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Franchise Law

Deborah S. Coldwell
Haynes and Boone, LLP

Sally Dahlstrom
Haynes and Boone, LLP

Taylor Rex Robertson
Haynes and Boone, LLP

Wes Dutton
Haynes and Boone, LLP

Alicia Pitts
Haynes and Boone, LLP

See next page for additional authors

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Authors

Deborah S. Coldwell, Sally Dahlstrom, Taylor Rex Robertson, Wes Dutton, Alicia Pitts, Alexander Clark, and Wilson Miller

FRANCHISE LAW

*Deborah S. Coldwell**
*Sally L. Dahlstrom***
*Taylor Rex Robertson****
*Wes Dutton*****
*Alicia Pitts******
*Alexander Clark******
*Wilson Miller******

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* B.A., Colorado State University, 1974; M.A.T., The Colorado College, 1979; J.D., University of Texas at Austin School of Law, 1990. Partner, Haynes and Boone, LLP, Dallas, Texas.

** B.S., Texas Christian University, 2011; J.D., University of Oklahoma College of Law, 2014. Associate, Haynes and Boone, LLP, Dallas, Texas.

*** B.S., Wake Forest University, 2007; J.D., Oklahoma City University School of Law, 2014. Associate, Haynes and Boone, LLP, Dallas, Texas.

**** B.A., Georgetown University, 2013; J.D., University of Michigan Law School, 2018. Associate, Haynes and Boone, LLP, Dallas, Texas.

***** B.A., B.B.A., Southern Methodist University, 2016. J.D., Southern Methodist University Dedman School of Law, 2019. Associate, Haynes and Boone, LLP, Dallas, Texas.

***** B.A., Austin College, 2012. J.D., University of Texas at Austin School of Law, 2019. Associate, Haynes and Boone, LLP, Dallas, Texas.

***** B.A., Washington and Lee University, 2017. J.D., University of Virginia School of Law, 2021. Associate, Haynes and Boone, LLP, Dallas, Texas.

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I. INTRODUCTION

The 2022 Annual Texas Survey on Franchise Law, like its predecessors, contains a healthy mixture of novel and familiar legal issues, pro-franchisor and pro-franchisee holdings, and Texas state and federal court opinions. This year's Survey period showcases emerging trends that involve expanding the vicarious liability of franchisors, close questions regarding the scope of federal subject matter jurisdiction, application of foreign state statutory claims by Texas courts, and preclusion of the retroactive application of a state statute by the Texas constitution. This year's Survey period also discusses perennial fixtures, such as the burdens of proof on dispositive motions, the essential elements of common law claims, and the remedies available to litigants involved in franchise disputes.

II. COMMON LAW CLAIMS

A. CONTRACT ISSUES—GOOD FAITH AND FAIR DEALING

As of this Survey period, the covenant of good faith and fair dealing remains a non-starter under Texas law when the alleged duty arises out of a franchise agreement. In *JTH Tax, LLC v. Bazan*,¹ franchisor JTH Tax, LLC (JTH Tax) sued Basilio Bazan (Bazan), its former franchisee, to recover unpaid sums due under franchise agreements, enjoin Bazan's violation of a non-compete provision, and obtain damages caused by Bazan's other material breaches.² Before JTH Tax terminated the agreements, Bazan had purported to transfer his debts and franchise obligations to a third party, but he was unable to enforce various agreements to that effect.³ Bazan alleged that JTH Tax pushed him into faulty agreements and counterclaimed for fraudulent inducement, breach of contract, tortious interference with contractual relations, and breach of the covenant of good faith and fair dealing.⁴ JTH Tax moved to dismiss Bazan's counterclaims.⁵

1. No. 7:20-CV-32, 2021 WL 3929569, at *1 (S.D. Tex. Feb. 3, 2021).

2. *Id.*

3. *Id.* at *2.

4. *Id.*

5. *Id.* Although the franchise agreement contained a choice of law provision calling for application of Virginia law, the court applied the laws of both Texas and Virginia to

The United States District Court for the Southern District of Texas granted JTH Tax's motion as to Bazan's claim for breach of the covenant of good faith and fair dealing.⁶ In reaching its conclusion, the court agreed with JTH Tax's argument that the franchisor-franchisee relationship alone was insufficient to establish the special relationship necessary to support a claim for breach of the duty of good faith and fair dealing.⁷ Because Bazan relied only on aspects of the franchisor-franchisee relationship to assert that JTH Tax maintained a level of control sufficient to establish such a special relationship, the court held that no special relationship existed and dismissed the claim.⁸

While parties to a franchise agreement will often take care to act in good faith, mere allegations of bad faith are almost always insufficient to state a claim for breach of the duty of good faith and fair dealing. Under Texas law, that duty arises only when a party's conduct or other agreements create a special relationship of trust and confidence characterized by more than just a history of cordial dealings and mutual expectations of faithful performance.⁹ By maintaining an arms-length relationship and avoiding arrangements that grant one party a substantial right to control the other, parties to a franchise agreement increase the chances of a Texas court refusing to impose a duty of good faith and fair dealing—a claim that is already generally disfavored under Texas law.¹⁰

B. FRAUD AND FRAUDULENT INDUCEMENT

When a franchise relationship sours, parties may allege fraud or fraudulent inducement based on perceived disconnects between initial expectation and disappointing results.¹¹ Two recent federal court cases serve as reminders that parties alleging fraud or fraudulent inducement must satisfy heightened pleading standards under Federal Rule of Civil Procedure 9(b) to survive a motion to dismiss. Parties who are faced with, or are planning to assert, fraud-based claims related to a franchise relationship

Bazan's counterclaims because Bazan did not specify which state's law governed his claims and because JTH Tax cited only Texas law in support of the motion to dismiss. *Id.*

6. *Id.* at *6.

7. *Id.* at *5.

8. *Id.*

9. *See* *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594–95 (Tex. 1992); *see also* *Shelby v. Conway*, No. 5:15-CV41, 2016 WL 6804923, at *14 (E.D. Tex. May 25, 2016) (finding lack of special relationship in fiduciary duty context even though contracting parties had friendly four-year relationship).

10. *Cf.* *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (finding special relationship in insurance context when a party to an insurance contract benefited from unequal bargaining power and maintained exclusive control of processes that affected the insured).

11. Fraudulent inducement may be established by the same elements necessary to prove fraud, plus proof of a valid contract. Thus, if a defendant in an action for breach of contract asserts a counterclaim for fraudulent inducement, the elements of defendant's fraudulent inducement claim are the same as that of common law fraud because the additional element necessary to prove fraudulent inducement—the existence of an enforceable contract—is an element of plaintiff's breach of contract claim. *See* *Anderson v. Durant*, 550 S.W.3d 605, 614–615 (Tex. 2018).

should be cognizant of these heightened pleading standards when anticipating a motion to dismiss.

For example, the former franchisee in *JTH Tax, LLC v. Bazan* alleged fraudulent inducement, arguing he had relied to his detriment on ineffective transfer documents supplied by JTH Tax.¹² However, the court held that Bazan failed to meet the heightened pleading standards for fraud-related claims because he did not specify which of JTH Tax's purported representations induced him to enter into the agreements; the name of the individual who made such representations; when those representations were made; or how JTH benefited from them.¹³ As in *JTH Tax*, merely stating plausible allegations satisfying each element may not be sufficient to state a claim for fraud. In many cases, heightened pleading standards require identification of specific misrepresentations by specific individuals in order to survive a motion to dismiss.

Although the franchisee's fraud claims in *Shree Veer Corp. v. OYO Hotels, Inc.* alleged more facts in support of its fraud claims than the franchisee in *JTH Tax*, the claims were likewise dismissed.¹⁴ Franchisee Shree Veer Corporation (Shree Veer) asserted claims for breach of contract, fraud, fraudulent inducement, and fraud by nondisclosure against franchisor OYO Hotels, Inc. (OYO Hotels) after OYO Hotels suspended a contractual revenue guarantee for Shree Veer's hotel rooms based on legal orders issued during the COVID-19 pandemic.¹⁵ The CEO of OYO Hotels had previously advertised the revenue guarantee and other incentives as part of its 2019 market expansion effort, and Shree Veer alleged that these statements fraudulently induced it to enter into contracts with OYO Hotels and constituted fraud by nondisclosure.¹⁶ OYO Hotels moved to dismiss Shree Veer's various fraud claims for failure to satisfy the heightened federal pleading requirements and failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6).¹⁷

Despite concluding that Shree Veer generally met the heightened pleading requirements of Rule 9(b), the court dismissed each of their fraud claims under Rule 12(b)(6).¹⁸ Although Shree Veer's complaint identified the alleged false statements, the speaker, the approximate time that the misrepresentations were made, the venue in which they were offered, and an alleged motivation for the statements, the court could not connect these facts to each element of the different fraud claims as re-

12. *JTH Tax*, 2021 WL 3929569, at *3 (Bazan alleged that JTH Tax pushed him into faulty agreements and counterclaimed for fraudulent inducement, breach of contract, tortious interference with contractual relations, and breach of the covenant of good faith and fair dealing).

13. *Id.*

14. *Shree Veer Corp. v. OYO Hotels, Inc.*, No. 3:20-CV-03268-L, 2021 WL 4502347, at *5 (N.D. Tex. Sept. 30, 2021).

15. *Id.* at *1-2. OYO Hotels invoked a suspension provision that could be triggered when hotel rooms became "unavailable." *Id.* at *2.

16. *Id.*

17. *Id.*

18. *Id.* at *4-5.

quired under Rule 12(b)(6).¹⁹ After identifying the elements required to prove each claim, the court concluded that there were insufficient non-conclusory allegations to support the claims, but declined to identify which elements had not been sufficiently pled.²⁰

When fraud is at issue, parties to a franchise agreement should remember the pleading standards under Rule 9(b) and Rule 12(b)(6) before drafting a complaint, counterclaim, or motion to dismiss. Particularly in the context of franchise relationships, fraud claimants and defendants should be mindful of the extra-contractual nature of fraud claims and the heightened burden that claimants bear to state a fraud-based claim with particularity. Parties on both sides of the “v.” must avoid focusing too much on the details of their contractual relationship and instead consider whether the claimant’s pleading is sufficiently detailed to provide the defendant with notice of the elements of the fraud claim against them.²¹ Given the frequency with which fraud claims arise in franchise litigation, franchisors and franchisees that ignore these pleading standards do so at great peril.

