No. 08-22-00225-CV

IN THE EIGHTH COURT OF APPEALS
EL PASO, TEXAS

WC 4TH AND RIO GRANDE, LP,
Appellant,
v.
LA ZONA RIO, LLC,
Appellee.

On Appeal from the 345th District Court of Travis County, Texas
Trial Court Cause No. D-1-GN-20-000195

APPELLEE'S REPLY IN SUPPORT OF MOTION FOR REHEARING

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INTRODUCTION

Despite its attempts, Appellant WC 4th and Rio Grande, LP ("WC 4th") cannot cure the error in the Court's Opinion. Only the Court can do that—and it should. Since Appellee La Zona Rio, LLC filed its Motion for Rehearing, developments outside of this district—prompted by WC 4th and its affiliates in both trial and appellate courts—have only confirmed the uncertainty and confusion that the Opinion spawned by impermissibly wading into another district's province. WC 4th's skewed interpretations of case law, the record, and the Court's Opinion further confirm the need for remediation. The Court should grant La Zona Rio's Motion for Rehearing and affirm.[1]

ARGUMENT

I. WC 4th's New Attempts to Justify the Court's Consideration of its Improper Collateral Attack are Baseless.

WC 4th no longer disputes (and appears to concede) that this appeal is a collateral attack on the Receivership Order entered by a Harris County trial court and affirmed in its entirety by the First Court of Appeals. Resp. at 7-8. Nor does WC 4th dispute that, after the Court issued its Opinion, the First Court denied World

[1] There is overlap between the issues raised in La Zona Rio's Motion for Rehearing in *WC 4th and Rio Grande, LP v. La Zona Rio, LLC,* No. 08-22-00073-CV ("*La Zona Rio I*") and in the instant case ("*La Zona Rio II*"). WC 4th's response to the motion for rehearing in this appeal is also substantially similar to its response to the motion for rehearing in *La Zona Rio I*. For the Court's convenience, La Zona Rio incorporates herein its arguments in its *La Zona Rio I* reply and addresses here the distinct aspects of WC 4th's response.

Class's motion for rehearing, and the Harris County court issued another order confirming that the Receiver's actions in *this case* were proper. *See* Mot. Judicial Not., Aug. 17, 2023, at 4. Instead, WC 4th makes a new argument that it "can collaterally attack the Receivership Order because it is void as to [WC 4th]." Resp. at 8. But that contention was waived because it was not raised until WC 4th's merits reply. *See Reyes v. Burrus*, 411 S.W.3d 921, 923 n.2 (Tex. App.—El Paso 2013, pet. denied); *Plasma Fab, LLC v. BankDirect Cap. Fin., LLC*, 468 S.W.3d 121, 134 n.7 (Tex. App.—Austin 2015) ("[A]n issue raised for the first time in a reply brief is waived and need not be considered by an appellate court."), *aff'd*, 519 S.W.3d 76 (Tex. 2017).

That contention is also meritless. WC 4th does not argue (and cannot on this record) that the Harris County trial court lacked jurisdiction or capacity to act, which is a prerequisite to establishing the Receivership Order is void. *See 1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 365 (Tex. App.—El Paso 2022, no pet.). And the Receivership Order cannot be void because WC 4th's collateral attack "does not go to the jurisdiction of [the Harris County trial court][.]" *See Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973). In other words, "if the [Harris County trial court] incorrectly determined [the Receiver's authority], this was merely an error … and *does not render the* [*Receivership Order*] *void*." *Id.* (emphasis added).

As a fallback, WC 4th attempts to defend the Court's erroneous application of a privity requirement. Resp. at 10. But Texas case law is clear that privity is not required. *See Employers Casualty Company v. Block*, 744 S.W.2d 940, 943 (Tex. 1988) ("Part of the court of appeals' error arises from its failure to distinguish between collateral attack of a final judgment and collateral estoppel to relitigate specific issues."); *Sierra Club*, 495 S.W.2d at 882; *Worley v. Avinger,* 2019 WL 3729508, at *6 (Tex. App.—Dallas Aug. 8, 2019, pet. denied) (rejecting collateral attack brought by parties that were not in privity with parties in litigation resulting in judgment being attacked).

