or justices appointed

to the court under Section 25A.014 (appointment of visiting judges). *Id.*

Conclusion

The Business Court is now a reality. While many aspects of the court are determined by statute, the new legal framework is not fully formed. This new framework will be shaped by rules currently under consideration and the actions of Texas attorneys, as well as the Business Court judges, as they navigate this relatively uncharted territory ahead.

Amy Prueger is a civil litigator with Enoch Kever PLLC in Austin, Texas. ★

PROPOSED RULES FOR THE NEW BUSINESS COURT

BY MARCY HOGAN GREER & HON. EMILY MISKEL

HOUSE BILL 19, CODIFIED INTO THE Texas Government Code as new chapter 25A, created a new statutory court of statewide jurisdiction for specialized matters involving businesses. *See* Acts 2023, 88th Leg., R.S., Ch. 380 (H.B. 19), Sec. 1, eff. September 1, 2023.[1] Governor Greg Abbott signed HB 19 into law on June 9, 2023. https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB19. This article explains the process that went into preparing the report and recommendations of the Supreme Court Advisory Committee (SCAC) for rules governing proceedings in the new Business Court. The SCAC's proposal is currently under review by the Supreme Court of Texas.

> The Business Court will open its doors on September 1, 2024, and both the judiciary and the Office of Courts Administration (OCA) are working hard to ensure that it is ready to hear disputes on day one.

HB 19 requires the Supreme Court to "adopt rules of civil procedure as the court determines necessary," including rules providing for the:

- timely and efficient removal and remand of cases to and from the Business Court;
- assignment of cases to judges of the Business Court;
- issuance of written opinions by the Business Court; and
- fees for filings and actions in the Business Court.

TEX. GOV'T CODE §§ 25A.016, 25.081, 25A.020.

On June 3, 2023, the Supreme Court requested the Supreme Court Advisory Committee "to study and make recommendations" as to each of these categories of rulemaking under HB 19, and others. The SCAC appointed a subcommittee to prepare reports and recommendations. The recommendations were vetted by the full SCAC on October 13, 2023. The proposed rules were then revised based on the comments and submitted to the Supreme Court on November 6, 2023. They are currently under deliberation by the Court.

Overview of rulemaking. The Texas Legislature created the Business Court to entertain complex, sophisticated business disputes. It is intended to provide an efficient and predictable venue for these lawsuits. The Business Court has jurisdiction over certain business and commercial cases with at least $5 million at stake (except there is no minimum amount in controversy for certain claim involving publicly traded entities). The Business Court will open its doors on September 1, 2024, and both the judiciary and the Office of Courts Administration (OCA) are working hard to ensure that it is ready to hear disputes on day one.

The Business Court will operate in divisions that correspond to the 11 administrative judicial regions of Texas. Five of these divisions serving urban areas (Dallas, Austin, Houston, San Antonio, and Fort Worth) will be funded and operational on September 1, 2024. The remaining six divisions, which serve predominately rural areas, will be deferred to the 2025 legislature for approval and funding. *See, e.g.*, TEX. GOV'T CODE § 25A.003.

The Business Court's limited jurisdiction is concurrent with the civil courts of Texas where the Business Court has operating divisions. The Texas Legislature provided that cases within its jurisdiction may be originally filed in the Business Court or may be removed there from other courts, similar to the removal process for cases that are amenable to jurisdiction in the federal courts.

The Business Court will be run by appointed judges who have at least 10 years of experience in practicing complex civil business litigation or business transaction law or 10 years of service on a civil bench in Texas. TEX. GOV'T CODE § 25A.008. Unlike other civil courts, Business Court judges are required to issue written opinions that will create a body of accessible law to govern the specialized court.

Other contributors to this special edition of the Advocate will report on various aspects of the new Business Court.

The scope of proposed rules. HB 19 requires the Supreme Court to "adopt rules of civil procedure as the court determines necessary, including rules providing for: (1) the timely and efficient removal and remand of cases to and from the Business Court; and (2) the assignment of cases to judges of the Business Court." TEX. GOV'T CODE § 25A.020. It also requires the Supreme Court to adopt rules "for the issuance of written opinions by the Business Court." *Id.* § 25A.016. Finally, HB 19 and to set fees for filings and actions in the Business Court. *Id.* § 25A.018.

The Supreme Court's June 3, 2023, letter instructed the SCAC:

> HB 19, by adding Government Code Chapter 25A, creates a Business Court and gives it jurisdiction over certain business matters. HB 19 includes several rulemaking directives. First, new §25A.016 directs the Court to adopt rules "for the issuance of written opinions by the Business Court." Second, new §25A.018 directs the Court to set fees for filings and actions in the Business Court. Finally, new § 25A.020 directs the Court to "adopt rules of civil procedure as the Court deems necessary," including rules "for the timely and efficient removal and remand of cases to and from the Business Court" and "the assignment of cases to judges of the Business Court." The Committee should draft recommended procedural and administrative rules.

https://scac.jw.com/wp-content/uploads/2023/06/36453016_1_2023-06-03-SCAC-Referral.pdf (last visited Jan. 14, 2024).

The Subcommittee. The Business Court Subcommittee appointed by the SCAC is: Marcy Greer – Chair, Hon. R.H. Wallace – Vice Chair, Rusty Hardin, Hon. Peter Kelly, Hon. Emily Miskel, Chris Porter, Hon. Maria Salas Mendoza. Hon. Cathy Stryker, Hon. John Warren, Hon. David Evans, Hon. Harvey Brown, and Robert Levy. We were gifted with a group of highly experienced and incredibly hard-working and collegial team members. We also invited Jerry Bullard, Melissa Davis Andrews, and David Shank to join our discussions, and they also provided significant input.

The Subcommittee's process. The Subcommittee focused on proposing rules that we believe will aid the courts and practitioners with respect to Business Court proceedings and the interplay between the Business Court and other Texas civil courts. Some portions of the legislation that primarily affected the behind-the-scenes administration of the Business Court were not proposed as rules of civil procedure.

The threshold issues. The Subcommittee had several virtual meetings and email discussions soon after the members were appointed. We discovered that we had a few, significant stumbling blocks that needed to be determined at the outset: (1) where the specialized rules for the Business Court should be located; (2) whether a heightened pleading standard should apply to demonstrate Business Court jurisdiction; and (3) a paradigm for setting court fees.

Some members initially thought that the Business Court Rules should go in the Rules of Judicial Administration (RJA), while others believed that they worked best in the Rules of Civil Procedure.

The pleadings question arises because the legislature created a removal/remand process that might require more information than Texas' traditional notice pleading. The Business Court's jurisdiction is complex and exacting. Pleadings that would satisfy notice pleading standards under Texas practice may not be sufficient to allow the judiciary to determine whether a case originally filed in or removed to Business Court were within that court's limited jurisdiction.

Finally, as to fee-setting, the subcommittee had no idea where to start. The legislature directed the Supreme Court to "set fees for filings and actions in the Business Court ***in amounts sufficient to cover the costs of administering this chapter***, taking into account fee waivers necessary for the interest of justice." TEX. GOV'T CODE § 25A.018 (emphasis added). We considered both traditional, up-front filing fees, as well as "pay-as-you-go" models (similar to arbitrations where fees are incurred per day of hearing, for example). But without having any data as to the number of cases that would be eligible for the Business Court—much less those that would be likely filed or removed there—the subcommittee felt it would be impossible to set fees sufficient to ensure that the Business Court would be self-funding. Concerns were also raised that setting fees too high may drive business away from the Business Court for many cases or too low would risk failing the legislative mandate of self-funding.

We reported these threshold matters to the full SCAC Committee in our August 19, 2023, meeting and had a vigorous discussion. *See* Transcript of Aug. 18, 2023, SCAC Meeting, https://scac.jw.com/wp-content/uploads/2023/09/scac23-08-18.pdf (last visited Jan. 14, 2024). Based on those

discussions and further deliberation of the subcommittee members, we assumed the following:

- ***Placement of the proposed rules.*** Other than a proposed amendment to Rule 2, the Subcommittee has recommended placement of the proposed Business Court rules at the end of Part II of the Texas Rules of Civil Procedure (Rules of Practice in District and County Courts) and to replace repealed Section 12 (Review By District Courts of County Court Rulings).[2]
- ***Pleadings specificity.*** The Subcommittee has recommended that initial pleadings be required to allege sufficient facts to establish jurisdiction and venue in the Business Court. Recognizing that this recommendation may depart from Texas' notice pleading standards in some cases, we considered it necessary to assist the court and practitioners in navigating these threshold matters and potentially avoiding disputes about jurisdiction and venue.
- ***Fees.*** We did not make recommendations regarding fees, except to propose that fees be set by administrative order rather than a formal rule. We had only very limited information as to the number of actions anticipated to be filed in the Business Court, and without it, it is impossible to set fees designed to allow the Business Court to be self-supported at the outset. We understand that OCA is carefully analyzing data that will help the Supreme Court to determine appropriate fees.

Drafting the rules. In the context of this beneficial discussion, the subcommittee analyzed HB 19 section by section to determine whether a rule or guidance was needed and if so, where it should be placed. *See* SCAC Meeting Agenda Oct. 13, 2023 (and materials) at 28-31, available at: https://scac.jw.com/wp-content/uploads/2023/11/SCAC-Meeting-Materials-Oct.-13-2023.pdf (last visited Jan. 14, 2024).[3] We concluded that certain court-administration provisions of the statute need not be implemented through rules or should be addressed in the RJA. We also wanted to leave room for local rules of the Business Court to develop. *See id.* The Subcommittee focused on proposing rules that we believe will aid the courts and practitioners with respect to Business Court proceedings and the interplay between the Business Court and other courts.

We then began drafting provisions and had extensive and robust discussions as a group in weekly Zoom meetings. We vetted and exchanged multiple drafts of the proposed rules before settling on a consensus draft.

We presented our report and recommendations to the full Supreme Court Advisory Committee in early October and invited written comments in advance of the October 13, 2023, meeting. *See* SCAC Meeting Agenda (and materials) at 4-31. We solicited both written and oral feedback and had a vigorous discussion of the proposed rules at the SCAC meeting on October 13, 2023. *See* Transcript of Oct. 13, 2023, SCAC Meeting, https://scac.jw.com/wp-content/uploads/2023/11/scac23-10-13.pdf (last visited Jan. 15, 2024).

Based on that discussion and additional oral and written comments, the subcommittee further revised the proposed rules and memo accordingly. We presented our final proposal to the Supreme Court on November 6, 2023.

The Supreme Court is currently reviewing the proposed rules, together with the subcommittee's proposed rules for the new Fifteenth Court of Appeals, and is expected to issue its preliminary approval order in February and publish in the March edition of the *Texas Bar Journal*. The public-comment period will be in the spring.

Marcy Hogan Greer is the managing partner of the appellate boutique Alexander Dubose & Jefferson LLP.

The Honorable Emily Miskel is a Justice on the 5th District Court of Appeals in Dallas. She previously served as judge of the 470th district court of Collin County, Texas. ★

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[1] Citations in this article to HB 19 will be to the codified version.

[2] We considered, alternatively, replacing the repealed Part III (Rules of Procedure for the Courts of Appeals) with the Business Court rules. With either placement, they would replace repealed Rules 331-345.

[3] The chart, memo, and proposed rules were updated after the SCAC discussion and are available on request.

TRAILBLAZING FOR TOMORROW: THE TEXAS BUSINESS COURT'S PROGRESSIVE REVAMP OF THE STATE JUDICIAL SYSTEM

BY SENATOR BRYAN HUGHES & TREY COX

TEXAS IS WIDELY RECOGNIZED AS THE NATION'S economic leader. Home to the world's 9th-largest economy and more Fortune 500 companies than any other state, it's easy to see why Texas is America's number one state for company relocations, GDP growth, and new job creation. But despite all the changes to the state over recent decades, one area has remained largely untouched in that same period: Texas's judicial system.

Texas is known for its business-friendly environment, with low taxes and minimal government regulation. But the state has faced criticism for years about its legal system being slow, unpredictable, and costly, hindering economic growth and development. While nearly thirty other states have created specialized business courts, Texas had not updated its judicial system since the late 1960s. Consequently, elected judges who may never have been exposed to large-scale commercial litigation are called upon to preside over such complex cases alongside run-of-the-mill family law disputes and personal injury claims. And, unlike their federal colleagues, they usually do so without the benefit of full-time clerks to work through what can be mountains of paper.

We contend that, though the future is difficult to predict, the legislation was ably drafted to adapt to issues that may arise.

The predictable result of this combination of bet-the-company cases with small-dollar disputes is that state trial judges' dockets can become overwhelmed when faced with a complex, large-scale mergers-and-acquisitions or securities issue. These cases often require in-depth research by the judge, lengthy judicial consideration of complex motions, and extremely detailed parsing of complex commercial agreements, all of which are time-consuming and resource-intensive, taking time from their regular dockets. Consequently, these cases can be subject to significant processing delays at the state trial court level. Similarly, the lack of a requirement for written opinions in all cases and the comparatively rare nature of complex commercial cases in state trial courts—for many state trial court judges the first of these massive cases heard in their courtroom may also be the last—has led to a lack of certainty and stability around these types of cases in Texas business law.

Thus, despite its world-class economy, Texas's judicial system has sometimes led corporations and other business entities to incorporate and litigate in other states, such as Delaware or New York, which have specialized business courts where the timeline for dispute resolution is more certain.

To address this issue, the Texas Legislature, with the support of Governor Greg Abbott and Chief Justice Nathan Hecht of the Texas Supreme Court, has passed House Bill 19 (HB 19), which will create specialized business trial courts.

Many of the major legal issues will stem from the initial operation of the new court. What impact will the Texas Business Court (TBC) have on the existing judicial system? We contend that, though the future is difficult to predict, the legislation was ably drafted to adapt to issues that may arise.

Some of the foremost criticism of the TBC is the purported impact on the function and resources of the existing legal apparatuses. The TBC will be made up of 11 divisions. The 11 divisions will cover the same territory as the administrative judicial regions. This geographic compatibility will facilitate the efficient use of existing facilities for TBC proceedings. Judges will not be crusading into the courthouse with disruption. A Business Court judge may hold court at any courtroom within the geographic boundary of the division to which the judge is appointed. HB 19 requires that, to the extent practical, a county's courtrooms and facilities must accommodate the Business Court's hearings, business, and other

proceedings. With the exception of jury trials, a Business Court may conduct remote proceedings with consent of the parties, provided the Business Court judge conducts those proceedings from a courtroom or other appropriate facility. Subject to any sealing orders, Business Court proceedings must be public. All Judges will work together to accommodate proceedings and the one-year delay should be used to sort out this process.

HB 19 affords a one-year buffer period between taking effect and the first TBC divisions opening for business on September 1, 2014. Beyond the initial one-year delay, there is a phased implementation of the new court. The court will start with only five divisions that oversee major metropolitan areas. The governor would appoint judges to the business court for a two-year term, and judges can be re-appointed multiple times. The remaining six divisions are scheduled to come online on September 1, 2026, the bill stipulates that these proposes divisions will actually be abolished unless, prior to September 1, 2026, they are reauthorized by the legislature and funded through additional legislative appropriations. The two years between the first divisions coming online and the option to expand to the full eleven will offer significant time to asses the utilization, efficiency, and necessity of the business court before contributing more resources to their expansion. Furthermore, the requirement of affirmative legislative action on this matter provides the legislature with a timely opportunity to statutorily tweak the business court should the need arise.

Some opponents of early drafts of HB 19 raised concerns of potential jurisdictional overreach (for example, would consumer or small business claims be drawn into the new business courts, when such disputes are better handled in the existing system). As amended, the jurisdictional question should be settled. The language has been more narrowly tailored, with clear requirements to qualify for filing or removal. In the interest of efficiency and on agreement of all parties and the judge, Texas's new Business Courts will have supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. However, if no agreement is reached, the claim may proceed in another civil court concurrently with any related claims proceeding in the Business Court.

This spirit of flexibility extends to the removal process. Under HB 19, businesses will have the opportunity to remove cases to the TBC within 30 days of receiving the initial notice of summons that named the party in state court. Removing the case to the TBC will not waive a defect in venue or constitute an appearance to determine personal jurisdiction. Similarly, a transfer provision in HB 19 allows for the judge of a court in which an action was initially filed to request the transfer of the case to the business court if it was within the business court's jurisdiction. Further, existing matters will not suddenly be thrust into a tumultuous mass removal, as HB 19 stipulates the TBC will apply only to those civil actions commenced on or after September 1, 2024.

These provisions will help prevent businesses from being hauled into state court for disputes which fall under the more specialized jurisdiction of the business court and will ensure fair and equal access to the TBC for all businesses and disputes which fall under its specialized jurisdiction.

TBC judges will also be required to issue written opinions in their cases. This requirement should go far towards building up a stable and predictable body of precedent for Texas business law and put businesses on notice as to how Texas judges actually apply that precedent. This will ease the burden on the existing judicial system as cases are directed to the business courts with a building precedent on how to address those cases more efficiently.

It is difficult to predict exactly what will happen to the number of lawsuits filed after the TBC is enacted, as there are several factors that could influence those numbers. However, it is likely that the TBC's creation will increase the filings of commercial and business suits in Texas as businesses grow more confident in the revamped Texas judicial system.

First, it is likely that the establishment of the TBC will lead to more businesses choosing Texas as the preferred jurisdiction for their commercial disputes due to the TBC's specialization, efficiency, and predictability. Such a result will naturally attract more lawsuits to Texas. Based on anecdotal evidence, it appears that many Texas companies will adopt mandatory venue clauses that will place their commercial lawsuits in the TBC. This could lead to an increase in the number of lawsuits filed in Texas, particularly from businesses based outside of the state.

Second, it is likely that the TBC's specialization in business disputes could lead to a virtuous cycle of an ever-increasing number of disputes being resolved through the TBC. If businesses have confidence in the TBC's ability to handle complex commercial disputes and see a body of strong precedent and caselaw being built up by the TBC and the 15th Court of Appeals, they may be more willing to initiate

disputes in the TBC, or remove existing disputes to the TBC. As time goes on, this may lead to an increase in the number of lawsuits filed in Texas.

Third, the certainty offered by the TBC for business law issues moving forward will, over time, likely result in more businesses choosing to incorporate in Texas and more individuals choosing to start businesses in Texas. It is an unfortunate reality that some of these businesses eventually will become embroiled in litigation, and when they do they will likely take their cases to the TBC. This too probably will lead to an increase in the number of lawsuits filed in Texas.

Overall, the impact of the TBC on the number of lawsuits filed in Texas will depend on a variety of factors, including the court's effectiveness in handling commercial disputes, the degree to which businesses trust the TBC, and the willingness of litigants to pursue lawsuits in a court with strict timelines and streamlined procedures. This bullish outlook, if accurate, could lead to saturation of the resources allocated to the TBC. Even with the flexible provisions aimed at improving efficiency, the scope of the TBC as currently set forth by HB 19 may be insufficient for an expanded workload. However, this issue would be emblematic of suffering from success. In this scenario, the TBC will have more than justified its existence and earned further expansion to meet increasing demand. 2026 will be the first major checkpoint: the TBC will be back in the hands of the legislature not just to reauthorize the next phase of expansion, but also to assess the future of the TBC and its impact on businesses and litigants for decades to come.

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A Texas Business Court

"The only true wisdom is knowing you know nothing." – Socrates

BY BRYAN O. BLEVINS, JR. & ASHLYNN WRIGHT

ON JUNE 9, 2023, GOVERNOR GREG ABBOTT signed House Bill 19 creating Texas's first Business Court. Tex. H.B. 19, 88th Leg., R.S. (2023) (enrolled version). Initially, the Bill provided for one court consisting of seven judges with broad jurisdiction over corporate governance and commercial disputes. Tex. H.B. 19, 88th Leg., R.S. (2023) (introduced version). The enacted version, however, creates a statewide Business Court made up of eleven divisions with ten judges for five operating divisions. The remaining six, predominantly rural, divisions, were created but will not be appointed judges at this time. If the Legislature does not re-authorize and fund those divisions before September 2026, they will cease to exist, making the Business Court accessible only to those cases with proper venue in urban areas of the state. It could be argued that even if the rural courts fade away, the proponents of this legislation got what they wanted for Texas' businesses – for business litigation issues to be decided by Republican and not Democratic judges.

The Governor will appoint each Business Court judge to serve a two-year term. While the appointment of a Business Court judge is subject to the advice and consent of the Texas Senate, the decision to put forth a sitting Business Court judge for reappointment in the future is left to the sole discretion of the Governor. Each judge will have concurrent jurisdiction with existing District Courts over derivative actions, corporate governance issues, contract and commercial transactions and related injunctive and declaratory relief. However, the Court's subject matter jurisdiction is substantially limited by high amounts in controversy, specific exclusions, and aspects of consent. While HB19 became effective September 1, 2023, the Court itself will not be "created" until September 1, 2024, and will only be available to civil actions commenced on or after September 1, 2024. Appeals from the Business Court will be made to the newly created Fifteenth Court of Appeals. The Fifteenth Court of Appeals also has statewide jurisdiction, but its judges will be elected not appointed.

The Texas Trial Lawyers Association (TTLA), Texas Association of Defense Counsel (TADC) and the Texas Chapter of the American Board of Trial Advocates (ABOTA) joined others in opposition to HB19. Many questioned the need for such a court given Texas's rich history of business litigation. Most opponents raised constitutional concerns over the appointment of judges and certain structural components of the court. Others argued that such a court would undermine the separation of powers between the executive and judicial branches of government and establish a dual system of justice between the "haves" and the "have nots" of Texas businesses. Despite this substantial opposition, Texas has its Business Court, but questions remain as to its operation, constitutionality, and viability.

Constitutionality

The Legislature created the Business Court as a "statutory court" under Article V, Section 1, of the Texas Constitution. Tex. Gov't Code Ann. § 25A.002. The constitutionality of the Court will be addressed in depth by other author(s), but with statewide, undivided jurisdiction and appointed judges a challenge to its constitutionality is virtually assured. The question for parties and practitioners will be whether to risk the uncertainty of litigation until the question of constitutionality is answered.

At the time HB19 passed, the Legislature was fully aware of these constitutional concerns. Section 4 of the Bill provides that the Texas Supreme Court has exclusive and original jurisdiction over any constitutional challenge to the Court. Is also provides that if the appointment of judges is found to be unconstitutional, then the Business Court "shall be staffed by retired or former judges or justices." Tex. H.B. 19, § 4, 88th Leg., R.S. (2023) (enrolled version). However, the use of visiting judges to staff the Business Court raises, again, more questions than answers.

Visiting judges are subject to party objection. Tex. Gov't Code Ann. § 25A.014; Tex. Gov't Code Ann. § 74.053. Generally, visiting judges are assigned either for a specific period of time or for a particular case. *In re Richardson*, 252 S.W.3d 822, 828 (Tex. App.—Texarkana 2008, orig. proceeding). Interestingly, the Texas Supreme Court previously raised concerns over the abuse of visiting judges in a different context:

> "In 1987, the Legislature limited each party to one objection per case, to prevent either side from being able to put off trial indefinitely by filing one objection after another. In 1991, the statute was amended again to allow unlimited objections to former judges who are not retired judges. Legislators discussing both of these changes expressed concern that the visiting judge system was being abused because judges who were defeated in elections were continuing to sit as visiting judges. Section 74.053 answers that concern by **protecting a party's interest in having its case heard by the locally-elected judge instead of one who had been rejected by the voters.** The Legislature balanced this interest against its desire to create a uniform system of administration and prevent delay by carefully limiting the right to object."

In re Canales, 52 S.W.3d 698, 703 (Tex. 2001) (emphasis added).

The uncertainty surrounding the Court will likely be exacerbated by the fact that appeals from the Business Court are directed to the Fifteenth Court of Appeals which will face its own constitutional challenge(s). These questions could take years to resolve while the stakes will be all or nothing for those willing to risk litigating in Texas's Business Court.

Jurisdiction and Costs - Sections 25A.004 & 25A.018

Once the Business Court begins to receive cases, the first order of business will be to determine whether actions filed or removed satisfy the subject matter jurisdiction and respective "amount in controversy" limitations. The amount in controversy includes all damages a plaintiff seeks to recover, not merely what the plaintiff is likely to recover. *United Servs. Auto Ass'n v. Brite*, 215 S.W.3d 400, 401-03 (Tex. 2007). *Brite* makes clear that even the speculative nature of some damages does not preclude them from being included within the amount in controversy calculation. *See Id*. at 403 (Noting the Texas Supreme Court's disapproval of the lower court's decision to exclude damages from an amount in controversy calculation due to their "speculative nature.").

Traditionally, plaintiffs plead amounts in controversy as above the minimum jurisdictional amount or around the expedited action amount. The question now will be whether a party can manipulate the jurisdiction of the Business Court by how much they are willing to plead. Are the courts bound by the petition as in a Motion for Special Exceptions or 91a Motion to Dismiss? Will a party seeking to avoid the Business Court have to formally plead an amount under $10million? Or can a party contest the amount in controversy? Will the Business Court allow early limited discovery on the likely damages similar to jurisdictional discovery. Will the determination of the amount in controversy have preclusive effect through res judicata or collateral estoppel? When considering disputes over the amount in controversy, the courts may initially look to federal decisions under 28 U.S.C. § 1446 – Procedures for Removal of Actions. Under 28 U.S.C. § 1446, a plaintiff is held to a "good faith" standard when pleading a specific amount. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014). When the plaintiff fails to state a specific **amount in controversy**, a defendant's notice of removal may do so subject to the court's determination by a preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a). 28 U.S.C. § 1446(c)(2)(B).

The Court will also have to balance the scope of its defined subject matter jurisdiction with the potential reach of its supplemental jurisdiction. Tex. Gov't Code Ann. §25A.004. This includes the definitional difference between an action and a claim and whether an action "arises out of" and creative supplemental claims that are merely "related to" litigation properly before the Court. Texas courts have confirmed that "related to" allows for the broadest nexus requiring nothing more than a tenuous or remote relationship between the claim and the underlying action. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n,* 518 S.W.3d 318, 325-26 (Tex. 2017). Ultimately, the Court's supplemental jurisdiction is self-limiting as the parties and the judge have to agree for such a claim to proceed along with the underlying action. Tex. Gov't Code Ann. §25A.004(f). Often litigation arising out of a contract or commercial transaction dispute will include one or more business torts such as fraud, misrepresentation, unjust enrichment, etc. These claims would likely fall under the supplemental jurisdiction of the Business Court but when would a Defendant agree to include such claims and associated evidence with the underlying contract or transaction claim? The pleading, agreement, or refusal to agree to the inclusion of supplemental claim(s) may also materially affect the Court's jurisdiction by increasing or decreasing the amount in controversy? Absent agreement, a supplemental claim would assumedly be severed and allowed to proceed in an existing court with original jurisdiction despite the obvious inefficiencies created by such a procedure.

Given the effective date, exclusion of rural judicial regions, limited subject matter jurisdiction, supplemental jurisdiction only upon agreement and actions specifically excluded, it is

unlikely that the Court will have sufficient filings to pay for its $6 million plus annual price tag. For example, corporate governance claims filed in the Business Court are limited to a $5 million amount in controversy unless brought by a publicly traded company. Publicly traded companies are often incorporated in Delaware and, as such, are likely to pursue such claims in Delaware's well established and predictable Court of Chancery. Additionally, while Texas certainly has more than its share of high dollar litigation, the $10 million "amount in controversy" requirement is substantially higher than any other business court in the country **and** the parties to the contract or transaction must have "agreed in the contract or a subsequent agreement that the business court has jurisdiction" over the dispute. Tex. Gov't Code Ann. § 25A.004(d).

The Texas Supreme Court has the obligation to establish fees for filings and actions in an amount sufficient to cover the costs of the Court including its judges, personnel, staff attorneys, offices, and chambers. Tex. Gov't Code Ann. § 25A.018. As such, approximately 12,000 cases a year would need to be filed to keep fees in line with current state court filing costs. Assuming the same annual filing rate as the Delaware Court of Chancery (<1,200), individual filing fees could easily exceed $5,000 per case. Considering this, one of two outcomes seems likely to occur: 1) the number of cases necessary to cover the costs of the court will greatly exceed the capacity of the ten judges, or 2) the Court fees will be so high that only the biggest cases and wealthiest of parties will be able to afford the cost. The legislation does not address what happens to the original filing fees when cases are removed from the existing court system, or the Business Court fees when actions in whole or in part are remanded back to courts of appropriate jurisdiction.

The Texas Supreme Court has the obligation to establish fees for filings and actions in an amount sufficient to cover the costs of the Court including its judges, personnel, staff attorneys, offices, and chambers.

Filing and Removal - Section 25A.006

A case may be filed directly in the Business Court in Austin, Texas, and it will be assigned to one of the five active divisions based upon the pleaded venue facts. Alternatively, a case can be brought in an existing District Court or County Court at Law and removed by either party to the Business Court and assigned to the division within the same Administrative Judicial District as the original filing. A case can be removed to the Business Court at any time if agreed to by the parties. However, parties cannot simply choose to place themselves before the Business Court if the action itself does not fall within the Court's subject matter jurisdiction. Subject matter jurisdiction cannot be waived even if both parties desire to be in the Business Court. *In re Banigan*, 660 S.W.3d 307, 314 (Tex. App.—Dallas 2023, no pet.) ("[I]t is well established that subject matter jurisdiction cannot be waived or conferred by consent, estoppel, or agreement."). Absent settlement, there will be a winner and a loser in the litigation and here the loser will retain the right to appeal the absence of subject matter jurisdiction regardless of prior agreement.

Either party may remove an action to the Business Court. However, such removal must be filed within thirty days after the removing party *discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action*. All parties should anticipate significant litigation over the timeliness of removal and whether the action falls within the Court's subject matter jurisdiction or included claims fall within the Court's supplemental jurisdiction. One question will be whether a case properly before the Business Court can be challenged at a later point as a result of subsequent amendment, motion practice or the development of evidence? Because removal occurs automatically upon filing the notice of transfer, the Business Court will initially decide these issues with appeal to the Fifteenth Court of Appeals.

Regardless of the timing, removal of a case can be initiated by the judge where the action was originally filed. If the judge initiates the transfer, the "presiding judge for the court's administrative region," after holding a hearing, "may transfer the action to the business court if *the transfer will facilitate the fair and efficient administration of justice*." Presumptively, this provision would not allow a pre-September 1, 2024, filed case to be removed nor an action that does not meet the subject matter jurisdiction of the Business Court. However, could a presiding judge from a non-operating Business Court division transfer a case to the Business Court if an applicable permissive venue exists within an operating division? Unlike the appeal of other removal decisions, the decision of the presiding judge would be made to the existing appellate court and not the Fifteenth Court of Appeals.

Another area of uncertainty is how the Business Court, and the MDL Court will interact. The Winter Storm Uri MDL represents a case study in the future conflict between the au-

thority of these two courts. The URI MDL includes a mix of personal injury, property damage and commercial disputes. Many of the cases involve commercial transactions or contract disputes in excess of the $10 million amount in controversy requirement. Can a party tag and transfer an existing Business Court case to a newly created MDL matter? Would an action subject to an MDL be removable to the Business Court if it falls within the Court's subject matter jurisdiction? Would the MDL Panel, the Fifteenth Court of Appeals or another applicable appellate court hear disputes arising out of such transfers? These are just a few of the many questions to be answered going forward.

Written Opinions and Rules - Sections 25A.016 & 25A.020

The Business Court will adopt its own "rules of practice and procedure" independently from the Texas Supreme Court. The only limitation on the Business Court is that such rules must be "consistent" with existing Texas Rules of Civil Procedure and Evidence. Business Court judges are also expected to issue written opinions in order to create a stable and predictable body of Texas business law. I agree with David Coale herein that Texas faces an unprecedented battle over controlling law not only at the appellate level but also between existing District and County Courts at Law and the opinion issuing Business Court.

Conclusion

After five consecutive legislative sessions, Texas finally has its own Business Court. However, it will only be accessible in the urban areas of the state and will serve predominantly high dollar litigants willing and able to pay exorbitant fees. Will it be worth it? That is the real question.

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"UNPRECEDENTED": HOW THE FIFTEENTH COURT OF APPEALS WILL IDENTIFY ITS PRECEDENT

BY DAVID COALE

WITH APOLOGIES FOR THE PUN, the Fifteenth Court of Appeals faces an "unprecedented" situation.

The Legislature created the first three intermediate courts of appeal in 1892. During the Twentieth Century, it created eleven more. For each of those new courts, the carved out (or in the case of Houston, duplicated) the new court's jurisdiction from within the jurisdiction of a pre-existing court.[1]

Similarly, the U.S. Court of Appeals for the Eleventh Circuit began operations in 1981 with jurisdiction over several states carved out from the pre-existing Fifth Circuit.[2]

As a result, each of these new courts started with a well-established body of precedent, inherited from their predecessor courts.

But the Fifteenth Court of Appeals has no predecessor. The Legislature gave it statewide jurisdiction over specific kinds of cases, as opposed to general jurisdiction over cases from a particular geographic area. As a result, that court does not start with an "inherited" body of precedent.

Similarly, the U.S. Court of Appeals for the Eleventh Circuit began operations in 1981 with jurisdiction over several states carved out from the pre-existing Fifth Circuit.

The Fifteenth Court thus faces a novel—and fundamental—question: what is its precedent?

This article examines five sources of insight for answering that question: (1) English common law (as defined by a Texas statute dating back to the Republic); (2) "vertical" precedent, as described by a 2022 supreme court case; (3) federal practice about the *Erie* doctrine; (4) generally recognized conflicts-of-laws principles; and (5) historical examples from the 1840s, when the Supreme Court of the Republic of Texas confronted a similar problem with a lack of precedent.

1. English common law

In 1836, the Republic of Texas faced a similar problem to the one faced today by the Fifteenth Court. Newly independent from Mexico, the young country had no law of its own.

The Congress of the Republic solved that problem with a statute that made a wholesale adoption of English common law.[3] A materially identical statute remains in force today, modified only to reflect the obvious fact that Texas is no longer a country:

> "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state."[4]

The supreme court has explained that this statute does not literally adopt the English case law of 1840, but rather, common-law principles as generally understood and "declared by the courts of the different states of the United States."[5]

Accordingly, under this statute, the Fifteenth Court begins operations with the "generally understood" principles of the common law as precedent.

2. "Vertical" precedent

In its 2022 opinion of *Mitschke v. Borromeo*,[6] the Texas Supreme Court carefully described the two kinds of precedent in Texas courts.

One, called "horizontal stare decisis," involves "the respect that a court owes to its own precedents."[7] This is the technical name for the challenge now faced by the Fifteenth Court, which has no precedents of its own.

The other, called "vertical stare decisis," stands for the "commonplace and uncontroversial" principle that "that lower courts must follow the precedents of all higher courts."[8]

As an intermediate appellate court, the Fifteenth Court is bound by precedents from the Texas Supreme Court and, where applicable, the U.S. Supreme Court and Texas Court of Criminal Appeals.

The principle of "vertical stare decisis" means that the Fifteenth Court inherits the precedent of higher courts, in addition to the "generally understood" principles of common law.

3. Federal practice

While the Fifteenth Court does not begin empty-handed, the question remains—how should it approach the many questions that are not answered by supreme-court precedent or general common-law principles? Federal practice, combined with the unusual jurisdiction of the Fifteenth Court, provides a constructive framework for an answer.

The Fifteenth Court's statewide jurisdiction is intended to create uniformity on the substantive areas within its jurisdiction. That's closely analogous to the Texas Supreme Court's jurisdictional mandate to consider "question[s] of law that [are] important to the jurisprudence of the state."[9]

Given those similar objectives, it would be fair to say that when the Fifteenth Court decides an issue, it's making an educated guess about how the supreme court would resolve the point. That's exactly what federal courts do, in cases where subject-matter jurisdiction arises from diversity of citizenship, when they must resolve an unsettled point of state law. A federal court makes an "*Erie* guess" to predict how the highest court of the state would decide that issue.

Within the Fifth Circuit, to make such a "guess," a federal court works its way down through a hierarchy of resources: (1) decisions of the state supreme court in analogous cases, (2) the rationales and analyses underlying state supreme court decisions on related issues, (3) dicta by the state supreme court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which the relevant state's court would likely look, and (7) other available sources, such as treatises and legal commentaries.[10]

That framework is a productive starting point for the Fifteenth Court, since it is also trying to anticipate how the Texas Supreme Court will resolve a particular issue. The resources identified by the Fifth Circuit for making an *Erie* guess, and the order of importance attached to them, fit well with the Fifteenth Court's mandate.

4. Conflicts

The unusual statewide jurisdiction of the Fifteenth Court could present some issues that are traditionally associated with conflict-of-laws analysis. For example, what if Texas law is silent on a particular question, other than the Dallas Court of Appeals answering it "yes" while the San Antonio Court of Appeals says "no" — and the parties are from San Antonio?

In a traditional conflict-of-laws analysis, the parties' location would carry weight, particularly if that location carries with it the *Restatement (Second) of Conflicts of Law* calls "justified expectations" about the controlling law (i.e., the precedent of the local court).[11]

But the Fifteenth Court's analysis of precedent isn't a traditional conflict-of-laws analysis. That Court isn't deciding whether to enforce a choice-of-law provision that may give another state's law priority over Texas. It's determining the substance of its own precedent—even though expectations may have varied throughout the state when the court was created. Indeed, the very reason for the Fifteenth Court's statewide jurisdiction is to encourage uniformity on certain issues.

But just because the parties' settled expectations about precedent don't control, doesn't make them irrelevant. In determining what a rule of law should be for all of Texas, the Fifteenth Court can and should consider the prevailing state of the law and try to avoid undue disruption to the parties' expectations when it can. Towards that end, the *Restatement*'s lists of factors that can guide various choice-of-law decisions can be helpful references for the Fifteenth Court, even if those factors do not directly control the specific issue at hand.

5. Historical examples

Two examples of how the Republic's supreme court dealt with a lack of precedent are instructive—not for their specific holdings, which became moot long ago—but for the general approaches that court brought to the issues.

In the first case, *Carr v. Wellborn* from 1844,[12] an Alabama court resolved a property-ownership dispute in favor of the guardian of an incompetent individual. The defendant resisted enforcement of that judgment in Texas on several complex grounds, causing the supreme court to observe: "[W]e find names eminent in the science of the law enrolled on opposite sides … that the mind rests suspended in doubt as to a correct conclusion."[13]

The threshold issue—the ability of a guardian appointed in

Alabama to sue in Texas—presented not only a question of first impression, but one where civil-law and common-law authority differed, and one that raised matters of "international law, public polity, and general comity between nations," since the United States was a foreign country at the time.[14]

Despite the flowery start, the supreme court's holding was direct. It followed the most relevant American decision available—a New York case about a bankruptcy estate—and concluded that the guardian could sue. The supreme court explained:

> Organized as our system is on the principles of the common law, both reason and prudence should lead us to adopt decisions of courts whose system is the same; especially when supported by the authority of reason and the dignity of names eminent for their proficiency in science and wisdom and their elucidation of the principles of the common law. … [W]e should follow in the beaten track, guided by the lights which they have shed, to conclusions correct in principle, guarded by precedent, and just in their effects.[15]

That explanation largely anticipates the modern framework for an *Erie* guess. In much the same way that the framework encourages, the supreme court reasoned that a factually analogous opinion, from a similar jurisdiction grounded in the same general principles as Texas, was the best case to choose as its precedent.

But in the second example, the Republic's supreme court took a near-opposite approach, focusing on general principles about structure rather than analogous precedent. The 1841 case of *Republic of Texas v. Smith*[16] arose from a criminal prosecution for running a gambling operation in a part of Bastrop County that later became Travis County. The defendant argued that he could not be prosecuted in Travis County since it did not exist at the time of the offense.

The threshold question, under the law at the time, was whether the supreme court could consider factual matters on appeal. The supreme court held that it had the power to do so.

The court observed that "we search in vain in the common law for an instance of an appellate court retrying the cause upon the facts," and acknowledged that the Republic's constitution adopted the "common law as the rule of decision in criminal proceedings." Nevertheless, reasoned the court, "[w]e cannot believe" that the Republic's constitutional convention intended to deny it that power, since the constitution made several (unrelated) additions to common-law criminal practice.[17] Those changes compelled a more active role for the supreme court than in a traditional common-law setting.

A cynic would say that the supreme court made up a justification for a power grab. But a fairer summary is that the court did its best with what it had. Texas chose "the common law" as its legal foundation, but with significant changes on matters such as the right to compel witness attendance. Rather than simply follow common-law precedent, the supreme court made a judgment about how those specific changes affected the overall structure of the Texas courts.

Conclusion

The Fifteenth Court of Appeals begins with no precedent. But it doesn't begin empty-handed. It inherits all opinions of higher courts, as well as the collective general wisdom of "the common law." From that starting point, the Fifth Circuit's framework for an Erie guess, augmented by the choice-of-law factors identified by the *Restatement (Second) of Conflict of Laws*, provide further guidance for specific issues. Historical examples from the Supreme Court of the Republic of Texas show that the Fifteenth Court will have to examine specific precedents and general structural principles to develop the body of law that it will need to draw upon for future cases.

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1 *See* "History of the Appellate Courts," https://www.txcourts.gov/5thcoa/about-the-court/history/ (last visited Jan. 3, 2024).

2 *See* "U.S. Court of Appeals for the Fifth Circuit - Legislative History," https://www.ca5.uscourts.gov/about-the-court/circuit-history/ (last visited Jan. 3, 2024).

3 *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 365 (Tex. 1990).

4 Tex. Civ. Prac. & Rem. Code § 5.001(a).

5 Moreno, 787 S.W.2d at 365 (quoting Grigsby v. Reib, 153 S.W. 1124, 1225 (Tex. 1913)).

6 645 S.W.3d 251 (Tex. 2022)

7 *Id.* at 256 (cleaned up).

8 *Id.* (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring).

9 Tex. Gov't Code § 22.001(a).

[10] *E.g.*, *Terry Black's Barbecue, LLC v. State Automobile Mut. Ins. Co.*, 22 F. 4th 450, 454 (5th Cir. 2022) (applying *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

[11] *See generally* Restatement (Second) Conflicts of Law § 6 (1971) (examining "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, [and] (e) the basic policies underlying the particular field of law").

[12] Dallam 624 (1844).

[13] *Id*. at 626.

[14] *Id*. at 627.

[15] *Id.*

[16] Dallam 407 (1841)

[17] *Id*. at 410-11.

THE FIFTEENTH COURT OF APPEALS: WHAT WE KNOW SO FAR

BY ANNE M. JOHNSON

IN ADDITION TO CREATING BUSINESS COURTS, the Texas 88th Legislature also passed Senate Bill 1045, which created a new statewide Fifteenth Court of Appeals to hear appeals from those business courts.[1] Governor Greg Abbott signed SB 1045 into law on June 9, 2023.

There are still many open questions about how this new court will operate. This paper attempts to answer some of those questions about Texas's newest appellate court, based on what we know so far.

Which appeals will be heard by the Fifteenth Court of Appeals?
The new court of appeals will have exclusive intermediate appellate jurisdiction over all matters from the newly-created business courts, as well as over appeals from the following matters that arise out of or are related to a civil case:

> (1) matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education as defined by Section 61.003, Education Code, or by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct, other than [15 specific exceptions];
>
> (2) matters in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality or validity of a state statute or rule, and the attorney general is a party to the case; and
>
> (3) any other matter as provided by law.

TEX. GOV'T CODE § 22.220(d).

There are fifteen specific exceptions to the Fifteenth Court of Appeals' jurisdiction, including Family Code proceedings, certain criminal proceedings, mental health commitments, civil asset forfeitures, condemnation, and personal injury/wrongful death cases. *Id.* § 22.220(d)(1).

The effective date of SB 1045 is September 1, 2023, but the court will be created on September 1, 2024. However, once the court is created, all cases pending in other courts of appeals that were filed on or after September 1, 2023, and of which the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction, will be transferred to the newly-created court of appeals.

Where will the Fifteenth Court of Appeals sit?
The new court of appeals will be located in Austin. TEX. GOV'T CODE § 22.2151(a). However, the court is "composed of all counties in this state," and it "may transact its business in any county in the district as the court determines is necessary and convenient." *Id.* §§ 22.201(p), 22.2151(b).

Considering that the Fifteenth Court of Appeals will have statewide jurisdiction and may sit and hear cases in any county in Texas, the Supreme Court Advisory Committee ("SCAC") is considering proposed rules that will require the court to notify the parties as to the location of any oral argument and provide instructions for participating electronically if applicable.

Who will serve on the Fifteenth Court of Appeals?
The court will be composed of a chief justice and four justices. TEX. GOV'T CODE § 22.216 (n-1). However, for the first three years after the court's creation, the court will consist of a chief justice and two justices. *Id.* § 22.216 (n-2). All justices will initially be appointed by the Governor, and later elected in statewide races.

What rules will govern the Fifteenth Court of Appeals?
SCAC is currently working on rules to govern the new Fifteenth Court of Appeals. Proposed rules were submitted by SCAC to the Supreme Court of Texas on November 6, 2023. The Court is expected to issue a preliminary approval order that will be published in the March Bar Journal. There will be a public comment period in the spring of 2024.

SCAC has made four recommendations regarding new rules.

1. *Proposed new Texas Rule of Appellate Procedure 25.3.* This is the most substantive change to the appellate rules, and is designed to implement the operative provisions of SB 1045 with respect to the new court of appeals. This rule is to be called "Perfecting and Prosecuting Appeals."

2. *Proposed amendments to Texas Rule of Appellate Procedure 32.1.* This change provides revisions to the uniform docketing statement to include requests for information that are required for purposes of implementing SB 1045.

3. *Proposed amendment to Texas Rule of Appellate Procedure 39.8.* This would provide that the court notify parties as to the location of any oral argument and provide instructions for participating electronically if applicable.

4. *Proposed items for Administrative Order.* SCAC has proposed that "transitional issues" regarding how currently pending cases should be transferred to the Fifteenth Court of Appeals should be addressed by Administrative Order rather than a rule amendment.

See SCAC Memorandum, "Proposed Amendments to the TRAP Rules for the Fifteenth Court of Appeals (SB 1045) and June 3, 2023, Referral Letter," dated October 2, 2023 ("SCAC Memorandum").

How many cases are expected to be heard by the Fifteenth Court of Appeals?
We don't know yet, but early estimates from the Office of Court Administration ("OCA") appear to be a smaller number than perhaps expected. By December 1, 2024, we will have a better idea. That is when the OCA is required to "submit to the legislature a report on the number and types of cases heard by the Court of Appeals for the Fifteenth Court of Appeals District in the preceding state fiscal year." TEX. GOV'T CODE § 22.2152.

It is important to note that SB 1045 provides that the Supreme Court may not transfer cases out of the Fifteenth Court of Appeals for docket equalization purposes or transfer cases to that court if it does not have exclusive jurisdiction.

How will pending appeals be transitioned to the Fifteenth Court of Appeals?
The most questions seem to have arisen around the issue of how currently pending appeals, filed after September 1, 2023 and within the exclusive jurisdiction of the Fifteenth Court of Appeals, will be transferred to that court.

SCAC has recommended giving autonomy to each court of appeals to decide for themselves how best to effectuate transfers to the Fifteenth Court of Appeals. SCAC suggests that each court of appeals "adopt a process for identifying and notifying parties that a particular case is designated for transfer to the Fifteenth Court of Appeals on September 1, 2024" and then "should not invest significant time and other resources on the merits of [appeals to be transferred] unless they believe they can finally dispose of the appeal in its entirety before September 1, 2024." *See* SCAC Memorandum at 48-49. However, each appellate court will be expected to "work up" existing cases through briefing so they are ready for submission ("at issue") by September 1, 2024.

It remains to be seen how each appellate court will handle the timing and process of transfers to the newest appellate court.

Thus, it remains to be seen how each appellate court will handle the timing and process of transfers to the newest appellate court.

What precedent will apply to cases transferred to the Fifteenth Court of Appeals?
This is another very interesting, unresolved question that is addressed by David Coale in his article in this journal, entitled "Unprecedented: How the Fifteenth Court of Appeals Will Identify Its Precedent."

Conclusion
One SCAC member has observed that it may be "wild and wooly" for a while, as appeals transfer from our existing fourteen intermediate appellate courts to the new Fifteenth Court of Appeals according to each appellate court's own procedures. Open questions about jurisdiction and governing precedent may add to the confusion. Exciting times ahead for appellate lawyers!

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[1] *See* Acts 2023, 88th Leg., R.S., Ch. 459 (S.B.1045), Sec. 1.01, eff. September 1, 2023. Citations in this article to SB 1045 will be to the codified version in Chapter 22 of the Texas Government Code.

LESSONS LEARNED—WHAT CAN THE NEW TEXAS BUSINESS COURTS LEARN FROM THE EXPERIENCES OF ITS SISTER STATES?

BY RICHARD L. RENCK & MACKENZIE M. WROBEL

TEXAS JOINS THE EVER-EXPANDING ROSTER of jurisdictions that have created specialized business and commercial courts or dockets. While we know Texans swell with Lone Star Pride, we have been blessed with professional careers that have allowed us to practice primarily in Delaware's Court of Chancery—as the youth today would call it: "the OG of business courts." Delaware's Court of Chancery has a history spanning over two centuries. In the last thirty years, though, over two dozen states have worked to recreate in their jurisdictions various forms of business and commercial courts (or, more often, specialized dockets in existing courts) seeking to replicate the traits that have often been cited as the driving force behind the Delaware Court of Chancery's more than 225 years of success. Those traits include predictability, stability, and the ability to move cases forward promptly to disposition. The key trait among those, however, is "predictability."

The other articles in this symposium on *The New Business Court in Texas* address various aspects of the history behind, the anticipated benefits of, and the potential challenges to the new Texas Business Court as it begins its work. This article will focus on how a few states that have trod this path before have tackled the task of creating a state-wide business or commercial court that both works in that jurisdiction and provides the type of predictability and stability that drive counsel and their clients to bring their disputes to these venues. In observing the relative successes (and, sometimes, failures) of those states' efforts, such successes appear to be attributed to, among other things, how those states: (a) staff the bench with trusted jurists; (b) succeed in the development of a body of precedential, written opinions by the court; and (c) allocate resources to and provide support within the court. Below I highlight how four states with state-wide business courts have addressed these issues. Two have been in existence for enough time to have an observable track record—Delaware and North Carolina. The others are of relatively recent vintage—Georgia and Wyoming.

Trusted Jurists

The single most important trait of a business court that instills confidence in sophisticated corporate and commercial parties involved in complex business disputes is the level of predictability that can be brought to bear on that dispute by the assigned fact-finder and ultimate decision-maker. In most states, that will be a judge who has been appointed or elected (or maybe both).

In advising directors or C-suite officers in our daily practice, almost invariably one of the early discussions will center on the assigned judge and how likely it is for the client to obtain a predictable and legally stable decision from that judge, with as much certainty as is reasonably possible in litigation. Many judicial character traits go into that calculus but key among them are how those business court judges are identified and placed on the bench. Indeed, these sophisticated clients question whether there is an element of partisanship or perceived bias built into the process and like to explore the assigned judge's depth of knowledge into the business realities underlying their disputes. Thus, whether the judges are elected or appointed, the length of their terms, and the legal acumen are critical to providing the desired predictability and stability.

Many judicial character traits go into that calculus but key among them are how those business court judges are identified and placed on the bench.

There is no "one size fits all" for designating trusted jurists. In Delaware, the seven jurists of the Court of Chancery—a chancellor and six vice-chancellors—are appointed by the governor and approved by the state senate to serve a twelve-year term. When a seat on that court opens up, a judicial nominating commission accepts applications from members of the Delaware Bar and selects two or three potential appointees for consideration by the governor. From there, the governor

selects his or her appointee from that list and presents the candidate to the state senate for final consideration and approval. Delaware has another unique feature of the nomination and appointment process where there is a constitutional requirement that no more than a bare majority of the judges on a particular court can be from a single political party. In North Carolina, the governor also appoints the state's business court judges. Georgia also apparently recognized the potential value of staffing the court via an appointment process (as opposed to popular elections) and, in creating its business court, amended its constitution to allow the governor to appoint judges to its business court. Somewhat similar to Delaware's process, Georgia-court hopefuls seeking five-year terms on the bench must also obtain approval from the Judiciary Committees of both the House and Senate. By way of another example, Wyoming employs a hybrid approach for seating jurists on its Court of Chancery. There, and similar to Delaware, a judicial nominating commission send the names of candidates to the governor and the governor selects an appointee from that list. The judge appointed via this process will serve for six years, but at the conclusion of the first year, that judge must stand for a state-wide, non-partisan retention vote.

The elephant in the room for business courts working to establish a trusted bench with stable and reliable precedent is the jury. It would appear, at least to these authors, that using juries as the ultimate arbiters of complex corporate and commercial disputes is antithetical to the concept of injecting predictability and stability into a process that is purportedly designed to provide just that. In Delaware's Court of Chancery and in North Carolina's business court, matters are ultimately decided in a bench trial. Wyoming also adopted that convention and, therefore, matters in its new Court of Chancery are tried to the judge rather than a jury. In Georgia, however, while the presumption is that it proceedings will be decided in bench trials, any party to the litigation may request that the matter be tried to and decided by a jury. We note that the Complex Commercial Law Division of the Delaware Superior Court adopts a convention similar to that of Georgia and provides for jury trials upon request of a party.

Development of a Body of Precedential Case Law

Directly related to the quality of the judges that sit on a business court will be the manner in which their daily efforts—whether in deciding pre-trial motions or deciding cases post-trial—contribute to a robust body of precedential case that legal counsel can draw upon in advising their clients. A deep body of well-reasoned written opinions is critical to providing the predictability and stability that lawyers and their clients seek in coming to a business court.

It is here where Delaware's Court of Chancery shines brightest. Its body of work on all matters of corporate and commercial law has been over two hundred years in the making. Delaware and other business courts across the country add to their respective bodies of law at a staggering rate. In 2022, over 1,100 new cases were filed in the Delaware Court of Chancery, it conducted over 1,200 hearings and its seven judges issued over 300 opinions—an increasing number of which are over 70 pages in length. In North Carolina, in 2022, there were 110 new cases filed, and its five judges issued 84 written opinions. In addition, while the business courts of Georgia and Wyoming are in their formative years, these authors are hopeful they will see the type of activity that will have those courts filling their reporters with an abundance of written decisional law in short order. In the future, when looking back at the relative success of the business and commercial courts created since the 1990s, we suspect that this metric will be key to evaluating success. We readily admit to bias for our native state of Delaware and its Court of Chancery, but the numbers above back us up. The sheer intellect, grit and determination that the judges of that court bring to bear every day in working through that many hearings and writing so many well-reasoned opinions is absolutely critical to its "gold standard" status among business courts.

For jurisdictions where matters in their business courts are tried to a jury, it would seem difficult for that jurisdiction to develop a robust body of case law. While the business court judges in those jurisdictions will likely author written decisions for pre-trial motions, particularly dispositive motions, that jurisdiction may struggle to develop the robust body of post-trial and appellate case law necessary to provide the predictability that sophisticated litigants crave.

Allocation of Resources and Support

Also critical to that ultimate success of the newly formed Texas Business Courts will be the resources and support the court system receives (both political and financial) and the ultimate buy-in from the bar (both plaintiff and defense sides) that having their complex business dispute heard in the business courts will be best for all.

In Wyoming the state legislature voted overwhelmingly and in a bi-partisan manner to create its new Court of Chancery. In Georgia, the governor and legislature felt so strongly about the benefits of having a state-wide business court that they went out to the citizens and amended the constitution. In

Delaware, the governor and the state legislature are keenly aware of how important the Court of Chancery is to it maintaining the "First State's" status as the first choice for incorporations and the franchise fees that those filings bring to Delaware's treasury. When the case load for the Delaware Court of Chancery began to explode, the state approved funds for each of the then five judges to have two law clerks. When that additional support proved insufficient, the state added two more vice-chancellors and two additional magistrates to the bench to support the needs of the bench and the expectations of the litigants appearing before it.

We close by noting that the ultimate success of the new Texas Business Courts will likely be determined on how well the business courts, the state government, and the citizens of Texas navigate through these issues now and in the future. As discussed in other articles in this symposium, the topics of appointment vs. election of judges, and jury vs. bench trials have been some of the hotly debated issues in the formation of the new Texas Business Courts. Hopefully the experiences of the four states described here can help shine a light on the path to success for this new court.

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THE TEXAS BUSINESS COURT AND THE TEXAS CONSTITUTION

BY STEPHEN I. VLADECK

STARTING THIS SEPTEMBER, TEXAS IS SET TO HAVE two new statewide courts—a trial level "Business Court" to handle certain complex business disputes; and a new intermediate court of appeals, the "Fifteenth," to exercise exclusive jurisdiction over appeals from the Business Court and a host of other disputes to which the state or its officers are party. Legislation to create these courts easily passed both houses of the Texas Legislature last June—with supporters arguing that they would allow for the consolidation of especially complex or significant cases before specialized judges chosen on a statewide basis, and critics arguing that they reflect a transparent effort to take power away from voters in those parts of the state with Democratic majorities, where the trial and intermediate appellate courts tend to be selected by Democratic voters. Given that the seven judges on the Business Court and the five judges on the Fifteenth Court of Appeals will be nominated by the Governor and confirmed by the Texas Senate, there certainly seems to be more than nothing to that charge.

But there is another potential issue with both courts—one that was raised as legislation to create them moved through the Texas Legislature, but never adequately addressed: That, insofar as they are "constitutional" courts, these new tribunals violate the Texas Constitution because they are **not** geographically divided. This argument is more substantial than it might appear at first blush—and will need to be resolved by the Texas Supreme Court before these new tribunals open for business this fall.

As the Texas Court of Criminal Appeals explained in 1987, "History teaches us that Texas, since it was a Republic and after it became a State, has always been divided into judicial districts."[1] Indeed, "[t]he importance of the fact that all of our present district courts are truly that, courts in and for a particular judicial district, cannot be emphasized enough."[2] This principle is manifested in Article V, Section 7 of the Texas Constitution, which mandates that "[t]he State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution," and that "[e]ach district judge shall be elected by the qualified voters at a General Election."[3]

To similar effect, when the Texas Constitution was amended in 1891 to first authorize the creation of intermediate courts of appeals, the same formulation was adopted. Article V, Section 6 mandates that "[t]he state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law." It also specifies that each "Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts," and that its judges "shall be elected by the qualified voters of their respective districts at a general election."[4]

Thus, the "constitutional" courts of the state of Texas are the Supreme Court, the Court of Criminal Appeals, the courts of appeals, and the district courts. And by long-settled constitutional mandate, the trial and intermediate appeals courts must be divided into geographic districts (and popularly elected within those divisions) so that the jurisdiction of those courts encompasses different physical subdivisions of the state. This understanding dates at least to 1891; and in some form, all the way back to the 1836 Constitution itself.

The Texas Constitution **also** grants the legislature broad authority to create other ("statutory") courts. Article V, Section 1 of the Texas Constitution specifically provides that "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."[5] And an 1891 amendment to that provision emphasized that "The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."[6]

Relying upon that text, the Texas Supreme Court has recognized that, in the creation of "such other" (statutory) courts, the legislature is therefore not bound by the procedural and

substantive requirements imposed by Sections 6 and 7.[7] But to avoid turning Sections 6 and 7 into a dead-letter (which they would become if all that mattered is what the legislature called a court), the Texas Supreme Court has likewise insisted that the legislature's broad deference is confined to courts that lack the features of the constitutional courts, and not just their names. As the Court explained in 1933, the 1891 amendment "was not intended to take away from and deprive the regular district courts of the jurisdiction specifically given them by the Constitution."[8] Section 1 thus "does not authorize the Legislature to deprive district courts of that jurisdiction expressly given them by the Constitution."[9]

Instead, the line that the Texas Supreme Court's cases have historically drawn has been between courts that are functionally equivalent to constitutional courts—which must conform to Sections 6 and 7—and those that are inferior to all of the state's constitutional courts. Thus, when the Court in 1950 upheld the legislature's creation of a Court of Domestic Relations in and for Potter County, it emphasized that "the effect of the language is to place the subject at the complete disposal of the legislature **so far as inferior courts are concerned**."[10] The ruling in *Jordan* v. *Crudgington* thus distinguished (rather than overruled) "[d]ecisions which strike down Acts creating what in fact, though not in name, are district courts, but do not conform to the constitutional pattern for district courts."[11]

> It is not logically possible to have a statewide statutory court that is "inferior" to district courts (or the existing courts of appeals, for that matter) when the constitutional courts exercise more limited geographic jurisdiction.

In other words, *Jordan* stands for two distinct propositions about the legislature's authority to create courts unbound by Sections 6 and 7: That authority is plenary so long as the statutory courts are inferior to the constitutional courts; and whether the putative statutory courts are in fact "inferior" turns on functional, rather than formal, considerations. It's not enough for the legislature to call a court a "statutory" court; the court must actually **be** "inferior" to avoid the requirements of Sections 6 and 7. A court that is the functional equivalent of a district court or court of appeals, just "not in name," must still "conform to the constitutional pattern" for such tribunals.[12]

Neither *Jordan* nor any subsequent decision by the Texas Supreme Court expressly articulated governing criteria for assessing a court's inferior status. But three points bear emphasizing. **First**, as the Court of Criminal Appeals put it in *Kelly* (37 years after Jordan), one question is whether "the legislature [is] acting to deprive any other district court of, or to detract from, the jurisdiction specifically granted them by the constitution."[13] By this logic, inferiority should be measured at least in part by whether the new court is taking jurisdiction away from the constitutional courts.[14]

Second, inferiority is not measured solely by whether the statutory court exercises some of the district court's subject-matter jurisdiction; after all, that will almost always be true to at least **some** degree.[15] Instead, the analysis has also typically focused on the new court's powers, and whether it is (and its judges are) empowered to act in the same manner as the constitutional courts.[16] A statutory court, in contrast, is one in which the judges lack the same powers as their colleagues on the constitutional courts—where their powers are more circumscribed (to wit, by statute).

Finally, because the district courts must themselves be geographically divided, it necessarily follows that "inferior" courts must also be at least as divided. It is not logically possible to have a statewide statutory court that is "inferior" to district courts (or the existing courts of appeals, for that matter) when the constitutional courts exercise more limited geographic jurisdiction. In *Jordan* itself, one of the critical features of the statutory court that the Texas Supreme Court upheld was its limited territorial scope; it was a domestic relations court only for Potter County. The same can be said of every other court that the Texas Supreme Court has found to be a "statutory" court for purposes of the Texas Constitution—that their geographic jurisdiction runs no further than that of the local district court. Taken to its logical stopping point, that principle ought to mean that the relevant geographic scope of a statutory court must be no larger than that of the constitutional courts—*i.e.*, the specific county in which the disputes arise.

Against that backdrop, both the new Business Court and Fifteenth Court of Appeals raise serious questions under the Texas Constitution. new section 25A.002 asserts that "[t]he business court is a statutory court created under Section 1, Article V, Texas Constitution." But as the Texas Supreme Court decisions surveyed above settle beyond peradventure, merely saying it doesn't make it so. Nor does the constitutional status of the court turn on the chapter of the Texas Government Code in which it is codified. And the rest of the bill certainly appears to reinforce the argument that this new court is a (statewide) district court in all but name.

For instance:

- New section 25A.003 provides that "[t]he judicial district of the business court is composed of all counties in this state," embracing the very kind of statewide jurisdiction that the Texas Constitution does not permit even for inferior constitutional courts—let alone statutory courts.

- New section 25A.004 invests the Business Court with virtually all of the same powers and authorities that District Courts exercise under current law, including "any relief that may be granted by a district court."

- New section 25A.004 also creates concurrent jurisdiction with District Courts in eleven different categories of disputes with an amount in controversy in excess of $10 million—and also confers supplemental jurisdiction over other claims in cases in which the Business Court has original jurisdiction.

- And new section 25A.005 provides that "[a] business court judge has all powers, duties, immunities, and privileges of a district judge."

These provisions certainly lend themselves to a strong argument that the new Business Court **is** a district court, just "not in name." It "has the powers provided to district courts"; each judge "has all powers, duties, immunities, and privileges of a district judge"; and it may exercise jurisdiction over a very broad array of disputes that are properly subject to the jurisdiction of constitutional district courts under current law. There is no descriptive or analytical respect in which the Business Court is "inferior" to any of Texas's district courts. In some respects, it stands on virtually equal footing; in others, its jurisdiction is even broader (including its statewide geographic scope.

The bill creating the Business Court attempted to mitigate the statewide scope problem by purporting to create "divisions" within the statewide "judicial district" encompassing the Business Court. But the legislation undeniably creates a single "court"; subdividing a unitary court geographically does not turn it into multiple independent courts. And in any event, the 11 existing geographic divisions incorporated by new section 25A.003(b),[17] do not divide the state in the same way as the existing district courts; they are much larger. Thus, even if the bill were further amended to create a different business court for each of those 11 regions, the inferiority problem would persist.[18]

If the Business Court **is** a district court under the Texas Constitution, then it must comply with Article V, Section 7 of the Texas Constitution. That means that the court must be "divided" into "districts" (so that a single, statewide "district" won't suffice). It means that the court's judges must be elected, not appointed, and by qualified voters of their respective districts. It means that those same judges must meet the eligibility criteria of § 7(b), including the requirements that they "have resided in the district in which the judge was elected for two years next preceding the election," and "reside in the district during the judge's term of office." And it means that, as a district court "in fact though not in name,"[19] the court must hold proceedings under Article V, Section 7(d) "at the county seat of the county in which the case is pending." Of course, one could argue that the Texas Supreme Court has never expressly foreclosed a statewide statutory court with jurisdiction that overlaps with the district courts; that much is certainly true. But it's hard to read the decisions cited above and come away with a strong argument for the constitutionality of such a structure.

If anything, the arguments against a statewide intermediate court of appeals are even stronger—since there is no serious contention that the Fifteenth Court of Appeals is "inferior" to the district courts or the other courts of appeals, all of which are "constitutional" courts under Article V of the Texas Constitution. Instead, the defense of **that** court likely rests on the (contestable) claim that nothing in the Texas Constitution precludes the creation of an intermediate constitutional appeals court the "district" of which is the entire state. But even if it is possible to divide the **same** district into multiple courts of appeals (as the legislature has now provided for Houston with the First and Fourteenth Courts of Appeals), it does not follow that the entire state can be "divided" into a single district. Giving the Fifteenth Court of Appeals concurrent jurisdiction with other courts of appeals is one thing; giving it statewide jurisdiction when there are 14 courts of appeals with more geographically circumscribed districts is quite another.

Reasonable minds can certainly disagree about the policy wisdom of creating a statewide business court or intermediate court of appeals. I confess some ambivalence on my own part to the strength of the competing arguments. And the constitutions of at least some of Texas's sister states do clearly allow for the creation of statewide business courts that are not just carved out from geographically distributed trial courts.[20] The critical point for present purposes is that, at least as it has historically been interpreted, the Texas Constitution does not appear to empower the legislature to create such tribunals.

It will be up to the Texas Supreme Court, of course, to settle the question once and for all. But it would behoove the justices to consider and resolve the issue **before** these courts open for business on September 1—all the more so because the constitutional arguments against them, at least under existing law, are quite substantial.

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[1] *Kelly* v. *State*, 742 S.W.2d 42, 44 (Tex. Crim. App. 1987).
[2] *Id*. at 45.
[3] Tex. Const. art. V, § 7(a), (b)
[4] *Id*. art. V, § 6(a), (b).
[5] *Id*. art. V, § 1.
[6] *Id*.
[7] *See, e.g.*, *Jordan* v. *Crudgington*, 231 S.W.2d 641 (Tex. 1950).
[8] *Reasonover* v. *Reasonover*, 58 S.W.2d 817, 818 (Tex. 1933).
[9] *Id*.
[10] *Jordan*, 231 S.W.2d at 644–45 (quoting *Harris County* v. *Stewart*, 41 S.W. 650, 655 (Tex. 1897) (emphasis added)).
[11] *Id*. at 645; *see also id*. at 646 (noting that objections to the Court of Domestic Relations in and for Potter County "would be valid **if** the court created by the Act were a district court, but since it is not a district court, the objections are without merit" (emphasis added)).
[12] *Id*.; *see also Whitner* v. *Belknap*, 34 S.W. 594, 596 (Tex. 1896) ("The substance, and not the name, must govern in the construction of that law.").
[13] 742 S.W.2d at 46–47.
[14] *See Reasonover*, 58 S.W.2d at 819 ("If 'conform' means 'to deprive,' the Legislature is empowered to take away from the regular district court all the jurisdiction given it by the Constitution, and confer it upon the statutory courts. This would not be 'conforming,' but 'destroying,' the jurisdiction of the district court, to the extent the Legislature might elect.").
[15] *See, e.g.*, *Jordan*, 231 S.W.2d at 645.
[16] *See, e.g.*, *Whitner*, 34 S.W. at 596; *see also Turner* v. *Tucker*, 258 S.W. 149, 150 (Tex. 1924) ("[A] court empowered to discharge principal functions of the district court must be regarded as a district court.").
[17] *See* Tex. Gov't Code § 74.042.
[18] One other significant feature of the proposed Business Court that cuts against its structural inferiority to Texas's constitutional courts is the novel statutory requirement in new section 25A.016 that "[t]he supreme court shall adopt rules for the issuance of written opinions by the business court." In other words, the Business Court will regularly be making law (through written opinions) in contexts in which Texas's district courts do **not**—law that will necessarily be relied upon, at least as persuasive authority, in other cases brought to the constitutional courts. Giving the Business Court that kind of (unique) authority relative to Texas's other trial courts underscores the extent to which the Business Court is **not** inferior to them; if anything, it will have the effect of allowing the new court to exercise a form of **supervision** over the substantive legal questions it resolves.
[19] *Jordan*, 231 S.W.2d at 645.
[20] To take just one (illustrative) example, Article VI of the Georgia Constitution authorizes the General Assembly, with a two-thirds majority in each chamber, to "enact legislation providing for, as pilot programs of limited duration, courts which are not uniform within their classes in jurisdiction, powers, rules of practice and procedure, and selection, qualifications, terms, and discipline of judges for such pilot courts and other matters relative thereto." Ga. Const. art. VI, ¶ 10. The Georgia Statewide Business Court, which closely resembles the Texas Business Court, was created pursuant to this provision.

H.B. No. 19

AN ACT relating to the creation of a specialty trial court to hear certain cases; authorizing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.

Subtitle A, Title 2, Government Code, is amended by adding Chapter 25A to read as follows:

CHAPTER 25A. BUSINESS COURT

Sec. 25A.001. DEFINITIONS.

In this chapter:

(1) "Controlling person" means a person who directly or indirectly controls a governing person, officer, or organization.

(2) "Derivative proceeding" means a civil action brought in the right of a domestic or foreign corporation, a domestic or foreign limited liability company, or a domestic or foreign limited partnership, to the extent provided by the Business Organizations Code.

(3) "Governing documents" means the instruments, documents, or agreements adopted under an organization's governing law to govern the organization's formation and internal affairs. The term includes:

(A) a certificate of formation, articles of incorporation, and articles of organization;
(B) bylaws;
(C) a partnership agreement;
(D) a company agreement or operating agreement;
(E) a shareholder agreement;
(F) a voting agreement or voting trust agreement; and
(G) an agreement among owners restricting the transfer of ownership interests.

(4) "Governing law" means the law governing the formation and internal affairs of an organization.

(5) "Governing person" means a person who is entitled, alone or as part of a group, to manage and direct an organization's affairs under the organization's governing documents and governing law. The term includes:

(A) a member of the board of directors of a corporation or other organization;
(B) a general partner of a general or limited partnership;
(C) a manager of a limited liability company that is managed by its managers;
(D) a member of a limited liability company that is managed by its members;
(E) a trust manager of a real estate investment trust; and
(F) a trustee of a business trust.

(6) "Governmental entity" means:

(A) this state; or
(B) a political subdivision of this state, including a municipality, a county, or any kind of district.

