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Franchise Law

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FRANCHISE LAW

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I. INTRODUCTION

Texas courts continue to examine franchise issues related to jurisdiction, enforcement of contractual terms and arbitration provisions, bankruptcy, common law and statutory claims, intellectual property, and remedies. Cases during this Survey period address a range of pertinent topics including Texas courts’ willingness to enforce arbitration provisions, flexible standards for courts to grant parties relief from a default judgment, the importance of creating a record for appeal, enforcement of waiver-of-reliance provisions, and many other important developments. This Survey’s selected cases and analyses will provide practitioners with valuable insights into the current state of franchise law in Texas.

II. PROCEDURE

A. JURISDICTION

1. *Subject Matter Jurisdiction*

In *Hyundai Motor America v. New World Car Nissan, Inc.*,¹ an automobile distributor (Hyundai) filed a petition for judicial review of an order from the Board of the Texas Department of Motor Vehicles (TDMV). Licensed and franchised Hyundai dealers in the San Antonio area filed a formal complaint against Hyundai with the TDMV alleging that Hyundai violated multiple provisions under Chapter 2301 of the Texas Occupations Code—namely, requiring the dealers to sell more vehicles than Hyundai had allocated to the dealers as inventory.² The TDMV referred the formal complaint to the State Office of Administrative Hearings for an adversarial hearing before an Administrative Law Judge (ALJ).³ Following an opportunity for discovery and an evidentiary hearing, the ALJ concluded that the dealers “failed to prove that Hyundai violated [any provisions of] the [Texas] Occupations Code.”⁴ The Board of the TDMV rejected the ALJ’s conclusions, however, and issued a final order overturning the ALJ’s findings—albeit without including any “supporting rationale, fact findings, or legal conclusions.”⁵ The Board ultimately granted Hyundai a rehearing, but still issued a final order de-

1. 581 S.W.3d 831 (Tex. App.—Austin 2019, no pet.).

2. *Id.* at 834.

3. *Id.*

4. *Id.*

5. *Id.* at 835.

termining that Hyundai had violated Chapter 2301. Hyundai filed a petition for review in the 201st District Court of Travis County, but several defendants removed the case to the Third Austin Court of Appeals before any proceedings occurred in the district court.⁶

The sole jurisdictional issue on appeal was whether the court of appeals had subject matter jurisdiction over any defendants *other than* the Board of the TDMV, including the TDMV, the Chair of the Board of the TDMV, and the Executive Director of the TDMV.⁷ The court noted that the Texas Occupations Code authorized judicial review of “‘final action[s] of the [Department’s] board’ in matters arising under Chapter 2301.”⁸ The term “board” is defined as the “nine-member governing board of the [TDMV].”⁹ The TDMV is “a statutorily created state agency” and “‘is composed of an executive director appointed by the board and other employees required to efficiently implement’ applicable laws[.]”¹⁰

The Occupations Code grants the Board “exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by [Chapter 2301.]”¹¹ Chapter 2301 further specifies that “[c]itation for an appeal [of an order of the Board] must be served on the executive director or the executive director’s designee and each party of record in the matter.”¹² Citing a 2002 opinion from the Texas Supreme Court for the holding that “in [a] suit for judicial review, only [the] agency ‘whose ruling is to be appealed’ was [a] ‘proper defendant to the district court proceeding’ when neither [the] APA nor [an] enabling statute required service of citation on any other party[.]” the court of appeals concluded that it lacked subject matter jurisdiction over the TDMV and the Chair of the Board of the TDMV.¹³ Because the statute specified that the Board was the only entity with authority to issue final orders, and because the statute directed notice of appeal to be served on the Executive Director of the TDMV, those were the only proper defendants in an action for judicial review of a Board final order.¹⁴ Upon concluding that the TDMV and the Chair of the Board of the TDMV were improper defendants and that the court lacked subject matter jurisdiction over them, both defendants were dismissed from the case with prejudice.¹⁵

6. *Id.*

7. *Id.*

8. *Id.* (quoting TEX. OCC. CODE ANN. § 2301.751(a) (citing *Keystone RV Co. v. Tex. Dep’t of Motor Vehicles*, 507 S.W.3d 829, 831 (Tex. App.—Austin 2016, no pet.))).

9. *Id.* (citing *Keystone RV*, 507 S.W.3d at 834–35).

10. *Id.* at 835–36 (quoting TEX. TRANSP. CODE ANN. § 1001.003 (citing TEX. TRANSP. CODE ANN. §§ 1001.002(a), (b)(3))).

11. *Id.* at 836 (quoting TEX. OCC. CODE ANN. § 2301.151(a)).

12. *Id.* (quoting TEX. OCC. CODE ANN. § 2301.752(b)).

13. *Id.* (quoting *Tex. Nat. Res. Conservation Comm’n v. Sierra Club*, 70 S.W.3d 809, 813 (Tex. 2002)).

14. *Id.*

15. *Id.* at 835.

While this opinion involved a relatively uncomplicated analysis of the limits of statutorily created subject matter jurisdiction, it addresses an issue which could arise in any action for judicial review of administrative orders. When bringing claims authorized by statute, it is always prudent to consider jurisdictional limitations on the subject matter of a claim, including proper parties.

2. *Personal Jurisdiction*

In *Victor Elias Photography, LLC v. Leonardo Worldwide Corp.*,¹⁶ the plaintiff (Elias) was a company specializing in syndicating hotel and resort photographs. Elias alleged that it granted a limited license to make use of various photographs (the Copyrighted Works) to Defendant Marriott International, Inc. (Marriott), and that Marriott (among other defendants) exceeded the scope of this license by distributing the Copyrighted Works for display on third-party travel websites.¹⁷ Marriott and its codefendants moved to dismiss Elias's copyright claims for lack of personal jurisdiction.¹⁸

Under Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing a prima facie case of personal jurisdiction.¹⁹ The court may review a range of evidence in determining whether the plaintiff meets this burden, including “pleadings, affidavits, interrogatories, depositions, oral testimony, exhibits, any part of the record, and any combination thereof.”²⁰ Any conflicting evidence must be resolved in favor of the plaintiff.²¹ In this case, the plaintiff relied on the Texas long-arm statute to assert that the district court had personal jurisdiction—either general or specific—over Marriott, and specific jurisdiction over the remaining defendants.²² Because the Texas long-arm statute “extends to the limits of due process” the court was required to ensure that personal jurisdiction over Marriott comported with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²³

With regard to general personal jurisdiction—the court's ability to assert jurisdiction over claims which do not arise out of a defendant's contacts with the forum—the court noted that such jurisdiction attaches only if the defendant's “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”²⁴ In this

16. No. H-18-2142, 2019 WL 3713724 (S.D. Tex. Jan. 25, 2019).

17. *Id.* at *1.

18. *Id.*

19. *Id.* (citing *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994)).

20. *Id.* (quoting *Command-Aire Corp. v. Ontario Mech. Sales & Serv. Inc.*, 963 F.2d 90, 95 (5th Cir. 1992)).

21. *Id.* (citing *Wilson*, 20 F.3d at 648).

22. *Id.*

23. *Id.* (citing *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 220 (5th Cir. 2012)).

24. *Id.* (quoting *Sangha v. Navig8 ShipManagement Private Ltd.*, 882 F.3d 96, 101 (5th Cir. 2018) (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011))).

case, Elias argued that the court had general jurisdiction over Marriott—despite the fact that Marriott is neither incorporated nor headquartered in Texas—because Marriott owns, franchises, or licenses numerous properties within Texas.²⁵ The court disagreed, noting recent Supreme Court precedent suggesting that it would be an “exceptional case” for a corporation to be amenable to general jurisdiction in a forum which encompasses neither its state of incorporation nor its principal place of business.²⁶ While it was undisputed that Marriott operated, franchised, or licensed 487 of its 6,700 worldwide properties in Texas—more than in any other single state—the court was more persuaded by Marriott’s arguments that (1) its 487 properties in Texas comprised only 7% of its global total; (2) every single property in Texas was owned by third-party affiliates or subsidiaries; and (3) Marriott was only responsible for managing a single property in Texas.²⁷ Elias’s contrary evidence failed to show that Marriott exercised a degree of control over any of its affiliates or subsidiaries sufficient for their conduct to be attributable to Marriott, and likewise failed to show that Marriott—incorporated in Delaware and headquartered in Maryland—engages in activities in Texas to a degree indicating that it qualifies as an “exceptional case” under *Daimler*.²⁸

Elias similarly failed to carry his burden to prove that his claim against Marriott “arises out of or is related to [Marriott’s] contacts” with the forum state, as required for the court’s exercise of specific personal jurisdiction over Marriott.²⁹ Elias contended simply that the court had specific jurisdiction over all defendants, including Marriott, based on their internet presence.³⁰ The fatal flaw in Elias’s argument was that, while the court can exercise specific jurisdiction based on a defendant’s operation of a website—applying the sliding-factor *Zippo* test based on the commercial nature and interactivity of a given website—Elias’s claims in this case arose from content displayed on *third-party* websites.³¹ While Marriott’s website (www.marriott.com) was undoubtedly highly interactive, Elias did not allege that any of the Copyrighted Works were improperly displayed on that particular website.³² Therefore, the court concluded that Elias’s claims “do not arise out of and are not related to Defendants’ Internet presence[.]” Elias failed to meet his burden of proving specific jurisdiction, and the court lacked personal jurisdiction over all defendants.³³

25. *Id.* at *2.

26. *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

27. *Id.*

28. *Id.*

29. *Id.* at *1–3 (quoting *Sangha*, 882 F.3d at 101).

30. *Id.* at *2.

31. *Id.* at *2–3 (citing *GreatFence.com, Inc. v. Bailey*, 726 F. App’x 260, 261 (5th Cir. 2018) (per curiam) (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997))).

32. *Id.* at *3.

33. *Id.* (granting defendants’ motion to dismiss for lack of personal jurisdiction).

Although the outcome of *Victor Elias* may have been different if the plaintiff had pleaded and proved his jurisdictional facts more artfully, this case demonstrates important nuances for personal jurisdiction in a digital era, as well as the significance of corporate formalities when assessing general jurisdiction.³⁴ As evidence of the high bar for establishing general personal jurisdiction over an entity which is neither incorporated nor headquartered in the forum state, the district court was unmoved by evidence of Marriott's substantial economic interests in Texas in the form of hundreds of properties owned and managed by franchisees, licensees, affiliates, and subsidiaries. Likewise, the court strictly construed the requirement that a plaintiff's claim "arise out of" the defendant's contacts with the forum state to exclude Marriott's distribution of Copyrighted Works to third parties for publication on third-party travel websites.

B. STANDING

In *Amazing Lash Franchise, LLC v. Nguyen*,³⁵ the U.S. District Court for the Southern District of Texas granted a franchisee's motion to dismiss a franchisor's claims for statutory fraud, common law fraud, negligent misrepresentation, and civil conspiracy because the plaintiff lacked standing to assert them.³⁶ As factual background, Scott D. Nguyen—acting through his wholly-owned corporation, Hawthorne Heights, LLC—purchased several "Amazing Lash" studios from Amazing Lash Studio Franchise, LLC (ALSF) in October 2017, with separate transfer agreements and franchise agreements executed in early November 2017.³⁷ In June 2018, Amazing Lash Franchise, LLC (Plaintiff) "was incorporated in

34. For a more in-depth personal jurisdiction analysis involving complex corporate entities, see *Diece-Lisa Indus. v. Disney Enters.*, 943 F.3d 239, 250 (5th Cir. 2019). While *Diece-Lisa* did not involve franchisees per se, the U.S. Court of Appeals for the Fifth Circuit discussed the so-called "franchise theory" and "licensor theory" for attributing the forum contacts of subsidiaries—in that case, Disney's retail entities—to the parent entity. *Id.* at 250–51. The Fifth Circuit described the "franchise theory" as arguing that the entire parent corporation "should be treated as one franchise for purposes of personal jurisdiction[.]" extending the court's personal jurisdiction over in-state subsidiaries to nonresident corporations. *Id.* The "licensor theory" is somewhat more targeted and proposes that personal jurisdiction over in-state licensees extends to nonresident licensors of allegedly-infringing content. *Id.* at 251. While the Fifth Circuit ultimately concluded that the relationships between resident and non-resident Disney entities were insufficient to confer personal jurisdiction under either theory, the Fifth Circuit's analysis of the "institutional independence" of subsidiaries and affiliates is relevant to similar jurisdictional analysis involving franchises. *Id.* Likewise, the Fifth Circuit's blunt rejection of non-exclusive licenses to resident third parties as the basis for personal jurisdiction is instructive. *Id.* at 253 ("Neither this nor any other circuit has held that specific jurisdiction may arise solely from a defendant licensor's non-exclusive licenses to third parties who sell allegedly infringing products in the forum state, and at least one circuit has explicitly rejected such a theory.") (collecting cases).

35. No. H-18-4671, 2019 WL 3302580 (S.D. Tex. July 23, 2019).

36. *Id.* at *1.

37. Scott D. Nguyen, Hawthorne Heights, LLC, and the LLCs for each of Nguyen's "Amazing Lash" studios (2621 Amazing River Oaks, LLC, 1923 Amazing Sawyer Heights, LLC, 1415 Amazing Voss, LLC, 9650 Amazing Woodlake, LLC, 10927 Amazing Vintage Park, LLC, 6501 Amazing Grand Lakes Katy, LLC) are hereafter referred to, collectively, as the Franchisee Defendants.

