

**CAUSE NO. DC-13-02857-E**

**TIC N. CENTRAL DALLAS 3, LLC, et al.,** § **IN THE DISTRICT COURT**  
§  
**Plaintiffs,** §  
§  
v. § **101<sup>ST</sup> JUDICIAL DISTRICT**  
§  
**ENVIROBUSINESS, INC., Individually and** §  
**d/b/a EBI CONSULTING, et al.,** §  
§  
**Defendants.** § **DALLAS COUNTY, TEXAS**

**DEFENDANT BOBBY CARLISLE'S**  
**MOTION TO DISMISS FOR LACK OF JURISDICTION**

Defendant Bobby Carlisle (“Carlisle”) asks the Court to dismiss Plaintiffs’ suit for lack of jurisdiction.

**I. Introduction**

Plaintiffs have brought a series of fraud and misrepresentation claims against defendants both individually and as assignees of TIC N. Central Dallas, LLC (“TIC N. Central”) – the entity that sold tenant-in-common interests in the Property (as hereinafter defined) to Plaintiffs through an investment plan outlined in a private placement memorandum. Plaintiffs lack standing to sue on the claims alleged in either capacity.<sup>1</sup>

The “LLC Plaintiffs”<sup>2</sup> lack standing to sue in an individual capacity because the alleged misrepresentations and nondisclosures that form their basis of the claims occurred at a time when

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<sup>1</sup> All Plaintiffs except Michael Dougherty are limited liability companies, LLCs. As explained more fully in this Motion, Defendant Bobby Carlisle’s first argument, relating to standing for Plaintiffs’ claims brought individually, does not apply to Plaintiff Dougherty’s claim as pled in the Second Amended Petition, but the second argument, relating to standing for Plaintiffs’ claims brought as assignees, does. Henceforth, this Motion’s reference to “Plaintiffs” is inclusive of Plaintiff Dougherty. When specifically discussing the standing issue that is inapplicable to him, this Motion will use the term “LLC Plaintiffs.”

<sup>2</sup> The “LLC Plaintiffs” are defined as TIC N. Central Dallas 3, LLC; TIC N. Central Dallas 4, LLC; TIC N. Central Dallas 7, LLC; TIC N. Central Dallas 8, LLC; TIC N. Central Dallas 9, LLC; TIC N. Central Dallas 10, LLC; TIC N. Central Dallas 11, LLC; TIC N. Central Dallas 13, LLC; TIC N. Central Dallas 16, LLC; TIC N. Central Dallas 18, LLC; TIC N. Central Dallas 19, LLC; TIC N. Central Dallas 20, LLC; and TIC N. Central Dallas 24, LLC.

the limited liability companies of Plaintiffs' LLCs had not yet been formed and, therefore, the LLC Plaintiffs did not exist. Furthermore, all Plaintiffs lack standing to sue as assignees because, as assignees of another entity, the Plaintiffs step into the shoes of the assignor entity, and they can only pursue a claim that existed as to that entity and only seek damages incurred by that entity. In this case, as an assignee, Plaintiffs have not pled any cause of action against Carlisle that was held by the assignor, TIC N. Central. In fact, the allegations Plaintiffs plead as assignees could not have been held by TIC N. Central, as assignor, as such allegations would require TIC N. Central, as issuer of the private placement memorandum, to stand on each side of the private placement memorandum and to have induced itself into the relying upon it.

## **II. Evidence Relied Upon**

Evidence is appropriate for consideration to determine jurisdiction. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (noting that a plea to the jurisdiction, also known as a motion to dismiss for lack of jurisdiction, “may require the court to consider evidence pertaining to jurisdictional facts” and “if the relevant undisputed evidence negates jurisdiction, then the plea to the jurisdiction must be granted”). In support of this Motion to Dismiss for Lack of Jurisdiction due to Plaintiffs’ lack of standing, Carlisle relies upon the following evidence:

1. The property condition report (the “EBI Report”) attached to Plaintiffs’ Second Amended Petition<sup>3</sup> (the “Petition”) as Exhibit 1 and allegedly containing misrepresentations as to the condition of the Property (as hereinafter defined). (A copy of the EBI Report is attached to this Motion as **Exhibit A**.)