And even if privity was required to render a collateral attack improper (it is not), WC 4th's interests were represented in the Harris County post-judgment receiver litigation (by World Class *and itself*), and the record establishes World Class's membership interest in WC 4th. *See WC 4th & Rio Grande, LP v. La Zona Rio, LLC*, 2023 WL 3672025, at *2 (Tex. App.—El Paso 2023, no pet. h.) ("*La Zona Rio II*"); Appellee.Br.21, Mot. at 8-9, 15; *see also, e.g.*, CR.213, 582, 622, 640-41, 708, 1097; 2.RR.1-31. That is all that is required. *HECI Expl. Co. v. Need*, 982 S.W.2d 881, 890 (Tex. 1998) ("[G]enerally, parties are in privity … when … their interests are represented by a party to the action.").

For these reasons and those stated in Part I of the Reply in Support of the First Motion, App.A, which La Zona Rio incorporates fully herein, the Court erred in considering WC 4th's collateral attack on the validity of the Receivership Order.

II. The Court Erred in Applying a De Novo Standard of Review to the Trial Court's Implicit Factual Findings, Which are Supported by the Record.

WC 4th concedes that the Court must review factual findings—whether express or implied—for an abuse of discretion. *See* Resp. at 13. But WC 4th contends that the Court "did not err in its [de novo] standard of review." *Id*. at 12. To support this contention, WC 4th mischaracterizes the questions at issue, the record, the case law, and the Rule 12 requirements. Specifically, WC 4th claims there is *nothing* in this record to support a finding that World Class had an interest in WC 4th that would allow the Receiver to take the challenged actions pursuant to the Receivership Order. *Id.* That is false. As this Court noted, the record contains "evidence that WCCG was linked to Rio Grande, LP." *La Zona Rio II*, 2023 WL 3672025, at *2; Appellee.Br.21; *see also, e.g.*, CR.213, 582, 622, 640-41, 708, 1097; 2.RR.1-31. But the Court erred in nevertheless failing to defer to the trial court's findings that are supported by that evidence. *See Haedge v. Cent. Tex. Cattlemen's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020) (per curiam) (the highly deferential abuse of discretion standard requires a court to "defer to the trial court's factual determinations if they are supported by evidence.").

WC 4th's attempts to obfuscate the record are disingenuous at best. WC 4th contends there is nothing in the record to "establish" that WC 4th and World Class are not "distinct legal entities." Resp. at 3. But that is irrelevant. *See 1st & Trinity Super Majority*, 657 S.W.3d at 365 (finding collateral attack improper even if "they all may be distinct corporate entities"). The Receivership Order requires World Class to turn over any "*interests* of [World Class] in any business or venture" and authorizes the Receiver to "seize the *membership interest* of any Limited Liability Company in which [World Class] is a member." CR.558, 561 (emphasis added). WC 4th likewise contends that the record shows it has a general partner and three limited partners. But again, the record clearly establishes that World Class is the general partner and ultimate manager of WC 4th. CR.213, 218.