. . . Delaware.”³⁸ “In September 2018, Plaintiff acquired the ‘Amazing Lash’ franchise system” and all of its existing franchise agreements from ALSF.³⁹ Plaintiff subsequently sued Franchisee Defendants for failing to comply with their obligations under the various franchise agreements, and Franchisee Defendants moved to dismiss Plaintiff’s fraud-based claims on the basis that Plaintiff lacked standing to assert fraud because Plaintiff was not in existence at the time the franchise agreements were executed.⁴⁰

The district court began its analysis by noting that a basic “requirement of constitutional standing is that the plaintiff must have suffered (or be imminently threatened with suffering) the alleged injury[.]” and adding that the burden to prove standing lies with the party invoking federal jurisdiction.⁴¹ While Texas law generally recognizes that assignees have standing to assert claims assigned to them, there is an exception for fraud-based claims, which are “personal to the defrauded party.”⁴² As a result, “[a]n assignee of a contract that was not a party to the fraudulent transaction does not have standing to sue unless he was ‘*specifically* assigned causes of action for fraud. . . .’”⁴³ As applied to the facts of this case, Plaintiff did not exist at the time of alleged misrepresentations made by Defendant Franchisees to Plaintiff’s assignor, ALSF.⁴⁴ Furthermore, although an Asset Purchase Agreement assigned all “claims or causes of action” of ALSF to an intermediate assignor entity (Wellness and Vitality Exchange, LLC, or WAVE), which in turn assigned its “right, title, and interest” to Plaintiff, neither assignment specifically assigned ALSF’s fraud-based claims, which remained personal to ALSF.⁴⁵ Therefore, because Plaintiff was never specifically assigned the rights to pursue ALSF’s fraud-based claims against the Franchisee Defendants, Plaintiff lacked standing to assert claims for statutory fraud, common law fraud, negligent misrepresentation, and civil conspiracy, and the court dismissed all such claims.⁴⁶

Though brief, this opinion illustrates a unique and important exception to the general rule that legal rights may be assigned using the ubiquitous “claims or causes of action” catchall. Given the frequency with which franchise relationships involve assignments, as well as the popularity of

38. *Amazing Lash*, 2019 WL 3302580, at *1.

39. *Id.*

40. *Id.*

41. *Id.* (quoting *Pelletier v. Victoria Air Conditioning, Ltd.*, 780 F. App’x 136, 139 (5th Cir. 2019)).

42. *Id.* at *2 (quoting *Baker v. City of Robinson*, 305 S.W.3d 783, 788 (Tex. App.—Waco 2009, pet. denied) (quoting *Vial v. Gas Sols., Ltd.*, 187 S.W.3d 220, 227 (Tex. App.—Texarkana 2006, pet. denied)).

43. *Id.* (quoting *In re JNS Aviation, LLC*, 376 B.R. 500, 533–34 (Bankr. N.D. Tex. 2007), *aff’d sub nom.* *JNS Aviation, Inc. v. Nick Corp.*, 418 B.R. 898 (N.D. Tex. 2009), *aff’d sub nom.* *JNS Aviation, Inc. v. Nick Corp.* (*In re JNS Aviation, L.L.C.*), 395 F. App’x 127 (5th Cir. 2010) (per curiam)).

44. *Id.*

45. *Id.*

46. *Id.*

fraud-based claims in franchise litigation, both plaintiffs and defendants would be well-served to consider standing to bring fraud-based claims at the inception of franchise litigation.

C. EXPERT WITNESSES

*ProTradeNet, LLC v. Predictive Profiles, Inc.*⁴⁷ involved a *Daubert* ruling on the admissibility of an expert witness's testimony on damages incurred by the plaintiff (PTN) due to alleged trademark infringement by the defendant (Predictive). As background, PTN is a subsidiary of Dwyer Franchising, LLC (Dwyer), and PTN and Dwyer provide services designed to help independently owned and operated franchised businesses source competitively-priced goods and services.⁴⁸ Specifically, PTN researches vendors of a variety of goods and services, and selects "Preferred Vendors" to market to franchisees.⁴⁹ In this case, PTN selected Predictive as a Preferred Vendor of employee recruiting services, and the two parties entered into a non-exclusive agreement in February 2017.⁵⁰ The agreement was terminated in 2018, and PTN subsequently sued for trademark infringement, alleging that Predictive continued to use the Dwyer marks after the termination of the agreement and after receiving a cease and desist letter from PTN.⁵¹

In proving its trademark claims, PTN sought to introduce the expert testimony of Dr. Charles M. North (Dr. North) on PTN's damages. Predictive argued that the U.S. District Court for the Western District of Texas, acting as an evidentiary "gatekeeper" under *Daubert* and its progeny, should exclude Dr. North's testimony as insufficiently reliable under Federal Rule of Evidence 702.⁵² The district court summarized its role as the following: "[p]ursuant to these rules, 'a district court may exclude evidence that is based upon unreliable principles or methods, legally insufficient facts and data, or where the reasoning or methodology is not sufficiently tied to the facts of the case.'"⁵³ Predictive specifically argued that Dr. North's testimony concerning Dwyer's unaudited financial

47. No. 6:18-CV-00038-ADA, 2019 WL 6499488 (W.D. Tex. Oct. 11, 2019).

48. *Id.* at *1.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at *3; see *Daubert v. Merrell Dow Pharm., Inc. (Daubert I)*, 509 U.S. 579 (1993). Federal Rule of Evidence 702 states that

[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

53. *ProTradeNet*, 2019 WL 6499488, at *3 (quoting *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1295 (Fed. Cir. 2015)).

records of advertising expenses and Dr. North's investigation of individual advertising transactions rendered his testimony unreliable.

The court ultimately concluded that Dr. North's analysis of trademark damages was sufficiently reliable to be admitted under Rule 702.⁵⁴ The court recited the "general rule" that issues with the "*bases and sources* of an expert's opinion affect the *weight* to be assigned to that opinion rather than its admissibility" noting that it is the role of the trier of fact to weigh the persuasiveness of evidence.⁵⁵ The exception to this general rule applies only where an expert's testimony "is so fundamentally unsupported that it cannot possibly help the fact finder."⁵⁶ In this case, the court found that Dr. North's analysis was "more than sufficient to pass muster under *Daubert*" and added that Predictive would have "ample opportunity to vigorously cross examine Dr. North" in an upcoming bench trial.⁵⁷ As factors weighing decisively in favor of admissibility under Rule 702, the court noted that: (1) Dr. North adequately revealed his methodology in his expert report; (2) Dr. North discussed relevant portions of the Lanham Act; (3) Dr. North "identified the buckets of damages" that PTN sought to recover; (4) Dr. North addressed "methodologies that have previously been blessed by courts"; and (5) Dr. North considered relevant expenses and used them to estimate a discount of the potential damages amount.⁵⁸ Having concluded that Dr. North's expert opinion was sufficiently reliable to be admitted, the court denied Predictive's motion to exclude Dr. North's testimony.⁵⁹

While this case generally conforms to well-established and permissive guidelines for the admissibility of expert damages testimony, it is illustrative of *Daubert* analysis in the context of trademark infringement with some relevance to franchise law; while there was no franchise relationship implicated in the case, the damages testimony—particularly regarding corrective advertising—would be applicable in a typical franchise trademark dispute.

D. ARBITRATION

Arbitration provisions continued to see support from Texas courts this Survey period. In *Dickey's Barbecue Restaurants, Inc. v. Campbell Invest-*

54. *Id.*

55. *Id.* (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (emphasis added)).

56. *Id.* (citing *Viterbo*, 826 F.2d at 422).

57. *Id.* at *3–4.

58. *Id.* at *4 (specifically mentioning that courts have determined the "FTC 25% Rule" to be a "proper methodology for assessing damages for corrective advertising" including pretrial corrective advertising); *Ill. Tool Works Inc. v. Rust-Oleum Corp.*, 346 F. Supp. 3d 951, 959–60 (S.D. Tex. 2018) (citing multiple cases to support its conclusion that 25% of total advertising expenditures was a fair award to compensate the plaintiff for corrective advertising undertaken to mitigate damages caused by defendant's Lanham Act violations).

59. *ProTradeNet*, 2019 WL 6499488, at *4.

ments, LLC,⁶⁰ the U.S. District Court for the Eastern District of Texas adopted the magistrate judge's conclusions and submitted the parties' disputes to arbitration despite objections raised by Dickey's, the franchisor, and the franchisee.⁶¹

In 2014, Dickey's, and Kody and Kevin Campbell (the Campbells) entered into a development agreement to open two Dickey's restaurants in Utah.⁶² The development agreement contained a broad arbitration provision:

[T]he parties agree to submit all disputes, controversies, claims, causes of action and/or alleged breaches or failures to perform arising out of or relating to [the Development] Agreement . . . or the relationship created by [the Development] Agreement . . . to non-binding mediation [A]ll Disputes which shall not be resolved through mediation . . . shall be submitted for binding arbitration⁶³

Shortly after signing the development agreement, the Campbells acquired an existing Dickey's franchise in South Jordan, Utah, which they operated for two years before closing.⁶⁴ The Campbells did not open any additional locations in Utah and, after receiving a notice of default and termination from Dickey's, the Campbells and their investment entity filed suit against Dickey's concerning their franchise relationship.⁶⁵ Dickey's moved to compel arbitration of the dispute, but the Utah district court refused.⁶⁶ Dickey's appealed the Utah court's decision to the U.S. Court of Appeals for the Tenth Circuit and separately filed a demand for arbitration with the American Arbitration Association (AAA) alleging breach of the development agreement and the South Jordan franchise agreement.⁶⁷ The Campbells responded by informing the AAA of the pending Utah litigation and sought to halt the arbitration.⁶⁸ After the AAA agreed to halt the arbitration until either (1) the parties agreed to proceed with arbitration; or (2) "the AAA receive[d] a final order of a court . . . provid[ing] that the case [should] proceed [to] arbitration[.]" the Campbells dismissed the Utah litigation with prejudice.⁶⁹

Dickey's filed a petition to compel arbitration in the Eastern District of Texas.⁷⁰ The Campbells pursued three objections based on the prior Utah litigation: (1) Dickey's was collaterally estopped from re-litigating the issue of arbitrability; (2) res judicata prevented Dickey's from raising the arbitration clause in this case; and (3) Dickey's waived its right to arbitra-

60. No. 4:18-CV-00491-ALM-KPJ, 2019 WL 1219118 (E.D. Tex. Mar. 15, 2019).

61. *Id.* at *1.

62. *Dickey's Barbecue Rests., Inc. v. Campbell Invs., LLC*, No. 4:18-CV-491-ALM-KPJ, 2019 WL 2301367, at *1 (E.D. Tex. Feb. 11, 2019).

63. *Id.* at *1.

64. *Id.* at *2.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at *3.

tion by not raising it in the Utah litigation.⁷¹ The district court disagreed on all points.⁷² The court overruled the objections because the terms of the agreement were never fully litigated in the Utah litigation, there was no final judgment in the other action, and Dickey's consistently took the position that the disputes should be submitted to arbitration.⁷³ Both parties objected to the magistrate's report because it did not specify which claims should be arbitrated, but the court simply granted Dickey's motion to compel arbitration of disputes arising out of the development agreement and denied Dickey's motion with respect to disputes arising from the franchise agreements or any other claims which formed the basis of the Utah litigation.⁷⁴

Whereas *Dickey's* addressed the enforceability of an arbitration provision, *Choice Hotels International, Inc. v. Onkar Lodging, Inc.*⁷⁵ concerned the enforceability of an arbitral award. In *Onkar Lodging*, Choice Hotels arbitrated a franchise agreement dispute with Onkar Lodging, Inc., Harbhajan Nahal, and Maljinder Singh (collectively, Onkar). The arbitration was administered by a panel of AAA arbitrators in Maryland.⁷⁶ That "AAA panel [ultimately] denied Onkar's claims and awarded Choice [Hotels] costs and [attorney's] fees."⁷⁷ Subsequently, both parties contested the award in the 202nd District Court in Bowie County, Texas, with Choice Hotels seeking to confirm and enforce the arbitral award and Onkar seeking to invalidate and vacate the award.⁷⁸ On September 13, 2018, the district court denied the motion by Choice Hotels to confirm the award and ordered all parties to arbitrate through JAMS—a different "private alternative dispute resolution provider."⁷⁹ Choice Hotels appealed the district court's denial and order, arguing that the district court erred in (1) denying Choice Hotels's motion to confirm the arbitration; and (2) in ordering a new arbitration with a different arbitration provider.⁸⁰

While the factual background of this franchise dispute and the merits of the underlying dispute are complex and noteworthy in-and-of themselves, the primary significance of the opinion by the Sixth Texarkana Court of Appeals is its analysis of the grounds for vacating an arbitral award, as well as the more general issue of whether the arbitration provision was binding in the first place.

71. *Dickey's Barbecue Rests., Inc. v. Campbell Invs., LLC*, No. 4:18-CV-00491-ALM-KPJ, 2019 WL 1219118, at *1–2 (E.D. Tex. Mar. 15, 2019).

72. *Id.*

73. *Id.*

74. *Id.* at *2–3.

