**Reversed and Remanded in Part, Affirmed as Modified in Part, and Opinion filed July 22, 2021.**


**In The**

# Fourteenth Court of Appeals

---

**NO. 14-18-00995-CV**

---

**DAVID HOTZE; DONNA HOTZE, AS TRUSTEE; BRUCE R. HOTZE, SR.; ELIZABETH HOTZE SANCHEZ; BRUCE R. HOTZE, JR.; CHRISTIAN HOTZE DRAKE; MICHELE HOTZE SUPPLE; ERNEST GEORGE HOTZE, III; AND BETH HOTZE, AS TRUSTEE FOR THE BRUCE R. HOTZE 2012 FAMILY TRUST, Appellants**

**V.**

**IN MANAGEMENT, LLC; INTER NOS BARKER CYPRESS, LTD; INTER NOS ODESSA, LTD.; INTER NOS WICHITA, LTD.; NEW ORLEANS IN, LTD.; INTER NOS SPACE PLUS, LTD.; INTER NOS SPRINGVILLE, LTD.; INTER NOS PIPELINE, LTD.; INTER NOS WALKER, LTD.; INTER NOS TP INVESTMENTS, LTD.; RICHARD HOTZE, INDIVIDUALLY AND AS TRUSTEE OF THE SPY GLASS TRUST; STEVEN F. HOTZE, INDIVIDUALLY AND AS TRUSTEE OF THE DAVID BRADLEY SFH 2005 FAMILY TRUST; MARK HOTZE, INDIVIDUALLY AND AS TRUSTEE OF THE HOTZE FIVE TRUST; TROIKA PARTNERS; PETER SCHWAB; EDWARD MATTINGLY; AND THOMAS BLACKBURN, Appellees**

**On Appeal from the 61st District Court**
**Harris County, Texas**
**Trial Court Cause No. 2016-36300**

## O P I N I O N

This case concerns a dispute among five brothers regarding control of a family-owned business, Compressor Engineering Corporation or "CECO." Two of the brothers, appellants David and Bruce Hotze, allege that the other three brothers, appellees Richard, Mark, and Steven Hotze, manipulated CECO's financial status to gain control of the company. Meanwhile, Richard, Mark, and Steven maintain that they merely undertook actions required to save CECO from impending bankruptcy and dissolution. Other parties to the lawsuit include trusts related to each of the brothers, family members, certain partnerships also owned by the brothers, and members of CECO's board of directors who had no ownership interest. Ultimately, CECO rebounded strongly from its financial troubles but Richard, Mark, and Steven ended up with greatly increased control of the company after debt CECO owed to Troika Partners, a partnership formed by the three brothers, was partially converted into CECO stock.

David, Bruce, and associated parties filed two lawsuits, bringing both individual and derivative claims. The lawsuits were consolidated for trial. A key issue in the case was whether the promissory note between Troika and CECO authorized a partial conversion of debt for stock. The trial court concluded that it did, and, so instructed, the jury found against David, Bruce, and the other plaintiffs on all claims. The trial court thereafter awarded certain defendants attorney's fees for successfully defending against claims under the Texas Theft Liability Act (TTLA).

Appellants raise five issues, asserting the trial court erred in (1) awarding attorney's fees to certain defendants for successfully defending against the TTLA claims; (2) refusing to invalidate the partial conversion of debt to CECO stock and instead instructing the jury that the promissory note authorized partial conversion; (3) allowing appellees to introduce evidence suggesting that the CECO board of directors relied on advice of counsel in approving the partial conversion but not permitting appellants to discover or introduce the substance of that advice; (4) rejecting appellants' claims relating to the indemnification and advancement of appellees' attorney's fees from certain jointly held business entities; and (5) construing appellants' trial pleadings as not raising a claim for breach of informal fiduciary duties.[1]

We hold that the trial court erred in concluding the promissory note authorized a partial conversion of CECO stock and in instructing the jury in accordance with that conclusion. We also hold the trial court erred in awarding attorney's fees to appellees under the TTLA. Accordingly, we reverse and remand the trial court's judgment in part, modify the remainder of the judgment to remove the award of TTLA attorney's fees, and affirm the remainder of the judgment as so modified.

## ***Background***

CECO manufactures and sells parts for compressors and other oilfield equipment. It was founded in 1964 by the Hotze brothers' father, but by 2012, the five brothers combined owned almost 85 percent of the Class A voting shares. The

[1] David and Bruce each filed separate briefs in this case. This list of issues reflects the issues and numbering employed by David in his brief. While Bruce's brief employs slightly different numbering and states slightly different issues, the same basic arguments are made in both briefs, and both David and Bruce have incorporated the other's arguments into their briefs. This opinion will address all issues necessary to the disposition of the appeal.

remainder was owned by other family members or by a family member's trust. CECO began issuing Class B, nonvoting shares in 2012, with the shares being distributed among the Class A shareholders. Until 2014, all the brothers served as directors of CECO, and all except Steven were CECO employees.

The brothers also co-owned several limited partnerships, referred to as the Inter Nos entities, which existed primarily to lease assets to CECO. The brothers were also managers and members of IN Management, LLC, which served as the general partner for each of the Inter Nos entities.