The only rebuttal "evidence" WC 4th offers is a misleading, self-serving and conclusory declaration from Nate Paul. Resp. at 16 (referencing CR.892-93). Mr. Paul's declaration does not address the ownership chain of WC 4th, let alone explain how the evidence of World Class's membership interest in WC 4th is wrong. CR.892. That affidavit is inadequate on its face for a variety of reasons. *See* Appellee.Br.23-25. It is also untimely because it was submitted for the first time as an attachment to WC 4th's motion to reconsider the Rule 12 ruling. Appellee.Br.16-18; CR.233-58, 880-93; *see PNP Petroleum I, LP v. Taylor,* 438 S.W.3d 723, 731 (Tex. App.—San Antonio 2014, pet. denied) (a court acts "within its discretion in

refusing to consider … new evidence attached to [a] motion to reconsider[.]"). WC 4th otherwise does not dispute that its Rule 12 motion was not sworn (as the Court properly recognized, *La Zona Rio II*, 2023 WL 3672025, at *1), which—regardless of the standard of review applicable to the authority issue—necessarily requires affirmance. *Watson v. City of San Marcos*, 2023 WL 3010938, at *2 (Tex. App.—Austin Apr. 20, 2023, pet. denied) ("As Rule 12 expressly states, a party's motion to show authority must be sworn," so, under an abuse of discretion standard, "the trial court properly denied the motion").

The existence of limited partners does not change this analysis. Their existence is irrelevant to the Receiver's authority to step into the shoes of the general partner of WC 4th. WC 4th contends that Texas law does not allow a receivership order to authorize a receiver to take possession of property held by "unaffiliated limited partners." Resp. at 2-3, 6, 15-16. But the Receivership Order authorizes the Receiver to take control of World Class's membership interest in WC 4th. That membership interest is as the general partner of WC 4th. The Receivership Order gives the Receiver the same rights in the context of the partnership that World Class had as general partner. *See* CR.73, 188. The rights and remedies of the limited partners are no less and no more under the Receiver than they were under World Class. This Court may disagree with the Receivership Order's grant of authority in that respect, but that issue was already appealed and affirmed. And the trial court

recently affirmed again that the Receiver's actions *in this case* were appropriate—that order is also being appealed to the Houston Courts of Appeals *by WC 4th*. *See* Reply to Mot. Judicial Not., Sept. 20, 2023, at 2. The trial court's denial of WC 4th's defective Rule 12 motion and its subsequent motion for reconsideration should be affirmed.

For these reasons and those stated in Parts II and III of the Reply in Support of the First Motion, App.A, which La Zona Rio incorporates fully herein, the Court erred in applying a de novo standard of review to the trial court's findings, which are supported by the record.

CONCLUSION

For the reasons explained above, La Zona Rio respectfully requests that this Court grant its Motion for Rehearing and affirm the challenged rulings. La Zona Rio also requests any other relief to which it is entitled.

Respectfully submitted,

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This brief complies with the length limitations of TEX. R. APP. P. 9.4(i) because this motion consists of 1716 words, excluding the parts of the motion exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Jeremy W. Dunbar*
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APPENDIX

TAB A

No. 08-22-00073-CV

IN THE EIGHTH COURT OF APPEALS
EL PASO, TEXAS

WC 4TH AND RIO GRANDE, LP,
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On Appeal from the 345th District Court of Travis County, Texas
Trial Court Cause No. D-1-GN-20-007177

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INTRODUCTION

Despite its attempts, Appellant WC 4th and Rio Grande, LP ("WC 4th") cannot cure the error in the Court's Opinion. Only the Court can do that—and it should. Since Appellee La Zona Rio, LLC filed its Motion for Rehearing, developments outside of this district—prompted by WC 4th and its affiliates in both trial and appellate courts—have only confirmed the uncertainty and confusion that the Opinion spawned. WC 4th's skewed interpretations of case law, the record, and the Court's Opinion further confirm the need for remediation. The Court should grant La Zona Rio's Motion for Rehearing and affirm.

