Opinion Issued October 5, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00356-CV

IN RE UBICAN GLOBAL, INC., UBICAN GLOBAL LICENSING, LLC, AND UBICAN GLOBAL MANAGEMENT, LLC, Relators

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Original Proceeding on Petition for Writ of Mandamus

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NO. 01-21-00293-CV

UBICAN GLOBAL, INC., UBICAN GLOBAL LICENSING, LLC, UBICAN GLOBAL MANAGEMENT, LLC, BRYCE DAVIS, AND CHRIS HERGHELEGIU, Appellants

V.

JUSTIFIED HEMP INVESTMENTS, LLC, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2020-53141

MEMORANDUM OPINION

In these related proceedings, relators, Ubican Global, Inc., Ubican Global Licensing, LLC, and Ubican Global Management, LLC (collectively, "Ubican"), filed a petition for writ of mandamus, asking this Court to direct the respondent[1] to vacate its order denying their motion to strike the petition in intervention by real party in interest, Justified Hemp Investments, LLC ("JHI"), in the underlying suit[2] and to enter an order striking the intervention. Ubican also filed an interlocutory appeal, challenging the trial court's denial of its "alternative" motion to dismiss JHI's claims "for improper venue." Appellants, Ubican CEO Bryce Davis ("Davis") and Vice President Chris Herghelegiu ("Herghelegiu"), also challenge the denial of their motion to dismiss JHI's claims for improper venue.

We conditionally grant mandamus relief and dismiss the appeal as moot.

Background

Ubican is a Delaware corporation with its principal place of business in Kansas City, Missouri. It is a health and wellness company participating in the global advertising and vending industry. In its original petition, Ubican alleged

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1 The respondent is the Honorable Tanya Garrison, Judge, 157th District Court of Harris County, Texas.

2 *Ubican Global, Inc., Ubican Global Licensing, LLC, and Ubican Global Management, LLC v. Todd Colter, Invenda Media Solutions, LLC, Andrew Gizienski, Steve Franco, Zachary Isaacks, and Ian Young,* Case No. 2020-53141 (157th Dist. Ct., Harris Cty., Tex.).

that, in August 2019, it entered into two exclusive licensing agreements with its business partner, Invenda Group AG ("Invenda"),[3] a Swiss-based supplier of vending machine technology. Ubican and Invenda executed agreements for the sale of Ubican products in Invenda vending machines throughout North America and for the sale of emerging wellness products, such as CBD and hemp products, worldwide. Ubican further alleged that, in late 2019 through early 2020, Todd Colter ("Colter"), who was a Ubican director, and Ian Young, Andrew Gizienski, Steve Franco, and Zachary Isaacks, who were Ubican employees (the "Ubican Employees"),[4] were working in Texas to solicit investors and develop Ubican's business. Accordingly, Ubican granted them access to its confidential internal strategies and key financial, customer, employee, and investor information.

Ubican alleged that, on March 3, 2020, Colter and the Ubican Employees traveled to Serbia to inspect the assembly of Invenda vending machines. It alleged that, during that visit, Invenda, Colter, and the Ubican Employees colluded to usurp Ubican's business opportunities. Invenda provided Colter and the Ubican Employees with prospective business information, including sales statistics, test cases, machine literature, and information on vending machines in Texas, that

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[3] Invenda is a defendant in the trial court but is not a party to the instant mandamus proceeding or appeal.

[4] Colter and the Ubican Employees are defendants in the trial court but are not parties to the instant mandamus proceeding or appeal.

Invenda withheld from Davis and Herghelegiu. And, Colter and the Ubican Employees provided Invenda with inside information on Ubican's financial position. Ubican alleged that Invenda then used that information to subject Ubican to increasing financial demands, with which it could not comply, in order to justify transferring Ubican's assets to a new entity in Texas formed by Colter.

In support, Ubican pointed to emails reflecting planning and discussions. On March 14, 2020, Young emailed Colter with details of a proposed business structure for "Invenda Global," a chart identifying "Our Investment Group," and a description of the various stakes and ownership interests. And, through the end of March 2020, Colter and Young solicited Ubican customers, vendors, and investors. On March 27, 2020, Colter emailed a quote for 500 vending machines to a Ubican customer, which Colter did not disclose to Ubican. In April 2020, Colter formed Invenda Media Solutions, LLC ("IMS"), a Texas entity with its registered office at Colter's home address in Houston. And, Invenda terminated its exclusive licensing agreements with Ubican. On June 12, 2020, Colter resigned as a Ubican director. And, Ubican terminated the employment of the Ubican Employees.