75. No. 06-18-00074-CV, 2019 WL 2363316 (Tex. App.—Texarkana June 5, 2019, no pet.) (mem. op.).

76. *Id.* at *1.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Regarding grounds for vacatur, the court of appeals began by noting that, under applicable Maryland law, an arbitration provision in a contract confers jurisdiction on the court to enforce the arbitration provision and enter a judgment enforcing the arbitration award.⁸¹ The decision of a court to grant or deny a motion to confirm or vacate an arbitration award is a conclusion of law which appellate courts review without deference.⁸² Maryland policy considerations favor arbitration as an efficient and effective alternative to litigation. The benefits outweigh the downside of “very narrowly limited” judicial review of arbitration awards, with courts generally deferring to arbitrators’ findings of fact and conclusions of law; “[m]ere errors of law and fact do not ordinarily furnish grounds for a court to vacate . . . an arbitration award.”⁸³ More specifically, the Maryland Uniform Arbitration Act (MUAA) expressly provides “that a court may not vacate an award, or refuse to confirm an award, ‘on the ground that a court of law or equity could not or would not grant the same relief.’”⁸⁴

MUAA also provides five specific instances in which a court “shall” vacate an arbitral award, but the basis specifically relevant to Onkar’s argument was that the “arbitrators exceeded their powers” by re-drafting the franchise agreement, failing to apply Maryland law, and manifestly disregarding the law.⁸⁵ The concept of an arbitration panel’s “powers” under the MUAA has been interpreted by Maryland appellate courts as a kind of jurisdiction, distinguishing the issues of whether the panel acted within its authority under the applicable arbitration agreement, and whether the arbitrators manifestly disregarded the law in resolving the dispute.⁸⁶

Regarding the quasi-jurisdictional component of arbitral “powers,” the court concluded that the AAA panel was well within its authority to construe the parties’ franchise agreement; while Onkar obviously disagreed with the panel’s interpretation of the terms of the franchise agreement and conclusion that Choice Hotels did not breach the agreement, the decisive issue was simply whether “the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”⁸⁷ The AAA panel likewise did not exceed its “powers” by failing to apply Maryland law on proximate causation. Because the panel concluded that Choice Hotels did not breach the agreement in the first place, any discussion of damages models or causation was mere dicta.⁸⁸ The court likewise rejected Onkar’s final basis for vacatur, concluding that the

81. *Id.* at *5.

82. *Id.* (citing *WSC/2005 LLC v. Trio Ventures Assocs.*, 190 A.3d 255, 260 (Md. 2018)).

83. *Id.* (quoting *Downey v. Sharp*, 51 A.3d 573, 583 (Md. 2012)).

84. *Id.* (quoting MD. CODE ANN. CTS. & JUD. PROC. § 3-224(c)).

85. *Id.* (quoting MD. CODE ANN. CTS. & JUD. PROC. § 3-224(b)(3)).

86. *Id.* at *6 (citing *Prince George’s Cty. Police Civilian Emps. Ass’n v. Prince George’s Cty. ex rel. Prince George’s Cty. Police Dep’t*, 135 A.3d 347, 356 (Md. 2016)).

87. *Id.* at *9 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)).

88. *Id.* at *10.

arbitrators did not manifestly disregard the law.⁸⁹ This last basis is an especially steep burden for the party attempting to vacate an arbitral award. While there is no bright line rule, the standard for vacatur enunciated by Maryland appellate courts requires “reasoning so palpably faulty that no judge, or groups of judges, could ever conceivably make such a ruling[.]”⁹⁰ The Sixth Texarkana Court of Appeals concluded that no such error existed in this case.⁹¹

Finally, the court of appeals held that, under Maryland law, the arbitration agreement was enforceable. The court began by acknowledging the general legal principle that arbitration agreements—like all contracts—are susceptible to invalidation for fraud, duress, unconscionability, and other common defenses to the enforcement of contracts.⁹² None of those common defenses applied in this case. Notwithstanding Onkar’s argument that the arbitration provision of its franchise agreement is illusory because Choice Hotels receives favorable treatment from arbitrators, the court held that sufficient consideration existed for the contract to be enforceable. Simply put, “because Choice [Hotels] was bound to arbitrate under the agreement, its promise to arbitrate was not illusory.”⁹³ Likewise, despite Onkar’s complaints of arbitrator bias in favor of Choice Hotels, evidence of such bias did not rise to the level of substantive and procedural unconscionability, as required by several Maryland courts before rendering an arbitration agreement unenforceable.⁹⁴ Specifically, Onkar’s support for its arguments—that the arbitration was required to take place at Choice Hotel’s headquarters in Rockville, Maryland, and that Choice Hotels used its relative size as leverage to select more favorable arbitrators and secure more favorable awards—fails to explain how the specific forum was unfair or unreasonable.⁹⁵ Finally, Onkar failed to prove that the arbitration agreement was obtained by fraud. Whereas Onkar argued that Choice Hotels fraudulently induced Onkar to agree to the arbitration agreement by omitting details about the arbitral process—such as the location and procedure for selecting arbitrators—the court of appeals reasoned that such omissions were not material misrepresentations, but that Choice Hotels had no duty to disclose such information in an arms-length transaction.⁹⁶ Thus, the arbitration agreement was enforceable, and the court of appeals reversed the

89. *Id.* (explaining that the “Maryland Court of Appeals determined that a court may vacate an arbitrator’s decision for manifest disregard of applicable law even though that ground is not listed as a statutory ground for vacatur.”).

90. *Id.* (quoting *WSC/2005 LLC v. Trio Ventures Assocs.*, 190 A.3d 255, 266 (Md. 2018)).

91. *Id.* at *11.

92. *Id.* (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

93. *Id.* at *12.

94. *Id.* (citing *Raglani v. Ripken Prof’l Baseball*, 939 F. Supp. 2d 517, 523 (D. Md. 2013)).

95. *Id.* at *13–15 (adding that “Onkar had the opportunity to conduct its due diligence before the arbitration and to raise the concerns it now raises, but evidently failed to do so.”).

96. *Id.* at *15.

district court's judgment denying confirmation of the arbitral award and ordering JAMS arbitration, and instead rendered judgment confirming the award.⁹⁷

Taken together, these cases demonstrate the strong policy preferences—in Texas and elsewhere—favoring the enforceability of arbitration provisions as well as the confirmation of arbitral awards, except in certain limited circumstances.

E. DEFAULT JUDGMENT

In *Choice Hotels International, Inc. v. Pecos Inn, LLC*,⁹⁸ the plaintiff (Choice Hotels) filed a trademark infringement suit against franchisee defendants (Pecos), with defendants being served on March 30, 2018. On April 30, 2018, Pecos had not answered the complaint and Choice Hotels moved for entry of default judgment which the clerk of the U.S. District Court for the Western District of Texas, Pecos Division, filed.⁹⁹ Choice Hotels moved for default judgment on September 11, 2018.¹⁰⁰ Pecos eventually filed an answer on June 3, 2019, and then filed a motion to set aside the entry of default.¹⁰¹

Rule 55 of the Federal Rules of Civil Procedure governs default judgments. Rule 55(c) permits a court to set aside an entry of default judgment “for good cause.”¹⁰² While the decision to set aside a default judgment “lies within the sound discretion of the district court[,]” defaults are generally disfavored and are not intended to be enforced strictly under the Federal Rules of Civil Procedure.¹⁰³ The most relevant considerations for a court when deciding whether to set aside a default judgment are determining (1) whether the default was willful; (2) whether setting aside the default judgment would prejudice the opposing party; and (3) whether the party seeking the set-aside has a meritorious defense to the underlying claims.¹⁰⁴

As applied to the facts of *Pecos*, the district court was persuaded on the first element by the fact that Pecos was a family-run business, and that the sole member of Pecos Inn, LLC—Ram Kunwar—possessed “minimal ability to read and write English” and relied heavily on his wife and children to understand legal communications.¹⁰⁵ Following the death of Kunwar's wife in 2015, his daughter began managing his hotel's operations, but she left abruptly in late 2018 due to complications with the ho-

97. *Id.* at *16.

98. No. PE:18-CV-9-DC, 2019 WL 5417154 (W.D. Tex. Sept. 17, 2019).

99. *Id.* at *1.

100. *Id.*

101. *Id.*

102. *Id.* (quoting FED. R. CIV. P. 55(c)).

103. *Id.* (citing *United States v. One Parcel of Real Prop.*, 763 F.2d 181, 183 (5th Cir. 1985) (quoting *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003))).

104. *Id.* (citing *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 544–45 (5th Cir. 2014)).

105. *Id.* at *2.

tel's operations and finances.¹⁰⁶ It was only after Kunwar's son, Rahul, took over the business that he first learned of the lawsuit and understood the need to respond. Despite conceding that Ram Kunwar was aware of the lawsuit at the time the complaint was filed, his inability to communicate prevented him from understanding the need to file an answer, prompting the court to conclude "that the default was due to excusable neglect and was not willful."¹⁰⁷ The court likewise concluded that setting aside the default would pose no prejudice to Choice Hotels—largely because Choice Hotels omitted to address that element in its opposition to Pecos's motion to set aside the default, but also because "mere delay does not alone constitute prejudice."¹⁰⁸ Finally, the court held that Pecos could raise a "defense of sufficient merit to raise the possibility of a change of outcome" in response to Choice Hotels's trademark-related claims, because Pecos asserted that it de-identified following demands from Choice Hotels as early as May 2017, and was not profitable following the termination of its franchise agreement.¹⁰⁹ Thus, having found a basis to set aside the judgment on all three requisite elements, the district court granted Pecos's motion to set aside the default judgment.¹¹⁰

This case demonstrates the flexible standards for courts to grant parties relief from a default judgment. In contrast to much harsher outcomes where parties fail to vigorously litigate claims and defenses in an adversary proceeding—as will be discussed in *Morrison* and *Opps*—judicial policy favoring a full and fair hearing weighs decisively against the resolution of litigation by a default judgment. Indeed, a fundamental premise of the adversarial system in common law is that self-interested parties, advocating ardently on their own behalf, provide the most thorough and transparent mechanism for resolving legal disputes. A default judgment undermines this premise by terminating a proceeding without any regard for the merits and is thus heavily disfavored.

F. SUMMARY JUDGMENT

In *Morrison v. Profanchik*,¹¹¹ appellants appealed a take-nothing summary judgment grant in favor of Profanchik on appellants' claims related to Profanchik's alleged breach of a nondisclosure agreement, his alleged interference with appellants' nondisclosure agreements with third parties, and his misappropriation of trade secrets.¹¹² The parties were no strangers at the time of this appeal, as their competing limestone veneer companies had previously been involved in at least four lawsuits.¹¹³ This

106. *Id.*

107. *Id.* at *3.

108. *Id.* (quoting *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000)).

109. *Id.* at *3–4.

110. *Id.* at *4.

111. No. 05-17-01281-CV, 2019 WL 3798182 (Tex. App.—Dallas Aug. 13, 2019, no pet.) (mem. op.), *supplemented*, No. 05-17-01281-CV, 2019 WL 5112268 (Tex. App.—Dallas Oct. 10, 2019, no pet.) (mem. op.).

112. *Id.* at *1.

113. *Id.*

particular dispute originated as a counterclaim by appellants in response to a lawsuit by Profanchik.¹¹⁴ Profanchik had, at one point, expressed interest in purchasing a franchise from appellants, and the parties executed a nondisclosure/noncompete agreement to facilitate the prospective franchise deal.¹¹⁵ Profanchik alleged that soon after signing the agreement, he discovered that appellants had made misrepresentations, prompting him to abandon the franchise purchase and start his own competing limestone veneer company.¹¹⁶ Profanchik subsequently sued appellants and appellants counterclaimed for breach and interference with various nondisclosure/noncompete agreements.¹¹⁷ In response to these counterclaims, Profanchik filed both traditional and no-evidence motions for summary judgment on appellants' counterclaims, and appellants likewise moved for summary judgment on Profanchik's claims against them.¹¹⁸ The 416th District Court in Collin County, Texas, granted Profanchik's motions and denied appellants' motion, and a jury subsequently returned a take-nothing verdict in favor of Profanchik.¹¹⁹

On appeal, the appellants only sought to contest the trial court's grant of summary judgment for Profanchik on appellants' claims for breach of contract, tortious interference, and misappropriation of trade secrets.¹²⁰ The trial court's grant of Profanchik's traditional summary judgment motion was reviewed *de novo*, under the ubiquitous legal standard that summary judgment may only be granted if "there is no genuine issue of material fact and [the movant] is entitled to summary judgment as a matter of law."¹²¹ No-evidence motions for summary judgment are reviewed under the same sufficiency-of-evidence standard as directed verdicts.¹²² Where, as in this case, the trial court did not specify whether it granted the motion for summary judgment on traditional or no-evidence grounds, appellants are required to "negate all possible grounds upon which the order could have been based."¹²³ To prevail on a motion for summary judgment on traditional or no-evidence grounds, the non-movant must show "more than a scintilla of evidence to support each challenged element of its claims" with "every reasonable inference" and "any doubts" resolved in the nonmovant's favor.¹²⁴

Regarding appellant's claims for tortious interference, appellants failed outright to challenge each possible ground for the trial court's grant of traditional or no-evidence summary judgment motions. Because appel-

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at *2.

119. *Id.*

120. *Id.*

121. *Id.* (citing TEX. R. CIV. P. 166a(c)).

122. *Id.* (citing *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)).

123. *Id.* (citing *Jarvis v. Rocanville Corp.*, 298 S.W.3d 305, 313 (Tex. App.—Dallas 2009, pet. denied)).