(7) "Internal affairs" means:

(A) the rights, powers, and duties of an organization's governing persons, officers, owners, and members; and
(B) matters relating to the organization's membership or ownership interests.

(8) "Managerial official" means a governing person or officer.

(9) "Officer" means a person elected, appointed, or designated as an officer of an organization by the organization's governing persons or governing documents.

(10) "Organization" means a foreign or domestic entity or association, regardless of whether the organization is for profit or nonprofit. The term includes:

(A) a corporation;
(B) a limited partnership;
(C) a general partnership;
(D) a limited liability partnership;
(E) a limited liability company;
(F) a business trust;
(G) a real estate investment trust;
(H) a joint venture;
(I) a joint stock company;
(J) a cooperative;
(K) a bank;
(L) a credit union;
(M) a savings and loan association;
(N) an insurance company; and
(O) a series of a limited liability company or of another entity.

(11) "Owner" means an owner of an organization. The term includes:

(A) a shareholder or stockholder of a corporation or other organization;
(B) a general or limited partner of a partnership or an assignee of a partnership interest in a partnership;
(C) a member of, or an assignee of a membership interest in, a limited liability company; and
(D) a member of a nonprofit organization.

(12) "Ownership interest" means an owner's interest in an organization, including an owner's economic, voting, and management rights.

(13) "Publicly traded company" means an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6, Securities Exchange Act of 1934 (15 U.S.C. Section 78f) and any entity that is majority owned or controlled by such an entity.

(14) "Qualified transaction" means a transaction, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, under which a party:

(A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least $10 million; or
(B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $10 million.

Sec. 25A.002. CREATION.

The business court is a statutory court created under Section 1, Article V, Texas Constitution.

Sec. 25A.003. BUSINESS COURT JUDICIAL DISTRICT; DIVISIONS.

(a) The judicial district of the business court is composed of all counties in this state.

(b) The business court is composed of divisions as provided by this section.

(c) The First Business Court Division is composed of the counties composing the First Administrative Judicial Region under Section 74.042(b).

(d) The Second Business Court Division is composed of the counties composing the Second Administrative Judicial Region under Section 74.042(c), subject to funding through legislative appropriations. The division is abolished September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(e) The Third Business Court Division is composed of the counties composing the Third Administrative Judicial Region under Section 74.042(d).

(f) The Fourth Business Court Division is composed of the counties composing the Fourth Administrative Judicial Region under Section 74.042(e).

(g) The Fifth Business Court Division is composed of the counties composing the Fifth Administrative Judicial Region under Section 74.042(f), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(h) The Sixth Business Court Division is composed of the counties composing the Sixth Administrative Judicial Region under Section 74.042(g), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(i) The Seventh Business Court Division is composed of the counties composing the Seventh Administrative Judicial Region under Section 74.042(h), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(j) The Eighth Business Court Division is composed of the counties composing the Eighth Administrative Judicial Region under Section 74.042(i).

(k) The Ninth Business Court Division is composed of the counties composing the Ninth Administrative Judicial Region under Section 74.042(j), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(l) The Tenth Business Court Division is composed of the counties composing the Tenth Administrative Judicial Region under Section 74.042(k), subject to funding through legislative appropriations. The division is abolished on September 1, 2026, unless reauthorized by the legislature and funded through additional legislative appropriations.

(m) The Eleventh Business Court Division is composed of the counties composing the Eleventh Administrative Judicial Region under Section 74.042(l).

(n) This subsection and Subsections (d), (g), (h), (i), (k), and (l) expire September 1, 2026.

Sec. 25A.004. JURISDICTION AND POWERS.

(a) Subject to Subsections (b), (c), (d), (e), and (f), the business court has the powers provided to district courts by Chapter 24, including the power to:

(1) issue writs of injunction, mandamus, sequestration, attachment, garnishment, and supersedeas; and

(2) grant any relief that may be granted by a district court.

(b) Subject to Subsection (c), the business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) a derivative proceeding;

(2) an action regarding the governance, governing documents, or internal affairs of an organization;

(3) an action in which a claim under a state or federal securities or trade regulation law is asserted against:

(A) an organization;
(B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person or managerial official;
(C) an underwriter of securities issued by the organization; or
(D) the auditor of an organization;

(4) an action by an organization, or an owner of an organization, if the action:

(A) is brought against an owner, controlling person, or managerial official of the organization; and
(B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization;

(5) an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;

(6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and

(7) an action arising out of the Business Organizations Code.

(c) The business court has civil jurisdiction concurrent with district courts in an action described by Subsection (b) regardless of the amount in controversy if a party to the action is a publicly traded company.

(d) The business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) an action arising out of a qualified transaction;

(2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action, except an action that arises out of an insurance contract; and

(3) subject to Subsection (g), an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization other than a bank, credit union, or savings and loan association.

(e) The business court has civil jurisdiction concurrent with district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, involving a dispute based on a claim within the court's jurisdiction under Subsection (b), (c), or (d).

(f) Except as provided by Subsection (h), the business court has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. A claim within the business court's supplemental jurisdiction may proceed in the business court only on the agreement of all parties to the claim and a judge of the division of the court before which the action is pending. If the parties involved in a claim within the business court's supplemental jurisdiction do not agree on the claim proceeding in the business court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the business court.

(g) Unless the claim falls within the business court's supplemental jurisdiction, the business court does not have jurisdiction of:

(1) a civil action:

(A) brought by or against a governmental entity; or
(B) to foreclose on a lien on real or personal property;

(2) a claim arising out of:

(A) Subchapter E, Chapter 15, and Chapter 17, Business & Commerce Code;
(B) the Estates Code;
(C) the Family Code;

(D) the Insurance Code; or
(E) Chapter 53 and Title 9, Property Code;

(3) a claim arising out of the production or sale of a farm product, as that term is defined by Section 9.102, Business & Commerce Code;

(4) a claim related to a consumer transaction, as that term is defined by Section 601.001, Business & Commerce Code, to which a consumer in this state is a party, arising out of a violation of federal or state law; or

(5) a claim related to the duties and obligations under an insurance policy.

(h) The business court does not have jurisdiction of the following claims regardless of whether the claim is otherwise within the court's supplemental jurisdiction under Subsection (f):

(1) a claim arising under Chapter 74, Civil Practice and Remedies Code;

(2) a claim in which a party seeks recovery of monetary damages for bodily injury or death; or

(3) a claim of legal malpractice.

Sec. 25A.005. JUDICIAL AUTHORITY.

A business court judge has all powers, duties, immunities, and privileges of a district judge.

Sec. 25A.006. INITIAL FILING; REMOVAL AND REMAND.

(a) An action within the jurisdiction of the business court may be filed in the business court. The party filing the action must plead facts to establish venue in a county in a division of the business court, and the business court shall assign the action to that division. Venue may be established as provided by law or, if a written contract specifies a county as venue for the action, as provided by the contract.

(b) If the business court does not have jurisdiction of the action, the court shall, at the option of the party filing the action:

(1) transfer the action to a district court or county court at law in a county of proper venue; or

(2) dismiss the action without prejudice to the party's rights.

(c) If, after an action is assigned to a division of the business court, the court determines that the division's geographic territory does not include a county of proper venue for the action, the court shall:

(1) if an operating division of the court includes a county of proper venue, transfer the action to that division; or

(2) if there is not an operating division of the court that includes a county of proper venue, at the option of the party filing the action, transfer the action to a district court or county court at law in a county of proper venue.

(d) A party to an action filed in a district court or county court at law that is within the jurisdiction of the business court may remove the action to the business court. If the business court does not have jurisdiction of the action, the business court shall remand the action to the court in which the action was originally filed.

(e) A party to an action filed in a district court or county court at law in a county of proper venue that is not within an operating division of the business court or the judge of the court in which the action is filed may not remove or transfer the action to the business court.

(f) A party may file an agreed notice of removal at any time during the pendency of the action. If all parties to the action have not agreed to remove the action, the notice of removal must be filed:

(1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action; or

(2) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action, not later than the 30th day after the date the application is granted, denied, or denied as a matter of law.

(g) The notice of removal must be filed with the business court and the court in which the action was originally filed. On receipt of the notice, the clerk of the court in which the action was originally filed shall immediately transfer the action to the business court in accordance with rules adopted by the supreme court, and the business court clerk shall assign the action to the appropriate division of the business court.

(h) The filing of an action or a notice of removal in the business court is subject to Section 10.001, Civil Practice and Remedies Code.

(i) Removal of a case to the business court is not subject to the statutes or rules governing the due order of pleading.

(j) Removal of a case does not waive a defect in venue or constitute an appearance to determine personal jurisdiction.

(k) The judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge shall notify all parties of the transfer request and request a hearing on the transfer request. After a hearing on the request, the presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice. The business court clerk shall assign an action transferred under this subsection to the appropriate division of the business court.

(l) The business court judge on establishment of jurisdiction and venue over an action shall by order declare the county in which any jury trial for the action will be held as determined under Section 25A.015.

Sec. 25A.007. APPEALS.

(a) Notwithstanding any other law and except as provided by Subsection (b) and in instances when the supreme court has concurrent or exclusive jurisdiction, the Fifteenth Court of Appeals has exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court.

(b) If the Fifteenth Court of Appeals is not created, an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court shall be filed in the court of appeals with appellate jurisdiction of civil cases for the county declared in an order under Section 25A.006(l).

(c) The procedure governing an appeal or original proceeding from the business court is the same as the procedure for an appeal or original proceeding from a district court.

Sec. 25A.008. QUALIFICATIONS OF JUDGE.

(a) A business court judge must:

(1) be at least 35 years of age;

(2) be a United States citizen;

(3) have been a resident of a county within the division of the business court to which the judge is appointed for at least five years before appointment; and

(4) be a licensed attorney in this state who has 10 or more years of experience in:

(A) practicing complex civil business litigation;

(B) practicing business transaction law;

(C) serving as a judge of a court in this state with civil jurisdiction; or

(D) any combination of experience described by Paragraphs (A)-(C).

(b) A business court judge may not have had the judge's license to practice law revoked, suspended, or subject to a probated suspension.

Sec. 25A.009. APPOINTMENT OF JUDGES; TERM; PRESIDING JUDGE; EXCHANGE OF BENCHES.

(a) The governor, with the advice and consent of the senate, shall appoint:

(1) two judges to each of the First, Third, Fourth, Eighth, and Eleventh Divisions of the business court; and

(2) one judge to each of the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions of the business court.

(b) A business court judge shall serve for a term of two years, beginning on September 1 of every even-numbered year.

(c) A business court judge may be reappointed.

(d) Not later than the seventh day after the first day of a term, the business court judges by majority vote shall select a judge of the court to serve as administrative presiding judge for the duration of the term. If a vacancy occurs in the position of administrative presiding judge, the remaining business court judges shall select a judge of the court to serve as administrative presiding judge for the remainder of the unexpired term as soon as practicable.

(e) A business court judge shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of state.

(f) To promote the orderly and efficient administration of justice, the business court judges may exchange benches and sit and act for each other in any matter pending before the court.

Sec. 25A.010. VACANCY.

If a vacancy occurs in an office of a business court judge, the governor, with the advice and consent of the senate, shall appoint, in the same manner as the original appointment, another person to serve for the remainder of the unexpired term.

Sec. 25A.011. JUDGE'S SALARY.

The salary of a business court judge is the amount provided by Section 659.012 and shall be paid in equal monthly installments.

Sec. 25A.012. REMOVAL; DISQUALIFICATION AND RECUSAL.

(a) A business court judge may be removed from office in the same manner and for the same reasons as a district judge.

(b) A business court judge is disqualified and subject to mandatory recusal for the same reasons a district judge is subject to disqualification or recusal in a pending case. Disqualification or recusal of a business court judge shall be governed by the same procedure as disqualification or recusal of a district judge.

Sec. 25A.013. PRIVATE PRACTICE OF LAW.

A business court judge shall diligently discharge the duties of the office on a full-time basis and may not engage in the private practice of law.

Sec. 25A.014. VISITING JUDGE.

(a) A retired or former judge or justice who has the qualifications prescribed by Section 25A.008 may be assigned as a visiting judge of a division of the business court by the chief justice of the supreme court. A visiting judge of a division of the business court is subject to objection, disqualification, or recusal in the same manner as a retired or former judge or justice is subject to objection, disqualification, or recusal if appointed as a visiting district judge.

(b) Before accepting an assignment as a visiting judge of a division of the business court, a retired or former judge or justice shall take the constitutional oath of office required of appointed officers of this state and file the oath with the secretary of state.

Sec. 25A.015. JURY PRACTICE AND PROCEDURE; VENUE FOR JURY TRIAL.

(a) A party in an action pending in the business court has the right to a trial by jury when required by the constitution.

(b) Subject to Subsection (d), a jury trial in a case filed initially in the business court shall be held in any county in which the case could have been filed under Section 15.002, Civil Practice and Remedies Code, as chosen by the plaintiff.

(c) Subject to Subsections (b) and (d), a jury trial in a case removed to the business court shall be held in the county in which the action was originally filed.

(d) A jury trial for a case in which a written contract specifies a county as venue for suits shall be held in that county.

(e) The parties and the business court judge may agree to hold the jury trial in any other county. A party may not be required to agree to hold the jury trial in a different county.

(f) The drawing of jury panels, selection of jurors, and other jury-related practice and procedure in the business court shall be the same as for the district court in the county in which the trial is held.

(g) Practice, procedure, rules of evidence, issuance of process and writs, and all other matters pertaining to the conduct of trials, hearings, and other business in the business court are governed by the laws and rules prescribed for district courts, unless otherwise provided by this chapter.

Sec. 25A.016. WRITTEN OPINIONS.

The supreme court shall adopt rules for the issuance of written opinions by the business court.

Sec. 25A.017. COURT LOCATION; STAFFING.

(a) In this section, "remote proceeding" means a proceeding before the business court in which one or more of the participants, including a judge, party, attorney, witness, court reporter, or other individual attends the proceeding remotely through the use of technology.

(b) The administrative presiding judge of the business court shall manage administrative and personnel matters on behalf of the court. The administrative presiding judge of the business court shall appoint a clerk, whose office shall be located in Travis County in facilities provided by this state. The clerk shall:

(1) accept all filings in the business court; and

(2) fulfill the legal and administrative functions of a district clerk.

(c) Each business court judge shall maintain chambers in the county the judge selects within the geographic boundaries of the division to which the judge is appointed in facilities provided by this state. For purposes of this section, the Office of Court Administration of the Texas Judicial System may contract for the use of facilities with a county.

(d) Subject to Section 25A.015, a business court judge may hold court at any courtroom within the geographic boundaries of the division to which the judge is appointed as the court determines necessary or convenient for a particular civil action. To the extent practicable, a county using existing courtrooms and facilities shall accommodate the business court in the conduct of the court's hearings and other proceedings.

(e) The business court may conduct a proceeding other than a jury trial as a remote proceeding to facilitate the resolution of a matter before the court. The business court may not require a party or attorney to remotely attend a court proceeding in which oral testimony is heard, absent the agreement of the parties.

(f) The business court shall conduct a remote proceeding from a courtroom or the facilities provided to a business court judge by this state.

(g) The business court shall provide reasonable notice to the public that a proceeding will be conducted remotely and an opportunity for the public to observe the remote proceeding.

(h) In a county in which a division of the business court sits, the sheriff shall in person or by deputy attend the business court as required by the court. The sheriff or deputy is entitled to reimbursement from this state for the cost of attending the business court.

(i) The business court may appoint personnel necessary for the operation of the court, including:

(1) personnel to assist the clerk of the court;

(2) staff attorneys for the court;

(3) staff attorneys for each judge of the business court;

(4) court coordinators; and

(5) administrative assistants.

(j) Subject to Subsection (k), the court officials shall perform the duties and responsibilities of their offices and are entitled to the compensation, fees, and allowances prescribed by law for the offices.

(k) All personnel, including the business court clerk, appointed under this section are employees of the Office of Court Administration of the Texas Judicial System and are state employees for all purposes, including accrual of leave time, insurance benefits, retirement benefits, and travel regulations.

Sec. 25A.0171. ADMINISTRATIVE ATTACHMENT TO OFFICE OF COURT ADMINISTRATION; REPORT.

(a) The business court is administratively attached to the Office of Court Administration of the Texas Judicial System.

(b) The Office of Court Administration of the Texas Judicial System shall provide administrative support to the business court as necessary to enable the business court to carry out its duties under this chapter.

(c) The Office of Court Administration of the Texas Judicial System may employ personnel necessary to provide administrative support to the business court under this chapter.

(d) Only the business court may exercise the duties of the business court under this chapter. Except as otherwise provided by this chapter, the Office of Court Administration of the Texas Judicial System does not have any authority or responsibility related to the duties of the business court under this chapter.

(e) Not later than December 1 of each year, the Office of Court Administration of the Texas Judicial System shall submit to the legislature a report on the number and types of cases heard by the business court in the preceding year.

Sec. 25A.018. FEES.

The supreme court shall set fees for filings and actions in the business court in amounts sufficient to cover the costs of administering this chapter, taking into account fee waivers necessary for the interest of justice.

Sec. 25A.019. SEAL.

The seal of the business court is the same as that provided by law for a district court except that the seal must contain the name "The Business Court of Texas."

Sec. 25A.020. RULES.

(a) The supreme court shall adopt rules of civil procedure as the court determines necessary, including rules providing for:

(1) the timely and efficient removal and remand of cases to and from the business court; and

(2) the assignment of cases to judges of the business court.

(b) The business court may adopt rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

SECTION 2.

Sections 659.012(a) and (e), Government Code, are amended to read as follows:

(a) Notwithstanding Section 659.011 and subject to Subsections (b) and (b-1):

(1) a judge of a district court or a division of the business court is entitled to an annual base salary from the

state as set by the General Appropriations Act in an amount equal to at least $140,000, except that the combined base salary of a district judge or judge of a division of the business court from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the maximum combined base salary from all state and county sources for a justice of a court of appeals other than a chief justice as determined under this subsection;

(2) a justice of a court of appeals other than the chief justice is entitled to an annual base salary from the state in the amount equal to 110 percent of the state base salary of a district judge as set by the General Appropriations Act, except that the combined base salary of a justice of the court of appeals other than the chief justice from all state and county sources, including compensation for any extrajudicial services performed on behalf of the county, may not exceed the amount that is $5,000 less than the base salary for a justice of the supreme court as determined under this subsection;

(3) a justice of the supreme court other than the chief justice or a judge of the court of criminal appeals other than the presiding judge is entitled to an annual base salary from the state in the amount equal to 120 percent of the state base salary of a district judge as set by the General Appropriations Act; and

(4) the chief justice or presiding judge of an appellate court is entitled to an annual base salary from the state in the amount equal to $2,500 more than the state base salary provided for the other justices or judges of the court, except that the combined base salary of the chief justice of a court of appeals from all state and county sources may not exceed the amount equal to $2,500 less than the base salary for a justice of the supreme court as determined under this subsection.

(e) For the purpose of salary payments by the state, the comptroller shall determine from sworn statements filed by the justices of the courts of appeals, district judges, and business court judges that the required salary limitations provided by Subsection (a) are maintained. If the state base salary for a judge or justice prescribed by Subsection (a) combined with additional compensation from a county would exceed the limitations provided by Subsection (a), the comptroller shall reduce the salary payment made by the state by the amount of the excess.

SECTION 3.

Section 837.001(a), Government Code, is amended to read as follows:

(a) Membership in the retirement system is limited to persons who have never been eligible for membership in the Judicial Retirement System of Texas or the Judicial Retirement System of Texas Plan One and who at any time on or after the effective date of this Act are judges, justices, or commissioners of:

(1) the supreme court;

(2) the court of criminal appeals;

(3) a court of appeals;

(4) the business court;

(5) a district court; or

(6) a commission to a court specified in this subsection.

SECTION 4.

(a) The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge.

(b) If the appointment of judges by the governor to the divisions of the business court under Section 25A.009, Government Code, as added by this Act, is held by the Texas Supreme Court as unconstitutional, the business court shall be staffed by retired or former judges or justices who are appointed to the court as provided by Section 25A.014, Government Code, as added by this Act.

SECTION 5.

Except as otherwise provided by this Act, the business court is created September 1, 2024.

SECTION 6.

(a) As soon as practicable after the effective date of this Act, the governor shall appoint judges to the First, Third, Fourth, Eighth, and Eleventh Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

(b) On or before September 1, 2026, but not before July 1, 2026, the governor shall appoint judges to the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Business Court Divisions as required by Section 25A.009, Government Code, as added by this Act.

SECTION 7.

(a) Notwithstanding Chapter 25A, Government Code, as added by this Act, the business court is not created unless the legislature makes a specific appropriation of money for that purpose. For purposes of this subsection, a specific appropriation is an appropriation identifying the business court or an Act of the 88th Legislature, Regular Session, 2023, relating to the creation of a specialty trial court to hear certain cases or of the business court.

(b) Notwithstanding Section 25A.007(a), Government Code, as added by this Act, a court of appeals retains the jurisdiction the court had on August 31, 2024, if the business court is not created as a result of Subsection (a) of this section.

SECTION 8.

The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.

SECTION 9.

This Act takes effect September 1, 2023.

E-filed in the Office of the Clerk
for the Business Court of Texas
10/30/2024 10:46 AM
Accepted by: Beverly Crumley
Case Number: 24-BC01B-0005

The Business Court of Texas,
1st Division

ENERGY TRANSFER LP (formerly known as ENERGY TRANSFER OPERATING, L.P.) and ETC TEXAS PIPELINE LTD., *Plaintiffs*,	§	
v.	§	Cause No. 24-BC01B-0005
CULBERSON MIDSTREAM LLC, CULBERSON MIDSTREAM EQUITY, LLC, MOONTOWER RESOURCES GATHERINGS, LLC, MOONTOWER RESOURCES OPERATING, LLC, and MOONTOWER RESOURCES WI, LLC, *Defendants*	§	

OPINION AND ORDER

Before the court is defendants' motion to remand this case.[1] The court grants that motion because plaintiffs filed this suit on April 8, 2022, but this

[1] Although defendants' October 10, 2024, filings is captioned, "Defendants' Brief in Support of Remand," their conclusion and prayer objects to this court's authority to hear this case and asked this court to remand the case to the district court. Because the defendants' brief in support of remand is in substance a motion to remand, the court treats

court does not have authority over cases filed before September 1, 2024. Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§ 8, 2023 Tex. Sess. Law Serv. 919, 929 (H.B. 19).

I. Background

On April 8, 2022, Energy Transfer LP; Energy Transfer Operating, L.P.; and ETC Texas Pipeline, Ltd. sued Culberson Midstream LLC; Culberson Midstream Equity, LLC; and Moontower Resources Gathering, LLC in the 193rd District Court of Dallas, Texas. Plaintiffs asserted declaratory judgment and contract breach claims regarding a gas gathering and processing agreement. Thereafter, the defendants appeared. The district court's docket sheet shows fifty-seven pages of district and appellate court activity from April 8, 2022, until August 31, 2024.

Plaintiffs removed the case to this court on September 30, 2024. Their removal appendix filed the next day contains eighteen volumes spread over six .pdf files. They later filed supplemental appendices.

On October 1st, this court requested briefs regarding what effect H.B. 19, § 8 has on this court's authority to hear this case. H.B. 19, § 1's operative

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it as such. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (treat a pleading's substance over form).

sections are codified as Government Code §§ 25A.001-25A.020. GOV'T CODE §§ 25A.001-25A.020.

Nine days later, defendants moved for remand asserting two arguments: (i) this case is not removable under § 25A.006 because H.B. 19, § 8's plain text means that chapter 25A is restricted to actions commenced on or after September 1, 2024, thus precluding application to this 2022 case; and (ii) applying H.B. 19 retroactively would be unconstitutional.

Plaintiffs responded with these arguments:

> ***First,*** the plain text of H.B. 19, § 8 shows no prohibition to the removal of cases, only an affirmation of this Court's ability to start accepting cases on September 1, 2024.
>
> ***Second,*** H.B. 19 (including § 8) is a procedural, as opposed to substantive, statute; accordingly, its removal process should apply to ongoing, pre-September 1, 2024 [sic] cases.
>
> And ***third,*** when the Legislature has excluded cases of a certain age from a new statutory scheme, it used specific language that is not in H.B. 19, § 8.

Defendants replied with statutory text, a public policy, legislative history, and other arguments.

Neither side contends that there are disputed fact issues, and the court does not find any. Nor do the parties contend that H.B. 19 is ambiguous on

this issue, and the court does not discern any such ambiguity. Finally, no party requested oral argument.

II. Analysis

A. Overview

The issue is whether H.B. 19, § 8 restricts the court's authority to act to cases commenced on or after September 1, 2024, as defendants contend, or whether § 8 marks the date when the court can begin accepting cases, as plaintiffs contend. For the following reasons, the court concludes that § 8 serves both purposes. Thus, the court lacks authority to hear this 2022 case.

B. Applicable Law

This is a statutory construction issue, which is a legal question. *In re Panchakarla*, 602 S.W.3d 536, 540 (Tex. 2020) (orig. proceeding). The applicable principles are:

> When a statute's language is unambiguous, "we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results." "We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." We construe statutes and related provisions as a whole, not in isolation, . . ., and as a general proposition, we are hesitant to conclude that a trial court's jurisdiction is curtailed absent manifestation of legislative intent to that effect, ...

Id. (citations omitted).

On June 9, 2023, Governor Abbott signed H.B. 19. H.B. 19, § 1 states:

> SECTION 1. Subtitle A, Title 2, Government Code, is amended by adding Chapter 25A to read as follows: . . ..

H.B. 19, § 1. Thereafter, H.B. 19, § 1 adds twenty sections regarding the business court's operation, including §§ 25A.004 and 25A.006 concerning the court's jurisdiction, removal, and remand rules.

Under § 25A.006(f)(1), a party may file an unagreed removal notice within thirty days after it discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the case. GOV'T CODE, § 25A.006(f)(1). Based on this section, plaintiffs contend that their removal is timely because they filed their notice within thirty days after September 1, 2024, when the court's jurisdiction became effective.

But H.B. 19 has seven other enabling provisions, including §§ 8 and 9:

> SECTION 8. The changes in the law made by this Act Apply to civil actions commenced on or after September 1, 2024.
>
> SECTION 9. This Act takes effect September 1, 2023.

Because plaintiffs first and third arguments are related, the court addresses them together.

C. H.B.19's plain text is dispositive.

1. The Statute's Plain Text

Section 25A.006 permits removal of cases to the business court if the case meets business court jurisdictional requirements. *Id.* § 25A.006((d)-(h). But § 25A.006 does not address whether cases, like this one, filed before September 1, 2024, are removable. Nor does any other part of chapter 25A. Rather, one must consider H.B. 19 as a whole to resolve that issue. Sections 8 and 9 provide that resolution.

Section 9 establishes that the statute became effective on September 1, 2023. That is, § 9 was the start date for ramping up this brand-new court to begin hearing cases. Based on § 9 alone, Government Code § 25A.006 would appear to allow parties to remove pending cases to this court beginning on September 1, 2023. But removals were not practical then because on that date this court had no court space, judges, staff, equipment, supplies, systems, rules, and other things needed to function. So, the legislature provided one-year for the court to become ready to begin accepting cases. H.B. 19, § 8 is that authorizing statute.

Section 8 does more than set the court's first operational date. If that were all that § 8 does, it would read, "The court may begin accepting cases beginning on September 1, 2024." But that is not what § 8 says.

Rather, § 8 also limits H.B. 19's changes to the law to cases commenced on or after September 1, 2024—a full year after the statute's effective date. Section 8's "this Act" in this context means entire H.B. 19, which begins with "An ACT relating to the creation of a specialty trial court to hear certain cases; authorizing fees." *See* H.B. 19, preface. Section 1 thereafter amends the Government Code by "adding" chapter 25A and its twenty sections. *Id.* Since chapter 25A in its entirety is a change in Texas law, it follows that § 25A.006's removal provisions also change Texas law.

This court presumes the legislature wrote § 8 the way it did for a reason and cannot ignore its plain language. *In re Panchakarla*, 602 S.W.3d at 540. Nor may it judicially amend the statute. *Id.* Indeed, H.B. 19's plain "text is the alpha and omega of the interpretative process." *Id.* at 540-41 (*quoting BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)).

Accordingly, this court must construe § 8 as limiting § 25A.006's removal provisions to cases filed on or after September 1, 2024.

2. Plaintiffs' Arguments

Nonetheless, plaintiffs' first argument is that § 8 does not contain the word "only" and shows no affirmative prohibition to removing pre-September 1, 2024, cases and merely affirms the court's ability to start accepting cases on that date. This argument has several deficits.

To begin, that § 8 restricts the court's entire chapter 25A authority to act to cases filed on or after September 1st necessarily restricts all chapter 25A provisions to cases filed on or after that date. So, no specific reference to removals is necessary to preclude removing cases filed before September 1, 2024.

Next, plaintiffs cite five examples of legislative enactments saying that the Act applies "only to" cases filed on or after the Act's effective date and stating that a case filed before the Act's effective date is governed by the law existing before that date. From there, they argue that (i) those words in those other statutes have meaning and (ii) their absence here means H.B. 19 does not so restrict its procedural application to post-September 1, 2024, filed cases. However, on at least one occasion the legislature included specific language expressly applying a change in law to pending actions:

> SECTION 10. (a) Except as provided in Subsection (b) of this section, the changes in law made by this Act apply to a pending suit affecting the parent-child relationship regardless of whether the suit was filed before, on, or after the effective date of this Act.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 10, 2001 Tex. Gen. Laws 2395, 2398 (H.B. 2249). Thus, by plaintiffs' reasoning, language of this sort would be necessary for chapter 25A to have retroactive application to pre-September 1, 2024, cases. But no such language exists here either.

Finally, stating that the statute's changes in the law apply to cases filed on or after September 1, 2024, implies that the changes in the law—including the removal provisions—do not apply to cases filed before that date. *See City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) (*inclusio unius est exclusio alterius* applies absent a valid alternative construction); Justice Antonin Scalia and James A. Garner, Reading Law 107-11 (2012) (Negative Implication Canon). Here there is no other valid construction. The legislature could have written the court "may begin accepting cases on or after September 1, 2024" had that been its intent. But they did not say that, and we cannot rewrite the statute to expand the scope of cases removable to this court. *In re Panchakarla*, 602 S.W.3d at 540.

3. Remaining Arguments

Plaintiffs next address defendants' argument that applying chapter 25A to cases filed before September 1st would be unconstitutional because H.B. 19 is a procedural statute for which retroactive application is not an impediment. Since the court resolves this case based on statutory text, it does not reach this argument. Likewise, the court does not address defendants' remaining arguments.

III. Conclusion

Accordingly, the court concludes that H.B. 19's plain text precludes plaintiffs' removal and remands this case to the 193rd District Court of Dallas County, Texas.

It is so Ordered.

BILL WHITEHILL
Judge of the Texas Business Court,
First Division

SIGNED: October 30, 2024

E-filed in the Office of the Clerk
for the Business Court of Texas
10/31/2024 11:51 AM
Accepted by: Beverly Crumley
Case Number: 24-BC01B-0007

The Business Court of Texas,
1st Division

SYNERGY GLOBAL OUTSOURCING, LLC, *Plaintiff*	§	
v.	§	Cause No. 24-BC01B-0007
HINDUJA GLOBAL SOLUTIONS, INC. and HGS HEALTHCARE, LLC, *Defendants*	§	

OPINION AND ORDER

Before the court is defendants' motion to remand this case.[1] The court grants that motion because plaintiff filed this suit on December 30, 2019, but this court does not have authority over cases filed before September 1, 2024. Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§ 8, 2023 Tex. Sess. Law Serv. 919, 929 (H.B. 19).

[1] Although defendants' October 15, 2024, filing is captioned, "HSG Parties' Response to the Court's October 2, 2024[Order," their conclusion and prayer asks the court to find that the case is not removable and remand it to the district court. Because that response is in substance a motion to remand, the court treats it as such. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (treat pleading's substance over form).

Background

On December 30, 2019, Synergy Global Outsourcing, LLC sued Hinduja Global Solutions, Inc. (HGSI) in the 191st District Court of Dallas County, Texas. Synergy later sued Ali Ganjaei and HGS Healthcare, LLC. All parties were joined before September 1, 2024. This dispute centers on a business development contract dispute. The district court's docket sheet shows seventy-six pages of district and appellate court activity from December 30, 2019, until August 31, 2024.[2]

Plaintiff removed the case to this court on October 1, 2024. Its removal appendix filed two days later contains twenty-five volumes.

On October 3rd, this court requested briefs regarding what effect H.B. 19, § 8 has on this court's authority to hear this case. H.B. 19, § 1's operative sections are codified as Government Code §§ 25A.001-25A.020. GOV'T CODE §§ 25A.001-25A.020.

Twelve days later, defendants moved for remand arguing based on statutory plain text that the removal procedures applicable to business court cases do not apply here because chapter 25A is restricted to actions

[2]The district court granted Ganjaei's special appearance, and the court of appeals affirmed.

commenced on or after September 1, 2024, thus precluding application to this 2019 case. They also cited two non-party memoranda on the judicial branch's website stating that only actions filed after September 1, 2024, are removable. Finally, they referred to prior instances where the legislature limited statutory amendments to only cases filed after the statute's effective date.

Plaintiff responded with these basic arguments:

> ***First,*** a plain language reading of H.B. 19, § 8 reveals no prohibition to the removal of cases, only an affirmation of this Court's ability to start adjudicating cases filed on or after September 1, 2024.
>
> ***Second,*** in instances where the Legislature seeks to prevent the application of a Statute to actions commenced before the effective date, it has utilized specific language that does not appear in H.B. 19, § 8.
>
> ***Third,*** H.B. 19 (including § 8) is a procedural not substantive statute; accordingly, the removal process outlined therein applies to ongoing, pre-September 1, 2024 [sic] cases.

Plaintiff expanded those arguments and urged textual points and referenced nine examples of the legislature including specific language limiting a statute's application to cases filed after the statute's effective date as evidence that § 8, which omits such explicit language, does not prevent removal in this case. According to plaintiff, § 8's purpose is to signal when the court is open and ready to adjudicate cases as opposed to § 9's September

1, 2023, date for when the court can begin the administrative process of preparing to open for business in 2024.

The court gave the parties an opportunity to respond, which they did.

Defendants reiterated their plain text arguments and addressed plaintiff's argument that § 8 exists to signal when the court may begin accepting cases by arguing it is H.B. 19, §5's statement that the court was created September 1, 2023, that says when the court may begin accepting cases and so, § 8 must mean something different.

Defendants also invoked the Negative Implication Canon (*inclusio unius est exclusio alterius*) to argue that H.B. 19's application to cases filed on or after September 1, 2024, means that the statute including its removal provisions do not apply to earlier filed cases.

Finally, defendants addressed plaintiff's examples of statutes expressly limiting their application to post-effective date cases by referring to two examples where the legislature included language stating that the legislative changes apply to existing cases as negating plaintiff's argument about needing express language to limit a change in law to new cases.

Plaintiff's response reiterated that § 8's plain text omitted words needed to give it the meaning defendants argued for and identified four cases

defendants cited that, according to plaintiff, support its premise that § 8 needed to include limiting language to limit the court's authority to cases filed on or after September 1, 2024.

Finally, plaintiff urged the court to reject extrinsic materials regarding legislative intent and defendants' policy argument that limiting the court's authority to newly-filed cases makes good sense.

Neither side contends that there are disputed fact issues, and the court does not find any. Nor do the parties contend that H.B. 19 is ambiguous on this issue, and the court does not discern any such ambiguity. Finally, no party requested oral argument.

Analysis

A. Overview

The issue is whether H.B. 19, § 8 restricts the court's authority to act to cases commenced on or after September 1, 2024, as defendants contend, or whether § 8 marks the date when the court can begin accepting cases, as plaintiff contends. For the following reasons, the court concludes that § 8 serves both purposes. Thus, the court lacks authority to hear this 2019 case.

B. Applicable Law

This is a statutory construction issue, which is a legal question. *In re Panchakarla*, 602 S.W.3d 536, 540 (Tex. 2020) (orig. proceeding). The applicable principles are:

> When a statute's language is unambiguous, "we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results." "We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." We construe statutes and related provisions as a whole, not in isolation, . . ., and as a general proposition, we are hesitant to conclude that a trial court's jurisdiction is curtailed absent manifestation of legislative intent to that effect, ...

Id. (citations omitted).

On June 9, 2023, Governor Abbott signed H.B. 19. H.B. 19, § 1 states:

> SECTION 1. Subtitle A, Title 2, Government Code, is amended by adding Chapter 25A to read as follows: . . ..

H.B. 19, § 1. Thereafter, H.B. 19, § 1 adds twenty sections regarding the business court's operation, including §§ 25A.004 and 25A.006 concerning the court's jurisdiction, removal, and remand rules.

Under § 25A.006(f)(1), a party may file an unagreed to removal notice within thirty days after it discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the case. GOV'T CODE, § 25A.006(f)(1). Based on this section, plaintiff contends that its

removal is timely because it filed its notice within thirty days after September 1, 2024, when the court's jurisdiction became effective.

But H.B. 19 has seven other enabling provisions, including §§ 8 and 9:

> SECTION 8. The changes in the law made by this Act Apply to civil actions commenced on or after September 1, 2024.
>
> SECTION 9. This Act takes effect September 1, 2023.

Because plaintiff's first and second arguments are related, the court addresses them together.

C. H.B.19's plain text is dispositive.

1. The Statute's Plain Text

Section 25A.006 permits removal of cases to the business court if the case meets business court jurisdictional requirements. *Id.* § 25A.006((d)-(h). But § 25A.006 does not address whether cases, like this one, filed before September 1, 2024, are removable. Nor does any other part of chapter 25A. Rather, one must consider H.B. 19 as a whole to resolve that issue. Sections 8 and 9 provide that resolution.

Section 9 establishes that the statute became effective on September 1, 2023. That is, § 9 was the start date for ramping up this brand-new court to begin hearing cases. Based on § 9 alone, Government Code § 25A.006 would appear to allow parties to remove pending cases to this court beginning on

September 1, 2023. But removals were not practical then because on that date this court had no court space, judges, staff, equipment, supplies, systems, rules, and other things needed to function. So, the legislature provided one-year for the court to become ready to begin accepting cases. H.B. 19, § 8 is that authorizing statute.

However, § 8 does more than set the court's first operational date. If that were all that § 8 does, it would read, "The court may begin accepting cases beginning on September 1, 2024." But that is not what § 8 says.

Rather, § 8 also limits H.B. 19's changes to the law to cases commenced on or after September 1, 2024—a full year after the statute's effective date and the court was created. Section 8's "this Act" in this context means entire H.B. 19, which begins with "An ACT relating to the creation of a specialty trial court to hear certain cases; authorizing fees." *See* H.B. 19, preface. Section 1 thereafter amends the Government Code by "adding" chapter 25A and its twenty sections. *Id.* Since chapter 25A in its entirety is a change in Texas law, it follows that § 25A.006's removal provisions also change Texas law.

This court presumes the legislature wrote § 8 the way it did for a reason and cannot ignore its plain language. *In re Panchakarla*, 602 S.W.3d at 540.

Nor may it judicially amend the statute. *Id.* Indeed, H.B. 19's plain "text is the alpha and omega of the interpretative process." *Id.* at 540-41 (*quoting BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)).

Accordingly, this court must construe § 8 as limiting § 25A.006's removal provisions to cases filed on or after September 1, 2024.

2. Plaintiff's Arguments

Nonetheless, plaintiff argues that § 8 does not contain the word "only" and shows no affirmative prohibition to removing pre-effective date cases and merely affirms the court's ability to start accepting cases on September 1, 2024. This argument has several deficits.

To begin, that § 8 restricts the court's entire chapter 25A authority to act to cases filed on or after September 1st necessarily restricts all chapter 25A provisions to cases filed on or after that date. So, no specific reference to removals is necessary to preclude removing cases filed before September 1, 2024.

Next, plaintiff cites nine examples of legislative enactments saying that the subject Act applies "only to" cases filed on or after the Act's effective date and stating that a case filed before the Act's effective date is governed by the

law existing before that date. From there, it argues that (i) those words in those other statutes have meaning and (ii) their absence here means H.B. 19 does not so restrict its procedural application to post-September 1, 2024, filed cases. However, on at least one occasion the legislature included specific language expressly applying a change in law to pending actions:

> SECTION 10. (a) Except as provided in Subsection (b) of this section, the changes in law made by this Act apply to a pending suit affecting the parent-child relationship regardless of whether the suit was filed before, on, or after the effective date of this Act.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 10, 2001 Tex. Gen. Laws 2395, 2398 (H.B. 2249). Thus, by plaintiff's reasoning, language of this sort would be necessary for chapter 25A to have retroactive application here. But no such language exists here either.

Finally, stating that the statute's changes in the law apply to cases filed on or after September 1, 2024, implies that the changes in the law—including the removal provisions—do not apply to cases filed before that date. *See City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) (*inclusio unius est exclusio alterius* applies absent a valid alternative construction); Justice Antonin Scalia and James A. Garner, Reading Law 107-11 (2012) (Negative Implication Canon). Here there is no other valid construction. The legislature

could have written the court "may begin accepting cases on or after September 1, 2024" had that been its intent. But they did not say that, and we cannot rewrite the statute to expand the scope of cases removable to this court. *In re Panchakarla*, 602 S.W.3d at 540.

3. Remaining Arguments

Because H.B. 19's plain text is dispositive, the court does not address the parties' remaining arguments.

Conclusion

Accordingly, the court concludes that H.B. 19's plain text precludes plaintiff's removal and remands this case to the 191st District Court of Dallas County, Texas.

It is so Ordered.

BILL WHITEHILL
Judge of the Texas Business Court,
First Division

SIGNED: October 31, 2024

E-filed in the Office of the Clerk
for the Business Court of Texas
11/6/2024 3:48 PM
Accepted by: Beverly Crumley
Case Number: 24-BC08B-0001

The Business Court of Texas
Eighth Division

TEMA OIL AND GAS COMPANY, *Plaintiff*, v. ETC FIELD SERVICES, LLC FKA REGENCY FIELD SERVICES, LLC, *Defendant.*	§ § § § § § § § § § § §	Cause No. 24-BC08B-0001

OPINION AND ORDER

Before the Court is Plaintiff Tema Oil and Gas Company's ("Tema") Motion to Remand ("Remand Motion") filed on October 8, 2024. Tema's Remand Motion and Defendant ETC Field Services, LLC, f/k/a Regency Field Services, LLC's ("ETC") Brief on Jurisdiction and Response in Opposition to Tema's Motion to Remand raise two issues: (1) whether ETC is entitled to remove to the Business Court of Texas ("Business Court") the case commenced in the 236th Judicial District Court of Tarrant County ("District Court"); and (2) whether Tema is entitled to sanctions. After considering the parties' arguments and the relevant law, the Court concludes that neither removal nor sanctions is

appropriate. Accordingly, the Court grants in part and denies in part Tema's Remand Motion.

I. BACKGROUND

The parties are business entities operating in the oil-and-gas industry. Their predecessors in interest executed a gas purchase contract encompassing the working interest in gas produced from two tracts in Loving County, Texas. The contract, according to Tema, obligates ETC to provide facilities to receive Tema's gas and to purchase it.

A. Tema commences litigation in the District Court

After ETC allegedly failed to meet its contractual obligation for numerous months over several years, Tema sued ETC in the District Court on March 17, 2017, for breach of contract and negligence. Thereafter, Tema and ETC became embroiled in a plethora of trial and appellate court activity spanning more than seven years before ETC filed a Notice of Removal to Business Court ("Removal Notice") on September 11, 2024.

B. The legislature passes H.B. 19 to create the Business Court

While this case was pending in the District Court, legislation establishing the Business Court was enacted in 2023 when H.B. 19 was signed into law. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§ 1-9, 2023 Tex. Sess. Law Serv. 919, 919-929. Section 1 of H.B. 19 codifies Chapter 25A of the Texas Government Code to establish the Business Court. *Id.* § 1 (codified at TEX. GOV'T CODE ANN. § 25A.001 *et. seq*). Although uncodified Section 9 of H.B. 19 notes that the effective date for H.B. 19 is September 1, 2023, two other uncodified sections of H.B. 19—Sections 5 and 8—clarify that the operative date for Chapter 25A is September 1, 2024. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§

5, 8-9, 2023 Tex. Sess. Law Serv. 919, 929. Section 5 identifies the Business Court's creation date as September 1, 2024, and Section 8 declares that H.B. 19's changes in law apply to cases begun on or after September 1, 2024. *Id.* §§ 5, 8.

C. Section 25A.006 permits removal and authorizes sanctions

Chapter 25A permits the removal of a case to the Business Court pursuant to Section 25A.006. *See* TEX. GOV'T CODE ANN. § 25A.006(d)-(j). Section 25A.006 establishes that removal is effectuated by filing notice and is permitted so long as the Business Court has jurisdiction; otherwise, remand is required. *Id.* § 25A.006(d)-(g). Section 25A.006 also establishes that sanctions are available for a frivolous notice of removal. *Id.* § 25A.006(h). Nothing in Chapter 25A, including Section 25A.006, speaks to the removal of a case commenced before September 1, 2024. Indeed, Chapter 25A does not include the commencement-date restriction articulated in Section 8 of H.B. 19.

D. Rule 355 permits removal and authorizes a party to seek remand

To implement Chapter 25A, the Supreme Court of Texas adopted new and amended rules of civil procedure applicable to the Business Court in June 2024. *See* Supreme Court of Tex., *Final Approval of Rules for the Business Court*, Misc. Docket No. 24-9037 (Jun. 28, 2024). The operative date for these new rules, like Chapter 25A, is September 1, 2024. *See id.* ("…this Order incorporates the revisions and contains the final version of the new and amended rules, effective September 1, 2024.").

The rule governing removal is Texas Rule of Civil Procedure 355. *See* TEX. R. CIV. P. 355. Like Section 25A.006, Rule 355 requires the moving party to give notice and to establish the Business Court's jurisdiction (albeit the rule uses the term "authority"). TEX.

R. CIV. P. 355(a)-(c). And like Section 25A.006, Rule 355 also requires remand if removal was improper, though, unlike Section 25A.006, Rule 355 authorizes a party to file a motion to remand. TEX. R. CIV. P. 355(f). Nothing in these new rules, including Rule 355, speaks to the removal of a case commenced before September 1, 2024. In fact, like Chapter 25A, these rules do not include the commencement-date restriction articulated in Section 8 of H.B. 19.

E. ETC seeks removal and Tema seeks remand and sanctions

ETC filed its Removal Notice on September 11, 2024. ETC contends, *inter alia*, removal is proper because the Business Court was granted authority over this case on September 1, 2024. Tema responded to ETC's Removal Notice by filing its Remand Motion on October 8, 2024. Tema argues, *inter alia*, removal is improper because only those cases filed on or after September 1, 2024, can be removed to the Business Court. Consequently, Tema seeks remand. Tema also seeks sanctions against ETC. Sanctions are warranted, according to Tema, because ETC seeks removal for frivolous purposes.

The Court also ordered, and the parties submitted, briefing on the effect, if any, of Section 8 on the Court's jurisdiction and authority to hear this case. Although provided the opportunity, neither party requested a hearing on its respective pleadings.

II. DISCUSSION

The issues before the Court are the propriety of removal and sanctions.

A. Removal is not permitted

As mentioned previously, neither Section 25A.006 nor Rule 355 contains an express provision permitting or prohibiting the removal of a case commenced before

September 1, 2024. In its briefing, ETC argues removal is permitted because it timely and properly removed the case, the Court has subject-matter jurisdiction of a case involving a publicly traded company and arising under trade regulation law, and Section 8 of H.B. 19 does not bar removal of the case. Section 8 does not bar removal of the case, according to ETC, because its plain language does not explicitly prohibit removal of cases filed before September 1, 2024, or expressly state it applies "only" to cases commenced thereafter. ETC maintains the absence of such limiting language indicates the legislature did not intend to exclude cases begun before September 1, 2024. In other words, ETC contends the legislature intended Chapter 25A to apply retroactively to permit removal of cases filed before September 1, 2024. ETC's argument is unpersuasive.

1. The plain and common text of H.B. 19 must be construed to ascertain if the legislature intended Chapter 25A to permit removal of cases filed before September 1, 2024

To determine whether Section 8 permits the retroactive application of Chapter 25A, the Court must construe Section 8 in the context and framework of H.B. 19.

Construing a statute is a question of law. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). The objective in construing a statute is to ascertain and effectuate legislative intent. *Id.* The legislative intent of a statute is ordinarily expressed in the plain and common meaning of its text "unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results." *Id.* (citation omitted). In construing the plain and common meaning of statutory text, the words and phrases are considered in the context and framework of the entire statute and construed as a whole. *Id.* at 325-26

(citations omitted). The words and phrases are also construed according to the rules of grammar and usage. *Id.* at 325 (quotation marks and citations omitted). The presumption is that the legislature chose the statutory text "with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *Id.* at 325-26 (citation omitted). When a statute is clear and unambiguous on its face, *i.e.*, when the statutory text is not susceptible to more than one reasonable interpretation and alone conveys legislative intent, there is no need to resort to extrinsic aids to construe the text. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018)*; but see* TEX. GOV'T CODE ANN. § 311.023 (permitting courts to consider legislative history and other construction aids regardless of ambiguity).

2. Section 8, when construed in harmony with the other provisions of H.B. 19, expresses the legislative intent that cases filed before September 1, 2024, cannot be removed to the Business Court

Section 8 is unambiguous and clear on its face, and ETC does not contend otherwise. In plain and common terms, Section 8, when construed in harmony with the other provisions of H.B. 19, expresses the legislative intent that cases filed before September 1, 2024, cannot be removed to the Business Court.

Section 8—H.B. 19's applicability clause—states in its entirety:

> The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.

Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929. Broken down to its constituent parts, Section 8 provides that (i) "[t]he changes in law" effectuated by H.B. 19 (ii) "apply to civil actions" (iii) "commenced on or after September

1, 2024." *Id.* Although the terms "civil action" and "commence" are not defined in Chapter 25A, the rules of civil procedure applicable to the Business Court, or any provision of H.B. 19, these terms have plain and common meanings. A civil action is a lawsuit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.001(2) (defining "litigation" as "a civil action commenced, maintained, or pending in any state or federal court"); *Civil Action*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/civil%20action (defining "civil action" as "a lawsuit about a person's rights") (last visited November 6, 2024). A lawsuit commences, *i.e.*, begins, when a petition is filed. *See* TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."); *Commence*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/commence (defining "commence" in one respect as "to enter upon: begin") (last visited November 6, 2024).

One of the changes in law effectuated by H.B. 19 is the creation of Chapter 25A in Section 1. Because Chapter 25A in its entirety is a change of law, it follows logically that Section 25A.006's removal provisions are changes in law, too. Thus, when construed in the context and framework of Chapter 25A's removal provisions, Section 8's plain and common language means what it says and says what it means: removal under Chapter 25A is a change in law limited in its application to cases begun on or after September 1, 2024. *See Union Pac. R.R. Co. v. Brown*, No. 04-17-00788-CV, 2018 WL 6624507, at *3 n.2 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op.) (holding statute's uncodified effective date was still binding law) (quoting *United States of Am. for the Use & Benefit of E*

J Smith Constr., Co. v. Travelers Cas. & Sur. Co., No. 5:15-CV-971 RP, 2016 WL 1030154, at *5 (W.D. Tex. Mar. 10, 2016) ("Uncodified session law is law nonetheless.")).

This construction of Section 8 is not absurd or nonsensical. No other provision in H.B. 19 indicates the contrary, *i.e.*, that suits filed before September 1, 2024, can be removed. Section 1 and Section 5—the portion of H.B. 19 identifying September 1, 2024, as the Business Court's creation date—are both silent on the matter. Neither section addresses the retroactive or prospective application of Chapter 25A or includes the commencement-date restriction articulated in Section 8. In fact, the identification of September 1, 2024, as the creation date for the Business Court in Section 5 bolsters the conclusion that lawsuits filed before September 1, 2024, cannot be removed to the Business Court. This conclusion is further bolstered when Sections 8 and 9 are considered together, as they should be. Although Section 9 makes H.B. 19 effective on September 1, 2023, Section 8 clarifies that the changes in law implemented by H.B. 19 affecting civil actions do not apply before September 1, 2024.

The Business Court was granted jurisdiction over cases begun on or after September 1, 2024. ETC does not dispute that Chapter 25A and its provisions, including removal, did not come into force until September 1, 2024, and that the case began in the District Court on March 17, 2017. Because the case did not begin in the District Court on or after September 1, 2024, Section 25A.006's removal provision does not apply. Consequently, ETC cannot remove the case to the Business Court pursuant to Section 25A.006. *See* TEX. GOV'T CODE ANN. § 25A.006(d) (stating that removal is permitted only if the Business

Court has jurisdiction).[1] Given the conclusion that removal is not permitted, there is no need to address ETC's argument that Chapter 25A's jurisdictional requirements are met because this case involves a publicly traded company and arises under trade regulation law.

(a) The absence of the word "only" or other limiting clarifying phrases from Section 8 does not mean that cases filed before September 1, 2024, can be removed

That the legislature included Section 8 in H.B. 19 to identify the date when Chapter 25A and its provisions, including removal, would become operative for case processing purposes strongly suggests, if not outright proves, the legislature did not intend for Chapter 25A to apply retroactively. Notwithstanding this reasoning, ETC asserts the omission of the word "only" or other limiting clarifying phrases from Section 8 was purposeful and indicative of the legislature's intent not to prohibit the removal of cases filed before September 1, 2024. Relying on the presumption identified in *Cadena Comercial USA Corp.* (and numerous other cases) that the purposeful omission of words indicates legislative intent, ETC cites various legislative acts that assertedly prove the legislature always resorts to distinctive language, even in jurisdictional statutes, when limiting an act's retroactive application. ETC's assertion is not persuasive.

The legislative acts cited by ETC are amendments containing express language in their applicability clauses delineating the non-retroactive application of the amended law.

[1] The conclusion that removal is not permitted here is consistent with the same conclusion reached by the Hon. Bill Whitehill of the Business Court's First Division in two similar cases involving lawsuits filed before September 1, 2024. *See Energy Transfer LP v. Culberson Midstream LLC*, No. 24-BC01B-0005, 2024 Tex. Bus. 1; 2024 WL 4648110 (Tex. Bus. Ct. Oct. 30, 2024); *Synergy Glob. Outsourcing, LLC v. Hinduja Glob. Sols., Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 (Tex. Bus. Ct. Oct. 31, 2024). These opinions and orders are available at https://www.txcourts.gov/businesscourt/divisions/first/.

For example, in the 2021 legislative act cited by ETC that amended the law to expand the recovery of attorney's fees, the legislature delineated the non-retroactive application of the amended law by stating, in the applicability clause, that whereas the amended law applied "only" to a case begun on or after the effective date, the existing law continued to apply to a case begun before then. *See* Act of May 28, 2021, 87th Leg., R.S. ch. 665, §§ 1, 2, 2011 Tex. Gen. Laws 1391, 1391. Likewise, in the 1989 legislative act cited by ETC that amended the law to limit the scope of consumer protection measures, the legislature delineated the non-retroactive application of the amended law by stating, in the applicability clause, that whereas the amended law applied "to all" cases begun on or after the effective date, the existing law continued to apply to a case begun before then. *See* Act of May 29, 1989, 71st Leg., R.S., ch. 380, §§ 1-6, 1989 Tex. Gen. Laws 1490, 1490-93.

In the legislative acts cited by ETC, it made sense for the legislature to insert "only" or other limiting clarifying phrases in the applicability clauses to expressly indicate that the amended law did not apply retroactively to pending cases. Here, in contrast, the possibility of the retroactive application of law to pending cases is not addressed by H.B. 19's amendment to existing law and codification of new law. The existing law amended by H.B. 19 is contained in Sections 2 and 3. These sections of the bill amended existing Sections 659.012(a) and (e) and 837.001(a) of the Government Code. These statutory provisions address the salary and membership in a retirement system, respectively, of a Business Court judge. *See* TEX. GOV'T CODE ANN. §§ 659.012(a), (e), 837.001(a). They do not concern civil actions and, thus, do not concern the possibility of retroactivity. In contrast, the only section of H.B. 19 that does concern civil actions is Section 1. But it, too,

does not broach the possibility of retroactivity. As has been previously mentioned, this section of the bill codified new law: Chapter 25A and its provisions, including removal. Because Chapter 25A is new law that came into force on September 1, 2024, there were no pending cases existing under Chapter 25A before September 1, 2024. Consequently, there was no need for the legislature to insert "only" or other limiting clarifying phrases in the applicability clause to expressly indicate that the new law did not apply retroactively to non-existing pending cases. It would have been superfluous for the legislature to have done so.

(b) The absence of the word "only" or other limiting clarifying phrases from Section 8 does not mean that the Court must accept pending cases on or after September 1, 2024

ETC also maintains the intentional absence of the word "only" or other limiting clarifying phrases from Section 8 transforms the meaning of Section 8 to that of a marquee flashing an open-for-business date of September 1, 2024. This is allegedly evident when Section 8 is juxtaposed to Sections 25A.006(d) and (f)(1). According to ETC, whereas Section 8 does not explicitly prohibit removal of a case filed before September 1, 2024, Sections 25A.006 (d) and (f)(1) explicitly permits removal of a case so long as it is removed within 30 days, as occurred here, no matter when it was commenced.

ETC's proposed construction is awkward and disregards, as set forth above, the plain and common meaning of Section 8 when construed in the context and framework of Chapter 25A's removal provisions. To accept ETC's proposed construction would lead to an absurd or nonsensical result: treating Section 8 as surplusage and rendering it meaningless. This the Court may not do. *See Spradlin v. Jim Walter Homes, Inc.*, 34

S.W.3d 578, 580 (Tex. 2000) (stating that statutory language should not be construed in a manner rendering words useless or a nullity). Had the legislature intended for Section 8 to mean simply that the Business Court could begin accepting cases on or after September 1, 2024, the legislature would have written Section 8 to so state. But the legislature did not, and the Court cannot rewrite Section 8 to so state. *See Cadena Comercial USA Corp.*, 518 S.W.3d at 326 ("… we take statutes as we find them and refrain from rewriting the Legislature's text.").

(c) Although consideration of H.B.19's legislative history is not required to ascertain legislative intent, the legislative history does not support the conclusion that removal of cases filed before September 1, 2024, is proper

Although ETC does not contend Section 8 is ambiguous, ETC nonetheless argues H.B. 19's legislative history supports the conclusion that the legislature intended Section 8 to permit removal of cases filed before September 1, 2024. That the legislature omitted the word "only" or other limiting clarifying phrases from Section 8 necessarily means, according to ETC, that the legislature intended to expand the Business Court's jurisdiction to consider pending cases burdening the dockets of other courts. ETC's argument is misguided.

Because Section 8 is facially unambiguous and its legislative intent can be discerned from the plain and common meaning of its words, there is no need to resort to H.B. 19's legislative history as an aid. *See Fort Worth Transp. Auth.*, 547 S.W.3d at 838. But even if H.B. 19's legislative history were considered, it would support the conclusion that the legislature did not intend removal of cases filed before September 1, 2024. All versions of

H.B. 19, from the introduced one to the enrolled one, contain the same creation-date and commencement-date restrictions, albeit the dates were revised from January 1, 2025, in the introduced version, to September 1, 2024, in all subsequent versions. This consistency demonstrates the legislature's intent to restrict removal to cases filed on or after September 1, 2024. *Cf. In re Marriage of Roach*, 773 S.W.2d 28, 30-32 (Tex. App.—Amarillo 1989, writ denied) (concluding that the deletion of "prospective only" language limiting the applicability of amendment to pleadings filed on or after the effective date from bill as it progressed from introduction to enrollment expressed legislative intent to allow application of amendment to cases pending on the effective date), with *Reynolds v. State*, 423 S.W.3d 377, 382 (Tex. Crim. App. 2014) (concluding that deletion of "savings clause" present in earlier versions of statutes and absence of language in amended statute indicating the earlier "savings clause" was to be retained expressed legislative intent to allow application of amended statute to persons with reportable convictions or adjudications that occurred on or after a certain date).

B. Remand is required

If a case is not removable, Section 25A.006(d) requires the Business Court to remand the case to the court in which the case was originally filed. TEX. GOV'T CODE ANN. § 25A.006(d). As discussed in part A.2. above, H.B. 19's unambiguous text permits the removal of a case to the Business Court only if the case was filed on or after September 1, 2024. Because Tema commenced this case more than seven years before that date, ETC's removal of it is not permitted, and the case must be remanded to the District Court. Accordingly, the Court grants the portion of Tema's Remand Motion seeking remand

pursuant to Rule 355(f). *See* TEX. R. CIV. P. 355(f)(1), (2) (requiring the Business Court to remand a case to the originating court if the Business Court determines, on a party's motion, that removal was improper).

C. Sanctions are not warranted

The Court, however, does not grant the portion of Tema's Remand Motion seeking sanctions pursuant to Section 10.001 of the Civil Practice and Remedies Code ("CPRC").

1. Sanctions for a frivolous notice of removal can be imposed under Chapter 25A if supported by competent evidence

Section 25A.006 of the Government Code establishes that sanctions for a frivolous notice of removal are available under Section 10.001 of the CPRC. TEX. GOV'T CODE ANN. § 25A.006(h). CPRC Section 10.001 permits a court to sanction a party for filing a pleading lacking reasonable inquiry, proper purpose, or legal or factual support. *Nath v. Tex. Children's Hosp. (Nath I)*, 446 S.W.3d 355, 362 (Tex. 2014); *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). Under Section 10.001, the party seeking sanctions bears the burden to establish "(1) that the pleading or motion was brought for an improper purpose, (2) that there were no grounds for the legal arguments advanced, or (3) that the factual allegations or denials lacked evidentiary support." *Orbison v. Ma-Tex Rope Co.*, 553 S.W.3d 17, 35 (Tex. App.—Texarkana 2018, pet. denied) (citations omitted). Because it is presumed that a pleading has been filed in good faith, the party seeking sanctions must overcome this presumption with competent evidence. *Nath I*, 446 S.W.3d at 361; *Unifund*, 299 S.W.3d at 97. This competent evidence must be proffered, and admitted, at an evidentiary hearing. *Orbison*, 553 S.W.3d at 35.

2. Despite Tema's arguments to the contrary, sanctions under Section 10.001 of the CPRC are not warranted because there is no competent evidence proving ETC filed a frivolous Removal Notice

Tema insists sanctions are warranted because ETC filed its Removal Notice for frivolous purposes. Those frivolous purposes, according to Tema, are to increase litigation costs, to delay proceedings, and to waste judicial resources. Tema asserts the frivolous nature of ETC's Removal Notice is proved by the fallacious allegations and arguments raised by ETC in support of removal and jurisdiction. Decrying that ETC has purposefully avoided a merits-based review of a case commenced more than seven years ago, Tema contends ETC has mischaracterized Tema's breach-of-contract and negligence claims as arising under trade or securities regulations and has failed to explain how removal is proper given the obvious prohibition against removing a case filed before September 1, 2024.

But Tema has not established its entitlement to sanctions. Tema did not request or obtain an evidentiary hearing on its request for sanctions. *See* BCLR 5(e) (requiring parties to notify the Business Court of a request for a hearing in the motion or response).[2] Nor has Tema proffered competent evidence overcoming the presumption that ETC's Removal Notice was filed in good faith and proving it was filed for a frivolous purpose. Tema, instead, relies on the arguments in its Remand Motion. Motions, and the arguments in them, are not evidence. *Orbison*, 553 S.W.3d at 36 (citations omitted).

Even though the Court has determined that ETC's Removal Notice was legally impermissible, ETC's argument that a pre-September 1, 2024 case could be removed was

[2] BCLR is the citation for the Local Rules of the Texas Business Court, which are available at https://www.txcourts.gov/media/1459346/local-rules-of-the-business-court-of-texas.pdf.

not *per se* groundless or frivolous. Absent additional evidence or some other legal basis, a sanctions award would be inappropriate. Accordingly, the Court declines to impose sanctions.

III. CONCLUSION

Consistent with this opinion, the Court **GRANTS** in part and **DENIES** in part Tema's Remand Motion and **REMANDS** the case to the 236th District Court of Tarrant County, Texas.

IT IS SO ORDERED.

JERRY D. BULLARD
Judge of the Texas Business Court,
Eighth Division

SIGNED ON: November 6, 2024

E-filed in the Office of the Clerk
for the Business Court of Texas
11/7/2024 11:51 AM
Accepted by: Beverly Crumley
Case Number: 24-BC04A-0002

The Business Court of Texas,
Fourth Division

MORNINGSTAR WINANS, *Plaintiff*, v. LUKE B. BERRY, M.D., *Defendant*.	§ § § § § § § § § §	Cause No. 24-BC04A-0002

OPINION AND ORDER

Before the court is Defendant's Plea to the Jurisdiction and Motion for Remand challenging the court's authority to hear this case. The court invited Plaintiff to file a response, which Plaintiff filed on October 31, 2024. After consideration, the court grants Defendant's motion and orders the case remanded to the 150th Judicial District Court, Bexar County, Texas.

BACKGROUND

On November 18, 2022, Plaintiff filed suit against Defendant in the 150th Judicial District Court, Bexar County, Texas. In her original petition, Plaintiff alleged causes of action for breach of fiduciary duty, fraud, and quantum meruit. She also requested damages

and attorney's fees. Defendant answered asserting a general denial and affirmative defenses. Over the next twenty-two months, the parties engaged in several discovery disputes. Most recently, the trial court set a hearing on Plaintiff's Amended Motion for Reconsideration of her Motion to Compel Production of Documents for September 30, 2024. Three days before the hearing, Plaintiff removed the case to this court.

In her notice of removal, Plaintiff states removal is timely pursuant to Section 25A.005(f)(1) of the Texas Government Code and Rule 355(c)(2)(A) of the Texas Rules of Civil Procedure. Both Section 25A.005(f)(1) and Rule 355(c)(2)(A) provide in cases where the parties do not agree to remove an action, a notice of removal must be filed no later than thirty days after "the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action." TEX. GOV'T CODE § 25A.005(f)(1); TEX. R. CIV. P. 355(c)(2)(A). According to Plaintiff, "the dispute preceded the Texas Business Courts' creation on September 1, 2024, and consequently, could not be removed prior to that date."

On October 23, 2024, Defendant filed a Plea to the Jurisdiction and Motion for Remand. In his motion, Defendant argues removal is improper because this court "does not have jurisdiction or statutory authority to hear th[is] case." According to Defendant, Chapter 25A of the Texas Government Code and its removal provision apply only to civil actions commenced on or after September 1, 2024. For support, he points to the plain language of Chapter 25A's enabling legislation, specifically, Section 8 of House Bill 19. Defendant also argues it would be unconstitutional to apply Chapter 25A and its removal provision retroactively.

Plaintiff responded by contending Section 8 of House Bill 19 does not appear in the text of Chapter 25A, and therefore, it does not define the scope of this court's jurisdiction. Plaintiff further points out Section 8 does not contain the word "only" or a savings clause, and therefore, does not prohibit the removal of cases filed before September 1, 2024. Finally, Plaintiff argues interpreting Section 8 as prohibiting the removal of cases already on file prior to September 1, 2024, would lead to a nonsensical result. Plaintiff explains she could circumvent Section 8's limitation by either 1) amending her petition to add new claims or parties or 2) nonsuiting her claims in district court and refiling in this court.

ANALYSIS

Whether Chapter 25A and its removal provision apply and permit a party to remove civil actions filed before September 1, 2024, from district court to this court is a question that implicates this court's subject-matter jurisdiction. Subject-matter jurisdiction is essential to a court's authority to decide a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 55354 (Tex. 2000). Without subject-matter jurisdiction, a court cannot decide a case. *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 440 (Tex. 2023).

The legislation establishing the Texas Business Court was enacted on June 9, 2023, when Governor Abbott signed House Bill 19. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§ 1-9, 2023 Tex. Sess. Law Serv. 919, 919-929. Section 1 of House Bill 19 codifies Chapter 25A of the Texas Government Code. *Id.* § 1 (codified at TEX. GOV'T CODE § 25A.001 *et seq.*). Chapter 25A contains twenty sections governing the business court's operation, including the procedure for removal. *See generally* TEX. GOV'T CODE § 25A.001 *et seq.*; *see also Energy Transfer LP v. Culberson Midstream LLC*, No. 24-BC01B-0005,

2024 Tex. Bus. 1; 2024 WL 4648110, at *2 (Tex. Bus. Ct. Oct. 30, 2024). Specifically, "Section 25A.006 permits removal of cases to the business court," but it "does not address whether cases, like this one, filed before September 1, 2024, are removable." *Energy Transfer LP*, 2024 WL 4648110, at *2.

This question is one of statutory construction. "In construing a statute, our objective is always—and only—to ascertain and give effect to the Legislature's intent, as both expressed and implicit in the enacted language." *Morath v. Lampasas Indep. Sch. Dist.*, 686 S.W.3d 725, 739 (Tex. 2024). This court must also remain mindful that under the Code Construction Act, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." TEX. GOV'T CODE § 311.022. Here, there is nothing in Chapter 25A's text making it expressly retroactive. This construction is confirmed by a review of the enabling legislation's plain language. *See Energy Transfer* LP, 2024 WL 4648110, at *2-3. Specifically, Section 8 of House Bill 19 expressly provides "The changes in the law made by this Act apply to civil actions commenced on or after September 1, 2024." Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929.

Plaintiff, however, asserts because Section 8 does not appear anywhere in the codified version of Chapter 25A, then Chapter 25A applies to cases filed in district court prior to September 1, 2024. This argument ignores the plain language of the enabling legislation, which expressly states the changes in this law, i.e. Chapter 25A and its removal procedure, apply to cases commenced on or after September 1, 2024. *See Energy Transfer LP*, 2024 WL 4648110, at *2-3.

Plaintiff next asserts the lack of the word "only" and a savings clause in Section 8 shows the legislature did not intend for Section 8 to prohibit the removal of cases filed before September 1, 2024. This court is not persuaded by this argument. As explained by the eighth division of this court, "there was no need for the legislature to insert 'only' or other limiting clarifying phrases in the applicability clause to expressly indicate that the new law did not apply retroactively to non-existing pending cases. It would have been superfluous for the legislature to have done so." *See Tema Oil & Gas Co. v. ETS Field Servs., LLC*, No. 24-BC08B-0001, 2024 Tex. Bus. 3 (Tex. Bus. Ct. Nov. 6, 2024).

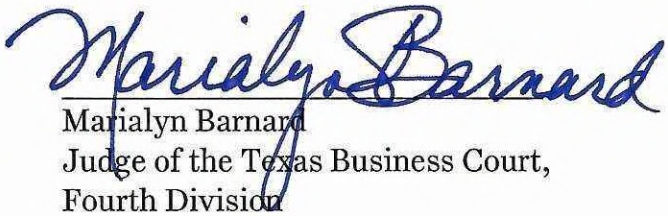
Finally, Plaintiff contends an interpretation that cases filed in district court prior to September 1, 2024, cannot be removed to this court is nonsensical. Plaintiff claims she can circumvent Section 8's limitation by pursuing an alternative litigation strategy. The court disagrees and expresses no opinion about Plaintiff's hypothetical litigation strategy as those facts are not before this court.

Accordingly, because this case commenced prior to September 1, 2024, Chapter 25A and its removal procedure do not apply to it, and this court has no authority to remove this case from the district court to this court.

CONCLUSION

In accordance with this opinion, the court grants Defendant's Plea to the Jurisdiction and Motion for Remand and orders the case remanded to the 150th Judicial District Court, Bexar County, Texas.

IT IS SO ORDERED.