ARGUMENT

I. WC 4th's New Attempts to Justify the Court's Consideration of its Improper Collateral Attack are Baseless.

WC 4th no longer disputes (and appears to concede) that this appeal is a collateral attack on the Receivership Order entered by a Harris County trial court and affirmed in full by the First Court of Appeals. Resp. at 5. Nor does WC 4th dispute that, after the Court issued its Opinion, the First Court denied World Class's motion for rehearing, and the Harris County court issued another order confirming that the Receiver's actions in *this case* were proper. *See* Mot. Judicial Not., Aug. 17, 2023, at 4. Instead, WC 4th makes a new argument that it "can collaterally attack the Receivership Order because it is void as to [WC 4th]." Resp. at 6. But that contention is waived and meritless. As a fallback, WC 4th also attempts to defend

the Court's erroneous application of a privity requirement. Resp. at 7. But WC 4th ignores binding case law, and the evidence establishes privity.

A. *WC 4th waived its contention that the Receivership Order is void, and its argument is meritless in any event.*

As a threshold matter, WC 4th did not argue that the Receivership Order is void until its merits reply brief. *See generally* Appellant.Br.; Reply.Br.23. The argument is therefore waived. *See Reyes v. Burrus*, 411 S.W.3d 921, 923 n.2 (Tex. App.—El Paso 2013, pet. denied); *Plasma Fab, LLC v. BankDirect Cap. Fin., LLC*, 468 S.W.3d 121, 134 n.7 (Tex. App.—Austin 2015) ("[A]n issue raised for the first time in a reply brief is waived and need not be considered by an appellate court."), *aff'd*, 519 S.W.3d 76 (Tex. 2017).

WC 4th's new argument is also meritless. WC 4th does not cite to a single case supporting its repeated but conclusory assertion that "the Receivership Order is void." *See* Resp. at 3 ("In collateral attack terms, that judgment [] is void[.]"); 6 (same). And its attempts to distinguish La Zona Rio's binding case law fall flat; those cases only confirm that the Receivership Order cannot, as a matter of law, be void. *See id.* at 7 n.4.

As WC 4th points out, *id.* at 5, in *Browning v. Prostok*, the Texas Supreme Court held that "[o]nly a void judgment may be collaterally attacked." 165 S.W.3d 336, 346 (Tex. 2005). The court also made clear that a judgment is "only void when it is apparent that the court rendering judgment had no jurisdiction

of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Id.* (internal quotations omitted). WC 4th does not argue (and cannot on this record) that the Harris County court lacked jurisdiction or capacity to act, which is a prerequisite showing that WC 4th must make. *See Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). WC 4th's argument that the Receivership Order is "void and subject to collateral attack [therefore] lacks merit." *1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 365 (Tex. App.—El Paso 2022, no pet.).

Nor did this Court hold that the Harris County court lacked jurisdiction or capacity to act; the Court never addressed whether the Receivership Order is void. *See WC 4th & Rio Grande, LP v. La Zona Rio, LLC*, 2023 WL 3663550, at *6-8 (Tex. App.—El Paso May 25, 2023, no pet. h.) ("*La Zona Rio I*"). Rather, the Court held that, under *Pajooh v. Royal West Investments LLC, Series E*, 518 S.W.3d 557 (Tex. App.—Houston [1st Dist.] 2017, no pet.) and Texas Business Organizations Code section 153.256, "the Receivership Order could not have authorized" the Receiver to take the actions it took below. *La Zona Rio I*, 2023 WL 3663550, at *7.

But whether the Receivership Order "could have authorized" the Receiver to take the challenged actions is the exact brand of question that the Texas Supreme Court has held constitutes an improper collateral attack. *See Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973). Importantly, the court in *Sierra*

Club reasoned that such an attack was improper specifically because, as here, it "does not go to the jurisdiction of [the original court] but was a matter to be resolved by that court in the exercise of its discretion." *Id.* In other words, "if the [Harris County trial court] incorrectly determined [the Receiver's authority], this was merely an error … and *does not render the* [*Receivership Order*] *void*." *Id.* (emphasis added). Indeed, in an odd attempt to distinguish *Sierra Club*, WC 4th effectively concedes that the Receivership Order cannot be void: "[WC 4th] does not challenge the Harris County District Court's jurisdiction to enter the Receivership Order." Resp. at 7 n.4. WC 4th's new "void" argument is waived and meritless.