124. *Id.* (citing *Merriman*, 407 S.W.3d at 248) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

lants failed to challenge *all possible grounds* supporting the grant of summary judgment, the Fifth Dallas Court of Appeals “must accept the validity of the unchallenged grounds and affirm the adverse ruling.”¹²⁵ Likewise, because the unchallenged grounds provided an independent basis for affirming the grant of summary judgment by the trial court, any further error by the trial court is—by definition—harmless, rendering the trial court’s grant of summary judgment on the tortious interference claim irreversible.¹²⁶

Appellants’ arguments concerning their claim for breach of contract were similarly ill-fated. Not only did appellants fail to explain how Profanchik breached the nondisclosure/noncompete agreement, but appellants failed to cite to a single piece of evidence in the summary judgment record at any point in the argument section of their appellate brief.¹²⁷ Instead, appellants relied exclusively on several paragraphs from one appellant’s affidavit, which did “little more than broadly state that Profanchik is using [appellants’] confidential and proprietary information to compete with [appellants’ business].”¹²⁸ While the affidavit referenced additional documents which appellants asserted include their intellectual property, the court of appeals concluded that the referenced statements—the sole evidence appellants cited in support of their breach of contract claim—were conclusory and therefore “not proper summary judgment evidence to be considered on appeal.”¹²⁹ Because appellants failed to present any cognizable evidence to support their claim for breach of the nondisclosure/noncompete agreement, appellants’ remaining arguments concerning the enforceability of the agreement were irrelevant.¹³⁰

Appellants’ final argument concerning their trade secrets claim failed miserably as well. Despite devoting five pages of their appellate brief in support of their argument that “there is no question that the summary judgment record contains disputed facts regarding trade secrets of [appellants,]” the appellants failed to provide a single citation to evidence in the summary judgment record.¹³¹ Appellants failed to address Profanchik’s no-evidence summary judgment arguments, providing yet another independent basis for the court of appeals to affirm the trial court’s grant of Profanchik’s summary judgment motion.¹³² With the final point of error summarily resolved, the court of appeals affirmed the trial court’s judgment in favor of Profanchik.¹³³

As acknowledged by the court in issuing its memorandum opinion, the

125. *Id.* at *3 (citing *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970)).

126. *Id.*

127. *Id.*

128. *Id.* at *4.

129. *Id.* (citing *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam)).

130. *Id.*

131. *Id.* at *5.

132. *Id.*

133. *Id.* at *6.

Morrison appeal involved issues which “are well-settled in law.”¹³⁴ Texas appellate courts have no duty to do appellants’ work for them by scouring the summary judgment record for evidence supporting appellants’ arguments.¹³⁵ Where appellants fail to challenge *each ground* on which summary judgment *could have been granted*, Texas appellate courts are required to affirm the judgment.¹³⁶ As in *Opp*, *Morrison* is a reminder of the importance of participating actively in both trial court and appellate proceedings. Had the *Morrison* appellants put more effort into contesting Profanchik’s summary judgment motions, they would not have had such an inadequate summary judgment record on appeal.

G. RECORD ON APPEAL

In *Opp v. Rainbow International, LLC*,¹³⁷ Jason and Jennifer Opp (the Opps) entered into a franchise agreement with the appellee (Rainbow) in April 2014. Between November 2016 and early 2017, Rainbow alleged that the Opps committed numerous breaches of the franchise agreement, such as failing to pay various fees, failing to make payments on their promissory note, bouncing checks, and failing to submit required sales reports.¹³⁸ On March 9, 2018, Rainbow filed suit in the 414th District Court in McLennan County, Texas, alleging various breach of contract claims.¹³⁹ The Opps filed two motions to transfer venue to federal court in Alaska—where they reside—but neither motion was included in the record on appeal and there is no record that hearings were conducted on the Opps’ motions.¹⁴⁰ The Opps likewise alleged that they filed a motion to continue the bench trial scheduled for October 18, 2018, but that motion was also not included in the record on appeal.¹⁴¹ The trial court ultimately conducted a bench trial on October 18, 2018.¹⁴² The Opps failed to attend the bench trial, and judgment was subsequently rendered for Rainbow in the amounts of \$189,686.08 in damages and another \$40,200.00 in attorney’s fees.¹⁴³

On January 18, 2019, the Opps filed a pro se notice of restricted appeal.¹⁴⁴ A restricted appeal is “a direct attack on the [trial court’s] judgment[.]” and requires the party attacking the judgment to show that: (1) “it filed notice of . . . restricted appeal within six months” of the judg-

134. *Id.* at *1 (citing TEX. R. APP. P. 47.4).

135. *Id.* at *5 (citing *King v. Wells Fargo Bank, N.A.*, 205 S.W.3d 731, 734–35 (Tex. App.—Dallas 2006, no pet.)).

136. *Id.* (first citing *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); then citing *St. John Missionary Baptist Church v. Flakes*, 547 S.W.3d 311, 314–15 (Tex. App.—Dallas 2018), *rev’d*, 595 S.W.3d 211 (Tex. 2020) (per curiam)).

137. No. 10-19-00022-CV, 2019 WL 5800449 (Tex. App.—Waco Nov. 6, 2019, no pet. h.).

138. *Id.* at *1.

139. *Id.* at *2.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

ment; (2) “it was a party to the underlying lawsuit”; (3) “it did not participate in the hearing” from which the judgment resulted “and did not timely file any post-judgment motions”; and (4) “error is apparent on the face of the record.”¹⁴⁵ The only element at issue in the Opps’ appeal was whether error was apparent on the face of the record.¹⁴⁶ Crucially, a restricted appeal requires that evidence of such error be apparent from the record on appeal, rather than error inferred from other sources.¹⁴⁷ In this case, the Opps bore the burden of including their motions to transfer venue and motion for continuance in the record on appeal. Without this documentation, the Tenth Waco Court of Appeals had no way to determine whether error was “apparent on the face of the record.”¹⁴⁸ Accordingly, the Opps’ issues on appeal involving those filings were overruled.¹⁴⁹

The Opps likewise contended that the trial court erred in declining to hear their motion to transfer venue.¹⁵⁰ The legal authority that the Opps cited to support this point of error, however, applied only to Texas justice courts—not the district court that rendered the judgment.¹⁵¹ Once again, the lack of any evidence in the appellate record—that the Opps requested a setting on their motion to transfer venue to federal court in Alaska—was fatal to their argument on appeal.¹⁵²

This case serves as a cautionary tale of the importance of participating earnestly and early in trial court proceedings, and diligently assembling the record on any appeal. The Opps not only failed to offer a meaningful defense at trial, but failed to preserve any opportunity for a retrial by omitting filings in the appellate record which were necessary for their arguments on appeal. As evidenced by the court of appeals’ court opinion overruling every single issue raised by the Opps, Texas appellate courts are bound to strictly construe the required elements of a restricted appeal notwithstanding the pro se status of the appellants.

III. THE FRANCHISE RELATIONSHIP, TERMINATION AND NON-RENEWAL

A. TERMINATION AND NON-RENEWAL

This Survey period revealed an interesting case involving franchise renewal terms. In *Pizza Inn, Inc. v. Clairday*,¹⁵³ a side letter agreement extending the term of the two area development agreements with devel-

145. *Id.* (quoting *Alexander v. Lynda’s Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)); see also TEX. R. APP. P. 30.

146. *Id.*

147. *Id.* (citing *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004)).

148. *Id.*

149. *Id.* at *2–3.

150. *Id.* at *3.

151. *Id.* (citing TEX. R. CIV. P. 87 (noting that Texas Rule of Civil Procedure 87 provides that the “movant has the duty to request a setting on a motion to transfer.”)).

152. *Id.*

153. No. 3:18-CV-0221-N, 2019 WL 499105 (N.D. Tex. Feb. 8, 2019) (mem. op.).

oper Clairday made it difficult for Pizza Inn to deny a second renewal term at the expiration of the first extension.¹⁵⁴ In that case, the original term of the development agreements between the parties lasted twenty years with the option of two five-year renewal terms.¹⁵⁵ At the expiration of the initial twenty-year term, the parties entered a side agreement extending the term by five years.¹⁵⁶ At the expiration of the first renewal term, Clairday demanded a second renewal option by delivering notice of renewal to Pizza Inn, albeit two months late.¹⁵⁷ Pizza Inn sued Clairday seeking a declaratory judgment that the development agreements expired by their terms.¹⁵⁸ Pizza Inn moved for summary judgment but the U.S. District Court for the Northern District of Texas declined to grant it.¹⁵⁹ Specifically, the court held that fact issues precluded summary judgment. Even though the side agreement explicitly provided consent to a single renewal term, it did not clearly negate the possibility of a second.¹⁶⁰ The court also pointed out Clairday suffered financial loss with the closing of the franchise and equity favored Clairday despite Clairday's delay because, when compared to a twenty-year term and five-year renewal term, two months delay was slight.¹⁶¹ This case demonstrates the importance of clearly outlining the terms (and limitations) in side agreements when the franchisor desires an "out" at the end of a renewal term.

IV. INTELLECTUAL PROPERTY

A. TRADEMARKS

1. *Unauthorized Use*

In *Mission Product Holdings, Inc. v. Tempnology, LLC*,¹⁶² the U.S. Supreme Court considered the issue of whether a debtor's rejection of a trademark licensing agreement in a bankruptcy proceeding terminates the licensee's rights to continue using the trademarks.¹⁶³ Tempnology granted Mission Product Holdings (Mission) an exclusive license to distribute Tempnology's products, as well as a non-exclusive license for Mission to use Tempnology's "Coolcore" trademarks.¹⁶⁴ Though the licensing agreement was not set to expire until July 2016, Tempnology filed for bankruptcy in September 2015, and subsequently sought to reject its licensing agreement with Mission under Section 365 of the Bankruptcy Code.¹⁶⁵ Under Section 365, a debtor is permitted to reject any executory

154. *Id.* at *1.

155. *Id.*

156. *Id.*

157. *Id.* at *3.

158. *Id.* at *1.

159. *Id.* at *2.

160. *Id.* at *3.

161. *Id.*

162. 139 S. Ct. 1652 (2019).

163. *Id.* at 1657.

164. *Id.* at 1658.

165. *Id.* (citing 11 U.S.C. § 365 (2018)).

contract—a contract still being performed—but the section clarifies that a debtor’s rejection of a contract constitutes a breach.¹⁶⁶ While neither party contested that Mission had a claim against the bankruptcy estate for damages resulting from the breach—an unsecured claim for which Mission may only receive a fraction of its damages—Tempnology sought declaratory judgment that Mission’s rights to continue using Tempnology’s trademarks were terminated by Tempnology’s rejection of the licensing agreement.¹⁶⁷

At the heart of the dispute were two analogies. According to one view, rejection of a contract under Section 365 was like any other breach of contract. It gave the non-breaching party (Mission) a claim for damages while preserving the non-breaching party’s other rights under the contract.¹⁶⁸ According to the other view, a Section 365 rejection is like a rescission of a contract in a non-bankruptcy context—allowing the non-rescinding party (Mission) to seek damages, but also terminating “the whole agreement along with all rights it conferred.”¹⁶⁹ The Supreme Court ultimately held that the former interpretation—that rejection was like breach—was more consistent with the text of Section 365 and broader principles of contract under the common law and the Bankruptcy Code.¹⁷⁰ Noting the “general bankruptcy rule” that the bankruptcy “estate cannot possess anything more than the debtor itself[.]” the Court reasoned that Tempnology conveyed the right to use its marks to Mission prior to the bankruptcy, and necessarily lost the right to prevent Mission from using the marks for the duration of the license agreement.¹⁷¹ Because Tempnology had no right to prevent Mission from using its marks at the time Tempnology declared bankruptcy, the bankruptcy estate had no basis to assert that right.¹⁷² The Court rejected Tempnology’s attempts to distinguish the unique nature of trademarks and other intellectual property from more general contracts; while the Court agreed that continued use of the marks following rejection of the licensing agreement could diminish the value to Tempnology’s marks, and further agreed that the Bankruptcy Code broadly aims to permit business reorganization, “it does not permit anything and everything that might advance that goal.”¹⁷³

While *Mission Product* did not involve a dispute between franchisees, its holding is of particular relevance in the franchise industry due to the importance of intellectual property and the prevalence of license agree-

166. *Id.*; see 11 U.S.C. § 365(g).

167. *Mission Prod.*, 139 S. Ct. at 1658–59.

168. *Id.* at 1661.

169. *Id.*

170. *Id.* at 1661–63.

171. *Id.* at 1663 (first citing *Bd. of Trade of Chi. v. Johnson*, 264 U.S. 1, 15 (1924); then citing 11 U.S.C. § 541(a)(1) (2018) (defining estate to include the “interests of the debtor in property”)).

172. *Id.*

173. *Id.* at 1665–66 (citing *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51, (2008)).

ments in relationships between franchisors and franchisees. Parties negotiating license agreements may wish to clarify the effect of a licensor's bankruptcy on the rights of licensees to continue using intellectual property governed by the agreement.

2. Enforcement

Whereas *Mission Product* presented an unsettled legal issue, *Choice Hotels International v. Gosla Family Trust*¹⁷⁴ involved a relatively straightforward trademark infringement case—serving as yet another reminder that in the hotel industry, trademark protection is prime. In *Choice Hotels*, the defendants operated a Comfort Suites hotel and Quality Suites pursuant to two franchise agreements with Choice Hotels International, Inc. (Choice Hotels).¹⁷⁵ After Choice Hotels terminated both franchise agreements, it discovered that the defendants were continuing to use the Quality and Comfort family of marks.¹⁷⁶ Even after Choice Hotels sent a cease and desist letter, defendants continued infringing by “(1) using Quality Suites road and building signs, (2) answering the telephone and saying, ‘Quality at Rittman,’ (3) and advertising the [hotel] on several internet websites as either a Quality Suites hotel or a Comfort Suites hotel.”¹⁷⁷ Choice Hotels filed suit against the defendants in the U.S. District Court for the Western District of Texas for trademark infringement and false designation of origin under the Lanham Act and trademark and unfair competition under Texas common law.¹⁷⁸ Choice Hotels moved for summary judgment and the court, in a short opinion, granted summary judgement to Choice Hotels as to liability and granted a permanent injunction against defendants.¹⁷⁹ The defendants’ use of the exact marks and the particularly pressing nature of the industry, where a bad experience could impact the entire franchise, was enough to establish likelihood of confusion and irreparable injury in this case.¹⁸⁰

V. COMMON LAW CLAIMS

A. FRAUD AND MISREPRESENTATION

In a typical waiver-of-reliance clause, a franchisee acknowledges that, other than representations set forth in the franchisor’s Franchise Disclosure Document and franchise agreement, the franchisee did not rely on any representations that may have been made in the franchise sales process regarding specific subjects, most commonly financial performance representations or guarantees of success. Texas courts have generally been willing to enforce a properly drafted waiver-of-reliance clause that

174. No. SA-18-CV-00648-ADA, 2019 WL 4980461 (W.D. Tex. Aug. 8, 2019).

175. *Id.* at *1–2.