Marialyn Barnard
Judge of the Texas Business Court,
Fourth Division

SIGNED ON: November 7, 2024

The Business Court of Texas
Fourth Division

JAMES JORRIE, *Plaintiff*, v. CRAIG CHARLES, JULIAN CALDERAS, JR., and AL GLOBAL SERVICES, LLC, *Defendants,* v. COBRA ACQUISITIONS, LLC, *Interpleader/Third-Party Defendant,* v. ESPADA LOGISTICS & SECURITY GROUP, LLC, ESPADA CARIBBEAN, LLC, ARTY STRAEHLA, KEN KINSEY, JENNIFER GAY JORRIE, and MAMMOTH ENERGY SERVICES, INC., *Third-Party Defendants,* v. OCEAN VENTURES, LLC, *Intervenor,* and v. CECHARLES CONSULTING, LLC, XFEI LLC, and XFED GLOBAL, LLC, *Third-Party Defendants.*	§ §	Cause No. 24-BC04B-0001

OPINION & ORDER

Before the court is (1) the Brief in Support of Removal to Business Court jointly filed by Plaintiff James Jorrie; Intervenor Ocean Ventures, LLC; and Third-Party Defendants Jennifer Gay-Jorrie, ESPADA Logistics & Security Group, LLC, and ESPADA Caribbean,

LLC (collectively the "Jorrie-Espada Parties") on October 14, 2024; (2) the Advisory Concerning the Jorrie-Espada Parties' Removal to Business Court filed by Defendants Craig Charles, Julian Calderas, Jr., and AL Global Services, LLC on October 24, 2024; and (3) the Supplemental Brief Regarding the Authority and Jurisdiction of Removal to Business Court filed by the Jorrie-Espada Parties on October 30, 2024.

Having considered the parties' arguments and the relevant law, the court remands this suit to the district court.

PROCEDURAL BACKGROUND

This lawsuit arose from a dispute among managing members of a limited liability company, AL Global ("the Company"). On November 30, 2018, managing member James Jorrie sued his co-managers and the Company in the 57th Judicial District Court of Bexar County, Texas. During the five years that followed, the parties engaged in discovery, added new parties and counterclaims, briefed an interlocutory appeal and mandamus proceedings, engaged in arbitration concerning their dispute with the interpleading party, and appointed two successive supervisors to wind up the Company's affairs. The district court set a jury trial for September 23, 2024.

A week before the trial setting, the Jorrie-Espada Parties removed the suit to this court. In response to the court's order requesting briefing, the Jorrie-Espada Parties filed their brief and supplemental brief in support of removal and Defendants filed their advisory stating they consented to removal. No other party filed briefing or objections regarding removal or remand. On October 25, 2024, the court gave notice of a potential *sua sponte* remand of the suit under Texas Rule of Civil Procedure 355(f)(3) and set a hearing for

November 1, 2024, to hear any objections to remand as well as argument regarding this court's authority and jurisdiction to hear the suit. The Jorrie-Espada Parties and Defendants appeared at the hearing through counsel and presented their arguments supporting the removal.

LEGAL STANDARD

No party has moved for remand of this suit, but the court must nonetheless examine its own subject-matter jurisdiction to determine whether remand is required. *See Tex. Propane Gas Ass'n v. City of Hous.*, 622 S.W.3d 791, 797 (Tex. 2021) (noting that courts "have an obligation to examine [their] jurisdiction any time it is in doubt"). This question requires construing the statute that created this court to determine whether that statute confers subject-matter jurisdiction over the suit.

The analysis involves pure issues of law, not fact. "Statutory construction is a question of law." *Am. Honda Motor Co. v. Milburn*, 696 S.W.3d 612, 623 (Tex. 2024). "Whether a court has subject matter jurisdiction is a question of law" as well. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 451 (Tex. 2016).

ANALYSIS

I. House Bill 19 created the Texas Business Court as of September 1, 2024.

The Business Court of Texas is a specialty statutory court that was created by the Texas Legislature through House Bill 19 to adjudicate complex commercial disputes. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 1, 2023 Tex. Sess. Law Serv. 919, 919

("the Act"). The Act was passed in 2023 while this suit was pending in district court. *Id.* § 9.

The Act added a new chapter to the Texas Government Code—Chapter 25A. *Id.* § 1. Chapter 25A is entitled "Business Court," and it outlines the new court's composition by regional divisions; specifies those divisions' respective locations; includes provisions for the qualifications and appointment of the court's judges; and describes the procedures by which suits may be filed in, transferred to, or removed to the court. TEX. GOV'T CODE §§ 25A.003, 25A.006, 25A.008-.009, 25A.017. Under Chapter 25A, "a party to an action filed in a district court or county court at law that is within the jurisdiction of the business court may remove the action to the business court." *Id.* § 25A.006(d). If agreed, such a notice of removal may be filed "at any time during the pendency of the action." *Id.* § 25A.006(f).

The Code's new Chapter 25A also grants the Business Court its jurisdiction and powers. *Id.* § 25A.004.

While the statute's effective date is September 1, 2023, the Act specifies that the Business Court "is created September 1, 2024" and that the "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." H.B. 19, §§ 5, 8, 9.

II. The Act makes Chapter 25A inapplicable to this 2018 suit.

Both parties concede the Act's Section 8 is unambiguous. And, under Section 8's plain language, the Act's "changes in law" apply to actions that commenced on or after September 1, 2024. *Id.* § 8. The Act's most substantial change in the law is the addition of Chapter 25A, which includes the provisions permitting removal to the Business Court. *Id.*

§ 1. Accordingly, as other divisions of this court recently concluded, we "must construe § 8 as limiting § 25A.006's removal provisions to cases filed on or after September 1, 2024." *Energy Transfer LP v. Culberson Midstream LLC*, No. 24-BC01B-0005, 2024 Tex. Bus. 1; 2024 WL 4648110, at *3 (Tex. Bus. Ct. Oct. 30, 2024); *see also Synergy Energy Glob. LLC v. Hinduja Glob. Sols., Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 (Tex. Bus. Ct. Oct. 31, 2024); *Tema Oil & Gas Co. v. ETC Field Servs., LLC*, No. 24-BC08B-0001, 2024 Tex. Bus. 3 (Tex. Bus. Ct. Nov. 6, 2024) ("Because the case did not begin in the District Court on or after September 1, 2024, Section 25A.006's removal provision does not apply.").

This civil action commenced in 2018, when Jorrie filed his original petition. *See* TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."); *e.g.*, *S & P Consulting Eng'rs, PLLC v. Baker*, 334 S.W.3d 390, 397–98 (Tex. App.—Austin 2011, no pet.) (en banc) (concluding for purposes of a statute's effective date that "an action commences when the original petition is filed").

On its face, Section 8 makes the entirety of Chapter 25A, including the Chapter's removal provisions, inapplicable to this 2018 suit.

III. This court lacks subject-matter jurisdiction of this suit.

The parties distinguish the Business Court's previous decisions remanding pre-2024 lawsuits. Here, because the parties all agree to proceed in this court, they contend their removal is proper under the Code's provision allowing that "a party may file an agreed notice of removal **at any time during the pendency of the action.**" TEX. GOV'T CODE § 25A.006(f) (emphasis added). Given the parties' agreed removal, their suit could arguably proceed by consent in this forum—unless Section 8's commencement date deprives the

court of subject-matter jurisdiction. *See Oncor Elec. Delivery Co. NTU v. Wilbarger CAD*, 691 S.W.3d 890, 907 (Tex. 2024) ("Of course, subject-matter jurisdiction cannot be conferred by waiver or estoppel.").

The court concludes that Section 8 is jurisdictional.

"The subject-matter jurisdiction of Texas courts derives solely from the Texas Constitution and state statutes." *Guardianship of Fairley*, 650 S.W.3d 372, 379 (Tex. 2022). "For . . . state trial courts of limited jurisdiction, the authority to adjudicate must be established at the outset of each case, as jurisdiction is never presumed." *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000).

"Subject-matter jurisdiction refers to a court's statutory or constitutional power to adjudicate a case." *Fairley*, 650 S.W.3d at 379. This court derives that power from Article V of the Texas Constitution and from statute—specifically, from the Code's new Chapter 25A. Chapter 25A grants this court the "power to . . . grant any relief that may be granted by a district court," though that power is "subject to" the remaining clauses that outline the court's limited statutory jurisdiction. *Id.* § 25A.004(a). Chapter 25A goes on to specify that the court "has civil jurisdiction concurrent with district courts in" specific types of actions listed in Section 25A.004(b)–(e), including certain types of actions involving a publicly traded company or in which the amount in controversy exceeds five or ten million dollars, depending on the types of claims at issue. *Id.* § 25A.004(b)–(d).

These new statutory provisions conferring power and jurisdiction on this court are fundamental "changes in law." *See* H.B. 19, § 8. And Section 8 specifies that those changes apply to "actions commenced on or after September 1, 2024"—which necessarily means

they do not apply to actions commenced any earlier. *Id.* Any other construction of Section 8 renders its commencement date mere surplusage. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

Because Chapter 25A grants this court its jurisdiction and Chapter 25A does not apply to suits commencing before September 1, 2024, this court lacks jurisdiction to adjudicate a suit filed before that date.

IV. The court need not consider extrinsic aids to construe the statute.

The parties correctly point out that courts "do not consider legislative history or other extrinsic aides to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent." *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018). In *Texas Health*, the Texas Supreme Court held that the lower court had improperly relied on extrinsic "legislative drafting history and [] statements individual legislators made during the legislative process" to interpret an unambiguous statute. *Id.* at 135.

But Section 8 is not extrinsic to the statute. Section 8 is in the enrolled House Bill 19, which was passed by the legislature and signed by the Governor, making it binding session law. 2023 Tex. Sess. Law Serv. 919, 929; *see Union Pac. R.R. Co. v. Brown*, No. 04-17-00788-CV, 2018 WL 6624507, at *3 n.2 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op.) (holding statute's effective date was binding law despite its absence from the codified version of the statute) (quoting *United States of Am. for the Use & Benefit of E J Smith Constr., Co. v. Travelers Cas. & Sur. Co.*, No. 5:15-CV-971 RP, 2016 WL 1030154,

at *5 (W.D. Tex. Mar. 10, 2016) ("Uncodified session law is law nonetheless.")). As one Texas court of appeals correctly described, "[a]s long as the official session law was enacted properly, the statute is valid." *Al-Yahnai Fountain Hawkins v. State*, No. 11-04-00278-CR, 2005 WL 2156981, at *2 (Tex. App.—Eastland Sept. 8, 2005, no pet.) (per curiam). "The fact that Vernon's does not transcribe the enacting language is of no consequence." *Id.* Absent rare and narrow circumstances not present here, the enrolled version of a bill is the binding statute enacted by the legislature. *Ass'n of Texas Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990).

House Bill 19, as enrolled, is official session law containing all nine sections of the "ACT relating to the creation of a specialty trial court to hear certain cases; authorizing fees." 2023 Tex. Sess. Law Serv. at 919–29. Contrary to the parties' assertions, Section 8's September 1 commencement date is within both the enrolled bill and the Act itself. *Id.* at 929. The binding Act thus specifies that all of its "changes in law"—**including Chapter 25A's clauses granting this court its jurisdiction**—apply to cases that commence on or after September 1, 2024. *Id.* Because this suit commenced before that date, the court lacks jurisdiction to adjudicate it.

CONCLUSION AND ORDER

Though the parties jointly ask the Business Court to hear this case, their agreement cannot expand the court's subject-matter jurisdiction. *See Tex. Disposal Sys. Landfill, Inc. v. Travis CAD*, 694 S.W.3d 752, 760 (Tex. 2024) ("We have long held that parties cannot confer jurisdiction by agreement."). The court has no choice but to remand the suit to district court.

For the reasons stated above, this action is therefore **REMANDED** to the 57th Judicial District Court of Bexar County, Texas.

SO ORDERED.

STACY ROGERS SHARP
Judge of the Texas Business Court,
Fourth Division

SIGNED ON: November 7, 2024

2024 Tex. Bus. 6

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

XTO ENERGY, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. 24-BC11B-0008
	§	
	§	
HOUSTON PIPE LINE COMPANY, LP, ETC KATY PIPELINE, LLC, ENERGY TRANSFER FUEL, LP, and OASIS, PIPELINE, LP,	§	
	§	
Defendants.	§	

OPINION AND ORDER

Syllabus

This opinion addresses the removability to the Business Court of cases filed before September 1, 2024, when removal has been contested. The Court concludes that, in such circumstances, Section 8 of House Bill 19 limits Business Court authority to act to cases filed on or after September 1, 2024.[1]

[1] This syllabus is provided for the convenience of the reader; it is not part of the Court's opinion and should not be cited or relied upon as legal authority.

¶1 Plaintiff XTO Energy, Inc. ("XTO") filed a Motion to Remand ("Motion"), challenging the Business Court's authority on the grounds that it lacks jurisdiction over a case removed from the district court that was commenced before September 1, 2024. After consideration of the Motion and the parties' responsive briefs, the Court grants the Motion to Remand.

BACKGROUND

¶2 XTO filed this lawsuit in the 133rd Judicial District Court of Harris County, Texas (the "District Court") in 2021 against defendants Houston Pipe Line Company, LP, ETC Katy Pipeline, LLC ("ETC"), Energy Transfer Fuel, LP, and Oasis Pipeline, LP (collectively, "Defendants"), who filed a counterclaim for monies allegedly owed under the parties' agreement. The disputed issues relate to natural gas transportation charges incurred during Winter Storm Uri in February 2021.

¶3 The parties have engaged in extensive motion practice in the District Court, including two mandamus petitions filed by ETC that are currently pending in the First Court of Appeals.[2] On October 1, 2024, Defendants removed the case to this Court. XTO filed its Motion to Remand on October 10.

LEGAL STANDARD

¶4 The legal standard governing the parties' dispute is straightforward. Whether a court has subject-matter jurisdiction over a suit is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Because courts "may not assume

[2] *See In re Houston Pipe Line Company*, 01-24-00397-CV; and *In re Houston Pipe Line Company*, 01-24-00508-CV.

jurisdiction for the purposes of deciding the merits of the case," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007), the Court must first resolve the jurisdictional question before it may proceed further.

ANALYSIS

A. The Court must construe Section 8 of House Bill 19.

¶5 The parties agree on the basics: "The Court should construe a statute to give effect to the Legislature's intent as expressed in its plain language." *Defendants' Brief in Support of Removal* at 2 (*citing R.R. Com'n of Tex. v. Tex. Citizens*, 336 S.W.3d 619, 628 (Tex. 2011)). And: "We must presume that the Legislature chooses its words carefully." *Id.* at 5.

¶6 But the agreement ends there. XTO contends that the "unambiguous and express intention of the Texas Legislature" was to exclude from removal all cases that were on file before September 1, 2024. *XTO's Motion to Remand* at ¶9. In support of its argument, XTO references the Business Court's enabling legislation; specifically, Section 8 of House Bill 19, which states that the "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."

¶7 Defendants respond that Section 8's plain language does not prohibit the removal of cases filed before September 1, 2024. When the Legislature wants to exclude cases filed before a certain date, Defendants argue, it uses more precise language to do so.

¶8 Governor Abbott signed House Bill 19 on June 9, 2023, thereby establishing the Texas Business Court. Act of May 25, 2023, 88th Leg., R.S., ch. 380 §§ 1-9, 2023 Tex.

Sess. Law Serv. 919, 919-929. House Bill 19 was codified into Chapter 25A of the Texas Government Code.

¶9 Well, almost all of it was codified. Section 8 of House Bill 19 did not find its way into the Texas Government Code, but it is in the text of the enabling legislation that Governor Abbott signed into law. Thus, the first question presented is whether courts should look to the enabling legislation when interpreting a law. The short answer is "yes."

¶10 Under the enrolled bill rule, the text of the enrolled statute "as authenticated by the presiding officers of each house, signed by the governor (or certified passed over gubernatorial veto), and deposited in the secretary of state's office, is precisely the same as and a 'conclusive record' of the statute that was enacted by the legislators." *Ass'n of Texas Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990). Accordingly, when analyzing the text of the Business Court's governing statute to determine its authority and jurisdiction to hear the case, the Court must apply Section 8 and presume that the enrolled bill accurately expresses the Legislature's intent. *See* TEX. GOV'T CODE §311.029 (under Texas's Code Construction Act, "the language of the enrolled bill version controls" over any subsequent printing of the statute).

B. The Court lacks subject-matter jurisdiction over this lawsuit.

¶11 As noted above, Section 8—the portion of the enrolled bill upon which XTO relies—states that the "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." Thus, XTO argues, no case that was already on file can be removed after that date—at least absent agreement of the parties that does not exist here. Defendants retort that the Legislature would have used the word "only" if it intended to

exclude all cases filed before September 1, 2024—*viz.*, remand would only be required if the Act was said to apply "*only* to civil actions commenced on or after September 1, 2024." The statute, Defendants say, "clearly affirms the Court's ability to start accepting cases on September 1, 2024" but is silent with respect to the intended effect on cases commenced before that date. *Defendants' Brief in Support* at 5.

¶12 But this reading violates at least three canons of construction. First, Section 5 of House Bill 19 states that "the business court is created September 1, 2024." Obviously, the Court could not have started accepting cases before that date. *Cf. In re Dallas County,* 697 S.W.3d 142, 164 (Tex. 2024) (under Senate Bill 1045, the 15th Court of Appeals' "vacancies" could not have existed before September 1, 2024—the date the bill brought the Court into existence). And it needed no further authorization to accept cases commenced on or after September 1; the day a court is created is the day it can start accepting cases.[3] So Defendants' reading of Section 8 renders its date reference at best superfluous, and possibly a nullity—contrary to the canon that presumes the entirety of a statute is intended to have effect. *See* TEX. GOV'T CODE §311.021(2). *See also Jorrie v. Charles,* No. 24-BC04B-0001, 2024 Tex. Bus. 4, at 7 ("Any other construction of Section 8 renders its commencement date mere surplusage."). *See also Malouf v. State ex rel. Ellis,* 694 S.W.3d 712, 718 (Tex. 2024) (courts must consider whole text of statute and construe it so that no part is meaningless).

[3] *See Energy Transfer LP v. Culberson Midstream LLC,* No. 24-BC01B-0005, 2024 Tex. Bus. 1, at 7 ("Section 8 does more than set the [business] court's first operational date. If that were all that Section 8 does, it would read, 'The court may begin accepting cases beginning on September 1, 2024.'")

¶13 Second, Defendants' interpretation also ignores the legal maxim, *expressio unius est exclusio alterius*—translated from Latin as "the expression of one thing is the exclusion of another." *See Johnson v. Second Inj. Fund,* 688 S.W.2d 107, 108 (Tex. 1985) ("The legal maxim *Expressio unius est exclusio alterius* is an accepted rule of statutory construction in this state."); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107-11 (2012) (discussing negative implication canon). Thus, the Act's express statement that its changes in law apply to "cases commenced on or after September 1, 2024" necessarily implies a reverse inference: that the change in law—removal, in this instance—*does not apply* to cases that were on file before that date.

¶14 Third, and finally, the Code Construction Act also instructs courts that "[a] statute is presumed to be prospective in its operations unless expressly made retrospective." TEX. GOV'T CODE §311.022. But Defendants' approach would flip the presumption of non-retroactivity on its head. *See Morningstar Winans v. Berry,* No. 24-BC04A-0002, 2024 Tex. Bus. 5, at 4 (*citing* TEX. GOV'T CODE §311.022). This, too, supports the conclusion that Defendants' reading of the Act should not direct the Court's decision. The plain language of Section 8, read in context with the whole of House Bill 19, demonstrates that the

Legislature intended to exclude the non-consensual removal of all cases filed before September 1, 2024.[4] Defendants' remaining arguments do not persuade us to the contrary.[5]

C. The Court need not address XTO's remaining arguments.

¶15 Because of our resolution of the statutory construction issue, we do not reach XTO's arguments that (1) Defendants' removal was untimely or (2) that consequentialist considerations—specifically, the pendency of two mandamus petitions in the First Court of Appeals—dictate a ruling in its favor.

CONCLUSION

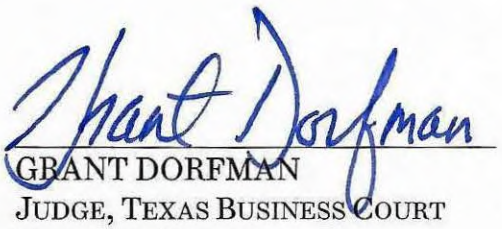
¶16 For the foregoing reasons, the Court lacks authority to hear this case. Plaintiff's Motion to Remand is hereby **GRANTED,** and the Court hereby directs the Business Court Clerk to remand this cause to the 133rd Judicial District Court of Harris County, Texas.

---

[4] Because XTO objects to removal, the Court does not address whether TEX. GOV'T CODE 25A.006(f)'s allowance of removal from the district court by agreement of the parties "at any time during the pendency of the action" may alter the Court's decision in this case. The decision herein, moreover, comports with all other Texas Business Court rulings to date involving the non-consensual removal of a case that was commenced before September 1, 2024. *See Energy Transfer LP, supra* n.5; *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2; *Tema Oil and Gas Co. v. ETC Field Servs., LLC,* No. 24-BC08B-0001, 2024 Tex. Bus. 3; *Morningstar Winans, supra.* The Texas Business Court opinions and orders cited herein can be found at https://www.txcourts.gov/businesscourt/opinions.

[5] In particular, Defendants' reliance upon the omission of the word "only" from Section 8 *(Defendants' Brief in Support* at 5-7) cannot bear the weight they place upon it. *See, e.g., In re Dallas County,* 697 S.W.3d at 158 (preferring "the fair meaning of the text" over "the hyperliteral meaning of each word") (*quoting* A. Scalia & B. Garner, Reading Law, at 356); *In re Off. of Att'y Gen.,* 456 S.W.3d 153, 155-56 (Tex. 2015) ("courts should resist rulings anchored in hyper-technical readings of isolated words or phrases. The import of language, plain or not, must be drawn from surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive."). *See also Energy Transfer, supra* n.5 at 8-9; *Tema Oil and Gas, supra* n.6 at 9-12.

IT IS SO ORDERED.



GRANT DORFMAN
JUDGE, TEXAS BUSINESS COURT
ELEVENTH DIVISION

DATED: November 26, 2024

E-filed in the Office of the Clerk
for the Business Court of Texas
12/16/2024 12:02 PM
Accepted by: Beverly Crumley
Case Number: 24-BC01A-0006

2024 Tex. Bus. 7

The Business Court of Texas,
First Division

Christopher Seter,	§	
Plaintiff,	§	
v.	§	
Westdale Asset Management, Ltd.,	§	Cause No. 24-BC01A-0006
JGB Ventures I, Ltd., Joseph	§	
Beard, and Westdale Investments,	§	
L.P.,	§	
Defendants.	§	

Memorandum Opinion and Order to Remand

1 Before the Court is *Plaintiff's Motion to Remand*, challenging removal on grounds that the action was commenced before September 1, 2024, and because the amount in controversy does not fall within this Court's jurisdiction.

2 The legislation creating the Business Court specifically states that the Court "is created September 1, 2024" and that "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." Act of May 25, 2023, 88th Leg., R.S., ch. 380 (H.B. 19 §§5, 8); 2023 Tex. Sess. Law Serv. 919, 929 (H.B. 19). In six prior instances, this Court has remanded actions commenced before September 1, 2024, for lack of authority or want of jurisdiction. *See, e.g.*, *Energy Transfer LP, et al. v. Culberson Midstream LLC, et al.*, 2024 Tex. Bus. 1 (Tex. Bus. Ct. October 30,

2024) (holding "this court does not have authority over cases filed before September 1, 2024"); *Jorrie v. Charles, et al.*, Tex. Bus. 4 (Tex. Bus. Ct. November 7, 2024) (holding "[b]ecause this suit commenced before that date, the court lacks jurisdiction to adjudicate it."); *Winans v. Berry*, Tex. Bus. 5 (Tex. Bus. Ct. November 7, 2024) (holding "because this case commenced prior to September 1, 2024, Chapter 25A and its removal procedure do not apply to it . . ."). The Court is unpersuaded by Defendants' arguments that these cases were wrongly decided.

3 It is undisputed that the instant action commenced before September 1, 2024. Without reaching Plaintiff's second argument, the Court holds that removal is improper and grants the motion to remand. IT IS THEREFORE ORDERED that the case is remanded to County Court at Law No. 3, Dallas County, Texas.

ANDREA K. BOURESSA
Judge of the Texas Business Court,
First Division

SIGNED ON: December 16, 2024.

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Case Number: 24-BC11A-0004

2024 Tex. Bus. 8

Note: The syllabus was created by court staff and is provided for the convenience of the reader. It is not part of the Court's opinion, does not constitute the Court's official description or statement, and should not be relied upon as legal authority.

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

Lone Star NGL Product Services LLC, *Plaintiff,* v. EagleClaw Midstream Ventures, LLC and CR Permian Processing, LLC, *Defendant.*	§ § § § § § § §	Cause No. 24-BC11A-0004

SYLLABUS

This opinion addresses the removability of actions to the Texas Business Court that were filed before September 1, 2024, where the Parties have entered into a post-September 1, 2024 written agreement that the Court has jurisdiction of the case, and the Parties have pleaded jurisdiction under Texas Government Code Section 25A.004(d). The Court concludes that it lacks subject-matter jurisdiction over this action because Section 8 of House Bill 19 limits the applicability of Texas Government Code Chapter 25A to "civil actions commenced on or after September 1, 2024." Per the request of the Parties, the Court further certifies the controlling question of law discussed herein for a permissive interlocutory appeal under Texas Civil Practice & Remedies Code Section 51.014(d). To the extent that the Court has the authority to do so, the Court's remand order is stayed pending the resolution of the Parties' permissive interlocutory appeal.

2024 Tex. Bus. 8

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

Lone Star NGL Product Services LLC, *Plaintiff,* v. EagleClaw Midstream Ventures, LLC and CR Permian Processing, LLC, *Defendant.*	§ § § § § § § §	Cause No. 24-BC11A-0004

OPINION AND ORDER

I. INTRODUCTION

¶1 Before the Court is (1) the Joint Notice of Removal by Plaintiff Lone Star NGL Product Services LLC ("Lone Star"), Defendant EagleClaw Midstream Ventures, LLC, and Defendant CR Permian Processing, LLC (collectively herein, the "Parties") filed September 17, 2024; (2) the Parties' Joint Brief in Support of Removal to Business Court filed October 16, 2024 ("Joint Brief"); and (3) Lone Star's Additional Brief in Support of Removal to Business Court filed November 4, 2024 ("Lone Star Brief"). The Court held a hearing on this matter on November 12, 2024. Having considered the Parties' arguments and the relevant law, and subject to the Court's stay of this Order, the Court **ORDERS** that

this suit be remanded to the district court and certifies the controlling question of law discussed herein for permissive interlocutory appeal under Texas Civil Practice & Remedies Code Section 51.014(d). To the extent that the Court has the authority to do so, the Court **STAYS** the remand order contained herein pending the resolution of the Parties' permissive interlocutory appeal under Texas Civil Practice & Remedies Code Section 51.014(e).

II. PROCEDURAL BACKGROUND

¶2 Pending first for years in the 61st Judicial District Court of Harris County, this lawsuit involves past and ongoing compliance with two natural gas purchase agreements that prescribe daily obligations to sell Y-Grade expiring in 2026.[1] According to the Parties, Lone Star has paid more than $100 million for Y-Grade sold by Defendants under the subject agreements. Lone Star will continue to be invoiced for Y-Grade delivered by Defendants through the remaining life of the agreements.[2] Since Lone Star filed its original petition on May 20, 2021, the Parties have engaged in robust litigation of the underlying substance of this "multi-hundred-million-dollar dispute,"[3] and Defendants

[1] Joint Brief at 2.
[2] *Id.* at 9.
[3] *See* Transcript of Record at 13, *Lone Star NGL Product Services LLC v. Eagle Claw Midstream Ventures, LLC*, No. 24-BC11A-0004 (Tex. Bus. Ct. Nov. 12, 2024) (hereinafter, "Transcript of Record") (quotation regarding the amount in controversy). Per the Parties' Joint Brief, there were no fewer than five discovery motions pending at the time of removal, and a discovery master has been appointed to manage disputes regarding certain third-party discovery. Joint Brief at 5–6 n. 2. Following removal, the Parties have continued engaging vehemently over issues relating to apex depositions and discovery sought in out-of-state litigation.

have incurred over $3 million in attorneys' fees.[4] When this Court first opened for business on September 1, 2024,[5] this case was 1,200 days old.[6]

¶3 On September 13, 2024, the Parties entered into a Rule 11 Agreement (defined by the Parties as the "Subsequent Agreement") making "clear that authority, jurisdiction, and venue exists in the Texas Business Court."[7] Pertinent portions of the seven-page Rule 11 Agreement[8] are set forth below:

> The Parties agree that the Current Lawsuit, including all claims and causes of action asserted as of the Effective Date of this Agreement, is within the jurisdiction of the Texas Business Court, as established by Chapter 25A of the Texas Government Code. The Parties also agree that they are subject to personal jurisdiction in the Texas Business Court.
>
> The Parties acknowledge that this Agreement is meant to satisfy the requirements of Section 25A.004 of the Texas Government Code as a "subsequent agreement that the business court has jurisdiction over the action."
> . . .
> The Parties intend that this Agreement—executed after September 1, 2024—is to allow the Current Lawsuit to be removable to the Texas Business Court.

---

[4] Defs.' Mot. for Protection and Mot. to Quash Dep. of Joseph Payne Under the Apex Dep. Doctrine at 5 n. 9 (filed in this Court on November 29, 2024, following removal).

[5] *See* Tex. H.B. 19, § 5, 88th Leg., R.S. (2023) ("Except as otherwise provided by this Act, the business court is created September 1, 2024.").

[6] In the Spring of 2021, the Bill that created this Court and its jurisdiction—House Bill 19 (herein, "H.B. 19" or "the Bill")—had not yet been filed in the Texas House of Representatives. Tex. H.B. 19, 88th Leg., R.S. (2023) "Bill Stages," TEXAS LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/BillStages.aspx?LegSess=88R&Bill=HB19 (last visited Dec. 2, 2024) (H.B. 19 was filed in the House of Representatives on February 28, 2023, and was signed by Governor Greg Abbott on June 9, 2023); *see* Jack Buckley DiSorbo, *A Primer on the Texas Business Court*, 76 BAYLOR L. REV. 360, 384–87 (2024) (discussing the passage of H.B. 19 and S.B. 1045 in the 2023 legislative session). When Governor Abbott signed H.B. 19 into law on June 9, 2023, the Bill included a limiting provision, Section 8, which states: "The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." Tex. H.B. 19 at § 8.

[7] Joint Brief at 3.

[8] "[T]he parties entered into a September 13th agreement. It is a seven-page-long agreement choosing this Court's forum, choosing this Court as venue, waiving personal jurisdiction challenges, and giving this Court all of the jurisdictional trappings that the parties are allowed to give the Court." Transcript of Record at 11.

> In the event it is determined that the Texas Business Court does not have the authority to hear the Current Lawsuit, the Parties also intend this provision to allow the Current Lawsuit to be non-suited without prejudice and refiled in the Business Court as the Business Court Lawsuit.[9]
> . . .
> "Primary Intent": The Parties intend this Agreement to be interpreted to afford the broadest possible reservation of the Parties' rights to assert any claims, causes of action, and/or defenses in the Business Court that were or could have been asserted in the Current Lawsuit as of the Effective Date.
>
> "Secondary Intent": The Parties also intend for this Agreement to be interpreted consistent with ensuring the Business Court has jurisdiction over the Current Lawsuit.[10]

As the Parties elucidate, "the Subsequent Agreement was not merely an agreement to remove the case to Business Court. Instead[,] the Subsequent Agreement reflects a *negotiated, holistic agreement* between the Parties that the dispute will be adjudicated by the Business Court."[11] The Parties succinctly express their intentions and requisite methodology at the outset of their Joint Brief:

> The Subsequent Agreement also contemplates nonsuiting this dispute and re-filing an identical lawsuit in the Business Court if the Court remands the case to the 61st Judicial District Court. Per the Parties' agreement, this dispute will be heard by the Business Court. But remanding the three and a half year old case now creates unnecessary hurdles that would otherwise be avoided if this removed lawsuit is permitted to proceed.[12]

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[9] Joint Brief at Exhibit 1 (II. Agreement to Jurisdiction of the Texas Business Court).
[10] *Id.* at Exhibit 1 (XI. Intent of Agreement).
[11] Joint Brief at 3 (emphasis added).
[12] *Id.* at 2, n. 1. Scrutiny of the Parties' Rule 11 Agreement and its contingencies reveals an appreciation of the potential ramifications of utilizing the newly created Chapter 25A removal procedures in a pre-September 1, 2024 action. Of note, significant legal commentary, albeit neither authoritative nor dispositive, existed on this subject prior to September 1, 2024. *See* MEETING OF THE TEX. SUP. CT. ADVISORY COMM., 35552:4–15 (Oct. 13, 2023) (transcript available at https://www.txcourts.gov/media/1457501/23-10-13-scac-transcript.pdf) (last visited Dec. 3, 2024) (Supreme Court Advisory Committee discussing that existing cases would have to be nonsuited and re-filed to be subject to the Court's jurisdiction); Lonny Hoffman, *Editor's Comments*, 106 THE ADVOCATE 3 (Spring 2024) ("Our ambition with this volume was to anticipate the most pressing questions and to *tentatively suggest* some answers.") (emphasis added); Senator Bryan Hughes & Trey Cox, *Trailblazing for Tomorrow: The Texas Business Court's Progressive Revamp of the State Judicial System*, 106 THE ADVOCATE 18, 19 (Spring 2024) ("Further, existing matters will not suddenly be thrust into a tumultuous mass removal, as HB 19 stipulates the TBC will apply only to those civil actions commenced on

¶4 On September 17, 2024, the Parties filed their Joint Notice of Removal to the Business Court. The pleaded basis for the Business Court's jurisdiction over the suit was Section 25A.004(d) of the Texas Government Code, which states:

> (d) The business court has civil jurisdiction concurrent with district courts in the following actions in which the amount in controversy exceeds $10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:
>
> (1) an action arising out of a qualified transaction;[13]
>
> (2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a ***subsequent agreement*** that the business court has jurisdiction of the action, except an action that arises out of an insurance contract; . . . .

TEX. GOV'T CODE § 25A.004(d)(1)–(2) (emphasis added). In their Notice of Removal, the Parties ascribe outsize meaning to the timing of their Rule 11 Agreement, stating "[c]rucially, that 'subsequent agreement' was entered into on September 12, 2024—***after*** the Business Court began operating on September 1, 2024."[14]

¶5 By its order of September 26, 2024, the Court directed the Parties to file briefing concerning the propriety of this suit's removal to the Texas Business Court and

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or after September 1, 2024."); Bryan O. Blevins, Jr. & Ashlynn Wright, *A Business Court*, 106 THE ADVOCATE 21, 23 (Spring 2024) ("Presumptively, this provision would not allow a case filed before September 1, 2024, to be removed, nor an action that does not meet the subject[-]matter jurisdiction of the Business Court.").

[13] "'Qualified transaction' means a transaction, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, under which a party: (A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least $10 million; or (B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $10 million." TEX. GOV'T CODE § 25A.001(14).

[14] Joint Notice of Removal at 2 (emphasis in original).

regarding the Court's authority and jurisdiction to hear the suit. On October 16, 2024, the Parties filed the Joint Brief.

¶6 On October 18, 2024, the Court invited further briefing from the Parties regarding what effect, if any, Section 8 of [this Court's enabling legislation,][15] H.B. 19[16] has on the Court's authority to hear this case. On November 4, 2024, Lone Star filed the Lone Star Brief. The Court held a hearing on this matter on November 12, 2024.

III. THE PARTIES' ARGUMENTS

¶7 In their briefs, the Parties presented a series of arguments in favor of removal, untempered by the usual adversarial process. The Parties' jurisdictional arguments are both rooted in the text of Chapter 25A:

i. Texas Government Code Section 25A.004(d)(2) gave the Parties the right to agree that the Business Court has jurisdiction of the action—or to "create jurisdiction in the Business Court"—notwithstanding any "effective date"[17] provisions included in the Bill.[18]

ii. This dispute concerns a qualified transaction under Texas Government Code Section 25A.004(d)(1); and complies with all other statutory requirements for the exercise of jurisdiction.[19]

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[15] *See* Procedural Background, *supra* note 6.

[16] *See* Tex. H.B. 19 at § 8 ("The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024").

[17] Of note, the true effective date provision of H.B. 19 is Section 9. *See id.* at § 9 ("This Act takes effect September 1, 2023.").

[18] *See generally* Joint Brief at 4–5; Lone Star Brief at 2–5. At the hearing, the Parties argued, "Section 8 as an effective date is not a subject-matter limitation on the Court. As such, it's a limitation that the parties can agree around." Transcript of Record at 12. The Parties believe that "[c]onsent cases are fundamentally different than non-consent cases." *Id.* at 17. "Section 8 is a safeguard for parties who are already embroiled in litigation and don't consent to be in business court." *Id.* at 31. "It is not a broad all-encompassing effective date that precludes any application of House Bill 19 prior to September 1, 2024, over the parties' consent." *Id.* at 36. "The Subsequent Agreement is entitled to be enforced in this Court, pursuant to Texas' paramount public policy favoring freedom of contract, as envisioned by the Texas Legislature in House Bill 19." Lone Star Brief at 5. In essence, according to the Parties, "[w]hen there is consent between the parties—that is between the plaintiffs and the defendants—does jurisdiction exist for cases that were commenced before September 1st, 2024? The answer to that question is irrefutably yes." Transcript of Record at 17.

[19] Joint Brief at 9–11.

¶8 Additionally, the Parties articulated that Section 8 of H.B. 19—which reads "[t]he changes in law made by this Act apply to civil actions commenced on or after September 1, 2024"—presents no bar to this Court's ability to adjudicate this dispute:

i. Section 8 of House Bill 19 does not limit the Business Court's jurisdiction to post-September 1, 2024 cases, owing to the omission of the word "only" from Section 8. In other words, if the Texas Legislature wanted the Business Court's jurisdiction to be limited to civil actions commenced on or after September 1, 2024, Section 8 would have read "The changes in law made by this Act apply ***only*** to civil actions commenced on or after September 1, 2024."[20]

ii. As Section 8 only applies to "changes in law made by" H.B. 19, Lone Star argues that Sections 1 through 3 of House Bill 19 contain changes in law, but sections 4 through 7 do not. They argue that Section 5, which unambiguously creates the Business Court,[21] also vests the Business Court with "subject[-]matter jurisdiction to adjudicate this dispute."[22]

iii. In the event Section 8 does limit the Court's jurisdiction, Section 8 can be waived by the Parties. Because the Parties agree to the jurisdiction of the Business Court, they will be estopped from arguing it was wrong for the Court to adjudicate this dispute under the doctrines of waiver and invited error. In making this argument, the Parties affirmatively allege that the effective-date restrictions in Section 8 are not "unwaivable subject-matter jurisdiction barriers."[23]

¶9 Finally, the Parties make an appeal solely based on the alleged potential consequences of a remand. Because the Parties have agreed to non-suit and refile this case in the event of a remand, remanding this case will not keep the dispute out of the Business Court. Purportedly, however, a remand will cause significant difficulties in the discovery process and increase costs for all Parties.[24]

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[20] Lone Star Brief at 6–9.
[21] *See* Tex. H.B. 19 at § 5 (stating, in its entirety, "Except as otherwise provided by this Act, the business court is created September 1, 2024").
[22] Lone Star Brief at 5–6.
[23] Joint Brief at 7–8; Lone Star Brief at 9–10.
[24] Joint Brief at 5–7.

¶10 At the November 12, 2024 hearing, the Parties appeared to argue beyond the briefing. In essence, because (i) portions of the "effective date" provisions of H.B. 19 and S.B. 1045 (which created the Fifteenth Court of Appeals) are nearly identical; and (ii) the Fifteenth Court of Appeals has accepted transfers of pre-September 1, 2024 cases, the Parties argue that no bar to this Court's exercise of jurisdiction over pre-September 1, 2024 removals exists.[25]

¶11 In keeping with their elaborate strategy, the Parties have also sought the Business Court's first permissive interlocutory appeal. Specifically, the Parties request that, in the event the Court finds that it lacks jurisdiction over this case, the Court certify a permissive interlocutory appeal on the following question: "[C]an a civil action that was commenced before September 1, 2024 be removed to Business Court where the parties entered into a subsequent agreement expressly consenting to the jurisdiction of the Business Court?"[26]

IV. LEGAL STANDARD

¶12 For every judicial proceeding, "subject-matter jurisdiction must exist before we can consider the merits," and a court must examine its jurisdiction "any time it is in doubt." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 797 (Tex. 2021) (quoting *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 774 (Tex. 2020)); *see also Tex.*

[25] Transcript of Record at 11–12. Beyond the arguments discussed in the body of the opinion, Lone Star also sought to ventilate the effect of "an August 13, 2024 memorandum from the Office of Court Administration to Texas District and County Clerks regarding the 'Creation of the Business Court, Effective September 1, 2024.'" Lone Star Brief at 9. Lone Star argues that pronouncements from the Office of Court Administration are irrelevant to the Court's authority to hear the case. *Id.* The Court does not base this opinion on the OCA memorandum. *Cf.* Citations to Legal Commentaries, *supra* note 12 (acknowledging that the Bar's discussion of Section 8 is neither dispositive nor authoritative).

[26] Joint Brief at 11–12.

Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993) ("Subject[-]matter jurisdiction is never presumed and cannot be waived."). "Whether a court has subject[-]matter jurisdiction is a question of law." *Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752, 757 (Tex. 2024).

¶13 A Notice of Removal to Business Court must plead facts to establish the Business Court's authority to hear the action. TEX. R. CIV. P. 355(b)(2)(A).[27] If the Business Court does not have jurisdiction of a removed action, the Business Court shall remand the action to the court in which the action was originally filed. TEX. GOV'T CODE § 25A.006(d); TEX. R. CIV. P. 355(f)(1).

V. ANALYSIS

A. The Parties cannot rely on Chapter 25A to establish the Business Court's authority to hear this action.

i. Chapter 25A—the most significant "change[] in law" made by H.B. 19—only "appl[ies] to civil actions commenced on or after September 1, 2024."

¶14 As Lone Star urges in its brief, "Section 8 should be read in harmony with the remainder of House Bill 19. . . ."[28] The Court concurs. "As with every question of statutory construction, our duty is to accurately articulate the meaning of the enacted text—here," of H.B. 19.[29] *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023). Indeed, "H.B.

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[27] The "Rules of Practice in the Business Court" are contained in Part III of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 352–60. For a discussion of the procedural background of the Rules' creation, see, for instance, Marcy Hogan Greer & Hon. Emily Miskel, *Proposed Rules for the New Texas Business Court*, 106 THE ADVOCATE 15 (Spring 2024).

[28] Lone Star Brief at 8.

[29] In this context, the enrolled version of H.B. 19 is the binding statute enacted by the Texas Legislature. *Jorrie v. Charles*, No. 24-BC04B-0001, 2024 Tex. Bus. 4, 2024 WL 4796436 at *3 (Tex. Bus. Ct. Nov. 7, 2024) (citing *Ass'n of Texas Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990)). Accordingly, when analyzing the text of Chapter 25A to determine the Court's authority and jurisdiction to hear the case, the Court must apply Section 8 and presume that the enrolled bill accurately expresses the Texas Legislature's

19's plain 'text is the alpha and omega of the interpretive process.'" *Energy Transfer LP v. Culberson Midstream LLC*, No. 24-BC01B-0005, 2024 Tex. Bus. 1, 2024 WL 4648110, at *3 (Tex. Bus. Ct. Oct. 30, 2024) (citing *In re Panchakarla*, 602 S.W.3d 536, 541 (Tex. 2020); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)).

¶15 "When the text unambiguously answers a question, our inquiry ends." *Brown*, 660 S.W.3d at 752. Long-settled Texas law dictates that "[e]very word of a statute is presumed to have been used for a purpose, and a cardinal rule of statutory construction requires that each sentence, clause, phrase and word be give[n] effect if reasonably possible." *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957).[30]

¶16 When Governor Greg Abbott signed H.B. 19 into law on June 9, 2023, the enrolled version of the Bill included two sections which are pertinent to this Opinion:

i. Section 1, which vests the Court with its jurisdiction, and sets forth the text of the new Chapter 25A of the Texas Government Code,[31] and

ii. Section 8, which states: "The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."[32]

¶17 Lone Star argues that Section 8 would only limit the applicability of the changes in law made by H.B. 19 if they were said to apply "***only*** to civil actions commenced

intent. *XTO Energy, Inc. v. Houston Pipe Line Co.*, No. 24-BC11B-0008, 2024 Tex. Bus. 6 at ¶ 10 (Tex. Bus. Ct. Nov. 26, 2024); *see* TEX. GOV'T CODE § 311.029 (under the Code Construction Act, "the language of the enrolled bill version controls" over any subsequent printing of the statute).

[30] *See* Lone Star Brief at 8.

[31] Tex. H.B. 19 at § 1 (emphasis added); *see* TEX. GOV'T CODE § 25A.004 (entitled "Jurisdiction and Powers"). As noted above, Lone Star admits that Section 1 of H.B. 19 constitutes a change in law. *See* Parties' Arguments, *supra* ¶ 8.ii; Lone Star Brief at 5–6.

[32] Tex. H.B. 19 at § 8.

on or after September 1, 2024."[33] This is not a novel argument. To date, no division of the Business Court has accepted this interpretation of Section 8.[34] No effort has been made to distinguish this iteration of the "only" argument. Thus, no reason exists for the Court to differ from its brethren. On its face, Section 8 unambiguously limits the applicability of any "change in law" made by H.B. 19 to "civil actions commenced on or after September 1, 2024."[35]

¶18 The introduction of Section 1 [and the functional preamble to the text of Chapter 25A] reads: "Subtitle A, Title 2, Government Code, is ***amended*** by ***adding*** Chapter 25A to read as follows: . . . ."[36] Putting aside its auxiliary purposes, the plain thrust of Section 1 and Chapter 25A is to ***change Texas Law*** to create the legal framework for the Business Court ***and vest it with its jurisdiction.***[37] By a simple page count, the text of Chapter

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[33] *See* Lone Star Brief at 6–9.

[34] *Energy Transfer*, 2024 WL 4648110, at *3 (rejecting "only" argument, relying on the Negative Implication Canon); *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 at 9–11 (Tex. Bus. Ct. Oct. 31, 2024) (identical analysis); *Tema Oil and Gas Co. v. Etc Field Services, LLC*, No. 24-BC08B-0001, 2024 Tex. Bus. 3, 2024 WL 4796433, at *4 (Tex. Bus. Ct. Nov. 6, 2024) ("[T]here was no need for the legislature to insert 'only' or other limiting clarifying phrases in the applicability clause to expressly indicate that the new law did not apply retroactively to non-existing pending cases. It would have been superfluous for the legislature to have done so."); *Winans v. Berry*, No. 24-BC04A-0002, 2024 Tex. Bus. 5, 2024 WL 4796435, at *2 (Tex. Bus. Ct. Nov. 7, 2024) (relying on the reasoning from *Tema Oil* to dispose of this argument); *XTO Energy*, 2024 Tex. Bus. 6 at ¶¶ 11–14 ("[T]his reading violates at least three canons of construction.").

[35] *See id.*; *Tema Oil*, 2024 WL 4796433, at *3 ("Section 8 is unambiguous and clear on its face. . . . In plain and common terms, Section 8, when construed in harmony with the other provisions of H.B. 19, expresses the legislative intent that cases filed before September 1, 2024, cannot be removed to the Business Court.").

[36] Tex. H.B. 19 at § 1 (emphasis added).

[37] *See id.*; TEX. GOV'T CODE § 25A.002–05. Albeit solely for the purpose of context herein, Justice Evan A. Young has characterized the establishment of the Business Court in H.B. 19 [and the Fifteenth Court of Appeals in S.B. 1045] as "the most substantial ***modification*** of the judicial system of our state since 1891." Keenan Willard, *Texas Business Court [J]udges [S]worn in at Fort Worth Ceremony*, NBC DFW (September 19, 2024, 10:26 PM), https://www.nbcdfw.com/news/local/first-texas-business-court-judges-sworn-in/3650590/?os=qtft_2&ref=app (last visited Dec. 7, 2024) (emphasis added); *see also* DiSorbo, *supra* note 6, at 360 (referencing the creation of the Business Court as "[t]he most sweeping ***change*** to the state judiciary since the early 2000s tort reform.") (emphasis added).

25A occupies twenty-two of the twenty-seven pages of the enrolled version of H.B. 19.[38] Certainly, Chapter 25A is the most significant "change[] in law" in H.B. 19, both in terms of volume and substance.[39]

¶19 Because the present lawsuit commenced[40] long before September 1, 2024, the Court holds that the Parties may not rely on the provisions of Chapter 25A to justify subject-matter jurisdiction in the Business Court, regardless of how innovative their arguments may be. Therefore, the Court need not address any of the Parties' arguments concerning the interpretation of Texas Government Code Section 25A.004(d). This conclusion is consistent with the consensus view of Section 8 in the Business Court.[41]

ii. The Parties may not rely on the doctrines of waiver, estoppel, or invited error to create subject-matter jurisdiction in the Business Court.

¶20 In the alternative, the Parties argue that "[t]he fact that a statutory 'effective date' exists in a bill does not mean that that date cannot be waived."[42] The Parties wish for

[38] This portion of the analysis refers to the enrolled version of the Bill which is posted to the Texas Legislature's website. Tex. H.B. 19, 88th Leg., R.S. (2023) "Text," TEXAS LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=HB19 (last visited Dec. 3, 2024).

[39] *See Jorrie*, 2024 WL 4796436 at *2 ("The Act's most substantial change in the law is the addition of Chapter 25A, which includes the provisions permitting removal to the Business Court."); *Energy Transfer*, 2024 WL 4648110, at *3 ("Since chapter 25A in its entirety is a change in Texas law, it follows that § 25A.006's removal provisions also change Texas law."); *Tema Oil*, 2024 WL 4796433, at *4 ("Because Chapter 25A in its entirety is a change of law, it follows logically that Section 25A.006's removal provisions are changes in law, too."); *Winans*, 2024 WL 4796435, at *2 ("This argument ignores the plain language of the enabling legislation, which expressly states the changes in this law, i.e. Chapter 25A and its removal procedure, apply to cases commenced on or after September 1, 2024."); *XTO Energy*, 2024 Tex. Bus. 6 at ¶ 13 ("Thus, the Act's express statement that its changes in law apply to 'cases commenced on or after September 1, 2024' necessarily implies a reverse inference: that the change in law—removal, in this instance—does not apply to cases that were on file before that date.").

[40] The Parties do not contest that the commencement date for this action was prior to September 1, 2024. For a discussion of the meaning of "commenced" in the context of H.B. 19, see *Tema Oil*, 2024 WL 4796433, at *3; *Jorrie*, 2024 WL 4796436 at *2.

[41] *See generally* authorities cited, *supra* note 39.

[42] Lone Star Brief at 10, n. 3.

the Court to condone a waiver, or invitation of error concerning the "effective date" provision of Section 8, and thereby maintain jurisdiction over this case:

> The parties have entered into the Subsequent Agreement, jointly requesting that the Court adjudicate this dispute. [H.B. 19's] effective date is not "absolute," "nonforfeitable," or "nonwaivable." To the contrary, the parties jointly and expressly invite the Court to adjudicate this dispute.[43]

¶21 To justify this argument, the Parties cite *Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), which overruled *Powell v. State*, 897 S.W.2d 307, 317 (Tex. Crim. App. 1994), by employing the doctrine of "invited error." The *Prystash* court held that since a criminal defendant had requested a certain jury instruction, he was estopped from complaining about its defectiveness on appeal. *Prystash*, 3 S.W.3d at 529–32. While there are clear and binding authorities addressing waiver, estoppel, and invited error surrounding a civil court's subject-matter jurisdiction,[44] the Parties focus on *Prystash* because the portion of the relevant statute which the criminal defendant waived was its "effective date" provision.[45]

¶22 At the hearing on this matter, the Parties stated, "The *Prystash* case is very clear that an effective date in a statute is not an ***unwaivable . . . always appealable subject-matter issue***."[46] Indeed, "[s]ubject-matter jurisdiction is an issue that may be raised for the

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[43] Joint Brief at 8.

[44] *See, e.g.,* authorities cited, *infra* ¶ 22.

[45] *See Prystash*, 3 S.W.3d at 529–32. At the hearing, the Parties posited, "if in *Prystash*[,] a party can tell a Court to apply a statute outside of its effective date, and that is enforceable in the capital murder context, it is certainly enforceable in the context where you have two publicly traded companies in a multiple-hundred-million-dollar dispute entering into a seven-page long agreement that they want this case to be adjudicated by this Court." Transcript of Record at 13. Nevertheless, the law remains clear that the factual context of an attempted waiver remains irrelevant if the waiver is alleged to confer subject-matter jurisdiction. *See* authorities cited, *infra* ¶ 22.

[46] *Id.* at 12 (emphasis added).

first time on appeal; [and] it may not be waived by the parties." *Tex. Ass'n of Bus.*, 852 S.W.2d at 445; *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) ("[S]ubject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver.") (internal quotations omitted); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) (explaining that a judgment is void when a court lacks subject-matter jurisdiction). Likewise, the doctrine of invited error cannot serve as the basis for subject-matter jurisdiction where it otherwise does not exist. *Interest of A.F.*, 653 S.W.3d 730, 745 (Tex. App.—Fort Worth 2019, no pet.) (citing *In re Crawford & Co.*, 458 S.W.3d 920, 928 n. 7 (Tex. 2015)). Thus, the success or failure of the Parties' waiver and invited error arguments turns on the Court's determination of whether Section 8 of H.B. 19 is a jurisdictional provision in this context.

¶23 The Court finds that Section 8 of H.B. 19 unambiguously operates as a jurisdictional provision when applied to Texas Government Code Section 25A.004 (entitled "Jurisdiction and Powers").[47] Therefore, the Court holds that parties to a "civil action[] commenced" before September 1, 2024 may not waive Section 8's "effective date" provision in order to establish subject-matter jurisdiction in the Business Court under Section 25A.004.

[47] *See Jorrie*, 2024 WL 4796436, at *3 ("The court concludes that Section 8 is jurisdictional."); ANALYSIS, *supra* at Section A.i ("Chapter 25A—the most significant 'change[] in law' made by H.B. 19—only 'appl[ies] to civil actions commenced on or after September 1, 2024.'").

iii. Because the text of S.B. 1045 explicitly provides for the transfer of pre-September 1, 2024 appeals, the Parties' analysis of its effective date provision does not withstand scrutiny.

¶24 At the hearing, the Parties added an argument that Section 8 is not a jurisdictional limitation on this Court by comparing it to S.B. 1045, which created the Fifteenth Court of Appeals:

> Senate Bill 1045, Section 1.1[5], has an almost identical effective date provision that says the changes in law made by this act, Senate Bill No. 1045, apply to appeals perfected on or after September 1st, 2024. And as this Court knows, when that court began to exist on September 1st, 2024, all of the existing appeals that were within that court's jurisdiction, were transferred to that court. And that court had subject-matter jurisdiction to adjudicate those appeals and has been adjudicating those appeals and the constitutionality of that court has been upheld by the Texas Supreme Court. And so Section 8 as an effective date is not a subject-matter limitation on the Court.[48]

¶25 The Court recognizes that Section 1.15(a) of S.B. 1045 states as follows: "The changes in law made by this Act apply to appeals perfected on or after September 1, 2024."[49] However, brief scrutiny of Section 1.15 reveals a section (b), which was neither discussed by the Parties at oral argument nor mirrored in H.B. 19's Section 8:

> (b) On September 1, 2024, all cases pending in other courts of appeal that were filed on or after September 1, 2023, and of which the Court of Appeals for the Fifteenth Court of Appeals District has exclusive intermediate appellate jurisdiction are transferred to the Court of Appeals for the Fifteenth Court of Appeals District.[50]

[48] Transcript of Record at 11–12.
[49] Tex. S.B. 1045, § 1.15(a), 88th Leg., R.S. (2023).
[50] *Id.* at § 1.15(b).

Evidently, Section 1.15(b)—and not Section 1.15(a)—governs the transfer of pre-September 1, 2024 appeals. No equivalent language appears in H.B. 19's Section 8. Thus, the Court does not find this argument persuasive.

iv. The Parties' arguments regarding judicial efficiency and the consequences of remand do not affect the Court's lack of subject-matter jurisdiction.

¶26 As noted above, the Parties argue that because they have already agreed to non-suit and refile in the Business Court, it would be sensible and efficient for the Court to simply maintain jurisdiction of the case.[51] Of course, a policy of preferring efficient processes cannot supersede the bedrock requirement of subject-matter jurisdiction. To the contrary, because any judgment rendered by a court without subject-matter jurisdiction would be void,[52] the dedication of any further Court resources to this matter (prior to non-suit and refiling) would be, at a minimum, a misallocation.

VI. CONCLUSION

¶27 The Parties have failed to establish that the Court has subject-matter jurisdiction over this case. *See* TEX. R. CIV. P. 355(b)(2)(A). As a result, the Court is required to remand this case to the district court. *See* TEX. GOV'T CODE § 25A.006(d) ("If the business court does not have jurisdiction of the [removed] action, the business court ***shall*** remand the action to the court in which the action was originally filed.") (emphasis added). Therefore, subject to the Court's stay issued in Paragraph 30 below, it is

[51] Joint Brief at 5–7 (Argument Section I.B, entitled "Remanding This Case Will [N]ot Keep This Dispute [O]ut of Texas Business Court."). According to the Parties, a remand would cause difficulties with live motions and discovery. *Id.*
[52] *See* ANALYSIS, *supra* ¶ 22.

ORDERED that the Business Court Clerk shall remand this cause to the 61st Judicial District Court of Harris County, Texas.

¶28 In addition, the Court grants the Parties' request for a permissive interlocutory appeal under Texas Civil Practice & Remedies Code Section 51.014(d). The Court grants the request because the legal issue considered by this Court—whether "a civil action that was commenced before September 1, 2024 [may] be removed to Business Court where the parties entered into a subsequent agreement expressly consenting to the jurisdiction of the Business Court"—is a controlling question of law as to which there is substantial ground for difference of opinion.[53] Additionally, a determination by the Court of Appeals of the legal issue here would materially advance the ultimate termination of this litigation.[54] On this matter, the Court echoes the Parties' argument—a permissive interlocutory appeal "advance[s] the ultimate termination of this litigation by giving both parties, all parties, certainty as to the jurisdictional issues before [the Court], whether we're confronting them following a remand and a nonsuit and a refiling or following a permissive appeal. . . .[N]ot only will it give certainty to litigants around the state, but . . . it will give . . . certainty to these parties that there's not some jurisdictional trap that [they] might be confronted with on appeal."[55]

[53] *See generally* Joint Brief at 11–12 (permissive appeal briefing). It appears that a meaningful number of Business Court litigants believe that pre-September 1, 2024 cases may be removed. A significant proportion of the cases removed to the Business Court to date were on file in the district courts prior to September 1, 2024.

[54] *Id.*

[55] Transcript of Record at 40; *see also* TEX. R. CIV. P. 168 ("The permission . . . must state why an immediate appeal may materially advance the ultimate termination of the litigation.").

¶29 This Court is cognizant of the Section 51.014(d) case law. Given that the Texas Business Court is in its nascent stages, the Court certifies the permissive interlocutory appeal to provide the Fifteenth Court of Appeals an opportunity to scrutinize this seminal issue, give guidance to the Business Court, and set clear precedent concerning the removal of actions which were pending prior to September 1, 2024.

¶30 Further, to the extent that the Court has the authority to do so, the Court **STAYS** the remand order contained herein pending the resolution of the Parties' permissive interlocutory appeal under Texas Civil Practice & Remedies Code Section 51.014(e).

SO ORDERED.

Hon. Sofia Adrogué
Texas Business Court, Eleventh Division

DATED: December 20, 2024

Order filed January 23, 2025.

In The

Fifteenth Court of Appeals

NO. 15-25-00003-CV

LONE STAR NGL PRODUCT SERVICES LLC, (IN ITS OWN CAPACITY AND AS ASSIGNEE), Plaintiff/Joint Petitioner

V.

EAGLECLAW MIDSTREAM VENTURES LLC AND CR PERMIAN PROCESSING, LLC, Defendants/Joint Petitioners

On Appeal from the Business Court Division 11A
Trial Court Cause No. 24-BC11A-0004

ORDER

The parties filed a joint petition for permissive interlocutory appeal pursuant to Section 51.014, subsections d and f, of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§ 51.014(d), (f); *see also* Tex. R. App. P. 28.3. Accompanying the joint petition is an order from the Business Court of Texas, Eleventh Division, finding that an appeal of its order remanding the case to the 61st Judicial District Court of Harris County "involves a controlling question

of law as to which there is a substantial ground for difference of opinion" and would "materially advance the ultimate termination of this litigation." *See* Tex. Civ. Prac. & Rem. Code § 51.014(d)(1)-(2). We agree that an appeal of this interlocutory order is warranted under Section 51.014(d) and accept the appeal. *See id.* § 51.014(f). The notice of appeal is deemed to have been filed as of the date of this order. *Id.*; Tex. R. App. P. 28.3(k). This appeal is governed by the rules for accelerated appeals. Tex. Civ. Prac. & Rem. Code § 51.014(f); Tex. R. App. P. 28.3(k).

The parties' joint petition also requests this Court to issue a briefing schedule that permits each party to simultaneously file its own merits brief without any response or reply briefs. This request is granted and the Court orders that the parties' briefs are due 20 days after the later of (1) the date the clerk's record is filed or (2) the date the reporter's record is filed.

It is so ordered.

PER CURIAM

Panel Consists of Chief Justice Brister and Justices Field and Farris.

The Business Court of Texas,
Third Division

C TEN 31 LLC, *directly and derivatively on behalf of* SUMMER MOON HOLDINGS LLC, *Plaintiff,* v. JOHN TARBOX, JORDAN VIMONT, CU DESIGNATED MANAGER 1 LLC, and CU DESIGNATED MANAGER 2 LLC, *Defendants*.	§ § § § § § § § § § § § §	Cause No. 24-BC03A-0004

SYLLABUS

On a motion to remand, the Court decides issues of statutory construction and procedure relating to the scope of the Business Court's jurisdiction under Section 25A.004(e) of the Government Code and the burden-shifting framework for challenges to amount-in-controversy pleadings in the removal context.

First, the Court holds that Section 25A.004(e), which grants the Court jurisdiction over actions that seek "injunctive relief or a declaratory judgment" and involve "a dispute based on a claim within the court's jurisdiction under Subsection (b), (c), or (d)," incorporates the amount-in-controversy limit (or exception) of the underlying Subsections—i.e., Subsection (b)'s $5 million limit, Subsection (d)'s $10 million limit, or Subsection (c)'s exemption from any amount-in-controversy limit. Here, the removing party invokes Subsection (b) as underlying the Court's jurisdiction over this action for injunctive and declaratory relief. As a result, the Court has jurisdiction only if the value of the rights at issue exceeds $5 million.

Second, the Court holds that when, as here, the notice of removal pleads that the value of the rights at stake are within the Court's jurisdiction and the petition does not plead otherwise, the party moving for remand bears the initial burden of showing that the amount pleaded is fraudulent or that a different amount is readily established, such as by statute. The Court adopts the same burden-shifting framework applied to jurisdictional challenges raised through pleas to the jurisdiction and motions for traditional summary judgment, such that the movant bears the initial burden on the pretrial motion but the party asserting jurisdiction bears the ultimate burden of proof at trial.

The Court also denies a request for attorney's fees and holds that the movant has not met its burden of proving that a venue clause in the Company Agreement applies to this action or that it binds Defendants, who are not signatories.

2025 Tex. Bus. 1

The Business Court of Texas,
Third Division

C TEN 31 LLC, *directly and derivatively on behalf of* SUMMERMOON HOLDINGS LLC, *Plaintiff,* v. JOHN TARBOX, JORDAN VIMONT, CU DESIGNATED MANAGER 1 LLC, and CU DESIGNATED MANAGER 2 LLC, *Defendants*.	§ § § § § § § § § § § § §	Cause No. 24-BC03A-0004

OPINION AND ORDER

Before the Court is Plaintiff's motion to remand. The Court holds that (1) jurisdiction under Section 25A.004(e) is limited by the amount-in-controversy requirement (or exception) in the underlying statute, and (2) when a notice of removal pleads that the amount in controversy is within the Court's jurisdictional limits and the petition below is silent on that issue, the party moving for remand

bears the initial burden of showing that the amount pleaded is fraudulent or that a different amount is readily established.

Having considered the briefing, the oral arguments, the evidence, and the governing law, the Court ORDERS that:

- the request for remand based on lack of jurisdiction is CARRIED pending an evidentiary hearing after discovery and supplemental briefing;[1]
- the request for remand based on the choice-of-venue clause is DENIED;
- the request for attorney's fees is DENIED;
- the request to supplement the record is GRANTED.

Procedural Background

This dispute arises out of the governance of Summer Moon Holdings, LLC (Summer Moon), which owns, operates, and franchises coffee shops. Summer Moon is governed by a Board of Managers (the Board), made up of three managers—one manager designated by minority owner CTen 31 LLC (CTen) and two managers designated by majority owner Coffee Unplugged, LLC (CU). On September 16, 2024, CTen's designated manager purported to remove CU's two designated managers, John Tarbox and Jordan Vimont, from the Board based on putative conflicts of interest. Two days later, CTen[2] sued Tarbox and Vimont in the 261st District Court of

[1] *See* Jurisdictional Analysis, Part B(4), *infra.*

[2] CTen brings this suit both directly and derivatively on behalf of Summer Moon.

Travis County, Texas, seeking a declaratory judgment that the removal was effective. Tarbox and Vimont removed the suit to this Court over CTen's objection.

In this Court, CTen filed a second amended petition alleging that Vimont and Tarbox resigned from the Board but that CU's designated replacement managers—CU Designated Manager 1 LLC and CU Designated Manager 2 LLC (the CU Managers)—are "Trojan Horse shell entities" and a "backdoor attempt to put Tarbox and Vimont back on the Board." CTen's second amended petition adds the CU Managers as defendants, requests injunctive relief, and seeks additional declaratory relief regarding the CU Managers and a series of alleged breaches of duties by all Defendants.

CTen subsequently moved to remand this action to the District Court, which Defendants opposed. CTen asks the Court to remand for lack of jurisdiction or based on a venue-selection clause. CTen also seeks an award of attorney's fees and an opportunity to supplement the record. Defendants oppose the requested relief. The Court held a hearing on the motion to remand on December 11, 2024.

After the hearing on the motion to remand, CTen filed an application for a TRO and temporary injunction, as well as a third amended petition. The third amended petition added claims relating to the removal and replacement of Summer Moon's chief financial officer (CFO), which is also the subject of the application for temporary relief. The Court held a TRO hearing on December 27, 2024.

Jurisdictional Analysis

Section 25A.006(d) of the Government Code and Rule 355 of the Texas Rules of Civil Procedure dictate that if this Court lacks jurisdiction over a removed action, the Court must remand the action to the court from which it was removed.[3] The parties dispute whether this Court has jurisdiction over this removed action. Their dispute raises two key jurisdictional issues: (1) whether the $5 million amount-in-controversy requirement in Section 25A.004(b) of the Government Code limits the Court's jurisdiction under Section 25A.004(e); and (2) if so, how a dispute over the amount in controversy is resolved in the removal context. The Court holds that it has jurisdiction only if the amount in controversy exceeds $5 million, and the movant bears the initial burden on the amount in controversy, under the same framework that governs pleas to the jurisdiction.

A. This Court has jurisdiction over this action only if the amount in controversy exceeds $5 million.

The parties' jurisdictional dispute requires the Court to interpret Section 25A.004 of the Government Code.[4] Texas courts determine the meaning of statutes from the statutory text, giving undefined words their ordinary, contemporaneous

[3] TEX. GOV'T CODE § 25A.006(d); TEX. R. CIV. P. 355(f)(1).

[4] Statutory construction is a question of law for the Court. *E.g., Malouf v. State ex rels. Ellis*, 694 S.W.3d 712, 718 (Tex. 2024); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 700 (Tex. 2015).

meaning, as understood from reading the statute as a whole and in context.[5] As used here, "context" generally refers to "the surrounding words and structure of the operative text," not extrinsic and subjective considerations.[6] The Court thus examines the language and structure of the provisions at issue in light of the statutory framework, striving for a "fair meaning" rather than "hyper-technical readings of isolated words or phrases."[7] Absent ambiguity, the inquiry begins and ends with the text: "the alpha and the omega of the interpretive process."[8]

Whether a court has subject-matter jurisdiction is generally a question of law for the court to decide, but controverting evidence of jurisdictional facts can create a fact question for the fact finder to decide.[9]

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[5] *Malouf*, 694 S.W.3d at 718; *Pub. Util. Comm'n of Tex. v. Luminant Energy Co. LLC*, 691 S.W.3d 448, 460 (Tex. 2024); *City of Austin v. Quinlan*, 669 S.W.3d 813, 821 (Tex. 2023); *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011).

[6] *U.S. Polyco, Inc. v. Tex. Cent. Bus. Lines Corp.*, 681 S.W.3d 383, 390 n.3 (Tex. 2023) (per curiam). The Texas Supreme Court's approach is consistent with the "whole text" canon, which "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Luminant Energy*, 691 S.W.3d at 461–62 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012)).

[7] *In re Dallas Cnty.*, 697 S.W.3d 142, 158 (Tex. 2024) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 356 and *In re Off. of Att'y Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015)).

[8] *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017); *see also City of Denton v. Grim*, 694 S.W.3d 210, 214 (Tex. 2024); *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex. 2006).

[9] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

1. This Court's jurisdiction is governed by Section 25A.004.

Section 25A.004 grants this Court "civil jurisdiction concurrent with district courts" in certain categories of actions, subject to specific exclusions.[10] The layout of Section 25A.004 is generally:

- Subsection (a): the Court's powers generally
- Subsection (b): jurisdiction over certain business-affairs actions when the amount in controversy exceeds $5 million
- Subsection (c): jurisdiction over Subsection (b) disputes, regardless of the amount in controversy, when a party is a publicly traded company
- Subsection (d): jurisdiction over actions arising out of certain commercial transactions[11] and violations of the Finance or Business & Commerce Code, when the amount in controversy exceeds $10 million
- Subsection (e): jurisdiction over certain injunctive and declaratory actions
- Subsection (f): supplemental jurisdiction
- Subsection (g): exclusions from the Court's non-supplemental jurisdiction
- Subsection (h): absolute exclusions from the Court's jurisdiction[12]

Defendants rely on Subsections (b) and (e). Subsection (b) grants the Court jurisdiction in listed actions "in which the amount in controversy exceeds $5

[10] TEX. GOV'T CODE § 25A.004.

[11] Specifically, "qualified transactions," involving at least $10 million in consideration or value, *id.* §§ 25A.001(14), 25A.004(d)(1), and when the parties have agreed—either in the contract or after the fact—to jurisdiction in the Business Court, *id.* § 25A.004(d)(2), subject to certain exclusions.

[12] *See id.* § 25A.004(b)–(h).

million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs."[13] Generally, the listed actions are:

- derivative proceedings;
- actions regarding an organization's governance, governing documents, or internal affairs;
- actions against certain defendants in which a claim is asserted under state or federal securities or trade regulation law;
- certain actions by an organization or its owner against the organization's owner, controlling person, or managerial official;
- certain actions alleging a breach of a duty owed to an organization or its owner;
- actions seeking to pierce the corporate veil; and
- actions arising out of the Business Organizations Code.[14]

Subsection (c) expands the reach of Subsection (b), granting the Court jurisdiction over "an action described in Subsection (b) regardless of the amount in controversy if a party to the action is a publicly traded company."[15]

Subsection (e) grants the Court jurisdiction over actions "seeking injunctive relief or a declaratory judgment under Chapter 37, Civil Practice and Remedies

[13] *Id.* § 25A.004(b).

[14] *Id.* § 25A.004(b)(1)–(7).

[15] *Id.* § 25A.004(c).

Code, involving a dispute based on a claim within the court's jurisdiction under Subsection (b), (c), or (d)."[16]

2. A claim is "within the court's jurisdiction under Subsection (b)" only if the amount in controversy in the action exceeds $5 million.

