# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-19-00799-CV**

**WC 1st and Trinity, LP; WC 1st and Trinity GP, LLC; WC 3rd and Congress, LP; and WC 3rd and Congress GP, LLC, Appellants**

**v.**

**The Roy F. & JoAnn Cole Mitte Foundation, Appellee**

**FROM THE 126TH DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-18-007636, THE HONORABLE JAMES LEE CARROLL, JUDGE PRESIDING**

**NO. 03-19-00905-CV**

**WC 1st and Trinity, LP; WC 1st and Trinity GP, LLC; WC 3rd and Congress, LP; and WC 3rd and Congress GP, LLC, Appellants**

**v.**

**The Roy F. and JoAnn Cole Mitte Foundation, Appellee**

**FROM THE 126TH DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-18-007636, THE HONORABLE JAN SOIFER, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

These appeals arise out of a commercial arbitration between the Roy F. & JoAnn Cole Mitte Foundation's (Mitte) and appellants, which are several corporate entities controlled by real estate investor Nate Paul. While the arbitration was ongoing, the arbitrator appointed a

receiver to take charge of certain real property owned by two appellants. The district court confirmed that order and, subseqently, appointed a receiver over the same properties using the court's statutory powers. Appellants appeal from both orders. We will dismiss the appeal of the order confirming the receiver's appointment for want of jursidiction (cause No. 03-00799-CV) and affirm the district court's appointment of a receiver (cause No. 03-00905-CV).

## BACKGROUND[1]

Paul is a real estate investor who does business through a network of entities with "WC" or "World Class" in the name. His principal entity is World Class Capital Group (WCCG). Employees of WCCG, such as Vice President of Accounting Barbra Lee and in-house counsel Maryann Norwood, perform work for other WC entities that are involved with his real estate development projects.

This dispute concerns two limited partnerships, WC 1st and Trinity, LP, and WC 3rd and Congress, LP (collectively, Limited Partnerships). WC 1st owns property at 1st and Trinity streets in Austin, and WC 3rd owns property at 3rd and Congress (collectively, Properties). The general partner of each entity is a limited-liability corporation with almost the same name as the partnership: WC 1st and Trinity GP, LLC, and WC 3rd and Congress GP, LLC (collectively, General Partners).[2] Each general partner owns a controlling interest in its limited

[1] In addition to the two appeals, appellants filed a related petition for writ of mandamus under cause No. 03-19-798-CV. We take judicial notice of the record in that case. *See Reynolds v. Quantlab Trading Partners US, LP*, 608 S.W.3d 549, 558 n.3 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("An appellate court may take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties.").

[2] All future references to "WC 1st" or "WC 3rd" are to the limited partnerships.

partnership and has sole authority to manage the limited partnership's affairs. It is undisputed that Paul controls both general partnerships.

In 2011, Mitte invested a portion of its endowment with the Limited Partnerships, acquiring approximately 16% of WC 1st and 6% of WC 3rd. Paul initially represented to investors that he was either developing the Properties or marketing them for sale. In 2018, appellants allegedly stopped providing Mitte with financial information regarding the Limited Partnerships. Mitte filed suit, and appellants invoked an arbitration provision in the partnership agreements. In July of 2019, the parties reached a settlement agreement whereby appellants agreed to purchase Mitte's interests in the Limited Partnerships for $10.5 million. Payment was due no later than August 20, 2019.

On August 16, 2019, the FBI raided appellants' office and Paul's residence in connection with pending federal criminal investigations. The day before the payment deadline, Norwood informed Mitte's counsel that appellants would not be paying the settlement. The settlement agreement gave Mitte two options in the case of nonpayment: to end the arbitration and sue for breach of the settlement agreement or to declare the agreement void and continue with the arbitration. Mitte chose the latter option, and the arbitration continued.

In October 2019, Mitte filed a motion asking the arbitrator to appoint a receiver because the assets of the Limited Partnerships were "at imminent risk of being lost, removed, or materially injured." The motion cited the raid, appellants' failure to pay the settlement agreement, and other factors that indicated that the entities might be in financial distress. Following a day-long evidentiary hearing on Friday, October 4, 2019, the arbitrator announced that she would grant Mitte's application and appoint Greg Milligan as receiver. Appellants' counsel asked the arbitrator to delay signing the order until the following Monday, when another

hearing was scheduled before the same arbitrator, so that counsel could review the order over the weekend. The arbitrator agreed. On Monday, shortly before the scheduled start time of the hearing, appellants informed the arbitrator and Mitte by letter that the Properties had been sold to unnamed "affiliates" of appellants. The 1st and Trinity Property had been sold for $23 million and the 3rd and Congress Property for $25 million. The letter further stated that the sale price for the First and Trinity Property "is equal to the highest offer yet made" on that property. The arbitrator subsequently signed an order appointing Milligan as receiver over the Properties.

Less than a month later, Mitte filed a petition with the district court to confirm Milligan's appointment as receiver. *See* Tex. Civ. Prac. & Rem. Code § 171.086(b)(6) (providing that "a party may file an application for a court order" while arbitration is pending to obtain certain forms of relief, including confirmation of award under Section 171.086). The district court held an evidentiary hearing and signed an order stating that the arbitrator's order "is hereby confirmed and adopted as the Order of this Court" and ordered Milligan to carry out his duties in conformity with that order under the arbitrator's supervision (Confirmation Order). Appellants took an interlocutory appeal from the Confirmation Order and filed a petition for mandamus relief.[3]

This Court temporarily stayed the Confirmation Order and "prohibit[ed] the alienation of the real property owned by the [Limited] Partnerships while the Court's stay is in place." *In re WC 1st & Trinity, LP*, No. 03-19-00798-CV, 2019 WL 5793123, at *1 (Tex. App.—Austin Nov. 6, 2019, order) (mem. op.) (per curiam). Three days later, Mitte filed a

[3] We decide appellants' mandamus petition today by separate opinion. *See In re WC 1st and Trinity, LP; WC 1st and Trinity GP, LLC; WC 3rd and Congress, LP; and WC 3rd and Congress GP, LLC*, No. 03-19-00798-CV (Tex. App.—Austin Sept. 30, 2021, orig. proceeding) (mem. op.).

petition asking the district court to appoint a receiver over the Limited Partnerships and the partnership properties under Section 64.001 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 64.001 (enumerating circumstances under which "[a] court of competent jurisdiction may appoint a receiver"). Appellants filed a motion to stay in the district court arguing that their interlocutory appeal of the Confirmation Order stayed further proceedings in this case. *See id.* § 51.014(b) (providing that interlocutory appeal of certain orders stays commencement of trial "pending resolution of the appeal").