176. *Id.* at *2.

177. *Id.*

178. *Id.*

179. *Id.* at *8–9.

180. *Id.* at *4–5.

expressly disclaims the alleged misstatements at issue. Results have not been universal. A recent decision from the Texas Supreme Court appears to close the door for good on certain fraud and fraudulent inducement claims based on false representations that are contradicted by the parties' franchise agreement. In *Mercedes-Benz, LLC USA v. Carduco, Inc.*,¹⁸¹ the Texas Supreme Court clarified that, under Texas law, a franchisee may not justifiably rely on misrepresentations by the franchisor's representatives when such misrepresentations are contradicted by the express terms of the franchise agreement.

In this case, Plaintiff Carduco alleged that Mercedes-Benz fraudulently induced it into purchasing the assets of a Mercedes-Benz dealership in Harlingen by making oral representations that Carduco could relocate its dealership to McAllen and be the area's exclusive dealer of Mercedes-Benz vehicles.¹⁸² Carduco claimed that it repeatedly informed Mercedes-Benz of its intentions to move to McAllen, and that Mercedes-Benz representatives even went with Carduco to look for new locations in McAllen.¹⁸³ At around the same time, Mercedes-Benz allegedly entered into talks with another dealer to open up an exclusive dealership in the McAllen area without informing Carduco.¹⁸⁴ Carduco's agent entered into a contract purchasing the assets of his son's Harlingen dealership and a separate dealer agreement with Mercedes-Benz.¹⁸⁵ The dealer agreement limited Carduco's right to operate to the dealership in Harlingen, Texas and provided that Carduco did not have any exclusive rights to sell Mercedes-Benz vehicles.¹⁸⁶ After Mercedes-Benz announced that a different dealer would be locating in McAllen and denied Carduco's formal request to relocate to McAllen, Carduco filed suit, alleging that Mercedes-Benz fraudulently induced it into entering into the dealer agreement.¹⁸⁷ The jury awarded Carduco \$15.3 million in actual damages and \$115 million in punitive damages. The Thirteenth Corpus Christi–Edinburg Court of Appeals upheld the judgment but reduced the punitive damages award to \$600,000.00.¹⁸⁸ Both parties appealed to the Texas Supreme Court.¹⁸⁹

To prevail on a fraud claim, actual and justifiable reliance must be shown.¹⁹⁰ Carduco argued that it was fraudulently induced to enter into the franchise agreement based on the franchisor's representations that Carduco could relocate to McAllen as the exclusive dealership in the region and that the franchisor had no plans to put another dealer in the McAllen area.¹⁹¹ Mercedes-Benz argued that the clear language of the

181. 583 S.W.3d 553 (Tex. 2019).

182. *Id.* at 554.

183. *Id.* at 556.

184. *Id.* at 554.

185. *Id.* at 555.

186. *Id.*

187. *Id.* at 556.

188. *Id.*

189. *Id.* at 557.

190. *Id.* at 558.

191. *Id.* at 557.

dealer agreement precluded reasonable reliance on pre-contractual representations since the express terms conflict with the alleged misrepresentations.¹⁹²

In making its determination, the supreme court summarized its holding in *Orcha Assets*, a recent case that found that direct contradiction, together with red flags and the party's sophistication negated justifiable reliance.¹⁹³ Carduco argued that the *Orcha Assets* analysis did not apply because there were no "red flags."¹⁹⁴ The supreme court rejected Carduco's argument, finding that *either* direct contradiction or red flags were sufficient to defeat justifiable reliance.¹⁹⁵ The supreme court explained that "when a plaintiff asserts reliance on a misrepresentation that the written contract directly and unambiguously contradicts, both are present because the existence of such a conflict is itself a large red flag."¹⁹⁶

Next, the supreme court rejected Carduco's argument that Mercedes-Benz had a duty to disclose because its representative made partial disclosures that triggered a duty to say more.¹⁹⁷ The supreme court cited the general rule that a failure to disclose is not fraud unless there is a duty to disclose and that no duty of disclosure arises without a confidential or fiduciary relationship.¹⁹⁸ The supreme court also reiterated that the relationship between a franchisor and prospective franchisees is not a special or fiduciary relationship.¹⁹⁹

Carduco argued the supreme court should adopt the court of appeals' reasoning that Section 551 of the Restatement (Second) of Torts, which provides that in arm's-length transactions when "one makes a partial disclosure and conveys a false impression, he has the duty to speak."²⁰⁰ The supreme court, acknowledging that it had never expressly adopted Section 551, determined that even if Section 551 applied, there was no factual basis for its application because Carduco conceded that no representatives of Mercedes-Benz had made any affirmative disclosure on the subject of relocating that could have triggered a legal duty to disclose more.²⁰¹ Although Carduco attempted to show that there were rumors that Mercedes-Benz would sell a new dealership in McAllen, this rumor never reached Carduco's decision makers.²⁰²

Finally, the supreme court cautioned that in an arm's-length transaction, the party alleging fraud must exercise ordinary care to protect its

192. *Id.*

193. *Id.* at 558 (citing *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648 (Tex. 2018)).

194. *Id.*

195. *Id.* at 559.

196. *Id.*

197. *Id.* at 561-63.

198. *Id.* at 562.

199. *Id.*

200. *Id.* at 561.

201. *Id.* at 562-63.

202. *Id.* at 561-62.

own interests and that justifiable reliance is based, in part, on the parties' experience and bargaining power.²⁰³ Given that Carduco's sole owner was an experienced car dealer that understood the relationship between manufacturers and authorized dealers, Carduco was required to exercise greater diligence than the execution of a written contract that directly contradicted Carduco's assertions of fraudulent inducement.²⁰⁴ The supreme court reversed the judgment of the court of appeals and adjudged that Carduco take nothing.²⁰⁵

Yesteryear Auto LLC v. Synergistic International LLC,²⁰⁶ also involved typical waiver-of-reliance and merger clauses present in many franchise agreements. In this case, the U.S. District Court for the Western District of Texas granted summary judgment for franchisor Synergistic International LLC d/b/a Glass Doctor based on waiver-of-reliance and merger provisions in the franchise agreement. Interestingly, the district court determined that there "was no boilerplate agreement" and commented that franchisor and franchisee "were careful to address the issue of reliance" at the time the franchise agreement was executed.²⁰⁷

Glass Door is a franchisor of businesses that install, repair, and replace flat glass and auto glass.²⁰⁸ Plaintiffs entered into a franchise agreement to operate a Glass Door franchise, but failed to pay the minimum license fees and abandoned the franchise after about a year.²⁰⁹ Plaintiffs filed suit against Glass Doctor, alleging breach of contract, fraud-based claims, and violations of the Deceptive Trade Practices Act (DTPA).²¹⁰ The claims were based on franchisee's contention that representatives of Glass Door told Plaintiffs they could use a preexisting building on franchisee's property to house the franchise and that the location was approved in order to induce Plaintiffs to enter into the franchise agreement.²¹¹ Plaintiffs also contended that they were fraudulently induced into entering into the franchise agreement by misrepresentations about the level of training and projections related to success.

Glass Door successfully argued that these misrepresentations were expressly disclaimed and contradicted by the waiver-of-reliance clause in the franchise agreement. For example, because Plaintiffs' preexisting building did not meet the specifications in the franchise agreement, the district court determined that Plaintiffs could not have relied upon any pre-contractual misrepresentation regarding approval of franchisee's preexisting building.²¹²

203. *Id.* at 563.

204. *Id.*

205. *Id.*

206. No. 6:16-CV-00441-ADA-JCM, 2018 WL 7377942 (W.D. Tex. Dec. 21, 2018).

207. *Id.* at *1.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at *9.

212. *Id.* at *5, *9.

As to franchisee's claim for fraud and fraudulent inducement, the court reviewed the terms of the franchise agreement and found that franchisee failed to proffer any of the elements of a claim for fraud or fraudulent inducement.²¹³ The lack of evidence on any element of the fraud claim coupled with the express language in the franchise agreement entitled franchisor to summary judgment on the fraud claim.²¹⁴ The court found that the following, "[w]hile not entirely dispositive," defeated the fraud claim: (1) the waiver-of-reliance provision where franchisees acknowledged that they were not relying on anything outside of the contract itself; (2) the fact that franchisees failed to list any specific representations they relied upon when provided a place to do so in the franchise agreement; and (3) the acknowledgment and representation by franchisees that they fully understood and accepted all business risks described in the franchise agreement.²¹⁵

Turning to the fraudulent inducement claim, which requires that the elements of fraud be established as they relate to an agreement between the parties, the court also granted summary judgment to the franchisor for the same reasons as the fraud claim.²¹⁶ After rejecting franchisees' efforts to toll the statute of limitations based on fraudulent concealment, the court addressed the elements of the fraudulent concealment claim. Again, the court found that franchisees failed to proffer evidence about what specific acts of fraud they relied upon.²¹⁷ All of the fraud-based claims require actual and justifiable reliance, which the court determined was defeated by the express waiver-of-reliance provision in the franchise agreement.²¹⁸

The court also determined that franchisees had failed to state a DTPA claim because such a claim would require the court to ignore the express language of the franchise agreement and rely on pre-contractual statements that conflicted with the terms of the franchise agreement.²¹⁹ In addition, franchisees failed to state any specific information concerning the franchise agreement that franchisor failed to disclose.

The court also determined that all of the claims were barred by the parol evidence rule.²²⁰ Under the parol evidence rule, and absent fraud, accident, or mistake, when parties reduce an agreement to writing, any prior or contemporaneous oral or written agreements are merged into the final written agreement.²²¹ Because the franchise agreement addressed the purported pre-contractual representations and addressed training, the right or ability to use Plaintiffs' existing structure, and projections regard-

213. *Id.* at *5.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at *7.

218. *Id.* at *7-8.

219. *Id.* at *7.

220. *Id.* at *8.

221. *Id.* at *7.

ing success, the parol evidence rule barred the consideration of oral representations concerning these topics.²²² Finally, the district court determined that Plaintiffs failed to offer any evidence of a breach of the franchise agreement, since all of the purported breaches were allowed by the franchise agreement.²²³

Waiver-of-reliance provisions have received significant attention in both state and federal courts in Texas, as they have gained popularity in franchise agreements. Because justifiable reliance is a necessary element of fraud, these disclaimers are meant to preclude fraudulent inducement and fraud claims. These disclaimers should be easier to enforce because of *Carduco* and *Yesteryear Auto*. Whether the alleged misrepresentation directly contradicts the express terms of a franchise agreement, however, often depends on how the alleged misrepresentations are defined.

Most importantly, the lesson of *Carduco* is that franchisees cannot rely upon oral representations made by the franchisor if such representations conflict with the express terms of the franchise agreement. Thus, franchisors, franchisees, and their counsel involved in franchising in Texas should: (1) include all material representations in the terms of the franchise agreement; and (2) include a “merger clause,” which supersedes and negates all prior representations by the parties other than those included in the franchise agreement itself.

B. TORTIOUS INTERFERENCE

In *Security Data Supply LLC v. Nortek Security and Control LLC*,²²⁴ plaintiff Security Data Supply, LLC (SDS), a franchisor and wholesale distributor of electronic security systems, and its franchisees (SDS Franchisees) (SDS and SDS Franchisees, collectively, Plaintiffs), brought claims for antitrust and price discrimination violations and tortious interference against defendants Nortek Security and Control (Nortek), Nortek employee Earnest Bernard (Bernard), and Wave Electronics, Inc. (Wave) (Nortek, Bernard, and Wave, collectively, Defendants).²²⁵ Nortek is a manufacturer of electronic security systems and Wave is a wholesale distributor of electronic security systems that competes with SDS.²²⁶ SDS claimed that while Bernard was employed at Nortek, Bernard provided Wave with preferential pricing on Nortek 2GIG products.²²⁷ SDS further alleged that Nortek sold identical products to SDS and Wave, but intentionally discriminated against SDS in price through a rebate program, which allowed Wave to sell Nortek 2GIG products at a lower price than SDS could buy them.²²⁸ SDS alleged that Nortek management was aware of this price discrimination scheme, and allowed it to continue after Ber-

222. *Id.* at *8.

223. *Id.*

224. No. 3:18-CV-1399-S, 2019 WL 3305628 (N.D. Tex. July 22, 2019).

225. *Id.* at *1.

226. *Id.*

227. *Id.* at *2.

228. *Id.* at *1.

nard left Nortek.²²⁹ Plaintiffs alleged that they lost a significant number of customers to Wave and were unable to compete for new customers.²³⁰ Plaintiffs sued Defendants for tortious interference with existing contract, tortious interference with prospective business relations, and tortious interference with existing business relations.²³¹ Defendants moved to dismiss these causes of action for failure to state a claim.