In 2014, CECO experienced a financial crisis that started when a $6.3 million receivable owed to its wholly-owned subsidiary CECO Pipeline Services, Inc. was discovered to be worthless. At that time, CECO's and Pipeline's assets, including accounts receivable, were pledged as collateral on loans from Comerica Bank. When the worthless account was discovered, CECO's loans went into default because they were then under secured. This gave Comerica the right to foreclose, but it deferred this right under a forbearance agreement that required, among other things, an additional investment of $2.5 million into CECO. An investigation into the worthless receivable further revealed that Pipeline had suffered millions in losses and still owed a number of vendors. The situation purportedly put CECO close to bankruptcy.

Meanwhile, relationships among the brothers began to deteriorate. David was removed from the CECO board of directors in January 2015, and Bruce's roles as CEO and chairman of the board were terminated later that same year. At that point, the CECO board consisted of the remaining three brothers (Richard, Mark, and Steven) as well as four outside directors, three of whom are parties in this case and appellees in this appeal, Peter Schwab, Edward Mattingly, and Thomas Blackburn.

Richard, Mark, and Steven formed a partnership, Troika Partners, that borrowed $2.5 million from CECO outside director Schwab and then loaned it to CECO to satisfy Comerica's requirement of additional investment. Troika requested the loan agreement provide it with a right to convert the debt to CECO stock. The CECO board approved the loan, with Schwab and the remaining Hotze brothers abstaining.[2] Whether the Troika promissory note, executed on February 25, 2015, authorized a partial conversion of debt for CECO stock or only a full conversion was a hotly contested issue in the trial court and remains one in this appeal.

Three months later, on May 25, 2015, Troika notified CECO that it was going to convert a portion of the debt to CECO stock. As required under the note, an appraiser chosen by CECO's board appraised the value of CECO stock; the appraiser concluded the stock was worthless as of April 30, 2015. On September 22, the CECO board voted on whether to approve the partial conversion. Before the vote, Richard informed the directors that he had communicated with outside counsel regarding whether a partial conversion was authorized under the note, but he supposedly did not reveal what counsel advised. None of the brothers participated in the vote, two outside directors voted in person to approve the conversion, one outside director abstained, and one outside director gave his proxy to the one who abstained, who then voted the proxy to approve the conversion.

As a result of the conversion, Troika received 240,348 Class A shares at par value of $1.00 per share and 135,000 Class B shares at par value of $0.01 per share in exchange for waiver of $38,503.56 in principal and all interest accrued up to that point, totaling $203,194.44. After conversion, CECO still owed Troika $2,461,496.44 and the note was still in place. As a result of the new stock issuance,

[2] Bruce was still a board member then.

the ownership interest of all other parties was severely diminished and Troika owned over 96% of the voting shares. Several months after the conversion, Troika transferred its CECO shares to Richard, Mark, and Steven, who then transferred the shares to trusts. On February 7, 2018, the CECO board voted to ratify the actions taken on September 22, 2015, including approval of the conversion.

In 2016, David sued Richard, Mark, Steven, Bruce, IN Management, and the Inter Nos entities in what is referred to as the "Partnership Case." Bruce subsequently realigned as a plaintiff in this case, and David's wife was added in her capacity as trustee of a family trust. Of note among the allegations in this case, David and Bruce alleged that the Inter Nos entities improperly advanced funds to the CECO directors to pay their legal expenses.

In 2017, David, Bruce, and several related parties sued Richard, Mark, Steven, and three of CECO's outside directors. The 2017 lawsuit asserted numerous individual and derivative claims, including requests for statutory remedies relating to the allegedly improper partial conversion, breaches of fiduciary duty, common law fraud, statutory fraud, Blue Sky fraud, and violations of the TTLA. This so-called "Conversion Case" is the basis of most of the issues in this appeal.

The two cases were consolidated for trial. Before trial, the judge granted a directed verdict against appellants on their TTLA claims. The court also ruled pretrial that as a matter of law, the Troika promissory note authorized partial conversion. Instructions noting this latter ruling were given with several of the questions in the jury charge. As stated above, the jury found against David, Bruce, and the other plaintiffs on all claims submitted to it. After trial, appellees moved for an award of attorney's fees under the TTLA and attached attorney affidavits in support. The trial court granted the motion and awarded appellees a take nothing

judgment on all claims and over $2 million in attorney's fees under the TTLA.

### *Discussion*

Because the parties on each side of this litigation have largely incorporated the arguments of the other parties on their side, in this opinion, we will generally refer to David, Bruce, and associated parties collectively as "appellants" and we will generally refer to Richard, Mark, Steven, and associated parties collectively as "appellees." The outside directors will also be included in the term "appellees" except where noted.

We will begin our analysis by discussing issues pertaining to the partial conversion of debt owed to Troika into CECO stock. Second, we consider the trial court's award of attorney's fees to appellees under the TTLA. Third, we address the indemnification and advance payment of legal costs from the Inter Nos entities to appellees. Fourth, we review issues concerning the evidence suggesting the CECO directors relied on advice of legal counsel in voting to approve the partial conversion of CECO stock. And lastly, we address whether appellants may raise a claim for breach of informal fiduciary duties.

## I. Partial Conversion

In David's second issue and Bruce's first and second issues, appellants contend that the trial court erred in refusing to invalidate the partial conversion of debt to CECO stock and instead holding as a matter of law that the promissory note in question authorized partial conversion. Under this issue, appellants assert arguments pertaining to the construction of the promissory note, alternative arguments concerning the approval of the conversion by CECO's board, and related arguments concerning the harm caused and the relief sought. We will begin, however, by addressing appellees' challenge to our jurisdiction over the

derivative claims brought by appellants on behalf of CECO, which include claims based on the stock conversion.