The district court took up appellants' motion to stay at the beginning of the hearing on Mitte's motion for appointment of a receiver. During the ensuing discussion, appellants' counsel represented that the Limited Partnerships were "still the owners" of the Properties. The district court overruled appellants' motion and turned to Mitte's motion. Mitte called Barbra Lee, Michael Shaunessy (one of Mitte's attorneys), and Milligan to testify in support of its application. Mitte's counsel read the deposition of Lee into the record because she allegedly had avoided service. Shaunessy testified regarding the history of the case. Among other things, he described his unsuccessful efforts to obtain copies of the closing documents from the purported sale or other documentary proof of the transaction. Milligan described the resistance he encountered in trying to obtain any information about the Limited Partnerships or the sale from appellants. He also tried unsuccessfully to confirm that the sale had occurred and added that no deed reflecting the conveyance had been recorded in the real property records. Appellants called Kenneth Albert Richey, a representative of the lender that holds a lien on the Third and Congress Property. The district court subsequently rendered an order appointing Milligan as receiver over the Limited Partnerships and all their properties (Appointment Order). *See* Tex. Bus. Orgs. Code § 11.404 ("Appointment of Receiver to Rehabilitate Domestic

Entity"). The Appointment Order granted the receiver all powers to manage the Limited Partnerships' assets that the general partners possess under the partnership agreements.

Appellants filed an interlocutory appeal of the Appointment Order and sought emergency relief. This Court granted emergency relief in part and prohibited any alienation of real property owned by the Limited Partnerships. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2019 WL 6972679, at *1 (Tex. App.—Austin Dec. 19, 2019, order) (mem. op.) (per curiam). We also abated the appeal and remanded the case for the district court to determine "whether appellants' rights would be adequately protected by supersedeas or another order under Texas Rule of Appellate Procedure 24." *Id.* In March 2020, the parties filed a status report informing us that the district court had ordered appellants to post a $3,875,305.00 supersedeas bond by April 7, 2020. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2020 WL 2832486, at *1 (Tex. App.—Austin May 29, 2020, order) (mem. op.) (per curiam). The following month, appellants informed us that they had sought and received a two-week extension, making the bond due on April 21, 2020. *Id.* Mitte informed us on May 7, 2020, that appellees "had not yet filed the bond" but had requested an additional three-day extension. *Id.* Appellants never filed a response, and we received no information that the bond had been filed. *Id.* We then lifted our stay of the receivership order, including the prohibition on alienating the real property owned by the Limited Partnerships. *Id.*

Later, in mid-May, Milligan filed in the district court a motion to supplement the Appointment Order alleging that appellants had refused to comply with the Appointment Order's provisions, including turnover of the Limited Partnerships' financial records. Milligan asked the district court to sign an order clarifying that the receivership "is in effect and that the Receiver has full authority to act on behalf of the [Limited] Partnerships unless and until the [Limited]

Partnerships post a supersedeas bond in the amount previously ordered," that Milligan "is the sole person authorized to operate, control, and manage any and all Partnership property without interference from [appellants]," and ordering appellants "to immediately effect an orderly transition of the [Limited] Partnerships." Appellants, in turn, filed a motion to vacate the Appointment Order. After this Court lifted its stay of the receivership order, the district court denied appellants' motion to vacate and signed a supplemental receivership order granting Milligan's requested relief. This Court subsequently granted appellants' request to add these two orders to this appeal. *See* Tex. R. App. P. 29.6 ("Review of Further Orders").[4]

We subsequently abated the interlocutory appeal after appellants informed us that they had filed for bankruptcy. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2020 WL 5884288, at *1 (Tex. App.—Austin Oct. 2, 2020, no pet.) (mem. op.) (per curiam) (citing Tex. R. App. P. 8.2). Appellants then filed a motion to reinstate informing us that their bankruptcy petitions had been dismissed as to each appellant on September 14, 2020. After we reinstated the appeal, Mitte filed a motion to dismiss on the ground that appellants had failed to comply with several of the district court's orders. *See* Tex. R. App. P. 42.3(c). We address that motion first.

## MOTION TO DISMISS

Rule 42.3(c) authorizes an appellate court to dismiss an appeal if "the appellant has failed to comply with . . . a court order[.]" *Id.* Mitte argues that appellants violated the district court's orders by: (1) failing to file a supersedeas bond; (2) failing to turn over the Limited Partnerships' books and records to Milligan; (3) filing suit against Milligan and his

[4] Appellants make no argument for reversing those orders that does not also apply equally to the Appointment Order.

counsel; (4) filing an assertedly "baseless" criminal complaint charging that Milligan conspired with the bankruptcy judge to deprive Paul of his property; (5) transferring funds out of the Limited Partnerships and entering into agreements on behalf of the partnerships with third parties when only Milligan had that authority; and (6) filing bankruptcy petitions on behalf of the partnerships without authority. Mitte attached to its motion excerpts from the various hearings' transcripts; an excerpt from Paul's deposition during the arbitration; a transcript of a status conference in the bankruptcy court; the bankruptcy court's order dismissing the petitions on the ground that Paul lacked the authority to file the petitions on behalf of appellants; an order of the arbitrator sanctioning appellants; a judgment in a separate case dismissing appellants' claims against Milligan and his counsel; and a copy of the criminal complaint filed with the Travis County District Attorney's Office. Appellants respond that Rule 42.3(c) only applies when an appellant violates an order of the appellate court. In the alternative, they argue that they are not legally required to post a supersedeas bond to appeal and that Mitte's exhibits do not demonstrate appellants are currently in noncompliance with any of the district court's orders.