C. VICARIOUS LIABILITY

When misconduct by a franchisee or its employee causes harm to a third party, a franchisor’s exposure to vicarious liability often depends on the terms of the franchise agreement. Two cases decided in 2021 clarify the interplay between a franchisee’s status as an independent contractor and contractual terms defining a franchisor’s right to control the franchisee’s operations. These cases indicate that the benefits a franchisor enjoys in controlling specific aspects of a franchisee’s business operations could come with significant tradeoffs, increasing the franchisor’s risk of being held vicariously liable for the acts or omissions of the franchisee. The greater the degree of control a franchisor exercises over a franchisee’s operations, the greater the chance that the franchisor will be held responsible to the conduct of the franchisee.

In *Doe v. YUM! Brands, Inc.*,²² a woman (Doe) alleged that she was sexually assaulted by a delivery driver employed by a Pizza Hut, Inc. (Pizza Hut) franchisee who delivered pizza to her apartment.²³ In addition to her claims against the driver, Doe asserted claims for negligence, negligence per se, and gross negligence against the franchisee, Pizza Hut, and Pizza Hut’s indirect parent company, YUM! Brands, Inc. (YUM).²⁴ Pizza Hut and YUM moved for summary judgment and argued Doe’s claims failed in part because neither entity had the right or ability to control activities at the franchised restaurant or the behavior of its employ-

19. *Id.*

20. *See id.* at *5.

21. *Id.*

22. No. 01-19-00844-CV, 2021 WL 5113021, at *1 (Tex. App.—Houston [1st Dist.] Nov. 4, 2021, no pet. h.).

23. *Id.*

24. *Id.*

ees, such as delivery drivers.²⁵ Doe argued in response that Pizza Hut and YUM controlled franchisees and franchisees' employees through their corporate policies, and therefore, the franchisee was acting as Pizza Hut's actual or ostensible agent for purposes of rendering Pizza Hut and YUM vicariously liable for Doe's tort claims.²⁶ The trial court granted summary judgment in favor of Pizza Hut and YUM, and Doe appealed.²⁷

As the Court of Appeals for the First District of Texas at Houston observed, a party who executes an agreement with an independent contractor is ordinarily not vicariously liable for the contractor's actions.²⁸ To resolve Doe's appeal, the court considered whether YUM or Pizza Hut had the right to control the means and details of the franchisee's work.²⁹ The court emphasized that the right-of-control test is the "keystone" issue when determining whether a franchisor may be liable for torts committed by a franchisee or its employees.³⁰

Ultimately, the court held that Pizza Hut and YUM both lacked the degree of control necessary to impose vicarious liability for Doe's claims.³¹ In reaching this conclusion, the court relied heavily on language of the franchise agreement, including the specific language designating the franchisee as Pizza Hut's independent contractor.³² Because "[a] contract expressly providing that a person is an independent contractor is determinative of the relationship absent evidence that the contract is a mere sham or subterfuge designed to conceal the true legal status of the parties," Doe bore the burden of proving that Pizza Hut and YUM's right to control the franchisee extended to the details of the conduct giving rise to her injury.³³

The court was unmoved by Doe's argument that language in Pizza Hut's "Brand Standards Manual" vested Pizza Hut with a sufficient right to control the franchisee's operations.³⁴ It held instead that the provisions in the manual and franchise agreement designating Pizza Hut's right to

25. *Id.* at *2.

26. *Id.* at *2–3. The summary judgment record included, among other things, the franchise agreement between Pizza Hut and the franchisee, the delivery driver's personal information, Pizza Hut's mandatory franchisee training materials, Pizza Hut's quality assurance program, YUM's training portal, and Pizza Hut's Brand Standards Manual. *Id.* at *2.

27. *Id.* at *3.

28. *Id.* at *10.

29. *Id.*

30. *Id.*

31. *Id.* at *14.

32. *Id.* at *11 (The relevant provision stated that "[Pizza Hut] and Franchisee are not and will not be considered as joint venturers, partners, or agents of each other. Neither Franchisee nor [Pizza Hut] will have the power to bind or obligate the other except as set forth in this Agreement. Franchisee specifically acknowledges that the relationship created by this Agreement is not a fiduciary, special, or any other similar relationship, but rather is an arm's-length business relationship. [Pizza Hut] owes Franchisee no duties except as expressly provided in this Agreement.").

33. *Id.* (quoting *Farlow v. Harris Methodist Fort Worth Hosp.*, 284 S.W.3d 903, 911 (Tex. App.—Fort Worth 2009, pet. denied)).

34. *Id.* at *13.

interpret and enforce its brand standards were insufficient to establish that Pizza Hut or YUM had a right to control the specific activity giving rise to Doe's injury.³⁵ Specifically, the court held that a franchisor's general minimum operational standards are insufficient evidence of a right to control the details of a franchisee's business.³⁶

The United States District Court for the Southern District of Texas reached the opposite result in *McNeel v. Kiddie Academy Domestic Franchising, LLC*.³⁷ The parents of a deceased three-month-old brought a wrongful death action in state court against franchisor Kiddie Academy Domestic Franchising, LLC (Kiddie Academy), its franchisee, and other defendants.³⁸ Kiddie Academy removed the action to federal court after the claims against all other defendants were dismissed.³⁹

The plaintiffs' child was found dead in a facility crib while under the care of a franchisee-operated childcare facility.⁴⁰ Plaintiffs alleged that Kiddie Academy was vicariously liable because it had a contractual right to control relevant aspects of the franchisee's operations, and thus Kiddie Academy had an obligation to prevent the franchisee's negligence but failed to do so.⁴¹ Kiddie Academy denied this interpretation of the franchise agreement and countered that it had only supervisory control of the franchisee.⁴²

At the outset, the court recognized that the franchise agreement expressly designated the franchisee as an independent contractor.⁴³ As in *Doe*, the court then considered whether the franchisor was vicariously liable via a right to control the means and details of the franchisee's conduct giving rise to the plaintiffs' claims.⁴⁴ Kiddie Academy's franchise agreement mirrored many of the provisions identified in *Doe*: it granted Kiddie Academy a right to inspect the franchisee's facility, to train the franchisee's employees, and to require the franchisee to adhere to various standards and operating procedures.⁴⁵ Despite these similarities, the court held Kiddie Academy vicariously liable based on a provision in the franchise agreement granting it authority to "enter upon the premises of the [f]ranchised [b]usiness and exercise *complete authority* with respect to the operation and administration of the [f]ranchised [b]usiness" in the event of a default under the franchise agreement.⁴⁶ In the court's view,

35. *See id.* at *11–14.

36. *Id.* at *13.

37. No. 3:19-CV-178, 2021 WL 920108, at *1 (S.D. Tex. Mar. 10, 2021).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at *1–2.

42. *Id.* at *2.

43. *Id.* at *1.

44. *See id.* at *1–2.

45. *Compare Doe v. YUM! Brands, Inc.*, No. 01-19-00844-CV, 2021 WL 5113021, at *11 (Tex. App.—Houston [1st Dist.] Nov. 4, 2021, no pet. h.) (outlining Pizza Hut's contractual right to control various aspects of franchisee's operations), *with McNeel*, 2021 WL 920108, at *2 (similar).

46. *McNeel*, 2021 WL 920108, at *2–3 (emphasis and alterations in original).

Kiddie Academy was vicariously liable regardless of whether Kiddie Academy had in fact exercised that degree of control over the franchisee prior to the child's death. The fact that Kiddie Academy had "the power to exercise 'complete authority'" was sufficient, particularly where prior events of default by the franchisee arguably entitled Kiddie Academy to assume control of the franchised location.⁴⁷

These cases serve as a reminder that robust right-of-control provisions in a franchise agreement can trigger vicarious liability. Franchisors naturally want to protect their brand and provide a uniformly positive experience to their franchisees' customers, but they should take caution when establishing the contractual mechanisms to accomplish that goal. While too little control can adversely impact a franchisor's brand, too much control may expose a franchisor to unanticipated vicarious liability arising from its franchisees' operations.⁴⁸ Of course, even in the absence of a contractual right of control, a franchisor may still be found vicariously liable if it exercises control over a franchisee's operations.⁴⁹

Prudent franchisors should endeavor to strike a thoughtful balance that avoids the costs of vicarious liability at one end of the control spectrum while guarding against the potential risks of overly lax controls damaging the franchisor's brand and reputation at the other. Franchisors may optimize risk reduction for themselves and third parties by pursuing arrangements that ensure franchisees' adherence to minimum standards in the absence of a franchisor's right of control. In the ever-evolving context of the modern franchisor–franchisee relationship, these cases demonstrate to franchisors the importance of carefully considering indirect means of enforcing operational standards before negotiating a right to control the details of a high-risk franchisee activity.

III. STATUTORY CLAIMS

A. COVENANTS NOT TO COMPETE

As demonstrated in a recent case where the United States District Court for the Western District of Texas granted a preliminary injunction in favor of a franchisor, Texas courts continue to enforce contractual covenants not to compete and state and federal laws prohibiting unfair competition. In *Mr. Appliance LLC v. JMG Associates, Inc.*, the franchisor sought injunctive relief to restrain two former franchisees from: (1) wrongfully utilizing the franchisor's trademarks; (2) engaging in unfair competition violating state and federal law; and (3) breaching the cove-

47. *Id.* at *3.

48. *See id.* at *2–3; *Doe*, 2021 WL 5113021, at *1. The reputational risks of exercising overly lax brand standards are particularly acute in the social media era where the public's awareness of negligence or misconduct by a franchisee or its employees could cause massive reputational damage to a franchisor.