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<sup>3</sup> Because a plaintiff is required to affirmatively plead facts sufficient to establish jurisdiction, it is appropriate for the Court to consider the pleadings in making its determination in that regard. *See Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

2. The private placement memorandum (the “PPM”) that Plaintiffs reference in the Petition and allegedly containing misrepresentations as restated from the EBI Report. (A copy of the PPM has been presented to the Court by Plaintiffs as Exhibit 1 to the Plaintiffs’ Response to Certain Defendants’ Motion for Summary Judgment, filed May 10, 2013. A copy of the PPM is attached to this Motion as **Exhibit B**.)
3. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 3, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit C**.)
4. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 4, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit D**.)
5. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 7, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit E**.)
6. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 8, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit F**.)
7. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 9, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit G**.)
8. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 10, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit H**.)

9. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 11, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit I.**)
10. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 13, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit J.**)
11. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 16, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit K.**)
12. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 18, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit L.**)
13. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 19, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit M.**)
14. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 20, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit N.**)
15. Certified copy of the Certificate of Formation for Plaintiff TIC N. Central Dallas 24, LLC from the Secretary of State of Delaware. (A copy of which is attached to this Motion as **Exhibit O.**)

### **III. Uncontroverted Facts**

Plaintiffs' allegations center upon their purchase of tenant-in-common interests in a commercial office building, located at 10100 N. Central Expressway, Dallas, Texas 75231 (the "Property") from TIC N. Central Dallas, pursuant to the PPM. The uncontested facts on which this Motion is based are as follows:

1. Plaintiffs entered into "Purchase Agreements" with TIC N. Central "whereby Plaintiffs purchased undivided tenant-in-common interests in the Property." Second Am. Pet. ¶ 41.
2. "Contemporaneous with the transactions wherein Plaintiffs purchased their respective tenant-in-common interests in the Property, TIC [N. Central] assigned each Plaintiff a percentage of certain rights, title, and interest TIC [N. Central] held in and to the Property pursuant to a General Assignment and Bill of Sale." Second Am. Pet. ¶ 41.
3. Plaintiffs allege claims against Carlisle for fraud, fraud by nondisclosure, statutory fraud in a real estate transaction, and negligent misrepresentation, along with derivative claims of conspiracy and aiding and abetting, which rely upon successfully pleading and proving the primary claims (collectively, Plaintiffs' "Claims"). Second Am. Pet. ¶¶ 50-103.
4. Each of Plaintiffs' Claims is based upon reliance on alleged misrepresentations and omissions "in the [EBI] Report and/or as included or quoted in the PPM." Second Am. Pet. ¶ 41; *see, generally*, Second Am. Pet. ¶¶ 37-43 and 50-83.
5. The EBI Report was issued on or about March 23, 2007. *See* EBI Report, cover page, **Exhibit A.**
6. The PPM was dated April 18, 2007. *See* PPM, p. ii, **Exhibit B.**

7. All LLC Plaintiffs formed their LLCs on May 21, 2007, except for Plaintiff TIC N. Central Dallas 24, LLC, which was formed on June 11, 2007. *See* Certificates of Formation for LLC Plaintiffs, Exhibits C-O.

#### **IV. Argument and Authorities**

This Court does not have jurisdiction over this suit because Plaintiffs lack standing as to each cause of action asserted in this case. *See M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710-11 (Tex. 2001) (“Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court’s power to decide a case.”).

##### **a. Standard for Motion to Dismiss for Lack of Jurisdiction and Standing**

A motion to dismiss for lack of jurisdiction<sup>4</sup> “challenges a trial court’s authority to hear a case by asserting that the factual allegations in the plaintiff’s pleadings, when taken as true, fail to invoke the trial court’s jurisdiction.” *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 249 (Tex. App.—Dallas 2005, no pet.); *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (stating that the purpose of a motion to dismiss for lack of jurisdiction is to dismiss a cause of action without regard to whether the claim has merit). It is the plaintiffs’ responsibility to plead sufficient facts to establish jurisdiction for the court to hear the case. *Texas Ass’n of Bus.*, 852 S.W.2d at 443; *Nauslar*, 170 S.W.3d at 249. The court must affirmatively decide whether or not the plaintiffs have affirmatively demonstrated the court’s jurisdiction to hear the suit, based upon the facts alleged by the plaintiffs and, when necessary to resolve jurisdictional facts, on evidence submitted by the parties. *See Holland*, 221 S.W.3d at 642-43; *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004); *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555; *see, e.g.*, *State v. Sledge*, 36 S.W.3d 152, 155 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2000, pet.

denied) (trial court conducted hearing and received oral testimony, affidavits, exhibits, and stipulations).