Defendants argue that this Court has jurisdiction under Subsection (e) because this action seeks injunctive and declaratory relief and involves "a dispute based on a claim within the court's jurisdiction under Subsection (b)."[17] They assert that the underlying claims here fall within four of the categories listed in Subsection (b)[18] and that this satisfies Subsection (e), regardless of the amount in controversy. CTen does not dispute that this is a declaratory and injunctive action or that it falls within the categories of actions listed in Subsection (b). But CTen argues that the $5 million amount-in-controversy requirement in Subsection (b) also applies under Subsection (e).[19] For the reasons below, the Court agrees with CTen that it lacks jurisdiction unless the amount in controversy exceeds $5 million.

[16] *Id.* § 25A.004(e).

[17] *Id.* § 25A.004(e).

[18] Specifically, they assert that it is a derivative action, relates to Summer Moon's governance and governing documents, alleges board managers breached duties owed to CTen and Summer Moon, and arose out of the Business Organizations Code. *Id.* § 25A.004(b)(1), (2), (5) & (7).

[19] *Id.* § 25A.004(e).

a. Subsection (b)'s amount-in-controversy requirement applies here.

The first issue is whether the phrase "within the court's jurisdiction under Subsection (b)" incorporates Subsection (b)'s amount-in-controversy minimum. The Court concludes that it does.

Because the term "within" is undefined, the Court gives the term its ordinary meaning, as it would be understood by a reasonable reader in this context. Courts often consult dictionary definitions from when the statute was enacted to determine a term's ordinary meaning.[20] Modern dictionaries define "within," when used as a preposition (as it is here), as indicating enclosure or containment; that something is inside—not beyond—the limit, period, length, range, or compass of something else; and most relevantly, that something is in the field, sphere, or scope of something else, such as when something is "within the jurisdiction of the state" or "within one's power."[21] Consistently, for example, the United States Supreme Court held in *United States v. Rodgers*[22] that a matter is "within the jurisdiction" of a

[20] *E.g.*, *Morath v. Lampasas Indep. Sch. Dist.*, 686 S.W.3d 725, 735 (Tex. 2024); *Interest of J.S.*, 670 S.W.3d 591, 598 (Tex. 2023); *MCI Telecomm. Co. v. AT&T Co.*, 512 U.S. 218, 227–28 (1994).

[21] *Within*, MERRIAM-WEBSTER.COM DICTIONARY (2024), available at www.merriam-webster.com; *within*, DICTIONARY.COM (2024), available at www.dictionary.com; *within*, CAMBRIDGE DICTIONARY (2024), available at www.dictionary.cambridge.org.

[22] 102 S. Ct. 2382, 2393 (1982); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 428 (2004) (holding statute limiting courts to granting habeas relief "within their respective jurisdictions" required that issuing court have jurisdiction over custodian); *Plyler v. Doe*, 457 U.S. 202, 214 (1982) (holding "within its jurisdiction," as used in Fourteenth Amendment, meant those on whom State would impose its laws).

governmental entity when the entity has the power to exercise authority over the matter, distinguishing authorized functions from peripheral matters.[23]

The statute also uses the undefined term "under" as a preposition. In addition to those less applicable in this context,[24] modern definitions of "under," when used as a the preposition, include when one thing is subject to the authority of or authorized by another.[25] Consistently, in *National Association of Manufacturers v. Department of Defense*, the United States Supreme Court held that "under section 1311," as used in the Clean Water Act, meant "pursuant to" or "by reason of the authority of" section 1311.[26] In *Powell v. City of Baird*, the Texas Supreme Court similarly held that "a poll tax is levied *under a State law*, within the meaning of Section 2 of Article VI of our State Constitution, if some State law directly authorizes such levy."[27] The Court explained, "As used in the above constitutional provision, the word 'under' is certainly used as a preposition, indicating subjection, guidance, or control. It is used in a sense of 'by authority of.'"[28]

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[23] 466 U.S. 475, 479 (1984); *see also, e.g.*, *United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011).

[24] For example, spatial definitions (such as below or beneath), quantitative definitions (such as less than or lower than), or hierarchical definitions (such as subordinate to).

[25] *Under*, MERRIAM-WEBSTER.COM DICTIONARY (2024), available at www.merriam-webster.com; *under*, DICTIONARY.COM (2024), available at www.dictionary.com; *under*, CAMBRIDGE DICTIONARY (2024), available at www.dictionary.cambridge.org.

[26] 583 U.S. 109, 124 (2018).

[27] 133 Tex. 489, 496, 128 S.W.2d 786, 789 (1939) (emphasis added).

[28] *Id.* at 497, 128 S.W.2d at 790.

Based on these ordinary meanings, understood in the context of Section 25A.004, the Court concludes that a claim is "within the court's jurisdiction under Subsection (b)" if it is in the scope of (within) the jurisdiction granted to this Court by the authority of (under) Subsection (b). The scope of the jurisdiction authorized by Subsection (b) is limited to "actions in which the amount in controversy exceeds $5 million."[29] Thus, the phrase "within the court's jurisdiction under Subsection (b)" incorporates Subsection (b)'s amount-in-controversy requirement.

This conclusion is buttressed by Subsection (e)'s inclusion of Subsection (c) in the list of subsections under which jurisdiction may originate. Subsection (c) exempts certain Subsection (b) actions from the amount-in-controversy requirement. If Subsection (e) eliminated the amount-in-controversy requirement for all Subsection (b) actions, there would be no reason for it to also list Subsection (c)—deleting the reference to Subsection (c) would have no effect on the meaning or reach of Subsection (e). Courts endeavor to avoid a statutory construction that would render a portion of the statute meaningless.[30]

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[29] TEX. GOV'T CODE § 25A.004(b).

[30] *Image API, LLC v. Young*, 691 S.W.3d 831, 842 (Tex. 2024) ("[W]e must read subsections (b) and (d) together, 'giving effect to each provision so that [neither] is rendered meaningless or mere surplusage.'" (quoting *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016))); *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014) ("[O]ur text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence.").

The language of Subsection (c) itself buttresses this conclusion in two ways. First, when a publicly traded company is a party to a Subsection (b) action, Subsection (c) grants the Court jurisdiction over the action "regardless of the amount in controversy."[31] This shows that the Legislature knows how to exempt actions in one subsection from another subsection's amount-in-controversy minimum in unmistakable terms.[32] If the Legislature intended both Subsection (c) and Subsection (e) to be exempt from the amount-in-controversy minimums, there would be no reason to do so clearly in Subsection (c) and then (purportedly) do the same thing much more obliquely in Subsection (e).

Defendants imply that an exemption from the amount-in-controversy requirement is implied from the fact that declaratory and injunctive claims do not seek monetary damages. But the parties agree that amount-in-controversy minimums can be applied to declaratory and injunctive actions; as discussed below, the amount in controversy in such actions is measured by the value of the rights at issue.

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[31] TEX. GOV'T CODE § 25A.004(c).

[32] *See Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 855 (Tex. 2024) ("We draw a different conclusion from Section 11.13(a): that the Legislature knows how to limit a particular exemption on a one-per-family basis. The fact that it did so in Section 11.13(a) but not Section 11.131(b) means that Section 11.131(b) bears no such limitation."); *Interest of J.S.*, 670 S.W.3d 591, 613 (Tex. 2023) ("We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015))); *In re Xerox Corp.*, 555 S.W.3d 518, 529 (Tex. 2018) ("Once again, the juxtaposition of word choice in these adjoining statutory provisions shows the Legislature knows how to say "damages" when it means to authorize an award of damages, yet deliberately chose not to use that term in describing the relief available under Section 36.052.").

Second, Subsection (c) refers to actions "*described in* Subsection (b),"[33] whereas Subsection (e) refers to claims "*within the court's jurisdiction under* Subsection (b)."[34] The Court presumes that this difference in language conveys a difference in meaning.[35] This difference is most consistent with the understanding that the reference in Subsection (c) is to the types of actions listed in Subsection (b) but not necessarily all of the jurisdictional prerequisites, whereas the reference in Subsection (e) necessarily implicates Subsection (b)'s jurisdictional prerequisites.[36]

Defendants argue that applying an amount-in-controversy requirement to Subsection (e) makes it redundant. The Court disagrees. Subsection (e) grants the Court jurisdiction over actions seeking specific types of relief—"injunctive relief or a declaratory judgment"—that otherwise might not be available for disputes based on claims within the Court's jurisdiction under Subsections (b), (c), or (d).[37]

Conversely, if Subsection (e) actions were exempt from Subsections (b) and (d)'s amount-in-controversy limits, those limits could be circumvented by reframing

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[33] TEX. GOV'T CODE § 25A.004(c).

[34] *Id.* § 25A.004(e).

[35] *See Malouf*, 694 S.W.3d at 727 ("[W]e generally presume the Legislature uses the same word consistently throughout a statute and uses different words to convey different meanings."); *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) ("When the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended." (quoting *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995))).

[36] *Malouf*, 694 S.W.3d at 720; *Ritchie*, 443 S.W.3d at 867.

[37] TEX. GOV'T CODE § 25A.004(e).

a claim as one for declaratory or injunctive relief. CTen argues that under Defendants' interpretation, the Court would lack jurisdiction over claims for $10,000 in damages for breach of a company agreement or breach of an agreement with a Business Court choice-of-venue provision, but the same claims would be within the Court's jurisdiction if artfully pleaded as a declaratory-judgment action. The Court does not find this to be the kind of "absurd" result that would justify deviation from the plain meaning of the statutory text.[38] But here, the plain language and structure of the statute dictate an approach under which no such loophole exists.

Finally, Defendants assert that the State Bar of Texas agrees with them, citing material from a State Bar CLE. To the extent the cited material may be understood to mean that qualified declaratory and injunctive claims can be added to actions that otherwise satisfy the Court's amount-in-controversy requirements, the Court agrees. But to the extent it may be understood to mean that declaratory or injunctive claims operate to exempt the entire action from amount-in-controversy limits, the statute says otherwise. "When decoding statutory language, we are bound by the Legislature's prescribed means (legislative handiwork), not its presumed intent

[38] *See Rodriguez v. Safeco Ins. Co. of Ind.*, 684 S.W.3d 789, 795–96 (Tex. 2024) (observing that statutes should be construed to avoid "genuinely absurd results," but "the absurdity safety valve is reserved for truly exceptional cases" where the result would be "unthinkable or unfathomable" (quoting *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013))).

(judicial guesswork): 'We must rely on the words of the statute, rather than rewrite those words to achieve an unstated purpose.'"[39]

b. The amount-in-controversy threshold applies to the action, not each claim.

Having decided that Section 25A.004(b)'s $5 million amount-in-controversy requirement applies here, the Court must next determine *how* it applies. As detailed below, the Court concludes that the amount in controversy applies at the "action" level, considering all claims properly joined before the Court, rather than as a per-claim minimum.

Because Section 25A.004 uses the undefined terms "action" and "claim," the Court is mindful of the distinction between these two terms and the differences in the way the statute uses them. When undefined,[40] the Texas Supreme Court has construed the term "action" to refer to a lawsuit or judicial proceeding generally and the term "claim" to refer to an individual theory of liability or cause of action asserted within a lawsuit or judicial proceeding.[41] The Fifth Circuit has similarly

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[39] *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86–87 (Tex. 2017) (quoting *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 571 (Tex. 2014) (plurality)).

[40] When these terms are defined by the statute, the Texas Supreme Court employes the definition given. *E.g.*, *Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021) ("By defining 'legal action' to include not just 'lawsuits,' 'petitions,' 'pleadings,' and 'filings,' but also 'causes of action,' 'cross-claims,' and 'counterclaims,' the Act permits a party to seek dismissal within sixty days after service of a cause of action or claim, even if it's not 'early' in the litigation.").

[41] *See Off. of the Attorney Gen. of Tex. v. C.W.H.*, 531 S.W.3d 178, 183 (Tex. 2017) (quoting *Jaster* and *Thomas* for meaning of "action"); *Jaster*, 438 S.W.3d at 563–64 ("The common meaning of the term 'action' refers to an entire lawsuit or cause or proceeding, not to discrete 'claims' or

distinguished between the terms "action" and "claim" when construing federal removal statutes.[42] Consistently, the Texas Business Court has recognized that "[a] civil action is a lawsuit."[43]

This is consistent with the ordinary meaning of those terms, as reflected in contemporaneous dictionaries: "action" relates to the lawsuit generally while "claim" relates to individual rights and remedies asserted within the suit.[44] It is also consistent with how those terms are used throughout Section 25A.004. For example, Section 25A.004(b)(3) addresses jurisdiction over "an action in which a claim under a state or federal securities or trade regulation law is asserted."[45]

This Court's jurisdiction under subsection (b) can depend on different aspects of the case, including:

- the nature of the action
  (e.g., "a derivative action"[46]);
- the nature of the claims asserted in the action

'causes of action' asserted within a suit, cause, or proceeding."); *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008) (distinguishing between lawsuits and causes of action in interpreting "health care liability claim"); *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995) ("The term 'action' is generally synonymous with 'suit[.]'"); *see also Montelongo*, 622 S.W.3d at 301.

[42] *E.g.*, *Dillon v. State of Miss. Military Dep't*, 23 F.3d 915, 918 (5th Cir. 1994); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064–66 (5th Cir. 1990); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1376 (5th Cir. 1980).

[43] *Tema Oil and Gas Co. v. ETC Field Servs., LLC*, 2024 Tex. Bus. 3 at ¶ 15.

[44] *See, e.g.*, *Action*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Claim*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also Fresh Coat, Inc. v. Parexlahabra, Inc.*, 424 S.W.3d 237, 242 (Tex. App.—Beaumont 2014, no pet.) (collecting additional definitions and authorities).

[45] TEX. GOV'T CODE § 25A.004(b)(3).

[46] *Id.* § 25A.004(b)(1); *see also id.* § 25A.004(b)(2), (b)(7).

(e.g., "a claim under a state or federal securities or trade regulation law"[47]);

- the nature of the allegations made in the action (e.g., "alleges an act or omission by"[48]);
- the nature of the parties to the action (e.g., "by an organization, or an owner of an organization . . . against an owner, controlling person, or managerial official"[49]); and
- the nature of the relief or remedy sought in the action (e.g., "seeking to hold an owner or governing person of an organization liable for an obligation of the organization"[50]).

Regardless of whether jurisdiction is pegged to specific claims or some other aspect of the suit, Subsection (b)'s jurisdictional grant, and its minimum amount in controversy, refer to the "action": "the business court has civil jurisdiction . . . in the following actions in which the amount in controversy exceeds $5 million . . . ."[51] In fact, all of Section 25A.004's jurisdictional grants refer to the "action,"[52] save one: Subsection (f)'s grant of supplemental jurisdiction refers to claims instead.[53] This makes sense, as supplemental jurisdiction typically applies to only some claims

[47] *Id.* § 25A.004(b)(3).

[48] *Id.* § 25A.004(b)(4)(B); *see also id.* § 25A.004(b)(5).

[49] *Id.* § 25A.004(b)(5)(A).

[50] *Id.* § 25A.004(b)(6).

[51] *Id.* § 25A.004(b).

[52] *Id.* § 25A.004(c) ("The business court has civil jurisdiction … in an action … ."), (d) ("The business court has civil jurisdiction … in the following actions in which the amount in controversy exceeds $10 million … ."); (e) ("The business court has civil jurisdiction … in an action …. .").

[53] *Id.* § 25A.004(f) ("the business court has supplemental jurisdiction over any other claim … ."). Subsection (f) grants jurisdiction "over any other claim related to a case or controversy within the court 's jurisdiction that forms part of the same case or controversy." *Id.* The phrase "form part of the same case or controversy" is also used in federal courts' supplemental-jurisdiction statute. 28 U.S.C. § 1367(a); *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 554 (2005).

within an action; the court generally must have some independent jurisdiction to which the supplemental jurisdiction can attach.[54] Section 25A.004's jurisdictional carve-outs, on the other hand, are sometimes stated with reference to the "action" and other times to specific "claims."[55]

Applying these common meanings as understood within the context of the statute, the Court holds that jurisdiction under Subsection (b) applies to the listed categories of "actions" when the amount in controversy in the action exceeds $5 million. Because "action" refers to the suit generally, it is not necessary for each individual claim to put more than $5 million in controversy to satisfy Subsection (b).[56] Thus, this Court has jurisdiction over this action only if the claims in the suit, collectively, put more than $5 million in controversy.

Importantly, the Court does not hold that the term "action" can never refer to less than all claims in a suit regardless of whether the claims are properly joined and within the Court's jurisdiction.[57] Section 25A.004 excludes certain "claims"

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[54] *See Exxon Mobil*, 545 U.S. at 554.

[55] TEX. GOV'T CODE § 25A.004(g), (h).

[56] This conclusion is consistent with the analysis of the amount in controversy in district courts, where the Government Code provides: "If two or more persons originally and properly join in one suit, the suit for jurisdictional purposes is treated as if one party is suing for the aggregate amount of all their claims added together, excluding interest and costs." TEX. GOV'T CODE § 24.009. District courts thus are not required to test the amount-in-controversy minimum on a claim-by-claim or even a party-by-party basis.

[57] *Cf. Williams v. Seidenbach*, 958 F.3d 341, 345 (5th Cir. 2020); *id.* at 350–51 (Ho, J., concurring); *id.* at 360–61 (Oldham, J., dissenting) (addressing term "action' as used in federal Rule 41(a)).

from the Court's jurisdiction and provides for supplemental jurisdiction over certain "claims."[58] The statute thus contemplates that the Court may have jurisdiction over an action but not every claim asserted in the action,[59] and claims over which the Court lacks jurisdiction would have to be either dismissed from the action or severed into a separate action for transfer or remand to another court.[60]

B. CTen has the burden of showing that Defendants' amount-in-controversy pleadings are fraudulent or that a lesser amount is readily established.

The amount in controversy in an action is "the sum of money *or the value of the thing* originally sued for."[61] The parties agree with this but disagree over whether the rights at issue in this action have a value over $5 million and how that should be decided. This dispute raises issues of first impression for the procedures governing removal to the Business Court when the parties dispute the amount in controversy. To decide these issues, the Court looks first to Texas authority and then takes guidance from federal authority, mindful of any differences in the governing law.[62] For the reasons below, the Court holds that CTen bears the initial burden of proof in

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[58] TEX. GOV'T CODE § 25A.004(f), (g)(2)–(5), (h).

[59] *Id.*

[60] *Id.* § 25A.006(b)–(d).

[61] *Tune v. Tex. Dep't of Pub. Safety*, 23 S.W.3d 358, 361 (Tex. 2000) (quoting *Gulf, C. & S.F.Ry. Co. v. Cunnigan,* 95 Tex. 439, 441, 67 S.W. 888, 890 (1902)).

[62] *See, e.g.*, *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 545 n.10 (Tex. 2018) (Texas courts look to federal law when interpreting similar authority); *Kinney v. Barnes*, 443 S.W.3d 87, 92 (Tex. 2014) ("We look to federal cases for guidance, not as binding authority."); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 505–09 (Tex. 2012) (Texas courts look to federal law for guidance when interpreting analogous statutory language but not dissimilar statutory language).

challenging Defendants' allegation that the amount in controversy exceeds $5 million; if CTen meets its burden, the burden shifts to Defendants to raise a fact issue; if there is a fact issue, Defendants will bear the burden of proof at trial.

1. Defendants pleaded that the amount in controversy exceeds $5 million; CTen has not pleaded otherwise.

The first step in analyzing jurisdiction is typically a pleadings burden. Whether filing in the Business Court or a district court, a plaintiff must plead facts that affirmatively show the jurisdiction of the court in which the action is brought, including that the relief sought is within the court's amount-in-controversy limits,[63] and a party removing an action to this Court must "plead facts to establish . . . the business court's authority to hear the action."[64] Federal courts likewise require complaints and removal notices to allege facts establishing jurisdiction, including any minimum amount in controversy.[65]

Rule 355 uses the term "plead" with respect to the jurisdictional allegations in a notice of removal.[66] Thus, while the term "pleading" often refers only to petitions and answers, the jurisdictional allegations in Defendants' notice of removal

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[63] *United Servs. Auto. Ass'n v. Brite*, 215 S.W.3d 400, 402 (Tex. 2007); TEX. R. CIV. P. 47(b); TEX. R. CIV. P. 354(a) (requiring petitions to "plead facts to establish the business court's authority to hear the action" and to comply with Part II of the Rules of Civil Procedure, including Rule 47).

[64] TEX. R. CIV. P. 355(b)(2)(A).

[65] *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 182 (1936); 28 U.S.C. § 1446(a).

[66] TEX. R. CIV. P. 355(b)(2)(A). Notices of removal are not subject to "due order of pleading" rules. TEX. GOV'T CODE § 25A.006(i); TEX. R. CIV. P. 355(d).

are part of the "pleadings" for these purposes. As the United States Supreme Court has observed, it would be "anomalous" to treat the jurisdictional allegations in a complaint differently than from those in a notice of removal.[67]

CTen's petitions, including the second and third amended petitions filed in this Court, are silent with respect to whether the action meets the Court's amount-in-controversy minimum.[68] But Defendants plead in their notice of removal that the value of the rights at issue exceeds $5 million. Construing the pleadings liberally in favor of jurisdiction and "look[ing] to the pleader's intent,"[69] the Court holds that Defendants have invoked the jurisdiction of this Court, and at a minimum, the amount-in-controversy allegations do not establish a lack of jurisdiction, such that Defendants would be entitled to amend.[70] The Texas Supreme Court has stated that, when an action is brought to protect a right or privilege, "[t]he subjective value of a

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[67] *Dart Cherokee Basin Op. Co., LLC v. Owens*, 574 U.S. 81, 88 (2014) (stating, in context of dispute over jurisdictional amount-in-controversy limit, that it would be "anomalous to treat commencing plaintiffs and removing defendants differently with regard to the amount in controversy").

[68] The petitions assert only that the relief sought is within the district courts' jurisdictional limits.

[69] *Tex. Tech Univ. Sys. v. Martinez*, 691 S.W.3d 415, 419 (Tex. 2024); *see also Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006) (citing *Tex. Dep't of Transp. v. Ramirez,* 74 S.W.3d 864, 867 (Tex. 2002), for rule that "pleadings should be liberally construed in favor of jurisdiction").

[70] *See Dohlen v. City of San Antonio*, 643 S.W.3d 387, 397 (Tex. 2022) ("[S]o long as petitioners' pleading does not affirmatively demonstrate the absence of jurisdiction, they should be given an opportunity to amend."); *Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 804 (Tex. 1989) ("The failure of a plaintiff to state a jurisdictional amount in controversy in its petition, without more, thus will not deprive the trial court of jurisdiction. Even if the jurisdictional amount is never established by pleading, in fact, a plaintiff may recover if jurisdiction is proved at trial." (citation omitted)).

privilege, if asserted in good faith, establishes jurisdiction if that value meets the requisite amount in controversy."[71] Independent of their other allegations, Defendants have pleaded that the value of the rights at issue exceeds $5 million.

With respect to Defendants' assertion that the rights at issue implicate the entire value of Summer Moon, the Court views this as unlikely. While the rights at issue appear to go to the heart of Summer Moon's business, at least some part of Summer Moon's value is likely attributable to assets or goodwill not dependent on the rights at stake.[72] But unlikely is not impossible, and even if the entire value of Summer Moon is not at stake here, that does not mean that the value at stake falls below $5 million. Defendants assert that Summer Moon's value "far exceeds $5 million," and CTen admits it has no factual basis for disputing the value of Summer Moon or the value of the rights at issue—an inquiry CTen says would be complex and involve expert analysis.[73] CTen relies solely on its contention that Defendants bear the burden of proof.

Additionally, it is evident on the face of the pleadings that this suit puts more at issue than just rights of control. In its live pleadings,[74] CTen seeks declarations

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[71] *Tune*, 23 S.W.3d at 362.

[72] *See generally McNutt*, 298 U.S. at 181.

[73] CTen stated at the oral hearing that it had elected not to investigate the value of Summer Moon, relying instead on the contention that Defendants bore sole responsibility for proving it up.

[74] At oral argument, both parties agreed that the Court should consider CTen's Second Amended Petition (its then-live pleading) in deciding this dispute and need not look at a "snapshot" at the

that all Defendants breached their fiduciary duties in a myriad of ways that could subject Defendants to potential liability, upend past Board actions (including approval of three new franchise locations), and mandate future Board actions.[75] CTen also seeks to enjoin future actions by the CU Managers, including prohibiting future franchise agreements without CTen's prior written approval, and to compel the Board to take other actions, including the disbursement of unquantified funds.[76] The amount in controversy may be impacted by the scope of these rights that CTen seeks to have determined and enforced in this action, the impact that relief would necessarily have on the rights of CU and Summer Moon's Board, and the duties and liability exposure CTen seeks to impose on Defendants.

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time of removal. After oral argument, CTen filed a Third Amended Petition in which it requested additional declaratory and injunctive relief related to its removal of Summer Moon's chief financial officer during the pendency of this suit.

[75] For example, CTen alleges that Defendants breached their fiduciary duties by failing to distribute unspecified amounts to members as allegedly required by Section 10 of the Company Agreement; earmarking $200,000 for a reserve fund for indemnification related to this lawsuit; approving the sale of franchise rights for three new franchise locations in Wake Forest/Raleigh, N.C., Nichols Hills, Okla., and Edmond, Okla.; authorizing upward salary adjustments and bonuses; failing to update financial disclosure documents; and failing to hire the entity chosen by CTen to serve as Summer Moon's new CFO and approve CTen's proposed terms for that employment, which include a salary of up to $240,000 per year for an indefinite number of years.

[76] For example, CTen seeks to enjoin approval of "any transaction described by Section 11.7," including entering into franchise agreements or incurring certain expenses, without CTen's written consent, and compel the Board to disperse the $200,000 reserve funds and the "mandatory monthly distributions required by the Company Agreement."

2. A notice of removal need not attach evidence of the amount in controversy.

CTen complains that Defendants did not file any evidence to support the assertion in their notice of removal that the value of the rights at issue exceeds $5 million. The Court holds that there is no duty to file jurisdictional evidence with a notice of removal to this Court.

Although Texas has no precedent on this, the United States Supreme Court addressed it in *Dart Cherokee Basin Operating Co., LLC v. Owens*.[77] Resolving a circuit split on the issue, the Supreme Court held that the notice of removal was not deficient for failing to include evidence that the amount in controversy exceeded $5 million, as required under the Class Action Fairness Act.[78] The Court reasoned that good faith amount-in-controversy allegations in a notice of removal should be treated like those in a petition: accepted unless and until challenged.[79] It concluded that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold," and the removal statute requires evidence of that amount "only when the plaintiff contests, or the

[77] 574 U.S. 81 (2014).

[78] *Id.* at 89.

[79] *Id.* at 87 ("When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal-court adjudication, the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court." (citations omitted)).

court questions, the defendant's allegation."[80] The Court agrees with and follows this portion of *Owens*.[81]

3. Texas and federal courts approach challenges to jurisdictional pleadings differently.

Under both Texas and federal law, when a party pleads in good faith that the amount in controversy is within the court's jurisdictional limits, those allegations control unless they are properly challenged.[82] But Texas and federal courts differ with respect to the burden of proving the amount in controversy when, as here, a party challenges the amount-in-controversy pleadings.

a. In federal courts, the removing party must prove the amount in controversy by a preponderance of the evidence.

Under federal law, when jurisdictional pleadings are challenged, the party asserting jurisdiction bears the burden of proving it by a preponderance of the evidence—regardless of whether that is the plaintiff in a suit initiated in federal court or the removing party in a suit removed to federal court.[83]

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[80] *Id.* at 89.

[81] Some portions of *Owens* relate to provisions of the federal removal statute that are not found in the Texas statute and rule, such that Texas law could differ.

[82] *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

[83] *See Sentry Ins. v. Morgan*, 101 F.4th 396, 398 (5th Cir. 2024) (burden on plaintiff filing in federal court); *Guijarro v. Enter. Holdings, Inc.*, 39 F.4th 309, 314 (5th Cir. 2022) (burden on defendant removing based on diversity); *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 85 (5th Cir. 2013) (burden on defendant removing under Class Action Fairness Act).

Notably, the federal removal statute has a provision specific to amount-in-controversy allegations that is not enacted in Texas.[84] The federal statute states that, in diversity actions (where there is an amount-in-controversy minimum), if the initial complaint specifies the sum demanded in good faith, that amount will be "deemed to be the amount in controversy," *except* that the notice of removal may assert a different amount in controversy if (a) the plaintiff seeks nonmonetary relief or (b) state practice either bars demands for a specific sum or permits recovery in excess of the amount demanded.[85] Federal courts have treated Texas cases as falling within these exceptions.[86] When a removal notice states the amount in controversy and a party challenges the stated amount, the court must remand unless it finds that the amount in controversy is within its jurisdictional limits.[87] In such instances, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied."[88]

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[84] *Compare* 28 U.S.C. § 1446(c)(2)*, with* TEX. GOV'T CODE § 25A.006(d), TEX. R. CIV. P. 355.

[85] 28 U.S.C. § 1446(c)(2)(A).

[86] *See, e.g.*, *InVas Med. Devices, LLC v. Zimmer Biomet CMF & Thoracic, LLC*, No. 3:21-CV-2947-G, 2022 WL 4538459, at *7 (N.D. Tex. Sept. 28, 2022) (nonmonetary relief); *Medina v. Allstate Vehicle & Prop. Ins. Co.*, 458 F. Supp. 3d 591, 596–97 (W.D. Tex. 2020) ("Because plaintiffs in Texas are not limited to the amount demanded in their complaint, § 1446(c)(2)(A)(ii) permits a removing defendant to assert the amount in controversy in the notice of removal . . . .").

[87] 28 U.S.C. § 1446(c)(2)(B).

[88] *Owens*, 574 U.S. at 88; *see also, e.g.*, *Durbois v. Deutsche Bank Nat'l Tr. Co.*, 37 F.4th 1053, 1056 (5th Cir. 2022) (quoting and applying *Owens*).

b. Texas courts apply the summary-judgment burden schemes.

Texas law has a more nuanced approach. Although the removal scheme for the Business Court is new to Texas law, jurisdictional challenges are not. Parties in Texas courts can challenge the existence of jurisdictional facts through multiple different procedural vehicles, including pleas to the jurisdiction and motions for summary judgment.[89] In turn, the burden for proving disputed jurisdictional facts depends on which procedural vehicle the party uses to challenge jurisdiction and how closely the challenged facts intertwine with the merits of the case.

When a party challenges the existence of jurisdictional facts in a plea to the jurisdiction or a motion for traditional summary judgment, Texas courts follow the framework applicable to traditional summary judgments: the movant bears the initial burden of putting forth evidence refuting jurisdiction; if the movant does so, the burden shifts to the nonmovant to put forth evidence that at least raises a fact issue on jurisdiction.[90] If the evidence creates a fact issue on jurisdiction, the court cannot

[89] *Bland*, 34 S.W.3d at 554 ("The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment." (citations omitted)).

[90] *Tex. Health & Human Servs. Comm'n v. Pope*, 674 S.W.3d 273, 281 (Tex. 2023); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 221, 227–28 (Tex. 2004); *see also* TEX. R. CIV. P. 166a(c).

grant the plea, and the party asserting jurisdiction must prove it by a preponderance of the evidence at trial.[91]

A party can also challenge the existence of jurisdictional facts through a motion for no-evidence summary judgment.[92] In that instance, the initial burden of proof is on the nonmovant, though it is a lesser burden: the nonmovant need only put forward enough evidence to raise a fact issue as to the challenged jurisdictional facts—i.e., "more than a scintilla."[93] Here too, if the evidence creates a fact issue on jurisdiction, the court cannot grant the motion, and the party asserting jurisdiction must prove it by a preponderance of the evidence at trial.[94] Unlike pleas to the jurisdiction and motions for traditional summary judgment, the rules permit a no-evidence summary judgment motion only "[a]fter adequate time for discovery."[95] The Texas Supreme Court relied on both protections—the lighter initial burden and the opportunity for discovery—in holding that no-evidence motions can be used to attack jurisdictional facts.[96]

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[91] *Miranda*, 133 S.W.3d at 228; *see also, e.g.*, *Ellis Cnty. State Bank v. Keever*, 888 S.W.2d 790, 792 (Tex. 1994) (preponderance-of-the-evidence standard); *Gray v. Gray*, 354 S.W.2d 948, 949 (Tex. App.—Houston 1962, writ dism'd) (observing that plaintiff in divorce proceeding had to prove that she and defendant were actually married at trial, by a preponderance of the evidence, to establish court's jurisdiction).

[92] *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

[93] *Id.* at 552.

[94] *Id.* at 551–52; TEX. R. CIV. P. 166a(i).

[95] *Swanson*, 590 S.W.3d at 552 (quoting TEX. R. CIV. P. 166a(i)).

[96] *Id.* at 551–52.

c. In Texas, amount-in-controversy pleadings control unless they are fraudulent or a different amount is readily established.

Another layer of complexity is added when the disputed jurisdictional fact is the amount in controversy. Because it is often closely intertwined with the merits of the case, Texas courts have often distinguished amount-in-controversy challenges from other jurisdictional challenges.[97] Over the last 140 years, the Texas Supreme Court has repeatedly held that, when a party challenges whether a suit is within the court's amount-in-controversy limits, the pleadings control unless the challenger shows that:

(a) the pleadings are fraudulent, alleging a false amount as a "sham" to wrongfully obtain jurisdiction; [98] or

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[97] In *Bland*, for example, the Texas Supreme Court explained that requiring a plaintiff to prove his damages in response to a plea to the jurisdiction would improperly require him to "try his entire case" at that early stage of development. 34 S.W.3d at 554.

[98] *Miranda*, 133 S.W.3d at 223 ("[W]hen the defendant contends that the amount in controversy falls below the trial court's jurisdictional limit, the trial court should limit its inquiry to the pleadings. In that situation, we concluded, 'the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction.'" (citations omitted, quoting *Bland*, 34 S.W.3d at 554)); *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 448–49 (Tex. 1996) (upholding jurisdiction where original petition alleged damages below $100,000, even though plaintiff later amended to seek $250,000, because neither petition itself nor defendant's evidence proved that original amount pleaded was fraudulent when made); *Hoffman v. Cleburne Bldg. & Loan Ass'n*, 85 Tex. 409, 410–11, 22 S.W. 154, 155 (1893) (stating, in the context of amount-in-controversy challenge, "[t]he jurisdiction of the court cannot be defeated when the case stated in the petition is within its jurisdiction, unless it is made to appear that the allegations upon which the jurisdiction depends were fraudulently inserted in the petition for the purpose of conferring the jurisdiction. Such fraud exists when the jurisdictional averments are not only untrue, but are made by the pleader for the purpose of deceiving, and without being believed to be true"); *Tidball v. Eichoff*, 66 Tex. 58, 60, 17 S.W. 263, 263 (1886) (holding that amount in controversy pleaded controls, even if plaintiff may have been mistaken about amount, absent evidence of fraudulent intent); *Dwyer v. Bassett & Bassett*, 63 Tex. 274, 276 (1885) ("If it was thought that the averments of the petition by which the amount in

(b) the amount in controversy is "readily establish[ed]" as outside the Court's jurisdiction.[99]

Thus, when a jurisdictional challenge is based on the amount in controversy, it "must ordinarily be decided solely on the pleadings."[100] "The subjective value of a privilege, if asserted in good faith, establishes jurisdiction if that value meets the requisite amount in controversy,"[101] and the court generally will not look behind such pleadings absent evidence that the amount pleaded is fraudulent.[102]

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controversy was made to exceed in value $500 were made fraudulently, and only for the purpose of giving to the court jurisdiction of the case, then it was necessary that this should not only have been pleaded, but an issue thereon should have been tried under proper instructions."); *Ross v. McGuffin*, 2 Willson 403, 404, 1884 WL 8426, at *1 (Tex. Ct. App. 1884) (upholding denial of plea to the jurisdiction when "the amount claimed in plaintiff's petition is the amount in controversy, and is within the jurisdiction of the court, and there is no evidence of a fraudulent or improper attempt to give jurisdiction, apparent upon the face of the petition, or shown by the record").

[99] *Bland*, 34 S.W.3d at 554 ("[W]hen a defendant asserts that the amount in controversy is below the court's jurisdictional limit, the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction, or the defendant can readily establish that the amount in controversy is insufficient, as for example when the issue in dispute is a license or right rather than damages." (citing *Tune v. Tex. Dep't of Public Safety*, 23 S.W.3d 358, 362 (Tex. 2000), in which Texas Supreme Court held that appeal from denial of concealed-handgun license satisfied $100 amount-in-controversy requirement even though claimant had paid only $70 for two-year handgun license, because $140 fee charged for four-year license established that minimum value of license was more than $100)); *see also Tex. Dep't of Public Safety v. Barlow*, 48 S.W.3d 174, 176 (Tex. 2001) (rejecting objection to failure to pleaded or prove amount in controversy in appeal from suspension of driver's license because statutory fees for license established that $100 minimum was met).

[100] *Bland*, 34 S.W. 3d at 555; *see also Cazarez*, 937 S.W.2d at 449 ("Jurisdiction is based on the allegations in the petition about the amount in controversy."). This is true even if the damages sought later increase beyond the jurisdictional limit due to the passage of time or the amount ultimately recovered in the judgment falls outside the jurisdictional limit. *Cazarez*, 937 S.W.2d at 449.

[101] *Tune*, 23 S.W.3d at 362.

[102] *See* fn. 98, *supra*. Texas courts have applied the same standard to disputes over the amount in controversy raised in pleas in the abatement. *E.g.*, *Tex. Land & Irrigation Co. v. Sanders*, 101 Tex. 616, 617, 111 S.W. 648, 648 (1908) (plaintiff alleged value disputed portion of rice crop was $960, just below court's $1,000 maximum, but defendants proved actual value was over $1,000).

4. CTen bears the initial burden on its motion, and Defendants' pleadings control unless fraudulent or a different amount is readily established.

The Court follows the Texas approach discussed above and adopts the following procedures for amount-in-controversy disputes in this Court:

First, when the plaintiff's petition alleges the amount in controversy, that pleading controls unless (a) a party presents evidence that the amount pleaded is falsely asserted to wrongly obtain or avoid jurisdiction, or (b) a different amount in controversy is readily established, such as by statutorily set fees.[103]

Second, when the plaintiff's pleadings are silent as to whether the amount in controversy falls within this Court's jurisdiction, but a removing party's notice of removal properly pleads that the amount is within the Court's jurisdiction, those pleadings will be given the same deference in the remand analysis: they will control absent the circumstances described in (a) or (b) above.

Third, in either case, if a party presents evidence demonstrating that the amount in controversy is outside the Court's jurisdiction, the Court will remand the case unless another party presents controverting evidence that, at a minimum, raises a fact issue.[104] And if there is a fact issue, the party asserting jurisdiction will bear the burden of proof on the issue at trial.[105]

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[103] *Cf. Bland*, 34 S.W.3d at 554; *see also Miranda*, 133 S.W.3d at 224.

[104] *Cf. Pope*, 674 S.W.3d at 281; *Miranda*, 133 S.W.3d at 227–28; TEX. R. CIV. P. 166a(c).

[105] *Cf. Miranda*, 133 S.W.3d at 227–28.

Applying the Texas approach rather than the federal approach means that amount-in-controversy pleadings will be treated the same in this Court regardless of whether they are made by a plaintiff or defendant, and parties challenging such pleadings bear the same burden regardless of whether the challenge is brought in a plea to the jurisdiction, motion for traditional summary judgment, or motion to remand.[106] In each case, the movant bears the burden on a motion filed before trial, while the burden of proof at trial—if jurisdiction is in question at the time of trial—remains on the party asserting jurisdiction. And in each case, amount-in-controversy pleadings control absent specific circumstances.

Adopting the federal approach here would mean that parties alleging jurisdiction in this Court would face different burdens depending on whether the allegations were made in a petition or a notice of removal. Moreover, while the federal approach has appeal, it is not entirely consistent with the reasoning and policy considerations adopted by the Texas Supreme Court in the cases discussed above. Federal courts require parties facing a jurisdictional challenge at the outset of the case to meet the same evidentiary burden (preponderance of the evidence) they would have to satisfy at trial, but the Texas Supreme Court has repeatedly held that a party should not have to marshal its evidence or prove its claims to survive early jurisdictional

[106] While this differs from motions for no-evidence summary judgment, those motions are distinguishable in that they apply a lower initial burden of proof and cannot be brought until after an adequate time for discovery has passed. *See* TEX. R. CIV. P. 166a(i)); *Swanson*, 590 S.W.3d at 552.

challenges.[107] That policy applies equally here, where an alternative approach would often require a defendant or third party to prove up the plaintiff's potential damages—evidence of which is likely to be in the plaintiff's hands at a pre-discovery stage of trial—even when the plaintiff has never affirmatively pleaded that damages are outside the Court's jurisdictional limits.[108]

Under these holdings, CTen bears the burden of presenting evidence that Defendants' amount-in-controversy pleadings are fraudulent (i.e., falsely assert that the value of the rights at issue exceed $5 million to wrongly obtain jurisdiction) or that the amount in controversy is readily established as $5 million or less.[109] CTen was not aware of this burden when it moved for remand, and the Court previously told the parties that they would be afforded an opportunity to conduct discovery in

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[107] *See, e.g.*, *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 805 (Tex. 2018) ("The plaintiff is not required to marshal all her evidence and conclusively prove her claim to satisfy this jurisdictional hurdle."); *Mission Consol.*, 372 S.W.3d at 637 (noting that plaintiff was not required to "marshal evidence and prove her claim" to show jurisdiction before trial and would "only be required to submit evidence if the defendant presents evidence negating" key jurisdictional facts); *Bland*, 34 S.W.3d at 554 ("A plea to the jurisdiction . . . should be decided without delving into the merits of the case. The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached."); *see also Swanson*, 590 S.W.3d at 551–52 (holding that allowing jurisdictional challenges in motions for no-evidence summary judgment would not improperly require parties to marshal their evidence because of lower burden of proof).

[108] Notably, while a party may specially except to request that a plaintiff amend its pleadings to assert the maximum amount of damages sought, the Court is aware of no similar mechanism for requiring a plaintiff to place a maximum value on the nonmonetary relief sought. *See* TEX. R. CIV. P. 47(c). Additionally, the damage ranges that must be specified under Rule 47—$250,000 or less, between $250,000 and $1 million, or over $1 million—will not resolve disputes of whether the amount in controversy exceeds $5 or $10 million, as required under Section 25A.004(b) and (d).

[109] Because CTen bears the initial evidentiary burden, the Court does not reach the evidence filed by Defendants in response to CTen's motion to remand or CTen's objections to that evidence.

the event that jurisdiction could not be decided as a matter of law. Therefore, the Court GRANTS CTen's request to supplement the record and CARRIES its request for remand. Both parties are afforded 45 days (through Monday, February 17, 2025) to conduct any discovery on the value of the subject matter of this case. CTen must file any supplemental briefing and evidence in support of its motion to remand by Monday, February 24, 2025. Defendants must file any responsive briefing and controverting evidence by Monday, March 3, 2025. Absent remand by agreement,[110] an evidentiary hearing will be held on Friday, March 7, 2025 at 10 a.m.

Choice-of-Venue Analysis

In its motion, CTen also argued that the Court should remand because "[t]he Company Agreement provides for exclusive jurisdiction in the Travis County District Courts." CTen did not provide the language of the venue clause or attach the Company Agreement. In response, Defendants asserted that they are not signatories to the Company Agreement and argued (among other things) that CTen had failed to meet its burden of proving that the venue clause applies to this action or that they are bound by it. Defendants asserted that the reason CTen did not quote or attach the contract is because it would have revealed that the venue clause applies only to

[110] The parties previously came close to negotiating an agreed remand, and the Court recognizes that this opinion might assist the parties in narrowing or resolving the impediments to agreement.

suits among members, which this is not. CTen did not reply, electing to stand on its motion to remand.

The Company Agreement was not in evidence before or at the hearing on the motion to remand, but it has come before the Court since then in connection with CTen's TRO application. It confirms that Defendants are not signatories and that the venue clause applies to "actions among the members" of Summer Moon, which Defendants undisputedly are not.[111]

Without deciding whether the venue clause otherwise would support remand, the Court holds that CTen has not shown that this action falls within the scope of the clause or that Defendants, as non-signatories, are bound by it. At the hearing on the motion to remand, CTen suggested for the first time that the venue clause applies because Defendants acted as agents of CU, a member of Summer Moon. But CTen offered no evidence or explanation for that theory. "Texas courts do not presume that an agency relationship exists."[112] Instead, the burden of proving agency rests

[111] Specifically, the venue clause states: "*Each member submits and consents* to the exclusive jurisdiction of the district courts of Travis County, Texas and the United States District Court for the Western District of Texas (Austin Division) and acknowledges and agrees that such courts shall constitute the exclusive and proper venues and convenient forums for the resolution of *any actions among the members* and the company with respect to the subject matter hereof." (emphases added, all-caps omitted). The Company Agreement defines "members" as the current and future holders Summer Moon's Class A, Class B, or Class C Common Units.

[112] *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 697 (Tex. 2017) (citing *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (per curiam)).

on the party asserting an agency relationship.[113] Because CTen has not provided any support for its agency theory, the Court cannot rely on it as a basis for remand. The Court DENIES the request to remand this action based on the venue clause in the Company Agreement.

Motion for Attorney's Fees

CTen seeks to recover the attorney's fees it incurred in seeking remand of this action, relying on Section 10.001 of the Civil Practice & Remedies Code.[114] The Court DENIES this discretionary request.[115] While Defendants did not prevail on their argument that there is no amount-in-controversy minimum for Subsection (e) actions, that argument not without any basis in law,[116] and CTen presented no evidence that Defendants asserted that argument for the purpose of causing delay or driving up costs rather than for the permissible purpose of having their case heard in

[113] *Id.*; *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 589 (Tex. 2017) ("Agency is not presumed; a party alleging the existence of an agency relationship bears the burden of proving it.").

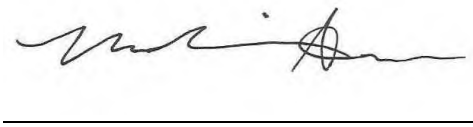
[114] *See* TEX. CIV. PRAC. & REM. CODE § 10.001. Section 10.001 applies to notices of removal filed in this Court. TEX. GOV'T CODE § 25A.006(h).

[115] TEX. CIV. PRAC. & REM. CODE § 10.004(a) (providing that a court "*may* impose" sanctions).

[116] *See James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 418 (Tex. 2022) (describing an argument as "erroneous, but by no accounts frivolous"); *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 730 (Tex. 2020) ("Making groundless arguments in bad faith or for an improper purpose might warrant sanctions, but arguments that are merely 'unpersuasive' do not."); *Pressley v. Casar*, 567 S.W.3d 327, 334 (Tex. 2019) (per curiam) (holding that party "may be wrong, but her argument . . . is not frivolous" under Chapter 10); *see also McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988) (describing frivolous arguments as those "that cannot conceivably persuade the court" (quoting *United States v. Edwards,* 777 F.2d 364, 365 (7th Cir. 1985))).

this Court.[117] With respect to the pending dispute over the value of the rights at issue in this action, this ruling is without prejudice to motions by either party seeking to recover attorney's fees incurred after the date of this order.

SIGNED ON: January 3, 2025.



Hon. Melissa Andrews
Judge of the Texas Business Court,
Third Division

[117] Courts generally presume that filings are in made in good faith, and the party seeking sanctions bears the burden of overcoming this presumption. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007).

E-filed in the Office of the Clerk
for the Business Court of Texas
1/18/2025 1:14 AM
Accepted by: Beverly Crumley
Case Number: 24-BC11A-0016

2025 Tex. Bus. 2

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

Bestway Oilfield, Inc., *Plaintiff,* v. Jacob R. Cox and ServicePlus, LLC, *Defendants.*	§ § § § § § §	Cause No. 24-BC11A-0016

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

¶1 Before the Court is (1) the Notice of Removal by Plaintiff Bestway Oilfield, Inc. ("Bestway"), filed October 24, 2024 ("Notice" or "Notice of Removal"); and (2) Bestway's Brief in Support of Removal filed November 14, 2024 ("Brief" or "Bestway Brief"). Defendants, Jacob R. Cox ("Cox") and ServicePlus, LLC ("ServicePlus") (collectively, "Defendants") were initially opposed,[1] but ultimately agreed to removal.[2] Thus, Defendants did not file a response to Bestway's Brief. Due to the Court's obligation

[1] Notice of Removal at 3 ("Defendants do not agree to the removal.").
[2] Bestway Brief at 4 ("The parties in this case have agreed to submit to the Business Court's jurisdiction and the amount in controversy exceeds $10 Million.").

to examine its subject-matter jurisdiction any time it is in question, the Court considered the propriety of this case's removal via submission on December 30, 2024. Having considered Bestway's arguments and the relevant law, and subject to the stay of this Order, the Court **ORDERS** that this suit be remanded to the district court. To the extent that the Court has the authority to do so, the Court **STAYS** the remand order contained herein, and all proceedings under this cause number, pending the resolution of the traditional appeal[3] and mandamus proceeding[4] arising out of *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 (Tex. Bus. Ct. Oct. 31, 2024).

II. PROCEDURAL BACKGROUND

¶2 Over four-and-a-half years ago, Bestway commenced this lawsuit in the 270th Judicial District Court of Harris County.[5] Bestway maintains various causes of action against Defendants arising out of Cox's alleged breach of his former employment agreement with Bestway, his creation of a "secret side business" [ServicePlus], and his alleged misappropriation of Bestway's "contacts and proprietary information."[6] By Bestway's estimation, "Cox and ServicePlus enjoyed immediate success with the secret side business, which is now grossing well over $10 Million . . . [per] year."[7]

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[3] *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, 15-24-00127-CV (traditional appeal filed November 12, 2024).
[4] *In re Synergy Global Outsourcing, LLC*, 15-25-00002-CV (mandamus proceeding filed January 3, 2025).
[5] Plaintiff's Original Petition was not included with the Appendix attached to the Notice of Removal. In both the Notice of Removal and the Bestway Brief, Bestway makes the assertion that "On *March 23, 2021*, Plaintiff sued Defendants . . . in the 270th Judicial District Court of Harris County, Texas . . . ." Notice of Removal at 1; Bestway Brief at 3 (emphasis added). A review of the District Clerk's record for this case (under Cause No. 2020-32320) reveals that this case was filed on May 28, 2020.
[6] Bestway Brief at 3 (Specifically, Bestway maintains claims of "breach of contract, breach of fiduciary duty, tortious interference with prospective business relations, unfair competition, and misappropriation of trade secrets/confidential information").
[7] *Id.* at 3.

¶3 On September 1, 2024, when this Court first opened for business, this case was 1,557 days old. According to the district clerk's site, the eighth scheduled trial date in this cause was set for October 28, 2024. On October 22, 2024, the district court denied Defendants' motion to continue the trial setting, which was opposed by Bestway.[8]

¶4 Two days later, on October 24, 2024, Bestway filed its Notice of Removal to the Texas Business Court. In the Notice, Bestway represented that "Defendants do not agree to the removal"[9] and alleged that the Business Court has subject-matter jurisdiction under Texas Government Code Sections 25A.004(b)(6) (veil-piercing); 25A.004(b)(7) (actions under the Texas Business Organizations Code); 25A.004(d)(3) (actions under the Texas Business & Commerce Code against an organization or an officer/governing person of an organization acting on the organization's behalf); and 25A.004(f) (supplemental jurisdiction over all remaining claims).[10]

¶5 Later the same day, the Court ordered Bestway to file a brief containing argument and authorities regarding the propriety of this suit's removal to the Texas Business Court and regarding this Court's authority and jurisdiction to hear the suit. In rendering this Order, the Court sought to determine the extent to which Section 8 of House Bill 19—which reads "[t]he changes in law made by this Act apply to civil actions

[8] The litigation below appears to be marked by several highly contentious discovery disputes, resulting in at least two orders granting discovery sanctions.
[9] Notice of Removal at 3. "If all parties . . . have not agreed to remove the action, the notice of removal must be filed: (1) not later than the 30th day after the date the party requesting removal of the action discovered or reasonably should have discovered, facts establishing the business court's jurisdiction over the action . . . ." TEX. GOV'T CODE § 25A.006(f)(1).
[10] Notice of Removal at 2–3.

commenced on or after September 1, 2024"[11]—might affect the Court's subject-matter jurisdiction.

¶6 On November 14, 2024, Bestway filed its Brief, asserting an additional basis for the Court's subject-matter jurisdiction, on the grounds that Defendants—in an apparent reversal of stance—had consented to removal:

> The business court has civil jurisdiction concurrent with district courts in which the amount in controversy exceeds $10 Million to adjudicate any action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract *or a subsequent agreement* that the business court has jurisdiction of the action. *See* TEX. GOV'T CODE § 25A.004(d)(2) (emphasis added).
>
> ***The parties in this case have agreed to submit to the Business Court's jurisdiction*** and the amount in controversy exceeds $10 Million.
>
> . . .
>
> House Bill 19 expressly authorizes parties to agree to jurisdiction in the Business Court during the pendency of an action. *See* H.B. 19, § 1, amending TEX. GOV. CODE § 25A.004(d)(2). *See also*, TEX. [GOV'T] CODE § 25A.006(f) (providing that "[a] party may file an agreed notice of removal at any time during the pendency of the action").[12]

¶7 Thus, Bestway provides this Court with yet another opportunity to address the agreed removal of a lawsuit that commenced before September 1, 2024. *See Jorrie v. Charles*, No. 24-BC04B-0001, 2024 Tex. Bus. 4, 2024 WL 4796436 (Tex. Bus. Ct. Nov. 7, 2024); *Lone Star NGL Prod. Servs. v. Eagleclaw Midstream Ventures*, No. 24-BC11A-0004, 2024 Tex. Bus. 8, 2024 WL 5202356 (Tex. Bus. Ct. Dec. 20, 2024).

[11] Tex. H.B. 19, § 8, 88th Leg., R.S. (2023).
[12] Bestway Brief at 4–5 (emphasis added).

¶8 Acknowledging the similarity of its posture to that of other Business Court litigants seeking to remove aging cases from district court, Bestway comments in its Brief that the appeal of *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 (Tex. Bus. Ct. Oct. 31, 2024) to the Fifteenth Court of Appeals, as well as "others that may be proceeding after it, will directly affect the jurisdictional outcome of this case . . . ."[13] Accordingly, Bestway requests, if the Court finds that it lacks jurisdiction over this case, that the Court "(1) certify a permissive interlocutory appeal regarding whether the parties subsequent agreement establishes jurisdiction in this Court ***or*** (2) abate this case and/or stay its order remanding the case until the Court[] of Appeal[s] issue[s] a final ruling in *Synergy*."[14]

III. LEGAL STANDARD

¶9 For every judicial proceeding, "subject-matter jurisdiction must exist before we can consider the merits," and a court must examine its jurisdiction "any time it is in doubt." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 797 (Tex. 2021) (quoting *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 774 (Tex. 2020)); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) ("Subject[-]matter jurisdiction is never presumed and cannot be waived."). "Whether a court has subject[-]matter jurisdiction is a question of law." *Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752, 757 (Tex. 2024).

[13] *Id.* at 2.
[14] *Id.* at 2–3 (emphasis added).

¶10 A Notice of Removal to the Business Court must plead facts to establish the Business Court's authority to hear the action. TEX. R. CIV. P. 355(b)(2)(A). If the Business Court does not have jurisdiction over a removed action, the Business Court shall remand the action to the court in which the action was originally filed. TEX. GOV'T CODE § 25A.006(d); TEX. R. CIV. P. 355(f)(1).

IV. ANALYSIS

A. Bestway cannot rely on Chapter 25A to establish the Business Court's authority to hear this action because Chapter 25A only applies to civil actions commenced on or after September 1, 2024.

¶11 "As with every question of statutory construction, our duty is to accurately articulate the meaning of the enacted text—here," of H.B. 19.[15] *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023). Indeed, "H.B. 19's plain 'text is the alpha and omega of the interpretive process.'" *Energy Transfer LP v. Culberson Midstream LLC*, No. 24-BC01B-0005, 2024 Tex. Bus. 1, 2024 WL 4648110, at *3 (Tex. Bus. Ct. Oct. 30, 2024) (citing *In re Panchakarla*, 602 S.W.3d 536, 541 (Tex. 2020); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)). "When the text unambiguously answers a question, our inquiry ends." *Brown*, 660 S.W.3d at 752.

[15] In this context, as this Court has opined, the enrolled version of H.B. 19 is the binding statute enacted by the Texas Legislature. *Lone Star*, 2024 Tex. Bus. 8 at ¶ 14, n. 29; *Jorrie*, 2024 WL 4796436 at *3 (citing *Ass'n of Texas Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990)). Accordingly, when analyzing the text of Chapter 25A to determine the Court's authority and jurisdiction to hear the case, the Court must apply Section 8 and presume that the enrolled bill accurately expresses the Texas Legislature's intent. *XTO Energy, Inc. v. Houston Pipe Line Co.*, No. 24-BC11B-0008, 2024 Tex. Bus. 6 at ¶ 10 (Tex. Bus. Ct. Nov. 26, 2024); *see* TEX. GOV'T CODE § 311.029 (under the Code Construction Act, "the language of the enrolled bill version controls" over any subsequent printing of the statute).

¶12 When Governor Greg Abbott signed H.B. 19 into law on June 9, 2023, the enrolled version of the Bill included two sections that are pertinent to this Opinion:

i. Section 1, which vests the Court with its jurisdiction, and sets forth the text of the new Chapter 25A of the Texas Government Code,[16] and

ii. Section 8, which states: "The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."[17]

¶13 Bestway argues that Section 8 would only limit the applicability of the changes in law made by H.B. 19 if they were said to apply "***only*** to civil actions commenced on or after September 1, 2024."[18] This Court has confronted and rejected this argument once before.[19] To date, no division of the Business Court has accepted this interpretation of Section 8.[20] No effort has been made to distinguish this iteration of the "only" argument. Thus, no reason exists for the Court to deviate from the established rule. On its face,

[16] Tex. H.B. 19 at § 1 (emphasis added); *see* TEX. GOV'T CODE § 25A.004 (entitled "Jurisdiction and Powers"). Bestway admits that Section 1 of H.B. 19 constitutes a change in law. Bestway Brief at 6 ("Section 8 provides the effective date for changes in law made by the Act. The changes in law are found in Sections 1 through 3 of the Act, which amend various parts of the Government Code.").
[17] Tex. H.B. 19 at § 8.
[18] *See* Bestway Brief at 6–7.
[19] *See Lone Star*, 2024 Tex. Bus. 8 at ¶¶ 8.i, 17.
[20] *Energy Transfer*, 2024 WL 4648110, at *3 (rejecting "only" argument, relying on the Negative Implication Canon); *Synergy*, 2024 Tex. Bus. 2 at 9–11 (identical analysis); *Tema Oil and Gas Co. v. ETC Field Services, LLC*, No. 24-BC08B-0001, 2024 Tex. Bus. 3, 2024 WL 4796433, at *4 (Tex. Bus. Ct. Nov. 6, 2024) ("[T]here was no need for the legislature to insert 'only' or other limiting clarifying phrases in the applicability clause to expressly indicate that the new law did not apply retroactively to non-existing pending cases. It would have been superfluous for the legislature to have done so."); *Winans v. Berry*, No. 24-BC04A-0002, 2024 Tex. Bus. 5, 2024 WL 4796435, at *2 (Tex. Bus. Ct. Nov. 7, 2024) (relying on the reasoning from *Tema Oil* to dispose of this argument); *XTO Energy*, 2024 Tex. Bus. 6 at ¶¶ 11–14 ("[T]his reading violates at least three canons of construction.").

Section 8 unambiguously limits the applicability of any "change in law" made by H.B. 19 to "civil actions commenced on or after September 1, 2024."[21]

¶14 As this Court concluded in *Lone Star*, "Chapter 25A is the most significant 'change[] in law' in H.B. 19, both in terms of volume and substance."[22] Because the present lawsuit commenced[23] long before September 1, 2024, the Court holds that Bestway may not rely on the provisions of Chapter 25A to justify subject-matter jurisdiction in the Business Court, regardless of how innovative its arguments may be.[24] Therefore, the Court need not—and does not—meaningfully analyze Bestway's jurisdictional allegations, each

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[21] *See generally* authorities cited, *supra* note 20; *Tema Oil*, 2024 WL 4796433, at *3 ("Section 8 is unambiguous and clear on its face . . . In plain and common terms, Section 8, when construed in harmony with the other provisions of H.B. 19, expresses the legislative intent that cases filed before September 1, 2024, cannot be removed to the Business Court.").

[22] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 18 ("The introduction of Section 1 [and the functional preamble to the text of Chapter 25A] reads: 'Subtitle A, Title 2, Government Code, is ***amended*** by ***adding*** Chapter 25A to read as follows: . . . .' Putting aside its auxiliary purposes, the plain thrust of Section 1 and Chapter 25A is to ***change Texas Law*** to create the legal framework for the Business Court ***and vest it with its jurisdiction***. By a simple page count [of the enrolled version of the Bill posted to the Texas Legislature's website, Tex. H.B. 19, 88th Leg., R.S. (2023) "Text," Texas Legislature Online, https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=HB19 (last visited Dec. 3, 2024)], the text of Chapter 25A occupies twenty-two of the twenty-seven pages of the enrolled version of H.B. 19."); *see Jorrie*, 2024 WL 4796436 at *2 ("The Act's most substantial change in the law is the addition of Chapter 25A, which includes the provisions permitting removal to the Business Court."); *Energy Transfer*, 2024 WL 4648110, at *3 ("Since chapter 25A in its entirety is a change in Texas law, it follows that § 25A.006's removal provisions also change Texas law."); *Tema Oil*, 2024 WL 4796433, at *4 ("Because Chapter 25A in its entirety is a change of law, it follows logically that Section 25A.006's removal provisions are changes in law, too."); *Winans*, 2024 WL 4796435, at *2 ("This argument ignores the plain language of the enabling legislation, which expressly states the changes in this law, i.e. Chapter 25A and its removal procedure, apply to cases commenced on or after September 1, 2024."); *XTO Energy*, 2024 Tex. Bus. 6 at ¶ 13 ("Thus, the Act's express statement that its changes in law apply to 'cases commenced on or after September 1, 2024' necessarily implies a reverse inference: that the change in law—removal, in this instance—does not apply to cases that were on file before that date.").

[23] Bestway does not contest that the commencement date for this action was prior to September 1, 2024. For a discussion of the meaning of "commenced" in the context of H.B. 19, see *Tema Oil*, 2024 WL 4796433, at *3 and *Jorrie*, 2024 WL 4796436 at *2.

[24] *See Lone Star*, 2024 Tex. Bus. 8 at ¶ 19 (holding same).

of which is based in Texas Government Code Section 25A.004.[25] This conclusion is consistent with the consensus view of Section 8 in the Business Court.[26]

B. Bestway may not rely on an alleged waiver to create subject-matter jurisdiction in the Business Court.

¶15 In the alternative, Bestway argues "[a]s discussed in the briefing in *Lone Star*, the fact that a statutory 'effective date' exists in a bill does not mean that that date cannot be waived."[27] To justify this argument, Bestway cites *Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), which overruled *Powell v. State*, 897 S.W.2d 307, 317 (Tex. Crim. App. 1994), by employing the doctrine of "invited error." The *Prystash* court held that since a criminal defendant had requested a certain jury instruction, he was estopped from complaining about its defectiveness on appeal. *Prystash*, 3 S.W.3d at 529–32. While there are clear and binding authorities addressing waiver, estoppel, and invited error surrounding a civil court's subject-matter jurisdiction,[28] Bestway appears to focus on *Prystash* because the portion of the relevant statute which the criminal defendant waived was its "effective date" provision.[29]

¶16 When it comes to the validity of an attempted "waiver," not all "effective date" provisions are created equal in the eyes of the law. It is fundamental that "[s]ubject-matter jurisdiction is an issue that may be raised for the first time on appeal; [and] it may

[25] *See* Procedural Background *supra* ¶¶ 4, 6 (discussing Bestway's alleged jurisdictional bases).
[26] *See generally* authorities cited, *supra* note 22.
[27] Bestway Brief at 5. Of course, the true effective date provision of H.B. 19 is Section 9. *See* Tex. H.B. 19 at § 9 ("This Act takes effect September 1, 2023."). However, in this instance, this distinction bears no legal significance.
[28] *See, e.g.*, authorities cited, *infra* ¶ 16.
[29] *See Prystash*, 3 S.W.3d at 529–32.

not be waived by the parties." *Tex. Ass'n of Bus.*, 852 S.W.2d at 445; *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) ("[S]ubject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver.") (internal quotations omitted); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) (explaining that a judgment is void when a court lacks subject-matter jurisdiction).[30] Thus, the success or failure of Bestway's waiver argument turns on the Court's determination of whether Section 8 of H.B. 19 is a jurisdictional provision in this context.

¶17 In this regard, the Court maintains its prior holdings that (1) Section 8 of H.B. 19 unambiguously operates as a jurisdictional provision when applied to Texas Government Code Section 25A.004 (entitled "Jurisdiction and Powers");[31] and therefore, (2) parties to a "civil action[] commenced"[32] before September 1, 2024 may not waive the application of Section 8 in order to establish subject-matter jurisdiction in the Business Court under Section 25A.004.[33]

V. CONCLUSION

¶18 Bestway has failed to establish that the Court has subject-matter jurisdiction over this case. *See* TEX. R. CIV. P. 355(b)(2)(A). As a result, the Court is required to remand

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[30] Likewise, the doctrine of invited error cannot serve as the basis for subject-matter jurisdiction where it otherwise does not exist. *Interest of A.F.*, 653 S.W.3d 730, 745 (Tex. App.—Fort Worth 2019, no pet.) (citing *In re Crawford & Co.*, 458 S.W.3d 920, 928 n. 7 (Tex. 2015)).

[31] *See Lone Star*, 2024 Tex. Bus. 8 at ¶ 23 ("The Court finds that Section 8 of H.B. 19 unambiguously operates as a jurisdictional provision when applied to Texas Government Code Section 25A.004 (entitled 'Jurisdiction and Powers')."); *Jorrie*, 2024 WL 4796436, at *3 ("The court concludes that Section 8 is jurisdictional."); ANALYSIS, *supra* at Section IV.A ("Bestway cannot rely on Chapter 25A to establish the Business Court's authority to hear this action because Chapter 25A only applies to civil actions commenced on or after September 1, 2024.").

[32] Tex. H.B. 19 at § 8.

[33] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 23.

this case to the district court. *See* TEX. GOV'T CODE § 25A.006(d) ("If the business court does not have jurisdiction of the [removed] action, the business court ***shall*** remand the action to the court in which the action was originally filed.") (emphasis added). Therefore, subject to the Court's stay issued in Paragraph 19 below, it is **ORDERED** that the Business Court Clerk shall remand this cause to the 270th Judicial District Court of Harris County, Texas.

¶19 Further, to the extent that the Court has the authority to do so, the Court **GRANTS** Bestway's request and **STAYS** the remand order contained herein, and all proceedings under this cause number, pending the resolution of the traditional appeal[34] and mandamus[35] arising out of *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, No. 24-BC01B-0007, 2024 Tex. Bus. 2 (Tex. Bus. Ct. Oct. 31, 2024).

SO ORDERED.

Hon. Sofia Adrogué
Texas Business Court, Eleventh Division

DATED: January 17, 2025

[34] *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, 15-24-00127-CV (traditional appeal filed November 12, 2024).
[35] *In re Synergy Global Outsourcing, LLC*, 15-25-00002-CV (mandamus proceeding filed January 3, 2025).

2025 Tex. Bus. 3

The Business Court of Texas,
First Division

Osmose Utilities Services, Inc.,	§	
Plaintiff,	§	
v.	§	
Navarro County Electric	§	Cause No. 24-BC01A-0011
Cooperative,	§	
Defendant.	§	
	§	
	§	

Syllabus[1]

Granting a motion for remand, the Court holds: (1) removal of an action to the Business Court means removal of the entire suit, and (2) regardless of whether an attempted partial removal presents a jurisdictional defect, the 2022 commencement date of the underlying lawsuit forecloses jurisdiction over the action by the Business Court.

[1] This syllabus is provided for the convenience of the reader; it is not part of the Court's opinion and should not be cited or relied upon as legal authority.

The Business Court of Texas,
First Division

Osmose Utilities Services, Inc., *Plaintiff,* v. Navarro County Electric Cooperative, *Defendant.*	§ § § § § § § §	Cause No. 24-BC01A-0011

Opinion and Order for Remand

1 Before the Court is *Navarro County Electric Cooperative, Inc.'s Urgent Motion to Remand*, challenging removal on the basis that partial removal is not permissible under the Government Code, and that the action is not within the Court's jurisdiction or authority. The Court agrees, and orders the action remanded back to the district court.

I. Procedural Background

2 The claims in Osmose Utilities Services, Inc.'s notice of partial removal were first asserted in underlying-plaintiff Eddie Martin's personal injury suit, filed in Ellis County in September 2022. Martin sued multiple defendants, including Navarro County Electric Cooperative, Inc., for severe injuries due to electrocution, later adding Osmose as a defendant. Osmose and NCEC report that NCEC settled with Martin in September 2024.

3 On October 16, 2024, Osmose filed a crossclaim against NCEC seeking declaratory relief and contractual indemnification for Martin's claims against Osmose pursuant to a General Services Agreement between the two co-defendants.

4 NCEC responded two days later with a counterclaim against Osmose, also seeking declaratory relief and alleging breach of the GSA and a subsequent pole inspection agreement.

5 On November 4, 2024, Osmose filed a partial removal notice of NCEC's counterclaim and Osmose's crossclaim against NCEC for adjudication in the Business Court.

6 NCEC moves for remand on numerous grounds. Osmose opposes remand.

II. Applicable Law

7 The Texas Business Court was "created September 1, 2024," and its governing law "appl[ies] to civil actions commenced on or after September 1, 2024." Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§5, 8, 2023 Tex. Sess. Law Serv. 919, 929. Accordingly, this Court has held repeatedly that it lacks jurisdiction or authority to hear actions commenced before September 1, 2024. *See, e.g.*, *Energy Transfer LP v. Culberson Midstream LLC*, 2024 Tex. Bus. 1, 24-BC01B-0005, 2024 WL 5320611 (Oct. 30, 2024); *Jorrie v. Charles,* 2024 Tex. Bus. 4, 24-BC04B-0001, 2024 WL 5337409 (Nov. 7, 2024); *Winans v. Berry*, 2024 Tex. Bus. 5, 24-BC04A-0002, 2024 WL 5337410 (Nov. 7, 2024).

8 The Fifteenth Court of Appeals recently denied a petition for writ of mandamus and motion for temporary relief following a consistent decision from this Division. *In re Westdale Asset Mgmt., Ltd.,* No. 15-24-00135-CV, 2025 WL 300912 (Tex. App.—15th Jan. 24, 2025, orig. proceeding). Thus, subject to the outcome of a permissive appeal currently before the Fifteenth Court of Appeals, it is currently accepted that all actions commenced before September 1, 2024, fall outside this Court's jurisdiction. *See Lone Star NGL Product Servs., LLC v. EagleClaw Midstream Ventures LLC*, 2024 Tex. Bus.

8, 2024 WL 5337407 (Dec. 20, 2024) (granting permissive appeal where parties jointly raise the issue of whether a pre-September 1 case can be removed based on the parties' subsequent agreement consenting to the Business Court's jurisdiction).

9 Still, the Legislature did not provide express definitions for the terms "civil action" or "action" as used in H.B. 19 or as codified in Chapter 25A of the Texas Government Code. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380; TEX. GOV'T CODE § 25A.001, *et seq*. In a prior decision, this Court held that Section 8 of H.B. 19 means that removal to the Business Court is only available for "cases begun on or after September 1, 2024." *Tema Oil & Gas Co. v. ETC Field Servs. LLC*, 2024 Tex. Bus. 3, at ¶14-18, 24-BC08B-0001, 2024 WL 5337411, at *3-4 (Nov. 6, 2024). As part of that opinion, the Court held that "[a] civil action is a lawsuit." *Id*. at ¶15.