The question of whether Rule 42.3 authorizes dismissal when an appellant fails to follow the trial court's order has divided appellate courts. *Compare Velasco v. Ellis*, No. 01-10-00073-CV, 2011 WL 2118865, at *7 (Tex. App.—Houston [1st Dist.] May 26, 2011, no pet.) (mem. op.) (rejecting similar argument and dismissing appeal because Rule 42.3 "does not specify the particular type of court order with which the appellant must comply or face dismissal"), *with Dzierwa v. Cerda*, No. 04-13-00407-CV, 2014 WL 3843950, at *2 & n.1 (Tex. App.—San Antonio Aug. 6, 2014, no pet.) (mem. op.) (applying appellants' interpretation). Assuming without deciding that Rule 42.3 authorizes dismissal for failure to comply with a trial court's orders, we will not exercise that authority here. The attachments to the motion reflect

that the district court has ordered appellants and Paul to pay Milligan $105,346 in sanctions for failure to comply with the district court's orders. The district court is in a better position to evaluate Mitte's allegations and whether further action is warranted. *Cf. In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004) (orig. proceeding) (stating that even though appellate courts have jurisdiction to entertain motion to hold party in contempt of trial court's unsuperseded judgment, "it remains the better practice to refer that motion to the trial court"). Accordingly, we deny the motion to dismiss under Rule 42.3.[5]

**STATUTORY STAY**

We first consider whether the appeal of the Confirmation Order automatically stayed further proceedings in this case. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b) (providing that interlocutory appeal generally stays commencement of trial "pending resolution of the appeal"). Appellants argue that the Appointment Order—which was rendered after appellants perfected their appeal of the Confirmation Order—is voidable for violating the stay. *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 87 n.1 (Tex. 2019) (orig. proceeding) (noting that "trial court action taken in violation of the stay is voidable").

Our analysis of this question begins with the text of the statute imposing the stay. Statutory construction is a question of law that we review de novo. *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 647 (Tex. 2020). Our goal in construing a statute is to give effect to the legislature's intent, "looking first to the 'plain and common meaning of the statute's words.'" *Id.* (quoting *MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475, 500 (Tex. 2010)). We do not interpret those words in isolation but rather "consider the context and framework of the entire statute and

[5] Our decision does not reflect an opinion on the propriety of the alleged conduct.

construe it as a whole." *Aleman v. Texas Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019) (citing *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 326 (Tex. 2017)). If the meaning of the text is clear, that meaning "is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Texas Workforce Comm'n v. Wichita County*, 548 S.W.3d 489, 492 (Tex. 2018).

Subsection 51.014(b) provides:

> An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) or in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

Tex. Civ. Prac. & Rem. Code § 51.014(b). Appellants argue that their appeal of the Confirmation Order is "[a]n interlocutory appeal under Subsection (a)" because their notice of appeal invoked Subsection 51.014(a)(1) and that it is not relevant whether the whether the Confirmation Order is, in fact, appealable under that subsection. Mitte responds that only an appeal from an order enumerated in Subsection 51.014(a) triggers the stay.

We agree with Mitte. Subsection (b) stays trial-court proceedings—generally only staying the commencement of trial—only when appeal is taken "under" Subsection 5.1014(a). *See id.* § 51.014(a). Subsection 51.014(a) authorizes an appeal from certain kinds of orders. *See id.* § 51.014(b). Applying the plain statutory language, only an interlocutory appeal authorized by Subsection 51.014(a) triggers the stay of trial provided for in Subsection (b).[6]

[6] Appellants argue that one court of appeals has held that action takes "after perfection of the interlocutory appeal" violated the stay regardless of the appeal's merits. *In re University of the Incarnate Word*, 469 S.W.3d 255, 256 (Tex. App.—San Antonio 2015, orig. proceeding). *Incarnate Word* does not help appellants because there was no question that that the appellant

*See, e.g., West Travis Cnty. Pub. Util. Agency v. CCNG Dev. Co.*, 514 S.W.3d 770, 773 (Tex. App.—Austin 2017, no pet.) ("This Court has jurisdiction over this interlocutory appeal only to the extent such jurisdiction is expressly granted by section 51.014(a) of the Texas Civil Practice and Remedies Code."); *ReadyOne Indus., Inc. v. Carreon*, 394 S.W.3d 717, 718 (Tex. App.—El Paso 2012, no pet.) ("The substance and function of the interlocutory order from which an appeal is taken controls our interlocutory jurisdiction.").

Next, appellants argue that the Confirmation Order is appealable under Subsection 51.014(a)(1), which authorizes a person to "appeal from an interlocutory order" that "appoints a receiver or trustee." *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1).[7] We strictly apply Section 51.014(a) because it is "a narrow exception to the general rule that interlocutory orders are not immediately appealable." *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011). For example, we have held that Subsection 51.014(a)(1)'s authorization to appeal an order that appoints a receiver or trustee does not authorize appeals of an order that appoints a successor receiver or trustee. *Haluska v. Haluska-Rausch*, No. 03-11-00312-CV, 2012 WL 254639, at *2 (Tex. App.—Austin Jan. 24, 2012, no pet.) (mem. op.); *see Boze v. Cartwright*, No. 01-19-00892-CV, 2020 WL 7776018, at *2 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (mem. op.) (citing cases reaching same holding).

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there had appealed from an order that is appealable under Subsection 51.014(a). *See id*. (citing Tex. Civ. Prac. & Rem. Code § 51.014(a)(8)).