Because standing is a component of subject-matter jurisdiction, a plaintiff's lack of standing deprives the court of jurisdiction over the claims asserted, and the claims must be dismissed without regard to the evidence or elements alleged. *Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006); *Zaan, LLC v. Sangani*, No. 05-12-00423-CV, 2015 WL 2398652, at \*5 (Tex. App.—Dallas May 20, 2015, no pet.). Standing is individual to each issue or cause of action. “The determination of whether a plaintiff possesses standing to assert a particular claim depends on the facts pleaded and the cause of action asserted.” *Mazon Assocs., Inc. v. Comerica Bank, Tex.*, 195 S.W.3d 800, 803 (Tex. App.—Dallas 2006, no pet.) (quoting *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 853 (Tex. App.—Fort Worth 2005, no pet.)).

Standing concerns “the question of whether a party has an enforceable right or interest.” *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (quoting 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil* 2d § 1559, at 441 (2d ed. 1990)). A party’s standing to pursue a cause of action is a question of law. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Nauslar*, 170 S.W.3d at 249. Under Texas law, the general test for standing requires that there be a real controversy between the parties that will be actually determined by the judicial declaration sought. *Tex. Ass’n of Bus.*, 852 S.W.2d at 446; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). Someone has “standing to sue when he is personally aggrieved by the alleged wrong.” *Nauslar*, 170 S.W.3d at 249; *Nootsie*, 925 S.W.2d at 661. Thus, a plaintiff with no legally-cognizable interest in the outcome of the case lacks standing to sue on its own behalf.

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<sup>4</sup> When filed as part of an answer, a motion to dismiss for lack of jurisdiction is referred to as a plea to the jurisdiction but, because it relates to subject-matter jurisdiction, such a motion can be raised at any time. *Texas*

*Nootsie*, 925 S.W.2d at 661; *Nauslar*, 170 S.W.3d at 249 (“Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate.”); *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 27 (Tex. App.—Tyler 2002, pet. denied); *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pet. denied); *Brown v. Mesa Distributors, Inc.*, 414 S.W.3d 279, 284 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2013, no pet.). In other words, “only the person whose primary legal right has been breached may seek redress for an injury.” *Nauslar*, 170 S.W.3d at 249.

**b. LLC Plaintiffs’ Lack Standing for Claims Brought Individually**

**i. The LLC Plaintiffs did not exist at the time of the alleged misrepresentations and nondisclosures.**

LLC Plaintiffs lack standing to pursue their claims brought individually because an entity that was not in existence at the time a misrepresentation was made lacks standing to pursue a fraud or negligence claim based on that misrepresentation. *Zaan, LLC v. Sangani*, No. 05-12-00423-CV, 2015 WL 2398652, at \*4 (Tex. App.—Dallas May 20, 2015) (finding that an LLC had no standing to pursue a fraud claim, “[g]iven that [the LLC] was not even in existence at the time” the alleged fraudulent inducement occurred); *Baker v. City of Robinson*, 305 S.W.3d 783, 788 (Tex. App.—Waco 2009, pet. denied) (holding that a partnership could not be a defrauded party “because the Partnership did not exist when the alleged misrepresentation was made”); *see also Sherry Lane Nat. Bank v. Bank of Evergreen*, 715 S.W.2d 148, 152 (Tex. App.—Dallas 1986 writ ref’d n.r.e.) (“Without breach of a legal right belonging to the plaintiff no cause of action can accrue to his benefit.”) (citing *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976)).