### A. Notice of Appeal

Appellees initially assert that appellants have waived any issues based on their derivative claims—including that the partial conversion of debt to stock was improper—because they failed to specify in their notice of appeal that they are appealing in a representative capacity. We have previously held that an appellant who does not perfect appeal in a representative capacity is before the court only in an individual capacity. *See Lively v. Henderson*, No. 14-05-01229-CV, 2007 WL 3342031, at *5 (Tex. App.—Houston [14th Dist.] Nov. 13, 2007, pet. denied) (mem. op.) (citing *Elizondo v. Tex. Natural Res. Conservation Comm'n*, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.)).

Appellants, however, have filed an amended notice of appeal stating that they are appealing the final judgment in all capacities, including individually and derivatively, as well as a motion for leave to file the amended notice. This motion has been carried with the case. Appellants note that at around the same time as their original notice of appeal, they also filed a post-trial motion to modify and for new trial addressing all claims; all parties fully briefed all the claims, including those brought derivatively; and in their appellate docketing statement, the outside directors acknowledged that appellants were appealing derivatively. Appellants additionally point out that since all the entities in this case are closely held, the formal derivative proceeding requirements of the Texas Business Organizations Code are relaxed as a matter of law, citing Texas Business Organizations Code sections 21.563 (corporations), 101.463 (limited liability companies), and 153.413 (limited partnerships). And appellants further argue that they are entitled to pursue all claims individually, regardless of whether we grant the motion for leave to file

the amended notice of appeal.

Under our discretion pursuant to Texas Rule of Appellate Procedure 25.1(g) and keeping in mind the Texas Supreme Court's oft-repeated admonition to reach the merits of appeals whenever reasonably possible and not decide cases on procedural technicalities, we hereby grant appellants' motion for leave to file the amended notice of appeal and deem the amended notice filed. Tex. R. App. P. 25.1(g); *e.g.*, *Horton v. Stovall*, 591 S.W.3d 567 (Tex. 2019) (per curiam); *Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997); *see also Rice v. Lewis Energy Grp., L.P.*, No. 04-19-00234-CV, 2020 WL 6293454, at *3-4 (Tex. App.—San Antonio Oct. 28, 2020, no pet.) (mem. op.) (granting motion for leave to file amended notice of appeal that added a party). Accordingly, we will address the merits of all issues necessary to the disposition of this appeal, whether raised in an individual or derivative capacity.

## B. The Promissory Note

### 1. Rules of Construction

We now turn to the proper construction of the Troika promissory note. A promissory note is an agreement evincing an obligation to pay money, and as such, the construction of its terms is controlled by the rules generally applicable to interpreting contracts. *Jim Maddox Props., LLC v. WEM Equity Cap. Invs., Ltd.*, 446 S.W.3d 126, 132 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Our primary concern in interpreting an agreement is to ascertain and give effect to the intentions of the parties as expressed in the instrument. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). We therefore give terms their plain and ordinary meaning unless the agreement indicates that the parties intended a different meaning. *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). We examine and consider the entire writing in an effort to

harmonize and give effect to all provisions of the agreement, so that none will be rendered meaningless. *J.M. Davidson*, 128 S.W.3d at 229.

**2. Interpreting the Note**

The sections of the Troika promissory note governing conversion read in full:

> 7. CONVERSION. The Holder has the right, at the Holder's option, at any time upon 30 days written notice, hereafter the "Conversion Notice," and before this Note is paid in full in accordance with the terms hereof, to convert the outstanding aggregate amount of principal of this Note and unpaid interest accrued thereon into Maker's Class A common stock and/or Maker's Class B common stock (the class or classes of conversion shares to be determined by Holder). Upon Maker's receipt of the Conversion Notice, the respective per-share values of Maker's Class A and Class B common stock shall be determined, at Maker's expense, as of a date no later than 30 days after the date of the Conversion Notice, by a qualified appraiser selected by Maker's board of directors. Upon receipt of the appraiser's report, Holder shall notify Maker in writing, hereafter the "Allocation Notice," as to the dollar amount to be converted to Maker's Class A common stock and, if any, the dollar amount to be converted to Maker's Class B common stock. The number of shares of Class A common stock to be received by Holder upon conversion shall be calculated by dividing (a) the dollar amount slated in the Allocation Notice to be converted to Maker's Class A common stock, by (b) the per-share value of Maker's Class A common stock. The number of shares of Class B common stock, if any, to be received by Holder upon conversion shall be calculated by dividing (a) the dollar amount stated in the Allocation Notice to be converted to Maker's Class B common stock, by (b) the per-share value of Maker's Class B common stock. Upon conversion, the Holder shall surrender this Note at Maker's principal office.
>
> 8. ISSUANCE OF STOCK ON CONVERSION. As soon as practicable after conversion of this Note, the Maker will cause to be issued in the name of, and delivered to the Holder, a certificate or certificates for the number of shares of Maker's Class A and/or Class

> B Common Stock to which the Holder shall be entitled on such conversion. The certificate or certificates shall bear such legends as may be required by applicable state and federal law in the opinion of legal counsel for the Maker. Such conversion shall be deemed to have been made at the close of business on the date that the Note has been surrendered for conversion. No fractional shares will be issued on conversion of this Note. If on conversion of this Note a fraction of a share results, the Maker will pay the cash value of that fractional share, calculated on the basis of the applicable conversion price.