Subsequently, Ubican sued Colter, IMS, and the Ubican Employees for breach of fiduciary duty, tortious interference, civil conspiracy, libel, and unjust enrichment. With respect to its claim for breach of fiduciary duty, Ubican asserted that it had placed a high level of trust in Colter and the Ubican Employees and had

given them access to confidential financial and strategic information. And, Colter and the Ubican Employees violated their duty of loyalty, duty not to compete, and duty of confidentiality by soliciting capital, customers, and business contacts for IMS, rather than for Ubican, and usurping Ubican's business opportunities. Further, by pursuing a domain name, receiving vending-related documents from Invenda, and soliciting capital, customers, and business contacts for IMS, Colter and the Ubican Employees went beyond mere preparation and engaged in direct competition against Ubican. Ubican sought damages for loss of customers, property, assets, goodwill, and revenue, along with punitive damages, and sought to impose a constructive trust.

With respect to its civil-conspiracy claim, Ubican alleged that, in addition to devising an agreement to usurp Ubican's business opportunities, Colter and the Ubican Employees took several overt acts, including misappropriating confidential information, colluding with Invenda, and creating a competing enterprise, for which they procured a domain name and solicited Ubican's investors and venders. Ubican sought damages for loss of customers, revenue, and goodwill.

With respect to its claims for tortious interference and libel, Ubican asserted that Colter and the Ubican Employees were aware of Ubican's contractual relationship with Invenda, its business relationships with potential vendors, and its reasonable expectancies in the profitable use, marketing, sales, lease, and imports

of Invenda vending machines in North America and globally. However, they intentionally and maliciously interfered with those agreements and expectancies by placing Ubican under unreasonable duress, by disparaging Ubican, and by creating a competing enterprise, for which they solicited Ubican's investors and vendors. In addition, Colter and the Ubican Employees interfered with Ubican's employment contracts, including confidentiality and proprietary-rights provisions. Ubican sought damages for loss of revenue, assets, and business expectancies, in addition to punitive damages.

Subsequently, JHI, a separate entity of which Colter was the principal, filed a petition in intervention, asserting claims against Ubican Global, Inc. and asserting third-party claims against its officers, Davis and Herghelegiu. In its petition in intervention, JHI asserted that, in 2019, it was fraudulently induced, through misrepresentations by Ubican, Davis, and Herghelegiu, to enter into a Subscription Agreement and to invest $2,000,000 in Ubican. The Subscription Agreement contained a choice-of-law provision, requiring that any disputes arising thereunder were to be governed by the laws of the State of Delaware, and JHI asserted that the misrepresentations constituted statutory and common-law fraud under the laws of both Delaware and Texas. The Subscription Agreement also contained a forum-selection clause, requiring that any disputes arising thereunder were to be brought in a Delaware court. JHI asserted, however, that Ubican had

waived the forum-selection clause by filing its lawsuit against Colter in a Texas court.

Ubican filed a motion to strike the intervention, asserting that JHI had no justiciable interest in Ubican's suit. Ubican noted that it did not allege any claims against JHI and asserted that JHI's fraud claims were fundamentally different from those Ubican had asserted against Colter and the Ubican Employees. JHI's claims involved different predicate facts, different time periods, different theories of liability, and different alleged harms and damages. Namely, JHI, a limited-liability company and a shareholder in Ubican, alleged that Ubican, Davis, and Herghelegiu had fraudulently induced JHI's execution of the Subscription Agreement and investment, and further were liable for securities fraud under Texas and Delaware law. Conversely, Ubican sued its former director (Colter) and former employees (Young, Gizienski, Franco, and Isaacks), in their individual capacities, for breaching fiduciary duties they owed to Ubican and for engaging in unfair competition. Ubican noted that,

> [a]s a third-party investor in Ubican, JHI's interests should be aligned with Ubican's lawsuit against Defendants. Ubican seeks damages against Defendants based on their orchestrated effort to raid Ubican of its assets, create a competing company to capitalize on those assets, and undercut Ubican's business for their own personal benefit. Defendants' actions amount to egregious violations of their duties of loyalty to Ubican as a director-fiduciary (Defendant Colter) and employees-agents (Defendants Young, Gizienski, Franco, and Isaacks). Ubican's recovery of damages from Defendants will benefit JHI by increasing the value of its shares.