*Baker v. City of Robinson* illustrates this point. In *Baker*, an individual purchased a building from the defendant city for development as a multifamily dwelling. *Baker*, 305 S.W.3d

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*Ass’n of Bus.*, 852 S.W.2d at 443.

at 786. After purchasing the building, the individual conveyed it to a partnership he created to conduct the redevelopment. *Id.* Thereafter, it was discovered that the building was not zoned appropriately for the redevelopment plans. *Id.* at 787. Arguing that the defendant city had originally stated that the property was zoned appropriately for the redevelopment plans, the individual and the partnership sued for fraud and breach of contract due to the alleged misrepresentation (though they later abandoned the breach of contract claim prior to the appellate court considering the issue). *Id.* at 787 and n.2. The defendant city moved for summary judgment on several theories, including that the plaintiff partnership did not have standing to bring the fraud claim because the partnership was not in existence at the time of the alleged misrepresentation. *Id.* at 787. The trial court granted summary judgment without indicating its reasoning. *Id.* On appeal, noting that a “fraud claim is personal to the defrauded party,” the appellate court held that “[b]ecause the Partnership did not exist when the alleged misrepresentation was made, the Partnership cannot be a defrauded party in this instance.” *Id.* at 788. The court further explained that “[a]ny fraud claim arising from the alleged misrepresentation can be asserted by only [the individual] himself.... Thus, the Partnership lacks standing to assert a fraud claim.” *Id.*

In *Zaan, LLC v. Sangani*, the Dallas County Court of Appeals recently applied these same principles to an LLC on facts that make the requirement that the LLC exist at the time of the alleged misrepresentations even more clear. In *Zaan*, an individual contracted to purchase property. 2015 WL 2398652, at \*2. He then formed an LLC, establishing himself as a member, then he assigned the contract for the purchase of the property to the LLC, and the LLC purchased the property. *Id.* Thereafter, a disagreement arose about development issues, and the LLC sued a business partner in the deal for fraud and statutory fraud based upon alleged misrepresentations

made to the individual prior to the formation of the LLC and the subsequent assignment of the contract for purchase to the LLC. *Id.* The LLC argued that it had standing to sue on the fraud claims because the individual had relied upon the misrepresentations in entering into the contract for purchase of the property, and that, in turn, caused the LLC to purchase the property once it was formed. *Id.* at \*4. The court rejected this argument because the LLC “was not even in existence at the time” of the alleged misrepresentations that ultimately resulted in the LLC purchasing the property. *Id.* Thus, even though the LLC actually purchased the property, it still did not have standing because it did not exist when the misrepresentations were made. *See id.* at \*2, \*4.

*Baker* and *Zaan* compel a finding that the LLC Plaintiffs lack standing to pursue their claims in their individual capacities as LLCs because the alleged misrepresentation and nondisclosures occurred prior to the LLC Plaintiffs coming into existence. *See* Certificates of Formation for LLC Plaintiffs, Exhibits C-Q; *Zaan*, 2015 WL 2398652, at \*4; *Baker*, 305 S.W.3d at 788. Specifically, all allegations of fraud and negligent misrepresentation in this case are based on statements included in the EBI Report, or interpretations of those statements included in the PPM. *See* Second Am. Pet. ¶¶ 36-37, 40-41, 43, 48. The EBI Report was dated March 23, 2007, and the PPM was dated April 18, 2007. *See* EBI Report, cover page, Exhibit A; PPM, p. ii, Exhibit B. All of the LLC Plaintiffs were formed as Delaware LLCs on May 21, 2007, except TIC N. Central Dallas 24, LLC, which was formed on June 11, 2007. *See* Certificates of Formation for LLC Plaintiffs, Exhibits C-O. Therefore, at the time the alleged misrepresentations occurred, none of the LLC Plaintiffs existed and, as clearly established by *Baker* and *Zaan*, none of the LLC Plaintiffs has standing to pursue the claims.

Plaintiffs' fraud by nondisclosure claim is no different and Plaintiffs are without standing to assert it. The duty to disclose arose, if at all, upon the publication of statements in the EBI Report and/or PPM, as Plaintiffs allege in the Petition: "*At the time of the production of the EBI Report, [certain defendants, including Bobby Carlisle] knew or should have known about the actual condition of the elevator and garage ramp . . .*"<sup>5</sup> Second Am. Pet. ¶ 48 (emphasis added); *see Four Bros. Boat Works v. Tesoro Petroleum Companies, Inc.*, 217 S.W.3d 653, 670-71 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (recognizing that, when there is a duty to disclose, it exists at the time partial information is disclosed). Thus, the LLC Plaintiffs' standing to assert the claim is the date of the EBI Report on March 23, 2007, before any of the LLC Plaintiffs were yet formed. *Compare* EBI Report, cover page, **Exhibit A**, with Certificates of Formation for LLC Plaintiffs, **Exhibits C-O**; *See Zaan*, 2015 WL 2398652, at \*2, \*4. Further, Plaintiffs' aiding and abetting and conspiracy claims are derivative claims and dependent on the jurisdiction of the fraud and negligence claims. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (noting that the court does not analyze dismissal of conspiracy claims separately from dismissal of the underlying claims). Thus, the LLC Plaintiffs do not have standing in an individual capacity for any of their causes of action.