Appellees assert that these provisions unambiguously authorized a partial conversion of the note. Appellants argue the note unambiguously authorized only a complete and not a partial conversion and that the trial court erred in instructing the jury otherwise. We agree with appellants.

To begin with, the note does not use the phrase or refer to the concept of partial conversion. *See* Tex. Bus. Org. Code §21.168 (requiring that convertible debt terms must be set forth in the debt instrument). Instead, paragraph 7 authorizes the holder (Troika) to "convert the outstanding aggregate amount of principal of this Note and unpaid interest accrued thereon into . . . common stock." The adjective "aggregate" means "total," "combined," "formed by the conjunction or collection of particulars into a whole mass or sum." The Random House Unabridged Dictionary 29 (2d ed. 1994). In paragraph 7, it is used to indicate that Troika could convert the outstanding total or combined amount of principal and unpaid accrued interest. It does not suggest Troika could convert a partial amount of the debt.

Additionally, the note requires that the note itself must be surrendered to effect conversion. Paragraph 7 states, "Upon conversion, the Holder shall surrender this Note at Maker's principal office." Paragraph 8 provides that "conversion shall be deemed to have been made at the close of business on the date that the Note has been surrendered for conversion." The note contains no provision for issuing a new

note in the event of a partial conversion. These provisions confirm that only a complete conversion is authorized by the note.

**3. Appellees' Textual Arguments**

Appellees suggest that the word "aggregate" in paragraph 7 is used to indicate that conversion must include at least some unpaid principal and some accrued interest and could not just include one or the other. Nothing in the paragraph, however, supports this reading. The sentence in question states that "*the* outstanding aggregate amount of principal of this Note and unpaid interest accrued thereon" could be converted, not "*an*" outstanding amount. (Emphasis added). The paragraph clearly contemplates only a complete conversion.

The outside directors additionally postulate, without explanation or citation to authority, that "if a party has the right to convert all of a note, it has the right to convert part of it." There is no reason for this to be true. As stated, convertible debt terms must be set forth in the debt instrument. *See* Tex. Bus. Org. Code §21.168. There may be many reasons a borrowing corporation would not want to permit any conversion unless the entirety of the connected debt is dissolved through such conversion.

Appellees point to the portion of paragraph 7 providing that after receiving the appraisal report, Troika was to notify CECO with an "'Allocation Notice[]' as to the dollar amount to be converted to [CECO]'s Class A common stock and, if any, the dollar amount to be converted to [CECO]'s Class B common stock." Appellees assert that this provision gave Troika the right to determine the amount of debt to be converted. A simpler reading, and one consistent with the terms recited in other parts of the paragraph, would be that this language authorized Troika to allocate how much of each class of stock it wanted, not how much of the debt it wanted to convert. *See J.M. Davidson*, 128 S.W.3d at 229 (explaining that

the entirety of an agreement must be considered to harmonize all the provisions).

Appellees also point to the resolution that the CECO board passed to authorize taking the Troika loan. This resolution stated that under the loan, Troika would have the right to "convert all or part of the unpaid balance of the Loan to" CECO stock. This language obviously supports the construction of the note appellees favor but is also obviously extraneous to the note itself and should not be considered if it is not in keeping with the clear intent of the language in the note. *See URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764 (Tex. 2018); *Ital. Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333-34 (Tex. 2011). Appellees further suggest that the resolution is part of the loan agreement and should therefore be considered together with the note itself, but the resolution clearly is not part of the loan agreement. It would turn the rules and goals of contract construction on their heads if a separate writing by only one party to an agreement—not signed or agreed to by the other party and potentially not even known by the other party—could change the terms of an unambiguous agreement between two parties. *See J.M. Davidson*, 128 S.W.3d at 229 (explaining that the primary concern in interpreting an agreement is to ascertain and give effect to the intentions of the parties as expressed in the instrument).

Appellees additionally mention that due to the appraised value for the CECO stock being zero at the time of conversion, the full debt owed could not have been converted because of the low par value of the stock. Appellees urge the court not to read the conversion provisions in such a way that would cause Troika to forfeit its right to conversion. Although Troika had the right to convert debt to stock, it was not required to do so. Troika could have chosen not to convert the debt to stock at all, or it could have waited until the stock value recovered to exercise its right of conversion. Regardless, this argument does not change the language of the note.

### C. Non-textual Arguments on Conversion

Appellees next assert that the September 22, 2015 board resolution authorized the partial conversion of debt to CECO stock even if the note did not. They also argue that the 2018 ratification vote authorized partial conversion, even if the note or the original board resolution did not. *See generally* Tex. Bus. Orgs. Code §§ 21.901–.917 (governing ratification of defective corporate acts and shares). The issue, however, is not just whether the board authorized a conversion of debt to stock or later ratified such action; the issue is whether, given that Troika had no right to demand a partial conversion, when the board created and gave to Troika (a partnership wholly owned by members of CECO's board) stock that amounted to over 96% of the outstanding voting shares in CECO in exchange for cancellation of a relatively small amount of debt ($38,503.56 in principal and $203,194.44 in interest, leaving $2,461,496.44 in principal owed), did the board members commit any torts or statutory violations? Because the jury was repeatedly instructed in the charge that the note authorized partial conversion, the jury never considered the board's actions in light of the fact that the note did not give Troika a right of partial conversion. The trial court's error in construing the note permeated the trial and the charge and rendered many of the jury's findings meaningless. A remand is therefore necessary for proper consideration of the board's actions.