Ubican asserted that JHI had improperly sought to intervene in order to "help defend" its controlling shareholder, Colter, against Ubican's claims and that JHI's claims were being used as a source of delay, distraction, and complication. For instance, Colter had relied on JHI's claims as a basis for his more than 100 document requests that had no bearing on his defense. And, Ubican pointed to the forum-selection clause in the Subscription Agreement, requiring that shareholder actions, such as those filed by JHI, be pursued in Delaware, exclusively.

Ubican filed an "alternative" motion to dismiss JHI's petition in intervention, asserting that JHI violated the forum-selection clause in the Subscription Agreement. Ubican explained:

> The motion is "alternative" because the Court need only consider the Motion to Dismiss if JHI can satisfy its burden to intervene in this lawsuit in the face of Ubican's Motion to Strike. If JHI fails to meet that burden, JHI's Petition in Intervention is properly stricken and the alternative motion to dismiss becomes moot.

Third-party defendants Davis and Herghelegiu also filed a motion to dismiss JHI's claims. They asserted that JHI had contractually agreed in the Subscription Agreement to bring any disputes related to its investment in the State of Delaware and that JHI had itself invoked the terms of the Subscription Agreement by relying on the choice-of-law provision in the Subscription Agreement in bringing a fraud claim against them under Delaware Code.

In its response to the motion to strike their petition in intervention, JHI argued that its fraud claims were "interwoven" with Ubican's claims against Colter and Colter's defenses, that discovery would be "similar," and that joining the claims in a single suit furthered the interests of all parties by resolving their mutual disputes. JHI asserted that it had a "justiciable interest in having a judicial determination of its non-liability for the tortious interference, unfair competition, conspiracy and concert of action." It asserted that its intervention would not complicate the case because Ubican's claims, Colter's defense, and JHI's intervention "involve discovery of Ubican's financial condition." In response to the motions to dismiss, JHI argued that Ubican had waived the forum-selection clause in the Subscription Agreement by suing Colter in a Texas court. It also argued that Davis and Herghelegiu could not enforce the forum-selection clause because they were not signatories to the Subscription Agreement.

After a hearing, the trial court issued an order denying Ubican's motion to strike the intervention, stating that the intervention was "proper under Texas Law and the Texas Rules of Civil Procedure." In its order, the trial court also denied the motions by Ubican and by Davis and Herghelegiu to dismiss JHI's intervention for improper venue. It held that venue in the main action was affixed in Harris County, Texas. It held that, although the Subscription Agreement required JHI to file its shareholder claims against Ubican in Delaware, Ubican had waived this

provision by filing its suit against its director and employees in Texas. And, JHI's shareholder claims against Davis and Herghelegiu were governed by a mandatory venue provision,[5] stating that "[v]enue of the main action shall establish venue of a . . . third-party claim properly joined." And, "[b]ecause venue in Harris County, Texas is proper in the main action, it shall control all other claims arising out of this same transaction, occurrence, or series of [transactions] or occurrences." Further, all "equitable factors"[6] favored venue in Harris County.

Mandamus

In its petition for writ of mandamus, Ubican argues that the trial court abused its discretion in refusing to strike JHI's petition in intervention because (1) JHI lacks a justiciable interest, i.e., standing, in the underlying suit and (2) JHI's claims are subject to a mandatory venue provision in the Subscription Agreement affixing venue in the courts of the State of Delaware. Ubican further asserts that it lacks an adequate remedy by appeal.

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5 *See* TEX. CIV. PRAC. & REM. CODE § 15.062 (providing that "[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim *properly joined* under the Texas Rules of Civil Procedure or any applicable statute" and that, "[i]f *an original defendant* properly joins a third-party defendant, venue shall be proper for a claim arising out of the same transaction, occurrence, or series of transactions or occurrences by the plaintiff against the third-party defendant if the claim arises out of the subject matter of the plaintiff's claim against the original defendant." (emphasis added)).

6 *See id.* § 15.003(a).