49. *Doe*, 2021 WL 5113021, at *10 (quoting *Domino's Pizza, L.L.C. v. Reddy*, No. 09-14-00058-CV, 2015 WL 1247349, at *1 (Tex. App.—Beaumont Mar. 19, 2015, pet. denied) (mem. op.)).

nant not to compete in the parties' franchise agreement.⁵⁰

In a brief opinion, the court reiterated that the standards for a preliminary injunction require a showing of the following: (1) a likelihood of success on the merits of the claim; (2) a likelihood of irreparable harm without injunctive relief; (3) that the balancing of harm to the defendant-franchisees favors injunctive relief; and (4) that the public interest weighs in favor of injunctive relief.⁵¹ The court had little trouble resolving the factors in favor of the franchisor after finding the defendants were unlawfully using the franchisor's protected trademarks, representing themselves as affiliates of the franchisor without any legal basis, and continuing to violate the noncompetition provisions in the parties' franchise agreement.⁵² The court not only held the plaintiff was likely to succeed on its claims but also found that the balancing of equities and the public interest favored granting the injunction.⁵³ As the court observed, the defendants "[could not] complain of the self-inflicted harm which [arose] from their infringement of [the] [p]laintiff's trademarks and breach of the Franchise Agreement," the enforcement of which favored the public interest.⁵⁴

The court enjoined the defendants from utilizing any of the plaintiff's "Mr. Appliance" trade names or marks on any of defendants' websites, products, or promotional materials, or "[d]oing any act or thing calculated or likely to cause confusion or mistake in the minds of members of the public or prospective customers of Mr. Appliance products or services."⁵⁵ The court further enjoined defendants—including all of their officers, agents, employees, owners, representatives, and affiliates—from operating a "competitive business" within any territory designated within the franchise agreement.⁵⁶ As indicated by the breadth of this injunction, covenants not to compete can provide powerful protections to franchisors to enjoin former franchisees from engaging in unfair competition.

B. BANKRUPTCY ISSUES

*In re Essential Financial Education, Inc.*⁵⁷ concerned a Chapter 7 liquidation adversary proceeding involving numerous actual and constructive fraudulent transfer claims by the appointed trustee, Daniel Sherman (Trustee), on behalf of Essential Financial Education, Inc. (Essential) against the debtor's former franchisor, OTA Franchise Corporation

50. *Mr. Appliance LLC v. JMG Associates, Inc.*, No. 6:20-cv-1077, 2021 WL 5197426, at *1 (W.D. Tex. Aug. 24, 2021).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *1–2 (defining "competitive business" as "any business involving installing and repairing appliances for residential and commercial customers and performing related services and selling related products.").

57. 629 B.R. 401, 401 (Bankr. N.D. Tex. 2021).

(OTAF).⁵⁸ The Trustee and OTAF filed cross motions for summary judgment on the Trustee's claims that OTAF had violated the Bankruptcy Code and Texas Uniform Fraudulent Transfer Act (TUFTA) by causing Essential to transfer funds to OTAF in the years preceding Essential's bankruptcy, which the Trustee alleged prejudiced the rights of Essential's other creditors and the bankruptcy estate.⁵⁹ While the factual background of Essential's relationship with OTAF and its other creditors is complicated, the overarching theme of the Trustee's claims was that OTAF engineered improper transfers of the Essential's assets to itself prior to the bankruptcy filing.⁶⁰

OTAF operated a franchise model in which it licensed its intellectual property to franchisees to operate "Online Trading Academy Centers" that educated its clients on how to use OTAF's proprietary trading systems.⁶¹ For nearly a decade prior to its bankruptcy, Essential and one of its owners, Thomas Caufield (Caufield), operated a franchised business under two consecutive franchise agreements with OTAF.⁶² Beginning in 2011, Caufield signed a franchise agreement with OTAF to operate an Online Trading Academy Center in the Dallas area (the Dallas Center).⁶³ By 2015, Caufield had fallen behind on \$200,000.00 in fees owed to OTAF under that 2011 agreement.⁶⁴ To raise funds to pay his debt, Caufield enlisted another investor, Michael Ludlow (Ludlow), and formed Essential with the intention of transferring his franchise agreement to the new entity after obtaining consent for the transfer from OTAF.⁶⁵ After negotiations with Caufield and Ludlow, OTAF permitted Caufield to transfer his franchise to Essential and signed a new franchise agreement with Essential in October 2015.⁶⁶ Shortly thereafter, Essential began having financial difficulties and started bouncing payments to the IRS for its tax liabilities in 2016.⁶⁷ Around the same time, Caufield began seeking investments from third parties, including several Essential students (the Student Lenders), to raise money to start a new business.⁶⁸

In 2017, the Securities and Exchange Commission (SEC) subpoenaed Caufield for information about his financial relationships with the Student Lenders.⁶⁹ This subpoena prompted OTAF to issue a notice of incurable breach to Essential in which it asserted: (1) that Essential was delinquent on \$101,467.62 owed to OTAF, and (2) that the SEC's investigation of Caufield's financial misconduct breached the terms of Essen-

58. *Id.* at 410.

59. *Id.* at 411-18.

60. *See id.* at 419-20.

61. *Id.* at 411.

62. *Id.* at 411-13.

63. *Id.* at 411.

64. *Id.* at 411-12.

65. *Id.* at 412.

66. *Id.*

67. *Id.* at 412-13.

68. *Id.*

69. *Id.* at 413.

tial's 2015 franchise agreement.⁷⁰ Over the ensuing year-and-a-half, Essential's financial situation quickly deteriorated.⁷¹ OTAF began pressuring Essential to sell Caufield's ownership stake, threatening to terminate Essential's franchise if it did not arrange a transfer involving payouts to OTAF and the Student Lenders.⁷² OTAF ultimately consented to the sale of Essential's assets to a new owner (Paramount) on July 2, 2018 (the Asset Sale), and OTAF received roughly \$860,000.00 in distributions from the sale.⁷³ Within weeks of the Asset Sale, one of Essential's creditors, Gary Flick (Flick), filed a lawsuit against Essential and Caufield alleging state and federal securities violations and filed a Chapter 7 Involuntary Petition against Essential on September 25, 2018.⁷⁴

In turning to the Trustee's claims that Essential's assets were improperly transferred to OTAF prior to the bankruptcy stay, the court observed that the elements of actual fraud transfer claims under § 544(b) of the Bankruptcy Code⁷⁵ and TUFTA § 24.005(a)(1)⁷⁶ are very similar.⁷⁷ After undertaking an exhaustive analysis of the actions of Caufield, Essential, and OTAF in the months preceding the bankruptcy, the court concluded that the Trustee failed to establish all elements of its actual fraudulent transfer claims because Essential's and OTAF's fraudulent intent remained genuine issues of material fact.⁷⁸ Despite evidence that Essential and Caufield failed to disclose the Asset Sale to investors, the court concluded it was sufficiently plausible that Caufield never actively concealed the Asset Sale and that the sale had a legitimate business purpose to preclude summary judgment on the actual fraudulent transfer claims.⁷⁹

The court also ruled that a genuine issue of material fact precluded summary judgment on the Trustee's two claims for constructive fraudulent transfer under § 548(a)(1)⁸⁰ of the Bankruptcy Code and TUFTA § 24.006.⁸¹ Specifically, the court ruled there was insufficient evidence that the Asset Sale was not for "reasonably equivalent value." In other

70. *Id.*

71. *Id.* at 414.

72. *Id.* at 414–15.

73. *See id.* at 416.

74. *Id.* at 417.

75. *Id.* at 419 (Section 544(b) requires: (1) A transfer of an interest of the debtor's property; (2) made within two years of the filing of the bankruptcy petition; and (3) such transfer was made with actual intent to hinder, delay, or defraud the debtor's creditors. *See* 11 U.S.C. § 544(b).).

76. *Id.* (TUFTA requires: (1) The debtor transferred assets shortly before or after a creditor's claim arose; and (2) with an actual intent to hinder, delay, or defraud any creditor of the debtor. *See* TEX. BUS. & COM. CODE ANN. § 24.005(a)(1).).

77. *Id.*

78. *Id.* at 440.

79. *Id.* at 428–30.

80. *Id.* at 442 (Section 548(a)(1) requires: (1) A transfer of an interest of the debtor's property; (2) made within two years of the filing of the bankruptcy petition; (3) the debtor voluntarily or involuntarily received less than reasonably equivalent value in exchange for such transfer; and (4) the debtor was insolvent on the date the transfer was made or became insolvent as a result of the transfer. *See* 11 U.S.C. § 548(a)(1).).

81. *Id.* (Section 24.006 of TUFTA requires: (1) A transfer of debtor's property interest; (2) without the debtor receiving reasonably equivalent value for the transfer; and (3)

words, the Trustee failed to carry its burden to prove that Essential “received value that [was] substantially comparable to the worth of the transferred property.”⁸² After construing all facts in favor of Essential, the court ruled that (1) the Trustee’s evidence that Essential’s creditors had no control over distribution of sale proceeds was insufficient to prove the lack of reasonably equivalent value, and (2) Essential’s balance sheets at the time of the Asset Sale created a fact issue regarding its solvency.⁸³ Because the Trustee failed to carry its burden on two essential elements under both § 548(a)(1) and § 24.006, summary judgment was improper on those claims.

Despite denying summary judgment on all four fraudulent transfer claims, the court granted summary judgment in favor of the Trustee on OTAF’s affirmative defenses.⁸⁴ Specifically, the court ruled as a matter of law against OTAF’s affirmative defenses that preferential transfers were made in the “ordinary course of business” or were exchanges for new value to Essential.⁸⁵ Because Essential received no additional value from OTAF following the initial transfer of the Asset Sale funds to escrow, OTAF’s affirmative defenses were inapplicable, and the Trustee could seek to avoid post-sale transfers of escrowed funds.⁸⁶

In re Essential provides a detailed analysis of potential liabilities which can arise when a franchisee or its owners become insolvent. Particularly regarding actual and constructive fraudulent transfer claims under the Bankruptcy Code and TUFTA, *In re Essential* demonstrates that the highly fact-intensive elements of those claims impose a high burden for the movant on summary judgment.

C. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO)

In *Arruda v. Curves*,⁸⁷ the Fifth Circuit Court of Appeals affirmed a trial court’s dismissal of former franchisees’ claims for violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act.⁸⁸ The crux of the franchisees’ claims against Curves International, Inc., Curves NA, Inc., and North Castle Partners, L.L.C. (collectively, Curves) was that Curves failed to disclose to current and prospective franchisees that: (1) Curves planned to “prune 1,000+” Curves locations as part of an internal plan dubbed “Operation Blueprint;” and (2) according to a 2015 market study, Curves was aware that its brand name had a “negative

the debtor was insolvent on the date the transfer was made or became insolvent as a result of the transfer. *See* TEX. BUS. & COM. CODE § 24.006.).