**ii. Any statement purporting to convey authority to rely upon the EBI Report to Plaintiffs does not affect lack of standing by Plaintiffs.**

Plaintiffs' lack of standing is not affected by their claims in the Petition that the cover letter to the EBI Report states that the EBI Report may be relied upon by "any party that purchases an interest in the property from" TIC N. Central. *See* Second Am. Pet. ¶ 38. Parties

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<sup>5</sup> Because there is no allegation that "Defendants discovered new information that made an earlier representation misleading or untrue," the only potential triggers for fraud by nondisclosure involve creating a false impression by making a partial disclosure, or voluntarily disclosing some information, thereby triggering a duty to disclose the whole truth. *See Four Bros. Boat Works*, 217 S.W.3d at 670-71. As Plaintiffs admit, both of these alleged duties arose at the time of production of the EBI Report.

cannot contract around the jurisdictional issue of standing, except through a specific assignment of a specific cause of action, and simply stating that unidentified and not-yet-in-existence entities can rely upon a report at some point in the future is not a proper assignment, does not avoid the clear law as expressed in *Zaan* and *Baker*, and does not confer standing to pursue fraud claims upon entities that did not exist at the time the alleged misrepresentation was made. Fraud claims are personal to the defrauded party. *Baker*, 305 S.W.3d at 788; *Vial v. Gas Solutions, Ltd.*, 187 S.W.3d 220, 227 (Tex. App.—Texarkana 2006, no pet.). “Without the breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate.” *Nausler*, 170 S.W.3d at 249; *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976). “Consequently, only the defrauded party has standing to assert a fraud claim,” and a plaintiff “may not sue for breaches of legal rights belonging to other parties.” *Zaan*, 2015 WL 2398652, at \*4 (citing *Nobles*, 533 S.W.2d at 927).

In fact, as explained above, in *Zaan*, after alleged misrepresentations were made to an individual, that individual created an LLC and transferred a contract to purchase property to it. The LLC argued that it had standing to sue for those misrepresentations because it was the party that purchased the property and actually suffered the injury. *Zaan*, 2015 WL 2398652, at \*2-\*4. The Dallas Court of Appeals specifically rejected this argument, explaining that, “[g]iven that [the LLC] was not even in existence at the time” the misrepresentations were made, the LLC’s claims are necessarily premised upon the duties of the defendant to the individual, rather than to the LLC itself. *Id.* at \*4. In other words, to the extent a claim existed, standing to assert belonged to the individual, even though the LLC was the actual purchaser of the property. *See id.*; *see also Nobles*, 533 S.W.2d at 927 (“A party who was not defrauded . . . has not suffered an invasion of a legal right and therefore does not have standing to bring suit based on that fraud.”).

In this case, the EBI Report was created for LaSalle Bank National Association (“LaSalle Bank”), and LaSalle Bank’s primary legal right has allegedly been breached by the misrepresentations and omissions, so only LaSalle Bank would have a claim.<sup>6</sup> *Nauslar*, 170 S.W.3d at 249 (“Only the person whose primary legal right has been breached may seek redress for an injury.”); *Zaan*, 2015 WL 2398652, at \*4 (“Only the person whose primary legal right has been breached by the asserted causes of action has standing to seek redress for an injury.” (citing *Nobles*, 533 S.W.2d at 927)). Even if the representations in the EBI Report could have been relied upon by TIC N. Central, it would have been with regard to TIC N. Central’s purchase of the Property from 10100 Operations, LLC. Plaintiffs have not alleged any claims based upon TIC N. Central’s purchase of the Property, and, to the extent any existed, they would be limited to contract claims, as tort claims would be subsumed by the contract, and any such contract claims would be well beyond their statute of limitations. The important point for purposes of this case is simply that any alleged reliance by TIC N. Central on misrepresentations in purchasing the Property would not support the claims alleged by Plaintiffs.