10 Yet, the Court stopped short of holding that "action," as used in Chapter 25A, always refers to the entirety of a case or lawsuit. *C Ten 31 LLC v. Tarbox*, 2025 Tex. Bus. 1, at ¶31, 24-BC03A-0004, 2025 WL 224542, at *8 (Jan. 3, 2025). In *C Ten 31*, one of the questions at issue was whether the amount-in-controversy jurisdictional thresholds had to be satisfied on a per-claim basis. This Court held that the amount-in-controversy requirement is

not a "per-claim minimum" but could be satisfied by the amount at issue in the action as a whole. *Id.* at ¶26.

11 The Third Division explained: "[T]he Court does not hold that the term 'action' can never refer to less than all claims in a suit regardless of whether the claims are properly joined and within the Court's jurisdiction." *Id.* at ¶32. The Court noted that Chapter 25A contemplates remand of claims outside the boundaries of this Court's jurisdiction, such as supplemental claims where consent among the parties is lacking. *Id.* (citing TEX. GOV'T CODE §§ 25A.004(f), (g)(2)-(5), (h); 25A.006(b)-(d)). In such instances, the Court left open the possibility that a remanded action may encompass fewer than all of the claims in the removed action.

12 Statutory interpretation requires construction of the statute "as a whole," considering the words chosen within context. *Miles v. Tex. Cent. Railroad & Infrastructure, Inc.*, 647 S.W.3d 613, 619 (Tex. 2022) (quoting *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019)). "If the statute's plain language is unambiguous, we interpret its plain meaning, presuming that the Legislature intended for each of the statute's words to have a purpose and that the Legislature purposefully omitted words it did not include." *Id.*

13 "The statutory terms bear their common, ordinary meaning, unless the text provides a different meaning or the common meaning leads to an absurd result.'" *Silguero*, 579 S.W.3d at 59 (citing *Fort Worth Transp. Auth. V. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018)); *see also*, TEX. GOV'T CODE § 312.002(a) ("Except as provided by Subsection (b) [concerning particular trades, subject matter, or terms of art], words shall be given their ordinary meaning."). "The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity." *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).

14 Only in the case of ambiguity should a court consider extrinsic factors such as legislative history or the effect of a particular construction. *See* TEX. GOV'T CODE § 311.023; *but see also*, *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) ("[W]e do not consider legislative history or other extrinsic aides to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent."). "Only when statutory text is susceptible of more than one reasonable interpretation is it appropriate to look beyond its language for assistance in determining legislative intent." *Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012) (citing *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011)).

III. Discussion

15 NCEC's motion raises numerous grounds objecting to this Court's jurisdiction. The Court does not reach several of those issues, including: whether a cross-claim or counterclaim can or must be severed before it can proceed separately from another claim in the business court or another court of original jurisdiction; whether a claim for contractual damages calculated, either in whole or in part, based on another party's damages for bodily injury is within this Court's jurisdiction; and whether the action arises from a qualified transaction as that term is defined in Chapter 25A. Instead, the motion is resolved by a determination that Chapter 25A permits only removal of a lawsuit, and not individual claims within a lawsuit, and secondarily that this lawsuit commenced before September 1, 2024, making removal improper.

A. Interpretation of "Action"

16 The Court first addresses NCEC's contention that the partial removal is improper where Chapter 25A only authorizes the removal of an action, with "action" referring to the entire lawsuit. To date, every opinion from the Business Court has interpreted the term action to mean a lawsuit. *See, e.g.*, *Tema Oil & Gas*, 2024 Tex. Bus. 3 at ¶15; *C Ten 31*, 2025 Tex. Bus. 1 at ¶25-

31. While the procedural history and specific issues in this case differ from those addressed in previous opinions, such distinguishing facts do not change the meaning of action.

1. Plain Meaning

17 The analysis must start with the statute's plain meaning. As this Court has previously noted, the plain meaning of action is a lawsuit. *Tema Oil & Gas*, 2024 Tex. Bus. 3 at ¶15 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 11.001(2); Civil Action, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/civil%20action (last visited November 6, 2024)); *see also*, *C Ten 31*, 2025 Tex. Bus. 1 at ¶25-31.

18 The Court cannot read into the statute a definition of action broader than its ordinary meaning. "We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." *In re Panchakarla*, 602 S.W.3d 536, 540 (Tex. 2020) (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015)). Where the Legislature has intended "action" to mean something other than a lawsuit, the statute has expressly included such a definition. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 27.001(6) (defining "legal action" in Texas' anti-SLAPP law to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or

counterclaim or any other judicial pleading or filing that requests legal, declaratory or equitable relief," excluding certain other actions, motions, or proceedings.). The Court must presume that the absence of a similar definition in Chapter 25A is intentional. *Panchakarla*, 602 S.W.3d at 540.

19 The inquiry ends here unless the statute is ambiguous or leads to an absurd result. *Silguero*, 579 S.W.3d at 59.

2. Ambiguity

20 Throughout Chapter 25A, the Legislature uses various terms to refer to lawsuits or parts thereof. In defining the Court's jurisdiction and creating the removal and remand procedures for the Court, the Legislature uses the term action predominantly, but not exclusively. TEX. GOV'T CODE §§ 25A.004, 25A.006. And as noted above, each word used by the Legislature must be presumed to be intentional and purposeful. *Miles*, 647 S.W.3d at 619.

21 The Legislature expressly used the term "case" in Section 25A.006 subsections (i) and (j). These provisions deal with the consequences of removal on the due order of pleading, and the ability to raise defects in venue or objections to personal jurisdiction, respectively. TEX. GOV'T CODE § 25A.006(i), (j). The Legislature's discussion of the effect on certain rights of removal of a *case* immediately following the provisions for removal of an

action indicate via context that, at least here, case and action are used synonymously. *See Miles*, 647 S.W.3d at 619.

22 The Legislature also uses the term claim when setting forth the Court's jurisdiction, both for those matters included and those excluded. TEX. GOV'T CODE § 25A.004(b)-(h). Of note, Subsection 25A.004(b)(3) uses claim and action within the same sentence. That provision establishes the Court's jurisdiction over "an action in which a claim under a state or federal securities or trade regulation law is asserted against [certain parties]." TEX. GOV'T CODE § 25A.004(b)(e). Here, "an action in which a claim . . . is asserted" has only one reasonable interpretation: a lawsuit in which such a claim is pending.

23 Subsection (g) admittedly does not follow suit. It reads, in part, "[u]nless the claim falls within the business court's supplemental jurisdiction, the business court does not have jurisdiction of: (1) a civil action: (A) brought by or against a governmental entity; or (B) to foreclose on a lien on real or personal property; . . ." TEX. GOV'T CODE § 25A.004(f). In this one instance, it could be argued that action and claim are used synonymously, in that the particular actions listed are claims over which the

business court does not have jurisdiction unless it exists via supplemental jurisdiction. *See Miles*, 647 S.W.3d at 619.

24 Yet, that one instance among 18 other uses of action in the same section—not to mention the 40 uses of action in Section 25A.006—all of which are reasonably read according to the word's ordinary meaning, is not sufficient to create a second reasonable interpretation of Chapter 25A. *See* TEX. GOV'T CODE §§ 25A.004, 25A.006. Ambiguity requires that the statutory text be subject to more than one reasonable interpretation. *See Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016) (citing *Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632, 635 (Tex. 2013)); *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d at 452 (citing *Smith*, 333 S.W.3d at 586). The Court therefore finds that the Legislature's use of action does not render Chapter 25A ambiguous.

3. Absurdity

25 Osmose argues against remand on the basis that a narrow reading of "action" would lead to absurd results. In particular, Osmose argues that it would be absurd to interpret the statute to require that claims over which the Court unquestionably lacks jurisdiction be swept up in a removal, only to be dismissed or remanded upon arrival. The Court agrees that this procedure

may be imperfect from the standpoint of judicial economy but does not agree that such an interpretation rises to the level of absurdity. As noted above, "[t]he absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity." *Combs*, 401 S.W.3d at 630.

26 The procedure for removal of actions was designed to ensure that determinations of the business court's jurisdiction are made in, and by, the business court. *See* TEX. GOV'T CODE § 25A.006(b), (d) (mandating that the business court dismiss or remand actions that are not within its jurisdiction); *see also*, TEX. R. CIV. P. 355-357. Osmose's response expressly recognizes this to be the case. Because the governing statute and procedural rules contemplate the business court being the initial arbiter of its own jurisdiction, a process that achieves that objective cannot be absurd. Thus, the Court does not find that applying the ordinary meaning of action would lead to absurd results.

4. Conclusion

27 In sum, the sole reasonable interpretation of Chapter 25A with respect to actions is that an action means a lawsuit, and does not refer to each individual claim within a lawsuit. *See Miles*, 647 S.W.3d at 619; *Silguero*, 579 S.W.3d at 59; *Tex. Mut. Ins. Co.*, 381 S.W.3d at 452. Because the

Court's governing law and procedural rules only authorize removal of actions, Osmose's attempt to remove only part of the underlying case was improper. *See* TEX. GOV'T CODE § 25A.006(d); TEX. R. CIV. P. 355(f).

28 The Court does not address the issue of whether this defect is jurisdictional, or relatedly, whether it is curable, because NCEC's motion for remand is already subject to disposition on other established grounds as set forth below.

B. Commencement of Action

29 NCEC further argues that the Business Court must remand Osmose's cross-claim and NCEC's counterclaim because they are part of an action filed in 2022, before the creation of the Business Court. NCEC is correct that Chapter 25A applies only to "actions commenced on or after September 1, 2024." *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8. On this basis, the Court finds that NCEC's motion is well-taken and must be granted.

30 With the action being the underlying lawsuit, the relevant date is the date on which suit was filed in the district court—not the date on which the parties filed the discrete claims sought to be removed to this Court. *See* TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."). The action was commenced

when Martin filed his original petition in September 2022. Accordingly, as the Court has held in numerous prior decisions, the Court lacks jurisdiction over the action and it must be remanded. *See, e.g.*, *Energy Transfer LP, et al., v. Culberson Midstream LLC, et al.*, 2024 Tex. Bus. 1 (Tex. Bus. Ct. Oct. 30, 2024).

IV. Order

31 IT IS THEREFORE ORDERED that this matter is remanded to the 40th Judicial District Court, Ellis County, Texas.

Andrea K. Bouressa

ANDREA K. BOURESSA
Judge of the Texas Business Court,
First Division

SIGNED ON: January 31, 2025.

The Business Court of Texas
Eleventh Division

TIFFANY LYNN SEBASTIAN and MICHAEL JEFFREY SEBASTIAN, INDIVIDUALLY and DERIVATIVELY ON BEHALF OF THE CLASSIC DEALERSHIPS and 16835 CADET PARTNERS, LLC, *Plaintiffs*, v. T. BENTLY DURANT, THOMAS R. DURANT, THE DURANT CLASSIC DYNASTY TRUST, MICHAEL A. WARD, 8100 PARTNERS, LTD., 8100 MANAGEMENT LLC, 8705 PARTNERS, LTD., and 8705 MANAGEMENT LLC, *Defendants*.	§	Cause No. 25-BC11A-0001

SYLLABUS[1]

This opinion concludes that, under Section 8 of House Bill 19—the court's enabling legislation—the entirety of a civil action commences with the filing of the original petition, regardless of when additional parties and claims are joined.

[1] NOTE: The syllabus was created by court staff and is provided for the convenience of the reader. It is not part of the Court's opinion, does not constitute the Court's official description or statement, and should not be relied upon as legal authority.

Additionally, Chapter 25A of the Texas Government Code permits only the removal of an "action," and not the partial removal of individual claims within an action. The court orders remand based on its lack of jurisdiction.

The Business Court of Texas
Eleventh Division

TIFFANY LYNN SEBASTIAN and MICHAEL JEFFREY SEBASTIAN, INDIVIDUALLY and DERIVATIVELY ON BEHALF OF THE CLASSIC DEALERSHIPS and 16835 CADET PARTNERS, LLC, *Plaintiffs*, v. T. BENTLY DURANT, THOMAS R. DURANT, THE DURANT CLASSIC DYNASTY TRUST, MICHAEL A. WARD, 8100 PARTNERS, LTD., 8100 MANAGEMENT LLC, 8705 PARTNERS, LTD., and 8705 MANAGEMENT LLC, *Defendants*.	§ § § § § § § § § § § § § § § §	Cause No. 25-BC11A-0001

OPINION AND ORDER

¶1 Before the court are (1) Michael Sebastian's Motion to Remand filed January 9, 2025; (2) Tiffany Sebastian's Joinder in the Motion to Remand filed January 15, 2025; (3) the response filed by T. Bently Durant, Thomas R. Durant, the Durant Classic Dynasty Trust, Michael A. Ward, 8100 Partners, Ltd., 8100 Management LLC, 8705 Partners, Ltd., 8705 Management LLC (collectively "Defendants") and

by Classic Chevrolet Sugar Land, LLC, Classic Chevrolet West Houston, LLC, Classic Elite Buick GMC, Inc., and 16835 Cadet Partners, LLC (collectively "Classic"); and (4) the Sebastians' joint reply.

¶2 Having considered the parties' arguments and the relevant law, the court grants the Sebastians' motions and remands this cause to the district court.

Factual and Procedural Background

¶3 This suit originated as a divorce proceeding. On July 11, 2024, Ms. Sebastian filed an Original Petition for Divorce in the 387th Judicial District Court of Fort Bend County, Texas. At the time, both spouses worked for and owned interests in Classic.

¶4 In the weeks that followed, according to the Sebastians, the Defendants improperly purported to terminate the Sebastians' employment, strip them of their membership interests, and block their access to the entities' books and records.

¶5 On September 18, 2024, Mr. Sebastian filed a Counterpetition for Divorce, adding Classic as Co-Respondents. On December 3, 2024, the Sebastians jointly filed a Third-Party Petition that brought derivative claims on Classic's behalf and added the Durant and 8100 Defendants. The Sebastians amended those claims on December 20, 2024, adding third-party claims against the remaining Defendants. Meanwhile, the parties pursued settlement—seeking to negotiate a buyout of the

Sebastians' membership interests under the parties' buy-sell agreement—but their discussions stalled.

¶6 On January 2, 2025, Defendants and Classic (jointly "the Removing Parties") filed their Notice of Removal to the Texas Business Court, pleading that they "remove[d] the individual and derivative claims asserted by" the Sebastians but did "not agree to submit the determination of" the divorce cross-petitions. The Sebastians, in turn, sought remand to the district court. At a hearing on January 30, 2025, all parties appeared through counsel and presented their arguments.

Legal Standard

¶7 "A party to an action filed in district court or county court at law that is within the jurisdiction of the business court may remove the action to the business court." TEX. GOV'T CODE § 25A.006(d). If the Business Court lacks jurisdiction of a removed action, the court shall remand the action to the original court in which the action was filed. *Id.*; TEX. R. CIV. P. 355(f)(1).

¶8 Whether a court has subject-matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Analysis

I. Ms. Sebastian's Motion for Joinder

¶9 No party presented argument opposing Ms. Sebastian's motion for joinder of Mr. Sebastian's motion to remand. The court grants the motion for joinder,

collectively considers the Sebastians' arguments in favor of remand, and finds that both motions were timely filed within 30 days of removal. *See* TEX. R. CIV. P. 355(f)(2).

II. The Sebastians' Motion to Remand

A. The Texas Business Court lacks jurisdiction of actions commenced before September 1, 2024.

¶10 The Business Court of Texas is a specialty statutory court, created by the Texas Legislature to adjudicate complex commercial disputes. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 1, 2023 Tex. Sess. Law Serv. 919, 919 ("the Act"). The Act added a new chapter to the Texas Government Code: Chapter 25A. *Id.* § 1. Chapter 25A is entitled "Business Court," and it outlines the new court's composition by regional divisions; includes provisions for the appointment of the court's judges; and describes the procedures by which suits may be filed in, transferred to, or removed to the court. TEX. GOV'T CODE §§ 25A.003, 25A.006, 25A.008–.009, 25A.017.

¶11 The Code's new Chapter 25A also grants the Business Court its jurisdiction and powers. *Id.* § 25A.004. While the statute's effective date is September 1, 2023, the Business Court "is created September 1, 2024" and the Act's Section 8 specifies that the "changes in law made by this Act apply to civil actions commenced on or after September 1, 2024." Act at §§ 5, 8, 9. This court has consistently construed Section 8 as conferring jurisdiction of only those suits commencing on or after

September 1, 2024. *E.g., Jorrie v. Charles*, 2024 Tex. Bus. 4, 2024 WL 5337409 (Nov. 7, 2024); *Winans v. Berry*, 2024 Tex. Bus. 5, 2024 WL 5337410 (Nov. 7, 2024); *Bestway Oilfield, Inc. v. Cox*, 2025 Tex. Bus. 2, 2025 WL 251338 (Jan. 17, 2025); *Energy Transfer LP v. Culberson Midstream LLC*, 2024 Tex. Bus. 1, 2024 WL 5320611 (Oct. 30, 2024).

B. The court lacks jurisdiction of this action because it commenced in July 2024.

¶12 The Sebastians move to remand on the basis that this action commenced when the original divorce petition was filed—before September 1, 2024. The Removing Parties counter that the derivative and third-party claims on Classic's behalf or against the Defendants commenced new "actions" against them that allow the court to exercise jurisdiction here. They protest that they were improperly joined to the divorce suit and have not yet been served with any claims.

¶13 The Act does not define the terms "civil action" or "commence." "When a statute contains an undefined term, we typically give the term its ordinary meaning." *Hegar v. Am. Multi-Cinema, Inc.*, 605 S.W.3d 35, 41 (Tex. 2020).

1. Under the Act's Section 8, the *civil action* is the entire lawsuit.

¶14 The Removing Parties concede that the divorce suit filed by Ms. Sebastian in July 2024 is an "action." They also recognize that "'action' is generally synonymous with 'suit,'" and that "for there to be a 'suit' or 'action,' it is 'essential that it rest in a court, with the power to hear it." Resp. at 11 (quoting *Jaster v. Comet*

II Constr., Inc., 438 S.W.3d 556, 568 (Tex. 2014) (plurality op.)). In July 2024, the divorce action undisputedly rested in a state district court having power to hear it.

¶15 After September 2024, the Sebastians filed various additional pleadings: Mr. Sebastian's Counterpetition identifying Classic as "Co-Respondents" without pleading any express claims against them, the Sebastians' later addition of derivative claims on Classic's behalf, and the Sebastians' two successive pleadings asserting claims against the Defendants. None of those events spawned a new "civil action." The Sebastians' claims were all filed in, and part of, the same action—the one filed by Ms. Sebastian in July 2024 and assigned the cause number 24-DCV-318087 in the 387th Judicial District Court of Fort Bend County.

¶16 The Texas Supreme Court, construing "action" as an undefined term, has considered its "common meaning" as referring to the "entire lawsuit or cause or proceeding, not to discrete 'claims' or 'causes of action' asserted within a suit[.]" *Off. of Att'y Gen. of Tex. v. C.W.H.*, 531 S.W.3d 178, 183 (Tex. 2017). The Act similarly treats a *claim* not as a standalone lawsuit but as a component of an *action*. TEX. GOV'T CODE § 25A.004(b)(3) (granting jurisdiction of "an **action in which a claim** under a state or federal securities or trade regulation law is asserted . . .") (emphasis added). Other divisions of this court have recognized that "a civil action is a lawsuit." *Tema Oil & Gas Co. v. ETC Field Servs., LLC*, 2024 Tex. Bus. 3 at ¶15, 2024 WL 5337411, at *3 (Nov. 6, 2024), *quoted in C Ten 31 LLC v. Tarbox*, 2025

Tex. Bus. 1 at 16, 2025 WL 224542, at *7 (Jan. 3, 2025) (" 'action' relates to the lawsuit generally while 'claim' relates to individual rights and remedies asserted within the suit.").

¶17 The Removing Parties argue their joinder to the divorce suit was procedurally and substantively improper. Because the company-related claims are unrelated to the divorce, they contend, the removed case should be deemed a separate "civil action" and should have been severed under Texas Rule of Civil Procedure 41 from the beginning. Indeed, they correctly recognize that a partial removal to this court would amount to a *de facto* severance.

¶18 But the Act does not override the long-settled doctrine permitting only court-ordered severance. *See id.*; *F.F.P. Op. Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007) (quoting *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990)). Instead, the Act permits a party to "remove the action"—not independent claims—to the Business Court. TEX. GOV'T CODE § 25A.006(d). The court holds that the Removing Parties' opposed notice of partial removal could not unilaterally divide this case into a new "civil action" for purposes of Section 8.

¶19 Under the Act's Section 8, *civil action* refers to the entire lawsuit, including the divorce cross-petitions and the later-filed claims involving the Removing Parties.

2. This civil action commenced before September 1, 2024.

¶20 This action commenced with the original divorce petition in July 2024. TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."). Because the court holds that no subsequent pleading created a new lawsuit, the entirety of this action—including the claims on Classic's behalf and against Defendants—"commenced" before September 2024.

¶21 The First Division of this court recently reached the same conclusion. *See Osmose Utils. Servs., Inc. v. Navarro Cnty. Elec. Coop.*, 2025 Tex. Bus. 3, 24-BC01A-0011 (Jan. 31, 2025). As in this case, Osmose attempted a partial removal, asking the Business Court to hear only the contractual claims involving Osmose and not the underlying personal-injury claims that pre-dated September 2024. *Id.* at ¶¶ 2–5. The court remanded, concluding that "the sole reasonable interpretation of Chapter 25A" was that "an action means a lawsuit, and does not refer to each individual claim within a lawsuit." *Id.* at ¶ 27. Accordingly, under the Act's Section 8, "the relevant date is the date on which suit was filed in the district court—not the date on which the parties filed the discrete claims sought to be removed to this Court." *Id.* at ¶ 30.

¶22 Sitting *en banc*, the Third Court of Appeals was similarly faced with a statute applying only to actions "commenced on or after" the legislation's effective date. *S & P Consulting Eng'rs, PLLC v. Baker*, 334 S.W.3d 390, 395 (Tex. App.—Austin

2011, no pet.) (en banc). The appellate court concluded "for purposes of the effective date" that "the filing of the original petition commences the action with respect to all parties regardless of when they are brought into the action." *Id.* at 396. Here, too, this action commenced in July 2024, regardless of when the Removing Parties were joined.

¶23 The Removing Parties claim they were not yet properly served, but the Act's effective date hinges on the date an action "commences," not on the date a plaintiff effects service or "brings suit." *See Tex. State Univ. v. Tanner*, 689 S.W.3d 292, 300 (Tex. 2024) (describing "distinction between 'bringing' and 'filing'" suit to satisfy statute of limitations). The Removing Parties certainly do not contend the case could have fallen within the Act's purview if only the Sebastians had effected service sooner.

¶24 The nonbinding precedent analyzing when an action commenced "**as to**" a certain defendant cannot alter the outcome, either:

- For purposes of triggering expert deadlines, holding "an action commences **as to** each defendant when it is first named as a defendant." *Morris v. Ponce*, 584 S.W.3d 922, 928 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).
- For purposes of triggering defendant's removal deadlines, holding "under Texas law, the action commenced **as to** [the defendant] when it was first named[.]" *Granite State Ins. Co. v. Chaucer Syndicate 1084 at Lloyd's*, CV-H-20-1588, 2020 WL 8678020, at *10 (S.D. Tex. July 14, 2020).

The Removing Parties rely on these and other cases construing when an action "commenced" as to a given party for purposes of triggering **that party's** rights or

obligations. *E.g., Martinez v. Gonzales*, No. 13-14-00241-CV, 2015 WL 5626242, at *4 (Tex. App.—Corpus Christi–Edinburg Sept. 17, 2015, pet. denied) (mem. op.) (construing *commencement* for purposes of "triggering the applicable [expert] deadline"); *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 400 (Tex. 2011) (noting plaintiff's amendment does not relate back to original pleading to toll her limitations deadline).[1]

¶25 But the question before this court is not merely one of when a certain party's rights or duties were triggered. The question is whether this court has jurisdiction of the suit at all. And the court has consistently held in multiple contexts and across multiple divisions that it lacks jurisdiction over **actions** preceding the Act's specified date. *E.g.*, *Seter v. Westdale Asset Mgmt., Ltd.*, 2024 Tex. Bus. 7 at ¶ 2, 2024 WL 5337346, at *1 (Dec. 16, 2024) ("In six prior instances, this Court has remanded actions commenced before September 1, 2024, for lack of authority or want of jurisdiction."), *mandamus pet. denied in In re Westdale Asset Mgmt.*, Ltd.,

[1] *See also Rigo Mfg. Co. v. Thomas*, 458 S.W.2d 180, 182 (Tex. 1970) (requiring diligent service for "commencement" of suit to trigger plaintiff's tolling of limitations); *Travelers Ins. Co. v. Brown*, 402 S.W.2d 500, 503 (Tex. 1966) (construing whether plaintiff "commence[d] any proceeding . . . seeking damages from the" defendant under its contractual defense); *Marez v. Moeck*, 608 S.W.2d 740, 742 (Tex. App.—Corpus Christi 1980, no writ) (requiring amended petition against proper party to trigger plaintiff's tolling of limitations). The *en banc* Austin Court of Appeals made an analogous distinction in *S & P*, noting that the "[c]ontext is critical, as are the consequences of a particular construction." 334 S.W.3d at 398 n.10 ("instead of determining whether a claim is unnecessarily barred by an unintended use of a statute, we are considering which version of a statute the legislature wanted to be applicable on the facts before us.").

No. 15-24-00135-CV, 2025 WL 300912 (Tex. App.—15th Jan. 24, 2025, orig. proceeding). The court construes the Act's Section 8 as an all-or-nothing jurisdictional grant as to suits commencing on or after September 1, 2024. *See id.*; *Jorrie*, 2024 Tex. Bus. 4 at 8. The clause's common meaning reflects no intent for each addition of a new party to revive the Business Court's jurisdiction on suits that were otherwise too old to satisfy Section 8.

¶26 To be clear, the court does not reach its decision based on whether the Sebastians' "cause of action" accrued against any defendant before September 1. Whether the parties exchanged demand letters or had a "right to relief" before that date is not dispositive here. *See* Resp. at 11. Instead, the *civil action* itself commenced in July upon the filing of the original petition.

¶27 The Removing Parties insist the Business Court is a more appropriate forum for the corporate-governance and derivative matters against them. And the Sebastians concede those matters substantively fall within the Act's subject-matter jurisdiction, but they counter that the "issues are too entwined" to bifurcate this suit. *See* Reply at 3, 4. Having concluded it lacks jurisdiction for the reasons above, the court expresses no opinion on whether the buy-sell litigation and remaining commercial disputes should be severed from the family-law claims or whether joinder was timely, necessary, or proper.

Conclusion and Order

¶28 For the reasons stated above, the court lacks jurisdiction of this suit and must remand it. The court **GRANTS** Tiffany Sebastian's Motion to Remand and Michael Sebastian's Motion for Joinder. The cause is **REMANDED** to the 387th Judicial District Court of Fort Bend County, Texas.

SO ORDERED.

STACY ROGERS SHARP
Judge of the Texas Business Court,
Fourth Division

SIGNED ON: February 4, 2025

FILED IN
BUSINESS COURT OF TEXAS
BEVERLY CRUMLEY, CLERK
ENTERED
2/10/2025

2025 Tex. Bus. 5

The Business Court of Texas,
1st Division

PRIMEXX ENERGY OPPORTUNITY FUND, LP and PRIMEXX ENERGY OPPORTUNITY FUND II, LP, *Plaintiffs*,	§	
v.	§	Cause No. 24-BC01B-0010
PRIMEXX ENERGY CORPORATION, M. CHRISTOPHER DOYLE, ANGELO ACCONCIA, BLACKSTONE HOLDINGS III LP, BLACKSTONE EMA II LLC, BMA VII LLC, BLACKSTONE ENERGY MANAGEMENT ASSOCIATES II LLC, BLACKSTONE ENERGY PARTNERS II LP, BLACKSTONE MANAGEMENT ASSOCIATES VII LLC, BLACKSTONE CAPITAL PARTNERS VII LP, BCP VII/BEP II HOLDINGS MANAGER LLS, BX PRIMEXX TOPCO LLC, and BPP HOLDCO LLC, *Defendants*	§	

MEMORANDUM OPINION AND ORDER

[¶ 1] Before the court are special appearances by Blackstone Holdings III LP, Blackstone EMA II LLC, BMA VII LLC, Blackstone Energy Management Associates II LLC, Blackstone Energy Partners II LP, Blackstone Management Associates VII LLC, Blackstone Capital Partners VII LP, BCP VII/BEP II Holdings Manager LLC, and BX Primexx Topco LLC (Blackstone Defendants).[1] Having considered the parties' arguments, pleadings, special appearances, submissions, and relevant law, the court signed an Order on January 17, 2025, denying the Blackstone Defendants' special appearances. This opinion follows.[2]

[¶ 2] The dispositive issue is whether filing an answer in an earlier iteration of the dispute in one court consents to personal jurisdiction to litigate

[1] Each Blackstone Defendant is alleged to be a "direct subsidiary" of Blackstone, Inc. 10/25/24 Plaintiffs' Original Petition (Pet.) ¶ 17. Defendant BPP HoldCo LLC did not join its fellow affiliates in filing a special appearance and is excluded from the definition of "Blackstone Defendants."

[2] The court entered its Order denying Blackstone Defendants' special appearances on January 17, 2025. On January 24, 2025, Plaintiffs filed a First Amended Petition. The thrust of Plaintiffs' amendment to its pleading was to add Blackstone, Inc. as a defendant. Because the court's Order was based on the Original Petition, this Memorandum Opinion and Order addresses Plaintiffs' Original Petition.

the same dispute in a later-filed suit in a different court in the same state. The court concludes that it does because the focus is on the defendants' consent to litigate the dispute in the state—not a particular court within the state.

I. Background

[¶ 3] This case arises from a private equity investment in a limited partnership. Plaintiffs assert direct and indirect liability claims against Defendants for breaching statutory and contract duties in forcing a sale of the partnership's business to a third party. The court discusses only those facts relevant to the Blackstone Defendants' special appearances.

A. Plaintiffs' Original Petition

[¶ 4] Primexx Resource Development, LLC (PRD) was an energy company operating in the Delaware Basin.[3] "Blackstone"[4] is alleged to have acquired a majority interest in PRD through Defendant BPP HoldCo LLC by investing in a partnership called Primexx Energy Partners, Ltd. (PEP).[5] A

[3] Pet. ¶ 1.

[4] Plaintiffs' Original Petition inconsistently refers to "Blackstone" to mean either (i) every defendant that is alleged to be a subsidiary of Blackstone (*see* Pet. ¶s 1 fn.1, 37) or (ii) just Defendant BPP HoldCo LLC (Pet. ¶ 27). In most instances, it appears that Plaintiffs intend "Blackstone" to refer to every Blackstone, Inc.-affiliated defendant.

[5] Pet. ¶s 1, 38.

Third Amended and Restated Limited Partnership Agreement (TAPA) governs investments in PEP.[6]

[¶ 5] Plaintiffs are Primexx Energy Opportunity Fund LP (PEOF I) and Primexx Energy Opportunity Fund II (PEOF II). PEOFs were PEP limited partners.[7]

[¶ 6] Beginning in June 2021, Callon Petroleum Company made "a series of lowball offers to purchase Primexx."[8] PEOFs claim that the Callon offer "almost exclusively benefitted [Blackstone] while destroying the value for all other investors (including [PEOF]s)."[9]

[¶ 7] Despite the above, Blackstone announced the sale Friday, July 30, 2021.[10] Blackstone demanded that the board approve the sale by Monday, August 2, 2021.[11] The sale closed on October 1, 2021.[12] PEOFs thereafter

[6] Pet. ¶s 1, 38.

[7] Pet. ¶s 38, 51.

[8] Pet. ¶ 2.

[9] Pet. ¶ 3.

[10] Pet. ¶ 3.

[11] Pet. ¶ 3.

[12] Pet. ¶ 80.

sued Defendants, claiming they breached their contract and statutory duties to act in good faith and with loyalty and due care.[13]

B. Procedural History

1. First Action

[¶ 8] PEOFs originally sued in Dallas County District Court on December 12, 2022 (First Action).[14] As discussed in part below, PEOFs argue that the instant case is effectively the same dispute as the First Action. The First Action included every Blackstone Defendant.

[¶ 9] Blackstone Defendants filed answers in the First Action without filing special appearances.[15] They also moved to dismiss the First Action based on a TAPA forum-selection clause.[16] The court granted that motion and dismissed the First Action on March 29, 2023.[17]

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[13] Pet. ¶ 4.

[14] Pet. ¶ 5 (citing *Primexx Energy Opp. Fund, LP et al. v. Primexx Energy Corp. et al.*, No. DC-22-17122 (District Court of Dallas County, Texas, 298th Judicial District)).

[15] Plaintiffs' Opposition to Blackstone Defendants' Special Appearances (Opp. to Blackstone SA) Exhibit 2.

[16] Pet. ¶ 5; Pet. Exhibit 2.

[17] Pet. ¶ 6; Pet. Exhibit 3.

2. Second Action

[¶ 10] PEOFs re-filed in the United States District Court for the Northern District of Texas on May 4, 2023 (Second Action).[18] PEOFs added Blackstone Inc. executive Angelo Acconcia as a defendant, but otherwise the parties remained the same.[19] That court later dismissed the case *sua sponte* for lack of subject matter jurisdiction.[20]

3. Third Action

[¶ 11] PEOFs again sued in Dallas County on July 31, 2023 (Third Action).[21,22] Angelo Acconcia and the Blackstone Defendants filed special appearances.[23]

[¶ 12] Nonspecially appearing defendants filed an unopposed motion to transfer from the 68th Judicial District to the 298th Judicial District.[24] They

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[18] Pet. ¶ 7 (citing *Primexx Energy Opp. Fund, LP et al. v. Primexx Energy Corp. et al.*, No. 3:23-cv-00985-K (N.D. Tex. 2023)).

[19] Pet. ¶ 7.

[20] Pet. ¶s 8–9; Pet. Exhibits 4, 5.

[21] Pet. ¶ 10 (citing *Primexx Energy Opp. Fund, LP et al. v. Primexx Energy Corp. et al.*, DC-23-10916 (District Court of Dallas County, Texas, 68th Judicial District)).

[22] PEOFs' petition states that it filed again in the 298th Judicial District, but this is contradicted by Opp. to Blackstone SA Exhibit 3 (Motion to Transfer from the 68th to 298th Judicial District Court of Dallas County).

[23] Pet. ¶ 10.

[24] Opp. to Blackstone SA Exhibit 3.

stated that "[PEOF]s filed the instant action, alleging the same claims against the same parties arising out of the same transaction as the First Action that the 298th District Court previously dismissed … (while also adding one additional defendant, Angelo Acconcia)."[25] "Indeed, many of the allegations in the instant action are word-for-word verbatim [] in the First Action."[26]

[¶ 13] The case apparently was later transferred to the 298th District Court.[27]

[¶ 14] PEOFs filed a Notice of Removal to the First Business Court Division.[28] All defendants consented to the removal.[29] This court ordered the parties to submit briefing regarding what effect, if any, Section 8 of Acts 2023, 88th Leg., ch. 380 (H.B. 19) had on the removal of the Third Action.[30] The parties agreed to dismiss the removed action without prejudice and the case was dismissed on October 18, 2024.[31]

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[25] Opp. to Blackstone SA Exhibit 3 at 2.

[26] Opp. to Blackstone SA Exhibit 3 at 2.

[27] *See* Pet. Exhibit 6 at 5 (Plaintiffs' Notice of Removal to the Business Court).

[28] Pet. ¶ 11 (citing Pet. Exhibit 6).

[29] Pet. ¶ 11.

[30] Pet. ¶ 11.

[31] Pet. ¶ 11.

4. Instant Action

[¶ 15] PEOFs filed the instant suit on October 25, 2024. This Original Petition is substantially identical to the petition in the Third Action that the parties previously tried to remove here, which the nonspecially appearing defendants had in turn stated "alleg[ed] the same claims against the same parties arising out of the same transaction as the First Action."[32] Accordingly, the active pleading here asserts the same causes of action arising out of the same transaction as the First Action against the same Blackstone Defendants.

C. Jurisdictional Fact Allegations

[¶ 16] PEOFs' petition alleges generally as to all "Defendants":

> This Court has personal jurisdiction over all Defendants because they consented to personal jurisdiction in Dallas, Texas in the Third Amended and Restated Limited Partnership Agreement, which established Dallas as the principal place of business for the partnership. All Defendants continuously and systematically did business in the State of Texas, have purposefully availed themselves of the privilege of conducting activities inside the State of Texas, and invoked the benefits and protections of the laws of the State of Texas.[33]

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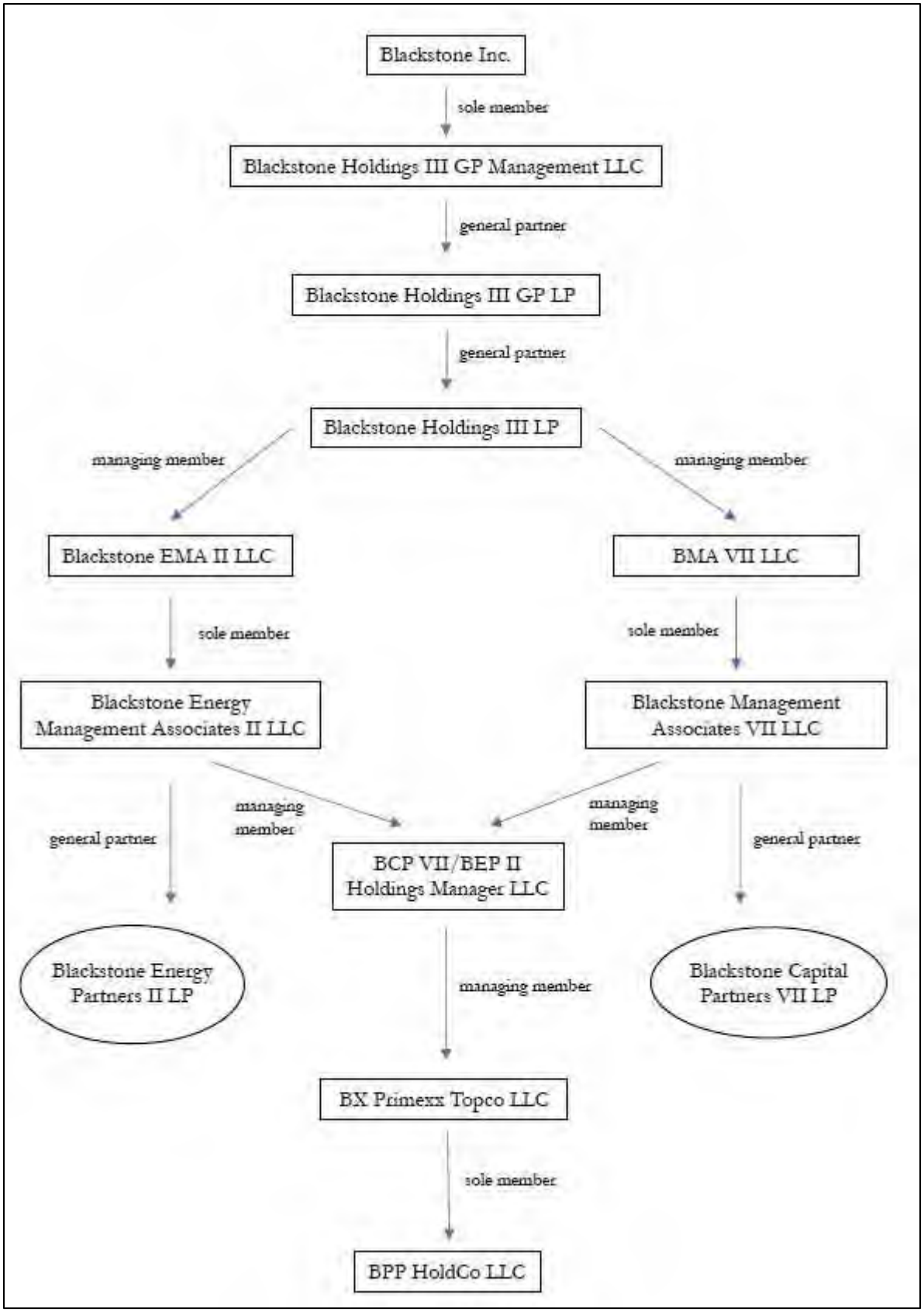
[32] *See* 24-BC01B-0004, APPX_0001–0036 to 9/27/24 Notice of Removal to Business Court; Opp. to Blackstone SA Exhibit 3 at 2.

[33] Pet. ¶ 31.

[¶ 17] None of the Blackstone Defendants are alleged to be Texas residents.[34] Instead, PEOFs allege that "[a]ll of the Blackstone entities named as Defendants are direct subsidiaries of Blackstone Inc., a corporation with citizenship in New York … and Delaware."[35] Based on the corporate structure shown below, PEOFs allege that "every Blackstone entity named here is, at a minimum, a citizen of New York and Delaware":

[34] Pet. ¶s 17–26.

[35] Pet. ¶ 17.


Blackstone Inc.
sole member
Blackstone Holdings III GP Management LLC
general partner
Blackstone Holdings III GP LP
general partner
Blackstone Holdings III LP
managing member
managing member
Blackstone EMA II LLC
BMA VII LLC
sole member
sole member
Blackstone Energy Management Associates II LLC
Blackstone Management Associates VII LLC
general partner
managing member
managing member
general partner
BCP VII/BEP II Holdings Manager LLC
Blackstone Energy Partners II LP
managing member
Blackstone Capital Partners VII LP
BX Primexx Topco LLC
sole member
BPP HoldCo LLC

[¶ 18] Based on the above diagram, PEOFs allege that "Blackstone used a combination of subsidiaries to manage BPP HoldCo LLC," which was a limited partner in the same partnership as PEOFs.[36]

[¶ 19] In opposing the Blackstone Defendants' special appearances, PEOFs identify specific allegations against each specially appearing Defendant.[37] PEOFs' allegations distill to two groups: (i) those against Blackstone Energy Partners II LP and Blackstone Capital Partners VII LP as "Blackstone Investors," and (ii) those against all other Blackstone Defendants.

[¶ 20] PEOFs allege that (i) the TAPA referenced Blackstone Investors by name and stated that capital for the agreement would come from them and (ii) a noncompetition provision in the TAPA specifically refers to the Blackstone Investors.[38] However, neither one is alleged to be a party to the TAPA.

[¶ 21] PEOFs allege the remaining Blackstone Defendants each (i) received millions of Callon shares in consideration for the Callon sale; (ii) is in

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[36] Pet. ¶s 40–41.

[37] Opp. to Blackstone SA at 6–10.

[38] Opp. to Blackstone SA at 7–8.

the corporate chain above BPP HoldCo LLC, which signed the TAPA; and (iii) is listed on SEC filings in connection with the sale.[39] None of these Defendants are alleged to be a party to the TAPA.

D. Parties' Arguments

[¶ 22] Defendants argue that PEOFs failed to allege sufficient, particularized jurisdictional facts supporting specific personal jurisdiction over any of the Blackstone Defendants (general jurisdiction was not asserted).[40] Defendants further argue that even assessed together, PEOFs' generalized allegations do not support specific jurisdiction over any specially appearing Defendant because PEOFs make no assertion that they performed any acts in Texas.[41] Defendants further argue that the few specific allegations concerning the Blackstone Investors and the remaining Blackstone Defendants listed above are not substantively connected to the challenged asset sale.[42]

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[39] Opp. to Blackstone SA at 7–10.

[40] Defendants' Verified Special Appearances (Blackstone SA) at 7.

[41] Blackstone SA at 7–8.

[42] Blackstone SA at 9–10.

[¶ 23] PEOFs respond that the Blackstone Defendants conducted substantial business in Texas in that they (i) had direct involvement in the investment in PRD, a Texas oil company, and the sale of those Texas oil assets at issue; (ii) either invested millions of dollars into PRD/PEP or received millions of shares from the Callon sale; (iii) are all in the same direct chain of entities that manage BPP HoldCo LLC, a PEP limited partner; and (iv) were involved in the TAPA and investment in PRD/PEP and its governance.[43]

[¶ 24] PEOFs further argue that regardless of their forum contacts, the Blackstone Defendants either (i) are estopped from arguing that the TAPA's forum-selection clause does not apply to them because they sought and received affirmative relief in the First Action by arguing the same or (ii) waived their right to object to personal jurisdiction by making a general appearance in the First Action.[44] Alternatively, PEOFs seek a continuance to conduct jurisdictional discovery, which they say Defendants avoided.[45]

[43] Opp. to Blackstone SA at 4–5, 7–10.

[44] Opp. to Blackstone SA at 16–20.

[45] Opp. to Blackstone SA at 28–29.

[¶ 25] Defendants reply that PEOFs have not shown that any Blackstone Defendants were involved in the Callon sale.[46] Defendants further argue that the TAPA was created five years before the Callon sale and lacks connection to the asserted claims.[47] Defendants argue they are not estopped because they have consistently argued PEOFs were signatories to the TAPA and bound by the forum-selection clause when bringing claims under the TAPA.[48]

[¶ 26] Regarding waiver, Defendants rely on *James v. Illinois Cent. R.R. Co.*, 965 S.W.2d 594 (Tex. App.—Houston [1st Dist.] 1998, no pet.) and *Megadrill Services Ltd. v. Brighouse*, 556 S.W.3d 490 (Tex. App.—Houston [14th Dist.] 2018, no pet.) for the premise that a defendant does not consent to jurisdiction merely by defending prior suits in Texas.[49]

[¶ 27] At the November 21, 2024, hearing, Defendants referred to a third case, *Grynberg v. M-I L.L.C.*, 398 S.W.3d 864 (Tex. App.—Corpus Christi

[46] Defendants' Omnibus Reply in Support of Special Appearances (Reply ISO Blackstone SA) at 2.

[47] Reply ISO Blackstone SA at 2.

[48] Reply ISO Blackstone SA at 4–5.

[49] Reply ISO Blackstone SA at 5–7.

2012, pet. denied), for the point that appearing in matters "ancillary" and prior to the main suit does not waive a personal jurisdiction challenge.[50]

[¶ 28] The court concludes that the Blackstone Defendants consented to Texas' jurisdiction in this action (*i.e.*, waived their right to object to personal jurisdiction).

II. Applicable Law

A. Special Appearances

[¶ 29] Texas Rule of Civil Procedure 120a governs special appearances. It provides:

> a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State.

TEX. R. CIV. P. 120a(1).

[¶ 30] A special appearance may be made as to "an entire proceeding" or any severable claim involved therein. *Id.* Every appearance, prior to judgment, not in compliance with this rule is a general appearance. *Id.*

[50] 11/21/24 Hr. Trs. at 123:20–124:5.

[¶ 31] A party availing itself of Rule 120a must strictly comply with its terms because failure to do so results in waiver. *PetroSaudi Oil Servs. Ltd. v. Hartley*, 617 S.W.3d 116, 136 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

[¶ 32] Thus, a party waives its special appearance when it (i) invokes the court's judgment on any question other than the court's jurisdiction; (ii) recognizes by its acts that an action is properly pending; or (iii) seeks affirmative action from the court. *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004) (per curiam) (citing *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998)). But a party does not waive its jurisdictional challenge by seeking affirmative relief consistent with the special appearance. *Nationwide Distrib. Servs., Inc. v. Jones*, 496 S.W.3d 221, 225 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

B. *In Personam* Jurisdiction

[¶ 33] A nonresident defendant is subject to personal jurisdiction in Texas if (i) the Texas long-arm statute authorizes the exercise of jurisdiction and (ii) the exercise of jurisdiction does not violate federal or state constitutional due process guarantees. *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010).

[¶ 34] The Texas long-arm statute's broad "doing business" language allows the trial court's jurisdiction to "reach as far as the federal constitutional requirements of due process will allow." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007) (quoting *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991)).

[¶ 35] Therefore, courts need "only analyze whether [the defendant]'s acts would bring [the defendant] within Texas' jurisdiction consistent with constitutional due process requirements." *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009).

[¶ 36] A state's exercise of jurisdiction comports with federal due process if (i) the nonresident defendant has "minimum contacts" with the state and (ii) the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc.*, 512 S.W.3d 878, 885 (Tex. 2017) (quoting *Walden v. Fiore*, 571 U.S. 277, 283 (2014)).

1. Minimum Contacts

[¶ 37] A defendant establishes minimum contacts with a state when it "purposefully avails itself of the privilege of conducting activities within the

forum state, thus invoking the benefits and protections of its laws." *Retamco*, 278 S.W.3d at 338.

[¶ 38] Courts consider three issues in determining whether a defendant purposefully availed itself of the privilege of conducting activities in Texas:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Id. at 339 (quoting *Moki Mac*, 221 S.W.3d at 575); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005).

[¶ 39] The minimum-contacts analysis focuses on the "quality and nature of the defendant's contacts," not quantity. *Retamco*, 278 S.W.3d at 339.

[¶ 40] "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Id.* at 338 (quoting *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002)).

a. Specific Personal Jurisdiction

[¶ 41] Specific jurisdiction requires that "(1) the defendant purposefully avails itself of conducting activities in the forum state, and (2) the cause of action arises from or is related to those contacts or activities." *Retamco*, 278 S.W.3d at 338 (buying Texas real estate) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). "The 'arise from or relate to' requirement lies at the heart of specific jurisdiction by defining the required nexus between the nonresident defendant, the litigation, and the forum." *Moki Mac*, 221 S.W.3d at 579; *Guardian Royal*, 815 S.W.2d at 228 (specific jurisdiction focuses on "the relationship among the defendant, the forum and the litigation").

[¶ 42] For a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, "there must be a substantial connection between those contacts and the operative facts of the litigation." *Moki Mac*, 221 S.W.3d at 585. The "operative facts" of a litigation are those that "will be the focus of the trial" and "will consume most if not all of the litigation's attention." *Id.* at 585.

[¶ 43] Specific jurisdiction requires courts to analyze jurisdictional contacts on a claim-by-claim basis. *Moncrief Oil Int'l Inc. v. OAO Gazprom*,

414 S.W.3d 142, 150 (Tex. 2013); *see also Seiferth v. Helicopteros Atuneros*, Inc., 472 F.3d 266, 274–75 (5th Cir. 2006) ("If a defendant does not have enough contacts to justify the exercise of general jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant's forum contacts."). But a court need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contact. *Moncrief*, 414 S.W.3d at 150–51.

2. Fair Play and Substantial Justice

[¶ 44] If the minimum contacts requirements are met, it is "rare" for exercising personal jurisdiction to not comply with fair play and substantial justice. *Retamco*, 278 S.W.3d at 341. Nonetheless, courts still consider factors to ensure that exercising jurisdiction does not offend traditional notions of fair play and substantial justice:

> (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies.

Id. (citing *Burger King*, 471 U.S. at 477–78).

3. The Parties' Burdens

[¶ 45] The plaintiff "bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach of Texas's long-arm statute." *Kelly*, 301 S.W.3d at 658. If the plaintiff fails to plead facts bringing the defendant within reach of the long-arm statute the defendant need only prove that it does not live in Texas to negate jurisdiction. *Id.* at 658–59. "Once the plaintiff has pleaded sufficient jurisdictional allegations, the defendant filing a special appearance bears the burden to negate all bases of personal jurisdiction alleged by the plaintiff." *Id.* at 658.

[¶ 46] "Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading." *Id.* Defendant can negate jurisdiction on either a factual or legal basis. *Id.* at 659.

[¶ 47] Factually, a defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations. *Id.* The plaintiff must then respond with its own evidence that affirms its allegations or else risk dismissal. *Id.* However, the court considers "additional evidence," including, "stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes,

and any oral testimony," only to the extent it supports or undermines the pleadings' allegations. *Id.* at 658 n.4 (citing TEX. R. CIV. P. 120a(3)). If the plaintiff's evidence is not within the scope of the pleadings' factual allegations, the plaintiff should amend the pleadings for consistency. *Id.* at 659 n.6.

[¶ 48] Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction either (i) because the defendant's contacts with Texas fall short of purposeful availment (including that the claims do not arise from the contacts) or (ii) that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction. *Id.* at 659.

III. Discussion

A. Blackstone Defendants' General Appearance

[¶ 49] To begin, "personal jurisdiction is a 'waivable right' and [a defendant] may give 'express or implied consent to the personal jurisdiction of the court.'" *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 704 (Tex. App.—Dallas 2010, no pet.) (quoting *Burger King Corp.*, 471 U.S. at 473 n.14). "To the extent a party has consented to jurisdiction in a particular forum, the trial court's exercise of personal jurisdiction over it does not violate due process

even in the absence of contacts with Texas." *Id.*; *Megadrill*, 556 S.W.3d at 497.

[¶ 50] Here, Blackstone Defendants made general appearances in the First Action by seeking affirmative action from the court and filing an answer without filing special appearances. *Exito Elecs.*, 142 S.W.3d at 304; TEX. R. CIV. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance.").

[¶ 51] First, each Blackstone Defendant moved to dismiss the First Action, seeking affirmative relief from the court and invoking its judgment regarding the TAPA's forum-selection clause.[51] That motion was granted, and the First Action was dismissed. Second, the Blackstone Defendants filed an answer in the First Action not subject to any jurisdictional challenge.[52]

[¶ 52] During the November 21, 2024, hearing, their counsel argued for the first time that PEOFs' petition in the First Action—through a drafting error or otherwise—failed to actually articulate any claims against the Blackstone Defendants.[53]

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[51] Opp. to Blackstone SA Exhibit 1.

[52] Opp. to Blackstone SA Exhibit 2.

[53] 11/21/24 Hr. Trs. At 122:11–123:11 (pointing out that the Petition in the First Action asserted claims against "Blackstone," which was defined as meaning only "BPP HoldCo").

[¶ 53] Regardless, it is quintessential that "by filing [an] answer, unconditioned by a special appearance" a defendant "acknowledge[s] that the case [i]s properly pending before *a Texas court*." *Massachusetts Bay Ins. Co. v. Adkins*, 615 S.W.3d 580, 600 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (emphasis original); *Exito Elecs.*, 142 S.W.3d at 304. Blackstone Defendants' last-minute attempt to find fault in PEOFs' petition does not erase the fact that they answered in the First Action, thereby entering a general appearance and waiving any objection to personal jurisdiction. *PetroSaudi*, 617 S.W.3d at 136; *Nationwide Distribution Servs.*, 496 S.W.3d at 224.

[¶ 54] Therefore, Blackstone Defendants waived their right to object to personal jurisdiction in the First Action and consented to litigate these claims in at least the 298th District Court of Dallas County, Texas.

B. Blackstone Defendants' Consent to Litigate these Claims in Texas

[¶ 55] Because a special appearance may be made as to "an entire proceeding" or otherwise is waived, TEX. R. CIV. P. 120a(1), one way to phrase

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The Court notes that in Defendants' reply, they argued a contradictory position. *See* Reply ISO Blackstone SA at 4 ("In DC-22-17122, PEOF asserted claims under the LPA against both signatories and nonsignatories (*the Attenuated Blackstone Defendants among them*)." (emphasis added)).

the issue is whether Blackstone Defendants made a general appearance in only the First Action, or if the "entire proceeding" includes the present suit.

[¶ 56] According to Blackstone Defendants, the First Action "was a different cause number, different case, different court" and therefore effectively a different proceeding with respect to Rule 120a.[54] They further argue that finding that they consented to personal jurisdiction in this case based on participation in a prior, separate lawsuit would "expand the doctrine[] of … waiver to novel lengths."[55]

1. Applicable Law

[¶ 57] Several courts in Texas hold that "[v]oluntarily filing a lawsuit in a jurisdiction is a purposeful availment of the jurisdiction's facilities and can subject a party to personal jurisdiction in another lawsuit when the lawsuits arise from the same general transaction." *Primera Vista S.P.R. de R.L. v. Banca Serfin, S.A. Institucion de Banca Multiple Grupo Financiero Serfin*, 974 S.W.2d 918, 926 (Tex. App.—El Paso 1998, no pet.); *see also Int'l Transactions, Ltd. v. Embotelladora Agral Regionmontana SA de CV*, 277 F.

[54] 11/21/25 Hr. Trs. At 119:19–123:19.

[55] Reply ISO Blackstone SA at 2, 5–7.

Supp. 2d 654, 667 (N.D. Tex. 2002); *Zamarron v. Shinko Wire Co., Ltd.*, 125 S.W.3d 132, 143 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Those cases trace to *General Contracting & Trading Co. v. Interpole*, 940 F.2d 20 (1st. Cir. 1991).

[¶ 58] In *Interpole*, General Contracting & Trading Co. (GCT) sued Interpole, Inc. in New Hampshire's federal district court seeking damages associated with the delayed delivery of GTC's order (Suit No. 1). *Id.* at 21. Interpole filed a third-party complaint for indemnity against Transamerican Steamship Corporation (Trastco), to which Trastco failed to respond, leading to a default against Trastco in Suit No. 1. *Id.* Trastco then brought a separate suit against Interpole in the same federal district court, charging fraud and misrepresentation regarding the same overall transaction (Suit No. 2). *Id.* Trastco subsequently challenged the default judgment in Suit No. 1 by claiming the court never had personal jurisdiction over it. *Id.* at 22.

[¶ 59] However, the First Circuit held that a "defendant may manifest consent to a court's *in personam* jurisdiction in any number of ways" and that "a party's consent to a court's jurisdiction may take place prior to the suit's institution … at the time suit is brought …, or after suit has started." *Id.* So, by bringing Suit No. 2, Trastco submitted itself to the district court's

jurisdiction in Suit No. 1 because "Trastco surrendered any jurisdictional objections to claims that Interpole wished to assert against it in consequence of the same transaction or arising out of the *same nucleus of operative facts*." *Id.* at 23 (emphasis added).

[¶ 60] The court reasoned "a ruling that Trastco did not submit to the court's jurisdiction in Suit No. 1 when it instituted Suit No. 2 would produce an unjust asymmetry, allowing a party (here, Trastco) to enjoy the full benefits of access to a state's courts *qua* plaintiff, while nonetheless retaining immunity from the courts' authority *qua* defendant in respect to claims asserted by the very party it was suing (here, Interpole)." *Id.*; *see also id.* at 24 ("There is no conceivable unfairness here. The choice to sue in New Hampshire, or to abstain, was Trastco's.").

[¶ 61] Thus, *Interpole* is (and its Texas progeny are) like the present case because Blackstone Defendants voluntarily appeared and chose to litigate claims arising from the Callon transaction here.

[¶ 62] Further, as discussed next, *Massachusetts Bay Ins. Co. v. Adkins* negates Defendants' "different cause number, different case, different court" argument. 615 S.W.3d at 598.

2. *Massachusetts Bay*

[¶ 63] *Massachusetts Bay* involved an underlying asbestos-related personal injury lawsuit filed in 1995 in Jefferson County, Texas and a transfer in 2017 to the 11th District Court of Harris County for pretrial matters (the MDL court). 615 S.W.3d at 584. Massachusetts Bay Insurance Company appealed the MDL court's order denying its special appearance. *Id.* The MDL court did in part because Massachusetts Bay waived its special appearance in the underlying litigation. *Id.*

[¶ 64] Specifically, on August 3, 2017, plaintiffs filed their forty-first amended petition in the Jefferson County trial court. *Id.* at 590.

[¶ 65] On October 10, 2017, a fellow defendant filed a notice of transfer in the Jefferson County court stating that the case had been transferred to the MDL court. *Id.* at 591.

[¶ 66] The next day, Massachusetts Bay filed an answer in the Jefferson County case without objecting to personal jurisdiction. *Id.* at 592. Massachusetts Bay later filed a special appearance in the MDL court on June 20, 2018. *Id.*

[¶ 67] Plaintiffs argued that Massachusetts Bay waived personal jurisdiction in the MDL case by earlier filing an answer in the Jefferson County

court that did not object to personal jurisdiction. *Id.* at 594. Massachusetts Bay responded that (i) its June 2018 special appearance was the first pleading that it filed in the MDL court, (ii) it was "a new proceeding with a new cause number," (iii) and its previous answer was effectively a nullity because the Jefferson County court lacked jurisdiction over the suit as of October 10, 2017. *Id.* at 594–95, 598.

[¶ 68] To begin, the *Massachusetts Bay* court disagreed that the Jefferson County court was completely deprived of jurisdiction upon transfer to the MDL court, and therefore Massachusetts Bay's answer was not a nullity. *Id.* at 598 (discussing TEX. R. JUD. ADMIN. 13.5(b) & 13.11(f)(2)).

[¶ 69] Moreover, the court disagreed that the proceeding under a separate cause number in the MDL court was a "new" proceeding for Rule 120a. *Id.* at 599 ("Rather than its being a separate proceeding, we conclude that the proceeding in the MDL court in Harris County was simply a continuation of the proceeding in Jefferson County, albeit in a different court in a different county.").

[¶ 70] Additionally, the court held that the "purpose of a special appearance [] is to contest the ability of all courts in the forum state—not a particular district court—to exercise personal jurisdiction over a defendant."

Id. at 599–600 (citing *Minucci v. Sogevalor, S.A.*, 14 S.W.3d 790, 794 (Tex. App.—Houston [1st Dist.] 2000, no pet.)).

[¶ 71] Further, Rule 120a(1) states that a special appearance may be made "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process *issued by the courts of this State*," not only that particular court of the State. *Id.* at 600 (quoting TEX. R. CIV. P. 102a(1) (emphasis original to opinion)).

[¶ 72] Thus, "[w]hat is relevant is that, by filing its answer, unconditioned by a special appearance, Massachusetts Bay acknowledged that the case was properly pending before *a Texas court*." *Id.* (emphasis original).

[¶ 73] Likewise, the Blackstone Defendants acknowledged that *these claims* were proper as to *these defendants* in a Texas court when they answered in the First Action without first filing special appearances.

3. Same Proceeding

[¶ 74] This action is essentially "a continuation of the proceeding" of the First Action. *See* 615 S.W.3d at 599.

[¶ 75] That is, the plaintiffs are the same, the defendants are the same (with the sole addition of Mr. Acconcia), and Blackstone Defendants' co-

defendants previously stated that the Third Action "alleg[ed] the same claims against the same parties arising out of the same transaction as the First Action" and that "[i]ndeed, many of the allegations in the [Third Action] are word-for-word verbatim of the allegations in the First Action."[56]

[¶ 76] And the instant action is substantially identical to the petition in the Third Action that parties previously tried to remove to this court. But for the cause number and the particular court, this action is essentially the same action as the first one filed on December 12, 2022, in the 298th Judicial District Court for Dallas County in which Blackstone Defendants made a general appearance.

[¶ 77] Accordingly, the Blackstone Defendants' general appearance in the First Action waived their right to object to personal jurisdiction here.

4. The Blackstone Defendants' Cases

[¶ 78] Blackstone Defendants cited cases "reject[ing] the notion that a foreign defendant waives its right [to] object to personal jurisdiction, or consents to jurisdiction, in Texas by having defended other lawsuits in Texas." *Megadrill*, 556 S.W.3d at 498. But those cases are factually distinguishable.

[56] Opp. to Blackstone SA Exhibit 3.

James v. Illinois Central

[¶ 79] *James v. Illinois Central*, held that "consent, as a basis for obtaining personal jurisdiction over a foreign corporation, has been abandoned," citing the Supreme Court's decision *McGee v. Int'l Life. Ins. Co.*, 355 U.S. 220, 222 (1957). 965 S.W.2d at 599. The court therefore reasoned that "[r]egardless of its involvement in other litigation, a court's exercise of personal jurisdiction … depends upon minimum contacts analysis and considerations of fair play and substantial justice." *Id.* at 599–600.

[¶ 80] However, the court's holding is contrary to the Supreme Court's more recent decision in *Burger King* and a long line of Texas cases, including those the Blackstone Defendants cited, holding that "[t]o the extent a party has consented to jurisdiction in a particular forum, the trial court's exercise of personal jurisdiction over it does not violate due process even in the absence of contacts with Texas." *See, e.g.*, *Megadrill*, 556 S.W.3d at 497 (citing *Burger King*, 471 U.S. at 473 n.14).

[¶ 81] Finally, the *James* court never said the previous lawsuits there were similar or related to the suit for which waiver was alleged, merely referring to "other lawsuits in Texas." 965 S.W.2d at 599, n.2.

Megadrill v. Brighouse

[¶ 82] *Megadrill* makes that distinction. 556 S.W.3d at 497. There, the plaintiff alleged that Megadrill waived its right to object to personal jurisdiction because it "actively engag[ed] in litigation in Texas." *Id.* However, that court noted several times that the prior lawsuits plaintiff relied on to allege waiver were "in an unrelated matter" and "unrelated to the present one." *Id.*

[¶ 83] After reviewing cases from other jurisdictions, the court held that plaintiff "cites no authority supporting his position that a party's consent to jurisdiction in one case extends to other *unrelated lawsuits* in the same jurisdiction." *Id.* at 498 (emphasis added); *see also id.* (distinguishing *Interpole* and other cases finding waiver where "the affirmative lawsuit was based on the same transaction that was at issue in the subject litigation, or at least a related transaction").

[¶ 84] Thus, the court held that "as a matter of law that [Megadrill] did not consent to personal jurisdiction in the present action by previously filing a federal court lawsuit in Texas on an *unrelated matter*." *Id.* at 499 (emphasis added).

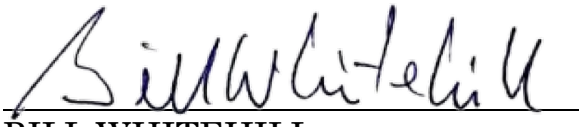
[¶ 85] Accordingly, Blackstone Defendants' reliance on *Megadrill* is misplaced because the First Action is related to the present action—it is essentially the same action.

Grynberg v. M-I L.L.C.

[¶ 86] Finally, Blackstone Defendants' reliance on *Grynberg* is likewise misplaced. 398 S.W.3d at 878. Although *Gyrnberg* and a line of cases hold that appearing in matters "ancillary" and prior to the main suit does not waive a personal-jurisdiction challenge, the examples of "ancillary" matters the court cited are distinguishable: (i) filing a Rule 11 agreement; (ii) entering into an agreed collateral order; (iii) filing a mandamus petition and motion for emergency relief; (iv) filing a notice of oral hearing on the motion to dissolve writ of garnishment; (v) agreeing to extend temporary restraining and temporary injunction orders; (vi) counsel attending a temporary restraining order hearing; or (vii) engaging in discovery before the special-appearance hearing. *See id.* None of these examples resemble filing an answer in a virtually identical lawsuit.

IV. Conclusion

[¶ 87] For these reasons, the court previously denied the Blackstone Defendants' special appearances on January 17, 2025.



BILL WHITEHILL
Judge of the Texas Business Court,
First Division

SIGNED: February 10, 2025.

2025 Tex. Bus. 6

The Business Court of Texas,
Third Division

SAFELEASE INSURANCE SERVICES LLC, *Plaintiff*, v. STORABLE, INC., et al., *Defendants*.	§ § § § § § § § § §	Cause No. 25-BC03A-0001

SYLLABUS

On a motion to remand, the Court holds that the 30-day period for removing an action to the Business Court does not begin before the action is filed. Because Plaintiff filed its notice of removal within 30 days after this suit was filed, the notice was timely. The Court also adheres to its previous holding that an action may satisfy this Court's jurisdictional amount-in-controversy minimums even when no party seeks damages.[1]

[1] The syllabus was created by court staff and is provided for the convenience of the reader. It is not part of the Court's opinion, does not constitute the Court's official description or statement, and should not be relied upon as legal authority.

The Business Court of Texas,
Third Division

SAFELEASE INSURANCE SERVICES LLC, *Plaintiff,* v. STORABLE, INC., et al., *Defendants*.	§ § § § § § § § §	Cause No. 25-BC03A-0001

OPINION AND ORDER

¶1 Before the Court is a motion to remand filed by defendants Storable, Inc., RedNova Labs, Inc., SiteLink Software, LLC, Easy Storage Solutions, LLC, Bader Co., and Property First Group, LP (collectively, Defendants). Having considered the arguments of the parties and the governing law, the Court **DENIES** the motion to remand. The Court holds that (1) the deadline for removing an action does not begin running before the action is filed, and (2) a party need not seek damages for an action to meet this Court's jurisdictional amount-in-controversy requirements.

Background

¶2 This suit arises out of a dispute between plaintiff SafeLease Insurance Services LLC (SafeLease), which provides insurance for self-storage facilities, and Defendants, who license facility-management software (FMS) to such facilities. The dispute centers on SafeLease's access to information maintained on Defendants' software by self-storage facilities, which SafeLease uses in providing insurance to those facilities or their individual customers. Until recently, SafeLease accessed the software as an authorized user on its customers' accounts, meaning that it did not have a separate access agreement with Defendants.

¶3 In late 2024, Defendants began restricting SafeLease's access to one of its three FMS platforms, storEDGE. The parties disagree as to the impetus of these actions: SafeLease alleges that Defendants are seeking to drive it out of the self-storage insurance market to benefit Defendants' own insurance products, while Defendants counter that they are enforcing their software's terms of agreement and mitigating security threats posed by SafeLease's misuse of their software.

¶4 SafeLease sued Defendants in the 345th District Court in Travis County on December 30, 2024. SafeLease sought a temporary restraining order (TRO) and injunctive relief to compel Defendants to restore SafeLease's authorized-user access to storEDGE and prohibit Defendants from removing or restricting SafeLease's access to storEDGE or Defendants' other two FMS platforms, SiteLink

and Easy Storage Solutions (ESS). The District Court granted (and later extended) the TRO but denied the temporary injunction (TI) on January 21, 2025, after an evidentiary hearing. Defendants then locked SafeLease out of all three of its FMS platforms. On January 28, SafeLease amended its petition to add allegations about Defendants' post-injunction actions and new tortious-interference claims.

¶5 SafeLease removed the action to this Court the next day, again seeking a TRO and TI to protect its access to the information on Defendants' software while the suit is pending. The Court denied the TRO on January 30 and set the TI for hearing on February 11. In the meantime, Defendants moved to remand the case. It is to that motion that the Court now turns.

Analysis

¶6 Defendants assert that the Court must remand for two reasons: first, removal was untimely because it was not filed within 30 days of when SafeLease "discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action," which Defendants assert occurred before the lawsuit was filed; second, the action does not meet the Court's jurisdictional amount-in-controversy requirements because the action seeks only equitable relief and not money damages. Both arguments fail.

A. SafeLease's removal was timely.

¶7 Under Section 25A.006 of the Government Code and Texas Rule of Civil Procedure 355, if an action filed in a district court or county court at law is within the Business Court's jurisdiction and venue, a party can remove the action to the Business Court by timely filing a notice of removal in both courts.[1] A notice of removal is timely if it is filed within 30 days after (a) the party "discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action" or (b) a TI is granted or denied, if the TI application was pending when the party "discovered, or reasonably should have discovered, facts establishing the business court's authority to hear the action."[2]

¶8 Defendants do not dispute that SafeLease filed its notice of removal within 30 days of filing suit and just over a week after the district court denied the TI application filed with the suit. But Defendants argue that SafeLease "discovered, or reasonably should have discovered" the facts that give the Court jurisdiction over the action well before SafeLease filed suit. Defendants provide no evidence for their assertions but contend that SafeLease's pleadings establish that SafeLease knew all the relevant facts before filing suit, meaning it had notice of those facts more than 30 days before the January 29 notice of removal.

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[1] TEX. GOV'T CODE § 25A.006(d)–(f); TEX. R. CIV. P. 355.

[2] TEX. R. CIV. P. 355(c)(2); *see also* TEX. GOV'T CODE § 25A.006(f)(1).