The outside directors further suggest appellants waived their complaints about the conversion by not challenging on appeal the jury's "yes" answer to Question 44, which asked: "Did Bruce Hotze or David Hotze waive any right to complain about Troika Partners converting debt for shares under the Note by refusing to participate in Troika Partners?" Like many other questions in the jury charge, however, this question was premised on the erroneous assumption that the

partial conversion was authorized by and made pursuant to the terms of the note.[3] Moreover, the outside directors offer no explanation regarding whether or how the alleged waiver would affect the derivative claims, which were brought on behalf of CECO itself and not David or Bruce. We find no merit in this argument.

### D. Disposition

The promissory note unambiguously authorized only a complete conversion of debt to CECO stock. The trial court erred in holding otherwise. This error permeated the trial and the jury charge. Normally, such error necessitates a remand of affected claims so that a jury can be properly instructed. Appellants, however, make two arguments as to why we should render judgment at least on certain aspects of the case while remanding other aspects.

#### 1. Appellants' Arguments for Rendering Judgment

First, in their briefing, appellants argue that we should render judgment that the partial conversion of debt to stock was invalid—as permitted under Business Organizations Code section 21.914(b) and Texas Rule of Appellate Procedure 43.1(c)—because Troika had no right to demand conversion under the note. This argument, however, wholly ignores appellees' assertion, mentioned above, that the conversion was properly conducted via the board resolution approving it or properly ratified by the 2018 ratification vote. These are matters to be undertaken on remand.

Second, during oral argument, appellants urged that we render judgment that the stock conversion was void because this was an interested director transaction and, appellants assert, appellees failed to obtain a jury finding under Business

[3] Contrary to the outside director's assertion, we conclude that appellants did enough in their briefs to challenge all jury questions that were premised on the propriety of the partial stock conversion.

Organizations Code section 21.418. Section 21.418 provides so-called "safe harbors" for interested director transactions when certain conditions are met, including when a majority of disinterested directors votes "in good faith" to approve the transaction and when the transaction is "fair to the corporation" at the time the transaction is ratified. Tex. Bus. Org. Code § 21.418(b). Appellants acknowledge that Question 10 in the charge asked jurors whether the conversion "fail[ed] to satisfy" certain conditions including that a majority of disinterested directors approved the transaction in good faith and that the transaction was fair to CECO when ratified by the board. Appellants argue, however, that Question 10 erroneously placed the burden of proof on appellants. *See generally In re Estate of Poe*, 591 S.W.3d 607, 634–35 (Tex. App.—El Paso 2019, pet. filed) (explaining that burden to establish safe harbor under section 21.418 is on the party seeking to validate an interested director transaction). They further assert that because Question 10 erroneously placed the burden of proof, appellees effectively failed to submit their safe harbor defense to the jury and thus waived it, citing Texas Rule of Civil Procedure 279 ("Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived.").

Even assuming, however, that Question 10 erroneously assigned the burden of proof on the safe harbor defense, that is not the equivalent of wholly failing to request submission of a defense. Appellants cite *Winfield v. Renfro*, for the proposition that "when an issue is submitted with a missing element, and the party who did not have the burden of proof objects, the appellate court must reverse and render, not reverse and remand for new trial." 821 S.W.2d 640, 657 (Tex. App.—Houston [1st Dist.] 1991, writ denied). As occurred in *Winfield*, however, the alleged error here was not the complete omission of an element but the allegedly

defective submission of an element. *See id*. The defective submission of an element requires reversal and remand (assuming harm is shown), not reversal and render. *See, e.g.*, *Buhman v. McGaughy*, No. 14-05-01215-CV, 2007 WL 2109466, at *1, 5-6 (Tex. App.—Houston [14th Dist.] July 24, 2007, pet. denied) (remanding because charge incorrectly assigned burden of proof) (mem. op.); *see also Winfield*, 821 S.W.2d at 657-58.

**2. Conclusion**

We decline to render judgment voiding the converted shares under Business Organizations Code section 21.914; instead, we reverse and remand all the claims impacted by the improper construction of the note.[4] This, in particular, includes appellants' requests for statutory remedies related to the allegedly improper partial conversion as well as claims for breaches of fiduciary duties, common law fraud, statutory fraud, and Blue Sky fraud raised in the so-called Conversion Suit. This does not include any claims in the so-called Partnership Suit or the claims for unlawful indemnification, which are addressed below. It also does not include appellants' claims under the TTLA, as the trial court granted directed verdict on these claims on grounds unrelated to the partial conversion and appellants do not challenge this ruling on appeal. As will be discussed below, however, appellants do challenge the trial court's award of attorney's fees to appellees under the TTLA. And this does not include appellants' fraudulent transfer claims, which were based on the transfer of funds from Troika to Richard, Mark, and Steven. The jury found against appellants on these claims, and appellants do not specifically challenge judgment on these claims in this appeal.[5]

[4] Under David's second issue and Bruce's first issue, appellants request a remand of all "CECO-related" claims.