As to the claim for tortious interference with existing contract, the U.S. District Court for the Northern District of Texas granted the motion to dismiss because the complaint did not include any facts showing that Defendants induced any party to breach a contract, which is an essential element of the claim.²³² Plaintiffs were granted leave to plead additional facts supporting the claim, however.²³³ As to the tortious interference with prospective business relations, the district court considered whether Plaintiffs pleaded business relationships that were beyond the negotiations stage.²³⁴ To state a claim for tortious interference with prospective business relations, a party must establish a reasonable probability that the parties would have entered into a contractual relationship, which requires “more than mere negotiations occurred.”²³⁵ In addition, a pre-existing business relationship can be used to establish a reasonable probability of prospective contractual relations.²³⁶ In this case, the cause of action was adequately pleaded because Plaintiffs alleged two business relationships beyond the negotiations stage, including its ongoing relationship with Nortek.²³⁷ The district court also determined that Plaintiffs had adequately pleaded an independently tortious act since Plaintiffs adequately alleged a violation of antitrust laws.²³⁸

Similarly, the district court determined that the cause of action for tortious interference with existing business relationships was adequately pleaded. The district court determined that to the extent that Texas recognizes a claim for interference with an existing business relationship, plaintiffs must show that the “interference was motivated by malice, but do not need to allege the existence of a contract subject to interference.”²³⁹ In this case, given the allegations of price discrimination and bribery, which Defendants should have known were illegal, Plaintiffs had

229. *Id.* at *2.

230. *Id.*

231. *Id.* at *8.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (quoting *Richardson-Eagle, Inc v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)).

236. *Id.* (quoting *Santander Consumer USA, Inc. v. Zeigler Chrysler Dodge Jeep-Downers Grove, LLC*, No. 3:16-CV-3310-B, 2017 WL 2729998, at *9 (N.D. Tex. June 26, 2017)).

237. *Id.*

238. *Id.* at *9 (citing *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 704–06 (Tex. 2015)).

239. *Id.*

adequately pleaded malice.²⁴⁰ Finally, the court denied the motion to dismiss as to the civil conspiracy claim because Plaintiffs successfully pleaded facts to support a civil conspiracy claim, including allegations that Bernard and Wave conspired to engage in discriminatory pricing in exchange for bribes and that Nortek and Wave jointly solicited Plaintiffs' customers to switch to Wave.²⁴¹

VI. STATUTORY CLAIMS

A. ANTITRUST

The Robinson-Patman Act (RPA) prohibits unlawful price discrimination. RPA cases generally arise when customers allege that a supplier has charged them higher prices than their competitors. Despite numerous attempts to repeal or modify it and refusal by the Federal Trade Commission to enforce it, the RPA remains a reality for private litigants. Although RPA claims do not generally arise in disputes between franchisor and franchisees, it is possible for price discrimination claims to be asserted by a franchisor and/or franchisee against a supplier. Such was the case in *Security Data Supply*, discussed above.

Plaintiffs alleged that Nortek and Wave violated the RPA by “knowingly inducing, receiving, or engaging in price discrimination.”²⁴² In addition, Plaintiffs alleged that Nortek, Wave, and Bernard had engaged in commercial bribery in violation of Section 2(c) of the RPA.²⁴³ Plaintiffs asserted that Bernard and other Nortek employees received gift cards as bribes in exchange for giving Wave preferential pricing.²⁴⁴ Defendants moved to dismiss the price discrimination claims asserted by the SDS Franchisees for lack of standing and argued that the SDS Franchisees had not suffered injury-in-fact or antitrust injury.²⁴⁵

The court noted that injury-in-fact is successfully shown by “pleading a decline in sales because of the defendant’s conduct, but lacks standing if no actual injury has yet occurred. . . .”²⁴⁶ The court rejected Defendants’ argument that injury-in-fact was not established for the purposes of surviving a motion to dismiss because Plaintiffs alleged the loss of specific clients and more than \$9.5 million in revenue losses due to discriminatory pricing.²⁴⁷ The court also determined that the SDS Franchisees suffered antitrust injury.²⁴⁸ The court found that the RPA injury was a “secondary-line case” involving price discrimination that injures competition among the discriminating seller’s customers.²⁴⁹ Because the complaint

240. *Id.*

241. *Id.* at *10.

242. *Id.* at *3.

243. *Id.*

244. *Id.* at *2.

245. *Id.* at *3–4.

246. *Id.* at *4.

247. *Id.*

248. *Id.*

249. *Id.*

had numerous allegations of the diversion of sales and profits from Plaintiffs to Wave, as well as allegations of discriminatory pricing that allowed Wave to sell Nortek products well below the price Nortek charged Plaintiffs, Plaintiffs had properly pleaded antitrust injury.²⁵⁰

Finally, the court determined whether the SDS Franchisees were proper plaintiffs to sue for antitrust injuries.²⁵¹ Defendants argued that the SDS Franchisees were not proper plaintiffs because they received their inventory from franchisor SDS, and not directly from Defendants.²⁵² The court rejected Defendants' argument that the SDS Franchisees were indirect purchasers, noting that the indirect purchaser rule does not apply in the "cost-plus" contract setting.²⁵³ Accepting the SDS Franchisees' allegations that any overcharge by Nortek is not absorbed by franchisor, but instead passed directly through to the SDS Franchisees through a standard mark-up, the court found that the SDS Franchisees were proper plaintiffs because they alleged a cost-plus contract setting.²⁵⁴

The court next turned to the viability of the commercial bribery charge, where Defendants argued that commercial bribery is not a violation of RPA Section 2(c).²⁵⁵ The court explained that although the U.S. Court of Appeals for the Fifth Circuit has not decided whether commercial bribery is a violation of the RPA, every circuit that has addressed this issue has found that commercial bribery is a violation.²⁵⁶ Having found that commercial bribery is viable under RPA Section 2, the court next analyzed the sufficiency of the allegations of commercial bribery as to Defendants.²⁵⁷ The court determined that the allegations of commercial bribery were sufficient to withstand a motion to dismiss as to Bernard, who is alleged to have received bribes in the form of gift cards, and as to Wave.²⁵⁸ The court found that the allegations as to Nortek's direct liability for commercial bribery failed to state a claim because the allegations concede that Nortek did not consent to the bribery; however, vicarious liability was properly pled.²⁵⁹

B. BANKRUPTCY ISSUES

The automatic stay pending bankruptcy proceedings generally protects only debtors. In limited circumstances, however, courts have extended the stay to prevent non-debtor third-party collection efforts, such as lawsuits against guarantors of a debtor's obligations. In addition, courts have used their discretionary powers to stay proceedings. The issue of the im-

250. *Id.*

251. *Id.* at *5.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *6.

258. *Id.* at *7.

259. *Id.*

pact of the automatic stay on non-debtor counter-defendants resulting from the Chapter 11 bankruptcy of some counter-defendants was discussed in *Gigi's Cupcakes, LLC v. 4 Box LLC*.²⁶⁰

Gigi's Cupcakes's franchisees counter-sued several franchise entities and businesses.²⁶¹ Four of the counter-defendants, including current franchisor Gigi's Cupcakes, filed voluntary petitions for Chapter 11 bankruptcy.²⁶² The U.S. District Court for the Northern District of Texas then stayed the case for ninety days to determine the effect of the bankruptcy proceeding on the claims against the non-debtors.²⁶³ Three of the non-debtors—FundCorp, Inc. (FundCorp), Food Business Services, LLC (Food Business), and Gina Butler (Butler)—moved to extend the ninety-day discretionary stay, which the franchisees opposed.²⁶⁴ FundCorp and Food Business are commercial entities that do business with debtor and franchisor Gigi's Cupcakes.²⁶⁵ Franchisees alleged that FundCorp and Food Business benefited from Gigi's Cupcakes's alleged fraudulent transfers prior to bankruptcy.²⁶⁶ Franchisees generally asserted claims against the non-debtors FundCorp and Food Business for state-law fraudulent transfer, civil conspiracy, declaratory judgment, and violations of the Texas Business Opportunity Act and Texas Deceptive Trade Practices Act.²⁶⁷

Butler was one of the original founders of the Gigi's Cupcakes franchise (Prior Franchisor) but claimed that she no longer had any interest in the franchises since transferring the franchise assets and interests, including the franchise agreements, to debtor KeyCorp. KeyCorp is the sole member of Gigi's Cupcakes. Keycorp assigned its rights to purchase the assets of the Prior Franchisor to Gigi's Cupcakes.²⁶⁸ Franchisees asserted claims against Butler for fraud, fraudulent concealment, negligent misrepresentation, fraud and fraudulent transfer under state law, civil conspiracy, and declaratory judgment.²⁶⁹

The district court noted that the automatic stay under 11 U.S.C. § 362(a) generally protects the debtor and does not apply to non-debtors.²⁷⁰ The court explained that the stay can be extended to non-debtors on rare occasions under Section 362(a) when the relationship between the debtor and the non-debtor third party is such that a judgment against

260. No. 3:17-CV-3009-B, 2019 WL 1767003 (N.D. Tex. Apr. 22, 2019) (mem. op.). Haynes and Boone attorneys Deborah Coldwell, Iris Gibson, and Sally Dahlstrom represent Gigi's Cupcakes, LLC and certain of its affiliates in this matter.

261. *Id.* at *1.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at *2.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at *4.

270. *Id.* at *1 (citing *Reliant Energy Servs., Inc. v. Enron Can. Corp.*, 349 F.3d 816, 825 (5th Cir. 2003)).

the non-debtor will be in effect a judgment against the debtor.²⁷¹ The district court noted that a second option was to exercise the court's broad discretion to stay proceedings in the interest of judgment.²⁷² The court addressed the extension of the stay as to FundCorp and Food Business, and Butler separately.

Non-debtors FundCorp and Food Business argued that the state-law fraudulent-transfer claims were subject to the automatic stay because these claims sought recovery of estate property.²⁷³ The district court agreed because the fraudulent-transfer claims alleged injuries derived from harm done to Gigi's Cupcakes, and thus belonged to the bankruptcy estate.²⁷⁴ This was because the franchisees alleged that Gigi's Cupcakes was insolvent but made payments to non-debtors for less than "reasonably equivalent value."²⁷⁵ Although the franchisees argued that some of the fraudulent-transfer claims were based on actual fraud that resulted in particularized injury to the franchisees, the court determined that franchisees failed to allege any specific conduct directed towards the franchisees.²⁷⁶ Because the fraudulent-transfer claims were general and common to all creditors, the court extended the automatic stay under Section 362(a)(3) since the fraudulent-transfer claims against FundCorp and Food Business were property of the bankruptcy estate.²⁷⁷ Next, the court extended the automatic stay to the three remaining claims against FundCorp and Food Business under its discretionary stay powers because these claims were "inextricably interwoven" with claims against the debtor and because determining liability for the remaining claims would require resolving factual and legal issues related to the debtor.²⁷⁸

The court, however, denied Butler's request that the court stay the litigation because the claims asserted against her were different from the claims asserted against the other two non-debtors, FundCorp and Food Business.²⁷⁹ While the claims against Butler arose mostly from her dealings with franchisees before debtor acquired the assets of the Prior Franchisor, the claims against FundCorp and Food Business arose after the asset purchase.²⁸⁰ The fraud-based claims against Butler were generally based on alleged misrepresentations made prior to the execution of the franchise agreements concerning the Prior Franchisor's financial health and solvency.²⁸¹ Where Butler's potential liability for fraud was based on representations made prior to the execution of the franchise

271. *Id.* (citing *Reliant Energy*, 349 F.3d at 825).

272. *Id.* (citing *Beran v. World Telemetry, Inc.*, 747 F. Supp. 2d 719, 723 (S.D. Tex. 2010)).

273. *Id.* at *3.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at *4.

279. *Id.*

280. *Id.*

281. *Id.* at *5.

agreements, debtors' liability was based on the debtors' alleged notice of Butler and the Prior Franchisor's fraud.²⁸² Nor could the court exercise its discretionary power to extend the stay because Butler did not show any hardship or judicial inefficiency that would result from allowing the claims against her to move forward.²⁸³ Therefore, except for the conspiracy claim, which involved the stayed parties, the court denied Butler's request to extend the stay as to the claims against her.²⁸⁴ Finally, the court ordered that franchisees could proceed against the three non-debtor defendants who had yet to appear, as there was no reason to stay these claims.²⁸⁵

Chapter 7 liquidation is a principal means used by franchises to discharge their debts. The Bankruptcy Code authorizes a broad discharge with the intent to provide a fresh start to honest but unfortunate debtors. Notwithstanding this broad discharge, Section 523(a) of the Bankruptcy Code sets forth certain debts that are nondischargeable, including debts obtained by actual fraud, embezzlement, and false representations.

Phelps v. Hunt (In re Hunt) involved the Chapter 7 individual bankruptcy of the principal owner of a franchisor entity.²⁸⁶ Hunt was the founder and principal owner of Tea 2 Go, LLC, which offered Tea 2 Go franchises.²⁸⁷ Hunt told Phelps that the Tea 2 Go stores were grossing \$750,000.00 to \$1,500,000.00 per year and provided projections for twelve proposed territories.²⁸⁸ Between August 2014 and mid-to-late 2015, Phelps acquired nine territories with exclusive rights to open Tea 2 Go stores.²⁸⁹ In the spring of 2016, after many stores failed or never opened, Phelps made an investment at Hunt's request that did not involve the purchase of additional franchises.²⁹⁰ Instead, for \$55,000.00, Phelps obtained from Hunt personally, a 49% interest in a company-owned Austin store.²⁹¹ Within a few weeks, Hunt sold the Austin store for \$50,000.00 without Phelps's knowledge.²⁹² In April 2016, Hunt and his businesses incurred a default judgment of over \$598,000.00.²⁹³ After Hunt filed for personal bankruptcy under Chapter 7, Phelps sought to liquidate his fraud claims against Hunt for (1) the amounts paid for acquiring the franchise rights from Tea 2 Go, LLC; and (2) the amount he paid Hunt for the 49% interest in the Austin store and then have these fraud claims determined to be nondischargeable under Section 523(a).²⁹⁴

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Phelps v. Hunt (In re Hunt)*, 608 B.R. 477 (Bankr. N.D. Tex. 2019) (mem. op.).

287. *Id.* at 483.

288. *Id.*

289. *Id.*

290. *Id.* at 484.

291. *Id.*

292. *Id.*

293. *Id.* at 485.