¶9 The Court holds that the 30-day removal deadlines in Section 25A.006 and Rule 355 do not begin running before the lawsuit is filed. Both the statute and the rule pivot on the discovery of facts "establishing the business court's jurisdiction to hear *the action*."[3] Before suit is filed, there is no "action" for the court to have authority over.[4] When undefined,[5] the Texas Supreme Court[6] and this Court[7] have construed the term "action" to refer to a lawsuit or judicial proceeding generally and the term "claim" to refer to an individual theory of liability or cause of action asserted within a lawsuit.[8] Consistently, the Texas Business Court has held

[3] TEX. GOV'T CODE § 25A.006(f)(1) (emphasis added); *see also* TEX. R. CIV. P. 355(c)(2) (using same language except term "authority" is substituted for "jurisdiction").

[4] *Tema Oil & Gas Co. v. ETC Field Servs., LLC*, 2024 Tex. Bus. 3 at ¶ 15, 2024 WL 5337411, at *3 (Tex. Bus. Ct. Nov. 6, 2024); *C Ten 31 LLC ex rel. Summer Moon Holdings LLC v. Tarbox*, 2025 Tex. Bus. 1 at ¶¶ 26–27, 2025 WL 224542, at *7 (Tex. Bus. Ct. Jan. 3, 2025).

[5] When these terms are defined by the statute, the Texas Supreme Court employes the definition given. *E.g.*, *Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021) ("By defining 'legal action' to include not just 'lawsuits,' 'petitions,' 'pleadings,' and 'filings,' but also 'causes of action,' 'cross-claims,' and 'counterclaims,' the Act permits a party to seek dismissal within sixty days after service of a cause of action or claim, even if it's not 'early' in the litigation.").

[6] *See Off. of the Att'y Gen. of Tex. v. C.W.H.*, 531 S.W.3d 178, 183 (Tex. 2017) (quoting *Jaster* and *Thomas* for meaning of "action"); *Jaster v. Comet II Constr., Inc*, 438 S.W.3d 556, 563–64 (Tex. 2014) ("The common meaning of the term 'action' refers to an entire lawsuit or cause or proceeding, not to discrete 'claims' or 'causes of action' asserted within a suit, cause, or proceeding."); *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008) (distinguishing between lawsuits and causes of action in interpreting "health care liability claim"); *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995) ("The term 'action' is generally synonymous with 'suit[.]'"); *see also Montelongo*, 622 S.W.3d at 301.

[7] *C Ten*, 2025 Tex. Bus. 1 at ¶¶ 25–31, 2025 WL 224542, at *7–9.

[8] Thus, this analysis is distinct from limitations analyses, which focus on when an individual claim accrued—something that can and typically does occur before suit is filed.

that "[a] civil action is a lawsuit."[9] A civil suit, or action, is "commenced by a petition filed in the office of the clerk."[10] This Court had no jurisdiction or authority to decide this "action" before it came into existence, which occurred when the petition was filed. Because SafeLease filed its notice of removal within 30 days of when it filed suit and within eight days of the district court's TI ruling, the notice was timely.

¶10 In addition to being consistent with a plain reading of the statutory text, this outcome avoids a host of practical difficulties with Defendants' approach. Under Defendants' theory, the 30-day deadline begins running when the parties have knowledge of the underlying facts that give rise to claims that fall within this Court's jurisdiction. If that were the case, the removal window could begin *and end* before a plaintiff files suit—*even for other parties*. Section 25A.006 and Rule 355 apply the same deadline to any "party" seeking to remove an action to this Court.[11] A defendant with knowledge of the jurisdictional facts would have no opportunity to timely remove a case if the plaintiff waited more than 30 days to file suit.[12] The

[9] *Tema*, 2024 Tex. Bus. 3 at ¶ 15, 2024 WL 5337411, at *3; *C Ten*, 2025 Tex. Bus. 1 at ¶¶ 26–27, 2025 WL 224542, at *7; *Sebastian v. Durant*, 2025 Tex. Bus. 4 at ¶ 16, 2025 WL 394634, at *2 (Tex. Bus. Ct. Feb. 4, 2025).

[10] TEX. R. CIV. P. 22.

[11] *See* TEX. GOV'T CODE § 25A.006(f)–(j); TEX. R. CIV. P. 355.

[12] Defendants argue that this will not occur because defendants will not know the amount of plaintiffs' damages or what claims they will bring. But it is plausible that there will be circumstances in which a defendant knows, or reasonably should know, what kinds of claims the plaintiff intends to

extended deadline for pending TI applications could likewise never apply when the underlying facts were known before suit was filed.[13]

¶11 Defendants assert that allowing a plaintiff to file suit in one forum then remove to another forum 30 days later enables forum shopping, which is what they contend SafeLease did here. But the Legislature chose to authorize removal by "[a] party,"[14] rather than limiting removal to "defendants" as in the federal removal statute.[15] This plainly enables removal by plaintiffs even though they also chose the original venue. To the extent the process can be abused for forum shopping, that risk is present in other Texas procedures, such as the plaintiff's right to nonsuit, and Texas law has mechanisms for addressing it.[16] And regardless, this Court must effectuate the statute as written and will not second guess the policy determinations made by the Legislature—the body duly elected to make such policy decisions.[17]

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assert and the extent of the damages—including, for example, when the parties engaged in pre-suit settlement discussions.

[13] *See* TEX. GOV'T CODE § 25A.006(f)(2); TEX. R. CIV. P. 355(c)(2)(B).

[14] TEX. GOV'T CODE § 25A.006(d); *see also* TEX. R. CIV. P. 355(a).

[15] 28 U.S.C. §§ 1441(a), 1446(a).

[16] *See, e.g.*, TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE § 10.001(1); *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (upholding sanctions against counsel who filed seventeen nearly identical cases, and then nonsuited sixteen of them, for the purpose of securing a particular forum); *In re Boehme*, 256 S.W.3d 878, 883 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *In re Bennett* for the proposition that "attorneys who abuse the legal process—as through improper forum-shopping—may be sanctioned").

[17] *See, e.g.*, *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 857 (Tex. 2024) ("[W]e do not ignore a statute's text to impose our own judicial meaning to reach a certain result, even if [] we[] think the statute unwise. Instead, we must refrain from rewriting text that lawmakers chose." (internal citations and quotation marks omitted)).

B. The amount in controversy in this case meets the Court's jurisdictional threshold.

¶12 SafeLease alleges that this case falls within this Court's jurisdiction under Section 25A.004(b), (d), and (e) of the Texas Government Code and that the amount in controversy exceeds the $5 million and $10 million minimums under those provisions.[18] Defendants do not attempt to disprove SafeLease's specific factual allegations; instead, they contend that SafeLease cannot meet the monetary thresholds because it does not seek an award of damages. The Court disagrees. As both the Texas Supreme Court and this Court have recognized, "the phrase 'amount in controversy,' in the jurisdictional context, means 'the sum of money *or the value of the thing* originally sued for[.]'"[19] Accordingly, both the Texas Supreme Court and this Court have held that actions in which damages were not sought nevertheless could satisfy jurisdictional amount-in-controversy minimums.[20]

¶13 Defendants rely on *Medina v. Benkiser*, a case out of the First Court of Appeals in Houston, to argue that a claim for damages is the only way to satisfy

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[18] For example, SafeLease alleges that the action puts at risk the entire $140 million value of its business and $600 million worth of insurance contracts.

[19] *Tune v. Tex. Dep't of Pub. Safety*, 23 S.W.3d 358, 361–62 (Tex. 2000) (emphasis in original) (quoting *Gulf, C. & S.F.Ry. Co. v. Cunnigan,* 95 Tex. 439, 441, 67 S.W. 888, 890 (1902)); *see also C Ten*, 2025 Tex. Bus. 1 at ¶ 32, 2025 WL 224542, at *9.

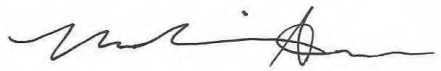
[20] *Tune*, 23 S.W.3d at 362 (holding that appeal from denial of concealed-handgun license satisfied amount-in-controversy requirement because of value of rights at issue); *Tex. Dep't of Public Safety v. Barlow*, 48 S.W.3d 174, 176 (Tex. 2001) (holding that appeal from suspension of driver's license satisfied amount-in-controversy requirement because of value of rights at issue); *C Ten*, 2025 Tex. Bus. 1 at ¶ 32, 2025 WL 224542, at *9 (holding that amount-in-controversy requirement may be met in injunctive and declaratory action).

amount-in-controversy minimums.[21] But *Medina* is distinguishable—it dealt with whether a statutory county court at law had jurisdiction to decide an injunctive suit arising under the Election Code.[22] The relief sought related to the procedures a political party would follow at its state convention, and there was no discussion of any argument that the rights sued for had any monetary value.[23] Even if *Medina* were not distinguishable, however, this Court is bound to follow Texas Supreme Court precedent.[24]

Conclusion

¶14 The Court concludes that SafeLease's notice of removal was timely and Defendants have not shown that the amount-in-controversy falls below the Court's jurisdictional minimums. Defendants' motion to remand is therefore DENIED.

SIGNED ON: February 10, 2025.



Hon. Melissa Andrews
Judge of the Texas Business Court,
Third Division

[21] 262 S.W.3d 25 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

[22] *Id.* at 26–27.

[23] *See id.*

[24] Texas courts of appeals have likewise considered the value of non-monetary relief in determining whether an amount-in-controversy threshold is met. *See, e.g.*, *Harris v. State*, 402 S.W.3d 758, 763 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *In re Commitment of Richards*, 202 S.W.3d 779, 789–90 (Tex. App.—Beaumont 2006, pet. denied).

2025 Tex. Bus. 7

The Business Court of Texas,
Third Division

SANDEEP YADAV *individually and derivatively on behalf of* 3T FEDERAL SOLUTIONS, LLC, *Plaintiff,* v. RAJEEVA AGRAWAL and POONAM AGARWAL, *Defendants*.	§ § § § § § § § §	Cause No. 24-BC03B-0003

OPINION AND ORDER

I. Introduction

¶1 House Bill 19—the statute that created the Texas Business Court and defines its jurisdiction—applies only "to civil actions commenced on or after September 1, 2024."[1] In this case, some claims were brought before that date, and other claims were brought afterward. All were brought in the same lawsuit. The Court must decide whether it has jurisdiction of the original lawsuit brought before September 1, 2024, and whether later

[1] Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929.

filed claims are part of the same "action." Because the Court concludes that the original lawsuit was brought too early to fit within this Court's jurisdiction and all of the claims are part of one "action," the Court grants the motion to remand the entire case to the district court.

II. Background

A. Nature of the Litigation

¶2 This case involves a corporate governance dispute about the control, ownership, and management of 3T Federal Solutions LLC ("3T Federal"), a closely held Virginia limited liability company that primarily engages in securing government contracts to provide goods and equipment to federal agencies.[2] 3T Federal has three members: Sandeep Yadav ("Yadav") and Rajeeva Agrawal and Poonam Agarwal (hereinafter "Agrawals").[3] Yadav is a 51% percent owner of 3T Federal, and the Agrawals, a married couple, are each 24.5% owners.[4]

¶3 The lawsuit was initiated on May 1, 2024, when Yadav, individually and derivatively on behalf of 3T Federal, filed a lawsuit in Travis County District Court against the Agrawals.[5] Yadav alleged causes of action for breach of fiduciary duty, unjust

[2] Copies of Travis Cnty. Rs. Vol. 1, Pl.'s Original Pet., ¶¶ 3, 9, Sept. 30, 2024.

[3] Defendants Rajeeva Agrawal and Poonam Agarwal are a married couple with slightly different surname spellings.

[4] Copies of Travis Cnty. Rs. Vol. 1, 3T Federal Solutions, LLC'S Pet. In Intervention and Verified Appl. for Inj., ¶11, Sept. 30, 2024.

[5] *See* Pl.'s Original Pet., Sept. 30, 2024.

enrichment, and declaratory relief.[6] He alleged the Agrawals took "actions to the detriment of Derivative Plaintiff and the company" causing Yadav and 3T Federal to suffer "financial loss . . . [and] further potential liabilities."[7] Through the lawsuit, Yadav sought managerial control of the company.[8]

¶4 The Agrawals answered on June 21, 2024 and filed counterclaims against Yadav on July 8, 2024.[9] The Agrawals asserted majority voting power and control of 3T Federal based on a prior judgment from Virginia.[10] Through their counterclaim, the Agrawals also alleged that Yadav had wrongfully operated the company as a de facto manager and unlawfully paid himself and family members from 3T Federal funds.[11] The Agrawals sought declaratory and injunctive relief and money damages.[12]

¶5 Also on July 8, 2024, counsel for the Agrawals filed a Petition in Intervention and Verified Application for Injunction on Behalf of 3T Federal.[13]

¶6 The Travis County district court case was litigated for five months prior to removal to the Texas Business Court. During that time, the district court heard and denied

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[6] *Id.*

[7] *Id.* at ¶ 8.

[8] *See Id.* at ¶ 53.

[9] Copies of Travis Cnty. Rs. Vol. 1, Defs.' Original Answer, Sept. 30, 2024; Copies of Travis Cnty. Rs. Vol. 1, Defs.' Countercl., Sept. 30, 2024.

[10] Federal Solutions, LLC'S Pet. in Intervention and Verified Appl. for Inj. ¶22, Sept. 30, 2024.

[11] Defs.' Countercl. ¶¶ 22–24, Sept. 30, 2024.

[12] *See Id.* ¶¶ 33, 39, 47.

[13] Federal Solutions, LLC'S Pet. in Intervention and Verified Appl. for Inj. ¶ 11, Sept. 30, 2024.

the Agrawals' and Intervenor 3T Federal's motion for temporary injunction on August 27, 2024.[14]

B. History of the Litigation

¶7 The Travis County district court case was not the first dispute between the parties over control of 3T Federal. Almost five years earlier, on October 22, 2019, the Agrawals sued Yadav in the Circuit Court in Hanover County, Virginia.[15] The Agrawals sought a declaratory judgement that Yadav had been validly replaced as the manager of 3T Federal pursuant to a written consent executed by the Agrawals and claimed Yadav had breached his fiduciary duties.[16] Following a bench trial, the Virginia circuit court of Hanover County, Virginia entered a final judgment on May 24, 2022 finding "each member [of 3T Federal] has 1/3 of the voting power [and the Agrawals] had the necessary voting power to execute a valid written consent . . . which removed Yadav as manager."[17] Yadav exhausted his appeals on April 12, 2024, following the denial of his petition for appeal by the Virginia Supreme Court.[18] He initiated his Texas lawsuit in Travis County District Court three weeks later.[19]

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[14] "Defendants—who carry the burden of proof in this matter—failed to make a sufficient factual showing that Plaintiff's purported capital contribution was invalid." Copies of Travis Cnty. Rs. Vol. 2, Order Den. Intervenors and Def.s' Appls. for Temporary Inj. ¶ 8, Sept. 30, 2024.

[15] *See* Pl.'s Original Pet., Sept. 30, 2024.

[16] Defs.' Countercl. ¶¶ 36–39.

[17] *Id.* Ex. 7.

[18] *Id.* Ex. 10.

[19] *See* Pl.'s Original Pet., Sept. 30, 2024.

C. Claims Filed Following Removal to Business Court

¶8 After five months of litigation in the Travis County District Court, the Agrawals filed a Notice of Removal to the Texas Business Court on September 30, 2024.[20] Four days later, Intervenor, 3T Federal, non-suited its earlier filed petition for intervention.[21] That same day, the Agrawals and "Intervenor 3T Federal Solutions LLC", acting through the same attorneys, filed a combined pleading entitled "First Amended Counterclaim, Original Petition in Intervention, and Original Third Party Claims" (hereinafter "October 4th Pleading") in the Business Court using the same cause number as the removed case.[22]

¶9 The October 4th Pleading contained thirteen "causes of action", alternatively referred to in the pleading as "claims."[23] Some were alleged by the Agrawals and others by Intervenor 3T Federal. The counterclaim, petition in intervention and third-party claims were filed in one combined pleading. The third-party portion of the October 4th Pleading named five new third-party defendants in claims asserted by Intervenor 3T Federal. The new third-party defendants, included four newly named corporate entities for whom the Agrawals allege Yadav served as manager and registered agent, and Yadav's wife Ritu Yadav.[24] The factual basis of the October 4th Pleading included allegations that Yadav,

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[20] *See* Defs.' Notice of Removal to Bus. Ct., Sept. 30, 2024.

[21] Intervenor's Notice of Nonsuit Without Prejudice, Oct. 4, 2024.

[22] *See* First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims, Oct. 4, 2024.

[23] *See Id.*

[24] Claim One: Breach of Contract Against Yadav, brought by the Agrawals and 3T Federal, Claim Two: Breach of Fiduciary Duty Against Yadav, brought by 3T Federal against Yadav, Claim Three:

while operating the company, excluded the Agrawals and "systematically damaged" 3T Federal "through blatant self-dealing."[25] It also contained new claims, including Claim 5 (a claim for dissociation of Yadav), Claims 8–12 (claims against new third parties) and Claim 13 (alternative derivative claims). The filing relied on a common "Verified Statement of Facts" closely resembling the Agrawal's prior original counterclaim filing, and 3T Federal's prior intervention petition. The five Third-Party Defendants each filed their Original Answer and Affirmative Defenses in the business court on November 12, 2024.

D. The Parties' Competing Positions on the Appropriateness of Removal

¶10 The Agrawals and Intervenor 3T Federal cited Texas Government Code Section 25A.004(b) as the basis for their September 30, 2024, removal to the Business Court alleging the case "involves the governance, governing documents and internal affairs of the Company" in an amount greater than $5 million.[26]

Conversion By Yadav, brought by 3T Federal against Yadav, Claim Four: Request for Declaratory Relief, brought by the Agrawals and 3T Federal , Claim Five: Request for Dissociation of Yadav, brought by the Agrawals and 3T Federal, Claim Six: Frivolous Claim Against Yadav, brought by the Agrawals, Claim Seven: Request for Injunctive Relief Against Yadav, brought by the Agrawals and 3T Federal, Claim Eight: Third Party Claim Against 3T Business Group, LLC for Aiding and Abetting and for Declaratory Relief, brought by 3T Federal against 3T Business Group, LLC, Claim Nine: Third Party Claim Against 3T Catamount, LLC for Aiding and Abetting and for Declaratory Relief, brought by 3T Federal against 3T Catamount, LLC, Claim Ten: Third Party Claim Against 3T Federal-SITS JV, LLC for Aiding and Abetting and for Declaratory Relief, brought by 3T Federal against 3T Federal-SITS JV LLC, Claim Eleven: Third Party Claim Against 3T Federal-Sierra JV, LLC for Aiding and Abetting and for Declaratory Relief, brought by 3T Federal against 3T Federal-Sierra JV, LLC, Claim Twelve: Third Party Claim Against Ritu Yadav for Aiding and Abetting, brought by 3T Federal against Ritu Yadav, Sandeep Yadav's wife, and Claim Thirteen: Alternative Derivative Claims. *See Id.*

[25] *Id.* at ¶ 1.

[26] Defs.' Notice of Removal to Business Ct. ¶ 2, Sept. 30, 2024.

¶11 On October 4, 2024, this Court requested briefing from the parties regarding what effect Section 8 of H.B. 19 "has on the propriety of this suit's removal to the Texas Business Court and this Court's authority and jurisdiction to hear the suit."[27] The same day, Intervenor 3T Federal nonsuited its Petition in Intervention and Verified Application for Injunction.[28] It then filed the October 4th Pleading.[29]

¶12 On October 30, 2024, Yadav timely filed a motion to remand asserting the Texas Business Court lacks jurisdiction over this case based on H.B. 19 Section 8.[30] Pursuant to Section 25A.004(f), Yadav also objected to the exercise of supplemental jurisdiction "over any claim in this case."[31] Similarly, on October 31, 2024, Yadav filed a Response to Defendants' Brief in Support of Business Court Jurisdiction, asserting i) that the original claims must be remanded because H.B. 19 §8 prohibits the Business Court from exercising jurisdiction over cases filed before September 1, 2024, ii) that Agrawal's counterclaims must proceed with the original claims pursuant to the compulsory counterclaim provision of Rule 97(a), iii) that the Agrawals' newly raised counterclaims relate back to the original counterclaims, and iv) that Yadav does not consent to the Business Court's exercise of supplemental jurisdiction over any claims.[32]

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[27] Order Requesting Br. on Removal, Oct. 4, 2024.

[28] Intervenor's Notice of Nonsuit Without Prejudice, Oct. 4, 2024.

[29] First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims, Oct. 4, 2024.

[30] Pl.'s Mot. to Remand and Obj. to Suppl. Jurisdiction 2–3, Oct. 30, 2024.

[31] *Id.* at 3.

[32] *See* Pl.'s Response to Defs.' Br. in Supp. of Business Ct. Jurisdiction, Oct. 31, 2024.

¶13 The Court held an oral hearing on the motion to remand on December 5, 2024.[33] At the hearing, the Court allowed the parties to file supplemental briefing, and the parties filed their briefs on December 13, 2024, and December 16, 2024.[34]

III. Analysis

A. Issues Presented

¶14 The issues in this motion to remand are twofold. The first issue, a now familiar one to the Business Court, is whether the court has jurisdiction to hear cases commenced prior to September 1, 2024.

¶15 The second issue is whether the Business Court has jurisdiction over the claims asserted in the October 4th Pleading, filed in the same action but after removal including: i) the amended counterclaims against Yadav ii) 3T Federal's petition in intervention; and iii) a third-party action filed by Intervenor 3T Federal naming five new third-party defendants.

B. Applicable Law

¶16 To analyze these issues, the Court reviews relevant legal standards, the text of H.B. 19, Section 25A of the Texas Government Code, and Texas Rule of Civil Procedure 355.

[33] *See* Order Scheduling Oral Hearing, Nov. 18, 2024.

[34] Intervenor and Defs.' Post-Hr'g Br. in Supp. of Business Ct. Jurisdiction, Dec. 13, 2024; Pl.'s Corrected Br. in Supp. of Pl.'s Mot. To Remand, Dec. 16, 2024.

i. Legal Standards

¶17 The issues here involve the interpretation of statutes that created the Business Court to determine whether those statutes confer subject-matter jurisdiction over this suit. Subject-matter jurisdiction "[i]nvolves a court's power to hear a case."[35] Subject-matter jurisdiction "exists when the nature of the case falls within the general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate."[36]

¶18 When interpreting a statute, courts generally "rely on the plain meaning of the statute's words' to discern legislative intent."[37] It is a bedrock principle that if a case can be "decided according to the statute itself, it must be decided by the statute itself."[38] The truest manifestation of what lawmakers intended is what they enacted because the Legislature "expresses its intent by the words it enacts and declares to be the law."[39]

ii. House Bill 19

¶19 H.B. 19 created the Texas Business Court, a new statewide specialty trial court with jurisdiction over defined complex business cases.[40] On June 9, 2023, Governor

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[35] *Tellez v. City of Socorro*, 226 S.W. 3d 413 (Tex. 2007).

[36] *Diocese of Galveston-Houston v. Stone*, 892 S.W. 2d 169, 174 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (citing *City of El Paso v. Madero Development,* 803 S.W.2d 396, 399 (Tex. App.—El Paso 1991, writ denied)).

[37] *Aleman v. Texas Medical Board,* 573 S.W.3d 796, 802 (Tex. 2019) (citing *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017)).

[38] *Bank Direct Cap. Fin. LLC v Plasma Fab, LLC*, 519 S.W. 3d 76, 78 (Tex. 2017).

[39] *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006); *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011).

[40] *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, 2023 Tex. Sess. Law Serv. 919.

Abbott signed H.B. 19 into law.[41] H.B. 19 added Chapter 25A to the Texas Government Code which establishes, among other things, the judicial districts and divisions of the court, the court's jurisdiction and authority over specified matters, procedures for removal and remand, venue, appellate procedure, and qualifications of judges.[42] Sections 5 and 8 of H.B. 19 address the Business Courts start date.[43] Section 5 states that except as otherwise provided by the Act, the "business court is created September 1, 2024." Section 8 of H.B. 19 states:

> The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024.[44]

¶20 Though neither Section 5 nor Section 8 are codified into the Texas Government Code they are integral sections of the statute, and uncodified session law is binding law.[45]

iii. Section 25A.006: Removal and Remand

¶21 Section 25A.006 of the Texas Government Code establishes the procedure and grounds for removal to business court.[46] Section 25A.006(d) permits a party to an "action" filed in a district court or county court at law to remove "the action" to the

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[41] *See Id.*

[42] *See Id.*

[43] *Id.* §§ 5, 8.

[44] *Id.* § 8.

[45] *See Tema Oil & Gas Co. v. ETC Field Servs., LLC*, 2024 Tex. Bus. 3 at ¶ 16, 2024 WL 5337411, at *4 (Tex. Bus. Ct. Nov. 6, 2024) (Citing *Union Pac. R.R. Co. v. Brown*, No. 04-17-00788-CV, 2018 WL 6624507, at *3 n.2 (Tex. App.—San Antonio Dec. 19, 2018, no pet.)).

[46] *See* TEX. GOV. CODE ANN. § 25A.006.

Business Court if the action is within the Court's jurisdiction.[47] If removal is opposed, a party must file its removal notice within thirty days after the party discovered, or reasonably should have discovered, facts establishing the Business Court's jurisdiction.[48]

¶22 After removal, if the Business Court decides it does not have jurisdiction of "the action," Section 25A.006(d) commands the court to remand "the action" to the originating court.[49]

iv. Texas Rule of Procedure 355

¶23 Following the passage of H.B. 19, and in accordance with Section 25A.020, the Texas Supreme Court adopted new and amended rules governing Business Court procedures, including removal and remand.[50] The rule that addresses removal procedures is Texas Rule of Procedure 355.[51] But as the Business Court's Eighth Division has explained, Rule 355 does not speak "to the removal of a case commenced before September 1, 2024."[52]

C. The Business Court Lacks Subject-Matter Jurisdiction to Hear Cases Commenced Prior to September 1, 2024

¶24 Yadav individually and derivatively on behalf of 3T Federal, filed his original petition against the Agrawals on May 1, 2024 in Travis County district court. The case was

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[47] *Id.* § 25A.006(d).

[48] *Id.* § 25A.006(f)(1).

[49] *Id.* 25A.006(d).

[50] *See Id.* § 25A.006(g); Supreme Court of Tex., *Final Approval of Rules for the Business Court*, Misc. Docket No. 24-9037 (Jun. 28, 2024).

[51] *See* TEX. R. CIV. P. 355.

[52] *Id.*; *Tema Oil*, 2024 Tex. Bus. 3 at ¶ 16, 2024 WL 5337411, at *2.

actively litigated there prior to removal and the district court denied temporary injunctive relief following a hearing on August 27, 2024.[53]

¶25 The Agrawals argue the Business Court has jurisdiction over actions commenced before and after September 1, 2024. They insist that H.B. 19 is "silent as to whether the Business Court's jurisdiction extends to civil actions filed before September 1, 2024" and that such silence "speaks volumes."[54] They also contend that Section 8 of HB 19 is not explicit enough to "apply only to those actions commenced on or after September 1, 2024."[55] The Agrawals point to other statutes passed by the legislature and argue the legislature utilized more explicit limiting language.[56] Finally, Defendants argue H.B. 19 is part of a procedural statute and therefore applies to ongoing lawsuits.[57]

¶26 The determination of the initial question—whether a lawsuit filed prior to September 1, 2024 can be removed to Business Court—is a matter of statutory interpretation. The Texas Supreme Court has instructed that a court's "mandate is to ascertain and give effect to the Legislature's intent as expressed in the statutory language."[58] A statute's unambiguous language controls the outcome.[59] When a statute is clear and unambiguous,

[53] *See* Order Den. Intervenor's and Defs.' Appl. for Temporary Inj., Sept 30, 2024.

[54] Br. in Supp. of Business Ct. Jurisdiction 2, Oct. 24, 2024.

[55] *Id.* at 1.

[56] *See Id.* at 5–6.

[57] *See Id.* at 6–7.

[58] *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017).

[59] *Id.* at 257.

"we do not resort to extrinsic interpretive aids, such as legislative history, because the statute's plain language 'is the surest guide to the Legislature's intent.'"[60]

¶27 The text of Section 8 of H.B. 19 provides a clear-cut resolution to this question. To reiterate, it provides "[t]he changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."[61] The "Act" is H.B. 19, the very statutory enactment that created the Business Courts and grants its authority, defines its jurisdiction, and governs its removal procedures. Section 25A.006 uses the term "action" forty times without ever using the term, "claim."[62] Section 25A does not define the term "action" but that term is generally synonymous with "suit, which is a demand of one's rights in court."[63] In *Jaster v. Comet II Construction, Inc.*, the Texas Supreme Court defined "action" as follows:

> "The common meaning of the term 'action' refers to an entire lawsuit or cause or proceeding, not to discrete 'claims' or 'causes of action' asserted within a suit, cause, or proceeding."[64]

¶28 And Black's Law Dictionary defines "action" as "[a] civil or criminal judicial proceeding; esp., lawsuit."[65] Black's Law Dictionary alternatively defines "action" as "an ordinary proceeding in a court of justice, by which one party prosecutes another party for

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[60] *Id.* (quoting *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)).

[61] Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929.

[62] *See* Tex. GOV'T CODE ANN. § 25A.006.

[63] *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563–64 (Tex. 2014) (plurality op.); *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995).

[64] *Jaster*, 438 S.W.3d at 563–64.

[65] *Action*, Black's Law Dictionary (12th ed. 2024).

the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."[66] Also, the Texas Business Court has on at least two occasions recognized that the term "civil action" is synonymous with lawsuit.[67]

¶29 While "commence" is also not defined in Section 25A, it generally means "to begin; start."[68] And Texas Rule of Civil Procedure 22 provides that a lawsuit commences when a petition is filed.[69]

¶30 Since Yadav's original petition was filed on May 1, 2024, the "action" "commenced" well before September 1, 2024. Pursuant to H.B. 19 Section 8, the Business Court has jurisdiction over cases commenced on or after September 1, 2024, not before.[70] Thus, the Business Court lacks authority to hear the underlying lawsuit that commenced on May 1, 2024 with the filing of Yadav's Original Petition.

¶31 Additionally, the Texas Business Court previously decided the question of whether actions initiated prior to September 1, 2024 can be removed. It has rejected at least ten attempts to remove actions filed before September 1, 2024, and remanded those cases back to their originating district courts.[71] The text of H.B. 19 Section 8 is clear and

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[66] *Id.*

[67] *See C Ten 31 LLC ex rel. Summer Moon Holdings LLC v. Tarbox*, 2025 Tex. Bus. 1 at ¶ 26, 2025 WL 224542, at *7 (Tex. Bus. Ct. Jan. 3, 2025); *Tema Oil*, 2024 Tex. Bus. 3 at ¶ 15, 2024 WL 5337411, at *3.

[68] *Commence*, American Heritage Dictionary of the English Language (5th Ed. 2022).

[69] *See* TEX R. CIV. P. 22.

[70] Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929.

[71] *See, e.g., Energy Transfer LP, et al. v. Culberson Midstream LLC, et al.*, 2024 Tex. Bus. 1, 2024 WL 5320611 (Tex. Bus. Ct. Oct. 30, 2024); *See also Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.* 2024 Tex. Bus. 2, 2024 WL 5337412 (Tex. Bus. Ct. Oct. 31, 2024); *See also Tema Oil,* 2024 Tex. Bus. 3, 2024 WL 5337411; *See also Jorrie v. Charles, et al.*, 2024 Tex. Bus. 4,

unambiguous. The Court finds no sound basis to depart from prior Business Court holdings. Since the underlying case is not removable, Section 25.006 requires the Business Court to remand the action to the originating court.[72]

D. The Business Court Lacks Subject-Matter Jurisdiction Over Claims Asserted in the October 4th Pleading

¶32 Having held that the term "civil action" in Section 8 of H.B. 19 compels the remand of the "action" commenced prior to September 1, 2024, the Court now turns to the second question: whether the Agrawals' and 3T Federal's claims contained in the October 4th Pleading and filed in the Business Court in the same case, are part of the action and therefore subject to remand along with the underlying action.

¶33 The Court reviews each section of the October 4th Pleading, separately including: 1) the Agrawals' counterclaims; 2) 3T Federal's Plea in Intervention; and 3) the third-party action filed against newly named third parties. The Court begins its analysis with the Agrawal's counterclaims against Yadav.

2024 WL 5337409 (Tex. Bus. Ct. Nov. 7, 2024); *See also Morningstar Winans v. Berry*, 2024 Tex. Bus. 5, 2024 WL 5337410 (Tex. Bus. Ct. Nov 4, 2024); *See also XTO Energy, Inc. v. Houston Pipe Line Co., LP*, 2024 Tex. Bus. 6, 2024 WL 5337408 (Tex. Bus. Ct. Nov. 26, 2024); *See also Seter v. Westdale Asset Management, Ltd.*, 2024 Tex. Bus. 7, 2024 WL 5337346 (Tex. Bus. Ct. Dec. 16, 2024); *See also Lone Star NGL Product Services v. EagleClaw Midstream Ventures, LLC*, 2024 Tex. Bus. 8, 2024 WL 5337407 (Tex. Bus. Ct. Dec 20, 2024); *See also Bestway Oilfield, Inc. v. Cox*, 2025 Tex. Bus. 2, 2025 WL 251338 (Tex. Bus. Ct. Jan. 17, 2025); *See also Osmose Utilities Services, Inc. v. Navarro County Electric Cooperative*, 2025 Tex. Bus. 3, 2025 WL 370681 (Tex. Bus. Ct. Jan 31, 2025).

[72] *See* Tex. GOV'T CODE ANN. § 25A.006.

i. The Agrawals' Amended Counterclaim

a. Summary of the Counterclaims

¶34 The Agrawals' amended counterclaim contains an eleven page "Statement of Facts" that details 3T Federal's formation and background, earlier disputes over the 3T Federal operating agreement, the ensuing Virginia litigation, and allegations that Yadav has been illegally operating the company as a de facto manager.[73] The Agrawals alleged that "while unlawfully operating the company, Yadav has systematically damaged" 3T Federal "through blatant self-dealing."[74]

¶35 The factual allegations and claims asserted in Agrawal's amended counter-claim, like Yadav's original petition, involve a long-standing corporate governance dispute between three members of 3T Federal. Each side contends they are the rightful manager of 3T Federal. Each side complains of the other's management or interference with management of the company.

¶36 The Agrawals' legal claims are included in six subsections under the heading "Causes of Action" in the October 4th Pleading. They include causes of action for: breach of contract, conversion, request for declaratory relief, a request for dissociation of Yadav, "frivolous claims", and a claim for injunctive relief.[75]

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[73] First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims ¶¶ 14–45, Oct. 4, 2024.

[74] *Id.* ¶ 1.

[75] *Id.* ¶¶ 46–80.

b. The Parties' Counterclaim Arguments

¶37 The Agrawals concede that their original counterclaims must be remanded to the district court but contend their later-filed amended counterclaims in the October 4th Pleading, do not relate back to the main action.[76] They also contend the compulsory-counterclaim rule does not require remand of any of their claims because Chapter 25A endorses claim splitting and overrides Rule 97(a) to the extent it is inconsistent with the statute.[77] The Agrawals also argue that the amended counterclaim seeking disassociation of Yadav was based on new allegations that were distinct from the amended counterclaim and does not relate back to the original filing.[78]

¶38 In response, Yadav claims the action is not subject to removal in light of H.B. 19 Section 8's application "to civil actions commenced on or after September 1, 2024."[79] He contends that an "action commences" when an original petition is filed and that "subsequent pleadings, including those naming new parties, are filed in the original action."[80] Alternatively, Yadav contends that the Business Court must remand the Agrawals' counterclaims because they are compulsory and relate back to Defendants' original Counterclaim.[81] Further in the alternative, Yadav argues that even if Defendants'

[76] Intervenor and Defs.' Post-Hr'g Br. in Supp. of Business Ct. Jurisdiction 11, Dec. 13, 2024.

[77] *Id.* at 3.

[78] *Id.* at 9.

[79] Pl.'s Mot. to Remand and Obj. to Suppl. Jurisdiction 2, Oct. 30, 2024.

[80] Pl.'s Corrected Br. In Supp. of Pl.'s Mot. To Remand 3, Dec. 16, 2024.

[81] *Id.* at 4.

counterclaims are not compulsory, the Business Court does not have jurisdiction over Defendants' counterclaims because they relate back to Agrawal's original counterclaim.[82]

c. The Business Court Lacks Subject-Matter Jurisdiction Over the Agrawals' Counterclaims

¶39 The Court turns to Yadav's contention that an "action commences" when an original petition is filed and that such "action" includes "subsequent pleadings," including the Agrawals' amended counterclaims.[83]

¶40 Under Rule 22, a civil suit is commenced by a petition filed in the office of the clerk, in this case on May 1, 2024.[84] By definition, a counterclaim is filed in opposition to or as a setoff against the plaintiffs claim and is in "response" to the plaintiffs pleading.[85] Stated otherwise, a counterclaim is an affirmative claim for relief filed against an opposing party in an existing lawsuit presented by a defendant in opposition to or deduction from the plaintiff's claim.[86]

¶41 Applying the definition of "counterclaim" and the Texas Supreme Court's definition of "action", Section III. C., *supra*, the Court finds that the Agrawals'

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[82] *Id.*

[83] *Id.* at 3.

[84] *See* TEX. R. CIV. P. 22.

[85] *See Counterclaim*, Black's Law Dictionary (12th ed. 2024) ("claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim"); *see also Counterclaim*, Black's Law Dictionary (11th ed. 2019) ("A claim for relief asserted against an opposing party after an original claim has been made").

[86] *See generally* TEX. R. CIV. P. 97 (a)–(b); *Sinton Sav. Ass'n v. Ellis*, 474 S.W.2d 281, 285 (Tex. App.—Corpus Christi 1971, writ ref'd n.r.e.).

counterclaims are not separate actions, and instead are part of the underlying lawsuit. The term "action" is defined as "an entire lawsuit or cause or proceeding,"[87] which would necessarily include all "claims" or "causes of action" asserted therein. Consistent with this, the Business Court has recognized that the term "civil action" is synonymous with lawsuit.[88] The Agrawals provided no case where a court held that the filing of a counterclaim constituted a separate action under similar circumstances.

¶42 Taken together, the Court finds the Agrawals' counterclaims filed in the October 4th Pleading, in the same cause as the underlying lawsuit, are not new or different actions and thus are subject to remand along with the original lawsuit.

¶43 Because the Court determines that the Agrawals' counterclaims are part of the same "action" as Yadav's originally filed lawsuit, and must be remanded as such, the Court need not reach the parties' alternative arguments.

ii. 3T Federal's Plea in Intervention is Not a New Action

¶44 The Court turns to 3T Federal's Petition in Intervention to assess whether it, too, is subject to remand with the underlying action.

a. 3T Federal's Plea in Intervention

¶45 3T Federal filed its petition in intervention in the combined October 4th Pleading. The substantive portion of the petition consists of a sentence in paragraph 6 and a related footnote that allege 3T Federal "has a justiciable interest in this suit because its

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[87] *Jaster*, 438 S.W.3d at 563–64.

[88] *See C Ten LLC v. Tarbox*, 2025 Tex. Bus. 1 at ¶ 26, 2025 WL 224542, at *7; *Tema Oil*, 2024 Tex. Bus. 3 at ¶ 15, 2024 WL 5337411, at *3.

interests will be affected by disposition of the claims at issue" and asserts the petition is a newly commenced action since it was filed after September 1, 2024.[89] 3T Federal's petition also asserts several causes of action that are identical to the Agrawals' counterclaims. 3T Federal joins the Agrawals in asserting claims for breach of contract (Claim 1), declaratory relief (Claim 4), and injunctive relief (Claim 7).[90]

¶46 The Agrawals and 3T Federal brought multiple "causes of action" against Yadav for breach of contract. They allege Yadav breached the 3T Federal operating agreement by refusing to acknowledge Rajeeva Agrawal's appointment as Manager, asserting control over the company despite the Agrawals' majority voting rights, and for acting as the de facto manager.[91]

¶47 The Agrawals also accuse Yadav of transferring assets from 3T Federal to himself, his spouse, and affiliated entities, borrowing money and funneling it to other entities, competing with 3T Federal through other ventures, and improperly causing 3T Federal to accept capital contributions.[92] The Agrawals and 3T Federal seek a declaratory judgment to void these actions, including payments made to Yadav, and the transfer of membership interest to Yadav and his business group.[93] In addition, the Agrawals and 3T Federal request injunctive relief to prevent Yadav from further controlling or managing the

[89] First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims ¶ 6 n.2, Oct. 4, 2024.

[90] *Id.* ¶¶ 46–81.

[91] *Id.* ¶ 49.

[92] *Id.*

[93] *Id.* ¶¶ 65–69.

company.[94] Finally, the Agrawals seek a mandatory injunction requiring him to return all company property, records, and information.[95]

¶48 3T Federal also raises two "causes of action" separately. First, 3T Federal forwards a breach of fiduciary duty claim, accusing Yadav of failing to honor the Agrawals' management rights, misappropriating company funds for personal use, competing with the company, and making false statements to the U.S. government regarding financial loans.[96] Additionally, 3T Federal asserts that Yadav illegally converted company assets, including cash, books, and records, and seeks compensation for the value of the converted property.[97]

¶49 Notably, 3T Federal has played a central role in the underlying lawsuit. After all, the primary subject of Yadav's lawsuit and the Agrawals' counterclaims is the ownership, control, management, and funding of 3T Federal. And when Yadav filed his original petition, he did so "individually and derivatively on behalf of 3T Federal" and those derivative claims have remained in the lawsuit since it began.[98] 3T Federal also intervened on July 8, 2024, through the same counsel as the Agrawals, claiming Yadav had, "unlawfully usurped the authority" of the Company's manager Rajeeva Agrawal, by locking him out as

[94] First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims ¶¶ 81–83, Oct. 4, 2024.

[95] *Id.* ¶ 84.

[96] *Id.* ¶¶ 54–60.

[97] *Id.* ¶¶ 61–64.

[98] Pl.'s Original Pet. 1, Sept. 30, 2024.

manager of 3T Federal.[99] 3T Federal later non-suited its petition for intervention, only to intervene again through the October 4th Pleading.[100]

b. The Parties' Contentions

¶50 The Agrawals and Intervenor 3T Federal contend the Business Court has jurisdiction of the plea in intervention filed in the October 4th Pleading because "an action commences for an intervening party when it files its petition in intervention."[101]

¶51 Yadav, for his part, contends that an "action commences" when the original petition is filed and that "subsequent pleadings, including those naming new parties, are filed in the original action which commences upon the filing of the original petition."[102]

¶52 Yadav contends that this action commenced on May 1, 2024, with the filing of Yadav's original petition, and that the Agrawals' counterclaims, 3T Federal's Petition in Intervention, and the Third-Party Claims are all claims filed into the action that commenced May 1, 2024.[103] Yadav cites *S & P Consulting Engineers, PLLC v. Baker*,[104] in support of his position that an action commences when the original petition is filed.[105]

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[99] 3T Federal Solutions, LLC'S Pet. In Intervention and Verified Appl. for Inj., ¶1, Sept. 30, 2024.

[100] Intervenor's Notice of Nonsuit Without Prejudice, Oct. 4, 2024; First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims 1, Oct. 4, 2024.

[101] Br. in Supp. of Business Ct. Jurisdiction 8, Oct. 24, 2024.

[102] Pl.'s Corrected Br. In Supp. Of Pl.'s Mot. To Remand 3, Dec 16, 2024.

[103] *Id.* at 4

[104] 334 S.W.3d 390 (Tex. App.—Austin, 2011, no pet.) (en banc).

[105] Pl.'s Corrected Br. In Supp. Of Pl.'s Mot. To Remand 3, Dec 16, 2024.

c. Analysis

¶53 A petition in intervention allows a party to join an ongoing lawsuit.[106] Intervention creates an opportunity for persons directly interested in the subject matter of an action to join that action or proceeding already instituted.[107] "The filing of a plea in intervention does not result in a separate legal proceeding."[108] Indeed, the purpose of a motion to intervene is to "prevent multiple suits concerning the same subject, and to resolve competing claims in the same proceeding."[109]

¶54 3T Federal primarily relies on three cases for its contention that the Plea in Intervention constitutes a new action: *Baker v. Monsanto*, *Hawthorn* v. *Guenther*, and *U.S. v. Randall & Blake*.[110] None of the cited cases are persuasive to the issues before the Court.

¶55 In *Baker,* the issue was whether an intervenor in an ongoing suit must formally serve parties with citation—as opposed to certified mail—in order to stop the running of the applicable statute of limitations.[111] The Supreme Court held that the defendants prior appearance in the litigation relieved the intervenors of the responsibility to serve the defendants Monsanto with formal citation.[112] This hardly supports 3T Federal's position that

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[106] *See Paxton v. Simmons*, 640 S.W.3d 588, 597 (Tex. App.—Dallas 2022, no pet.).

[107] *See Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 267 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd).

[108] *Id.*

[109] *Id.*

[110] *Baker v. Monsanto Co.,* 111 S.W.3d 158, 159 (Tex. 2003); *Hawthorne v. Guenther*, 461 S.W.3d 218 (Tex. App.—San Antonio 2015, pet. denied); *United States v. Randall & Blake*, 817 F.2d 1188 (5th Cir. 1987).

[111] *Baker,* 111 S.W.3d at 159 (Tex. 2003).

[112] *Id.* at 161.

"an action commences for an intervening party when it files its petition."[113] *Baker's* elemental holding, that a party that has already generally appeared in a matter is not entitled to formal citation and service of a petition in intervention, as opposed to Rule 21a service, does not support the Agrawals' and 3T Federal's contentions.

¶56 3T Federal's reliance on *Hawthorn v. Guenther* and *U.S. v. Randall & Blake* is equally misplaced.[114] Both cases hold, unremarkably, that claims filed in a petition (or motion) in intervention are sufficient to satisfy the applicable statute of limitations, as to that party. Nothing in those cases suggests that such claims are independent "actions" or "lawsuits" separate and apart from the original action.

¶57 More persuasive is *S & P Consulting*, a case Yadav cites for the proposition that subsequent pleadings in an existing lawsuit do not recommence an action.[115] In *S & P Consulting*, the Austin Court of Appeals, sitting en banc, analyzed which version of an amended law applied based on when an "action commenced."[116] The court held that "subsequent petitions by defendants against new parties become part of an action that has already commenced."[117]

¶58 In *S & P Consulting,* the court reviewed Texas Rules of Civil Procedure 22, 37, and 38 to determine when an action had commenced and noted:

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[113] Br. in Supp. of Business Ct. Jurisdiction 8, Oct. 24, 2024.

[114] *Hawthorne*, 461 S.W.3d 218; *United States v. Randall & Blake*, 817 F.2d 1188.

[115] Pl.'s Corrected Br. in Supp. of Pl.'s Mot. To Remand 3, Dec. 16, 2024.

[116] *S & P Consulting*, 334 S.W.3d at 397.

[117] *Id.* at 396.

> "Rule 22 states that [a] civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk. Thereafter, 'additional parties, necessary or proper parties to the suit, may be brought in,' indicating that these new parties are being added to an action that has already commenced. . . Rule 38 appears to use the word 'action' as a substitute for 'suit' as used in rules 22 and 37. . . . While these rules are not conclusive . . . they provide a context indicating that the filing of the original petition commences the action with respect to all parties regardless of when they are brought into the action."[118]

¶59 The Court concluded that the action "commenced with the filing of the original petition against the original defendants" and that "subsequent petitions by defendants against new parties become part of an action that has already commenced."[119]

d. Conclusion

¶60 The purpose of a plea in intervention is to intervene in an existing lawsuit and prevent multiple suits concerning the same subject, and to resolve competing claims in the same proceeding.[120] Here, 3T Federal intervened in an ongoing lawsuit between Yadav and the Agrawals in the same cause number, in an action removed to Business Court.

¶61 The Court agrees with the reasoning of the en banc Austin Court of Appeals in *S & P Consulting* that "subsequent petitions by defendants against new parties become part of an action that has already commenced."[121]

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[118] *Id.*

[119] *Id.* at 397.

[120] *See Eagle Oil & Gas*, 549 S.W.3d at 267.

[121] 334 S.W.3d at 390.

¶62 Like *S &P Consulting*, the action to which 3T Federal intervened, "commenced with the filing of the original petition against the original defendants."[122] When 3T Federal intervened, they did so in the ongoing action.

¶63 As described in Section III. C., *supra*, Section 8 of H.B. 19 prohibits the Business Court from exercising jurisdiction over "civil actions" commenced before September 1, 2024. An action, defined as an entire lawsuit or cause or proceeding, necessarily includes all asserted "claims" or "causes of action" filed in the action. The Court determines that the plea in intervention filed in the underlying action commenced on May 1, 2024, not with the filing of the October 4th Pleading. Thus, 3T Federal's intervention does not qualify as a separate civil action commenced on or after September 1, 2024.

iii. 3T Federal's Third-Party Claims Are Not New Actions

¶64 The Court now turns to 3T Federal's third-party claims in the October 4th Pleading to determine whether they are part of the pre-September 1st "action" and therefore subject to remand with the underlying action.

a. 3T Federal's Claims

¶65 3T Federal's claims against five newly named third-parties—four entity defendants and one individual defendant—are contained in counts 8–12 of the October 4th Pleading.[123] They include causes of action for aiding and abetting and declaratory relief

[122] *Id.* at 397–98.

[123] First Am. Countercl., Original Pet. in Intervention, and Original Third Party Claims ¶¶ 87–121, Oct. 4, 2024.

against: 3T Business Group, LLC; 3T Catamount, LLC; 3T Federal-SITS JV, LLC; 3T Federal-Sierra JV, LLC; and Ritu Yadav.[124]

¶66 3T Federal primarily alleges each of the five defendants aided and abetted Yadav's alleged breaches of contract and fiduciary duty by assisting in transfers of funds and ownership interests to the five defendants.[125] 3T Federal is the only entity to allege third-party claims against the new defendants. However, in Claim 13 entitled "Alternative Derivative Claims," the Agrawals allege that to the "extent that [the Agrawals] are adjudged to lack authority to cause the company to bring direct claims against Yadav and the other third-party defendants," the Agrawal's assert the same claims derivatively and on behalf of the company.[126]

¶67 Notably, 3T Federal has not moved to sever the third-party claims against the new parties from the original action, nor did it file the new claims as a separate action in the Business Court, but instead, filed its third-party claims directly in the same lawsuit involving Yadav and Agrawal.

b. The Parties' Arguments

¶68 3T Federal argues the Business Court must exercise jurisdiction over 3T Federal's "action" against the "newly added" defendants.[127] Its argument in this regard

[124] *Id.*

[125] *See Id.*

[126] *Id.* ¶¶ 122–124.

[127] Intervenor and Defs.' Post-Hr'g Br. in Supp. of Business Ct. Jurisdiction 11, Dec. 13, 2024.

largely duplicates its petition in intervention.[128] In particular, it insists that even if the Business Court's jurisdiction is limited to actions commenced on or after September 1, 2024, the Court still has jurisdiction over the third-party claims because they commenced on October 4, 2024.[129] 3T Federal primarily relies on three additional cases in support of its argument: *Morris v. Ponce*, *Granite State v. Chaucer, Martinez v. Gonzalez*.[130]

¶69 Yadav, for his part, again urges the Court to rule that an "action commences" when a petition is filed and that "subsequent pleadings, including those naming new parties," are all part of the same "action" and share the same original filing date.[131]

c. Analysis

¶70 In determining whether 3T Federal's third-party claims are part of the pre-September 1, 2024 "action" and therefore subject to remand, the Court applies a similar analysis as in the context of the petition in intervention. To reiterate, removal to the Business Court is governed by Section 25A.006(d) which permits a party to an "action" to remove "the action" to the Business Court if it is within the Court's jurisdiction.[132] In turn, Section 8 of H.B. 19 restricts the Business Court's jurisdiction to "civil actions" that

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[128] *Id.* ("the [Agrawals'] action against the newly added defendants commenced on October 4, 2024. For the same reasons the Court must exercise jurisdiction over the Intervenor's action, it must also exercise jurisdiction over this action").

[129] *Id.* at 3–4.

[130] Br. In Supp. Of Business Ct. Jurisdiction 9–10, Oct. 24, 2024; *Morris v. Ponce*, 584 S.W.3d 922 (Tex. App. —Houston [14th Dist.] 2019, no pet.); *Granite State Ins. Co. v. Chaucer Syndicate 1084 at Lloyd's*, No. CV H-20-1588, 2020 WL 8678020 (S.D. Tex. July 14, 2020); *Martinez v. Gonzales*, No. 13-14-00241-CV, 2015 WL 5626242 (Tex. App.—Corpus Christi-Edinburg, Sept. 17, 2015, no pet.).

[131] Pl.'s Corrected Br. in Supp. of Pl.'s Mot. To Remand 3, Dec. 16, 2024.

[132] TEX. GOV'T CODE ANN., § 25A.006(d).

commenced on or after September 1, 2024.[133] And the term "action" is expansively defined as "an entire lawsuit or cause or proceeding," which necessarily includes all asserted "claims" or "causes of action"[134]

¶71 The cases cited by 3T Federal do not alter this analysis.

¶72 In *Morris v. Ponce*, the Fourteenth Court of Appeals considered a medical malpractice claim brought by Ponce against a hospital.[135] The original suit was filed in 2012.[136] Ponce amended his petition to add new defendants in January 2014.[137] The defendants sought dismissal of the action claiming the pre-2013 version of the statute required service of an expert report within 120 days after the original lawsuit filing, while the 2013 version required service within 120 days of the defendants' answer.[138] The 2013 version applied "only to an action commenced on or after" September 2013.[139] The court held the action commences as to each defendant when first named in the lawsuit.[140] Since the newly added defendants were named after September 2013, the court applied the 2013 version of the statute and held the report was timely.[141]

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[133] Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8, 2023 Tex. Sess. Law Serv. 919, 929.

[134] *See Jaster*, 438 S.W.3d at 563–64; *Thomas*, 895 S.W.2d at 356.

[135] *Morris*, 584 S.W.3d at 924.

[136] *Id.* at 925.

[137] *Id.*

[138] *Id.* at 924–95.

[139] *Id.* at 925.

[140] *Id.* at 928.

[141] *Id.*

¶73 3T Federal also cites *Granite State v Chaucer*.[142] There, a federal district court was asked to determine when a case "commences" for purposes of the one-year limit on removal under diversity jurisdiction.[143] Plaintiff argued that the case "commenced" in October 2018, rendering the defendant's 2020 removal untimely, while the defendant contended the case did not commence until the defendant was served in August 2019.[144] The district court noted that "Texas law is unclear as to whether an action commences, for removal purposes, when the petition is first filed or when a new defendant is added."[145] The court then analyzed *S & P Consulting* and *Morris v. Ponce,* and after considering both lines of cases, held an action commences for each defendant when they are first named in the case.[146]

¶74 Finally, in *Martinez v. Gonzales,* the Corpus Christi Court of Appeals determined that that an action commences for each defendant when that defendant is first named.[147] The *Martinez* court held that "the filing of an amended petition adding defendants . . . constitutes the filing of a new lawsuit."[148] While the court attempted to distinguish *S & P Consulting*, it offered little explanation for its divergence.[149]

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[142] 2020 WL 8678020.

[143] *Id.* at *1.

[144] *Id.*

[145] *Id.*

[146] *Id.* at *8–10.

[147] 2015 WL 5626242.

[148] *Id.* at *8.

[149] *Id.* at *2–3.

¶75 The Court finds *Morris, Granite State* and *Martinez* distinguishable from the case at hand. Those cases turn on when an action commenced as to a particular party for purposes of triggering *that party's* rights or obligations.[150] All three concern whether new claims filed in an existing lawsuit constitute an action for purposes of limitations as to a particular party.[151] Here, the determination is whether the Business Court has jurisdiction of the "action," not when a particular party's rights or duties were triggered.[152] For purposes of assessing the Court's jurisdiction over the third-party claims, the Court finds *S & P Consultant's* holding—that "subsequent petitions by defendants against new parties become part of an action that has already commenced"—more convincing.[153]

¶76 Additionally, 3T Federal's third-party claims were not filed as a separate action nor were they severed from the primary case. Instead, they were filed and remain in the same action that dates back to May 1, 2024. The Texas Supreme Court has explained that a severance "splits a single suit into two or more independent actions."[154] This, too, suggests that 1) different claims are all part of the same action, at least until they are

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[150] *See Morris*, 584 S.W.3d 922; *see also Granite State,* 2020 WL 8678020; *see also Martinez*, 2015 WL 5626242.

[151] *See Morris*, 584 S.W.3d 922; *see also Granite State,* 2020 WL 8678020; *see also Martinez*, 2015 WL 5626242; *see also Sebastian v. Durant*, 2025 Tex. Bus. 4 at ¶¶ 22–25, 2025 WL 394634 at *4 (Tex. Bus. Ct. Feb. 4, 2025).

[152] *Sebastian*, 2025 Tex. Bus. 4 at ¶ 25, 2025 WL 394634 at *4.

[153] *S & P Consulting*, 334 S.W.3d at 396.

[154] *Van Dyke v. Bosewll, O'Toole, Davis & Pickering,* 697 S.W.2d 381, 383 (Tex. 1985); *see also E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 523 (Tex. 2002) ("A severed action becomes a different action").

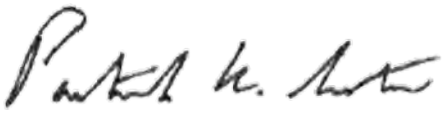
severed and 2) to the extent litigants wish to remove matters to the Business Court to treat them as separate actions, such a result might be accomplished by moving to sever an action.

¶77 Section 8 of H.B. 19 restricts the Business Court's jurisdiction to "civil actions" commenced on or after September 1, 2024. The Court determines that 3T Federal third-party claims in their October 4th Pleading are part of the action that commenced upon the filing of Plaintiff's Original Petition on May 1, 2024. As such, they do not constitute separate actions commenced after September 1, 2024, and the Court lacks jurisdiction of those claims.

IV. Conclusion

¶78 For the reasons stated above, the Court lacks jurisdiction of this action in its entirety, including all claims filed in the October 4th Pleading, and therefore remands this case to the 419th District Court of Travis County, Texas.

SIGNED ON: February 11, 2025.



Hon. Patrick K. Sweeten
Judge of the Texas Business Court,
Third Division

2025 Tex. Bus. 8

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

Cypress Towne Center, Ltd., both individually and derivatively on behalf of Kimco 290 Houston II, L.P., *Plaintiff,* v. Kimco Realty Services, Inc., Kimco Developers, Inc., KD Houston 1086A, Inc., Kimco Realty Corporation, *Defendants.*	§ § § § § § § § § § §	Cause No. 24-BC11A-0013

SYLLABUS[1]

This opinion addresses the removability of actions to the Texas Business Court that were filed in the district court before September 1, 2024, where a publicly traded company was joined as a defendant in the underlying case after September 1, 2024, and Defendants filed an opposed notice of removal within thirty days of the publicly traded defendant's joinder. The Court concludes that it lacks subject-matter jurisdiction over this action because Section 8 of House Bill 19 limits the applicability of Texas Government Code Chapter 25A to "civil actions commenced on or after September 1, 2024."

[1] The syllabus was created by court staff and is provided for the convenience of the reader. It is not part of the Court's opinion, does not constitute the Court's official description or statement, and should not be relied upon as legal authority.

THE BUSINESS COURT OF TEXAS
ELEVENTH DIVISION

Cypress Towne Center, Ltd., both individually and derivatively on behalf of Kimco 290 Houston II, L.P., *Plaintiff,* v. Kimco Realty Services, Inc., Kimco Developers, Inc., KD Houston 1086A, Inc., Kimco Realty Corporation, *Defendants.*	§ § § § § § § § § § §	Cause No. 24-BC11A-0013

OPINION AND ORDER

I. INTRODUCTION

¶1 Before the Court is (1) the Notice of Removal by Defendants, Kimco Developers, Inc., KD Houston 1086A, Inc., Kimco Realty Services, Inc., and Kimco Realty Corporation (collectively, "Defendants") filed October 14, 2024 ("Notice of Removal" or "Notice"); (2) Defendants' Brief Supporting Removal to Texas Business Court filed November 5, 2024 ("Defendants' Initial Brief" or "Initial Brief"); (3) Plaintiff, Cypress Towne Center, Ltd.'s ("Plaintiff") Motion to Remand and Brief Regarding Jurisdiction

filed November 12, 2024 ("Motion to Remand"); (4) Defendants' Response to Plaintiff's Motion to Remand and Brief Regarding Jurisdiction filed November 22, 2024 ("Defendants' Response" or "Response"); (5) Plaintiff's Reply in Support of Plaintiff's Motion to Remand filed December 2, 2024 ("Plaintiff's Reply" or "Reply"); (6) Plaintiff's Proposed Opinion and Order filed December 5, 2024 ("Plaintiff's Proposed Opinion"); (7) Defendants' Proposed Opinion and Order filed December 23, 2024 ("Defendants' Proposed Opinion"); (8) Plaintiff's February 6, 2025 e-mail submission of the *Sebastian*[1] opinion; and (9) Defendants' Response to Plaintiff's Submission of the [*Sebastian*] Decision to This Court filed February 11, 2025 ("Defendants' *Sebastian* Brief" or "*Sebastian* Brief"). The Court held a hearing on this matter on December 5, 2024. Having considered the Parties' arguments and the relevant law, the Court **GRANTS** Plaintiff's Motion to Remand and **ORDERS** that this suit be remanded to the district court.

II. Procedural Background

¶2 On June 16, 2022, Plaintiff commenced this action in the 11th Judicial District Court of Harris County against its partners, Kimco Developers, Inc., and KD Houston 1086A, Inc.,[2] asserting both individual and derivative claims.[3] According to Defendants, "Plaintiff's claims arise out of an accounting adjustment made by the General

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[1] *Sebastian v. Durant*, 2025 Tex. Bus. 4, 2025 WL 394634 (Feb. 4, 2025).

[2] App. to Notice of Removal at BC APPX 000003-000018 (Plaintiff's Original Petition, filed June 16, 2022).

[3] Plaintiff's Proposed Opinion at 2; *see* Motion to Remand at 3 ("In 2021, without notice to Cypress, Kimco retroactively recharacterized its prior loans as equity investments earning a 10% preferred return. This unilateral change increased Kimco's priority return by 230 percent—from $2.1 million to nearly $7 million—effectively eliminating Cypress's partnership value while increasing Kimco's invested capital by over $2 million."); *see generally* App. to Notice of Removal at BC APPX 000003-000018 (Plaintiff's Original Petition, filed June 16, 2022); BC APPX 000127-000144 (Plaintiff's First Amended Petition, filed December 4, 2023); BC APPX 000147-000163 (Plaintiff's Second Amended Petition, filed December 11, 2023); BC APPX 000418-000439 (Plaintiff's Third Amended Petition, filed September 20, 2024).

Partner and include breach of contract, breach of fiduciary duty, declaratory relief, vicarious liability, conspiracy, piercing the corporate veil, and alter ego."[4] Since Plaintiff filed its original petition, the Parties have engaged in substantial motion practice, including a mandamus proceeding concerning net worth discovery which was resolved by the Fourteenth Court of Appeals.[5] The third trial setting in the underlying case was scheduled for March 3, 2025.[6]

¶3 On September 20, 2024, nineteen days after this Court opened for business,[7] Plaintiff filed its Third Amended Petition, adding Kimco Realty Corporation ("KRC") (a publicly traded company, NYSE: KIM) as a defendant under theories of veil piercing and alter ego liability.[8] Twenty-four days later, on October 14, 2024, Defendants filed their opposed Notice of Removal to the Texas Business Court.[9] In the Notice, Defendants state:

> Jurisdiction is proper in the 11th Business Court Division pursuant to TEX. GOV'T CODE § 25A.004(c) and (e). Defendant Kimco Realty Corporation (NYSE: KIM) is a publicly traded company and both Plaintiff and Defendants/Counter-Plaintiffs in this action seek declaratory judgments

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[4] Defendants' Proposed Opinion at 2.

[5] Plaintiff's Proposed Opinion at 2; *see* Notice of Opinion Distribution (filed in this Court on January 7, 2025); *In re Kimco Developers, Inc.*, No. 14-24-00361-CV, 2024 WL 5250445 (Tex. App.—Houston [14th Dist.] Dec. 31, 2024, orig. proceeding).

[6] App. to Notice of Removal at BC APPX 000414 (Order signed by Judge Hawkins, resetting trial for March 3, 2025).

[7] *See* Tex. H.B. 19, § 5, 88th Leg., R.S. (2023) ("Except as otherwise provided by this Act, the business court is created September 1, 2024.").

[8] App. to Notice of Removal at BC APPX 000418–000439 (Plaintiff's Third Amended Petition). Of note, KRC has been mentioned in Plaintiff's pleadings since the outset of this litigation, each successive petition reading: "[KRC] is a real estate investment trust that invests in shopping centers throughout the United States. The company's properties are generally owned and operated through various subsidiaries, such as its wholly-owned subsidiary [Kimco Developers, Inc. or KDI]." *See id.* at BC APPX 000006 (¶ 10 in Plaintiff's Original Petition, filed June 16, 2022); BC APPX 000130 (¶ 10 in Plaintiff's First Amended Petition, filed December 4, 2023); BC APPX 000150 (¶ 10 in Plaintiff's Second Amended Petition, filed December 11, 2023); BC APPX 000421 (¶ 12 in Plaintiff's Third Amended Petition, filed September 20, 2024).

[9] In general, if all parties to an action have not agreed to remove the action, the notice of removal must be filed not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action. TEX. GOV'T CODE § 25A.006(f)(1); TEX. R. CIV. P. 355(c)(2)(A).

> interpreting the Limited Partnership Agreement of Kimco 290 Houston II, LP under Chapter 37 of the Civil Practice and Remedies Code. Accordingly, this cause is removable pursuant to TEX. GOV'T CODE § 25A.006(d) and TEX. R. CIV. P. 355(a).[10]

By filing their Notice, Defendants removed the entire action from the district court, including all claims and causes of action which were initially brought prior to September 1, 2024.[11]

¶4 By its order of October 15, 2024, the Court directed the Defendants to file briefing concerning the propriety of this suit's removal to the Texas Business Court and regarding the Court's authority and jurisdiction to hear the suit. The Court set the deadline for Defendants' briefing for November 5, 2024; and ordered that Plaintiff may file any responsive brief on or before November 12, 2024.

¶5 On November 5, 2024, Defendants filed their Initial Brief. On November 12, 2024, in lieu of a response brief, Plaintiff filed its Motion to Remand. Therefore, the Court granted leave for Defendants to file their Response on November 22, 2024; and Plaintiff to file its Reply on December 2, 2024. On December 5, 2024, the day of the hearing on Plaintiff's Motion to Remand, Plaintiff filed Plaintiff's Proposed Opinion granting remand.

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[10] Notice of Removal at ¶¶ 3–4. There has been significant argument concerning whether concurrent (TEX. GOV'T CODE § 25A.004(e)) or supplemental (TEX. GOV'T CODE § 25A.004(f)) jurisdiction would apply to certain claims in the lawsuit; and relatedly, whether certain claims are derivative or direct claims. *See* Defendants' Initial Brief at 7, n.13; Plaintiff's Motion to Remand at 9–15; Defendants' Response Brief at 6–7; Plaintiff's Reply at 2–3, n.2; Defendants' Proposed Opinion at 7–8. While the Court appreciates the Parties' comprehensive approach, the Court need not reach a resolution of this portion of the dispute because Chapter 25A does not apply to this action. *See* Analysis *infra* ¶¶ 10–15 and accompanying authorities; Plaintiff's Reply at 2–3, n.2.

[11] Defendants' Initial Brief at 4 ("Because the Petition filed on September 20, 2024, added a publicly traded company as a defendant and both Plaintiff and Defendants seek declaratory judgments by the Court as to the meaning of the LPA, the entire matter is within this Court's jurisdiction, including as to the parties against whom the action was initially brought prior to September 1, 2024.").

At the hearing, the Court granted leave for Defendants to file a proposed opinion denying remand. On December 23, 2024, Defendants filed Defendants' Proposed Opinion. On February 6, 2025, Plaintiff sent correspondence to the Court attaching the opinion in *Sebastian v. Durant*, 2025 Tex. Bus. 4, 2025 WL 394634 (Feb. 4, 2025). On February 10, 2025, Defendants moved for leave to file a brief concerning *Sebastian*, which the Court granted. On February 11, 2025, Defendants filed the *Sebastian* Brief.

III. LEGAL STANDARD

¶6 For every judicial proceeding, "subject-matter jurisdiction must exist before we can consider the merits," and a court must examine its jurisdiction "any time it is in doubt." *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 797 (Tex. 2021) (quoting *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 774 (Tex. 2020)); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) ("Subject[-]matter jurisdiction is never presumed and cannot be waived."). "Whether a court has subject[-]matter jurisdiction is a question of law." *Tex. Disposal Sys. Landfill, Inc. v. Travis Cent. Appraisal Dist.*, 694 S.W.3d 752, 757 (Tex. 2024).

¶7 A Notice of Removal to the Business Court must plead facts to establish the Business Court's authority to hear the action. TEX. R. CIV. P. 355(b)(2)(A). If the Business Court does not have jurisdiction over a removed action, the Business Court shall remand the action to the court in which the action was originally filed. TEX. GOV'T CODE § 25A.006(d); TEX. R. CIV. P. 355(f)(1).

IV. ANALYSIS

A. The Court lacks subject-matter jurisdiction over the removed action because it commenced prior to September 1, 2024.

¶8 "As with every question of statutory construction, our duty is to accurately articulate the meaning of the enacted text—here," of H.B. 19.[12] *Brown v. City of Houston*, 660 S.W.3d 749, 752 (Tex. 2023). Indeed, "H.B. 19's plain 'text is the alpha and omega of the interpretive process.'" *Energy Transfer LP v. Culberson Midstream LLC*, 2024 Tex. Bus. 1, 2024 WL 4648110, at *3 (Oct. 30, 2024) (citing *In re Panchakarla*, 602 S.W.3d 536, 541 (Tex. 2020); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017)). "When the text unambiguously answers a question, our inquiry ends." *Brown*, 660 S.W.3d at 752.

¶9 When Governor Greg Abbott signed H.B. 19 into law on June 9, 2023, the enrolled version of the Bill included two sections that are pertinent to this Opinion:

i. Section 1, which vests the Court with its jurisdiction, and sets forth the text of the new Chapter 25A of the Texas Government Code,[13] and

ii. Section 8, which states: "The changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."[14]

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[12] In this context, as this Court has opined, the enrolled version of H.B. 19 is the binding statute enacted by the Texas Legislature. *Lone Star NGL Prod. Servs. v. Eagleclaw Midstream Ventures*, 2024 Tex. Bus. 8 at ¶ 14, n.29, 2024 WL 5202356, at *5 (Dec. 20, 2024); *see* TEX. GOV'T CODE § 311.029 (under the Code Construction Act, "the language of the enrolled bill version controls" over any subsequent printing of the statute).

[13] Tex. H.B. 19, § 1, 88th Leg., R.S. (2023) (emphasis added); *see* TEX. GOV'T CODE § 25A.004 (entitled "Jurisdiction and Powers").

[14] Tex. H.B. 19 at § 8.

¶10 After exhaustive consideration of the issue by each division of the Texas Business Court, the Fifteenth Court of Appeals recently rendered a binding opinion concerning whether the Business Court has subject-matter jurisdiction over actions commenced prior to September 1, 2024. In holding that the Business Court did not have jurisdiction over an action pending prior to September 1, 2024, the Fifteenth Court of Appeals opined: "The fundamental problem here is that if the Act [H.B. 19] were to apply to civil actions commenced both before and after the effective date, the effective date itself would be meaningless; the Act [H.B. 19] would apply to all cases everywhere all at once. We cannot construe this effective date to effectively eliminate any effective date." *In re ETC Field Servs., LLC*, No. 15-24-00131-CV, 2025 WL 582320, at *3 (Tex. App.—15th Dist., Feb. 21, 2025, orig. proceeding).