[7] Appellants' notice of appeal also invoked Subsection 51.014(a)(2), which authorizes an appeal from an interlocutory order that "overrules a motion to vacate an order that appoints a receiver or trustee." Tex. Civ. Prac. & Rem. Code § 51.014(a)(2). Appellants later argued in a motion to abate their appeal of the Confirmation Order that Subsection (b) does not apply because "no 'motion to vacate an order that appoints a receiver' was filed in or ruled upon by the trial court." We agree that the record contains no motion to vacate the Confirmation Order and, thus, that this appeal is not under Subsection 51.014(a)(2).

Section 51.014 does not define "appoint." To determine an undefined statutory term's "common, ordinary meaning, we typically look first to their dictionary definitions and then consider the term's usage in other statutes, court decisions, and similar authorities." *Texas State Bd. of Exam'rs of Marriage & Fam. Therapists v. Texas Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017). To "appoint" means the act of placing someone in a particular position or role. *Appoint*, *Black's Law Dictionary* (11th ed., 2019) (defining "appoint" as "to choose or designate (someone) for a position or job, esp. in government"). On the other hand, confirmation means "[t]he act of giving formal approval; the ratification or strengthening of an earlier act." *Confirmation*, *Black's Law Dictionary* (11th ed., 2019). The Texas Arbitration Act illustrates this distinction. Separate provisions authorize a court to appoint a person to act as an arbitrator, *see* Tex. Civ. Prac. & Rem. Code § 171.086(a)(5) (authorizing court, on application of party, to "appoint one or more arbitrators so that an arbitration under the agreement to arbitrate may proceed"), and to confirm the actions of that person, *see id.* §§ 171.086(b)(3)(A) (authorizing court "to require the issuance and service under court order, rather than under the arbitrators' order, of a subpoena, notice, or other court process in support of the arbitration"), .087 ("Unless grounds are offered for vacating, modifying, or correcting an award . . . the court, on application of a party, shall confirm the award.").

Put simply, an order confirming the actions of an arbitrator is substantively distinct from an order appointing an arbitrator. Subsection 51.014(a)(1) authorizes appeals only from orders appointing an arbitrator, and we may not judicially amend the statute to add confirmation orders. *See Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535 (Tex. 2021) ("A court may not judicially amend a statute by adding words that are not contained in the language of the statute." (citing *Lippincott v. Whisenhunt*, 462 S.W.3d 507,

508 (Tex. 2015) (per curiam))). We hold that an order confirming an arbitrator's appointment of a receiver is not appealable under Subsection 51.014(a)(1). *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(1).

We consider next whether the Confirmation Order "appoints" a receiver. Whether an order is appealable "depends on the order's characteristics and function, not its title." *See In re Texas Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 205 (Tex. 2002) (orig. proceeding). In construing a court order, we begin with its literal text. *Kourosh Hemyari v. Stephens*, 355 S.W.3d 623, 626 (Tex. 2011) (per curiam). We construe the order as a whole and seek to give effect to every part. *See id.*; *In re Piatt Servs. Int'l, Inc.*, 493 S.W.3d 276, 281 (Tex. App.—Austin 2016, orig. proceeding [mand. denied]). The Confirmation Order provides:

> On the 31st Day of October, 2019[,] came [] to be heard [Mitte's] Application for Confirmation of an Arbitration Award. The Court has before it an Order Appointing Receiver . . . [.]. The Court notes that both the Applicant's Bond and the Receiver's Bond have been filed with the district clerk in this cause, and thus all bond requirements of the arbitrator's Order Appointing Receiver have been satisfied.
>
> After reviewing the moving papers and hearing the arguments of counsel, the Court is of the opinion that the Application has merit and should be GRANTED. It is, therefore,
>
> ORDERED that the Order Appointing Receiver attached hereto as Exhibit A is confirmed and adopted as [an] Order of this Court.
>
> It is further ORDERED that the appointed receiver, Greg Milligan, shall carry out his duties in conformance with the attached Order Appointing Receiver and shall be supervised by the Arbitrator, Suzanne Covington.
>
> It is further ORDERED that the Order Appointing Receiver Attached hereto as Exhibit A shall have the same force and effect as if issued by this Court.

Construed as a whole, the order ratifies—i.e., confirms—the arbitrator's appointment of Milligan as receiver but does not appoint the receiver itself. *Cf.* Tex. Civ. Prac. & Rem. Code

§ 171.086(b)(3)(A) (authorizing court to allow certain orders and processes issued by arbitrator to be issued and served as court's own order). We therefore conclude that the Confirmation Order is not appealable under Subsection 51.014(a)(1) and, thus, did not trigger the stay. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b). Because our conclusion also means that we lack appellate jurisdiction over the appeal from the Confirmation Order, we turn to the appeal of the Appointment Order. *See de la Torre v. de la Torre*, 613 S.W.3d 307, 310 (Tex. App.—Austin 2020, no pet.) ("Interlocutory orders are appealable only if made appealable by statute and only to the extent jurisdiction is conferred by statute.").

## APPOINTMENT ORDER

We now consider whether the district court abused its discretion by appointing a receiver. Appellants argue that the Appointment Order is unsupported by the pleadings and, in the alternative, that Mitte failed to demonstrate the existence of circumstances justifying a receivership.

### Standard of Review

We review a trial court's order appointing a receiver for an abuse of discretion. *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.). "Under an abuse of discretion standard, we defer 'to the trial court's factual determinations if they are supported by evidence,' but review legal determinations de novo." *Haedge v. Central Tex. Cattlemen's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020) (quoting *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011)). With respect to factual matters, a trial court does not abuse its discretion "if some evidence reasonably supports the court's ruling." *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020).

But "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.* at 917 (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

**Trial by Consent**

First, appellants argue that the Appointment Order is unsupported by the pleadings. *See* Tex. R. Civ. P. 301 ("The judgment of the court shall conform to the pleadings[.]"). The Appointment Order does not cite a specific statute authorizing the receivership but contains findings and conclusions that track the requirements of Section 11.404 of the Business Organizations Code. Appellants urge that appointing Milligan under Section 11.404 was error because Mitte's pleadings sought a receivership under Section 64.001 of the Civil Practice and Remedies Code. Mitte responds that the issue of a receivership under Section 11.404 was tried by consent. *See id.* R. 67 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). We agree with Mitte.