A. *Standard of Review and Applicable Law*

Mandamus relief is appropriate to correct a clear abuse of discretion when there is no adequate remedy by appeal. *See In re Odyssey Healthcare, Inc*., 310 S.W.3d 419, 422 (Tex. 2010). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). With respect to the resolution of factual issues, the reviewing court may not substitute its judgment for that of the trial court, and the relator must establish that the trial court could reasonably have reached only one decision. *Id.* at 839–40. A trial court has no discretion in determining what the law is or in applying the law to the facts. *Id*. at 840. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *In re Allstate Cnty. Mut. Ins. Co*., 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding).

Mandamus relief is available if a trial court abuses its discretion by erroneously denying a motion to strike a petition in intervention. *See In re Union Carbide Corp*., 273 S.W.3d 152, 156–57 (Tex. 2008); *In re O'Quinn*, 355 S.W.3d 857, 861–62 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding [mand. denied]). "Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. Rule 60 "authorizes a party with a justiciable interest in a pending suit to

intervene in the suit as a matter of right." *In re Union Carbide*, 273 S.W.3d at 154; *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). An intervenor need not secure the trial court's permission to intervene; rather, a party opposing the intervention has the burden to challenge it by a motion to strike. *Harris Cty. v. Luna–Prudencio*, 294 S.W.3d 690, 699 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

Once a motion to strike has been filed, the burden shifts to the intervenor to show a justiciable interest in the lawsuit. *In re Union Carbide*, 273 S.W.3d at 155. The "justiciable interest" requirement protects pending cases from having interlopers disrupt the proceedings. *Id*. A person or entity has the right to intervene "if the intervenor could have brought the same action, or any part thereof, in [its] own name, or, if the action had been brought against [it], [it] would be able to defeat recovery, or some part thereof." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657; *Mass. Bay Ins. Co. v. Adkins*, 615 S.W.3d 580, 602 (Tex. App.—Houston [1st Dist.] 2020, no pet.); *see Smith v. City of Garland*, 523 S.W.3d 234, 241 (Tex. App.—Dallas 2017, no pet.); *see also J. Fuentes Colleyville, L.P. v. A.S.*, 501 S.W.3d 239, 243 (Tex. App.—Fort Worth 2016, no pet.) ("[T]he interest is analogous to that essential for a party to maintain or defend an action." (internal quotations omitted)); *Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("Generally, an intervenor must show standing

to maintain an original suit in order to intervene."). A justiciable interest "must be present and not merely remote or contingent." *Zeifman v. Michels*, 229 S.W.3d 460, 464 (Tex. App.—Austin 2007, no pet.).

Whether a party has a justiciable interest is determined on the basis of the factual allegations in the petition for intervention and those set forth in the pleadings of the other parties. *Smith*, 523 S.W.3d at 241. If a party demonstrates a justiciable interest in the suit, the trial court has broad discretion to determine whether the plea in intervention should nevertheless be struck on the ground that intervening would excessively complicate the case with a multiplicity of issues or is not essential to effectively protecting the intervenor's interests. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657. On the other hand, a trial court has "no discretion" to deny a motion to strike if the intervenor fails to establish a justiciable interest in the lawsuit. *In re Union Carbide*, 273 S.W.3d at 156.

B. *Abuse of Discretion*

Ubican argues that the trial court abused its discretion in denying its motion to strike the intervention because JHI, a shareholder, failed to show a justiciable interest in Ubican's lawsuit against Colter, IMS, and the Ubican Employees. Because Ubican moved to strike JHI's intervention, JHI had the burden to demonstrate a justiciable interest in Ubican's suit. *See id.* at 155; *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657. Again, we consider whether JHI has a justiciable

interest on the basis of the factual allegations in its petition for intervention and those set forth in Ubican's pleadings. *See Smith*, 523 S.W.3d at 241.

In its petition in intervention, JHI, a limited-liability company and shareholder in Ubican, asserted claims against Ubican and third-party defendants, Ubican's CEO Davis and Vice President Herghelegiu, for securities fraud under Delaware law and for statutory and common-law fraud under Texas law. In each claim, JHI alleged that it was induced by misrepresentations made by Ubican, Davis, and Herghelegiu in 2019 to enter into the Subscription Agreement and to invest $2,000,000 in Ubican. JHI sought compensatory damages and, alternatively, "rescission of the Subscription Agreement and return of JHI's capital contribution."