B. *There is no privity requirement, and the record supports privity in any event.*

As a hedge, WC 4th seems to alternatively argue that, even if the Receivership Order is not void, the Court was correct in endorsing WC 4th's impermissible collateral attack because World Class and WC 4th were not "in privity." *Id.* at 8. But WC 4th confuses the issue and misstates the case law and the record. WC 4th offers no response to the accepted principle that—unlike the estoppel doctrine the Court relied on—the doctrine prohibiting collateral attacks has no privity requirement. *Id*. at 6-9 (collecting cases). Nor does WC 4th meaningfully distinguish La Zona Rio's binding case law.

WC 4th implies in a footnote that *Employers Casualty Company v. Block*, 744 S.W.2d 940 (Tex. 1988) has no applicability because the Texas Supreme Court ultimately affirmed. Resp. at 7 n.4. But the court affirmed for "reasons different from those expressed by the court of appeals," finding that, as in this case, the court of appeals erred in "fail[ing] to distinguish between collateral attack of a final judgment and collateral estoppel to relitigate specific issues." *Emps. Cas. Co.*, 744 S.W.2d at 941, 943.

In the same footnote, WC 4th also mischaracterizes *Sierra Club's* holding, contending that the court "disallowed the collateral attack there because it was an attack on the jurisdiction of the district court." Resp. at 7 n.4. But again, the court disallowed the collateral attack for the opposite reason (and the same reason this Court should disallow WC 4th's): the attack in *Sierra Club* "d[id] *not* go to the jurisdiction" of the court that issued the judgment, so the judgment was *not* "void" and the attack was thus improper. 496 S.W.2d at 882 (emphasis added). WC 4th also wholly ignores that *Sierra Club* and other cases rejected collateral attacks even when none of the challenging parties were in privity with the parties in the direct litigation. *Id.*; *see also Worley v. Avinger*, 2019 WL 3729508, at *6 (Tex. App.—Dallas Aug. 8, 2019, pet. denied). The collateral estoppel doctrine's privity requirement does not apply. *See* Mot. at 6-9.

And even if it did, WC 4th mischaracterizes the record. WC 4th contends that the only evidence of privity was that World Class and WC 4th "are represented by the same counsel … making the same arguments against the same Receivership Order." Resp. at 8. But WC 4th ignores the evidence in the record establishing its connection to World Class via WC 4th's general partner. *See* Mot. at 15; CR.214, 243, 286. WC 4th also ignores that World Class was (and is) actively challenging in the Harris County trial court the Receiver's authority to act *on WC 4th's behalf* in this litigation, arguing that the court "abused its discretion by authorizing the [R]eceiver" to take the actions being challenged here. Mot. at 8.

Under Texas Supreme Court precedent, that suffices. *See HECI Expl. Co. v. Need*, 982 S.W.2d 881, 890 (Tex. 1998) ("[G]enerally, parties are in privity … when … their interests are represented by a party to the action."). WC 4th also ignores its own representations in this appeal that its interests were being represented by World Class and are currently being represented *by itself*, Mot. at 9, including in WC 4th's direct appeal of the Harris County trial court's recent order that confirms the Receiver had the authority to take the challenged actions here. *See* Reply to Mot. Judicial Not., Sept. 20, 2023, at 2. Regardless of privity, WC 4th's collateral attack is impermissible.

II. The Court Erred in Applying a De Novo Standard of Review to the Trial Court's Implicit Factual Findings, Which are Supported by the Record.