Trial by consent occurs "[w]hen both parties present evidence on an issue and the issue is developed during trial without objection[.]" *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009) (citing Tex. R. Civ. P. 67; *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445–46 (Tex. 1993)). An issue "is not tried by consent merely because evidence regarding it is admitted." *Bos v. Smith*, 556 S.W.3d 293, 306–07 (Tex. 2018). The reviewing court "must examine the record not for evidence of the issue, but rather for evidence of trial of the issue." *Id.* at 307 (citing *Sage St. Assocs.*, 863 S.W.2d at 446); *see Hofrock v. Hornsby*, No. 03-14-00505-CV, 2016 WL 3136857, at *4 (Tex. App.—Austin June 3, 2016, no pet.) (mem. op.) ("Trial by

consent exists in exceptional cases where the record clearly shows that the parties tried the unpleaded issue.").

Section 64.001 allows a court having jurisdiction to appoint a receiver in certain actions concerning a "property or fund" if the property or fund is "in danger of being lost, removed, or materially injured." *See* Tex. Civ. Prac. & Rem. Code § 64.001(a)–(b). Section 11.404 authorizes a court having jurisdiction over a domestic entity to "appoint a receiver for the entity's property and business" if "it is established" that:

> (A) the entity is insolvent or in imminent danger of insolvency;
>
> (B) the governing persons of the entity are deadlocked in the management of the entity's affairs, the owners or members of the entity are unable to break the deadlock, and irreparable injury to the entity is being suffered or is threatened because of the deadlock;
>
> (C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent; [or]
>
> (D) the property of the entity is being misapplied or wasted[.]

Tex. Bus. Orgs. Code § 11.404(a)(1).[8]

Appellants assert that Mitte's arguments and evidence "focused exclusively" on the requirements for a receiver under Section 64.001 rather than Section 11.404. While acknowledging that Mitte's evidence concerning the financial status of the Limited Partnerships and the actions of the governing persons is relevant to matters an applicant must prove to obtain a receivership under Section 11.404, appellants insist that it is equally relevant to Section 64.001's requirement that an applicant show that the property is "in danger of being lost, removed, or materially injured." *See* Tex. Civ. Prac. & Rem. Code § 64.001(b); *see also Bos*,

[8] There is no dispute that both limited partnerships are domestic entities. *See* Tex. Bus. Orgs. Code § 1.002(18) (defining "domestic entity").

556 S.W.3d at 307 ("The doctrine of trial by consent does not apply when the evidence of an unpleaded matter is relevant to the pleaded issues because it would not be calculated to elicit an objection." (quotation marks omitted)). Assuming that is true, Mitte also presented evidence and argued that alternative remedies were not adequate to protect its interest. Section 11.404 requires that an applicant prove that "all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402(a), are inadequate," Tex. Bus. Orgs. Code § 11.404(b)(3), but Section 64.001 does not have the same requirement, *see In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.) (explaining that applicant seeking receivership "pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists" (citing *Anderson & Kerr Drilling Co. v. Bruhlmeyer*, 136 S.W.2d 800, 806 (Tex. 1940); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. E Court, Inc.*, No. 03-02-00714-CV, 2003 WL 21025030, at *6 (Tex. App.—Austin May 8, 2003, no pet.) (mem. op.))); *accord In re Estate of Price*, 528 S.W.3d 591, 593 (Tex. App.—Texarkana 2017, no pet.). The record shows that the parties joined issue over whether an injunction prohibiting alienation of the Properties or a receivership over the Properties alone would be sufficient to protect Mitte's interests. Mitte presented evidence that appellants had refused to comply with every part of the arbitrator's order appointing a receiver and argued that a receivership was the only possible remedy. Milligan testified that he could not adequately preserve the values of the Properties without control over the Limited Partnerships and described the resistance he had already faced from appellants. Considering the whole record, we conclude that the record clearly shows "evidence of trial of the issue" of whether a receiver should be appointed over the Limited Partnerships under Section 11.404. *See Bos*, 556 S.W.3d at 307; *Pouya v. Zapa Ints., Inc.*, No. 03-07-00059-CV,

2007 WL 2462001, at *5 (Tex. App.—Austin Aug. 31, 2007, pet. denied) (mem. op.) (concluding equitable receivership was tried by consent even though applicant pled only statutory ground for receivership).

**Merits of Receivership**

We next consider whether Mitte carried its burden to show that circumstances justified appointment of a receiver. *See, e.g.*, *Spiritas v. Davidoff*, 459 S.W.3d 224, 232 (Tex. App.—Dallas 2015, no pet.) ("The burden to show the existence of circumstances justifying the appointment of a receiver rests on the party seeking the appointment."). The district court filed findings and conclusions that Mitte had established the existence of three of the predicate circumstances in Section 11.404(a) and that all of Subsection 11.404(b)'s requirements were met.[9] Appellants argue that the district court failed to properly appoint Milligan under Section 11.404 and, in the alternative, that Mitte failed to satisfy the requirements for a receivership under that section.