In its pleadings, Ubican asserted, with respect to its claims for breach of fiduciary duty and civil conspiracy, that it placed a high level of trust in Colter and the Ubican Employees; that it gave them access to confidential financial and strategic information; and that Colter and the Ubican Employees violated their duty of loyalty, duty not to compete, and duty of confidentiality by colluding with Invenda, soliciting capital, customers, and business contacts for IMS, and usurping Ubican's business opportunities in 2020. Ubican alleges that Colter and the Ubican Employees went beyond mere preparation by misappropriating confidential information, colluding with Invenda, and creating a competing enterprise, for

which they solicited Ubican's investors, contacts, customers, and venders. Ubican sought damages for loss of customers, property, assets, goodwill, and revenue, sought punitive damages, and sought to impose a constructive trust.

With respect to its claims for tortious interference and libel, Ubican asserted that Colter and the Ubican Employees were aware of Ubican's contractual relationship with Invenda, its business relationships with potential vendors, and its reasonable expectancies in the profitable use, marketing, sales, lease, and imports of Invenda vending machines in North America and globally. However, they intentionally and maliciously interfered with those agreements and expectancies by placing Ubican under unreasonable duress, by disparaging Ubican, and by creating a competing enterprise, for which they solicited Ubican's investors and vendors. In addition, Colter and the Ubican Employees interfered with Ubican's employment contracts. Ubican sought damages for loss of revenue, assets, and business expectancies, in addition to seeking punitive damages.

Based on the foregoing, JHI's shareholder claims against Ubican and its CEO (Davis) and vice president (Herghelegiu) involve different predicate facts, different time periods, different parties, different theories of liability, and different alleged harms than those presented in Ubican's claims against its former director (Colter) and former employees (Young, Gizienski, Franco, and Isaacks), in their individual capacities. Further, JHI sued to rescind a Subscription Agreement that

has no bearing on Ubican's suit, and Ubican sued for tortious interference with its own contracts, to which JHI is not a party. Thus, JHI would not have been entitled to recover any part of the relief that Ubican seeks in its petition. *See In re Union Carbide Corp.*, 273 S.W.3d at 155 ("To constitute a justiciable interest, the intervenor's interest must be such that if original action had never been commenced, and [the intervenor] had first brought it as the sole plaintiff, [it] would have been entitled to recover . . . at least of a part of the relief sought in the original suit." (internal quotations omitted)); *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657.

In addition, Ubican asserts it claims against its former director and former employees. "[T]he right to proceed against an officer or former officer of a corporation for breaching a fiduciary duty owed to the corporation belongs to the corporation itself." *Webre v. Sneed*, 358 S.W.3d 322, 330 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 465 S.W.3d 169 (Tex. 2015) (internal quotations omitted). A corporate officer owes a fiduciary duty to the corporation, but, absent some contractual or special relationship, he does not owe a fiduciary duty to an individual shareholder. *Id.* at 329. JHI is a shareholder in Ubican. "[A] corporate shareholder has no individual cause of action for personal damages caused solely by a wrong done to the corporation." *Id.* Likewise, individual stockholders generally "have no separate and independent right of action for injuries suffered by the corporation which merely result in the depreciation of the value of their stock."

Id. "Accordingly, an action for such injury must be brought by the corporation, not individual shareholders." *Id*. (internal quotations omitted). Thus, JHI could not have brought Ubican's pending action, or any part thereof, in its own name. *See Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 (holding that entity may intervene if it "could have brought the same action, or any part thereof, in [its] own name").

In its response to the motion to strike its petition in intervention, JHI asserted for the first time that it intervened in Ubican's lawsuit as a defendant, and not as a plaintiff. JHI asserted that it had a "justiciable interest in having a judicial determination of its non-liability for the tortious interference, unfair competition, conspiracy and concert of action." JHI further argued that its fraud claims were "interwoven" with Ubican's claims against Colter and Colter's defenses.