82. *Id.* at 442 (quoting *Stanley v. U.S. Bank Nat’l Ass’n (In re TransTexas Gas Corp.)*, 597 F.3d 298, 306 (5th Cir. 2010)). The Trustee’s evidence that (1) OTAF’s expert did not opine on the value of the Asset Sale, and (2) Essential’s creditors had no control over distribution of the proceeds was deemed insufficient.

83. *Id.* at 443.

84. *Id.* at 443–44.

85. *Id.* at 446–49.

86. *Id.* at 451.

87. 861 Fed. App’x. 831, 831 (5th Cir. 2021) (per curiam).

88. *Id.* at 832.

halo” and that franchise locations would continue to close at a rate of 15% annually if nothing was done to rehabilitate the brand’s image.⁸⁹ According to the franchisees, Curves was aware as early as 2016 that its franchise system was failing and decided at the time “that it would make no further investment in the Curves brand, thereby ensuring the further collapse of the Curves franchise system.”⁹⁰ The franchisees alleged that by failing to include information about Operation Blueprint and the 2015 market study in its Franchise Disclosure Documents or its communications to current franchisees, Curves breached its contracts with them and violated the RICO Act.⁹¹

The RICO claims were significant to the franchisees’ case because they formed the basis for the federal district court’s exercise of federal question jurisdiction in the absence of diversity of citizenship.⁹² When the district court granted Curves’ Rule 12(b)(6) motion to dismiss on plaintiffs’ RICO claims, it dismissed the remaining state law claims for lack of subject matter jurisdiction.⁹³ The franchisees’ sole issue on appeal to the Fifth Circuit was whether the trial court erred in dismissing the two RICO claims.⁹⁴

On appeal, the Fifth Circuit affirmed dismissal of the RICO claims and reasoned that the RICO statute required a “pattern of racketeering activity” as a necessary predicate for the claim.⁹⁵ This, in turn, required the franchisees to “state with particularity” that Curves had a duty to disclose information related to Operation Blueprint and the 2015 market study and that Curves failed to do so through a scheme to defraud.⁹⁶ The fatal flaw in the franchisees’ RICO claims was that their argument for Curves’ duty to disclose was rooted in a Federal Trade Commission Act (FTCA) rule requiring franchisors to disclose “[t]he general market for the product or service the franchisee will offer . . . such as whether the market is developed or developing, whether the goods will be sold primarily to a certain group, and whether sales are seasonal.”⁹⁷ Because the franchisees conceded the FTCA did not create a private right of action for violations of the FTCA’s franchise rules, any alleged violation of the FTCA by Curves could not constitute a predicate act of mail or wire fraud to support the franchisees’ RICO claims.⁹⁸

The Fifth Circuit declined to consider whether the alleged fraud violated an independent duty under Texas state law that could supply the requisite RICO predicate act, reasoning that the franchisees waived that

89. *Id.* at 832–33.

90. *Id.* at 833.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 834.

96. *Id.*

97. *Id.* at 835.

98. *Id.*

alternative argument by failing to present it before the trial court.⁹⁹ In affirming the federal district court's dismissal of the RICO claims for insufficient allegations of a predicate act and the remaining claims for lack of subject matter jurisdiction, the Fifth Circuit cautioned that not every breach of contract involves fraud, and that federal courts "must be wary of transforming business-contract or fraud disputes into federal RICO claims."¹⁰⁰

D. FOREIGN STATUTORY CLAIMS IN TEXAS COURTS

*Jack in the Box Inc. v. San-Tex Restaurants, Inc.*¹⁰¹ involved a Texas federal court's consideration of franchisor Jack in the Box, Inc.'s (JITB) motion to dismiss counterclaims asserted by San-Tex Restaurants, Inc. (San-Tex), a former franchisee, for violations of the California Franchise Relations Act (CFRA), the California Unfair Practices Act (CUPA), breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, negligent and intentional misrepresentation, and civil conspiracy.¹⁰² The lawsuit arose from JITB's termination of San-Tex as a franchisee due to alleged deficiencies at multiple San-Tex restaurants in the San Antonio market.¹⁰³ Following notice of termination, JITB alleged that San-Tex continued to operate the restaurants without valid franchise or license agreements with JITB.¹⁰⁴ In response, San-Tex asserted a flurry of counterclaims arising from JITB's conduct leading up to the termination.¹⁰⁵

Regarding JITB's motion to dismiss, the court began its analysis by holding that California law applied to San-Tex's contractual claims arising out of the parties' franchise agreement, but that Texas law applied to the remaining claims—including the California statutory claims under CFRA and CUPA.¹⁰⁶ The court reasoned that the franchise agreement had a choice-of-law provision designating California law for claims "regarding the making, entering into, performance, or interpretation" of the franchise agreement, and that such provision included San-Tex's claims

99. *Id.* at 835–36.

100. *Id.* at 836.

101. SA-20-CV-00328, 2021 WL 148058, at *1 (W.D. Tex. Jan. 14, 2021).

102. *Id.* at *1–2.

103. *Id.* at *1 (JITB's alleged that San-Tex restaurants had multiple operational deficiencies including a broken HVAC system, exterior damage, potholes in parking lots, poor lighting, malfunctioning equipment, broken coolers and ice machines, insufficient kitchen exhaust, and multiple OSHA violations).

104. *Id.*

105. *Id.* at *2 (San-Tex alleged that it had invested millions of dollars into the restaurants in reliance on JITB's partnership, JITB failed to adequately support San-Tex, JITB fraudulently induced San-Tex to undertake costly remodeling with the false promise of a renewal of its franchise agreement, JITB acted maliciously to create a pretext for terminating San-Tex's franchise agreement, JITB fraudulently induced San-Tex to spend millions of dollars remodeling its locations only to refuse San-Tex a reasonable opportunity to recoup its investment, and that one of JITB's food inspectors had sexually harassed multiple San-Tex employees and retaliated against San-Tex for reporting the harassment by giving San-Tex restaurants sub-par food safety scores).

106. *Id.* at *4–5.

for breach of contract, breach of the duty of good faith and fair dealing, and its statutory claims.¹⁰⁷ However, the court held that San-Tex's claims for promissory estoppel, misrepresentations, conspiracy, and claims arising out of the remodeling of restaurant locations did not implicate performance under the franchise agreement and were therefore subject to Texas law.¹⁰⁸

Despite California law governing San-Tex's claims under the CFRA and CUPA, the primary hurdle to San-Tex's recovery was whether the statutes applied to franchisees located outside California.¹⁰⁹ Because San-Tex was a Texas-based entity that was never previously domiciled in California and had never operated restaurants in California, JITB argued neither CFRA nor CUPA applied.¹¹⁰ San-Tex countered by arguing that JITB construed "franchisee" too narrowly in interpreting the statutes, adding that San-Tex's ties to California were sufficient facts to confer jurisdiction under the CFRA and CUPA.¹¹¹

The court concluded that San-Tex did not plead facts sufficient to trigger jurisdiction under the CFRA because it did not allege that the California-based assignees had a current ownership interest in San-Tex. However, the court granted leave for San-Tex to amend its counterclaim in the event it could prove that a California-based investor had a current ownership interest in San-Tex.¹¹² Regarding San-Tex's CUPA claim, the court observed that CUPA—unlike the CFRA—did not contain an express requirement that franchisees be domiciled in California and was meant to apply to non-residents where the underlying fraudulent or anti-competitive conduct occurred in California.¹¹³ Because San-Tex alleged that at least some of JITB's fraudulent conduct occurred at its corporate headquarters in California, the court held that San-Tex's CUPA claim survived JITB's motion to dismiss.¹¹⁴

Regarding the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, negligent misrepresentation, and intentional misrepresentation arising from the alleged pretextual termination of San-Tex's franchise agreement, the court concluded that San-Tex had alleged facts with sufficient particularity to state claims under Rule 12 as well as the heightened pleading standards for fraud under Rule 9(b).¹¹⁵ As for San-Tex's claims for breach of

107. *Id.* at *4.

108. *Id.* at *4-5.

109. *Id.* at *5.

110. *Id.*

111. *Id.* San-Tex argued specifically that (1) JITB had a prior franchise relationship with two California-based franchisees that assigned their franchise rights to San-Tex; and (2) the conduct giving rise to San-Tex's statutory claims allegedly occurred in California. *Id.*

112. *Id.* at *6.

113. *Id.*

114. *Id.*

115. *Id.* at *6-8, *11. The court found it sufficient that San-Tex alleged that specific employees of JITB represented to San-Tex that it would not be terminated as a franchisee if San-Tex made leadership changes and invested additional time and resources in its res-

the implied covenant of good faith and fair dealing and its claim for promissory estoppel arising from JITB's "Roof Shoring" remodeling incentive program, the court granted dismissal upon finding that, under Texas law, San-Tex failed to plausibly allege a promise upon which it could have detrimentally relied.¹¹⁶ Finally, the court dismissed San-Tex's claim for civil conspiracy based on San-Tex's allegations that JITB and an affiliate, Different Rules, LLC (Different Rules), conspired to arrange a vote of "no confidence" in San-Tex's prior leadership.¹¹⁷

While the court's resolution of San-Tex's common law counterclaims involved relatively routine application of San-Tex's allegations to the essential elements of those claims, the court's holding that CUPA protects the rights of franchisees located entirely outside of California could pose new risks of liability to franchisors with operations in that state.

IV. PROCEDURE

A. JURISDICTION

In *OsteoStrong Franchising, LLC v. Rhodes*,¹¹⁸ OsteoStrong Franchising, LLC (OsteoStrong), a global joint-health franchise, filed suit against two terminated foreign sales representatives for engaging in unlawful conduct.¹¹⁹ The defendants had entered into agreements with OsteoStrong to sell master licenses in Europe but failed to meet the sales quota in the agreement.¹²⁰ Among other things, OsteoStrong alleged that one defendant sales representative held himself out as the CEO of one of OsteoStrong's affiliate entities, opened an OsteoStrong location in Harrogate, England, and published the trademark without authority.¹²¹ On September 25, 2020, defendants moved to dismiss OsteoStrong's complaint.¹²² Defendants argued that OsteoStrong's trademark claims pursuant to the Lanham Act should be dismissed for lack of subject matter jurisdiction because the defendants were foreign citizens (a United Kingdom resident and citizen, respectively) engaged in foreign commerce, and

restaurants, and that JITB proceeded with termination despite San-Tex's allegations that those changes were made. *Id.*

116. *Id.* at *8–10 While San-Tex alleged that JITB circulated a "Remodel Guide" and related letter expressly contemplating a new franchise agreement as a prerequisite to beginning remodeling, the court ultimately agreed with JITB that the letter and guide could not be construed as a contract offer, and that *even if* they did, San-Tex failed to timely undertake the roof repairs by the deadline described in the letter. *Id.* Because San-Tex failed to meet the Roof Shoring program's required conditions, the court held that it was unreasonable for San-Tex to assume that it would be entitled to a renewal of its franchise agreement simply because it undertook repairs at its restaurant locations. *Id.*

117. *Id.* at *12–13 (reasoning that (1) a parent corporation cannot conspire with a wholly-owned subsidiary, and (2) San-Tex failed to adequately allege a "meeting of the minds" between JITB and Different Rules in furtherance of a conspiracy to stage the vote of no confidence—an essential element of its civil conspiracy claim).