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<sup>6</sup> There are no allegations that Plaintiffs are third-party beneficiaries to the EBI Report, likely because Plaintiffs do not meet the requirements, but third-party benefits only confer certain rights regarding contract claims, which do not exist in this case. And, third-party beneficiaries still step into the shoes of those who contracted for the benefit, and they do not receive greater rights and cannot acquire better standing than that held by the contracting party. *Texas Farmers Ins. Co. v. Gerdes By & Through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 218 (Tex. App.—Fort Worth 1994, writ denied).

### **c. Plaintiffs Lack Standing as Assignees of TIC N. Central**

In order for a second party to have standing to pursue a claim that accrued to a different party, an assignment of the right to pursue the cause of action is required. *See Allodial Ltd. P'ship v. N. Tex. Tollway Auth.*, 176 S.W.3d 680, 683 (Tex. App.—Dallas 2005, pet. denied). In this case, Plaintiffs fail to meet the procedural requirements for such an assignment and failed to establish any cause of action that could have been assigned.

#### **i. Plaintiffs fail to plead or prove the existence of a cause of action held by assignor or its subsequent assignment to Plaintiffs.**

In addition to individual claims, Plaintiffs bring their claims “as assignee of a tenant in common interest in TIC N. Central’s right, title and interest in certain real property located in Dallas County, Texas....” Second Am. Pet. ¶¶ 2-15. This statement, however, is wholly inadequate to establish standing for asserting a cause of action by assignment. In order to properly maintain a cause of action based upon an assignment, the plaintiff must plead and prove the existence of both the cause of action by the assignor, and the assignment of that cause of action. *Pain Control Inst., Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 898 (Tex. App.—Dallas 2014) (“To recover on an assigned cause of action, the party claiming the assigned right must show that the cause of action being assigned existed and was assigned to the party alleging assignment occurred.”); *Allodial*, 176 S.W.3d at 683; *Tex. Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 217 (Tex. App.—Fort Worth 1994, writ denied) (to recover on assigned cause of action, party claiming assigned rights must prove cause of action existed that was capable of assignment and cause was assigned to party seeking recovery); *Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.) (To recover on assigned cause of action, one must plead and prove “a cause of action capable of being assigned existed and was assigned” to party alleging theory of assignment.).

In the present case, Plaintiffs do not allege any cause of action against Carlisle that was a cause of action that existed as to TIC N. Central, and, if such cause of action did exist, there is no support for an assignment of that cause of action to Plaintiffs. Without pleading and proving the existence of a cause of action that could have been brought by TIC N. Central against Carlisle and proving that TIC N. Central specifically assigned that cause of action to Plaintiffs, any claim based upon the alleged assignment must fail for lack of standing. *See Pain Control Inst.*, 447 S.W.3d at 898; *Allodial*, 176 S.W.3d at 683.

**ii. Plaintiffs' claims against Carlisle are for rights beyond that which TIC N. Central had at the time of alleged assignment.**

Even when a valid assignment exists, the assignor is only assigning the precise claims that it had at the time of assignment. “An existing right is a precondition for a valid assignment.” *Pain Control Inst.*, 447 S.W.3d at 898. Therefore, an “assignee obtains only the right, title, and interest of his assignor at the time of his assignment, and no more.” *State Fid. Mortgage Co. v. Varner*, 740 S.W.2d 477, 480 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, writ denied); *Great Am. Ins. Co. v. Jim Stephenson Motor Co.*, No. 05-94-00858-CV, 1996 WL 135688, at \*4 (Tex. App.—Dallas Mar. 26, 1996, writ denied). The assignee “acquires no greater right than was possessed by his assignor, and simply stands in the shoes of the latter.” *Deer Park Bank v. Aetna Ins. Co.*, 493 S.W.2d 305, 306 (Tex. Civ. App.—Beaumont 1973, no writ) (quoting *Gulf Coast Factors, Inc. v. Hamilton Supply Co.*, 389 S.W.2d 341, 346 (Tex. Civ. App.—Houston 1965, no writ)); *John H. Carney & Assocs. v. Tex. Prop. & Cas. Ins. Guar. Ass'n*, 354 S.W.3d 843, 850 (Tex. App.—Austin 2011, pet. denied). Because an assignor cannot convey more rights than it possesses, if the assignor has not right to a cause of action, no such right can be assigned. *John H. Carney & Assocs.*, 354 S.W.3d at 850; *Pain Control Inst.*, 447 S.W.3d at 899. Moreover, “an assignee may recover only those damages potentially available to its assignor.” *Great Am. Ins.*

*Co.*, 1996 WL 135688, at \*4; *Varner*, 740 S.W.2d at 480; *see John H. Carney & Assocs.*, 354 S.W.3d at 850.