[5] We note that the outside directors have suggested that appellants waived any charge error in questions 29 and 31, relating to the outside directors' duties of care and loyalty to

## II. TTLA Attorney's Fees

In David's first issue and Bruce's fifth, appellants challenge the trial court's award of attorney's fees to appellees under the TTLA. Among their complaints, appellants point out that appellees did not request attorney's fees under the TTLA until after trial, did not present any evidence of such fees during trial, and did not submit any jury questions or receive a verdict for TTLA attorney's fees. During trial, the trial court granted a directed verdict favoring appellees on appellants' TTLA claims. After trial, appellees requested the trial court award them fees under the TTLA, and appellants objected because the issue was not submitted to the jury.

An award of attorney's fees and court costs to each prevailing person is mandatory under the TTLA. Tex. Civ. Prac. & Rem. Code § 134.005(b). This includes a defendant who successfully defends against a claim under the act. *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 147–48 (Tex. 2019). However, this was a jury trial, and absent an agreement among the parties, appellees were entitled to have the issue of the reasonableness of the requested attorney's fees submitted to the jury. *See Smith v. Patrick W.Y. Tam Tr.*, 296 S.W.3d 545, 547 (Tex. 2009); *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 658 n.38 (Tex. 2009); *Asafi v. Rauscher*, No. 14-10-00606-

---

CECO, by predicating them on Question 10, which inquired about the propriety of the partial conversion. It is unclear if the outside directors would continue to press this argument in light of our holding that the note did not authorize partial conversion. To the extent they would continue such argument, it is without merit. The same error permeated questions 10, 29, 31 and others, and all affected issues must be remanded.

On a related note, appellants raised alternative arguments concerning the wording of certain charge questions. We do not reach these arguments because to do so would be to speculate on the claims, evidence, and argument that may be presented in a retrial of this case in light of our holding that the Troika note did not authorize the partial conversion of stock. *See, e.g.*, *SpawGlass Const. Corp. v. City of Houston*, 974 S.W.2d 876, 879 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) ("Courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations.").

CV, 2011 WL 4031015, at *8–9 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011, pet. denied) (mem. op.); *Ogu v. C.I.A. Servs. Inc.*, No. 01-07-00933, 2009 WL 41462, at *3–5 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (mem. op.).

Appellees, however, did not request TTLA attorney's fees until after the verdict had been returned, and the parties did not agree to try the fees issue to the court. After trial, appellees submitted two affidavits and requested that the court find the requested fees to be reasonable and necessary. In arguing for the propriety of this procedure, appellees cite to the supreme court's *Agar* opinion in which the reasonableness of attorney's fees was established through affidavits. *Agar*, however, was a summary judgment case, not a jury trial, and nothing in *Agar* suggests a party can wait until after a jury trial to request TTLA attorney's fees supported by an affidavit. 580 S.W.3d at 138. In a bench trial, the trial court determines whether requested attorney fees are reasonable, but in a jury trial, the general rule applies and the reasonableness of attorney fees is a question of fact for the jury that must be supported by evidence introduced at trial. *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751–52 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Appellees cite no evidence submitted at trial to support any award of attorney's fees under the TTLA.

The outside director appellees additionally assert that the trial court could properly determine the reasonableness of the fees based on the post-trial affidavits because they were uncontroverted, citing Tex. Civ. Prac. & Rem. Code § 18.001(b) and *Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Appellants point out, however, that they did challenge the affidavits on several grounds and rule 18.001 contains several prerequisites that appellees did not meet here. *See* Tex. Civ. Prac. & Rem. Code § 18.001(c)(3), (d), (d-2). Moreover, an affidavit submitted to a trial court after a verdict has been reached is

not trial evidence. *See* Tex. R. Civ. P. 270 ("[I]n a jury case no evidence on a controversial matter shall be received after the verdict of the jury."); *Manon*, 162 S.W.3d at 751–52.

When nothing in a mandatory fee statute modifies the general rule that the party seeking fees must present evidence of such fees to be entitled to their award, an award of fees in the absence of evidence is reversible error. *E.g.*, *Carter v. Ball*, No. 04-19-00194-CV, 2019 WL 5030227, at *4 (Tex. App.—San Antonio Oct. 9, 2019, no pet.) (mem. op.); *Tibbetts v. Gagliardi*, 2 S.W.3d 659, 665 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). In such cases, when no evidence was presented regarding the reasonableness of attorney's fees, courts have either affirmed a trial court's refusal to award fees or reversed an award of fees and rendered a take-nothing judgment on the fees issue. *See, e.g.*, *Carter*, 2019 WL 5030227, at *4 (affirming refusal to award fees under mandatory statute); *Dilston House Condo. Ass'n v. White*, 230 S.W.3d 714, 718–19 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (same); *Manon*, 162 S.W.3d at 751-52 (affirming instructed verdict on claim for fees); *Tibbetts*, 2 S.W.3d at 665 (reversing fees award and entering take-nothing judgment on claim for fees). Here, as discussed, appellees presented no evidence at trial regarding the reasonableness of attorney's fees incurred in defending against the TTLA claims. Accordingly, we reverse the trial court's award of attorney's fees under the TTLA and modify the judgment to order that appellees take nothing on their claims for TTLA fees.