118. No. 4:20-CV-465, 2020 WL 8970652, at *1 (S.D. Tex. Dec. 10, 2020).

119. *Id.* at *1–2.

120. *Id.* at *1.

121. *Id.*

122. *Id.* at *2.

allegedly infringed on marks registered for protection in a foreign jurisdiction.¹²³

Challenges to a court's subject matter jurisdiction are fundamental—parties cannot waive subject matter jurisdiction, and a court must dismiss a case when it lacks the statutory or constitutional power to adjudicate it.¹²⁴ As the United States District Court for the Southern District of Texas explained, to determine whether a federal court has jurisdiction over a trademark claim, a court must evaluate sufficiency of the defendant's contacts in the United States and the interests of the United States by reviewing three non-exclusive factors: (1) the defendant's citizenship, (2) the effect of their alleged conduct on U.S. commerce, and (3) the existence of a conflict with foreign law.¹²⁵ The court noted that the absence of any factor is not dispositive and that the defendant's activities need only have "some effect" on U.S. commerce.¹²⁶

The court concluded that OsteoStrong had sufficiently demonstrated subject matter jurisdiction because a U.S. company's lost profits could have an effect on U.S. commerce, the unauthorized use of OsteoStrong's trademarks could hurt its reputation, and no conflict-of-law problem arose because no U.K. authority supported defendants' unauthorized use.¹²⁷ Notably, OsteoStrong's trademarks were indisputably registered in both the United States and in the United Kingdom.¹²⁸ Therefore, because the second and third factors favored OsteoStrong, the court denied the defendants' motion to dismiss as to subject matter jurisdiction.¹²⁹

Whereas *OsteoStrong* addressed subject matter jurisdiction in the context of federal trademark law as applied to foreign defendants, *APFA Inc. v. UATP Management, LLC* involved the threshold question of whether a plaintiff had standing to assert claims in federal court—a distinct element of federal courts' subject matter jurisdiction.¹³⁰ An association of franchisees, Adventure Park Franchisee Association Inc. (Association), brought Texas and New Jersey state law claims against UATP Management, LLC (UATP), a franchisor of Urban Air indoor adventure parks.¹³¹ The Association sought declarations that UATP breached an implied covenant of good faith and fair dealing, violated the Texas Deceptive Trade Practices Consumer Protection Act (TDTPCA) and the New Jersey Franchise Practices Act (NJFPA), engaged in com-

123. *Id.* at *4.

124. *Id.* at *2.

125. *Id.* at *5.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at *6.

130. *APFA Inc. v. UATP Mgmt., LLC*, 537 F.Supp.3d 897, 903–04 (N.D. Tex. 2021) (mem. op.) (noting that standing is a jurisdictional prerequisite for federal courts to exercise jurisdiction pursuant to the "case-or-controversy" requirement in Article III of the U.S. Constitution).

131. *Id.* at 901.

mon law fraud, and breached franchise agreements.¹³² The case was originally filed in the United States District Court for the District of New Jersey before being transferred to the United States District Court for the Northern District of Texas due to the existence of a forum-selection clause in the relevant franchise agreements.¹³³ UATP filed a motion to dismiss under Rule 12(b)(1), arguing (among other things) that the Association lacked standing to bring the suit on behalf of all of the franchisees.¹³⁴

At the outset, the court noted that it must first analyze standing because a federal court's jurisdiction is limited only to the power authorized by statute and the Constitution.¹³⁵ The court was unpersuaded by the Association's arguments that it had associational standing on behalf of its UATP franchisee members.¹³⁶ An association must satisfy three prongs to establish associational standing: (1) "its member would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."¹³⁷

The Association advanced several theories for why individual franchisee participation was not warranted: (1) relief was limited to declaratory and injunctive relief; (2) at best, discovery requests may lead to resolution without member participation at all and, at worst, only certain members would need to participate; (3) claims are limited to UATP's alleged actions, not the franchisees' actions; and (4) the franchisees were similarly affected, and the differences were slight.¹³⁸

The court rejected the associational standing argument after concluding the Association failed to satisfy the third prong (i.e., it failed to show the claim and requested relief did not require facts specific to each individual) and was not in the best position to present the franchisees' individual claims.¹³⁹ Having found a lack of standing, the court dismissed the Association's claims without prejudice so that the franchisees could file their own individual cases.¹⁴⁰

While the facts and legal arguments in *OsteoStrong* and *APFA* are distinct, both cases demonstrate the importance of subject matter jurisdiction as an essential prerequisite for adjudicating the merits of the parties' claims and defenses. *OsteoStrong* concerned Lanham Act causes of action against foreign defendants in which the federal court's subject matter jurisdiction was upheld on nonexclusive factors. *APFA* involved a determi-

132. *Id.* at 902.

133. *Id.* at 903.

134. *Id.*

135. *Id.* at 904.

136. *Id.* at 905.

137. *Id.*

138. *Id.* at 907.

139. *Id.* at 909.

140. *Id.* at 910.

nation of whether a plaintiff was sufficiently involved in a dispute to bring claims on behalf of third parties, regardless of the nature of the claims or the citizenship of the parties. While subject matter jurisdiction is a basic—indeed, a fundamental—concept in litigation, *OsteoStrong* and *APFA* indicate why litigants should always consider the potential for a defense based on lack of subject matter jurisdiction as a quick and powerful option for dismissing an entire action.

OYO Hotels, Inc. v. Om Chamunda, LLC concerned a dispute over a business relationship that soured due to unfinished renovations and conflicts exacerbated by COVID-19's impact on the hospitality industry.¹⁴¹ The United States Court for the Northern District of Texas held that plaintiff OYO Hotels, Inc. (OYO), a global hotel-brand franchisor, sufficiently pleaded minimum contacts with Texas to support personal jurisdiction over defendant, Om Chamunda, LLC (Chamunda).¹⁴² Chamunda was the owner of an Alabama hotel that had entered into an agreement to convert its property to OYO-branded hotel franchise.¹⁴³ OYO alleged that, in the early days of the pandemic, Chamunda committed several breaches of the franchise agreement.¹⁴⁴ After Chamunda sent a demand letter threatening to sue, OYO sought damages for breach of contract and a declaratory judgment as to the state and federal claims threatened by Chamunda in its demand letter.¹⁴⁵ Chamunda moved to dismiss the action, arguing that the court lacked specific personal jurisdiction over Chamunda.¹⁴⁶

The *OYO Hotels* court began its analysis by outlining the Fifth Circuit's three-step test for evaluating specific jurisdiction: "(1) whether the defendant has minimum contacts with the forum state, i.e. whether it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable."¹⁴⁷ After examining the long-term nature of the Texas-based back-office operations the parties had agreed to, the court determined those operations represented a "depth of control" by Chamunda, which indicated that its alleged breach of the parties' contract would cause harm in Texas.¹⁴⁸ The Texas choice-of-law provision in the parties' franchise agreement further underscored the court's finding of personal jurisdiction over Chamunda in Texas.¹⁴⁹

141. *OYO Hotels, Inc. v. Om Chamunda, LLC*, No. 3:20-CV-3433-N, 2021 WL 4125194, at *1 (N.D. Tex. Sept. 9, 2021) (mem. op.).

142. *Id.* at *3–5.

143. *Id.* at *1.

144. *Id.*

145. *Id.*

146. *Id.* at *1–3.

147. *Id.* at *3.

148. *Id.* at *4.

149. *Id.*

OYO Hotels serves as a useful reminder that contracts providing greater control can also establish a hook for personal jurisdiction. When drafting franchise agreements, practitioners should ensure they strike the right balance between a franchisor's control and a franchisee's autonomy to avoid exposing a franchisor to personal jurisdiction in an unfavorable forum.

In a consolidated interlocutory appeal of *Volkswagen Aktiengesellschaft v. State*, the state of Texas and Travis County, Texas, alleged that Volkswagen and its subsidiaries (collectively, Volkswagen) fraudulently installed software to evade compliance with U.S. emission standards.¹⁵⁰ Although Volkswagen had previously settled criminal and civil claims with the Environmental Protection Agency for \$20 billion, Texas brought its own civil enforcement action for violations of the Texas Clean Air Act since Volkswagen's settlement did not include a release of liability from state and local governments.¹⁵¹ The trial court denied Volkswagen's request for a special appearance to argue that the court lacked personal jurisdiction due to insufficient minimum contacts with Texas.¹⁵² Volkswagen appealed, arguing that the trial court erred in denying its special appearance to challenge personal jurisdiction.

On appeal, the Court of Appeals for the Third District of Texas at Austin was tasked with determining whether Volkswagen's contacts with Texas were sufficient to confer specific jurisdiction for the state's emissions tampering claims under the Texas Clean Air Act.¹⁵³ The court of appeals explained that the Texas long-arm statute is limited by due process requirements that are only satisfied when the nonresident defendant: "(1) has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice."¹⁵⁴ Here, the court of appeals reasoned that Volkswagen's activities were not purposefully directed at Texas, and thus, Volkswagen did not purposefully avail itself of the privilege of conducting activities in Texas.¹⁵⁵ As a result, the court of appeals reversed the trial court's denial of the special appearance and dismissed the case for lack of personal jurisdiction.¹⁵⁶

In *Nestlé USA, Inc. v. Ultra Distribuciones Mundiales S.A. de C.V.*, the United States District Court for the Western District of Texas held that the Texas long-arm statute permitted jurisdiction over Ultra Distribuciones Mundiales (Ultra), a Mexican distributor of Nestlé products, and that exercising personal jurisdiction over Ultra did not violate the U.S.