In their capacity as alleged assignees of TIC N. Central, Plaintiffs in this case can only bring claims against Carlisle that TIC N. Central itself could have brought, and Plaintiffs are only allowed to recover damages that TIC N. Central itself could have recovered against Carlisle if it had retained the causes of action allegedly assigned. Thus, Plaintiffs' standing must be analyzed in light of the particular claims asserted to determine if those claims had accrued to the assignor prior to assignment. *See Pain Control Inst.*, 447 S.W.3d at 898. In this case, even if there was a valid assignment document, Plaintiffs lack standing under any theory of assignment of claims because TIC N. Central itself did not have any of the claims that Plaintiffs have alleged in the Petition, as Plaintiffs infer. Reviewing the allegations in the Petition from the shoes of TIC N. Central, as required for an assignment of a cause of action, illustrates this point:

- TIC N. Central was not induced into purchasing tenant-in-common interests in the Property as Plaintiffs allege they were. *See Second Am. Pet.* at ¶¶ 41, 56, 64, 73 and 82.
- TIC N. Central never purchased tenant-in-common interests in the Property.
- TIC N. Central was not harmed in the manner alleged in the Petition.
- As the author of the PPM, TIC N. Central did not rely upon the PPM as Plaintiffs allege in the Petition. *See Second Am. Pet.* at ¶¶ 41, 56, 64, 73 and 82.
- In the PPM, TIC N. Central specifically and repeatedly warned the Plaintiffs not to rely upon any statements or reports of third parties, including the EBI Report, and instead urged Plaintiffs to conduct their own investigations. *See, e.g.*, PPM at p. 34 and Exhibit 1 to PPM, at pp. 5-6.
- The allegations in the lawsuit would require TIC N. Central to claim it was induced to contract with itself via the Purchase Agreements. *See, generally*, PPM and Second Amended Petition.

Each of these factors clearly show that TIC N. Central never held a right to bring the claims Plaintiffs allege in the Petition.

In the end, the allegations in this lawsuit are specific to the claims asserted by Plaintiffs. The allegations do not support any potential claim that TIC N. Central may have held and assigned to Plaintiffs. Because TIC N. Central did not have a right to maintain the causes of action alleged by Plaintiffs, it did not possess those claims, and Plaintiffs do not have standing to sue upon the causes of actions stated in the Petition as assignees of TIC N. Central. *See Pain Control Inst., Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 900 (Tex. App.—Dallas 2014); *see also John H. Carney & Assocs.*, 354 S.W.3d at 850 (“An assignee ‘stands in the shoes’ of the assignor but acquires no greater right than the assignor possessed.” (citation omitted)); *La Joya Gardens, L.L.C. v. Chubb Custom Ins. Co.*, No. 406-CV-598-Y, 2007 WL 1461449, at \*2 (N.D. Tex. May 17, 2007) (“The assignee stands in the same position as the assignor and may assert only those rights that the assignor possessed.” (citing *Adams v. Petrade Int’l, Inc.*, 754 S.W.2d 696, 720 (Tex. App.—Houston 1988, no pet.))).

## **V. Conclusion**

Because it is clear from Plaintiffs’ pleadings and the evidence submitted with this Motion that the Court does not have jurisdiction to hear Plaintiffs’ causes of action as set forth herein, the Court should dismiss all causes of action alleged by LLC Plaintiffs individually and all causes of action alleged by Plaintiffs as assignees.

## **VI. Prayer**

For these reasons, Defendant Bobby Carlisle respectfully requests that the Court grant Defendant Bobby Carlisle’s Motion to Dismiss for Lack of Jurisdiction and dismiss all causes of action alleged by LLC Plaintiffs individually and all causes of action alleged by Plaintiffs as assignees, and for such other and further relief to which Carlisle is entitled.

Respectfully submitted,

PRYOR & BRUCE

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following counsel of record via Electronic Mail this 23rd day of September 2015:

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