¶11 This is consistent with the Business Court's consensus interpretation of Sections 1 and 8 of H.B. 19. In essence, it is now settled that the Texas Business Court lacks subject-matter jurisdiction over actions which were commenced prior to September 1, 2024. *See Jorrie v. Charles*, 2024 Tex. Bus. 4, 2024 WL 5337409 (Nov. 7, 2024); *Winans v. Berry*, 2024 Tex. Bus. 5, 2024 WL 5337410 (Nov. 7, 2024); *Bestway Oilfield Inc. v. Cox*, 2025 Tex. Bus. 2, 2025 WL 251338 (Jan. 17, 2025); *Energy Transfer*, 2024 Tex. Bus. 1, 2024 WL 5320611. As Plaintiff accurately assessed, "[t]he Texas Legislature spoke with precision when crafting Chapter 25A's temporal scope: it applies only to 'civil actions commenced on or after September 1, 2024.'"[15] Therefore, parties to a lawsuit

[15] Motion to Remand at 4.

commenced before September 1, 2024, may not rely on Texas Government Code Chapter 25A to justify subject-matter jurisdiction in the Business Court.[16] In applying this general rule, the only operative fact is the commencement date of the action which was removed to the Business Court.[17]

¶12 Without deviation, each division of the Business Court has concluded that, under Section 8, a "civil action" commences when the original petition was filed. *See Yadav*, 2025 Tex. Bus. 7 at ¶¶ 29–30, 59, 62, 2025 WL 467645, at *6–11 (for purposes of Section 8, the removed action commenced upon the filing of Plaintiff's Original Petition, even when new claims were joined to the lawsuit after September 1, 2024); *Sebastian*, 2025 Tex. Bus. 4 at ¶¶ 20–26, 2025 WL 394634, at *3–5 (despite an attempt to remove only some of the claims in the underlying lawsuit, the relevant "civil action" in the analysis of Section 8 is the entire action, which commences on the filing of the original petition); *Osmose*, 2025 Tex. Bus. 3 at ¶¶ 15–30, 2025 WL 370681, at *3–5 (within the context of Section 8, the commencement date for an action is the date on which the original petition was filed, not the date on which discrete claims are made against various parties); *Jorrie*, 2024 Tex. Bus. 4 at ¶ 12, 2024 WL 5337409, at *2 (under Section 8, the relevant action

[16] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 19, 2024 WL 5202356, at *7.

[17] Each division of the Business Court relies entirely on the commencement date of the removed action to determine whether Section 8 requires remand. *See Energy Transfer*, 2024 Tex. Bus. 1, 2024 WL 5320611; *Synergy Global Outsourcing, LLC v. Hinduja Global Solutions, Inc.*, 2024 Tex. Bus. 2, 2024 WL 5337412 (Oct. 31, 2024); *Tema Oil and Gas Co. v. ETC Field Servs., LLC*, 2024 Tex. Bus. 3, 2024 WL 5337411 (Nov. 6, 2024); *Jorrie*, 2024 Tex. Bus. 4, 2024 WL 5337409; *Winans*, 2024 Tex. Bus. 5, 2024 WL 5337410; *XTO Energy, Inc. v. Houston Pipe Line Co., LP*, 2024 Tex. Bus. 6, 2024 WL 5337408 (Nov. 26, 2024); *Seter v. Westdale Asset Mgmt., Ltd.*, 2024 Tex. Bus. 7, 2024 WL 5337346 (Dec. 16, 2024); *Lone Star*, 2024 Tex. Bus. 8, 2024 WL 5337407; *Bestway*, 2025 Tex. Bus. 2, 2025 WL 251338; *Osmose Utils. Servs., Inc. v. Navarro Cnty. Electric Cooperative*, 2025 Tex. Bus. 3, 2025 WL 370681 (Jan. 31, 2025); *Sebastian*, 2025 Tex. Bus. 4, 2025 WL 394634; *Yadav v. Agrawal*, 2025 Tex. Bus. 7, 2025 WL 467645 (Feb. 11, 2025).

commenced when the original petition was filed); *Tema*, 2024 Tex. Bus. 3 at ¶¶ 14-15, 2024 WL 5337411, at *3 (the commencement date for an action under Section 8 is the date on which the original petition was filed). Plaintiff's analysis cogently articulates this point. "[U]nlike the term 'filed,' which may apply equally to suits or to causes of action within a suit, the term 'commenced' refers specifically to the initiation of a suit as a whole."[18]

¶13 To illustrate, an adaptation of the Fifteenth Court of Appeals' language in *ETC Field Services* demonstrates how the settled rule would apply in this case:

> *Commence* means to "begin" or "start," and is used primarily in "more formal associations with law and procedure, combat, divine service, and ceremony." [Texas Rule of Civil Procedure 22 uses] the term in the precise context of starting a new lawsuit: "A civil suit in the district or county court shall be *commenced* by a petition filed in the office of the clerk." This civil action was thus "commenced" in the [Harris] County district court on [June 16, 2022], not in the business court. Its removal to the business court [two] years later on September [20], 2024 . . . did not *commence* a new civil action but *continued* the previous one in a different court.[19]

¶14 Thus, Defendants appear to urge that this Court create an exception to the Business Court's settled rule, and hold that a party may remove an action which was commenced prior to September 1, 2024 if the action is subsequently amended to add a publicly traded company as a defendant after September 1, 2024.[20] Under the facts presented here—where Defendants removed the entire action including all claims and

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[18] Motion to Remand at 6 (citing TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."); TEX. R. CIV. P. 6 ("No civil suit shall be commenced . . . on Sunday."); *Straub v. Pesca Holding LLC*, 621 S.W.3d 299, 302-05 (Tex. App.—San Antonio 2021, no pet.) (distinguishing between "filed" and "commenced")).

[19] *In re ETC Field Servs.*, 2025 WL 582320, at *2 (citations omitted).

[20] *See* Defendants' Proposed Opinion at 4-5.

controversies pending prior to September 1, 2024[21]—the Court cannot justifiably deviate from the established rule.

¶15 Because the Court declines to adopt Defendants' desired exception to the established interpretation of Section 8, the rule remains simple in application. Plaintiff's Original Petition was filed in the district court on June 16, 2022.[22] Because this lawsuit was commenced before September 1, 2024, the Court holds that (i) the Defendants may not rely on Chapter 25A to justify subject-matter jurisdiction in this case; and (ii) the Court lacks subject-matter jurisdiction over the action.

B. The post-September 1, 2024 addition of a publicly traded defendant in a pre-September 1, 2024 civil action does not affect the Court's jurisdictional analysis or the operation of Section 8.

¶16 Defendants attempt to distinguish this case from its forebears, characterizing this as a "matter of first impression to the Business Courts regarding removal when a publicly traded company is added to an action as a defendant for the first time after September 1, 2024."[23] In support of this effort, Defendants rely on the language of Texas Government Code Sections 25A.004(b) and (c).[24] Working in tandem, and subject to the restrictions of Section 8 and H.B. 19 generally, these provisions create subject-matter

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[21] Defendants' Response at 2 ("As Defendants *have a clear right to remove the entire action* and this Court has jurisdiction over same, Cypress' Motion should be denied and *this Court should exercise its jurisdiction to hear the entire action.*") (emphasis added).
[22] App. to Notice of Removal at BC APPX 000003–000018 (Plaintiff's Original Petition).
[23] Defendants' Proposed Opinion at 1; *see* Defendants' Response at 1 ("Cypress gives short shrift to the unique posture of this case of first impression: Cypress filed its third amended Petition after September 1, 2024, on September 20, 2024, which added a publicly traded entity for the first time and triggered the permissive right to remove this action to the Business Court, which Defendants exercised.").
[24] Defendants' Proposed Opinion at 3.

jurisdiction in the Texas Business Court over seven specific categories of action[25] (i) wherein "the amount in controversy exceeds $5 million, excluding interest, statutory and exemplary damages, penalties, attorney's fees, and court costs;" or (ii) "regardless of the amount in controversy if a party to the action is a publicly traded company." TEX. GOV'T CODE § 25A.004(b)–(c).

¶17 Defendants contend that because (i) certain claims and causes of action asserted in this case allegedly fall within these seven specific categories; and (ii) KRC, a publicly traded company, was added as a party to this action after September 1, 2024, that the Business Court has subject-matter jurisdiction over the entire action, including those claims and causes of action which pre-existed the Court.[26] However, Defendants offer no alternative construction of H.B. 19, nor do we conclude an alternative construction exists,

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[25] These categories are as follows:

> (1) a derivative proceeding; (2) an action regarding the governance, governing documents, or internal affairs of an organization; (3) an action in which a claim under a state or federal securities or trade regulation law is asserted against: (A) an organization; (B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person or managerial official; (C) an underwriter of securities issued by the organization; or (D) the auditor of an organization; (4) an action by an organization, or an owner of an organization, if the action: (A) is brought against an owner, controlling person, or managerial official of the organization; and (B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization; (5) an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith; (6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and (7) an action arising out of the Business Organizations Code.

TEX. GOV'T CODE § 25A.004(b)(1)–(7).

[26] Defendants' Response at 2 ("As Defendants have a clear right to remove the entire action and this Court has jurisdiction over same, Cypress' Motion should be denied and *this Court should exercise its jurisdiction to hear the entire action.*") (emphasis added).

which might indicate that the addition of a publicly traded company following September 1, 2024 affects the Court's application of Section 8.

¶18 In the legal analysis presented, Defendants rely principally on (i) two context-dependent rulings concerning the meaning of the word "commence"—*Martinez v. Gonzales*[27] and *Morris v. Ponce*[28]—and (ii) a conclusory "Construction of the Enabling Legislation."[29] Moreover, certain arguments concerning judicial efficiency, legislative history, and federal removal authority, while present in Defendants' briefing, were not utilized as primary bases for Defendants' Proposed Opinion.[30] Nevertheless, the Court will address each of these items *seriatim*.

i. *Martinez* and *Morris* are inapposite to the analysis of Section 8's effect on the scope of the Court's subject-matter jurisdiction.

¶19 *Martinez* concerns the effective date of 2013 amendments to Texas Civil Practice & Remedies Code § 74.351(a). The pre-2013 version of Section 74.351(a) stated, in relevant part:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date *the original petition was filed*, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.[31]

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[27] No. 13-14-00241-CV, 2015 WL 5626242 (Tex. App.—Corpus Christi-Edinburg Sept. 17, 2015, pet. denied); *see* Defendants' Proposed Opinion at 4–5.

[28] 584 S.W.3d 922 (Tex. App.—Houston [14th Dist.] 2019, pet. denied); *see* Defendants' Proposed Opinion at 4–5.

[29] Defendants' Proposed Opinion at 3 (Section entitled "Construction of the Enabling Legislation").

[30] *Compare* Defendants' Initial Brief at 8–13 (discussing "gain efficiencies" and legislative history); Defendants' Response Brief at 8 ("This action is exactly the type of case the Legislature and Governor envisioned the Business Court hearing."), *with* Defendants' Proposed Opinion.

[31] *Martinez*, 2015 WL 5626242, at *2 (quoting Act of June 17, 2005, 79th Leg. R.S., ch. 635, § 1, 2005 TEX. SESS. LAW SERV. Ch. 635 (current version at TEX. CIV. PRAC. & REM. CODE § 74.351(a))) (emphasis added).

The 2013 amendment reads:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date *each defendant's original answer is filed*, serve on that party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.[32]

¶20 Per the Legislature's explicit statements in the 2013 amendment's enabling legislation, it "applie[d] only to an action *commenced* on or after [September 1, 2013]."[33] The plaintiffs filed their original petition containing health care liability claims prior to September 1, 2013, but on September 11, 2013, amended their petition to name two new physician defendants. The new defendants filed their answers on October 13 and 21, 2013.

¶21 Under the pre-2013 version of Section 74.351(a), the expert reports would both have been due on January 9, 2014.[34] Under the 2013 amendment, the expert reports would have been due February 10 and 18, 2014, respectively.[35] Plaintiffs served the expert reports concerning both new physician defendants on January 31, 2014.[36] Naturally, the new physician defendants moved to dismiss the claims against them for lack of timely expert reports.[37] The trial court denied the motions, and the new physician defendants appealed.[38] Affirming the trial court, the Thirteenth Court of Appeals stated, "we hold that *for purposes of section 74.351(a)*, an action *commences* when the particular defendant is named, thus triggering the applicable deadline for serving an expert report."[39]

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[32] *Martinez*, 2015 WL 5626242, at *1 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(a)) (emphasis added).
[33] *Id.*
[34] *See id.*
[35] These dates were not explicitly calculated in the *Martinez* opinion but are added here for clarity.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at *4 (emphasis added).

¶22 In *Morris*, the Fourteenth Court of Appeals ruled on the exact same legal issue, concurring with the Thirteenth Court of Appeals.[40] In sum, both *Martinez* and *Morris* set forth a context-dependent meaning of the word "commencement"[41] where the relevant statute concerned a health care liability defendant's statutory procedural rights.

¶23 Defendants rely on *Martinez* and *Morris* to justify the assertion that "[s]ince the action was commenced against KRC after September 1, 2024, [D]efendants had the right to remove *the action* to this Court under Section 25A.006(d)."[42] However, as Defendants have made clear, it is not solely the action against KRC (*i.e.*, the arguably jurisdictional action) which Defendants removed to the Business Court, but the entire action.[43] Because the relevant sections of H.B. 19 do not prescribe any party-specific rights in this context, *Martinez* and *Morris* are inapposite.[44]

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[40] *Morris*, 584 S.W.3d at 928 ("[W]e hold that, *for purposes of section 74.351(a)*, an action commences as to each defendant when it is first named as a defendant.") (emphasis added).

[41] *See also S & P Consulting Eng'rs, PLLC v. Baker*, 334 S.W.3d 390, 396 (Tex. App.—Austin 2011, no pet.) ("We conclude that, for purposes of the effective date of [a different section of the Texas Civil Practice and Remedies Code], an action commences when the original petition is filed. For this purpose, the action does not recommence with the filing of an amended petition even if that petition names a new defendant for the first time."). The Court is cognizant of the Parties' briefing on *S & P Consulting*; it does not need to discuss this case in depth as the rule concerning "commencement" for purposes of Section 8 has been settled by the other divisions of the Business Court. *See* Motion to Remand at 6; Defendants' Response at 4; Plaintiff's Proposed Opinion at 4; Defendants' Proposed Opinion at 4; *Sebastian* Brief at 2.

[42] Defendants' Proposed Opinion at 5 (emphasis added); *see* Defendants' Response at 3–5.

[43] Defendants' Proposed Opinion at 8 ("The Court therefore has jurisdiction over this entire action under [Chapter 25A].").

[44] *Yadav*, 2025 Tex. Bus. 7 at ¶ 75, 2025 WL 467645, at *13 ("The Court finds *Morris* . . . and *Martinez* distinguishable from the case at hand. Those cases turn on when an action commenced as to a particular party for purposes of triggering that party's rights or obligations[] . . . [and] concern whether new claims filed in an existing lawsuit constitute an action for purposes of limitations as to a particular party. Here, the determination is whether the Business Court has jurisdiction of the 'action,' not when a particular party's rights or duties were triggered.") (emphasis omitted) (footnotes omitted); *see Sebastian*, 2025 Tex. Bus. 4 at ¶ 24, 2025 WL 394634, at *4 (labeling *Martinez* and *Morris* as "nonbinding precedent," and rejecting an attempt at partial removal); *see also* Defendants' *Sebastian* Brief at 2 (discussing *Sebastian*'s analysis of *Martinez* and *Morris*). In the *Sebastian* Brief, Defendants state "The *Sebastian* court itself recognized the result would be different if the subsequent pleading created a new lawsuit. . . . A new lawsuit is exactly what *Martinez* held results from an amended petition adding defendants, which is what happened here. . . ."

ii. **Section 8 is unambiguous and applies to all parties in a civil action, independent of when a party is joined.**

¶24 Defendants do not proffer any alternative construction of Section 8 to justify their position. Instead, Defendants propose that this Court rely on the following conclusory statement:

> *Nothing* in Section 8 of House Bill 19 suggests that defendants who have actions brought against them for the first time after September 1, 2024 cannot exercise their right to have those actions heard in the Business Court just because their co-defendants had claims brought against them prior to September 1, 2024.[45]

¶25 On the contrary, as this Court has held, Section 8 of H.B. 19 unambiguously operates as a jurisdictional provision when applied to Texas Government Code Section 25A.004 (entitled "Jurisdiction and Powers"), such that no party to a civil action commenced prior to September 1, 2024 may rely on the provisions of Chapter 25A to justify subject-matter jurisdiction in the Business Court.[46] In its current unqualified form, Section 8 uniformly applies to all parties in a civil action, independent of when a party is joined.[47]

Defendants' *Sebastian* Brief at 2–3. This statement does not fully reflect the *Sebastian* court's analysis. One of the primary holdings of *Sebastian* was that, for purposes of Section 8, a civil action commences with the original petition's filing, regardless of when additional parties are joined. *See Sebastian*, 2025 Tex. Bus. 4 at ¶ 22, 2025 WL 394634, at *3. Thus, under *Sebastian*, the post-September 1, 2024 joinder of new claims and parties (as occurred here in Plaintiff's Third Amended Petition) does not create a new lawsuit for purposes of Section 8. *See* Defendants' *Sebastian* Brief at 2–3 ("The *Sebastian* court itself recognized the result would be different if the subsequent pleading created a new lawsuit.").

[45] Defendants' Proposed Opinion at 3 (emphasis added).

[46] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 19, 2024 WL 5202356, at *7.

[47] *See* note 17 *supra* and accompanying text. Each Business Court decision concerning Section 8 turns on one operative fact—the commencement date of the removed action. This includes the *Sebastian* decision, which concluded that a civil action commences with the original petition's filing, regardless of when additional parties are joined; and that Chapter 25A permits removal of an entire "action" rather than of individual claims. *See Sebastian*, 2025 Tex. Bus. 4, 2025 WL 394634.

iii. Appeals to judicial economy and legislative history cannot overcome the text of H.B. 19.

¶26 In their briefs, Defendants also placed emphasis on judicial economy and the legislative history of H.B. 19.[48] These arguments cannot overcome the text of H.B. 19. It is fundamental that a focus on judicial economy cannot supersede the bedrock requirement of subject-matter jurisdiction,[49] and Texas courts "do not consider legislative history or other extrinsic aides to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent."[50] As applied in this matter, Section 8 lacks ambiguity.

iv. Defendants' comparison between the Texas Business Court's removal procedure and federal removal procedure does not account for the existence of Section 8.

¶27 Finally, in their efforts to bypass Section 8, Defendants appear to compare the Business Court's removal procedure with federal removal procedure.[51] Defendants highlight that "the federal courts [ensure] removability within 30 days after the amendment from which removability may be ascertained was filed, no matter the filing date of the initial suit."[52] In the Business Court, there is a similar procedure for the opposed removal of actions which are amended to add jurisdictional claims following the commencement of suit.[53] However, Defendants do not argue—and there does not appear to be any basis to argue—that the existence of this similar procedure somehow operates to

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[48] Defendants' Initial Brief at 8–13; *see* Plaintiff's Reply at 2 (observing that Defendants' Chapter 25A arguments were "mutating").
[49] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 26, 2024 WL 5337407, at *8.
[50] *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018).
[51] *See* Defendants' Response at 5; Defendants' Proposed Opinion at 4, n.2; Defendants' *Sebastian* Brief at 3, n. 4.
[52] Defendants' *Sebastian* Brief at 3, n.4.
[53] *See* Procedural Background, *supra* note 9; TEX. GOV'T CODE § 25A.006(f)(1); TEX R. CIV. P. 355(c)(2)(A).

supersede the text of Section 8, which clearly dictates that "[t]he changes in law made by [H.B. 19]," including Chapter 25A, only "apply to civil actions commenced on or after September 1, 2024."[54] Ultimately, this comparison never coalesced with a functional legal theory which might vest the Court with subject-matter jurisdiction.

¶28 While this matter does raise new factual themes,[55] Defendants do not demonstrate how this case is legally distinguishable from any of the pre-September 1, 2024 actions which have been remanded by the Texas Business Court. Defendants removed a civil action which was pending prior to September 1, 2024. However, no party to a civil action pending prior to September 1, 2024 may utilize the provisions of Chapter 25A to justify subject-matter jurisdiction in the Business Court.[56] Therefore, the Court must remand for lack of subject-matter jurisdiction.

V. Conclusion

¶29 Defendants have failed to establish that the Court has subject-matter jurisdiction over this case. *See* Tex. R. Civ. P. 355(b)(2)(A). As a result, the Court is required to remand this case to the district court. *See* Tex. Gov't Code § 25A.006(d) ("If the business court does not have jurisdiction of the [removed] action, the business court *shall* remand the action to the court in which the action was originally filed.") (emphasis added). Therefore, Plaintiff's Motion to Remand is **GRANTED** and it is **ORDERED** that

[54] *See* Tex. H.B. 19 at § 8; Defendants' Proposed Opinion at 4, n.2; Defendants' Response at 5.
[55] *See* Analysis, *supra* at ¶ 16; Defendants' Proposed Opinion at 1 ("This opinion addresses a matter of first impression to the Business Courts regarding removal when a publicly traded company is added to an action as a defendant for the first time after September 1, 2024.").
[56] *Lone Star*, 2024 Tex. Bus. 8 at ¶ 19, 2024 WL 5202356, at *7.

the Business Court Clerk shall remand this cause to the 11th Judicial District Court of Harris County, Texas without delay.

SO ORDERED.

Hon. Sofia Adrogué
Texas Business Court, Eleventh Division

DATED: February 25, 2025

2025 Tex. Bus. 9

The Business Court of Texas,
1st Division

PRIMEXX ENERGY OPPORTUNITY FUND, LP and PRIMEXX ENERGY OPPORTUNITY FUND II, LP, *Plaintiffs*,	§	
v.	§	Cause No. 24-BC01B-0010
PRIMEXX ENERGY CORPORATION, M. CHRISTOPHER DOYLE, ANGELO ACCONCIA, BLACKSTONE INC., BLACKSTONE HOLDINGS III LP, BLACKSTONE EMA II LLC, BMA VII LLC, BLACKSTONE ENERGY MANAGEMENT ASSOCIATES II LLC, BLACKSTONE ENERGY PARTNERS II LP, BLACKSTONE MANAGEMENT ASSOCIATES VII LLC, BLACKSTONE CAPITAL PARTNERS VII LP, BCP VII/BEP II HOLDINGS MANAGER LLS, BX PRIMEXX	§	

TOPCO LLC, and BPP HOLDCO LLC, *Defendants*	§ §

OPINION AND ORDER

Syllabus*

This opinion addresses the nature, scope, adaptability, and enforcement of a partner's statutory duties of loyalty and care and obligation to perform them in (i) good faith and (ii) a manner it reasonably believes to be in the partnership's best interest when that partner exercised its drag-along rights and sold the partnership's business.

Texas's freedom of contract principles give partners wide latitude to expand or limit their conduct standards. But the loyalty and care duties and related performance obligations cannot be eliminated. This partnership agreement expressly limits those duties and obligations to the greatest extent permitted by law. This case centers on the enforceability of those limits.

I. OPINION

[¶ 1] This is a drag-along sale case arising from a private equity investment in a limited partnership. The controlling partner exercised its partnership agreement drag-along sale rights to force an exit event sale, and two minority owners complain that the sale was unlawful.

[¶ 2] Drag-along rights are a normal vehicle for majority owners to force minority owners—potentially against their will—to sell their interests to a

* This syllabus is provided for the reader's convenience; it is not part of the Court's opinion; and it is not legal authority.

third party on terms and conditions the majority owner decides. So, there may be conflicts between the owners when the majority decides to sell at a price or on terms the minority dislikes. The issues can be more acute where the parties hold different equity positions. Thus, parties creating such agreements often negotiate terms protecting themselves in a future drag-along sale.

[¶ 3] Two limited partners sued the controlling partner and managing general partner alleging that they breached "fiduciary" and contract duties and obligations by, among other things, (i) accepting too low a price; (ii) failing to perform adequate due diligence, consider continuing the business as a viable stand-alone business or other alternatives, consider whether the sale was fair to the partnership and other partners; and (iii) not giving timely notice of the sale. They also sued the managing partner's chief executive for conspiracy and other "derivative theory" causes of action.[1]

[¶ 4] Those defendants moved for traditional summary judgment.[2] The material facts are undisputed, and the result turns on the extent to which (i)

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[1] Plaintiffs sued numerous other parties, but they are not included in this summary judgment motion.

[2] Movants' attacked plaintiffs' original petition, which was their then live pleading. Plaintiffs since filed their first amended petition (FAP), which adds an additional defendant but no new causes of action. The parties agreed that the FAP would not moot the summary judgment motion. So, this opinion and order is directed to the FAP.

the Texas Business Organizations Code (TBOC) displaces common law partnership fiduciary duty law and (ii) partners may limit a partner's "fiduciary like" responsibilities to the partnership and other partners.

[¶ 5] The court denies the motion regarding plaintiffs' claims that the sales proceeds (i) were misapplied under the partnership agreement and (ii) were unfairly allocated between the partnership and a "sidecar" business sold in the same transaction.

[¶ 6] However, based on the partnership agreement's plain text, the court otherwise concludes that the controlling partner's drag-along rights meet minimum statutory requirements. Further, except as described in ¶ 5, the evidence conclusively proves that the controlling partner and the managing general partner met their modified statutory and contract duties and obligations.

[¶ 7] Additionally, for the reasons discussed in ¶ 6, the court grants the motion regarding "derivative liability" theories regarding the managing partner and its chief executive to the same extent the court grants the controlling partner's motion.

[¶ 8] Moreover, the court directs the parties to provide additional briefing regarding plaintiffs' remaining derivative liability theories.

[¶ 9] The summary judgment motion concerns only the duty and breach elements of plaintiffs' causes of action. Thus, the court expresses no opinion regarding plaintiffs' injury causation and resulting damages elements.

II. JURISDICTION AND VENUE

[¶ 10] This court has subject matter jurisdiction since this is a partnership governance dispute and the amount in controversy exceeds $5 million. TEX. GOV'T CODE § 25A.004(b)(2) and (4)–(6).

III. THE SUMMARY JUDGMENT RECORD

[¶ 11] The court considered the parties' summary judgment filings and proper summary judgment evidence. It did not consider evidence movants filed with their prior supplemental briefing because they did not seek leave to supplement the record and plaintiffs in substance objected to that evidence. Neither party objected to any other summary judgment evidence.

IV. FACTS AND PEOFS' CLAIMS

[¶ 12] The court derives these facts from the parties' summary judgment evidence and PEOFs' FAP admissions.

A. The Parties and Related Entities

[¶ 13] Primexx Energy Partners, Ltd. (PEP) was a limited partnership.[3] Its Third Amended and Restated Partnership Agreement (TAPA) is the applicable agreement.[4] PEP owned Primexx Resource Development, LLC (PRD).[5] PEP and PRD are not parties.

[¶ 14] Primexx Energy Opportunity Fund LP (PEOF I) and Primexx Energy Opportunity Fund II (PEOF II) were PEP limited partners.[6] PEOF I signed the TAPA through its representative Whittier Management GP LLC, by Steven A. Anderson as the Vice President of Whittier Holdings, Inc.[7]

[¶ 15] BPP HoldCo LLC (HoldCo or Blackstone) was a PEP limited partner.[8] HoldCo is a Blackstone Inc. affiliate.[9]

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[3] FAP ¶ 1.
[4] FAP ¶ 1; Movants' Ex. 2 (TAPA).
[5] FAP ¶ 1.
[6] FAP ¶s 42, 55.
[7] TAPA at 73.
[8] Movants' Ex. 1 (PIPA); FAP ¶ 1.
[9] FAP ¶ 20.

[¶ 16] Primexx Energy Corporation (PEC) was PEP's managing general partner.[10] PEC was formed in September 2000, and in 2021 was governed by its July 2016, Second Amended and Restated Bylaws (Bylaws).[11]

[¶ 17] A nine-member board of directors controlled PEC.[12] HoldCo appointed five such directors, PEOF I appointed two, and Tom Fagadau appointed two.[13] Thus, at all relevant times HoldCo controlled PEC's Board.[14]

[¶ 18] Angelo Acconcia and four others were HoldCo's initial-appointed directors.[15] Jim Jeffs and Robert Holland were PEOF I's appointed directors, and Tom and Chip Fagadau were Fagadau's appointed directors.[16]

[¶ 19] Under the Bylaws, Tom Fagadau was PEC's President and Chief Executive Officer.[17] However, as of August 2, 2021, Christopher Doyle held those positions.[18]

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[10] FAP ¶s 1, 42.

[11] Movants' Ex. 10 (Bylaws).

[12] FAP ¶ 82.

[13] Bylaws at Art. III, § 2; Schedule I. The Bylaws do not define "Blackstone," however, context shows that it means HoldCo. Both the TAPA and the PIPA, entered contemporaneously with the Bylaws, define "Blackstone" to mean HoldCo. (TAPA at 1; PIPA at 1). Furthermore, the Bylaws were signed by HoldCo. (Bylaws at 21).

[14] FAP ¶ 53.

[15] Movants' Ex. 10 (Bylaws) at Schedule I.

[16] Movants' Ex. 10 (Bylaws) at Schedule I.

[17] Movants' Ex. 10 (Bylaws) at Schedule II.

[18] FAP ¶ 33; Movants' Ex. 3 (Aug. 2, 2021, Board Minutes).

[¶ 20] PEOFs sued Doyle, PEC, HoldCo, Blackstone Inc., various Blackstone Inc. affiliates[19], and Angelo Acconcia. Acconcia, Blackstone Inc., and the Blackstone Inc. affiliates did not join this motion.

B. PEP's Background

[¶ 21] PEP's operating company, PRD, developed horizontal drilling properties in the Permian Basin.[20]

[¶ 22] In 2016, PEP engaged firms to identify opportunities for reducing its debt and raising capital.[21] After considering several proposals and multiple financing options, PEP chose "The Blackstone Group's" offer as the most attractive based on its valuation, capital commitment, and reputation.[22]

[¶ 23] Before signing the TAPA, "Blackstone," certain members of PEP's management team, and PEP's existing equity holders created a term sheet outlining expected terms for "Blackstone's" potential investment.[23] Per the term sheet, they expected a transaction whereby (i) "Blackstone" would

[19] FAP ¶ 20 ("All of the other Blackstone Defendants are direct subsidiaries of Blackstone Inc.").

[20] FAP ¶s 1, 37.

[21] FAP ¶ 40.

[22] FAP ¶ 41. In 2021, The Blackstone Group changed its name to Blackstone Inc. *Id.*

[23] FAP ¶ 48; TAPA at Annex B. The court uses "Blackstone" throughout this opinion where PEOFs are unclear regarding which Blackstone entity or related person they refer to.

invest up to $500 million; (ii) "Blackstone" would control a management company with five of nine board members; (iii) with three exceptions not relevant here, all "Board matters" would be decided by a majority vote; (iv) "Blackstone" could at any time force an in-kind distribution of all Company assets in a "Liquidity Event" in accordance with an agreed distributions waterfall; and (v) "Blackstone" would have "customary drag-along rights" regarding a potential sale of the partnership Units.[24]

[¶ 24] HoldCo and PEP signed a fifty-four-page Partnership Interest Purchase Agreement (PIPA) stating terms whereby HoldCo would invest in PEP.[25]

[¶ 25] HoldCo signed the TAPA as a limited partner (Unitholder).[26] PEC remained PEP's Managing General Partner[27] and, at some point, contributed $1,000 as a Managing General Partner Capital Contribution.[28]

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[24] FAP ¶ 48; TAPA at Annex B. The term sheet and other documents do not say which "Blackstone" entities would provide the new equity or how "Blackstone" would internally structure its investment.

[25] PIPA; *see also* TAPA at 1.

[26] FAP ¶ 42; TAPA at 1, 83.

[27] FAP ¶ 42.

[28] TAPA § 3.2.

C. Partners' Duties to the Partnership and other Partners

[¶ 26] Per the TAPA, HoldCo and PEC owe PEP and its partners the duty of good faith and fair dealing to the fullest extent Texas law requires:

> Each Partner and the Managing General Partner shall, to the fullest extent required by Texas Law, owe to the Partnership and its Partners the duties of good faith and fair dealing, and in the case of the Managing General Partner, the duty to not exceed in such capacity the bounds of authority granted to any general partner by this Agreement and Texas law (all such duties collectively, the "Agreed Duties").[29]

[¶ 27] But the TAPA then limits—to the extent the law permits—HoldCo's and PEC's duties to the partnership and other partners, including giving HoldCo and PEC the right to make partnership decisions in their sole and absolute discretion and in their own sole interests.[30] For example,

> (ii) To the extent that, at law or in equity, a Partner owes any duties (including fiduciary duties) to the Partnership, any other Partner or any Assignee pursuant to the applicable law, any such duty, other than the Agreed Duties, is hereby eliminated to the fullest extent permitted pursuant to applicable law, it being the intent of the Partners that to the extent permitted by law and except to the extent set forth in this Section 5.9 or expressly specified elsewhere in this Agreement, no Partner or the Managing General Partner, in their capacities as such, shall owe any duties of any nature whatsoever to the Partnership, the other Partners or any Assignee, other than the Agreed Duties, and each Partner, in its capacity as such, may decide or

[29] TAPA § 5.9(a) (emphasis original).

[30] TAPA §§ 5.9(b)–(c).

> determine any matter in its sole and absolute discretion taking into account solely its interests and those of its Affiliates *(excluding the Partnership and its Subsidiaries)* subject to the Agreed Duties. Each Partner further acknowledges and agrees that it would not have become a Partner in the Partnership if this agreement were not acceptable to it.[31]

D. HoldCo's Drag-Along Sale Rights

[¶ 28] Next, TAPA Article VI describes the Unitholders' rights, duties, and obligations.[32] In particular, § 6.7 gives HoldCo "drag-along" rights authorizing it to negotiate and ultimately force the other Unitholders to consummate a sale of PEP's business to a third party—provided the sale results from an arm's-length transaction after July 12, 2018.[33] That section also provides for distributing the resulting proceeds pursuant to a TAPA waterfall.[34]

E. PEOF II and BPP Sidecar

[¶ 29] PEOF II soon became a PEP Unitholder.[35]

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[31] TAPA § 5.9(c)(ii) (emphasis added). The emphasized parenthetical shows that even if the partnership itself could be considered an affiliate of a partner, the partner is still free to disregard the interests of the partnership. So, the TAPA establishes that partners may put their interests above the partnership, to the extent allowed by applicable law.

[32] TAPA at Art. VI.

[33] TAPA § 6.7(a); *see What Is an Arm's Length Transaction*, Investopedia, https://www.investopedia.com/terms/a/armslength.asp (last visited March 5, 2025).

[34] TAPA § 6.7(b).

[35] FAP ¶ 55.

[¶ 30] "Blackstone" later created a "sidecar vehicle," BPP Acquisition LLC (BPP), to buy additional acreage in PEP's acreage footprint.[36]

F. The Callon Sale

[¶ 31] PEP's valuations improved in 2020 and 2021.[37] By June 2021, PEOFs' stakes were worth more than $200 million.[38]

[¶ 32] In early Spring 2021, Jim Jeffs learned that PEC's management, led by Doyle, was exploring a potential sale.[39] At that time, Jeffs was a PEC board member and received updates from PEC "management" and the "Blackstone" board members about the sale process.[40]

[¶ 33] In early May, Callon Petroleum made an initial offer of interest to purchase PEP and BPP for $375 million and 8.5 million Callon shares.[41] Three weeks later, it increased the cash portion to $425 million.[42]

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[36] FAP ¶ 58. *See* Sidecar, Investopedia, https://www.investopedia.com/terms/s/sidecar-investment.asp (last visited March 5, 2025).

[37] *See* FAP ¶s 62–64.

[38] FAP ¶ 64.

[39] PEOFs' Ex. 3 (Jeffs Dec.) ¶ 3.

[40] Jeffs Dec. ¶ 3.

[41] FAP ¶ 69.

[42] FAP ¶ 69.

[¶ 34] On June third, Doyle emailed PEC's Board (including Jeffs) that Callon's enhanced offer was not nearly as compelling as continuing to operate as a stand-alone entity.[43]

[¶ 35] It was reported during a PEC Board meeting a week later that (i) PRD's and BPP's balance sheets had strengthened over the past six months and remained healthy, (ii) they met forecast expectations through the first-quarter 2021, and (iii) the efficient execution and capital acceleration with a second rig expected to grow the companies meaningfully.[44]

[¶ 36] Throughout June and July 2021, Doyle told PEC's Board that he continued speaking with Callon, but it was unable to close the gap and had not presented an attractive offer.[45] During that same period, Callon increased its offer to $440 million cash and 9.2 million shares; however, its share price also decreased so the actual offer remained unimproved.[46]

[¶ 37] On July twenty-eighth, Jeffs and Doyle discussed the potential Callon deal.[47] By then, Callon's stock price had decreased, making its offer

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[43] FAP ¶ 69; Jeffs Dec. ¶ 5.
[44] FAP ¶ 70.
[45] FAP ¶ 74.
[46] FAP ¶ 75.
[47] Jeffs Dec. ¶ 6.

worth $50 million less than the prior month.[48] Doyle told Jeffs that Callon's offer was "too low" to be taken seriously and that Callon needed to dramatically increase its offer before he would even consider it a realistic offer.[49]

[¶ 38] Then, "without any warning or explanation," on July thirtieth "Blackstone" told the Board that it had accepted Callon's offer at the same price Doyle two days earlier told Jeffs was too low to even consider.[50]

[¶ 39] Based on information Doyle and the "Blackstone" directors provided directly to Jeffs, he did not understand that a sale was close until Doyle formally announced the sale at the end of July.[51]

[¶ 40] Once Jeffs heard from "Blackstone" about the final sale terms, he spoke with Eric Derrington and Steve Anderson, PEOFs' representatives with Whittier Trust Company.[52] They in no way suggested that PEOFs supported the deal and expressed their belief that it was hastily put together without sufficient opportunity to evaluate the sale.[53]

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[48] Jeffs Dec. ¶ 6.
[49] Jeffs Dec. ¶ 6.
[50] Jeffs Dec. ¶ 7.
[51] Jeffs Dec. ¶ 4.
[52] Jeffs Dec. ¶ 9.
[53] Jeffs Dec. ¶ 9; PEOFs' Ex. 4 (Derrington Dec.) ¶s 7–9.

[¶ 41] PEC's board and BPP's board of managers met on August 2, 2021, and after discussion unanimously approved the Callon deal.[54] However, Tom Fagadau said he did not personally support the sale but was voting for it "only pursuant to drag-along obligations."[55] Steve Pully similarly voted for the sale, expressing the same sentiment."[56] No other PEC director, including Jeffs and Langdon, expressed that reservation.[57]

[¶ 42] The sale closed on October 1, 2021.[58]

[¶ 43] In a phone call around "the time of sale," a "Blackstone" executive told a "Primexx board member" that senior "Blackstone" executives directed the exit although "he" knew it was a bad deal.[59]

G. Summary of Claims

[¶ 44] According to PEOFs:

> 85. By forcing the Board to vote on (and approve) the proposed transaction over a weekend, Blackstone necessarily precluded the Managing General Partner or the Board from engaging in a reasoned and fully informed decision-making process or satisfying their contractual and fiduciary duties. Yet all

[54] Movants' Ex. 3 (Aug. 2, 2021, Board Minutes).

[55] Movants' Ex. 3 (Aug. 2, 2021, Board Minutes) at 2.

[56] Movants' Ex. 3 (Aug. 2, 2021, Board Minutes) at 3. Chip Fagadau approved the deal for BPP with the same reservation. *Id.*

[57] Movants' Ex. 3 (Aug. 2, 2021, Board Minutes) at 2–3.

[58] FAP ¶ 94.

[59] FAP ¶ 76.

> Blackstone-controlled Board Members voted to approve the sale without conducting any analysis or due diligence to fairly evaluate the transaction and whether it would be fair to all Primexx investors.
>
> 86. The final sale documents were executed on August 3, 2021.
>
> ***
>
> 87. In the weeks and months leading up to the Callon transaction, Defendants did not hold regularly scheduled Board meetings to discuss and consider whether a sale transaction made sense from the point of view of the company and all of its unitholders, engage in any non-cursory review or analysis of the company's intrinsic fair value or future prospects, or retain experts to conduct thorough due diligence or review of the fairness of the forced sale.[60]

[¶ 45] PEOFs further allege that (i) "Blackstone" structured the sale terms, which included both PRD's assets and "Blackstone's" sidecar (BPP), so "Blackstone" was the only entity to receive any significant sale proceeds[61] and (ii) although PEOFs owned preferred shares, after the Callon sale closed, "Blackstone" paid compensation to common Unitholders, who were behind PEOFs in the payment waterfall.[62]

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[60] FAP ¶s 85–87.

[61] FAP ¶s 96, 107.

[62] FAP ¶ 98.

H. Procedural History

[¶ 46] PEOFs sued defendants, except Acconcia, in a state district court.[63] That court dismissed the case based on a forum-selection clause requiring the suit to be brought in federal court.[64]

[¶ 47] PEOFs added Acconcia and refiled in federal court.[65] That court *sua sponte* dismissed the case before any defendant appeared.[66]

[¶ 48] PEOFs again sued in state court.[67] Later, in May 2024, movants filed a traditional summary judgment motion challenging the breach element of PEOFs' causes of action and moved to stay discovery.

[¶ 49] In September 2024, PEOFs removed the case to this court.[68] Based on the parties' agreement, the court dismissed the case without prejudice.[69] The parties filed a district court Rule 11 agreement providing that

[63] FAP ¶ 6.
[64] FAP ¶ 7.
[65] FAP ¶ 8.
[66] FAP ¶s 9–10; FAP Exs. 4, 5.
[67] FAP ¶ 11.
[68] FAP ¶ 12.
[69] FAP ¶ 12.

earlier discovery could be used here and outlining the parties' agreement regarding dispositive motions.[70] PEOFs then filed this action.[71]

[¶ 50] The court held arguments regarding movants' motion and requested supplemental briefing on certain issues. The parties responded with additional briefing and evidence. The court considered the briefing but did not consider the supplemental evidence because it was not properly submitted.

V. APPLICABLE LAW

A. Summary Judgment Standards

[¶ 51] At any time, a defendant may move with or without supporting evidence for a summary judgment as to all or any part of any causes of action asserted against it. TEX. R. CIV. P. 166a(b). The motion must state its specific grounds. *Id.* at 166a(c).

[¶ 52] Thereafter, the court *shall* render judgment if the pleadings, summary judgment filings, and properly filed evidence show that, except as to the amount of damages, there is no *genuine* issue as to any *material* fact and the movant is entitled to judgment as a matter of law on the issues stated in

[70] FAP ¶ 13.
[71] FAP ¶ 13.

the motion or in an answer or any other response. *Id.*; *JLB Builders, L.L. C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021).

[¶ 53] A court can grant a defendant traditional summary judgment only if the defendant's evidence as a matter of law either proves all elements of its defense or disproves at least one element of the nonmovant's claim. *See, e.g.*, *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995) (causation disproved as a matter of law).

[¶ 54] So, a summary judgment motion

> . . . is essentially a motion for a pretrial directed verdict. * * * Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. * * * [Courts] review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. * * *

Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 581–82 (Tex. 2006) (citations omitted).

[¶ 55] A genuine fact issue exists if more than a scintilla of evidence supports the alleged fact. *See Amazon.com Servs. LLC v. Grant*, No. 05-23-01306, 2024 WL 5053063, *2 (Tex. App.—Dallas Dec. 10, 2024, no pet.).

Evidence is more than a scintilla when it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *King Ranch v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). However, less than a scintilla exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

[¶ 56] When a partnership agreement's terms are unambiguous and the material facts are undisputed, compliance with those terms is a question of law for the court. *Hrdy v. Second St. Props.*, 649 S.W.3d 522, 554 (Tex. App.—Houston [1st Dist.] 2022, pet. denied).

[¶ 57] Accordingly, to decide this motion the court must apply contract and statutory construction principles to the TAPA, movants' motion, PEOFs' response, and the summary judgment evidence.[72]

[72] At common law, transactions between a partner and the partnership or other partners are presumed unfair, and the partner seeking to justify the transaction must prove its fairness. *Hrdy*, 649 S.W.3d at 539; *Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980). However, the court need not address whether that burden allocation applies to statutory causes of action at trial because movants must conclusively establish the Callon sale's fairness to negate the breach element of PEOFs' "fiduciary" breach claims as a matter of law. *Hrdy*, 649 S.W.3d at 539, 554.

B. Contract Construction Rules

[¶ 58] Courts construe partnership agreements like contracts. *Id.* A court's primary objective when construing contracts "is to ascertain and give effect to the parties' intent as expressed in the instrument." *U.S. Polyco, Inc. v. Texas Cent. Bus. Lines Corp.*, 681 S.W.3d 383, 387 (Tex. 2023) (quoting *URI, Inc. v. Kleberg Cty*, 543 S.W.3d 755, 763 (Tex. 2018)).

[¶ 59] Usually, courts deem the contract alone to express the parties' intent because it is objective, not subjective, intent that controls. *Id.*

[¶ 60] With unambiguous contracts, courts "can determine the parties' rights and obligations under the agreement as a matter of law." *Inwood Nat'l Bank v. Fagin*, No. 24-0055, 2025 WL 349890, *4 (Tex. January 31, 2025) (per curiam) (quoting *ACS Invs., Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997)).

[¶ 61] Additionally, context is a permissible indicator of meaning, and courts are to harmonize and give effect to all contract terms by analyzing them regarding the whole contract. *Polyco*, 681 S.W.3d at 390.

[¶ 62] Appropriate context includes the circumstances that existed when the parties made their contract:

> Context is not, however, confined to the two-dimensional contractual environs in which the words exist but may also encompass the circumstances present when the contract was entered. This is so because words are the skin of a living thought, and our quest is to determine, objectively, what an ordinary person using those words under the circumstances in which they are used would understand them to mean.

Board of Regents of the Univ. of Texas Sys. v. IDEXX Labs., Inc., 691 S.W.3d 438, 444 (Tex. 2024) (per curiam) (quoting *URI, Inc.*, 543 S.W.3d at 764). Stated differently, context includes the business context and realities the words were meant to address. *Id.* at 445.

C. Statutory Construction Rules

[¶ 63] Statutory construction's purpose is to implement the Legislature's intent by giving effect to every word, clause, and sentence. *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 689–90 (Tex. 2020). Indeed, statutory text is the "first and foremost" indication of legislative intent. *Greater Hous. P'Ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). Thus, courts apply the words' common, ordinary meaning unless (i) the text supplies a different meaning or (ii) the common meaning produces absurd results. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

[¶ 64] Further, courts derive statutory meaning from the entire statute. TEX. GOV'T CODE § 311.021(2); *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560,

572 (Tex. 2016). So, courts "presume the Legislature chose statutory language deliberately and purposefully," *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014), and that it likewise excluded language deliberately and purposefully, *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

[¶ 65] Absent contrary text, courts assume the Legislature uses statutory terms having a supreme-court-developed common law meaning to convey a consistent statutory meaning. *SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 566 (Tex. 2022). But a statutory provision inconsistent with prior common law decisions "eliminates any instructive or persuasive value those decisions may have once had." *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427, 434 (Tex. 2015).

[¶ 66] Finally, but critically, Texas upholds parties' contractual freedom to narrow general fiduciary duties consistent with statutory minimum requirements:

> Unless otherwise provided by statute or law, duties owed by an agent to his or her principal may be altered by agreement. Accordingly, factors which must be taken into consideration when determining the scope of an agent's fiduciary duty to his or her principal include not only the nature and purpose of the relationship, but also agreements between the agent and principal.

National Plan Adm'rs, Inc. v. National Health Ins. Co., 235 S.W.3d 695, 700 (Tex. 2007) (principal's contract with third-party administrator limited agent's fiduciary duties to its principal according to agreed terms); *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (partnership agreement may limit partners' fiduciary duties).

[¶ 67] That is, "the substance of an agreement to act on behalf of a principal must be considered in determining the exact nature of the relationship." *National Plan*, 235 S.W.3d at 702–03. Even more specifically, parties may agree to limit an agent's general duty to act solely for the principal's benefit in all matters connected with their relationship. *Id.* at 703.

[¶ 68] Thus, courts will not impose a general fiduciary duty when the parties agreed that a partner can take actions that would otherwise violate it. *Id.* at 703. This is especially so where the contract results from a transaction between sophisticated parties represented by experienced representatives and counsel. *Id.* at 702.

D. Interpretive Canons

[¶ 69] Further, the *expressio unius est exclusio alterius* canon, which presumes that purposeful inclusion of specific terms implies the purposeful exclusion of terms that do not appear, is a proper construction maxim absent a

valid alternative construction. *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011); Antonin Scalia and Bryan A. Garner, READING LAW 107 (2012).

[¶ 70] Conversely, the *noscitur a sociis* canon—"it is known by its associates"—provides that a word or phrase's meaning, especially one in a list, should be known by the words immediately surrounding it. *Paxton*, 468 S.W.3d at 61. Courts rely on this canon to avoid giving a word a meaning so broad that it is incompatible with the statutory context. *Id.*

E. Intermediate Appellate Court Precedents

[¶ 71] This court began operating September 1, 2024, and the simultaneously created Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction over business court decisions. *See* Act of May 25, 2023, 88th Leg., R.S., ch. 380, §§ 8, 2023 TEX. SESS. LAW SERV. 919, 929 (H.B. 19) (business court creation); TEX. GOV'T CODE § 254.007 (appellate jurisdiction). And neither the Fifteenth Court nor this court has decided cases addressing this case's partnership issues. Thus, Texas Supreme Court decisions are currently the only judicial precedents addressing these issues. However, this court considers other intermediate appellate decisions for whatever persuasive value they have.

F. Applicable Business Organizations Code Provisions

1. Introduction

[¶ 72] A limited partnership is a partnership formed by two or more persons, with one or more general partners and one or more limited partners. TBOC § 1.002(50); Byron F. Egan, EGAN ON ENTITIES 467 (4th Ed. 2023).

[¶ 73] TBOC Chapter 153 governs limited partnerships. However, Ch. 152's general partnership laws and other rules of law and equity compatible with Ch. 153 also apply to limited partnerships. TBOC § 153.003(a)–(b).

[¶ 74] Specifically, limited partnership managing partners are subject to Ch. 152's general partner duties and obligations. *Id.* §§ 152.204(a), 153.152(a)(1)–(2), 153.153(1)–(2); EGAN ON ENTITIES 475. Thus, PEC was subject to a partner's Ch. 152 statutory responsibilities. Further, the parties assume HoldCo exercised sufficient control over PEP such that rules applicable to general partners also apply to HoldCo's conduct.[73]

2. Chapter 152 Responsibilities

[¶ 75] PEOFs allege that HoldCo and PEC breached TBOC's loyalty and care duties and the related obligation to discharge them in good faith and in a

[73] Movants' Motion at 16, n.34; *see also Strebel*, 371 S.W.3d at 279 (fiduciary duties that otherwise do not exist may arise when a limited partner exercises control over the partnership).

manner the defendant reasonably believes to be in the partnership's best interests.[74] The applicable statutes include:

General Conduct Standards

> (a) A partner owes to the partnership [and] the other partners . . .:
>
> (1) a duty of loyalty; and
>
> (2) a duty of care.
>
> (b) A partner shall discharge the partner's duties to the partnership and the other partners under this code or under the partnership agreement and exercise any rights and powers in the conduct . . . of the partnership business:
>
> (1) in good faith; and
>
> (2) in a manner the partner reasonably believes to be in the best interest of the partnership.
>
> (c) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.
>
> (d) A partner, in the partner's capacity as partner, is not a trustee and is not held to the standards of a trustee.

TBOC § 152.204.

Duty of Loyalty

> A partner's duty of loyalty includes:

[74] FAP ¶s 105–09, 112–114.

(1) accounting to and holding for the partnership property, profit, or benefit derived by the partner: (A) in the conduct . . . of the partnership business; or . . . ;

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

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

Id. § 152.205.

Duty of Care

(a) A partner's duty of care to the partnership and the other partners is to act in the conduct . . . of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances.

(b) An error in judgment does not by itself constitute a breach of the duty of care.

(c) A partner is presumed to satisfy the duty of care if the partner acts on an informed basis and in compliance with Section 152.204(b).

Id. § 152.206.

Effect of Partnership Agreement and Nonwaivable Provisions

(a) Except as provided by Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.

(b) A partnership agreement or the partners may not:

(1) unreasonably restrict a partner's or former partner's right of access to books and records under Section 152.212;

(2) eliminate the duty of loyalty under Section 152.205, except that the partners by agreement may identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable;

(3) eliminate the duty of care under Section 152.206, except that the partners by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

(4) eliminate *the obligation of good faith under Section 152.204(b),* except that the partners by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

* * *

Id. § 152.002 (emphasis added).

Information Regarding Partnership

(a) On request and to the extent just and reasonable, each partner and the partnership shall furnish complete and accurate information concerning the partnership to:

(1) a partner; . . .

Id. § 152.213.

[¶ 76] In short, the partners' agreement is the baseline for determining their responsibilities to the partnership and each other—subject to TBOC's minimum requirements. TBOC § 152.002(a).

[¶ 77] Like 1994's Texas Revised Partnership Act (TRPA) before it, these statutes provide a more specific and explicit statement of a partner's duties to the partnership and other partners than existed under the common law and the prior Texas Uniform Partnership Act (TUPA). *See* Miller, *Partner Duties Under the Common Law and the Texas Business Organizations Code*, 68 The Advocate Ch. 18, § 1 (Miller, *Partner Duties*).

[¶ 78] However, because courts and commentators have been unclear regarding the extent to which the TBOC and its predecessors modified common law fiduciary principles, reviewing that statutory history aids their proper construction and application.

G. Legislative Background

[¶ 79] Before 1961, the common law governed Texas partnership law, *Ingram v. Deere*, 288 S.W.3d 886, 894–95 (Tex. 2009), and recognized fiduciary duties between partners, *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 593–94 (Tex. 1992) (citing *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938)).

[¶ 80] In 1961, Texas adopted the TUPA. *Ingram*, 288 S.W.3d at 894. Without expressly defining partners as fiduciaries, the TUPA stated a partner's duty to account for partnership profits and hold them as "a trustee" and the

section governing partners' duties was titled "Partner Accountable as a Fiduciary." TUPA § 21(1). Thus, TUPA comported with treating partners as trustee-fiduciaries but did not unambiguously call them that.

[¶ 81] At common law and under TUPA, partners owed each other fiduciary duties to: (i) fully disclose all matters affecting the partnership, (ii) account for all partnership profits and property, (iii) refrain from self-dealing, and (iv) refrain from competing with the partnership. *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App.—Houston [14th Dist.] 1995, *aff'd*, 977 S.W.2d 543 (Tex. 1998)).

[¶ 82] For example, the common law imposed a strict duty on partners to disclose material facts affecting the partnership or other partners—even if the partners have strained relationships and adverse interests. *See Johnson*, 120 S.W.2d at 787 (duty to disclose negotiations with third parties to resell partnership's property); Erin Larkin, Comment, *Partners' Duties Without the Word Fiduciary*, 59 Baylor L. Rev. 895, 899 (2010).

[¶ 83] Nonetheless, TUPA's text appeared to alter *Johnson's* voluntary disclosure requirement by imposing the disclosure duty on demand:

> Partners shall render on demand true and full information of all things affecting the partnership to any partner . . .

TUPA § 20.

[¶ 84] But § 20's commentary said that § 20 should not be construed to limit the disclosure duty to instances without demand when fiduciary principles would require full disclosure. *See* Larkin at 900–12; Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 Sw L. J. 437, 448 (1960) (comment to § 20, citing Byron D. Sher and Alan R. Bromberg, *Texas Partnership Law in the 20th Century – Why Texas Should Adopt the Uniform Partnership Act*, 12 Sw L.J. 263, 298–300 (1958)). And case law continued to express the full disclosure duty. *See Bohatch*, 905 S.W.2d at 602.

[¶ 85] However, effective January 1, 1994, Texas adopted the TRPA. *Ingram*, 288 S.W.2d at 894. TRPA § 4.03(c) provided that

> . . . [e]ach partner and the partnership shall furnish, on request and to the extent just and reasonable, to a partner complete and accurate information regarding the partnership.

[¶ 86] Despite nearly identical language as TUPA § 20, the Bar Committee Notes to TRPA § 4.03 (TRPA's successor to TUPA § 20 and predecessor to TBOC § 152.213) reached a different conclusion regarding the disclosure duty:

> Subsection (c) is based on TUPA § 20 and provides that partners must be furnished, on demand, complete and accurate information concerning the partnership to the extent just and

> reasonable. *This information right arises only on request; the information need not be volunteered.* * * *

Comment of Bar Committee—1993, Art. 6132b-4.03 (emphasis added).

[¶ 87] Commentators and courts debated the extent to which the TRPA changed the common law, including whether it eliminated *Johnson's* voluntary full-disclosure duty. *See* Elizabeth S. Miller, *Overview of Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, 49-SUM Tex. J. Bus. L. 1, 36–47 (2020) (Miller, *Overview*); Larkin at 900–12.

[¶ 88] Although the Legislature derived TRPA from the Uniform Law Commission's Revised Uniform Partnership Act (RUPA), there are informative differences. For example, RUPA § 404 describes its "General Standards of Partner's Conduct" as fiduciary duties, but TRPA does not. And TRPA § 4.04(f)'s added provision that a partner is not a trustee and is not held to the standards of a trustee arguably further evidenced that TRPA replaced partners' common law fiduciary principles with specific statutory standards, while leaving the common law as a gap-filler. Larkin at 900–12. That is, unlike RUPA § 404, TRPA § 4.04 created ambiguity by providing that a partner's loyalty duty was not limited to only those duties stated in the text.

Compare RUPA § 404(b) ("A partner's duty of loyalty to the partnership and the other partners is *limited to the following* . . ." (emphasis added)) *with* TRPA § 4.04(b) ("A partner's duty of loyalty *includes* . . ." (emphasis added)).

[¶ 89] Soon after TRPA's enactment, the supreme court described a partner's statutory duties to the partnership and other partners as "in the nature of a fiduciary duty in the conduct" of partnership business. *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995). However, that statement's effect on the TRPA is unclear because the prior TUPA and common law governed that case. *Id.* at 618, n.1. And the court held that the applicable principle—former partners have no duty to offer a business opportunity to each other—is the same under the old and new laws. *Id.*

[¶ 90] So, the Fifth Circuit Court of Appeals commented on the lack of clarity regarding TRPA's effect on prior TUPA and common law principles. *In re Gupta*, 394 F.3d 347, 351–52 (5th Cir. 2004).

[¶ 91] Moreover, it is hard to tell whether the fiduciary duty discussions in *Cruz v. Ghani*, No. 05-17-0056-CV, 2018 WL 6566642, *6 (Tex. App.—Dallas 2018, no pet); *Shannon Medical Center v. Triad Holdings III, L.L.C.*, 601 S.W.3d 904, 909–15 (Tex. App.—Houston [14th Dist.] 2019, no pet.); and *Red Sea Gaming, Inc. v. Block Invs. (Nevada) Co.*, 338 S.W.3d 562, 568

(Tex. App.—El Paso 2010, pet. denied) (and similar cases) state the applicable law because they involve unobjected to jury charges.[75]

[¶ 92] In sum, the extent to which the TRPA and the TBOC replaced common law principles—and especially the disclosure duty—is unclear. It is with that background that the court discusses the TBOC's application here.

H. The Nature and Scope of HoldCo's and PEC's Duties and Obligations

1. Introduction

[¶ 93] PEOFs posit ten causes of action. All but one allege direct or indirect (conspiracy, aiding and abetting, and knowing participation in) fiduciary breach claims without delineating between common law or TBOC duties.[76] PEOFs' summary judgment response is equally non-differentiating.[77] Therefore, the court begins by discussing the current status of TBOC partnership "fiduciary duties."

2. Applicable Loyalty and Care Duties and Discharge Obligations

[¶ 94] It is axiomatic that the court must identify the nature and scope of HoldCo's duties and obligations to PEP and its partners before it can

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[75] Where an appellant did not object to the jury charge, evidentiary sufficiency issues are measured against the charge as written and not necessarily the correctly stated law. *Cruz*, 2018 WL 6566642, at *6. *Red Sea Gaming*, 338 S.W.3d at 566.

[76] FAP ¶s 104–68.

[77] *See* PEOFs' MSJ Resp. at 11–30 (combining common law and statutory principles).

address whether HoldCo conclusively established that it did not breach those responsibilities as PEOFs claim.[78] (The court collectively refers to a partner's "fiduciary" duties and obligations as "responsibilities.") The existence of a legal duty is a threshold legal question for the court to decide. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 171, 181, n.20 (Tex. 2004).

[¶ 95] Where, as here, determining the nature and scope of a partner's duties and obligations is a matter of statutory and contract construction, that process begins with the TAPA:

> [A] partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.

TBOC § 152.002(a)

[¶ 96] Because here, the partners agreed that they would have the "duties of good faith and fair dealing" to the fullest extent required by Texas law (TAPA § 5.9(a)) but otherwise disclaimed any "fiduciary duties" to the

[78] For clarity, "causes of action" are legal theories supporting a right to relief such as negligence or contract breach. "Claims," when used as a noun, are assertions a party makes to describe the factual basis supporting a cause of action or affirmative defense. For example, "Defendant breached the contract by . . ." "Grounds" are legal bases underlying a party's request for court action. For example, "the court should grant summary judgment because . . ." Parties should be careful to properly use these terms.

fullest extent permitted by law (TAPA §§ 5.9(b)–(c)), we turn to applicable TBOC sections to determine what duties and obligations remained. That analysis produces these results:

a. Affirmative Responsibilities

[¶ 97] At common law, a trustee is held to strict fiduciary standards:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *** Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (citation omitted) (trustee standards applied to joint venturer).

[¶ 98] However, TBOC § 152.204(d) provides that partners are not held to a trustee's standards. And TBOC, like its predecessor TRPA, omits the word "fiduciary" when prescribing partners' duties to the partnership and other partners. So, based on plain text, traditional trustee-fiduciary duties, as such, do not apply to partners except (i) as TBOC imposes analogous statutory

duties and obligations; (ii) the TBOC incorporates compatible common law principles; or (iii) partners agree to impose them on themselves.

[¶ 99] Loyalty and care duties and the obligations to perform them (i) in good faith and (ii) in a manner the partner reasonably believes to be in the partnership's best interest are among the responsibilities TBOC imposes. *Id.* § 152.204(a)–(b).

[¶ 100] TBOC's list of loyalty duties is not exclusive because "includes" precedes that list. *Id.* § 152.205. So, common law loyalty principles apply if compatible with Ch. 152 and the partnership agreement. *Id.* § 152.003. And, under the *noscitur a sociis* canon, any supplemental common law loyalty duties must be of the type listed in § 152.205 and consistent with other partnership statutes and permitted TAPA terms. *See Paxton*, 468 S.W.3d at 61.

[¶ 101] However, TBOC's duty of care definition is exclusive because it omits expansive language.[79] *See* TBOC § 152.206; *City of Houston*, 353 S.W.3d at 145. That is,

[79] § 152.206(c)'s statement that a partner is presumed to satisfy its duty of care if it acts on an informed basis and in compliance with its § 152.206 obligations is an evidentiary presumption, not a separate statutory responsibility. *Id.*

> Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est).*

READING LAW 93.

[¶ 102] And, unless modified, the TBOC retains the common law obligations to act in good faith and in a manner the partner reasonably believes to be in the partnership's best interest. TBOC § 152.204(b).

[¶ 103] The TBOC also imposes a duty upon request and to the extent just and reasonable to provide partners with accurate information concerning the partnership. *Id*. § 152.213.

b. Modifications to Responsibilities

[¶ 104] One of the principal trustee duties the TBOC removes from partners' duties is a trustee's duty to place its beneficiary's interest above the trustee's interest. *See* TBOC §152.204(d) (elimination of trustee status and duties); BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 543 (Trustee's duty of loyalty to the beneficiaries).

[¶ 105] Further, partners do not violate their responsibilities merely because the partner acts in its own interest. *Id*. § 152.204(c).

[¶ 106] Although partners may not completely eliminate their responsibilities, they may define specific conduct that does not violate them

provided those terms are not manifestly unreasonable. *Id.* § 152.002(b). The TBOC does not state any "magic words" that are required to implement these contractual carveouts to the statutory responsibilities.

[¶ 107] However, partners may eliminate the obligation to perform their duties and exercise any rights and powers under the partnership agreement in a manner the partner reasonably believes to be in the partnership's best interest if such terms are not manifestly unreasonable. *See id.* § 152.002(b)(4). That is because § 152.002(b)'s list of unwaivable responsibilities mentions a partner's obligation to perform its duties in good faith under § 152.204(b)(1) without also listing a partner's obligation to discharge its duties in a manner it reasonably believes to be in the partnership's best interest under § 152.204(b)(2). *Id.* § 152.002(b)(4).

[¶ 108] That partners may waive the obligation to act in a manner the partner reasonably believes to be in the partnership's best interest comports with §§ 152.204(c), (d).

[¶ 109] Moreover, the *expressio unius est exclusion alterius* canon further supports that result because § 152.002(b)(4) mentions the good faith obligation while not mentioning the separate obligation to perform those

obligations in a manner the partner reasonably believes is in the partnership's best interest. *City of Houston*, 353 S.W.3d at 145.

3. Good Faith and Fair Dealing

[¶ 110] Although TBOC § 152.204(b)(1) requires partners to discharge their contract rights and duties and TBOC loyalty and care duties in good faith, that obligation does not rise to the level of a separate "fiduciary" duty as such:

> Though courts may be tempted to elevate this language to an independent duty, this obligation is not stated as a separate duty, but merely as a standard for discharging a partner's statutory or contractual duties.

Elizabeth S. Miller, *Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, State Bar of Texas Advanced Business Law Course 30 (2023) (Miller, *Fiduciary Duties*); *see* Comment of Bar Committee—1993, Art. 6132b-4.04 (good faith obligation "is not a separate duty" it is "merely a statement of how any duty . . . must be discharged").

[¶ 111] Unlike loyalty and care duties, the TBOC does not define the "good faith" discharge obligation. *See* TBOC § 152.204(b)(1). Thus, courts refer to the common law for that meaning. *Id.* § 152.003; *SandRidge*, 642 S.W.3d at 566.

[¶ 112] *Fitz-Gerald v. Hull*, holds that partners owe each other the "utmost good faith and the most scrupulous honesty." 237 S.W.2d 256, 265 (Tex. 1951). *Bohatch v. Butler & Binion*, subsequently reiterated that principle but concluded that terminating a partner for reporting alleged overbilling did not violate the principle. 977 S.W.2d 543, 545–47 (Tex. 1998).

[¶ 113] Later, the supreme court clarified that, although a partner's common law fiduciary duty includes a duty of good faith and fair dealing, that duty requires only that the parties "deal fairly" with each other and does not include the more onerous fiduciary duty to place the other party's interests before its own:

> Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to "deal fairly" with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.

Crim, 823 S.W.2d at 594. However, the court did not further define "deal fairly." Nor has it since done so.

[¶ 114] Case law indicates that the statutory good faith obligation includes, at a minimum, not lying to or misleading other partners. *See, e.g.*, *Shannon Medical*, 603 S.W.3d at 912–915 (partner misled partners regarding

permitted affiliate business); *Cruz*, 2018 WL 6566642, *10–16 (partner misrepresented reasons for closing one business and misled partner regarding permitted competing business); *Red Sea Gaming*, 338 S.W.3d at 568–69 (failure to disclose resale opportunity while negotiating buyout).

[¶ 115] However, one does not act in bad faith by exercising its lawful rights:

> Improper motives cannot transform lawful actions into actionable torts. "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right."

Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996) (quoting *Montgomery v. Phillips Petroleum Co.*, 49 S.W.2d 967, 972 (Tex. Civ. App.—Amarillo 1932, writ ref'd) (quoting 1 R.C.L. § 6 at 319)).

[¶ 116] Thus, one does not lack good faith by exercising lawful contract rights. *See Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944, 947 (Tex. 1984) ("There can be no implied covenant as to a matter specifically covered by the written terms of the contract."); *English v. Fischer*, 660 S.W.2d 521, 523 (Tex. 1983) (No implied covenant of good faith and fair dealing required mortgagee to disburse insurance proceeds contrary to contract terms.); *John*

Masek Corp. v. Davis, 848 S.W.2d 170, 174 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (approved jury instruction that a "fiduciary duty [] does not extend so far as to create duties in derogation of the express terms of the partnership agreement").

[¶ 117] Further, good faith is often best described as not in bad faith.

> Good faith, as judges generally use the term in matters contractual, is best understood as an "excluder" – a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used to thinking that every word must have one or more general meanings of its own – must be either univocal or ambiguous.

See Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 262 (1968).

4. Duties of Candor and Mandatory Disclosures

a. Introduction

[¶ 118] Some courts have recently held that partners owe a fiduciary duty (i) to make full disclosure of all matters affecting the partnership, including a duty to account for all partnership profits and property and (ii) a strict duty of good faith and candor. *See Zinda v. McCann Street, Ltd.*, 178 S.W.3d 883, 890–91 (Tex. App.—Texarkana 2005, pet. denied); *Houle v. Casillas*, 594 S.W.3d 524, 552 (Tex. App.—El Paso 2019, no pet.).

[¶ 119] Such rulings concern two issues: (i) does the good faith obligation encompass the honesty requirement; and (ii) does the *Johnson v. Peckham* mandatory duty to disclose all facts that could materially affect the partnership, or other partners, continue after TRPA § 4.03 and TBOC § 152.213. "Yes" is the answer to the former, and "it depends on the circumstances" is the answer to the second.

b. Good Faith and Candor

[¶ 120] To begin, *Zinda* for example equates good faith and candor. 178 S.W.3d at 890–91. Because "candor" means "[t]he quality of being open, honest, and sincere; frankness; outspokenness," *Candor*, BLACK'S LAW DICTIONARY (12th ed. 2024), the TBOC effectively incorporates the candor duty to be honest in § 152.204(b)(1)'s good faith obligation.

c. Voluntary Disclosure

[¶ 121] Although *Zinda* cited TRPA § 4.04 as authority for a broad duty to disclose all information affecting the partnership, that court did not address whether § 4.03 retained the prior *Johnson v. Peckham* duty to voluntarily disclose, even without request, all material information. 178 S.W.3d at 890–91.

[¶ 122] Like TRPA § 4.03, the TBOC requires partners to provide information on reasonable request. TBOC § 152.213. So, the debate regarding the *Johnson* rule after TRPA § 4.03 applies to TBOC § 152.213 too. However, although the TBOC does not expressly so state, the common law good faith obligation also applies to § 152.213. *See id.* § 152.003 (common law supplement to TBOC). However, those concepts are limited to (i) the common law definition of "good faith" to mean "deal fairly," *Crim*, 823 S.W.2d at 593–94, and (ii) statutory constraints that §§ 152.204(c), (d), and 152.213 and any applicable partnership agreement terms impose.

[¶ 123] Since Texas adopted TRPA § 4.03, the Texas Supreme Court has provided little guidance regarding a partner's duty to voluntarily provide information affecting the partnership. For example, in *American Star Energy and Minerals Corp. v. Stowers*, the Supreme Court suggested in *dicta* that there are circumstances when the duty of care may require a partner to disclose material information affecting the partnership's operation. 457 S.W.3d at 434–35.

[¶ 124] That statement is *dicta* because the issue there was when do limitations begin to run in a suit to enforce a partnership's contract liability against a partner. The Supreme Court held that, based on the partnership as

an entity theory, partners were not individually liable until the partnership's liability was finally established at which time limitations began running against the individual partner. *Id.* at 428–30, 435.

[¶ 125] Responding to the partners' argument that due process required that they be joined in the suit against the partnership, the court explained that (i) as a matter of law the partners had notice of their potential liability when they became partners; (ii) citing *Zinda*, the court stated that the duty of care "may" require partner to inform other partners of a suit against the partnership; and (iii) partners can agree in their partnership agreement for a partner served with a lawsuit against the partnership to provide that information to the other partners. *Stowers*, 457 S.W.3d at 434–35.