150. *Volkswagen Aktiengesellschaft v. State*, No. 3-19-00453-CV, 2020 WL 7640037, at *1 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem. op).

151. *Id.*

152. *Id.* at *3.

153. *Id.*

154. *Id.*

155. *Id.* at *8–9.

156. *Id.* at *9.

Constitution's Fourteenth Amendment Due Process Clause.¹⁵⁷ Franchisor Nestlé USA, Inc. (Nestlé) filed claims for trademark infringement, related claims under the Lanham Act, and violations of the California Unfair Competition Law.¹⁵⁸ Nestlé claimed that Ultra sold products that were intended to be exclusively distributed within Mexico on the "gray market" in the U.S. without Nestlé's consent.¹⁵⁹ Ultra moved to dismiss those claims, arguing the court lacked personal jurisdiction.¹⁶⁰

Because Texas's long-arm statute is coterminous with the limits of federal due process, the district court only needed to determine whether exercising personal jurisdiction over Ultra violated due process.¹⁶¹ In making this determination, the court would first consider whether Nestlé could make a case that Ultra had minimum contacts with the state.¹⁶² If Nestlé alleged sufficient jurisdictional facts to show that Ultra had minimum contacts, the burden would shift to Ultra to show that the exercise of jurisdiction would be unreasonable.¹⁶³ After considering Nestlé's allegations that Ultra was aware the products it distributed in Mexico were being resold in Texas, the court concluded that Ultra had sufficient minimum contacts with Texas to warrant the exercise of personal jurisdiction. Because Ultra delivered the products at issue into the stream of commerce with the expectation that they would be sold ultimately to customers in Texas, there was no due process violation in exercising personal jurisdiction over Ultra.¹⁶⁴

As with subject matter jurisdiction, claims that a forum court lacks personal jurisdiction over a defendant can provide a powerful and quick basis for dismissing a lawsuit. As indicated by *OYO Hotels* and *Nestlé*, the minimum-contact analysis often involves highly nuanced arguments about the nature of a defendant's conduct and its intended effect on the forum state.

B. CHOICE OF LAW

In *Jack in the Box Inc. v. San-Tex Restaurants, Inc.*, the United States District Court for the Western District of Texas examined franchisor JITB's motion to dismiss counterclaims filed by its franchisee San-Tex.¹⁶⁵ In the motion, JITB argued that California law applied only to some of

157. *Nestlé USA, Inc. v. Ultra Distribuciones Mundiales S.A. de C.V.*, 516 F. Supp. 3d 633, 644 (W.D. Tex. 2021).

158. *Id.* at 641.

159. *Id.* at 640–41 (Gray market goods are "foreign manufactured goods, for which a valid United States trademark has been registered, that are legally purchased abroad and imported into the United States without the consent of the American trademark holder.").

160. *Id.* at 641.

161. *Id.* at 642.

162. *Id.* at 646.

163. *Id.*

164. *Id.* at 644–46.

165. *Jack in the Box Inc. v. San-Tex Rest., Inc.*, SA-20-CV-00328, 2021 WL 148058, at *1 (W.D. Tex. Jan. 14, 2021) (discussed in Section (III), *supra*, regarding foreign statutory claims in Texas).

the counterclaims due to a choice-of-law clause and that all other claims were inadequately pled.¹⁶⁶

Despite there being no dispute that San-Tex's restaurants never operated in California, the district court held the choice-of-law provision evidenced the parties' intent for California law to apply to claims arising from the franchise agreement, especially the parties' contractual claims.¹⁶⁷ For claims that did not arise from the franchise agreement, the district court explained that Texas, as the forum state, applied the "most significant relationship test" where the following factors are weighed: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered."¹⁶⁸ The district court found that Texas had the "most significant relationship" to San-Tex's non-contractual claims for promissory estoppel, misappropriation, and conspiracy because the second, third, and fourth factors supported the application of Texas law.¹⁶⁹ While the district court ultimately resolved JITB's motion to dismiss on the merits of each claim without opining on whether the choice of law for each claim was outcome-determinative, the district court's decision to apply California law to San-Tex's contract-based claims and Texas law to San-Tex's tort claims indicates that choice-of-law determinations can vary on a claim-by-claim basis.¹⁷⁰

In *Great American Insurance Co. v. Beyond Gravity Media, Inc.*,¹⁷¹ California corporation Beyond Gravity Media, Inc. and its sole shareholder (collectively, Beyond Gravity) executed franchise agreements with Code Ninjas, LLC (Code Ninjas) to open and operate multiple Code Ninja locations. As part of that process, Beyond Gravity secured a commercial general liability policy (Policy) from Great American Insurance Co. (Great American) that provided coverage for third-party claims in the event of: "(1) 'bodily injury' or 'property damage' caused by an 'occurrence,' (2) a 'personal advertising injury,' and (3) the rendition of 'professional services' for which the insured is legally liable."¹⁷² The Policy also included various exclusions to coverage, including bars to coverage for Beyond Gravity's "knowing violation" of its contractual obligations and for underlying claims arising from breach of contract and misuse of intellectual property and confidential information.¹⁷³

A little over a year after the franchise agreements were executed, Beyond Gravity attempted to rescind its agreements with Code Ninjas by alleging breaches of California law. Code Ninjas responded by filing a

166. *Id.* at *4.

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.* at *13.

171. 3:20-CV-53, 2021 WL 4192738, at *1 (S.D. Tex. Sept. 15, 2021) (mem. op).

172. *Id.*

173. *Id.* at *7.

lawsuit against Beyond Gravity in a Texas federal court, alleging Beyond Gravity breached the franchise agreement and infringed Code Ninja's intellectual property for the purpose of starting a competing business.¹⁷⁴ Beyond Gravity and Code Ninjas ultimately reached a confidential settlement of that lawsuit but not before Great American sued Beyond Gravity, seeking a declaratory judgment that Code Ninja's lawsuit was not covered by the policy and that Great American had no duty to reimburse Beyond Gravity for the costs of defending the Code Ninja lawsuit or paying the resulting settlement.¹⁷⁵ Specifically, Great American argued that it had no duty to defend or indemnify Beyond Gravity because Code Ninja's allegations did not fall within the coverage grant of the Policy.¹⁷⁶ Great American and Beyond Gravity filed cross motions for summary judgment on the issue of insurance coverage.¹⁷⁷

The United States District Court for the Southern District of Texas began its analysis of the cross motions for summary judgment by determining whether California or Texas law would control the Policy's interpretation.¹⁷⁸ The district court noted that in the absence of any choice-of-law provision in the policy, Texas choice-of-law rules applied because Texas was the forum state.¹⁷⁹ The district court went on to explain that Texas's choice-of-law rules required courts to apply the "most significant relationship" test in contract disputes to determine which of two or more conflicting states' laws controlled.¹⁸⁰ In contrast to California law on allegations sufficient to trigger an insurer's duty to defend, the district court observed that the Texas Supreme Court has not recognized any exception to the "eight corners" rule, meaning that an insurer must defend its insured so long as the allegations in the underlying complaint fall within the scope of coverage provided by the relevant insurance policy.¹⁸¹

The district court ultimately decided to apply Texas's rules after concluding that there was no real conflict between Texas and California law that would affect the outcome of the case.¹⁸² While California law—unlike Texas law—permits courts to examine extrinsic evidence in determining whether underlying allegations triggered insurance coverage, the distinction was moot because there was no extrinsic evidence in the summary judgment record for the district court to consider.¹⁸³ Finding no significant distinction between California and Texas law for evaluating whether Code Ninja's lawsuit triggered Great American's duty to defend Beyond Gravity, the district court applied Texas's eight-corners

174. *Id.* at *1.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at *2–3.

179. *Id.* at *2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

rule.¹⁸⁴ After comparing Code Ninja's allegations in the underlying lawsuit to the provisions in the Policy, the district court held that multiple exclusions applied to bar coverage for Beyond Gravity and granted Great American's motion for summary judgment.¹⁸⁵

Both *San-Tex* and *Beyond Gravity* offer nuanced analyses of choice-of-law issues depending on whether the parties expressly contract for a specific state's laws to apply. Even where the disputed agreement contains a choice-of-law provision, as in *San-Tex*, a court may still apply the laws of other states depending on the relationship of specific claims to the parties' agreement. Where the parties' contract is silent as to choice of law, as in *Beyond Gravity*, Texas courts will apply the "most significant relationship" test to determine which state's laws most appropriately apply to the parties' claims and will typically apply the forum state's law where the choice-of-law analysis is not outcome-determinative. Prudent parties can often avoid tricky choice-of-law disputes by carefully wording their franchise agreements to designate which state's law shall apply to claims arising from the relevant franchise relationship.

C. JURY WAIVER

Upshaw v. Lacado, LLC is a prime example of the use-it-or-lose-it nature of jury waiver provisions at the trial court level; a party cannot challenge the validity of a jury verdict by raising the jury waiver provision for the first time on appeal.¹⁸⁶ In *Upshaw*, the underlying jury verdict found that Roy Upshaw and R&S Upshaw Franchising, LLC (collectively, Upshaw) breached three franchise agreements with Lacado, LLC (Lacado).¹⁸⁷ Upshaw argued that Lacado waived its right to a jury trial on its breach of contract claim because Upshaw's Franchise Disclosure Document included an express jury waiver.¹⁸⁸ The Court of Appeals for the Second District of Texas at Fort Worth noted, however, that such argument was untimely because Upshaw never objected to Lacado's request for a jury trial or otherwise raised the jury trial waiver until Upshaw moved the trial court to disregard the jury's verdict.¹⁸⁹

D. DISCOVERY

In *Chandler v. KMCC Enterprises, LLC*, the Court of Appeals for the Second District of Texas at Fort Worth reversed the trial court's grant of default judgment in favor of KMCC Enterprises, LLC and its owners (collectively, KMCC), which the trial court granted after striking Jessica Chandler and Sculpt Pod, Inc.'s (collectively, Chandler) pleadings as a

184. *Id.*

185. *Id.* at *11.