Although an intervenor can be characterized as a plaintiff or a defendant, depending on the claims asserted and relief requested by the intervenor, "courts rarely designate intervenors as defendants." *In re Ford Motor Co*., 442 S.W.3d 265, 274–75 (Tex. 2014). Most intervenors inherently resemble a plaintiff:

> the intervenor files an affirmative claim, and, at least at the point of intervention, no parties are directly suing the intervenor. Where the intervenor is seeking affirmative relief and is not defending a claim, we should operate under a presumption that the intervenor is a plaintiff. Such an intervenor is only a defendant where the intervenor is closely aligned with the defendant, direct antagonism exists between intervenor and plaintiff, and equitable factors weigh in favor of treating the intervenor as a defendant.

Id. at 275.

As discussed above, JHI, in its petition in intervention, asserted statutory and common-law fraud causes of action as a shareholder "seeking affirmative relief" against Ubican, Davis, and Herghelegiu in the form of compensatory damages and rescission of the Subscription Agreement. *See id*. JHI, in its response to the motion to dismiss its petition in intervention, again argued in support of its fraud claims against Ubican, Davis, and Herghelegiu. Ubican's pleadings show that it did not assert any claims against JHI or assert that it is directly or indirectly liable for any of its damages. *See id.* Because the record shows that JHI filed its petition in intervention seeking affirmative relief and that it is not defending against any claims brought against it, we "operate under a presumption that [JHI] is a plaintiff." *See id*. at 274–76.

Such an intervenor is only a defendant if (1) the intervenor is closely aligned with the defendant, (2) direct antagonism exists between the intervenor and the plaintiff, and (3) equitable factors weigh in favor of treating the intervenor as a defendant. *Id.* at 275 (noting that intervenor can occupy position of defendant if intervenor's "claims and prayer align them with the defendant and pit them directly against the plaintiff, even if no parties assert claims against them").

Here, there is not "direct antagonism" between JHI and Ubican. *See id*. Ubican seeks accountability and redress for the conduct of its former director and former employees. JHI sues as a shareholder for compensation and to rescind a

Subscription Agreement that has no bearing on Ubican's suit. As Ubican asserts, each could obtain its requested relief without any logical or legal inconsistency. *See id*. at 276 (holding that there was "no real antagonism" between intervenor and plaintiff because, although plaintiff's and intervenor's interests may have been indirectly adverse, their interests were not in direct opposition and plaintiff's interests were not threatened by those of intervenor); *cf. City of Dall. v. Abney*, No. 09-16-00038-CV, 2016 WL 3197591, at *9 (Tex. App.—Beaumont June 9, 2016, no pet.) (mem. op.) (finding direct antagonism where only one party could prevail at expense of other on claims at issue).

Further, as Ubican noted in its motion to strike the intervention, JHI's interests as a shareholder are actually *aligned* with those of Ubican, as follows:

> Ubican seeks damages against Defendants based on their orchestrated effort to raid Ubican of its assets, create a competing company to capitalize on those assets, and undercut Ubican's business for their own personal benefit. Defendants' actions amount to egregious violations of their duties of loyalty to Ubican as a director-fiduciary (Defendant Colter) and employees-agents (Defendants Young, Gizienski, Franco, and Isaacks). Ubican's recovery of damages from Defendants will benefit JHI by increasing the value of its shares.

More importantly, however, even were we to conclude that JHI intervened as a defendant, it still had the burden to demonstrate a justiciable interest in Ubican's suit. *See Smith*, 523 S.W.3d at 242–43. That is, JHI was required to show that if Ubican's action had been brought against it, JHI "would be able to

defeat recovery, or some part thereof." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657; *see Smith*, 523 S.W.3d at 242.

JHI asserted that it has a "justiciable interest in having a judicial determination of its non-liability" for Ubican's claims for "tortious interference, unfair competition, conspiracy and concert of action." JHI asserted that it meets the test for an intervening defendant because, "[h]ad Ubican brought suit against JHI rather than its sole member [Colter], JHI would have been able to defeat recovery, in whole or in part, by establishing Ubican lacked the financial wherewithal to take advantage of the Invenda opportunity and by showing that Ubican is, in fact, financially defunct."