[¶ 126] Regarding the second point, the court did not discuss TRPA § 4.03 or TBOC 152.213. *Id.* Nor did it explain what circumstances "may" require disclosures. *Id.* Finally, the court did not explain why such a duty falls under the care duty instead of the good faith obligation. *Id.* So, *Stowers* does not guide as to when partners must voluntarily disclose information to other partners. And that statement may be construed as a "suggestion" that such an obligation survives after TRPA § 4.03 and TBOC § 152.213. Miller, *Fiduciary Duties* 30.

[¶ 127] Additionally, "[a]s a general rule, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent."[80] *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). And, in an arm's-length transaction, a duty to disclose facts does not exist absent a misleading statement about facts and the complaining party lacked an equal opportunity to discover the facts. *See id.* 756.

[¶ 128] Without firm rules concerning when a partner must volunteer information regarding circumstances not expressly mentioned in § 152.213, the court applies these standards in this case:

- A partnership agreement may address the issue either directly or indirectly by omission. *See* TBOC §§ 152.002(a) (partnership agreement governs the relations among partners and the partnership), 152.002(b)(2)–(4) (ability to modify loyalty and care duties and good faith obligation); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95–96 (Tex. 2011) (contract freedom);

[80] For example, fraud by omission may occur where a person discovers new information that makes an earlier material representation false or misleading, *Dewayne Rogers Logging, Inc. v. Propac, Ltd.*, 299 S.W.3d 374, 391 (Tex. App.—Tyler 2009, pet. denied); or a person makes a partial disclosure that leaves a false impression, *Mercedes-Benz USA, LLC v. Cardusco, Inc.*, 583 S.W.3d 553, 561–62 (Tex. 2019).

FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P., 426 S.W.3d 59, 68 (Tex. 2014) (omissions may be read as intentional).

- Absent a partnership agreement standard, partners must disclose material information affecting the partnership or other partners that ordinarily would not be expected to be covered by a partnership agreement. For example, a partner must tell at least partnership management when the partner is served with a suit against the partnership. *See Stowers*, 457 S.W.3d at 434–35.

- A partner may not mislead the partnership or other partners where fraud by omission principles would apply absent the partnership relationship. *See* ¶s 114, 127.

- That a partner is acting in its self-interest does not by itself create a duty to voluntarily disclose information regarding its conduct if the partnership agreement lawfully permits that conduct. *See* TBOC § 152.204(c), (d).

- A partner need not disclose facts that would be immaterial under the circumstances, including circumstances contemplated by the partnership agreement.

5. Separate Analysis Required

[¶ 129] TBOC's text divides partners' loyalty and care *duties* on one hand from their *obligation* to *discharge* them in good faith (and when applicable

in a manner the partner reasonably believes to be in the partnership's best interest) on the other hand. *See* TBOC § 152.204.

[¶ 130] For example, one can perform its loyalty duty according to the partnership agreement's terms but discharge that duty in bad faith by lying to or misleading its partners while doing so. *See, e.g.*, *Shannon Medical*, 603 S.W.3d at 912–915; *Cruz*, 2018 WL 6566642, *10–16; *Red Sea Gaming*, 338 S.W.3d at 568–69. On the other hand, the good faith obligation is irrelevant for liability purposes if the partner breached the duty by engaging in prohibited conduct.

[¶ 131] So, courts should analyze whether a duty is breached before considering whether the defendant acted in good faith and, when applicable, in a manner it reasonably believed was in the partnership's best interest.

VI. APPLICATION

A. Introduction

[¶ 132] Movants basically argue that PEOFs' claims fail in their entirety because (i) the TAPA authorized HoldCo to exercise its drag-along rights and force the other partners to participate in selling PRD's assets in an Exit Event; (ii) HoldCo complied with its TAPA conditions to wait two years and conduct the sale in an arm's-length transaction; and (iii) its contract rights and conduct

satisfied Texas law's minimum requirements since TAPA defines conduct that meets the minimum requirements of loyalty and care and it acted in good faith.

[¶ 133] Conversely, PEOFs primarily argue that "Blackstone" breached its contract good faith duty and statutory responsibilities in several ways—including by failing to act in the partnership's best interest regarding the consideration received and the processes HoldCo used to analyze the deal.

[¶ 134] In short, the analysis converges on whether HoldCo acted in good faith when it exercised its drag-along rights and forced the sale of PRD's assets to Callon on terms HoldCo selected. Because movants seek complete dismissal of all claims against them, the court addresses all claims PEOFs assert against movants regardless of whether movants expressly addressed every such claim.

B. PEOFs' Claims by Category

[¶ 135] PEOFs' petition and the parties' submissions do not divide their arguments between distinct breach of loyalty, care, or good faith

responsibilities. And several of PEOFs' claims are variations of the same idea. Nonetheless, PEOFs' claims include these categories:[81]

- **Loyalty**: (i) failing to act in the partnership's best interest; (ii) structuring the deal to benefit "Blackstone;" (iii) prioritizing "Blackstone's" interest in fossil fuel divestment over acting in Primexx's best interests; (iv) acting in "Blackstone's" sole interest; (v) structuring a deal that would provide no return for PEOFs but would generate a substantial recovery for Blackstone; (vi) accepting an unfair sales proceeds' allocation; (vii) directing the sale to proceed despite knowing it was a bad deal; (viii) failing to maximize the value and return for PEP or other Unitholders aside from furthering "Blackstone's" interests; and (ix) failing to ensure "Blackstone" had no conflicts of interest.

- **Care**: (i) failing to keep PEOFs informed about the potential sale leading up to the sale; (ii) failing to conduct regular board meetings to discuss whether the sale made sense from the company's perspective; (iii) forcing a rushed sale; (iv) forcing the sale with only one business days' notice of the final terms; (v)

[81] Any claims not mentioned here are variations of what is discussed and are treated in the same manner. If the court calls a loyalty claim a care claim or vice-versa, it is regarded as such.

failing to take steps to maximize the value for PEP or the Unitholders; (vi) inadequate due diligence and marketing; (vii) preventing the board or other Unitholders from analyzing the terms; (viii) failing to professionally market the business or its assets; (ix) failing to analyze whether it was more profitable to run the business as a stand-alone operation than to sell it; (x) failing to consider alternatives; (xi) failing to consider whether a rushed sale would be fair to PEP or its partners, including PEOFs; and (xii) failing to properly distribute proceeds according to the waterfall.

- **Good faith**: All the above.

C. Overall Considerations

[¶ 136] The court must analyze PEOFs' claims under the TAPA subject to TBOC minimum standards. That is, Texas recognizes these sophisticated parties' freedom to contract within TBOC's minimum standards. *See, e.g.*, TBOC § 152.002(a); *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 504 (Tex. 2015). Indeed, Texas regards parties' freedom to contract as they wish (within public policy) a sacred right:

> As a fundamental matter, Texas law recognizes and protects a broad freedom of contract. We have repeatedly said that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their

> contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

Nafta Traders, 339 S.W.3d at 95–96 (quoting *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008)).

[¶ 137] Moreover, freedom of contract principles require courts to "recognize that 'sophisticated parties have broad latitude in defining the terms of their business relationship,' and courts are obliged to enforce the parties' bargain according to its terms." *Sundown Energy LP v. HJSA No. 3 P'ship*, 622 S.W.3d 884, 889 (Tex. 2021) (quoting *FPL Energy*, 426 S.W.3d at 67). Therefore, courts may not rewrite a contract under the guise of interpretation. *Id.*

[¶ 138] Here, the parties agreed to minimize HoldCo's and PEC's loyalty and care duties to the extent Texas law permits and agreed that HoldCo would discharge the remaining duties in good faith to the fullest extent Texas law requires.

[¶ 139] The court's analysis is also informed by these undisputed facts:

- These are sophisticated parties represented by counsel.
- Drag-along rights are established vehicles used to facilitate equity investments.

- PEOFs empowered HoldCo and PEC to exercise HoldCo's drag-along rights in their sole interest and discretion and in a manner that served HoldCo's (and by extension its affiliates') and PEC's interests—if it waited two years, completed an arm's-length transaction, and dealt fairly in doing so.
- PEOFs agreed that PEP's Unitholders must follow HoldCo's instructions when it exercised its drag-along rights.
- That is, PEOFs agreed to a structure that gave Blackstone, Inc.—acting through HoldCo—a majority of PEC's board seats; required all Unitholders to fulfill HoldCo's directions regarding the sale, thereby requiring all partner appointed directors and, thus, PEC to approve the sale at HoldCo's direction; and removed any discretionary PEC power to disobey HoldCo's directions regarding the Callon sale.[82]

[¶ 140] In short, that is the deal PEOFs made and the deal the court is to enforce to the full extent Texas law permits.

[82] *See* TAPA § 6.7 (Unitholders must instruct their directors to approve the sale).

D. Breach of Statutory Responsibilities

1. Introduction

[¶ 141] Although PEOFs' "fiduciary" breach causes of action are properly TBOC breach causes of action, the court uses the elements of a common law fiduciary breach claim to frame a TBOC cause of action's elements as: (i) a statutorily recognized relationship between the plaintiff and defendant, (ii) the defendant's breach of a statutory responsibility to the plaintiff, and (iii) the defendant's breach caused an injury to the plaintiff or a benefit to the defendant.[83] *See McLeod v. McLeod*, 644 S.W.3d 792, 804 (Tex. App.—Eastland 2022, no pet.) (fiduciary breach elements).

[¶ 142] It is undisputed that HoldCo and PEC were PEP partners and owed PEOFs statutory loyalty and care duties and an obligation to discharge them in good faith regarding the Callon sale—subject to their agreed modifications to those responsibilities.[84] And PEOFs do not claim that any TAPA modifications to those responsibilities is manifestly unreasonable. *See* TBOC §§ 152.002(b)(2)–(4); *Cruz*, 2018 WL 6566642, *14.

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[83] There are not two separate breach of fiduciary duty causes of action: one under the statute and one under the common law. Rather, there is only a cause of action based on the code that may incorporate certain common law aspects that are compatible with the code.

[84] *See* ¶ 74.

[¶ 143] Accordingly, the court must (i) define the nature and scope of the applicable responsibilities and (ii) decide whether PEOFs raised a genuine issue of material fact regarding their alleged breach regarding the Callon sale.

2. First Cause of Action: "Fiduciary" Breach (HoldCo)

a. Preface

[¶ 144] The Callon sale resulted from agreements the parties created five years earlier. Their term sheet shows that "Blackstone" expected, among other things, (i) control over PEC's board with five of nine directors and (ii) "customary drag-along rights" regarding a proposed sale of 100% of the partners' interests.[85] The TAPA embodies those points.

[¶ 145] The parties implemented this arrangement through the PIPA;[86] the TAPA;[87] and PEC Bylaws.[88] PEOFs do not claim those contracts were signed under duress or they did not understand their risks.

[¶ 146] Whittier Trust Co., by Steven Anderson, signed the TAPA as PEOF I's general partner.[89] PEC's Bylaws identified Jim Jeffs and Robert

[85] TAPA at Annex B (Summary of Proposed Terms, Term Sheet-Royalties Vehicle).
[86] PIPA.
[87] TAPA.
[88] Movants' Ex. 10 (Bylaws).
[89] TAPA.

Holland as PEOF I's "Fund Directors" and Holland as PEC's General Counsel and Secretary.[90] Jeffs' declaration confirms that he was appointed to serve as a PEC director.[91] Whittier's professional financial managers represented PEOFs.[92]

[¶ 147] PEOF I, PEC, and HoldCo made that deal, which PEOF II accepted.

b. Loyalty and HoldCo's Drag-Along Rights

i. Introduction

[¶ 148] At a high level, the loyalty duty concerns a transaction's substance and whether a partner acted with conflicts of interest. *See* TBOC § 152.205 (loyalty includes refraining from (i) acting on behalf of a conflicted person, (ii) competing with the partnership, or (iii) dealing with the partnership in a manner adverse to the partnership).

[¶ 149] Thus, the court begins with those requirements and considers the extent to which the TAPA lawfully limits those duties. In sum, the TAPA and TBOC combine to produce these Callon sale results: (i) HoldCo must give

[90] Movants' Ex. 10 (Bylaws).
[91] Jeffs Dec. ¶ 2.
[92] *See* Derrington Dec. ¶s 3, 6.

PEOFs reasonable access to books and records, including a duty to account for and distribute Callon sale profits according to the waterfall; (ii) HoldCo need not conduct the sale in a manner it reasonably believed was in PEP's or PEOFs' interests; (iii) HoldCo could negotiate the sale terms in its sole discretion and in its own sole interest (including PEC's and "Blackstone's" interests) without subordinating its interests to PEP's or the other partners' interests—if it waited two years and conducted an arm's-length transaction; and (iv) HoldCo had to comply with the TAPA's terms and "deal fairly" with PEP and its partners while exercising its drag-along rights.

ii. Accounting for Proceeds

[¶ 150] PEOFs allege that HoldCo did not properly distribute Callon sale proceeds according to the TAPA waterfall.[93] Movants' *motion* asserts that "[t]he sale proceeds were [] distributed to the partners pursuant to the agreed waterfall in the Limited Partnership Agreement" and includes some evidence

[93] FAP ¶ 98.

to that effect.[94] PEOFs did not respond to movants' argument or provide any corresponding evidence.[95]

[¶ 151] However, a summary judgment motion itself is not evidence. *Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143 (Tex. 1980). And movants' evidence does not conclusively negate PEOFs' improper payment claim. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). So, PEOFs "ha[d] no burden to respond to [the] summary judgment motion" on this issue. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

[¶ 152] Movants' evidence tends to show that PEOF II (but not PEOF I) received money and Callon shares and the value of those shares.[96] However, that does not disprove PEOFs' claim that common Unitholders may have been paid ahead of preferred Unitholders contrary to the waterfall. So, the court denies movants' motion to the extent it seeks dismissal of PEOFs' claim that

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[94] Movants' MSJ at 3; Movant's Exs. 7, 8, 11.

[95] *See* PEOFs' Resp. at 8. PEOFs' only reference to the waterfall payment structure in their response was that "Blackstone was the only investor to receive any significant proceeds from the sale," citing to a different portion of their petition than where this allegation appears. *Id.* Accordingly, the court understands this statement was offered in support of PEOFs' allegation that the Callon sale was fundamentally unfair to the non-HoldCo investors, not that the waterfall was distributed improperly.

[96] Movant's Exs. 7 (PEOF II Distribution Letter), 8 (AST Callon Petroleum Share Registration Statement), 11 (NASDAQ Historical Data for CPE).

HoldCo failed to properly account for and distribute the Callon sale profits according to the waterfall.

iii. Allocation of Proceeds between PEP and BPP

[¶ 153] PEOFs allege that HoldCo unfairly structured the allocation of sales proceeds between PEP and BPP (the sidecar business) to advantage BPP's owners and disadvantage PEP's owners.[97] Movants' motion did not address that claim. Thus, the court denies summary judgment regarding it.

iv. Remaining Loyalty Claims

[¶ 154] TAPA § 6.7 addresses the nature and scope of HoldCo's Callon loyalty duty by defining permitted conduct. And, reading § 6.7 together with § 5.9 and the circumstances surrounding HoldCo's private equity investment in PEP further inform the parties' objective understanding regarding the nature and scope of HoldCo's Callon sale responsibilities. *Polyco*, 681 S.W.3d at 391 (construe contracts as a whole giving effect to all contract terms).

[¶ 155] That is, the parties broadly met TBOC § 152.002(b)(2) contract-created loyalty standards by framing specific activities that do not violate the loyalty duty. For example, TAPA §§ 5.4 through 5.9 and 5.11 span more than

[97] FAP ¶s 96, 107, and 108.

three pages discussing "arm's-length" or fair market value requirements and fairness standards for potential conflicted transactions that might otherwise breach loyalty duties.[98] So, the partners identified those circumstances, considered their risks, and negotiated protections. Thus, they knew how to identify and negotiate regarding risks.

[¶ 156] More specifically, TAPA § 5.9 defines conduct that would not violate loyalty duties, including granting all partners—including PEC—the ability to

> . . . decide or determine any matter in its sole and absolute discretion taking into account solely its interest and those of its Affiliates (excluding the Partnership and its Subsidiaries) subject to the Agreed Duties. Each Partner further acknowledges and agrees that it would not have become a Partner in the Partnership if this arrangement were not acceptable to it.

[¶ 157] They further defined Agreed Duties to mean "to the fullest extent required by Texas law, . . . the duties of good faith and fair dealing . . .," which means the duty to "deal fairly." *Crim*, 823 S.W.2d at 593–94.

[98] TAPA § 5.4 Gas Purchasing Lines; § 5.05 Farmouts; § 5.6 Sales of Properties to Partnership; § 5.7 Purchases Properties from Partnership; § 5.8 Fair Market Value; and § 5.11 Competitive Activities and AMI.

[¶ 158] Those agreements extend to HoldCo's § 6.7 drag-along rights involving an "Exit Event," which includes "(i) the consummation of a sale of the Partnership substantially as a whole in one transaction or a series of closely related transactions or a sale of all or substantially all of the assets of the Partnership." In short, TAPA §§ 5.9(c) and 6.7 authorized HoldCo to negotiate and complete the Callon sale in its sole discretion and interest if it waited at least two years and conducted an arm's-length transaction.

[¶ 159] However, TAPA § 6.7 provides more deferential standards for HoldCo's drag-along rights. The differences between HoldCo's sole discretion and sole interest standards that do not require a fair market value, and the TAPA Article V standards for those potentially conflicted transactions that do require a fair market value shows that the parties knowingly negotiated for and accepted the risks that § 6.7 created. Thus, they met TBOC § 152.205's minimum standards, and it is undisputed that HoldCo waited roughly five years and the Callon sale was an arm's-length sale.[99]

[99] FAP ¶s 2 (referring to "third party" Callon), 42 (TAPA signed July 12, 2016), 94 (Callon sale closed October 1, 2021); Nov. 21, 2024, Hrg. Tr. at 8:2–22, 22:11–25:12, 26:16–27:18.

[¶ 160] So, except as to the sale proceeds' allocation and distribution, HoldCo conclusively met its loyalty duty regarding the Callon sale.

[¶ 161] But HoldCo (and PEC) had to conduct the sale in good faith.

c. Care and HoldCo's Drag-Along Rights

[¶ 162] In contrast to the loyalty duty, the care duty concerns the conduct or process a partner used while operating the business or deciding whether to do a third-party deal. *See* TBOC § 152.206 (care requires acting without negligence in conducting the partnership's business). That is, the TBOC adopts a form of business judgment rule as its care duty standard. *See id.*; Miller, *Fiduciary Duties* 27.

[¶ 163] Here, the parties' arm's-length sale standard as a matter of law satisfied TBOC § 152.206(a)'s care duty regarding the Callon sale by adopting an alternative minimum sale process procedure. *See Cruz*, 2018 WL 6566642, *14. It is undisputed that the Callon sale was an arm's-length transaction.[100] Thus, HoldCo satisfied its care duty with the Callon sale.

[¶ 164] But, HoldCo still had to discharge that obligation in good faith.

[100] FAP ¶s 2 ("third party" Callon), 42 (TAPA signed July 12, 2016), 94 (Callon sale closed October 1, 2021); Nov. 21, 2024, Hrg. Tr. at 8:2–22, 22:11–25:12, 26:16–27:18.

d. Good Faith

i. Introduction

[¶ 165] Texas courts have not drawn clear distinctions between the loyalty, care, good faith, and candor responsibilities. *See, e.g.*, *Zinda, Ltd.*, 178 S.W.3d at 890–91 (analyzed duties of full disclosure, candor, and good faith as a single fiduciary duty); *Cruz*, 2018 WL 6566642, *10–11 (combined loyalty and good faith analysis). Nor has the court found Texas cases applying those principles to drag-along sales.

[¶ 166] However, the risks inherent with drag-along rights are well known. *See, e.g.*, Evan Tarver, *What are Drag-Along Rights? Meaning, Benefits, and Example*, Investopedia June 11, 2024, https://www.investopedia.com/terms/d/dragalongrights.asp. Thus, they are typically negotiated at the beginning of a relationship and are recognized as one of the best ways for a majority owner to maintain control over future transactions that may involve minority owners. Soren Lindstrom and Lindsey Reighard, *II. How to Deal with Minority Shareholder Investments*, 2016 TXCLE Advanced Bus. L. 14.II (2016).

[¶ 167] Indeed:

> Drag-Along rights, or drag rights, which give the majority owner the right to force minority owners to participate in a sale

> of the company, can be a fiercely negotiated provision in a company's governing documents.
>
> * * *
>
> In negotiating these provisions, the minority owner seeks to ensure that such a sale will not disadvantage the minority. In light of what is at stake and the inherent uncertainty drag rights engender, parties are understandably cautious when approaching the negotiating table.

Robert B. Little & Joseph A. Orien, *Issues and Best Practices in Drafting Drag-Along Provisions*, Harvard Law School Forum on Corporate Governance (2016) (Little and Orien).

[¶ 168] With PEOFs having accepted those risks and HoldCo having met the TAPA's minimized standards, PEOFs rely on good faith-based arguments to support their claims.[101] The court addresses PEOFs' arguments as follows:

ii. Fair Price and Process

[¶ 169] Many of PEOFs' claims share the core premise that the consideration HoldCo negotiated and the process used to value and negotiate the sale was unfair because the consideration was too low and produced too little return for PEOFs.[102] Central to that premise is the notion that HoldCo

[101] *See, e.g.*, FAP ¶s 52, 53, 105; PEOF Resp. at 3–6, 11–20.

[102] *See, e.g.*, FAP ¶s 2, 80–81, 84, 100–103, 107; PEOF Resp. at 8–9, 27–30, 35.

had to conduct different processes and negotiate a fair price for the partnership as a whole, including PEOFs, instead of a price that suited HoldCo as decided in its sole discretion.[103] Yet HoldCo's freedom to do exactly that is what TAPA §§ 5.9 and 6.7 provide for and what PEOFs agreed to five years earlier when they wanted "Blackstone's" money.

[¶ 170] Nonetheless, PEOFs ask the court to alter the risk allocation equation and imply non-existent § 6.7 fair price and required process terms.[104] But no such terms exist in the TAPA, and imposing them would violate Texas's sacred contract freedom rights. *See Nafta Traders*, 339 S.W.3d at 95–96. Instead, PEOFs negotiated away those potential protections for "Blackstone's" promised at least two-year capital infusion.[105]

[¶ 171] Furthermore, PEOFs presuppose that HoldCo had to act "in a manner the partner reasonably believes to be in the best interest of the

[103] *See, e.g.*, FAP ¶s 85, 92, 99; PEOF Resp. at 28.
[104] *See* PEOF Resp. at 26–30.
[105] TAPA § 6.7.

partnership." *See* TBOC § 152.204(b)(2).[106] Not so. As discussed in ¶s 107–09 and 149, the parties disclaimed that obligation.[107]

[¶ 172] Moreover, as a matter of law HoldCo and PEC did not act in bad faith by exercising their contract rights to discharge HoldCo's drag-along rights as they did. *E.g.*, *Texas Beef Cattle*, 921 S.W.2d at 211 (Tex. 1996); *John Masek*, 848 S.W.2d at 174.

[¶ 173] PEOFs' argue that applying the TAPA as written could lead to absurd results such as HoldCo selling the business for a dollar.[108] The court rejects that argument because, although courts will not enforce unambiguous terms that lead to absurd results, that safety valve is reserved for only truly exceptional cases where it is unthinkable, unfathomable, or quite impossible that a rational person could have intended it. *Fairfield Indus., Inc. v. EP Energy E&P co., L.P.*, 531 S.W.3d 234, 248–49 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Here, the consideration was far greater than a dollar.

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[106] *See, e.g.*, FAP ¶ 92 ("Blackstone prioritized its own corporate interest … over acting in the best interest of Primexx.").

[107] *See* TAPA §§ 5.9(b)–(c). PEOFs' reliance on *Houle v. Casillas* for the premise that HoldCo had to consider their interests is misplaced because there was no written agreement in that case excluding that responsibility. PEOFs' Resp. at 14; *see* 594 S.W.3d at 547.

[108] PEOFs' Resp. at 25.

[¶ 174] Furthermore, it is not the court's role "to question the wisdom of the parties' agreement or to rewrite its provisions under the guise of interpreting it."[109] *Id.* at 242.

[¶ 175] Accordingly, based on the undisputed facts, the parties' business purposes when they signed the TAPA, its unambiguous terms, and TBOC's unambiguous provisions applicable to this case, as a matter of law HoldCo's drag-along rights were not so unthinkable, unfathomable, or impossible that a reasonable person in the parties' positions could not have rationally agreed to their application when they created the TAPA. Indeed, TAPA § 5.9(c)(ii) unambiguously records the parties' agreement that they would not have entered into the TAPA if its terms were not acceptable to them.

[¶ 176] Had these results not been the product of risks PEOFs accepted at the outset, they would have negotiated different standards as they repeatedly did in §§ 5.4–5.8. Or they would have rejected what they deemed to be their best option at the time. But they did none of those things. Accordingly, the court (i) declines to retroactively add diligence standards or

[109] *Fairfield* cites *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013), for support. Although *Combs* is a statutory construction case, the same principles apply here.

a fair price requirement and (ii) and dismisses all PEOFs' claims regarding HoldCo's pre-sale process or negotiated consideration.

iii. Information Disclosures

[¶ a] Drag-sale Notice Provisions

[¶ 177] The nature of HoldCo's disclosure and good faith responsibilities requires blending common law and statutory principles with contract terms.[110]

[¶ 178] And the amount of notice a majority owner must give the minority owners before invoking drag rights is a common issue parties may address. Little and Orien. For example, in *Halpin v. Riverstone Nat'l, Inc.*, the court refused to enforce drag-along rights where the majority owners did not comply with a pre-merger notice requirement. C.A. No. 9796, 2015 WL 854724, *5–7 (Del. Ch. February 26, 2015).

[¶ 179] Furthermore, the TAPA refers to "notice" over one hundred times.[111] That is, PEOFs could have negotiated for an advance notice protection as they did elsewhere in the TAPA but did not do so in § 6.7.

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[110] *See* ¶s 110–28.

[111] *See, e.g.*, TAPA §§ 3.6(b)(v) (in certain circumstances the partnership must give ten days' notice to Series A Preferred Unitholders prior to a liquidation event).

[¶ b] Voluntary Advance Notice

[¶ 180] The PEP partnership agreement is silent on whether HoldCo or PEC had to give PEP, PEOFs, or any other partners advance notice regarding the Callon Sale. For these reasons, the court declines to rewrite the TAPA to include that requirement:

- To begin, as discussed in ¶ 178, advance notice requirements are common with drag-along rights. Yet, the parties did not include an advance notice requirement.
- Further, given HoldCo's unambiguous authority to conduct the sale in its sole discretion in its sole interests (including its affiliates and PEC's sole discretion and interests), advance notice to PEOFs was not material to that deal. That is, the Unitholders, and thus a majority of the directors had to follow HoldCo's directions.

[¶ 181] Accordingly, the court declines to inject notice provisions into § 6.7's drag-along rights that the parties omitted. *See FPL Energy*, 426 S.W.3d at 68 (Tex. 2014) (omissions intentional where parties negotiated for similar terms elsewhere in the contract).

iv. Sales Proceeds Allocation and Distribution

[¶ 182] For the reasons the court denies HoldCo's motion regarding whether it breached its loyalty duty regarding the allocation and distribution Callon sale proceeds, HoldCo did not conclusively negate the good faith obligation regarding those claims.

v. Requested or Misleading Information

[¶ 183] PEOFs do not allege that HoldCo, PEC, or Doyle failed to provide any information PEOFs requested regarding the Callon sale. Thus, TBOC § 152.213's duty to provide requested information is not implicated.

[¶ 184] Similarly, PEOFs do not allege that HoldCo, PEC, or Doyle gave them, or the board false or misleading information regarding the deal. Indeed, those persons could not have provided misleading information to PEOFs if (i) none of those persons communicated with PEOFs and (ii) Jeffs and Langdon were not, as PEOFs posit, their agents on the board. So, the court need not consider whether any such bad faith breach occurred.

vi. Regular Board Meetings

[¶ 185] PEOFs say that in the weeks and months before the Callon sale, HoldCo failed to hold regularly scheduled board meetings to discuss whether

a sale made sense from the company's or partners' viewpoints.[112] Central to that claim is that there were missed regularly scheduled board meetings. However, PEC's Bylaws do not say when such meetings were to occur.[113] And PEOFs did not respond with evidence on that issue. Since HoldCo submitted evidence that there were no regularly scheduled meetings to be missed, and PEOFs not having submitted contrary evidence, the court grants HoldCo's motion regarding the claim that it failed to hold regularly scheduled PEC board meetings to discuss the Callon sale.

e. Conclusion

[¶ 186] Excluding PEOFs' claims directed to the allocation and distribution Callon sale proceeds, as a matter of law HoldCo did not breach its duties of loyalty or care or its obligation of good faith in the execution of Callon sale pursuant to its drag right.

3. Second Cause of Action: "Fiduciary Breach" (PEC)

[¶ 187] With limited exception, PEOFs' arguments regarding PEC are the same as for HoldCo. Thus, the court's conclusions regarding HoldCo are at least the same as for PEC.

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[112] FAP ¶ 87.

[113] *See* Movants' Ex. 10 (Bylaws at Art. III).

[¶ 188] Additionally, TAPA § 5.9 provides PEC additional support. For example, § 5.9(b) provides that PEC, as the Managing General Partner,

> . . . shall not owe any fiduciary or similar duty or obligation whatsoever to the Partnership, any Partner or Assignee, except as required by any provision of applicable law that cannot be waived, and
>
> (B) to the extent that, at law or in equity, the Managing General Partner owes any duties (including fiduciary duties) to the Partnership, any other Partner or assignee pursuant to applicable law, any such duty other than the Agreed Duties is hereby eliminated to the fullest extent permitted pursuant to the applicable law.

[¶ 189] PEOFs argue that PEC breached its responsibilities by participating in the sale because no provisions in the TAPA required PEC to comply with "Blackstone's" drag-along instructions. Although the TAPA does not expressly require PEC to follow HoldCo's direct instructions, PEOFs' argument ignores reality. The reality is that HoldCo controlled PEC's board. And TAPA § 6.7 required all Unitholders to consent to the sale and take all steps needed to complete the sale—including instructing any Existing Limited Partner Directors to approve the drag-along sale. Indeed, PEC had no choice but to do what its directors voted to do, and they all voted to approve the sale and the Transaction Resolutions authorizing PEC's officers to take actions

necessary to complete the sale.[114] Notably, PEOF appointed directors Jeffs and Langdon voted for the sale without reservation.[115]

[¶ 190] Additionally, FAP ¶ 85 concedes that forcing the Callon sale by using its drag-along rights was under HoldCo's sole control:

> By forcing the Board to vote on (and approve) the proposed transaction over a weekend, Blackstone necessarily precluded the Managing General Partner or the Board from engaging in a reasoned and fully informed decision-making process or satisfying their contractual and fiduciary duties. Yet all Blackstone-controlled Board members voted to approve the sale without conducting any analysis or due diligence to fairly evaluate the transaction and whether it would be fair to all of Primexx's investors.

[¶ 191] So, the court resolves PEOFs' Second Cause of Action as it does their First.

E. Third Cause of Action: Breach of Contract (HoldCo)

[¶ 192] The elements of a contract breach claim are: (i) a valid contract exists; (ii) the plaintiff performed; (iii) the defendant breached the contract; and (iv) the plaintiff was damaged as a result. *E.g.*, *Williams v. First Tenn. Nat.*

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[114] Movants' Ex. 3 (Aug. 2, 2021, Board Minutes at Ex. A).

[115] Movants' Ex. 3 (August 2, 2021, Board Minutes). PEOFs deny that they controlled Jeffs and Langdon as of August 2, 2021. However, PEOFs was entitled to control two seats on the board. Whether PEOFs chose to abandon that right is not material to this motion because board approval was a non-discretionary function since all Unitholders had to cooperate in closing the deal, including the § 6.7 requirement that they direct their appointed directors to approve the deal. And HoldCo controlled five of nine seats.

Corp., 97 S.W.3d 798, 802 (Tex. App.—Dallas, 2003, no pet). Here, the third element is the only one before the court.

[¶ 193] It is undisputed that HoldCo waited the required two years and it conducted the Callon deal in an arm's-length sale.[116] Nonetheless, PEOFs' Third Cause of Action posits that HoldCo breached the TAPA based on the same alleged good faith breaches they say support their First Cause of Action.

[¶ 194] Because HoldCo's "fiduciary" duties required it to perform in good faith, its contract duty to perform in good faith is no greater than its TBOC-based responsibilities. Accordingly, the court resolves PEOFs' Third Cause of Action same as it disposes of their First.

F. Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action: Derivative Liability Causes of Action (Holdco, PEC, and Doyle)

1. Introduction

[¶ 195] PEOFs' Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action assert civil conspiracy, aiding and abetting fiduciary breach, and knowing participation in fiduciary breach causes of action against Holdco, PEC, and Doyle.[117] These are derivative liability torts because they involve a

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[116] FAP ¶s 2 (referring to "third party" Callon), 42 (TAPA signed July 12, 2016), 94 (Callon sale closed October 1, 2021); Nov. 21, 2024, Hrg. Tr. at 8:2–22, 22:11–25:12, 26:16–27:18.

[117] FAP ¶s 136–154.

defendant's participation in another person's torts where the defendant otherwise would not be liable for the tort. *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 140–42 (Tex. 2019) (civil conspiracy a vicarious—not direct—liability tort); *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 930 (Tex. 2010) (aiding abetting claim failed for same reason civil conspiracy failed, but noted that the Texas Supreme Court has not recognized an independent aiding and abetting claim); *Kinzbach Tool Co v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (joint and several liability for knowingly participating in agent's fiduciary breach to principal).

2. Aiding and Abetting (HoldCo and Doyle)

[¶ 196] Neither the supreme court nor the Fifteenth Court of Appeals have recognized aiding and abetting as a separate liability theory apart from civil conspiracy. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017); *Palliative Plus LLC v. A Assure Hospice, Inc.*, No. 03-23-00770-CV, 2025 WL 284920, *10 (Tex. App.—Beaumont January 24, 2025, no pet. h.). So, subject to those courts later recognizing this theory, the court dismisses PEOFs' aiding and abetting cause of action against Holdco and Doyle. *See* TEX. R. CIV. P. 166(g), (p).

3. Civil Conspiracy and Knowing Participation (Holdco, PEC, and Doyle)

[¶ 197] PEOFs' civil conspiracy and *Kinzbach* claims depend on the viability of their fiduciary breach claims. Thus, at a minimum, the court's rulings regarding PEOFs' fiduciary breach claims apply equally to these causes of action; and the court incorporates those prior rulings here.

[¶ 198] The following discussion concerns issues that movants' motions implicate but that the parties did not previously discuss. So, the court does not rule on them now. However, pursuant to Rules 166(g), (p) the court directs the parties to brief these issues:

- To what extent were PEC or Doyle legally capable of the civil conspiracies alleged against them (consider the various combinations alleged against them)?
- Is knowing participation in a fiduciary breach a viable cause of action where HoldCo controlled the Board, the Unitholders, and Doyle regarding the Callon sale?

[¶ 199] For causes of action concerning them, PEC and Doyle are to submit their briefs within ten days of this opinion's signature date. PEOFs are to submit their responses, if any, within ten days of the later submission by

PEC or Doyle. The briefs are to be no more than ten pages excluding the style, caption, and preliminary tables.

VII. CONCLUSION

[¶ 200] Accordingly, the court denies movants' motion regarding causes of action asserted against them based on claims that (i) the Callon sale proceeds were not properly distributed according to the TAPA waterfall and (ii) the consideration was not fairly allocated between PEP and BPP. Otherwise, the court grants movants' motion and dismisses the causes of action against them as described above.

It is, SO ORDERED.

BILL WHITEHILL
Judge, Texas Business Court-
First Division

SIGNED: March 10, 2025

FILED IN
BUSINESS COURT OF TEXAS
BEVERLY CRUMLEY, CLERK
ENTERED
3/11/2025

2025 Tex. Bus. 10

The Business Court of Texas,
Third Division

SAFELEASE INSURANCE SERVICES LLC, *Plaintiff,* v. STORABLE, INC., et al., *Defendants*.	§ § § § § § § § §	Cause No. 25-BC03A-0001

MEMORANDUM OPINION AND ORDER

¶1 Before the Court is a document titled "Objections To Temporary Injunction Order, Motion to Rule On Exclusion Of Opinions Of Dr. Williams, And Motion to Reconsider Based On Objections And Exclusion" (hereafter, the Motion to Reconsider) filed by defendants Storable Inc., RedNova Labs Inc., Bader Co., SiteLink Software LLC, Easy Storage Solutions LLC, and Property First Group LP (collectively, Storable). The Court GRANTS in part and DENIES in part the Motion to Reconsider, as detailed below.

Background

¶2 This suit arises out of a dispute between SafeLease Insurance Services LLC (SafeLease), which provides insurance for self-storage facilities, and Storable, which licenses facility-management software (FMS) to such facilities. Storable's FMS platforms include storEDGE, SiteLink, and Easy Storage Solutions (ESS). The dispute centers on SafeLease's access to information maintained on these platforms by self-storage facilities that license FMS software from Storable and that are also customers of SafeLease. Until recently, SafeLease accessed these FMS platforms as an authorized user on its customers' accounts. In late 2024, Storable began blocking SafeLease's access to storEDGE. The parties dispute the impetus of these actions: SafeLease alleges that Storable seeks to drive it out of the self-storage insurance market to benefit Storable's own self-storage insurance products; Storable asserts that it is enforcing its software's terms of use and mitigating security threats posed by SafeLease's misuse of the platform.

¶3 SafeLease sued Storable in the 345th District Court in Travis County on December 30, 2024. The District Court granted a temporary restraining order (TRO) compelling Storable to restore SafeLease's authorized-user access to storEDGE and prohibiting Storable from removing or restricting SafeLease's access to storEDGE, SiteLink, or ESS. After extending the TRO, the District Court denied the request for a temporary injunction (TI). A week later, SafeLease amended its

petition to include new tortious interference claims and allegations about Storable's actions after the TI was denied. SafeLease then removed the action to this Court.

¶4 In this Court, SafeLease filed a new application for a TRO and TI to protect its access to the information on Storable's FMS platforms while the lawsuit is pending.[1] On January 30, 2025, the Court denied the TRO and set a TI hearing. The TI hearing was conducted on February 11, 13, and 14, with closing arguments on Tuesday, February 18. The Court issued a TI Order the following day, February 19, granting SafeLease limited injunctive relief. Storable filed this Motion two days later, on Friday, February 21, and set it for written submission today, March 11.

Analysis

A. Storable's Request for Ruling and Reconsideration

¶5 The Motion to Reconsider asks the Court to rule on another motion filed by Storable—its "Motion To Exclude Or Disregard Opinions Of Dr. Williams On The Ground That They Are Unreliable And Constitute No Evidence" (the Motion to Exclude)—and to reconsider the TI Order on that basis. The Court determines that reconsideration is unnecessary for several reasons.

[1] The Court treats this as a new application, based on the newly asserted claims and the changed circumstances that occurred after the District Court denied the prior TI application. In any event, the Court views the District Court's prior decisions in this case with the same deference and as carrying the same weight as its own prior decisions in the case.

¶6 First, exclusion of the challenged testimony would not alter the Court's decision to grant the TI Order. The Motion to Exclude challenges the testimony of SafeLease's antitrust economist, Dr. Michael Williams. Dr. Williams testified in support of SafeLease's antitrust claim, but the TI Order does not rely on SafeLease's antitrust claim; it relies exclusively on SafeLease's claim for tortious interference with existing contracts. The Motion to Reconsider points to a reference in paragraph 4 of the TI Order to Storable "leveraging" its "market power in the FMS market." Although "leveraging" and "market power" may be terms of art in antitrust law, the Court refers to Storable's use of its position in the FMS market and as the FMS provider for a large segment of SafeLease's tenant-insurance customers, and not to SafeLease's antitrust claims. To avoid any potential confusion, the Court will amend the TI Order to replace "leveraging their market power in the FMS market" with "using their position in the FMS market."

¶7 Second, while the Motion to Reconsider was set for written submission, the underlying Motion to Exclude was never set for either written submission or oral hearing. A motion must be presented to the court to trigger the court's duty to rule.[2]

[2] *See, e.g.*, *Ballard v. King*, 652 S.W.2d 767, 769 (Tex. 1983); *Lawrence v. Jones*, No. 14-23-00270-CV, 2024 WL 1269874, at *4 (Tex. App.—Houston [14th Dist.] Mar. 26, 2024, no pet.); *In re Ogaz*, No. 08-23-00344-CR, 2023 WL 8519276, at *1 (Tex. App.—El Paso Dec. 7, 2023, no pet.); *In re Liverman*, 658 S.W.3d 881, 882 (Tex. App.—El Paso 2022, no pet.); *In re Blakeney*, 254 S.W.3d 659, 662 (Tex. App.—Texarkana 2008, orig. proceeding); *Guyot v. Guyot*, 3 S.W.3d 243, 246 (Tex. App.—Fort Worth 1999, no pet.); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 378 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 736 (Tex. App.—Dallas 1992, writ denied).

Merely filing the motion does not satisfy this requirement; presentation requires that the motion be set for an oral hearing or written submission.[3] This process is important because, among other reasons, it puts opposing parties on notice of when responsive filings are due. Because the Motion to Exclude was never set, SafeLease never responded and was not required to do so. Given the pace of the TI proceedings, the Court likely would have expedited setting the Motion to Exclude, while still giving SafeLease an opportunity to respond, if requested.[4] But the Court received no request to do so or to otherwise set the Motion to Exclude.

¶8 Third, the February 18 Motion to Exclude challenges Dr. Williams's testimony given at the TI hearing on February 11. A motion to exclude filed a week after the conclusion of the challenged testimony generally comes too late.[5]

¶9 Storable's Motion to Exclude asserts challenges to the foundation and methodology underlying Dr. Williams's opinions.[6] To be timely, those objections

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[3] *E.g.*, *Lawrence*, 2024 WL 1269874, at *4; *Moore v. Carder*, No. 01-22-00156-CV, 2023 WL 3102582, at *2 (Tex. App.—Houston [1st Dist.] Apr. 27, 2023, no pet.); *Smith v. El Paso Veterans Transitional Living Ctr.*, 556 S.W.3d 361, 362 (Tex. App.—El Paso 2018, no pet.); *see also* TEX. BUS. CT. LOC. R. 5; 3RD DIV. CT. PRO. at V(A)–(B).

[4] The parties have known since February 14 that the Court would issue its TI Order on February 19. When it filed the Motion to Exclude on February 18, Storable was aware that it was filing the day before the TI Order would issue.

[5] *See, e.g.*, *Knoderer v. State Farm Lloyds*, 515 S.W.3d 21, 44 (Tex. App.—Texarkana 2017, pets. denied); *Farm Servs., Inc. v. Gonzales*, 756 S.W.2d 747, 750 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied); *Traders & Gen. Ins. Co. v. Randolph*, 467 S.W.2d 689, 690 (Tex. App.—Amarillo 1971, writ dism'd).

[6] For example, Storable argues that Williams: failed to "provide reliable data to support his market-share opinion" or "study the factors that determine the likelihood of monopoly power"; should have used revenue or output, rather than the number of facilities, in measuring market share; "used

had to be raised and ruled on before or when the testimony is offered.[7] The purpose of this requirement is two-fold: (1) it gives the trial court the necessary opportunity to look beyond the face of the testimony to inquire into its underlying basis before ruling,[8] and (2) it "gives the proponent a fair opportunity to cure any deficiencies and prevents trial and appeal by ambush."[9] Once opinion testimony is admitted without objection, "it may be considered probative evidence even if the basis for the opinion is unreliable."[10]

¶10 The Motion to Exclude also argues that Dr. Williams's opinion that Storable had "a dangerous probability of achieving monopoly power" in the tenant-insurance market is conclusory.[11] Unlike objections to foundation or methodology, a party need not timely object to expert testimony that is conclusory on its face; such

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incorrect numbers, without necessary adjustments, for the number of Storable's facilities and the total number of self-storage facilities in the United States"; and should not have excluded certain large operators in defining the relevant market. Motion to Exclude at 1, 7.

[7] *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 786 (Tex. 2020); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816–17 (Tex. 2009).

[8] *Pike*, 610 S.W.3d at 786 (quoting *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 233 (Tex. 2004)); *Pollock*, 284 S.W.3d at 816–17 (same).

[9] *Pike*, 610 S.W.3d at 786; *Pollock*, 284 S.W.3d at 817; *see also, e.g.*, *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 716 (Tex. 2016); *Mar. Overseas Corp. v. Ellis,* 971 S.W.2d 402, 409 (Tex. 1998).

[10] *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 899 (Tex. 2020) (quoting *Pollock*, 284 S.W.3d at 818); *see also Pike*, 610 S.W.3d at 786 (same).

[11] Motion to Exclude at 3–7.

testimony inherently lacks probative value.[12] But the Court need not reach this issue because it did not consider Dr. Williams's opinion regarding whether Storable had a dangerous probability of achieving monopoly power in the tenant-insurance market. As Storable points out in its Motion to Exclude,[13] that opinion related to SafeLease's antitrust claims, which the Court did not rely on in granting injunctive relief under the TI Order.

¶11 The Court notes that Storable objected to Dr. Williams's testimony on several grounds at the TI hearing and took Dr. Williams on voir dire. To the extent any objections were timely raised and ruled on at the hearing, no further objection or ruling is needed. The Court further notes that there was limited opportunity for discovery and to vet the expert opinions before the TI hearing, which occurred less than two months after the case was filed. While it was necessary to expedite the TI proceedings, the substance of any testimony offered in the TI proceedings remains subject to challenges and objections at future stages of the case, including summary judgment and trial.

B. Storable's Objections to the TI Order

¶12 Storable objects that the TI Order decides the "ultimate merits" of the case rather than only whether SafeLease demonstrated a "probable" right to

[12] *Pike*, 610 S.W.2d at 786 (quoting *Coastal Transp.*, 136 S.W.3d at 233); *Pollock*, 284 S.W.3d at 816 (same).

[13] Motion to Exclude at 3.

recover.[14] The Court disagrees and notes that Storable issued a press release shortly after the TI issued demonstrating that it correctly understood that the TI Order "does not represent a final determination on the merits of the case."[15] The TI Order states that SafeLease demonstrated a "probable right to relief" and expressly notes that such a showing does not mean that SafeLease will ultimately prevail on the merits based on a fully developed record.[16] Rule 683 compels the Court to include in the TI Order the findings that form the reasons it granted the injunction,[17] and the TI Order makes it clear that the findings are based on the evidence presented at the TI hearing and that a final trial on the merits has not yet occurred. Nevertheless, to avoid any potential confusion, the Court will amend the TI Order to further clarify that the holdings in the order are based on the evidence the parties presented at the

[14] Motion to Reconsider at 2–3.

[15] Exhibit A to "Supplement to Plaintiff's Response to Objections to Injunction and Motion to Reconsider."

[16] TI Order at ¶ 3 & n.1 (quoting *Bienati v. Cloister Holdings, LLC*, 691 S.W.3d 493, 498 (Tex. 2024); *Transp. Co. of Tex. v. Robertson Transps., Inc.*, 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953)).

[17] TEX. R. CIV. P. 683 (requiring order to specify the reasons the court granted the relief). Storable objects to the statement in the TI Order that "SafeLease has *pleaded and proved* valid causes of action against Defendants; a probable right to the relief sought; and a probable, imminent, and irreparable injury in the interim." Motion to Reconsider at 3 (emphasis added). But this is a common way of stating the elements required for a TI. *See, e.g.*, *State v. Loe*, 692 S.W.3d 215, 226 (Tex. 2024); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Hughs v. Dikeman*, 631 S.W.3d 362, 382 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *Adobe Oilfield Servs., Ltd. v. Trilogy Operating, Inc.*, 305 S.W.3d 402, 405 (Tex. App.—Eastland 2010, no pet.); *8100 N. Freeway Ltd. v. City of Houston*, 329 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The statement is in no way a ruling that SafeLease has or ultimately will prevail on the merits.

TI hearing and do not prevent either party from proving or disproving any of the disputed facts at the trial on the merits.

¶13 The Court will also amend the TI Order to remove a statement that the parties agreed to the form but not the substance of the order. Although the Court instructed the parties to confer and reach an agreement as to the form (but not the substance) of each side's proposed orders, the Motion informs the Court that Storable refused to do so.[18] The Court notes that if Storable had meaningfully engaged in this process, some of its concerns might have been ameliorated before the TI Order issued.

SIGNED ON: March 11, 2025.

Hon. Melissa Andrews
Judge of the Texas Business Court,
Third Division

[18] Motion to Reconsider at 3.

2025 Tex. Bus. 11

The Business Court of Texas,
Eleventh Division

ET GATHERING & PROCESSING LLC, *Plaintiff*, v. TELLURIAN PRODUCTION LLC, *Defendant*.	§ § § § § § § § § § §	Cause No. 24-BC11A-0028

OPINION AND ORDER

Syllabus*

In a plea to the jurisdiction, Defendant challenged the Court's authority to hear this case by arguing the amount in controversy pleaded by Plaintiff was merely a sham for the purpose of wrongfully obtaining this court's jurisdiction. Applying Texas's well-established plea to the jurisdiction standard, the Court concluded Defendant did not produce evidence that Plaintiff's actions amounted to a sham and denied Defendant's plea.

OPINION

* NOTE: The syllabus was created by court staff and is provided for the convenience of the reader. It is not part of the Court's opinion, does not constitute the Court's official description or statement, and should not be relied upon as legal authority.

¶1 Before the court is Defendant Tellurian Production LLC's Plea to the Jurisdiction challenging the court's authority to hear this case. The court invited Plaintiff ET Gathering & Processing LLC to file a response, which Plaintiff filed on February 27, 2025. Defendant also filed a reply on March 4, 2025. The court held a hearing on the matter on March 6, 2025. After considering the parties' arguments, the court denies Defendant's plea.

BACKGROUND

¶2 The essential facts of this case are straightforward. Plaintiff and Defendant entered a Gas Gathering Agreement, and Plaintiff alleges Defendant breached the agreement. According to Plaintiff, it agreed to gather and process the production of Defendant's natural gas for an agreed contracted rate, and Defendant agreed to deliver to Plaintiff all the natural gas it owned or controlled from a dedicated area of land in Louisiana.[1]

¶3 In its first amended petition, Plaintiff specifically alleges Defendant breached the agreement by failing to deliver the natural gas to it, and as a result, it was entitled to recover the foregone fees associated with gathering and processing the natural gas. Plaintiff alleges these foregone fees alone exceed $10 million based on the amount of gas produced from two wells, the Graham and Scott wells, located on the dedicated acreage. To support its assertion, it pleads these wells produced over 26,0000,000 MCF as evidenced in certain gas volume statements. Plaintiff further alleges that under the

[1] Currently pending before the court is Plaintiff's "Unopposed Motion for Temporary and Permanent Sealing Order."

agreement, it was entitled to recover capital expenditures it made to build necessary infrastructure to gather and process the gas from the Graham and Scott Wells. In addition to the foregone fees and capital infrastructure associated with the Graham and Scott Wells, Plaintiff alleges Defendant breached the agreement by failing to deliver natural gas from six other wells located on the dedicated acreage, causing it to incur additional foregone fees associated with those wells. Based on these assertions, Plaintiff contends the amount in controversy exceeds $10 million and thus, falls within this court's jurisdiction.

¶4 Defendant filed an answer asserting a general denial, several affirmative defenses, and a counterclaim for breach of contract disputing the rate charged by Plaintiff for gathering and processing. Pertinent here, Defendant also filed a plea to the jurisdiction challenging the court's authority to hear this case. In its plea, Defendant alleges the amount in controversy pleaded by Plaintiff is merely a sham for the purpose of wrongfully obtaining this court's jurisdiction. Defendant explains Plaintiff initially filed an action against it in state district court, but after engaging in discovery, Plaintiff non-suited its action and re-filed it in this court, changing its allegation to indicate the amount in controversy exceeds $10 million. Defendant contends this jurisdictional allegation is false. For support, it points to invoices amounting to approximately 8.2 million; these invoices reflect the gathering and processing fees billed by a third party for gas delivered to it by Defendant from the dedicated acreage. The court notes Defendant maintains its actions did not amount to a breach of a contract. In addition to its sham allegation, Defendant contends Plaintiff is entitled to recover only the benefit of the bargain and Plaintiff did not actually

incur any expenses because it did not gather and process any gas from the dedicated acreage.

¶5 In response, Plaintiff asserts it pleaded facts supporting its assertion that the amount in controversy amounts to more than $10 million. It points to three specific categories pleaded in its live pleading: (1) its foregone revenue for gathering and treating gas from the Graham and Scott wells, (2) the capital cost expenditures associated with those wells, as well as (3) the foregone revenue for gathering and treating gas from other wells. Plaintiff contends these categories satisfy this court's jurisdictional threshold under Texas's liberal pleading standard. Plaintiff further emphasizes its forgone revenue for gathering and treating gas from the Graham and Scott wells alone satisfies the jurisdictional amount. As to Defendant's assertion of a sham pleading, Plaintiff contends Defendant has not produced any evidence showing its allegations in its first amended petition were made fraudulently or in bad faith. In its reply, however, Defendant maintains Plaintiff created new allegations in its attempt to clear the court's $10 million jurisdictional threshold.

ANALYSIS

¶6 The parties agree this court's jurisdiction is governed by section 25A.004(d) of the Texas Government Code. *See* TEX. GOV'T CODE § 25A.004(d). This section provides this court has jurisdiction over actions that arise out of a qualified transaction when the amount in controversy exceeds $10 million, excluding monetary requests not at issue here. *See id.* Under the statute, a "'qualified transaction' means a transaction . . . under which a party: (A) pays or receives, or is obligated to pay or is entitled to receive, consideration with

an aggregate value of at least $10 million." *See id.* § 25A.001(14). Here, Defendant challenges Plaintiff's amount in controversy assertion through a plea to the jurisdiction.

¶7 Plea to the jurisdiction jurisprudence is well established in Texas. As stated by the Texas Supreme Court:

> A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit. The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case. The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached.

Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). As in this case:

> [W]hen a defendant asserts that the amount in controversy is below the court's jurisdictional limit, the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction, or the defendant can readily establish that the amount in controversy is insufficient, as for example when the issue in dispute is a license or right rather than damages. A plea to the jurisdiction cannot be used to require the plaintiff to prove the damages to which he is entitled in order to show that they exceed the court's jurisdictional limits. The plaintiff's allegation of damages in excess of jurisdictional limits suffices to show the amount in controversy, even if damages cannot ultimately be proved at all. Were it otherwise, the plaintiff would be required to try his entire case to show an entitlement to damages in excess of the court's jurisdictional limits.

Bland, 34 S.W.3d at 554; *see also Miranda*, 133 S.W.3d at 226. Earlier this year, this court recognized these long-standing principles. *See C Ten 3 LLC ex rel. v. Tarbox*, 2025 Tex. Bus. 1, at ¶46, 2025 WL 224542, at *13–14 (Jan. 3, 2025) (highlighting the Texas Supreme Court has repeatedly recognized these principles over the last 140 years). There, the court also reiterated that Texas courts, including this court, "generally will not look

behind such pleadings absent evidence that the amount pleaded is fraudulent." *See id.* at ¶47. Turning to the case before the court, the court applies these principles.

¶8 Here, the crux of Defendant's plea to the jurisdiction centers on Defendant's allegation that Plaintiff's first amended petition is a sham pleading. However, merely filing in district court and then engaging in discovery to later determine one should nonsuit and refile in this court in and of itself is not evidence of fraud or a sham. The purpose of discovery is to allow the parties "to obtain the fullest knowledge of issues and facts prior to trial." *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978). In this case, Plaintiff's decision to nonsuit its action in district court after engaging in some discovery and then refile its action in this court amounts to litigation strategy as opposed to fraudulent behavior or a sham pleading as Defendant argues.

¶9 Accordingly, in absence of proof of fraud or a sham pleading, the allegations in the pleadings control to determine whether this court has jurisdiction to hear this case. *See C Ten*, 2025 Tex. Bus. 1, at ¶46, 2025 WL 224542, at *13; *see also Miranda*, 133 S.W.3d at 224 (pointing out trial court is precluded from inquiring behind the facts pleaded in determining amount in controversy for jurisdictional purposes); *Bland*, 34 S.W.3d at 554 (explaining pleadings are determinative unless defendant shows amount was pleaded as a sham). When reviewing the pleadings, the court construes them "liberally in favor of the plaintiff[] and look to the pleader['s] intent." *Miranda*, 133 S.W.3d at 226.

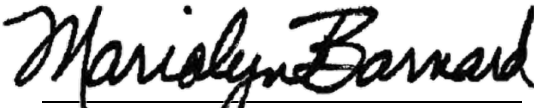
¶10 In its first amended petition, Plaintiff asserts the amount in controversy exceeds $10 million based on three main categories: (1) the forgone revenue in gathering and processing fees it would have received from the Graham and Scott wells located on the

dedicated acreage; (2) the capital costs expenditures made on infrastructure associated with these wells; and (3) additional forgone revenue in fees it would have received from other wells located on the dedicated acreage. Plaintiff further asserts in its petition that the first category alone exceeds the $10 million jurisdictional threshold when considering the amount of gas it would have gathered and processed based on its charged rate. These allegations are sufficient to invoke this court's jurisdiction. As repeatedly held by the Texas Supreme Court and recognized by this court, "[t]he plaintiff is not required to marshal all her evidence and conclusively prove her claim to satisfy this jurisdictional hurdle." *See Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 805 (Tex. 2018); *see also C Ten*, 2025 Tex. Bus. 1, at ¶53, 2025 WL 224542, at *15. And to the extent Defendant disputes the rate charged by Plaintiff for gathering and processing the gas, the court remains mindful that the Plaintiff's allegations in the pleadings control.

CONCLUSION

¶11 Accordingly, based on the pleadings before the court, the court denies Defendant's plea to the jurisdiction.

IT IS SO ORDERED.



Marialyn Barnard
Judge of the Texas Business Court

SIGNED ON: March 11, 2025

Petition for Writ of Mandamus Denied and Opinion filed February 21, 2025.

In The
Fifteenth Court of Appeals

NO. 15-24-00131-CV

IN RE ETC FIELD SERVICES, LLC, Relator

ORIGINAL PROCEEDING
Business Court Division 8A, Tarrant County, Texas
Case No. 24-BC08B-0001

OPINION

This is one of several original proceedings challenging an order by the new business court remanding to the district court a civil action commenced before September 1, 2024. The bill creating the business court states that "changes in law made by this Act apply to civil actions *commenced* on or after September 1, 2024."[1] Because removal to the business court does not "commence" a new civil

[1] Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 8 (emphasis added).

action but simply transfers an existing one, we hold the new removal statute does not apply, and the business court did not err by remanding it.

BACKGROUND

On March 17, 2017, Tema Oil and Gas Co. sued Relator ETC Field Services, LLC, in Tarrant County district court for breach of a gas-purchase contract. After seven years of litigation, in June of 2024 the parties jointly requested a preferential trial setting in the spring of 2025. But less than three months after that request, ETC unilaterally removed the suit to the newly created Texas business court. Tema moved to remand the case back to the Tarrant County district court, and the business court granted that motion by written opinion signed November 6, 2024.

Two days later, ETC appealed the remand order to this Court. Tema moved to dismiss the appeal on the ground that it was not a final order and no statute authorized an interlocutory appeal.[2] ETC defended the interlocutory appeal, but alternatively filed this original proceeding for mandamus relief if interlocutory appeal was unavailable. We hold today that no interlocutory appeal is available in these circumstances. *See ETC Field Servs., LLC v. Tema Oil and Gas Co.*, No. 15-24-00124-CV (Tex. App.—15th Dist., Feb. 21, 2025).

"But that of course does not preclude mandamus review."[3] "[T]he Legislature's decision to forego interlocutory review of *all* pending cases in no way suggests it intended interlocutory review of *none* of them."[4] Accordingly, we

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[2] Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction, *ETC Field Servs., LLC v. Tema Oil and Gas Co.*, No. 15-24-00124-CV (Tex. App. —15th Dist., Nov. 13, 2024).

[3] *In re Schmitz*, 285 S.W.3d 451, 458 (Tex. 2009); *see In re Gulf Expl., LLC*, 289 S.W.3d 836, 841 (Tex. 2009); *Deloitte & Touche, LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997) ("Further, our mandamus jurisdiction is not dependent on appellate jurisdiction.").

[4] *In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 466 (Tex. 2008).

turn to that issue in this opinion.

ANALYSIS

"Mandamus relief is available if the relator establishes a clear abuse of discretion for which there is no adequate appellate remedy."[5] We address each requirement in turn.

I. No Abuse of Discretion

House Bill 19 created a new statewide business court as of September 1, 2024.[6] The Act provided for removal of actions pending in a local trial court to the business court, to be accomplished by filing a notice of removal in both courts within 30 days after discovery of facts establishing the business court's jurisdiction.[7] The action would then "immediately" be transferred to the business court and assigned to the appropriate division of that court.[8]

While the effective date of the Act was September 1, 2023,[9] the business court itself was not actually created until September 1, 2024.[10] So the Act provided that "[t]he changes in law made by this Act apply to civil actions commenced on or after September 1, 2024."[11] The question here is whether a civil action filed before that date in a local trial court could properly be removed to the business court after that date. We hold that it cannot, since removal does not "commence" a new action in the business court after the Act's effective date, but simply transfers a pre-existing one.

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5 *In re AutoZoners, LLC*, 694 S.W.3d 219, 223 (Tex. 2024).

6 Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 5.

7 TEX. GOV'T CODE § 25A.006(d), (f).

8 *Id*. § 25A.006(g).

9 Act of May 25, 2023, 88th Leg., R.S., ch. 380, § 9.

10 *Id*. § 5.

11 *Id*. §§ 8, 9.

Commence means to "begin" or "start," and is used primarily in "more formal associations with law and procedure, combat, divine service, and ceremony."[12] The Texas rules of procedure use the term in the precise context of starting a new lawsuit: "A civil suit in the district or county court shall be *commenced* by a petition filed in the office of the clerk."[13] This civil action was thus "commenced" in the Tarrant County district court on March 17, 2017, not in the business court. Its removal to the business court seven years later on September 11, 2024 [R.011] did not *commence* a new civil action but *continued* the previous one in a different court.[14]

The Legislature's choice of "commenced" rather than "filed" appears to be deliberate. The term *filed* can mean to "commence a lawsuit" in some contexts, but it's primary meaning is to "deliver a legal document to the court clerk … for placement into the official record."[15] The rules of procedure employ this broader meaning by requiring that *all* pleadings and motions "must be filed with the clerk of the court" unless tendered in open court. TEX. R. CIV. P. 21(a) (emphasis added). Chapter 25A uses "filed" more than a dozen times to refer to filings in both local trial courts and the business court.[16] But Chapter 25A uses "commenced" only in its effective date clause. So while this civil action was "filed" in the 236th district court before removal *and* also "filed" in the Business Court after removal, it was "commenced" only in the former. And that was before the effective date of

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12 *Commence*, Garner, Bryan A., GARNER'S MODERN ENGLISH USAGE 225 (5th ed. 2022); *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 264 (1985) ("1: to have or make a beginning: START"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 295 (unabridged ed. 1966) ("to begin; start").

13 TEX. R. CIV. P. 22 (emphasis added).

14 *See* TEX. GOV'T CODE § 25A.006(g); TEX. R. CIV. P. 355(e).

15 *File*, BLACK'S LAW DICTIONARY 768 (12th ed. 2024).

16 *See, e.g.*, TEX. GOV'T CODE § 25A.006(a), (d)–(g).

September 1, 2024.

The structure of Chapter 25A makes plain the same distinction between an "initial filing" in the Business Court (§ 25A.006(a)–(c)) and a later "removal" to the Business Court (§ 25A.006(d)–(j)). It provides that removal does not commence a new civil action but transfers an existing one: "the clerk of the court in which the action was originally filed shall immediately transfer the action to the business court in accordance with rules adopted by the supreme court."[17] The rules of civil procedure adopted by the Supreme Court also distinguish between an "Action Originally Filed in the Business Court" (TEX. R. CIV. P. 354) and an "Action Removed to the Business Court" (TEX. R. CIV. P. 355). As a result, removal of a pending civil action does not *commence* a new civil action in the Business Court but simply *transfers* an existing one. We assume the Legislature used "commenced" advisedly in the effective date clause for just this purpose.[18]

A different case would be presented if a civil action filed in a district court were nonsuited (an "unqualified and absolute" right under Texas law),[19] and a new civil action commenced in the business court. But that did not occur here and should become unlikely in the future as time and limitations pass.[20]

ETC points out correctly that chapter 25A does not explicitly say it applies "only" to cases commenced on or after September 1, 2024, and for cases

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17 *Id*. § 25A.006(g).

18 *See, e.g.*, *In re Cont'l Airlines, Inc*., 988 S.W.2d 733, 735 (Tex. 1998).

19 *See Morath v. Lewis*, 601 S.W.3d 785, 787 (Tex. 2020).

20 The general tolling provision would not apply to such actions since it is limited to cases dismissed "because of lack of jurisdiction in the trial court where the action was first filed." TEX. CIV. PRAC. & REM. CODE § 16.064(a)(1). But a similar tolling provision applies to timely filed actions dismissed by the business court. *See* TEX. R. CIV. P. 357 ("If the business court dismisses an action or claim and the same action or claim is filed in a different court within 60 days after the dismissal becomes final, the applicable statute of limitations is suspended for the period between the filings.").

commenced before that date does not expressly prohibit removal or state that previous law governs.[21] With perfect hindsight, one can always rewrite a statute to make it more plain. But the Legislature is not required to exercise perfect hindsight, and "we cannot re-write this section to make its boundaries more distinct."[22] The fundamental problem here is that if the Act were to apply to civil actions commenced *both before and after* the effective date, the effective date itself would be meaningless; the Act would apply to all cases everywhere all at once. We cannot construe this effective date to effectively eliminate any effective date.[23]

Because removal to the business court does not apply to cases commenced elsewhere before September 1, 2024, we hold the business court did not abuse its discretion by remanding this civil action to the district court from which it came.

II. Adequate Remedy by Appeal

Normally, we would not address whether an adequate remedy exists if we find no abuse of discretion.[24] But the Supreme Court has repeated twice recently that in complex cases it may be prudent for courts of appeals to address alternative issues in the interest of judicial economy, rather than having cases "bounce back and forth … between levels of the court system" should the Supreme Court take a different view.[25] Because the issues here have already been raised in other appeals,

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[21] *See, e.g.*, Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 3, 2011 Gen. Laws 961, 964 (adopting TCPA); Act of May 28, 2021, 87th Leg., R.S., ch. 665, § 2, 2021 Tex. Gen. Laws 1391, 1391 (amending TEX. CIV. PRAC. & REM. CODE § 38.001).

[22] *City of San Antonio v. Hartman*, 201 S.W.3d 667, 673 (Tex. 2006).

[23] *See Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978) ("[T]he Legislature did not intend to do a useless thing by putting a meaningless provision in a statute.").

[24] *E.g., In re Palacios*, 221 S.W.3d 564, 566 (Tex. 2006).

[25] *Tex. Comm'n on Envtl. Quality v. Maverick Cnty.*, 642 S.W.3d 537, 549–50 (Tex. 2022) (holding opinion addressing alternative ground is not an advisory); *see also Point Energy Partners Permian, LLC v. MRC Permian Co.*, 669 S.W.3d 796, 812 (Tex. 2023) (same); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996) ("We conclude that the court of appeals should consider all grounds that the trial court rules on and may consider grounds that

and in this unique context of new trial and appellate courts interpreting new rules, we briefly address when mandamus review might be available in this Court.

First, the absence of a right to interlocutory appeal neither requires nor precludes mandamus review. "There is no definitive list of when [a final] appeal will be adequate, as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."[26] Removal of qualifying cases to the business court is a statutory right that must be respected, so we decline to say there can be no immediate review in cases where that right is improperly granted or denied. But appellate review of *every* order granting or denying remand would add "unproductively to the expense and delay of civil litigation."[27] "Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals,"[28] in part because our rules allow appellate courts to deny mandamus relief without waiting for a response or issuing an opinion.[29]

Second, the business court was designed for prompt and uniform resolution of complex business litigation,[30] and restricted from adjudicating claims for medical or legal malpractice, or for monetary damages for bodily injury or death.[31] Business court judges are required to have expertise not generally required of other judges.[32] But these advantages are not always unique, and removal or remand may

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the trial court does not rule on in the interest of judicial economy.").

26 *In re Gulf Expl., LLC*, 289 S.W.3d 836, 842 (Tex. 2009); *see also In re State Farm Mut. Auto. Ins. Co*., 629 S.W.3d 866, 872 (Tex. 2021) ("We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against its detriments.").

27 *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 136 (Tex. 2004).

28 *Id*. at 137.

29 *See* TEX. R. APP. P. 52.4, 52.8.

30 *See* TEX. GOV'T CODE § 25A.004 (listing business court's special jurisdiction).

31 *See id*. § 25A.004(h).

32 *See id*. § 25A.008(a)(4) (requiring 10 years of experience in complex civil business

not result in the same degree of "time and money utterly wasted"[33] since the business court's jurisdiction is "concurrent" with that of other district courts,[34] and the same rules of "[p]ractice, procedure, rules of evidence, issuance of process and writs, and all other matters pertaining to the conduct of trials, hearings, and other business" generally apply in both.[35] The advantage of occasional mandamus review is that these factors may have greater case-specific benefits in some suits than in others, and would be less intrusive than if every remand order must be reviewed by interlocutory appeal.

Third, the Act seeks to create a consistent, uniform, and predictable body of corporate and business law by creating a single business court with multiple divisions rather than multiple courts with separate jurisdictions. Business court judges are required to issue written opinions on dispositive rulings at any party's request, and without any request on issues important to the jurisprudence of the state.[36] Business court orders, judgments, and actions are appealed to this Court alone, rather than one of our 14 sister courts of appeals.[37] Mandamus review of significant rulings in exceptional cases would allow this Court "to give needed and helpful direction to the law that would otherwise prove elusive,"[38] without unduly interfering on "issues that are unimportant both to the ultimate disposition of the

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litigation, business transaction law, judicial service in a court with civil jurisdiction, or any combination of the foregoing).

33 *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014).

34 TEX. GOV'T CODE § 25.004(b)–(f).

35 *Id.* § 25A.015(g); TEX. R. CIV. P. 2.

36 *See id*. § 25A.016; TEX. R. CIV. P. 360.

37 *See id*. § 25A.007.

38 *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 136 (Tex. 2004).

case at hand and to the uniform development of the law."[39]

Considering the benefits and detriments here, we do not believe extended mandamus review is warranted. The parties have had seven years to prepare for trial and requested a preferential trial setting before this action was removed, so many potential benefits of pretrial proceedings in a specialized business court are so much water under the bridge. If trial proceeds before a jury, it would be before a Tarrant County jury regardless of removal or remand.[40] And as noted in part I, we believe the Legislature has specifically designed the effective date here to preclude removal of cases commenced elsewhere before that date.[41]

CONCLUSION

"Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either."[42] For the reasons stated in part I, we hold that civil actions transferred to the business court by removal must be remanded if they were commenced in another court before September 1, 2024. But for the reasons stated in part II, we hold that in these early days of business court litigation, remand and removal is subject to review by mandamus according to the same principles and rules as in any other pretrial orders, but those rules do not justify relief here. For both of those reasons, ETC's petition for mandamus is denied.

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39 *Id*.

40 *See* TEX. GOV'T CODE § 25A.015(c).

41 *See In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 461 (Tex. 2008) ("[O]ur place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government.").

42 *Id*. at 461.

Scott A. Brister
Chief Justice

Before Chief Justice Brister and Justices Field and Farris.