186. *Upshaw v. Lacado, LLC*, No. 02-20-00031-CV, 2021 WL 3085757, at *1 (Tex. App.—Fort Worth July 22, 2021) (pet. denied).

187. *Id.*

188. *Id.* at *5.

189. *Id.*

death-penalty discovery sanction.¹⁹⁰ The court of appeals held the trial court abused its discretion in dismissing Chandler's claims because Chandler was not aware of—and did not bear personal responsibility for—the sanctionable conduct that the trial court used to justify striking Chandler's pleadings.¹⁹¹

In the underlying trial court proceedings, KMCC sued Chandler—both the individual and the entity—for breach of the parties' franchise agreement.¹⁹² Throughout those proceedings, Chandler replaced attorneys, failed to attend certain hearings, and was subject to numerous sanctions.¹⁹³ Specifically, Chandler's refusal to answer discovery for two years and comply with three of the trial court's discovery orders prompted the trial court to enter orders against Chandler for contempt, award sanctions, and grant a default judgment against Chandler on its liability to KMCC.¹⁹⁴

On appeal, the court of appeals did not condone Chandler's discovery misconduct but instead explained there was no evidence in the record to support a death-penalty sanction that “adjudicates a claim and precludes the presentation of the case on the merits.”¹⁹⁵ The court of appeals observed that the Texas Supreme Court's previous holdings that death-penalty sanctions “must relate directly to the abuse found” and that a party cannot be punished for an attorney's conduct when evidence shows only that the party entrusted her legal representation to the offending attorney.¹⁹⁶ As applied to *Chandler*, there was no evidence in the record that Chandler was aware of the discovery dispute; Chandler was not personally served with the trial court's order to show cause, and no evidence indicated that Chandler was personally involved in the offending conduct.¹⁹⁷ Given the high bar for death-penalty sanctions established by the Texas Supreme Court, the court of appeals reversed the trial court and remanded for further proceedings because it found that Chandler merely entrusted legal representation to counsel and that the trial court did not attempt to determine who was responsible for the dilatory conduct.¹⁹⁸

Chandler shows that death-penalty sanctions will only be upheld by Texas courts in extraordinary cases where the party in question has personal knowledge or takes affirmative action, and not when the party merely relies on their attorney.¹⁹⁹

190. *Chandler v. KMCC Enter. LLC*, No. 02-20-00344-CV, 2021 WL 4783160, at *1 (Tex. App.—Fort Worth Oct. 14, 2021, no pet.) (mem. op.).

191. *Id.*

192. *Id.*

193. *Id.* at *1–4.

194. *Id.* at *4.

195. *Id.* at *7.

196. *Id.* at *5.

197. *Id.* at *7.

198. *Id.*

199. *See id.*

E. DEFAULT JUDGMENT

In *GTN Capital Group, LLC v. Techmation Corp.*, the United States District Court for the Northern District of Texas granted a motion for default judgment in favor of plaintiff-franchisor GTN Capital Group, LLC (GTN) after defendant-franchisees Techmation Corporation and Timothy C. Smith (collectively, Techmation) failed to file a pleading in response to GTN's complaint asserting breach of contract and Lanham Act claims.²⁰⁰ Indeed, Techmation failed to even file an appearance in the lawsuit.²⁰¹ The district court ultimately ruled that (1) default judgment was procedurally warranted because Techmation failed to appear and there was nothing in the record suggesting that the failure resulted from a good faith mistake or excusable neglect, and (2) GTN adequately pled a claim for injunctive relief, alleging that Techmation infringed GTN's intellectual property and breached the parties' franchise agreement.²⁰² Concluding that the conditions precedent for default judgment on GTN's claims for injunctive relief were satisfied, the court awarded GTN relief: (1) permanently enjoining Techmation's use of GTN's marks or similar marks that may cause a likelihood of confusion or misunderstanding; (2) permanently enjoining Techmation from operating a competing business at Techmation's former GTN franchise location in Arlington, Texas; and (3) awarding recovery of \$24,570.00 in attorneys' fees and \$402.00 in costs of court to GTN.²⁰³

In *Qi v. An*, the Court of Appeals for the Second District of Texas at Fort Worth upheld a trial court's grant of default judgment after defendant Yue Qi (Qi) failed to file an answer to a lawsuit filed by co-owners of a Bareburger franchise alleging claims for breach of contract, fraud, theft, conversion, negligent misrepresentation, and unjust enrichment.²⁰⁴ The trial court entered default judgment against Qi but allowed the lawsuit to continue against Qi's co-defendant.²⁰⁵ Following a bench trial, the trial court entered a post-answer default judgment against Qi's co-defendant, after which Qi moved for a new trial or, in the alternative, a motion for remittitur, and appealed the trial court's denial of those motions.²⁰⁶ On appeal, the district court affirmed the trial court's entry of default judgment against Qi, specifically rejecting Qi's proffered excuses for his failure to file an answer and agreeing with the trial court that Qi "exhibited conscious indifference to filing an answer."²⁰⁷ However, the appel-

200. *GTN Capital Grp., LLC v. Techmation Corp.*, No. 4:21-CV-1091, 2021 WL 5505576, at *1 (N.D. Tex. Nov. 22, 2021) (mem. op.).

201. *Id.*

202. *Id.* at *2-3.

203. *Id.* at *2-4.

204. *Qi v. An*, No. 2-20-00330-CV, 2021 WL 5028607, at *1, *3 (Tex. App.—Fort Worth Oct. 28, 2021, no pet.) (mem. op.).

205. *Id.* at *4.

206. *Id.*

207. *Id.* at *4-6 (noting that "Qi ignored the fact that he had been served with citation and that he had been instructed that a default would be taken if he did not file an answer" and that Qi rejected his attorney's advice that it was "extremely urgent" that Qi pay out-

late court did rule in favor of Qi's first and second issues: the plaintiffs failed to properly plead a claim for indemnity, and the trial court's award of unliquidated damages and attorneys' fees for that claim was an abuse of discretion.²⁰⁸ While the default judgment was largely affirmed, the specific damages award for the indemnity claim was reversed, and the appellate court remanded the case to the trial court with instructions to delete the portion of its default judgment attributing liability to the indemnity claim and to hold a new trial on the issue of attorneys' fees.²⁰⁹

V. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. COMPENSATORY DAMAGES

In *Truist Bank v. Mellow Mushroom Three Peat, Inc.*, pizza franchisees Mellow Mushroom Three Peat, Inc. (Mellow Mushroom) asserted counterclaims against its bank when Mellow Mushroom was sued for failing to pay back two of its loans.²¹⁰ After structural defects to the building of one of their restaurants forced it to close, Mellow Mushroom became unable to generate any income and consequently stopped paying its loans to Truist Bank (Truist).²¹¹ When Truist sued for the remainder of the loans, Mellow Mushroom responded with multiple tort-based counterclaims for fraud and negligence.²¹² In evaluating Truist's motion for summary judgment, the U.S. District Court for the Northern District of Texas deemed the dispute a mere debt-collection case and granted Truist's motion.²¹³

Specifically with regard to Mellow Mushroom's counterclaim for negligence, the district court reiterated the basic rule that a claimant must first establish the existence of a legal duty in order to recover damages for negligence.²¹⁴ In this case, the district court reasoned that Mellow Mushroom failed to establish that Truist owed a duty to manage its loan with reasonable care, observing that Mellow Mushroom cited to just one case in support of its negligence claim and that the cited case did not impose a duty on banks to manage loans with reasonable care and did not include any negligence-related holdings.²¹⁵ The district court speculated that the dearth of authority supporting the existence of such a duty was due to the economic-loss doctrine, which "bars tort claims when the damage at issue

standing legal invoices in order to obtain assistance with the lawsuit, and that Qi instead "relied on a faulty assumption that a default judgment in the United States would operate the same as one in China.")

208. *Id.* at *6–8.

209. *Id.* at *8.

210. *Truist Bank v. Mellow Mushroom Three Peat, Inc.*, 4:19-CV-00346, 2021 WL 1606017, at *1 (N.D. Tex. Apr. 21, 2021).

211. *Id.* at *2.

212. *Id.* at *1.

213. *Id.*

214. *Id.* at *5.

215. *Id.* (citing *Am. Airlines Empls. Fed. Credit Union v. Martin*, 29 S.W.3d 86 (Tex. 2000)).

is the subject matter of a contract.”²¹⁶ The district court noted that converting a breach of contract claim into a tort is disfavored because it adds after-the-fact, non-negotiated tort duties into a contract.²¹⁷ As applied to Mellow Mushroom’s claim for negligence against Truist, the district court concluded that the economic-loss doctrine prevented exactly what Mellow Mushroom sought to do in this case: convert what should have been a contract-based claim for breach of its loan agreement into a tort-based claim for negligence.²¹⁸ The district court granted the motion with regard to Mellow Mushroom’s remaining counterclaims, finding that Mellow Mushroom failed to carry its burden to prove breach of the loan agreement, to establish that Truist had (and breached) a fiduciary duty to Mellow Mushroom, or to establish that Truist fraudulently induced Mellow Mushroom to enter into the loan agreement.²¹⁹

The economic-loss doctrine also served as a bar to compensatory damages in *JTH Tax, LLC v. Bazan*.²²⁰ As one of its bases for dismissing all of Bazan’s tort counterclaims, the court agreed with JTH Tax that the tort claims only arose from (and only sought damages caused by) alleged breaches of contractual duties.²²¹ Because Bazan did not specify whether Texas or Virginia law applied to his counterclaims (and because JTH Tax only cited Texas law in its motion), the court decided to apply the laws of both states.²²² The court agreed with JTH Tax that Texas law embraced the economic-loss doctrine but noted that because JTH Tax had invoked no similar precedent under Virginia law at the motion to dismiss stage, the court would not dismiss the tortious interference and bad-faith claims to the extent Virginia law did apply.²²³

B. INJUNCTIVE RELIEF

The United States District Court for the Western District of Texas granted a preliminary injunction to franchisor Mr. Appliance LLC (Mr. Appliance) against its former franchisees, JMG Associates, Inc. (collectively, JMG), to enforce a noncompete provision and enjoin JMG’s unfair competition and continued use of Mr. Appliance’s trademarks.²²⁴ The court granted the injunction upon finding that Mr. Appliance carried its burden to establish: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of injunctive relief, (3) the bal-

216. *Id.* (citing *Am. Nat. Petro. Co v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 282 (Tex. 1990)).