294. *Id.*

As to the amounts paid for acquiring the franchises from the franchisor, the U.S. Bankruptcy Court for the Northern District of Texas determined that Hunt could be personally liable for the fraud related to the purchase of the franchise rights if Hunt's conduct amounted to actual fraud or if Hunt personally committed a fraudulent or intentionally tortious act. Relying on its decision in *Farooqi v. Carroll (In re Carroll)*,²⁹⁵ the bankruptcy court determined that if claims against the corporation could be proven, personal liability against the debtor for the resultant damages for his own tortious conduct would result if Hunt obtained funds "by false pretenses, a false representation, or actual fraud."²⁹⁶

The court first considered whether Phelps satisfied his burden under Section 532(a)(2)(A) to show that Hunt "made materially false statements with the intent to deceive him that, in turn, induced his investment, payment of franchise fees, or purchase of an interest in the LLC."²⁹⁷ False or fraudulent statements concerning the debtor's financial condition are excluded under Section 523(a)(2)(A).²⁹⁸ As to the statements where Hunt "touted the financial performance of the tea stores," these representations concerned the financial condition of Tea 2 Go (and Hunt) and therefore fell outside Section 523(a)(2)(A).²⁹⁹ Although Tea 2 Go's actions may be actionable, the court determined that Phelps did not meet his burden to establish that the "payments for the franchises were solicited through intentionally deceitful conduct by Hunt."³⁰⁰ In addition, the profit and loss statements fell short of "paint[ing] a substantially untruthful picture" of Hunt's financial condition. Therefore, Phelps failed to meet his burden to prove that the claims should be nondischargeable under Section 523(a)(2)(B), which prevents the discharge of debts obtained by using written statements (here the profit and loss statements) that are materially false.³⁰¹ The district court highlighted the fact that Phelps continued to invest after it became clear that there were problems with the stores that he had previously purchased.³⁰²

Next, the court turned to whether Hunt's sale of a 49% interest in the Austin franchise to Phelps for \$55,000.00 satisfied the elements of nondischargeability under Sections 523(a)(4) and (a)(6). Section 523(a)(4) excepts from discharge debt arising from, among other acts, embezzlement or larceny.³⁰³ Section 523(a)(6) provides that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."³⁰⁴ Here, the court found that Phelps met his

295. 464 B.R. 293 (Bankr. N.D. Tex. 2011) (mem. op.).

296. *In re Hunt*, 608 B.R. at 486.

297. *Id.* at 490.

298. *Id.* at 488.

299. *Id.* at 489–90.

300. *Id.* at 490.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 491 (quoting 11 U.S.C. § 523(a)(6) (2018)).

burden to establish that Hunt intended to procure the \$55,000.00 for his own benefit.³⁰⁵ Given that Hunt was in “deep financial trouble” and the fact that the Austin store was sold within a month without accounting to Phelps, Phelps established embezzlement and willful misconduct under Section 523(a)(4) and (a)(6).³⁰⁶

Filing an involuntary petition under 11 U.S.C. § 303 can be a good collection tool for creditors. Under Section 303 of the Bankruptcy Code, creditors can file an involuntary bankruptcy petition under either Chapter 7 or 11 against a debtor who has more than twelve creditors if they meet certain criteria. Careful planning is required because, pursuant to Section 303(i)(2) of the Code, if the court dismisses an involuntary petition after a determination that it was filed in bad faith, sanctions can be imposed.

The issue of bad faith filing of an involuntary petition was considered in *In re Essential Financial Education, Inc.*, which involved an involuntary petition filed against franchisee Essential Financial Education, Inc. (Essential).³⁰⁷ Sophisticated investor Thomas Caufield (Caufield) formed Essential and operated an online financial management investment company pursuant to a franchise agreement with franchisor OTA Franchise Corporation (OTA).³⁰⁸ After Caufield and Essential violated the franchise agreement by improperly soliciting investments, OTA permitted franchisee to sell the business in lieu of termination and subject to the franchisee’s payment of several large debts owed to franchisor and others.³⁰⁹ Gary Flick (Flick), an investor in Essential, claimed he did not receive the promised return on his investment and sued Essential for securities violations and fraud.³¹⁰ Essential and Flick entered into a proposed final judgment where Essential and Caufield agreed to repay Flick.³¹¹ Before the judgment was approved, however, Flick filed an involuntary petition of bankruptcy against Essential, which Essential did not protest.³¹² OTA sought dismissal or abstention of the involuntary bankruptcy petition.³¹³

First, Flick argued that OTA did not have standing because it was not a creditor with claims against the estate. The U.S. Bankruptcy Court for the Northern District of Texas disagreed with Flick and determined that OTA was a creditor of the estate because it had claims against Essential under the franchise agreement for indemnification and attorney’s fees relating

305. *Id.* at 492.

306. *Id.*

307. *In re Essential Fin. Educ., Inc.*, No. 18-33108-BJH, 2019 WL 1750906 (Bankr. N.D. Tex. Apr. 16, 2019). Haynes and Boone attorneys Deborah Coldwell and Sally Dahlstrom represented OTA in this matter.

308. *Id.* at *1.

309. *Id.*

310. *Id.* at *2.

311. *Id.*

312. *Id.*

313. *Id.*

to the settlement and involuntary petition.³¹⁴

Next, OTA argued that Essential's involuntary petition should be dismissed because Flick did not hold a claim against Essential, the petition was nothing more than an extension of prebankruptcy litigation between Essential and Flick, and the equities favored dismissal.³¹⁵ The bankruptcy court disagreed.

First, the bankruptcy court found that Flick had a claim against Essential, as evidenced by the pre-petition schedules filed by Essential that listed Flick as an unsecured creditor in an amount of the proposed final judgment.³¹⁶ Furthermore, the court found there were no facts to suggest collusion between Essential and Flick.³¹⁷ Second, the court determined that the bankruptcy case was not a mere extension of prebankruptcy litigation because the claims against the estate listed in Essential's schedules were presumptively valid.³¹⁸ Third, the bankruptcy court held that the bad faith necessary to support dismissal of an involuntary case requires that a petitioning creditor "acted with wrongful motives, wrongful objectives or both."³¹⁹ Further, many courts have adopted a presumption that a petitioning creditor "acted in good faith" in filing an involuntary petition. The fact that Flick sent a pre-petition demand letter to OTA threatening to file the involuntary petition unless he was paid was aggressive, but standing alone did not support a finding that the involuntary petition was filed in bad faith or solely as a litigation tactic.³²⁰ Finally, after weighing the seven abstention factors to determine whether abstention should be granted in the court's discretion, the court concluded that the involuntary petition should proceed in federal bankruptcy court and denied OTA's abstention request.³²¹

Using an involuntary petition for an improper purpose, such as attempting to gain advantage in a pre-petition litigation, may result in sanctions. If like in *Essential*, however, the petitioning creditors meet the threshold criteria and the debtor is not generally paying its debts as they become due, the bankruptcy case will proceed just as if a voluntary petition had been filed.

VII. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. COMPENSATORY DAMAGES

In the franchise and distribution context, Texas courts continue to permit a business owner's ability to provide lay witness opinion regarding lost profits and other damages. In the proper context, this avenue to es-

314. *Id.* at *3.

315. *Id.* at *4.

316. *Id.*

317. *Id.*

318. *Id.* at *5.

319. *Id.* (citing *Aigner v. McMillan*, No. 11-47029-DML-7, 2013 WL 2445042, at *4 (Bankr. N.D. Tex. June 4, 2013) (mem. op.)).

320. *Id.*

321. *Id.* at *6-7.

establish damages can alleviate the need for costly experts or mollify strategic mistakes regarding designation of experts. In *Servicios Comerciales Lamosa, S.A. de C.V. v. De la Rosa*, the U.S. District Court for the Northern District of Texas examined a manufacturers' motion to exclude lay opinion testimony from a distributor's owner regarding lost profits.³²² Two manufacturers of ceramic tile filed contract claims against their Texas-based distributor, Mundo Tile, and its owner, De la Rosa, seeking approximately \$3 million in unpaid amounts under promissory notes and a personal guaranty.³²³ Mundo Tile and De la Rosa filed numerous counterclaims, including a contract claim for breach of an alleged exclusive distribution arrangement.³²⁴

After denying various motions for summary judgment, the district court turned to the manufacturers' motion to exclude expert and lay opinion testimony from De la Rosa regarding lost profits and other damages.³²⁵ The manufacturers first argued Mundo Tile had not timely designated its owner as an expert, but Mundo Tile noted that De la Rosa would only be offering lay opinion testimony.³²⁶ While the manufacturers argued De la Rosa's testimony should be struck because it would not constitute "competent evidence with reasonable certainty," the district court reiterated that Rule 701 of the Federal Rule of Evidence has long recognized that a business owner could testify to the "value or projected profit[]" of his business without qualifying as an expert in accounting, appraisals, or other forms of valuation—so long as the owner had sufficient personal knowledge of the business and financials.³²⁷

Because De la Rosa was the founder, sole operator, and owner of Mundo Tile for more than fourteen years, the district court concluded he had sufficient knowledge of his company's financials to testify about lost profits under Rule 701.³²⁸ The manufacturers' objections to De la Rosa concerned the weight of his testimony, as opposed to admissibility, which could be tested during cross examination or through rebuttal testimony.³²⁹ Accordingly, the court denied the motion to exclude De la Rosa's lay opinion testimony.³³⁰ This case serves as a useful reminder that you do not always need a paid expert to establish damages in a breach of contract claim so long as the business owner has sufficient information about his company's financials. There may be instances, however, where cross examination could be detrimental or an owner's testimony may need to be bolstered or supplemented by a retained expert.

322. *Servicios Comerciales Lamosa, S.A. de C.V. v. De la Rosa*, 328 F. Supp. 3d 598 (N.D. Tex. 2018) (mem. op.).

323. *Id.* at 604–05.

324. *Id.* at 605.

325. *Id.* at 610–15.

326. *Id.* at 615, 617.

327. *Id.* at 615, 617–18.

328. *Id.* at 618.

329. *Id.* at 618–19.

330. *Id.* at 618.

B. INJUNCTIVE RELIEF

The dispute in *All Tech Repairs, Inc. v. MMI-CPR, LLC*³³¹ concerned an Area Representative Agreement (ARA) related to retail stores for cell phones and other electronic devices.³³² There were three plaintiffs: (1) All Tech Repairs, Inc. (All Tech), the “Area Developer”; (2) Mobile Solutions, Inc. (MSI), a franchisee of defendant-franchisor MMI-CPR, LLC (CPR); and (3) Mobile Solutions One, Inc. (MSO), the operating company for MSI’s stores (collectively, the Plaintiffs).³³³ CPR notified All Tech that it was terminating the ARA—a contract only between CPR and All Tech—due to All Tech’s alleged failure to develop a number of stores and to support franchisees.³³⁴ Plaintiffs sought a declaration that the termination notice was invalid because there was no opportunity to cure, alleged CPR breached the ARA by failing to pay royalty fees to All Tech, and sought a temporary restraining order and preliminary injunction to enjoin CPR from terminating the ARA.³³⁵

The U.S. District Court for the Northern District of Texas first examined the immediate and irreparable harm elements necessary for injunctive relief.³³⁶ While Plaintiffs claimed lost income, lost customers, and financial distress constituted their irreparable harm, the court noted those would only be “irreparable” if they could not be measured in money damages or if they demonstrated a substantial threat to their existence.³³⁷ Because Plaintiffs offered only conclusory statements to demonstrate the alleged harms could not be measured in money damages, the court focused exclusively on whether a potential threat to the Plaintiffs’ existence existed.³³⁸

To that end, the court concluded Plaintiffs could not meet their burden on this issue because they delayed seeking injunctive relief for sixteen days after the case was removed to federal court.³³⁹ Plaintiffs defended their delay by explaining they were engaged in good-faith negotiations with opposing counsel to avoid litigation.³⁴⁰ While the court gave Plaintiffs some benefit for trying to negotiate a solution with CPR, it emphasized that Plaintiffs took no steps to protect themselves from the loss of future royalties during those negotiations—which constituted the alleged substantial threat to their existence.³⁴¹ Plaintiffs’ actions therefore under-

331. No. 3:19-CV-1051-K, 2019 WL 2286082 (N.D. Tex. May 29, 2019) (mem. op.).

332. *Id.* at *1.

333. *Id.*

334. *Id.*

335. *Id.* Plaintiffs alleged that CPR had breached the ARA in three different ways, including the failure to pay royalties to All Tech. *Id.*

336. *Id.* at *2.

337. *Id.*

338. *Id.*

339. *Id.* The court also noted that the dispute over the ARA first arose in January 2019, yet Plaintiffs did not seek any injunctive relief in state court until April 17, 2019, prior to the case being removed to federal court. *Id.*

340. *Id.*

341. *Id.*

mined the “urgency” of their requested injunctive relief.³⁴²

Further, the court determined that the irreparable nature of the harm felt by Plaintiffs was due in part to their operating structure—not as a result of any alleged breach of the contract by CPR.³⁴³ While the Plaintiffs’ delay in seeking injunctive relief and their operating structure may not have been fatal to their request for injunctive relief if taken separately, the court concluded that they undermined any proof that Plaintiffs proved irreparable or imminent harm when considered together.³⁴⁴

This case demonstrates that franchises must ensure they take swift steps to protect against any irreparable harm even if they attempt good-faith negotiations to avoid litigation in a cost-effective and efficient manner. Otherwise, a court can make an easy inference that allegations of a “immediate” harm are unwarranted. Further, when alleging irreparable harm, it is critical to tie that irreparability to the basis for the lawsuit, such as allegations of breach by the other party rather than harm resulting from their own business decisions.