First, appellants argue that the district court abused its discretion because it failed to specify in the Appointment Order whether it had appointed Milligan under sections 11.404 or .405 of the Business Organizations Code. They urge that this alleged oversight undermines the order because the two statutes authorize a court to appoint a receiver in different circumstances and for different purposes. *See* Tex. Bus. Orgs. Code §§ 11.404 ("Appointment of Receiver to Rehabilitate Domestic Entity"), .405 ("Appointment of Receiver to Liquidate Domestic Entity;

[9] A court may but is not required to file findings of fact and conclusions of law in conjunction with an order appointing a receiver. *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.). "These findings and conclusions may be helpful in determining if the trial court exercised its discretion in a reasonable and principled fashion" but "are not binding" on the reviewing court. *Id.*

Liquidation"). Although there are several differences between the two statutes, the court's failure to specify which statute controls is not fatal to the Appointment Order. We determine the nature of an interlocutory order appointing a receiver "from its characteristics and function, not its title or form or the manner in which the parties characterize it." *In re Estate of Hallmark*, No. 11-18-00187-CV, ___ S.W.3d ___, ___, 2020 WL 5186615, at *3 (Tex. App.—Eastland Aug. 31, 2020, no pet.) (citing *Texas Nat. Res. Conservation Comm'n*, 85 S.W.3d at 205); *see Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) (noting that "it is the character and function of an order that determine its classification"). The findings and conclusions included in the order closely track the language of Section 11.404 but not of Section 11.405. Construed as whole, the Appointment Order appoints Milligan under Section 11.404. *See In re Estate of Hallmark*, ___ S.W.3d at ___, 2020 WL 5186615, at *3 (receivership order construed according to "characteristics and function" rather than "form").

Turning to the district court's findings and conclusions, we begin with its conclusion that the Limited Partnerships are "insolvent or in imminent danger of insolvency." *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A). The Business Organizations Code defines "insolvency" as "the inability of a person to pay the person's debts as they become due in the usual course of business or affairs." *Id.* § 1.002(40). The record reflects that both Limited Partnerships had recently failed to pay their debts as they became due. Lee testified that the lender who holds a mortgage on the First and Trinity Property posted it for foreclosure after WC 1st did not make payments on the loan. Milligan testified that the lender on the Third and Congress Property had accelerated the loan after several quarters of nonpayment by the partnership. Richey confirmed that the loan had been accelerated after "three or four" quarters of nonpayment. Appellants respond that neither entity is insolvent: WC 1st reached an agreement

with its lender to avoid foreclosure by placing certain cash in escrow for the lender, and WC 3rd and its lender executed a loan forbearance agreement in which the lender agreed not to exercise any foreclosure remedies until December 31, 2021.

Even if these agreements would preclude a conclusion that the Limited Partnerships are insolvent, there is significant evidence that both entities are in imminent danger of reaching that state. WC 1st made capital calls in 2013 and 2017 and refinanced its loan in 2015 to make its loan payments, and WC 3rd made two capital calls in 2016 for the same reason.[10] WC 1st's only source of income is leasing a parking lot and leasing other parts of the property for events connected with the South by Southwest festival, but the revenue has never been enough to cover expenses. Lee testified that the precise amount of the annual loss varies, and that WC 1st lost half a million dollars in 2018. WC 3rd pays approximately 1.2 million dollars a year on its loan but receives no regular revenue from the lease of the property. Lee testified that there "needs to be" additional capital calls for both Limited Partnerships to continue operating but that she was not aware of any plans for ones or for raising money from other sources. Additionally, Lee testified that she could not say whether either partnership was ever in possession of sufficient funds to pay the settlement agreement.

Appellants do not address this evidence but rather argue that Mitte failed to demonstrate an "imminent risk" of foreclosure of both properties. They contend this showing was necessary because the total value of the Properties is substantially greater than the Limited Partnerships' debts. In support of this argument, appellants rely on authorities applying a

[10] We discuss later how bank records indicate some of the funds gained from the refinancing were not applied to loan payments or the entity's other expenses but were transferred to another entity controlled by Paul. That evidence further supports the district court's insolvency finding.

statutory requirement that property must be at imminent risk of loss before a court may appoint a receiver to take charge of it. *See, e.g.*, *Furgerson v. First Nat'l Bank of Paris*, 218 S.W.2d 1019, 1021 (Tex. App.—Texarkana 1949, no writ) (holding same statutory requirement not met because even though mortgage was in default, "the record reflects that the mortgaged property was of much greater value than the debt and lien against it"); *Fisher v. First Nat'l Bank*, 112 S.W.2d 1085, 1087 (Tex. App.—Beaumont 1938, no writ) ("To obtain appointment of receiver under statute, plaintiff must show, not only interest in property, and defendant's past wrongful management thereof, but present danger of property being lost, removed, or materially injured unless receiver is appointed."). Section 11.404 similarly provides that a court may appoint a receiver only if circumstances exist that "necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties." Tex. Bus. Orgs. Code § 11.404(b)(1). But Section 11.404 makes the question of whether circumstances exist that necessitate appointment of a receiver distinct from whether an entity is insolvent. *See generally id.* § 11.404(a)(1)(A), (b)(1). Appellants' authorities do not persuade us that the test for insolvency is whether the value of the Properties exceed the value of the Limited Partnerships' debts rather than the statutory definition of the inability to pay debts as they become due in the usual course of business. *See In re Jobs.com, Inc.*, 283 B.R. 209, 214–15 (Bankr. N.D. Tex. 2002), *aff'd on other grounds sub nom.*, *Carrieri v. Jobs.com, Inc.*, 301 B.R. 187 (N.D. Tex. 2003), *aff'd*, 393 F.3d 508 (5th Cir. 2004) (rejecting argument that debtor was not insolvent "because the Debtor had assets in excess of its liabilities . . . [because] that is not the test for insolvency" under Section 11.404's predecessor statute). Deferring to the district court's factual determinations, we conclude the district court did not abuse its discretion by concluding

that the Limited Partnerships are either insolvent or in imminent danger of insolvency. *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A).