As discussed above, the record shows that Ubican did not assert any claims against JHI or assert that it is directly or indirectly liable for any of its damages. Ubican brought its claims against Colter, in his individual capacity, for alleged breaches of his fiduciary duties to Ubican while acting as its director. JHI is a limited-liability company and a shareholder, with no fiduciary duties to Ubican. To the extent that JHI attempts to stand in the shoes of its principal, Colter, the law regards JHI and Colter as separate. *See Julka v. U.S. Bank Nat'l Ass'n*, 516 S.W.3d 84, 88 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (noting that "presumption of legal separateness . . . exists between a limited liability company and its members"); *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston

[14th Dist.] 2016, pet. denied) (stating that limited liability company is a legal entity distinct from its members). In addition, Ubican sued for tortious interference with contracts to which JHI is not a party.

Based on the foregoing, we conclude that JHI has not demonstrated a justiciable interest in Ubican's suit. That is, JHI has not shown either that it could have brought the same action, or any part thereof, in its own name, or that, if Ubican's action had been brought against it, JHI would have been able to defeat recovery or some part thereof. *See Guar. Fed. Sav. Bank*, 793 S.W.2d at 657; *In re Rogers Wealth Grp., Inc.*, No. 02-18-00010-CV, 2018 WL 1230460, at *4 (Tex. App.—Fort Worth Mar. 9, 2018, orig. proceeding) (mem. op.) ("Because [intervening plaintiff] has not shown that she could have brought even some part of [the plaintiff's] suit in her own name, she has not met her burden to show she has a justiciable interest in [the plaintiff's] suit."); *Smith*, 523 S.W.3d at 243 (holding that intervening defendant, whose interest was, at best, remote, failed to demonstrate justiciable interest in suit).

Because JHI did not demonstrate a justiciable interest in the main suit, we hold that the trial court abused its discretion in denying Ubican's motion to strike JHI's petition in intervention.[7] *See In re Union Carbide*, 273 S.W.3d at 156

[7] Because we conclude that JHI does not have a justiciable interest in Ubican's lawsuit, we do not reach whether this Court has jurisdiction to grant mandamus relief based on Ubican's venue complaints.

(concluding that because intervenors failed to demonstrate "any justiciable interest" in main suit, trial court was without discretion to deny motion to strike petition in intervention).

C. *No Adequate Remedy by Appeal*

We next consider whether Ubican has an adequate remedy by appeal. *See id.* at 156–57. "There is no definitive list of when an 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." *In re Gulf Expl., LLC*, 289 S.W.3d 836, 842 (Tex. 2009); *In re Vantage Drilling Int'l*, 555 S.W.3d 629, 633 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding [mand. denied]). "This determination is not an abstract or formulaic one; it is practical and prudential." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004). Considerations include whether mandamus relief is essential to "preserve important substantive and procedural rights from impairment or loss," to "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive on appeals from final judgments," and to spare the litigants and the public "the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Id.* An appeal is inadequate if parties are in danger of permanently losing substantial rights, such as when an appellate court would not be able to cure the error on appeal. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex.

2004); *In re Lewis*, 357 S.W.3d 396, 403 (Tex. App.—Fort Worth 2011, orig. proceeding).

Here, Ubican asserts that JHI's intervention "forces Ubican to litigate claims that were improperly brought against it in this proceeding." It asserts that the intervention disrupts the proceedings and Ubican's prosecution of its underlying claims for relief. JHI argues that its shareholder claims should be tried in Ubican's suit in the interest of judicial economy.

We concluded above that JHI lacks a justiciable interest in Ubican's suit. We noted that JHI's claims involve different parties, different time periods, different predicate facts, different theories of liability, the laws of a different state, and different damages than those involved in Ubican's claims. Further, JHI's claims are governed by a Subscription Agreement that has no bearing on Ubican's suit. And, JHI's interests would not be affected or resolved by the resolution of Ubican's claims. Thus, JHI's intervention grants it an opportunity to mire Ubican's claims with new parties and wholly unrelated matters.

Preventing JHI, an intervenor who lacks a justiciable interest in Ubican's suit, from complicating and confusing Ubican's claims is essential to preserving Ubican's important substantive and procedural rights from impairment or loss. *See In re Prudential*, 148 S.W.3d at 136. In an appeal from an adverse judgment, it would be difficult, if not impossible, for Ubican to untangle the manner in which

confusion over the numerous important differences between its claims and those of JHI contaminated a jury's deliberations. *See, e.g.*, *In re Devon Energy Prod. Co.*, 321 S.W.3d 778, 784–85 (Tex. App.—Tyler 2010, orig. proceeding). An appeal is inadequate for mandamus purposes when, as here, an appellate court would not be able to cure the error on appeal. *In re Van Waters & Rogers*, 145 S.W.3d at 211; *In re Lewis*, 357 S.W.3d at 403. And, mandamus relief is appropriate to spare Ubican, the other parties to its suit, and the public the "time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *See In re John G. & Marie Stella Kenedy Mem'l Found*., 315 S.W.3d 519, 522–23 (Tex. 2010) (quoting *In re Prudential*, 148 S.W.3d at 136).