WC 4th concedes that the Court must review factual findings—whether express or implied—for an abuse of discretion. *See* Resp. at 11. That highly deferential standard requires the Court to "defer to the trial court's factual determinations if they are supported by evidence." *Haedge v. Cent. Tex. Cattlement's Ass'n*, 603 S.W.3d 824, 827 (Tex. 2020) (per curiam). As discussed in the Motion for Rehearing (Part III), there is evidence in the record supporting the trial court's conclusion that, as the Court put it, "[the Receiver] had the authority as general partner of Rio Grande, LP to manage, operate, and even transact [WC 4th's] assets"—including the Receivership Order itself, which says just that. Mot. at 15 (quoting *La Zona Rio I*, 2023 WL 3663550, at *8). Nevertheless, WC 4th contends the Court "did not err in its [de novo] standard of review." Resp. at 10. But WC 4th mischaracterizes the pertinent inquiry, the case law, and the Rule 12 requirements.

First, WC 4th incorrectly frames the inquiry as a legal question, asking whether "the plain language of the Receivership Order authorizes the Receiver's actions if World Class does not have any interest in [WC 4th]." Resp. at 12. But that ignores the prerequisite factual question of World Class's interest in WC 4th, which is supported by evidence showing the connection via WC 4th's general partner. What authority the Receivership Order grants the Receiver over entities in which World Class has no interest is immaterial. Instead, the question of whether

the Receiver "had the authority as the general partner of [WC 4th] to manage, operate, and even transact the partnership's assets" is factual, not legal. *La Zona Rio I*, 2023 WL 3663550, at *8.

Second, WC 4th doubles down on its reliance on *Penny v. El Patio, LLC* to support its proposition that the question of the Receiver's authority in this case is a question of law. Resp. at 11. But WC 4th ignores *Penny's* facts. There, the plaintiff challenged the authority of the defendant's counsel (retained by the defendant's operating manager), contending counsel's retention did not comply with the defendant's operating agreement. *Penny v. El Patio, LLC*, 466 S.W.3d 914, 919 (Tex. App.—Austin 2015, pet. denied). To resolve the issue, the court interpreted the authority provisions of the operating agreement to determine if the operating manager was authorized to hire legal counsel. *Id.* at 920. That interpretive question was obviously one of law, separate from the threshold factual question at issue here. No one disputes the interpretation of the Receivership Order. As the Court recognized, the pertinent question is instead whether World Class had an interest in WC 4th such that the Receiver could act on its behalf pursuant to the Receivership Order. Mot. at 14. That is clearly a question of fact, subject to review for abuse of discretion.

Third, even ignoring the authority question, WC 4th does not dispute that an abuse of discretion standard applies to whether WC 4th met the threshold Rule 12

procedural requirements in the first instance. *Watson v. City of San Marcos*, 2023 WL 3010938, at *2 (Tex. App.—Austin Apr. 20, 2023, pet. denied). Nor does WC 4th dispute that it did not meet those requirements because its Rule 12 motion was not sworn (as the Court properly found). Resp. at 15 n.9; *see also La Zona Rio I*, 2023 WL 3663550, at *2 n.3. The trial court's findings should have been affirmed for that reason alone.[1] *See Watson*, 2023 WL 3010938, at *2 ("As Rule 12 expressly states, a party's motion to show authority must be sworn," so, under an abuse of discretion standard, "the trial court properly denied the motion").

CONCLUSION

For the reasons explained above, La Zona Rio respectfully requests that this Court grant its Motion for Rehearing and affirm the challenged rulings. La Zona Rio also requests any other relief to which it is entitled.

Respectfully submitted,

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[1] The Court should reject WC 4th's attempt to excuse this dispositive defect. The unsupported idea that "the dismissal occurred without notice to [WC 4th]" is irrelevant to whether WC 4th complied with Rule 12's requirements. Resp. at 15. WC 4th admits that it filed its Rule 12 motion "*before* the dismissal," *id.*, and nevertheless failed to provide a verification, as required. *See* TEX. R. CIV. P. 12. The Court's inquiry should end there.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i) because this motion consists of 2247 words, excluding the parts of the motion exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Jeremy W. Dunbar*
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