Even if the district court had abused its discretion by concluding that the Limited Partnerships are insolvent, its finding that the actions of the "governing persons of the [Limited] Partnerships are illegal, oppressive, or fraudulent," *see id.* § 11.404(a)(1)(C), is supported by the record. The legislature did not define what constitutes fraud for these purposes, so we "apply the definition most consistent with the context of the statutory scheme." *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016). Fraud has many dictionary definitions, the most relevant of which is "unconscionable dealing." *Fraud*, *Black's Law Dictionary* (11th ed. 2019); *see also Defraud*, *Black's Law Dictionary* (11th ed. 2019) ("To cause injury or loss to (a person or organization) by deceit"). At common law, fraud "means an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage." *Flanary v. Mills*, 150 S.W.3d 785, 795 (Tex. App.—Austin 2004, pet. denied); *accord In re L.M.I.*, 119 S.W.3d 707, 710 (Tex. 2003); *In re A.R.M.K.*, 588 S.W.3d 692, 700 (Tex. App.—Amarillo 2019, no pet.); *KMS Retail Rowlett, LP v. City of Rowlett*, 559 S.W.3d 192, 201 (Tex. App.—Dallas 2017), *aff'd*, 593 S.W.3d 175 (Tex. 2019); *In re E.P.*, 185 S.W.3d 908, 910 (Tex. App.—Austin 2006, no pet.).

First, the record supports a determination that the General Partners owed Mitte a legal duty arising out of both law and contract. The limited partnership agreements each required the general partner to "conduct the affairs of the Partnership in the best interests of the Partnership" and not to the benefit the general partner's other businesses "if such conduct also produces a detriment to the Partnership." In addition, the General Partners owed Mitte, as

limited partner, a fiduciary duty. *See Ingram v. Deere*, 288 S.W.3d 886, 892 n.1 (Tex. 2009) (recognizing, "as a matter of common law," general rule "that '[t]he relationship between . . . partners . . . is fiduciary in character'" (quoting *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998))); *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.) (observing that "relationship between general partner and limited partners in a limited partnership is fiduciary in nature"). A fiduciary relationship includes the duties of "utmost good faith, fairness, and honesty[.]" *Bohatch*, 977 S.W.2d at 545; *see AMI Ass'n Mgmt., Inc. v. Sprecher*, No. 01-15-00791-CV, 2017 WL 3526762, at *6 (Tex. App.—Houston [1st Dist.] Aug. 17, 2017, no pet.) (mem. op.) ("At a minimum, a fiduciary duty encompasses a duty of good faith and fair dealing, and it requires a party to place the interest of the other party before his own." (citing *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.))).

The district court could reasonably have concluded that the General Partners breached these duties. First, there is evidence that the General Partners represented that the Properties had been sold to harm Mitte's interests. Specifically, there is evidence that the representation that the $23 million sale price for the 1st and Trinity Property was "equal to the highest offer yet made on the property" was false. Milligan testified that he obtained a June 2018 letter of intent sent to WC 1st offering to purchase the First and Trinity property for $60 million. The district court admitted the letter of intent into evidence, and appellants have never disputed that they received the letter or that it was a genuine offer. Shaunessy testified that appellants never responded to his many requests for copies of the closing documents or similar documentary proof. Milligan testified that he was also unable to acquire the closing documents and that the county property records contain no trace of the transfer. The statement of

appellants' counsel at the beginning of the hearing that the Limited Partnerships were "still the owners" of the two properties was the first time Milligan knew "for sure" that the sale had not gone through. The district court could reasonably conclude that the General Partners misrepresented that the Properties had been sold to avoid the receivership and so that Mitte would accept less than the true value of its interest in the Limited Partnerships.

The district court could also have reasonably concluded that the general partner of WC 1st mismanaged the funds entrusted to it. WC 1st refinanced the loan on the 1st and Trinity Property in December 2015, yielding $3 million. Lee testified by deposition that the entire sum was expended on the partnership's "operating expenses." WC 1st's bank records show that $2.5 million was deposited on December 15, 2015, and that almost the entire sum was transferred to WCCG in a series of transactions ending the following month. Milligan testified that he found no documentation that the transfers were payment of a debt to WCCG, and he could never discover another business-related reason for the transfers. Under these circumstances, the transfers support a conclusion that the general partner breached its duties. *See In re Estate of Benson*, No. 04-15-00087-CV, 2015 WL 5258702, at *6 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd) (mem. op.) (holding that trustee's evidence of undisclosed transfer of $4.76 million supported finding of breach of duty to corporation); *see also Fitzerman v. Classic Americana, LLC*, No. 05-15-00528-CV, 2016 WL 1450165, at *10 (Tex. App.—Dallas Apr. 13, 2016) (mem. op.), *supplemented*, 2016 WL 1701345 (Tex. App.—Dallas Apr. 27, 2016, no pet.) (mem. op.) (holding evidence of wire transfers to person uncontacted with company's business was some evidence of fraud for purposes of exemplary damages).

The evidence of unexplained transfers also supports a conclusion that the General Partners may have engaged in illegal conduct. In this context, fraudulent and illegal conduct are related:

> Illegal and fraudulent actions in corporate management share considerable similarities and in some circumstances overlap—fraud generally is itself "illegal," and may subject the actor to criminal liability. *See, e.g.*, Tex. Penal Code, ch. 32 (fraud), ch. 35 (insurance fraud), ch. 37 (perjury and other falsification). Fraudulent and illegal actions in this context pose a danger to the corporation itself.

*Ritchie v. Rupe*, 443 S.W.3d 856, 869 (Tex. 2014).[11] It is an offense under Chapter 32 of the Penal Code for a person to "misappl[y] property he holds as a fiduciary . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." Tex. Penal Code § 32.45(b). Each general partner acted in a fiduciary capacity by virtue of their obligations under the limited partnership agreement. *See Berry v. State*, 424 S.W.3d 579, 585 (Tex. Crim. App. 2014) (explaining that "one acts in a 'fiduciary capacity' for purposes of the misapplication statute if his relationship with another is based . . . on a justifiable expectation that he will place the interests of the other party before his own."). And the district court could reasonably conclude that transferring money to WCCG rather than using it to pay the partnership's operating expenses violated the limited partnership agreement and so constituted a misapplication of that property. *See* Tex. Penal Code § 32.45(a)(2)(A)

[11] *Ritchie* interpreted Section 11.404's predecessor statute, former article 7.05 of the Texas Business Corporations Act, which authorized a court to appoint a receiver if the applicant established "that the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent[.]" *See* Act of Mar. 30, 1955, 54th Leg., R.S., ch. 64, art. 7.05, 1955 Tex. Gen. Laws 239, 290–91, *amended by* Act of May 3, 1961, 57th Leg., R.S., ch. 169, 1, 1961 Tex. Gen. Laws, 319, 319 (formerly Tex. Bus. Corp. Act art. 7.05), *expired* Jan. 1, 2010, Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 2, 2003 Tex. Gen. Laws 267 (current version at Tex. Bus. Orgs. Code § 11.404).