Further, Ubican notes that Colter has already relied on JHI's claims as a basis for his more than 100 document requests in Ubican's suit that have no bearing on his defense. The delay and expense of responding to discovery requests from a party lacking a justiciable interest in the underlying case cannot be rectified on appeal. *See, e.g.*, *In re Liberty Cty. Mut. Ins. Co*., 537 S.W.3d 214, 223 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

We conclude that the benefits of mandamus review in this case outweigh the detriments. We hold that Ubican lacks an adequate remedy by appeal.

Interlocutory Appeal[8]

On appeal, Ubican argues that the trial court erred in denying its "alternative" motion to dismiss JHI's claims against it "for improper venue" because JHI's petition in intervention "violate[d] a binding forum-selection clause" in the Subscription Agreement and certain statutory provisions. Ubican explained:

> The motion is "alternative" because the Court need only consider the Motion to Dismiss if JHI can satisfy its burden to intervene in this lawsuit in the face of Ubican's Motion to Strike. If JHI fails to meet that burden, JHI's Petition in Intervention is properly stricken and the alternative motion to dismiss becomes moot.

Davis and Herghelegiu argue that the trial court erred in denying their motion to dismiss JHI's claims because JHI was contractually bound by the terms of the Subscription Agreement to bring any disputes related to its investment in the courts of Delaware. They assert that JHI had itself invoked the terms of the Subscription Agreement by relying on the choice-of-law provision in bringing a fraud claim against them under Delaware Code and that they are entitled to rely on the provision under direct-benefits-estoppel doctrine.

Appellate courts lack jurisdiction to decide moot controversies and render advisory opinions. *See Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). A justiciable controversy must exist at every stage of the legal

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[8] Appellate cause number 01-21-00293-CV. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(b) (authorizing, in suits involving intervening plaintiffs, interlocutory appeal of trial court's ruling that "plaintiff did or did not independently establish proper venue").

proceedings, including the appeal, or the case is moot. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). "If a controversy ceases to exist—the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome—the case becomes moot." *Id*. (internal quotations omitted). The same is true if an appellate court's judgment cannot have any practical legal effect upon a then existing controversy. *Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007) ("An appeal is moot when a court's action on the merits cannot affect the rights of the parties.").

We concluded above that the trial court erred in not striking JHI's intervention in the underlying suit because JHI lacks a justiciable interest in Ubican's lawsuit. *See In re Union Carbide*, 273 S.W.3d at 156 (holding that trial court "had no discretion" to deny motion to strike intervention by intervenor who failed to show justiciable interest in suit and thus lacked "standing"). Accordingly, we do not reach whether the trial court erred in denying the motions to dismiss JHI's claims based on venue questions. *See Cantu v. Howard S. Grossman, P.A.*, 251 S.W.3d 731, 734 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("Venue concerns the geographic location within the forum where the case may be tried."); *see also Gregory B. Baten Tr. v. Branch Banking & Tr. Co.*, No. 05-14-00133-CV, 2015 WL 543794, at *3 (Tex. App.—Dallas Feb. 10, 2015, no pet.) (mem. op.) (noting that striking intervention completely disposed of intervenor's

interest in suit, that intervenor was no longer party, and could not appeal remaining complaints about proceedings). Because this Court's judgment in the appeal would not have any practical legal effect on the parties' dispute, the appeal is moot. *See Zipp*, 218 S.W.3d at 73. Accordingly, we dismiss the appeal.

Conclusion

We conditionally grant Ubican's petition for writ of mandamus. We direct the trial court to vacate its order denying Ubican's motion to strike the intervention and to enter an order granting Ubican's motion to strike the intervention. *See* TEX. R. APP. P. 52.8(c). The writ will issue only if the trial court does not comply. We dismiss the interlocutory appeal.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.