## III. Prepayment and Indemnification of Legal Expenses

In David's fourth issue, appellees contend that the trial court erred in denying their derivative claims on behalf of the Inter Nos entities based on the allegedly improper indemnification and advance payment of legal costs from the entities to appellees Mark, Richard, and Steven. The advance payments totaled

over $1 million. The trial court rejected jury charge submissions on these claims and denied appellants' post-trial motions asserting they proved such claims as a matter of law.[6]

Both sides cite to sections of Texas Business Organizations Code chapter 8, "Indemnification and Insurance" as controlling. Tex. Bus. Orgs. Code § 8.001–.152. Appellants first argue that because appellees did not plead for or obtain jury findings as to mandatory indemnification under section 8.051, they were not entitled to any payment of their legal costs by the Inter Nos entities. That section, entitled "Mandatory Indemnification," states in full:

> (a) An enterprise shall indemnify a governing person, former governing person, or delegate against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person or delegate if the person is wholly successful, on the merits or otherwise, in the defense of the proceeding.
>
> (b) A court that determines, in a suit for indemnification, that a governing person, former governing person, or delegate is entitled to indemnification under this section shall order indemnification and award to the person the expenses incurred in securing the indemnification.

*Id*. § 8.051.

Nothing in this section requires pleadings or jury findings specifically on an entitlement to indemnification pursuant to the section. Instead, it mandates indemnification of the reasonable expenses of governing persons who are pulled into litigation because of their governing positions if they are "wholly successful"

[6] Appellants' arguments under this issue are somewhat difficult to follow. Appellants appear to argue both that appellees were not entitled to indemnity and that the advancement of fees prior to trial was improper, but they do not distinguish between the potential remedies for these differing allegations or account for the fact that the jury and the court found against them on all claims. We will address appellants' arguments to the extent we understand them.

in their defense. Appellants do not cite any other authority or make any argument outside of citing section 8.051 for the proposition that a pleading and jury findings were required for appellees to be entitled to indemnification. Accordingly, we find no merit in their first argument.

Next, appellants assert that the Inter Nos entities' partnership agreements do not permit indemnification and advancement of litigation expenses under the circumstances of this case. They begin by noting that the governing documents for one of the entities does not mention indemnification or advancement of legal costs, and they conclude from this that indemnification or advancement from that entity was not permitted as a matter of law. But they do not cite any authority or make any argument supporting this conclusion. *See* Tex. R. App. P. 38.1(i) (requiring that appellate briefs "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Sklar v. Sklar*, 598 S.W.3d 810, 824 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

As for the other entities' partnership agreements, appellants assert that they do not permit indemnification when the claims being defended against are for fraud, breach of fiduciary duty, and breach of the partnership agreements themselves, which appellants identify as the types of claims they pursued in this litigation. The governing documents, however, provide for indemnification of members, officers, and others against any and all claims in which those persons may become involved based on the affairs of the partnership except when "the claim or liability arises from the gross negligence, willful misconduct, fraud or breach of this Agreement by such [person] or actions of such [person] outside the scope of [the] Agreement." Contrary to appellants' representation, this language does not bar indemnity simply because a claim is made of fraud, breach of fiduciary duty, or breach of the agreements; it bars indemnity for claims *arising*

*from* certain types of conduct. Just because a claim has been made regarding certain conduct does not mean that the conduct actually occurred. For example, in this case, the jury found against appellants on all their claims. Accordingly, there is no merit in appellants' argument that the partnership agreements barred indemnification in this case as a matter of law.

Additionally, appellants assert that even if indemnification was permissible, the allocation of the costs among the different Inter Nos entities was unreasonable. On this basis, appellants contend that Richard, who acknowledged directing the allocation, breached the fiduciary duties he allegedly owed to the entities. Appellants' complaint regarding the allocation is that it was supposedly done "based solely on the 'ability to pay' (i.e., the amount of funds each entity had on hand)—not based on any fair, reasoned allocation basis or formula." Appellants, however, cite no authority and make no cogent argument to support their supposition that allocating indemnification to the entities based on the entities' ability to pay was unreasonable or a breach of fiduciary duties. *See* Tex. R. App. P. 38.1(i). Accordingly, this argument is inadequately briefed.

Lastly, appellants argue that even assuming permissive indemnification and advancement was allowed under the agreements, it was not properly approved in this case. Specifically, appellants assert that Business Organizations Code section 8.103 requires an approval by majority vote of disinterested governing persons before permissive indemnification or advancement can occur and that such vote did not occur. As appellants themselves point out, however, indemnification is mandatory—and thus does not require a vote—under section 8.051 if the appellees are "wholly successful" in the defense of the claims. Appellees were, of course, wholly successful in the first trial and may be again on remand. Appellants do not offer any argument as to why we need to address the propriety of a permissive

indemnification when indemnification may be mandatory on remand, and we decline to make any argument for them. *See* Tex. R. App. P. 38.1(i); *Bhatia v. Woodlands N. Houston Heart Ctr., PLLC*, 396 S.W.3d 658, 666 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). We need not and do not state a position on this issue at this time. *See SpawGlass Const. Corp. v. City of Houston*, 974 S.W.2d 876, 879 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) ("Courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations.").