(providing that "misapply" means to "deal with property contrary to[] an agreement under which the fiduciary holds the property").

Based on the record before us, we conclude that the district court did not abuse its discretion by concluding that the Limited Partnerships were insolvent or in imminent danger of insolvency and that the actions of the governing persons of the Limited Partnerships were oppressive, illegal, or fraudulent. *See* Tex. Bus. Orgs. Code § 11.404(a)(1)(A), (C).

We now turn to whether the district court abused its discretion by concluding that Mitte demonstrated that other available "legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity," were "inadequate." *See id.* § 11.404(b)(3); *see also Perry v. Perry*, 512 S.W.3d 523, 527 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("The appointment of a receiver is a harsh, drastic, and extraordinary remedy, which must be used cautiously."). Appellants argue that the district court abused its discretion because there were several alternative remedies available to protect Mitte's interest. Mitte responds that the record supports a conclusion that no other remedies would have adequately protected Mitte's interest.

We agree with Mitte. First, appellants argue that no legal or equitable remedies were necessary at all because the value of the Properties so far exceed the Limited Partnerships' debts that a sale—even a foreclosure sale—would yield Mitte a profit exceeding the value of its interests in the Properties. But this assumes that the Properties would sell for or near fair market value at a foreclosure sale. It is well settled that "evidence of the price paid in a foreclosure sale is no evidence of fair market value because there is not a willing seller who . . . is under no necessity of selling." *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 785 (Tex. 2020) (internal quotation marks omitted); *see Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1,

3 (Tex. 2014) (discussing foreclosure sale where property sold for approximately half fair market value). Appellants do not explain why a foreclosure sale of the Properties would be different.

As an alternative, appellants argue that an injunction prohibiting alienation of the Properties—essentially the same relief afforded by this Court's stay order—would have been adequate protection. They argue such relief would have sufficed because there was no attempt to alienate the Properties when this Court's stay order was in place. They also point out that they offered several times in the district court to stipulate to such an injunction. Although appellants are correct that the record shows no further attempts to alienate the Properties after this Court's stay order, that does not necessarily mean that an injunction would have sufficed to protect Mitte's interest. The evidence supports a finding that appellants misrepresented that the Properties had been sold to evade the arbitrator's appointment of a receiver and to deprive Mitte of the true value of its interests. Moreover, Milligan testified that appellants had consistently refused his requests for information that the Confirmation Order expressly required them to turn over, including bank records. It was only Milligan's status as receiver that enabled him to obtain WC 1st's bank records directly from the financial institution and discover the unexplained transfers to WCCG. All this evidence reasonably supports a finding that an injunction prohibiting alienation of the Properties would not have been an adequate remedy.

The same conduct could also reasonably support a finding that a receivership over the Properties alone would be inadequate. Additionally, Milligan testified that he would be unable to discharge his duties to conserve the value of the Properties without control of the Limited Partnerships because he must be able to access the entities' books and records, negotiate with tenants, and conduct the entities' day-to-day affairs. And given the evidence of the financial status of the Limited Partnerships and their previous record of nonpayment, the district

court could have reasonably concluded that lesser remedies would have been insufficient to protect against the possibility of foreclosure.

Appellants respond that the risk of foreclosure stems from the receivership itself because the loan documents state that creation of a receivership over the Limited Partnerships or their property constitutes a default. Additionally, the loan forbearance agreement between WC 1st and its lender is expressly contingent on Paul retaining control of the general partner. While the receivership may constitute a default, the Appointment Order also prohibits lenders from foreclosing on the Properties without court approval.[12] The district court could also have considered that appellants failed to post a supersedeas bond in an amount that is a small fraction of appellants' valuation of the Properties. Given the financial status of the Limited Partnerships and the conduct of the General Partners, the district court could have reasonably concluded that a receivership would not greatly contribute to the risk of loss.

While a receivership over the Limited Partnerships might not be a perfect remedy, the record reasonably supports the district court's conclusion that "all other available legal and equitable remedies, including the appointment of a receiver for specific property" of the

[12] As proof that Milligan's appointment caused a default on the Third and Congress Property, appellants cite to a default notice from the lender dated June 9, 2020—the day after the district court rendered the supplemental receivership order. Appellants attached that notice to their motion seeking review of further orders. Mitte has moved to strike the notice and the portion of appellants' brief that relies on it because the notice was not before the district court at the time of its ruling. In the alternative, Mitte asks to supplement the record with additional evidence that would put the notice in context. Mitte is correct that "[a]n appellate court reviews the actions of the trial court based solely on the record before the court at the time it makes its ruling." *In re Methodist Primary Care Grp.*, 553 S.W.3d 709, 720 n.2 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (citing *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 n.9 (Tex. 1990) (orig. proceeding)). Instead of striking the notice and the portions of appellants' brief that rely on it, we will simply not consider the notice. We deny the motion to strike and dismiss the motion to supplement the record as moot.

Limited Partnerships were inadequate to protect Mitte's interest. *See* Tex. Bus. Orgs. Code § 11.404(b)(3).

We overrule appellant's challenges to the Appointment Order.

**CONCLUSION**

Having concluded that the Confirmation Order is not an appealable interlocutory order, we dismiss cause No. 03-19-799-CV for want of jurisdiction. We affirm the Appointment Order.

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Edward Smith, Justice

Before Chief Justice Byrne, Justices Baker and Smith

No. 03-19-799-CV: Dismissed for Want of Jurisdiction

No. 03-19-905-CV: Affirmed

Filed: September 30, 2021