The dispute in *South Plains Sno, Inc. v. Eskimo Hut Worldwide, Ltd.* concerned alcoholic frozen drinks that were sold as a to-go item in Lubbock, Texas.³⁴⁵ South Plains Sno, Inc. (South Plains), the franchisee, filed suit alleging Eskimo Hut Worldwide, Ltd. (Eskimo), the franchisor, breached the franchise agreement. Eskimo filed counterclaims also asserting breach and sought a temporary injunction to stop the franchisee from selling the products.³⁴⁶ The temporary injunction was granted by the 251st District Court of Randall County, Texas, and South Plains filed an interlocutory appeal of that decision.³⁴⁷

The Seventh Amarillo Court of Appeals first described the recipes for the frozen drinks at issue.³⁴⁸ Eskimo provided recipes to South Plains for mixing the “base mix,” which was combined with water, the customer’s selected flavor, and wine or other alcoholic beverages.³⁴⁹ Eskimo did not supply the alcohol or require its franchisees to purchase a particular type of alcohol, and a franchisee determined what, if any, amount of alcohol to add to the drink mix.³⁵⁰ Eskimo asserted that South Plains violated the franchise agreement because it did not follow the base mix and flavors for the drinks, something South Plains did not dispute.³⁵¹

South Plains argued Eskimo could not have any probable right of recovery because the provisions of the franchise agreement related to the

342. *Id.*

343. *Id.* at *3.

344. *Id.*

345. *S. Plains Sno, Inc. v. Eskimo Hut Worldwide, Ltd.*, No. 07-19-00003-CV, 2019 WL 1591994 (Tex. App.—Amarillo Apr. 12, 2019, no pet.) (per curiam) (mem. op.).

346. *Id.* at *1.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

addition of alcohol was illegal and unenforceable.³⁵² Specifically, South Plains relied on an excerpt from the Texas Alcohol Beverage Code that required every alcohol permittee (like South Plains) to have exclusive control over every phase of the sale of alcoholic beverages—and any device, scheme, or plan that surrenders control was unlawful.³⁵³ According to the court, South Plains did not cite to any case that supported the argument that, by dictating the recipe of the base mix, Eskimo concocted any scheme that forced South Plains to surrender control in violation of the alcohol code.³⁵⁴ Without any persuasive evidence of illegality, the court found no abuse of discretion by the trial court and affirmed its grant of the temporary injunction.³⁵⁵

In a separate part of the opinion, the appellate court examined whether a provision of a franchise agreement regarding extraordinary relief, standing alone, could authorize a court to grant injunctive relief irrespective of the elements for such relief under Texas law.³⁵⁶ Neither the parties nor the court could find any such authority.³⁵⁷ The court recognized, however, that the mere existence of the provision provided at least some evidence that South Plains agreed that failing to comply with uniform standards for the drinks would produce incalculable and irreparable damage sufficient for extraordinary relief.³⁵⁸ Coupled with testimony from Eskimo that South Plains' actions jeopardized the consistency of Eskimo's product, the appellate court concluded there was enough evidence for the trial court to have found some evidence of imminent injury and irreparable harm.³⁵⁹

An important takeaway from this case is that franchisors should be cognizant of the restrictions in the Texas Alcohol Beverage Code if the franchise agreement concerns recipes for alcoholic beverages. Further, while most franchise agreements include an extraordinary relief provision like the one in this case, that provision standing alone may not necessarily be sufficient to meet the requirements for injunctive relief under Texas law.

352. *Id.* at *4.

353. *Id.* (relying on TEX. ALCO. BEV. CODE ANN. § 109.53).

354. *Id.*

355. *Id.* at *5.

356. *Id.* The relevant provision provided:

It is specifically understood and agreed that Eskimo Hut Worldwide will incur incalculable and irreparable damage from any violation of sections . . . 7.A . . . of this Agreement . . . and that Eskimo Hut Worldwide has no adequate remedy at law and is entitled to injunctive relief, including specific performance, for any such action or threatened violation. All remedies conferred on either party shall be cumulative.

Id.

357. *Id.*

358. *Id.*

359. *Id.* at *6.

C. ATTORNEY'S FEES AND COSTS

OsteoStrong Franchising, LLC v. Richter concerned a trademark infringement case filed in the U.S. District Court for the District of New Mexico that was identical to a case originally filed in U.S. District Court for the Southern District of Texas before the franchisor voluntarily dismissed the first case in the face of a motion to dismiss due to lack of personal jurisdiction.³⁶⁰ In the second case, the franchisees sought costs and fees incurred in defending the first dismissed action under Rule 41(d) of the Federal Rules of Civil Procedure.³⁶¹ While the franchisor argued there was no vexatious intent to justify any award of costs and fees, the court expressed doubt whether such intent was required under Rule 41(d).³⁶² Even assuming such intent was not required, however, the court declined to impose costs in favor of the franchisees because: (1) the franchisor had a good-faith basis to believe the Texas court had personal jurisdiction; (2) its voluntary dismissal was prompted by the franchisees rather than an exercise of forum-shopping by the franchisor; and (3) the Texas case was dismissed at an early stage of the litigation.³⁶³

This case is instructive for parties who voluntarily dismiss claims in one federal court and refile identical claims in federal court in a different state. If too much time elapses, there was no good-faith basis for filing in the first court, or if the second court determines the re-filing was due to forum-shopping, then costs could be imposed on the plaintiff at the outset of the second litigation.

In *Stockade Franchising, LP v. Kelly Restaurant Group, LLC*, a franchisor sought to recover attorney's fees incurred in confirming an award issued by an arbitrator in its favor due to the franchisees' breach of franchising agreements and intellectual property violations.³⁶⁴ While the arbitrator had awarded damages to the franchisor plus attorney's fees and expenses,³⁶⁵ the U.S. District Court for the Western District of Texas, Austin, noted at the outset that the award clearly stated: "All claims for relief sought by any of the parties that are not expressly awarded are hereby denied."³⁶⁶ Further, the district court had not earlier awarded attorney's fees when it confirmed the award.³⁶⁷

360. *OsteoStrong Franchising, LLC v. Richter*, No. 18-1184 WJ/JFR, 2019 WL 3007062 (D.N.M. July 10, 2019) (mem. op.). While this case was ultimately decided in New Mexico federal court, it began in Texas federal court and provides analysis that could be relevant for parties seeking to file in Texas federal court after voluntarily dismissing a prior action in a different state's federal court. See *OsteoStrong Franchising, LLC v. Richter*, No. 4:17-CV-03746 (S.D. Tex. May 9, 2018).

361. *OsteoStrong Franchising*, 2019 WL 3007062, at *1.

362. *Id.* at *2.

363. *Id.* at *3-4.

364. *Stockade Franchising, LP v. Kelly Rest. Grp., LLC*, No. 1:18-CV-918-RP, 2019 WL 5773699 (W.D. Tex. Oct. 30, 2019).

365. *Id.* at *1 (referencing pages 1-3 of the arbitration award).

366. *Id.* (quoting page 4 of the arbitration award).

367. *Id.* at *2.

Notwithstanding the language of the arbitration award and the district court's confirmation, the franchisor argued it was entitled to attorney's fees in costs for confirming the award based on the parties' franchising agreements.³⁶⁸ The district court rejected this argument because the terms of the provision at issue only authorized fees "based entirely or in part on the terms" of the agreements, which was not at issue since the franchisor was actually seeking fees to enforce the arbitration award.³⁶⁹ Well-established case law restricted a trial court from awarding additional attorney's fees to enforce or appeal a confirmation unless the arbitration agreement provided otherwise, which the agreement did not do in this case.³⁷⁰ Without any basis in the franchising agreement to entitle the franchisor to fees and costs for confirming the arbitration award, the court denied the franchisor's motion for additional fees.³⁷¹ While confirming arbitration awards invariably require costs and expenses, if franchise clients want the ability to recover those fees they must expressly include the ability to recover such fees in their franchising agreements.

After the U.S. District Court for the Northern District of Texas, Dallas, granted a franchisor's motion for summary judgment on a franchisee's claims in *Pizza Inn Inc. v. Clairday*, the parties proceeded to trial on the parties' competing declaratory judgment actions.³⁷² The jury found in favor of the franchisee and awarded \$250,000.00. The franchisee then moved for costs and attorney's fees under Rule 54(d).³⁷³ The franchisor objected to the amounts and recovery of both under the Federal Rules, and the district court examined each item in the franchisee's bill of costs and motion for attorney's fees.³⁷⁴

First, the district court sustained the franchisor's objection to the amount of court costs related to expert expenses and reduced the amount based on 28 U.S.C. § 1920.³⁷⁵ The court noted that unless an expert is court-appointed, the statute limits the court to taxing a maximum of \$40.00 per day for an expert witness's attendance plus reasonable travel expenses.³⁷⁶ Accordingly, the court limited the amounts related to expert witnesses to \$40.00 per day for attendance plus just under \$900.00 for reasonable travel expenses.³⁷⁷

Second, with respect to attorney's fees, the court observed that a party can recover attorney's fees so long as it is entitled to them—even if the

368. *Id.* The court noted in a footnote that the franchisor did not argue for fees and costs on any other basis. *Id.* at *2 n.2.

369. *Id.* at *2.

370. *Id.* at *3.

371. *Id.* at *3–4.

372. *Pizza Inn Inc. v. Clairday*, No. 3:18-CV-0221-N, 2019 WL 5739296, at *1 (N.D. Tex. Nov. 4, 2019) (mem. op.).

373. *Id.*

374. *Id.*

375. *Id.* at *1–2. The franchisor did not object to reimbursement for court filing fees or the costs of two deposition transcripts, and the court awarded these amounts since they were reasonable and within the limits of the statute. *Id.* at *2.

376. *Id.*

377. *Id.*

party did not specifically request such fees—so long as its adversary is put on notice such fees are at issue.³⁷⁸ While presentment of such fees can be made orally or in writing, the court reiterated that merely filing a lawsuit does not suffice.³⁷⁹ Since the franchisee’s pleading included a general request for attorney’s fees, the court found sufficient evidence of presentment, especially in light of a provision in the parties’ franchise agreement that authorized a prevailing party to move for such fees after liability had been determined.³⁸⁰ The franchisor also argued that the franchisee had failed to segregate its fees between the claims it succeeded on and those it did not, but the court concluded the franchisee had properly segregated its fees. While some fees were incurred for successful and unsuccessful claims, the court determined segregation was not required since the attorneys’ work was so intertwined within those claims.³⁸¹

It should be noted that while the burden to present attorney’s fees is relatively small, a party seeking fees must still ensure it provides sufficient notice under federal law. Further, during the evolution of litigation, a party must take care to segregate fees among all its claims in the event that it prevails only on some claims. Franchise lawyers should also be conscious of the statutory limits for expert witnesses under federal law, so a client does not have to absorb some of those costs even if it prevails at trial and on its motion for fees and costs.

VIII. CONCLUSION

This Survey period witnessed the Texas courts continuing to define procedural and substantive issues in the franchising context.

Among the procedural cases, *Victor Elias Photography, LLC* emphasized the important nuances for personal jurisdiction in our digital era, as well as the importance of corporate formalities when assessing general jurisdiction. *Amazing Lash Franchise* demonstrates the importance of the exception to the general rule that legal rights may be assigned using the ubiquitous “claims or causes of action” catchall, which can affect parties’ constitutional standing to bring a lawsuit. And *Dickey’s Barbecue Restaurants* showed that arbitration provisions and awards continued to see support from Texas courts.

Choice Hotels International, Inc. v. Pecos Inn demonstrates the lengths courts will go to grant parties relief from default judgements. In that case, the court set aside the default judgment. The court emphasized the judicial policy favoring a full and fair hearing that weighs decisively against the resolution of litigation by a default judgment.

This Survey’s analysis of common law claims included cases addressing fraud and misrepresentation.

378. *Id.*

379. *Id.* at *3.

380. *Id.* at *3–4.

381. *Id.* at *4.

Most notably, waiver-of-reliance provisions were addressed in both state and federal courts in Texas. Because justifiable reliance is a necessary element of fraud, these disclaimers, which are commonplace in franchise agreements, are meant to preclude fraudulent inducement and fraud claims. In *Carduco*, the Texas Supreme Court clarified that, under Texas law, a franchisee may not justifiably rely on misrepresentations by the franchisor's representatives when such misrepresentations are contradicted by the express terms of the franchise agreement. Likewise, in *Yesteryear Auto*, the federal district court granted summary judgment for the franchisor based on waiver-of-reliance and merger provisions in the franchise agreement. Disclaimers should be easier to enforce because of *Carduco* and *Yesteryear Auto*. It is important to note, however, that whether the alleged misrepresentation directly contradicts the express terms of a franchise agreement often depends on how the alleged misrepresentations are defined.

Finally, among the remedy cases, *Servicios Comerciales Lamosa, S.A. de C.V. v. De la Rosa* demonstrated that Texas courts continue to permit a business owner's ability to provide lay witness opinion regarding lost profits and other damages in the franchise and distribution context. In this case, the court denied the manufacturer's motion to exclude lay opinion testimony from a distributor's owner regarding lost profits. *All Tech Repairs* serves as a reminder to take immediate action to protect against any irreparable harm even if there is an attempt for good-faith negotiations to avoid litigation in a cost-effective and efficient manner. Otherwise, a court can make an easy inference that allegations of "immediate" harm are unwarranted. Further, when alleging irreparable harm, it is critical to tie that irreparability to the basis for the lawsuit, such as allegations of breach by the other party rather than harm resulting from their own business decisions.

Taken together, the cases analyzed in this Survey provide a recent account of the most prominent changes occurring in the field of franchise law in Texas. These cases illustrate continuing trends in franchise law jurisprudence and draw attention to emergent legal issues which franchise law practitioners should continue to monitor in the months and years ahead.