Based on the foregoing discussion of appellants' arguments, appellants have not established as a matter of law that appellees were not entitled to indemnity or the advancement of legal costs in this case. However, because the ultimate determination of whether appellees are entitled to indemnity may turn on whether they are "wholly successful" in defending against appellants' claims on remand, we reverse and remand the indemnity/advancement of fees issues to the trial court. *See* Tex. Bus. Orgs. Code § 8.051.

## IV. Evidence Regarding Legal Advice

In their third issues, appellants contend that the trial court erred in permitting appellees to present evidence that suggested the CECO directors had relied on the advice of legal counsel in voting to approve the partial conversion of CECO stock but not permitting appellants to discover or introduce into evidence the substance of that advice. Appellants suggest that in doing so, the trial court allowed the impression to be made that counsel had advised the directors that the partial conversion was permissible when, in actuality, appellants suspect at least one of the consulted attorneys advised against partial conversion. The jury charge instructed the jury in several places "that a director may, in good faith and with ordinary care, rely on information, opinions, reports, or statements . . . concerning

CECO and prepared or presented by . . . legal counsel."

Appellees assert that the trial court did not err in excluding the substance of any advice because it was protected by the attorney-client privilege. *See generally* Tex. R. Evid. 503. Appellants respond by pointing to several grounds for holding the communication in this case was not privileged or the privilege had been waived. Appellants also complain that the trial court should have at least considered the communications in camera before ruling on admissibility.

We decline to rule on this issue, however, because it is not necessary to the disposition of this appeal and to do so would be to issue an advisory opinion. *See* Tex. R. App. P. 47.1; *SpawGlass Const.*, 974 S.W.2d at 879. It would be speculative to assume in this case that the same evidence would be offered or sought in the same way as occurred in the first trial and would again be admitted and excluded for the same reasons. This is particularly true given the fact that in the first trial, the court erroneously instructed the jury that the Troika note authorized partial conversion. *See N. Nat. Gas Co. v. Conoco, Inc.*, 939 S.W.2d 676, 681 (Tex. App.—El Paso 1996), *aff'd*, 986 S.W.2d 603 (Tex. 1998) (declining to offer opinion regarding admissibility of evidence in light of ruling trial court erroneously construed contract in first trial); *Rogers v. Ricane Enters.*, 930 S.W.2d 157, 178 (Tex. App.—Amarillo 1996, writ denied) (declining to offer opinion regarding what evidence might be admissible in a retrial).

Determinations of whether this evidence is discoverable and admissible may turn on whether appellees assert any affirmative claims on remand, *see Republic Insurance Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (discussing offensive use doctrine), and whether and how the directors' supposed reliance on counsel's advice is offered into evidence, *see* Texas Rule of Evidence 511(a)(1) and *In re Alexander*, 580 S.W.3d 858, 869 (Tex. App.—Houston [14th Dist.] 2019, orig.

proceeding) ("Rule 511(a) 'allows a partial disclosure of privileged material to result in an implied waiver of the privilege as to additional material that has not been disclosed.'") (quoting *Berger v. Lang*, 976 S.W.2d 833, 837 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that party who created false impression regarding outcome of grievance procedure impliedly invited or consented to disclosure of the outcome even though confidential)). Because these key factors cannot be foretold, we decline to offer an opinion regarding the discoverability and admissibility of the evidence on remand. *See SpawGlass Const.*, 974 S.W.2d at 879; *N. Nat. Gas*, 939 S.W.2d at 681; *Rogers*, 930 S.W.2d at 178.

## V. Breach of Informal Fiduciary Duty Claim

In David's fifth issue, appellants contend that the trial court erred in construing their pleadings as not raising a claim for breach of informal fiduciary duties and in denying appellants leave to amend their pleadings to assert such claim. Because, as discussed above, we are remanding this case for new proceedings on several of appellants' claims, appellants are free on remand to amend their pleadings to raise this claim. *See Mattox v. Cty. Commissioners' Ct.*, 389 S.W.3d 464, 474 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Simulis, L.L.C. v. Gen. Elec. Cap. Corp.*, 392 S.W.3d 729, 735 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). This appellate issue is therefore moot because a ruling on it would have no impact on the proceedings below.

## *Conclusion*

The trial court erred in concluding that the promissory note authorized a partial conversion of CECO stock and in instructing the jury on that conclusion. The trial court also erred in awarding attorney's fees under the TTLA to appellees because appellees failed to produce any evidence at trial in support of such award.

Appellants failed to establish that they were entitled to judgment as a matter of law on any issue other than appellees' entitlement to attorney's fees under the TTLA.

We reverse and remand the portions of the trial court's judgment pertaining to the following claims that appellants raised in their pleadings: requests for statutory remedies related to the allegedly improper partial conversion; claims for breaches of fiduciary duties, common law fraud, statutory fraud, and Blue Sky fraud; and claims based on indemnification of appellees' legal costs (but not including claims under the TTLA). We also modify the judgment to remove the award of attorney's fees under the TTLA to appellees and instead order that appellees take nothing on their attorneys' fees request under the TTLA. We affirm the remainder of the judgment as so modified.[7]

/s/ Frances Bourliot
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.

[7] At one point in their briefing, appellants assert the trial court erred in its submission of questions 4 and 6 to the jury. These questions pertained to claims in the Partnership Case involving the management of the Inter Nos entities. These arguments were inadequately briefed, and appellants made no request in their prayer or otherwise regarding these claims. *See generally* Tex. R. Civ. P. 38.1(i).