217. *Id.*

218. *Id.*

219. *Id.* at *5–6.

220. No. 7:20-CV-32, 2021 WL 3929569, at *5 (S.D. Tex. Feb. 3, 2021) (discussed in Section (II), *supra*, regarding contract claims—good faith and fair dealing).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Mr. Appliance LLC v. JMG Assocs., Inc.*, No. 6:20-CV-1077, 2021 WL 5187426, at *1–2 (W.D. Tex. Aug. 24, 2021) (discussed in Section (III), *supra*, regarding covenants not to compete).

ance of harm weighs in favor of injunctive relief, and (4) the public interest weighs in favor of injunctive relief.²²⁵ *Mr. Appliance* serves as a reminder that in cases where infringement of a franchisor's marks or a violation of a contract is clear, a preliminary injunction is a useful and a relatively inexpensive tool to quickly obtain relief.

Unlike in *Mr. Appliance*, the United States District Court for the Northern District of Texas denied a motion for a temporary restraining order in a dispute between an Italian food restaurant chain Spaghetti Warehouse Restaurants, Inc. (Spaghetti Warehouse) and some of its Ohio-based franchise locations (collectively, Dayton Franchisees).²²⁶ Spaghetti Warehouse sought to temporarily restrain the Dayton Franchisees from using Spaghetti Warehouse trademarks, alleging that the franchisees had failed to pay licensing fees as required by their franchise agreement.²²⁷

As the district court observed, the necessary elements for a temporary restraining order are nearly identical to those of a preliminary injunction, albeit with the additional requirements that the "likelihood" of success on the first two elements be "substantial."²²⁸ These heightened requirements to obtain a temporary restraining order reflect the more limited scope of injunctive relief available under a temporary restraining order: whereas a preliminary injunction is designed to maintain the status quo until the merits of a dispute are resolved, a temporary restraining order is a "highly accelerated and temporary form of preliminary injunctive relief" designed to maintain the status quo and prevent irreparable harm for "just so long as is necessary to hold a hearing, and no longer."²²⁹

The district court found that Spaghetti Warehouse failed to establish the requisite "substantial threat of irreparable harm" and reasoned that its motion to restrain operation of the Dayton Franchisees' restaurants "would alter, not maintain, the status quo."²³⁰ After denying Spaghetti Warehouse's motion, the court ordered that the parties confer regarding an expedited discovery and briefing schedule for Spaghetti Warehouse's related application for a preliminary injunction.²³¹

225. *Id.* at *1. The court found that Mr. Appliance was likely to prevail because JMG was unlawfully utilizing trademarks and competing with Mr. Appliance in breach of the parties' agreement, the balance of harm weighed against JMG because its infringement was self-inflicted, and the public policy supported Mr. Appliance in holding JGM accountable to the parties' agreement. *Id.*

226. *Spaghetti Warehouse Rests., Inc. v. Spaghetti Warehouse Dayton, LLC*, No. 3:21-CV-00707, 2021 WL 4549269, at *1 (N.D. Tex. Apr. 9, 2021).

227. *Id.*

228. *Id.* ("To obtain injunctive relief, a party must establish: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that irreparable harm will result if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the defendant; and (4) that the granting of the preliminary injunction will not disserve the public interest.").

229. *Id.* (first quoting *Hassani v. Napolitano*, Civ. No. 3:09-CV-1201-D, 2009 WL 2044596, at *1 (N.D. Tex. July 15, 2009); then quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters Local No. 70*, 415 U.S. 423, 439 (1974)).

230. *Id.* at *1-2.

231. *Id.* at *2.

Mr. Appliance and Spaghetti Warehouse provide useful contrasts on the scope of relief available under an application for preliminary injunction and a motion for a temporary restraining order. While both procedures have similar elements, the expedited nature of a temporary restraining order generally requires a greater showing of the likelihood for irreparable harm than an application for a preliminary injunction.

VI. THE FRANCHISE RELATIONSHIP, TERMINATION AND NON-RENEWAL

A. TERMINATION & NON-RENEWAL

Last year, this Article summarized a case in which the United States District Court for the Southern District of Texas examined the scope of the term “equipment” under the Texas Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (the Act).²³² Having concluded Fire Protection Service, Inc.’s (FPS) unsold inventory constituted “equipment,” the parties proceeded to a non-jury trial on all of FPS’s claims against Survitec Survival Products, Inc. (Survitec).²³³ At the conclusion of FPS’s case in chief, Survitec orally moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c) and filed a written trial brief in support.²³⁴ In the motion, Survitec argued the Act did not retroactively apply to the parties’ pre-existing oral contract and, even if it did apply, retroactive application would violate the Texas constitution.²³⁵

It was undisputed the parties’ oral contract began in the late 1990s, prior to the Act’s effective date in 2011, and that either party could terminate the contract without cause.²³⁶ The Act provided for retroactive application to any dealer agreement if the agreement had no expiration date and constituted a “continuing contract”—defined under Texas law as one that contemplates “continuing performance[,]” is “indefinite in duration[,]” and “can be terminated at the will of either party.”²³⁷ FPS attempted to argue that the arrangement was actually a series of shorter contracts rather than a single continuing contract, but the district court rejected the argument upon finding no evidence that the contract was anything other than a long-term agreement until it was terminated.²³⁸ After concluding the Act retroactively applied to the parties’ oral contract, the district court turned to the question of whether applying the Act ret-

232. See Deborah S. Coldwell, Sally L. Dahlstrom, Taylor Rex Robertson, Wes Dutton, & Samuel Mallick, *Franchise Law*, 7 SMU ANN. TEX. SURV. 71, 90 (2021) (citing *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, No. 4:19-02162, 2019 WL 3766567, at *1 (S.D. Tex. Aug. 9, 2019)); TEX. BUS. & COM. CODE § 57.002(7)(A).

233. *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 519 F. Supp. 3d 414, 417 (S.D. Tex. 2021).

234. *Id.*

235. *Id.* at 419.

236. *Id.* at 420.

237. *Id.* (quoting *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 390 (Tex. 1977)).

238. *Id.*

roactively would violate the Texas constitution.²³⁹ This question depended on three factors: “(1) the nature of the prior right impaired by the statute; (2) the extent of the impairment; and (3) the nature and strength of the public interest served by the statute as evidence by the Legislature’s factual findings.”²⁴⁰

The district court first recognized there was no evidence the parties agreed to incorporate the Act’s requirements into their contract or that either modified the contract in any way after it began in the late 1990s.²⁴¹ As a result, the district court concluded the Act impaired the parties’ settled expectations in their contract—namely, that Survitec could no longer terminate without good cause, had to provide 180 days’ notice prior to any such termination, and was required to repurchase Survitec’s unsold inventory upon any termination.²⁴² The district court rejected FPS’s argument that any impairment would only be slight, finding the Act would cause significant, if not total, impairment of the parties’ settled expectations.²⁴³ FPS also tried to argue that Survitec could have terminated the contract between the time the Act was announced and its effective date, but the district court explained that this grace period did not “prevent the Act’s impairment of Survitec’s settled expectation” of a choice to terminate the contract.²⁴⁴ It reasoned that, under FPS’s logic, Survitec would have essentially “been *forced* to terminate” the dealer agreement to avoid the Act’s effect on the oral agreement.²⁴⁵ Finally, as to the public interest factor, the district court found the only beneficiaries of the Act were dealers, not the public interest at large.²⁴⁶ As a result, the district court concluded that even though the Act applied retroactively to the parties’ contract, such application so impaired the parties’ settled expectations that it violated the Texas constitution and could not be enforced.²⁴⁷ Accordingly, the district court entered judgment for Survitec on FPS’s claim under the Act.²⁴⁸

In *Bodine v. First Co.*, the United States District Court for the Northern District of Texas was presented with similar questions on the scope and applicability of the Act.²⁴⁹ Two manufacturer representatives—DBS Associates, Inc. and DABCO—and their purported owners, the Bodines, (collectively, plaintiffs) filed a litany of claims against First Co. and three First Co. employees (collectively, defendants), including various claims under the Act, after defendants terminated their partnership arrange-

239. *Id.*

240. *Id.* (internal quotations omitted).

241. *Id.*

242. *Id.* at 421.

243. *Id.*

244. *Id.* at 422.

245. *Id.* (emphasis included in original).

246. *Id.* at 422–23.

247. *Id.* at 423.

248. *Id.*

249. *Bodine v. First Co.*, No. 3:20-CV-3116-BT, 2021 WL 5505562, at *1, *9 (N.D. Tex. Nov. 24, 2021) (mem. op.), *appeal filed*, No. 21-11266 (5th Cir. 2021). Taylor Rex Robertson and other colleagues at Haynes and Boone, LLP represented First Co. in this matter.

ment with plaintiffs for the storage of heating, ventilation, and air conditioning (HVAC) units.²⁵⁰

Defendants moved to dismiss all of the plaintiffs' claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).²⁵¹ While the parties disputed whether HVAC units fell within the scope of "equipment," the defendants also argued plaintiffs had not sufficiently pled they were "dealers" and thus afforded protection under the Act.²⁵² In their motion, defendants noted that plaintiffs alleged they sold the units to wholesalers and contractors who then in turn sold to end users—which necessarily meant plaintiffs did not sell to end users as required under the definition of "dealers."²⁵³ The plaintiffs failed to address the "dealers" argument in their response, prompting the district court to conclude the plaintiffs had tacitly conceded to their status as "dealers" under the Act.²⁵⁴ Because the plaintiffs had already been granted leave to file an amended complaint in the Northern District of Texas (in addition to several other pleadings prior to being transferred to the Northern District), the district court dismissed the claim with prejudice for failure to state a claim.²⁵⁵

In *Econo Lube Franchisor SPV LLC v. Hafsi*, the United States District Court for the Western District of Texas was presented with franchisor Econo Lube Franchisor SPV LLC's ("Econo Lube") partial motion for summary judgment on trademark and breach of contract claims against former franchisees Mohamed Hafsi (Hafsi) and Yaser Belbisi (Belbisi) (collectively, Franchisees).²⁵⁶ Though the Franchisees failed to respond to the motion, Econo Lube was still required to prove the absence of a genuine issue of material fact to prevail on summary judgment.²⁵⁷ On the trademark claims, the district court first found that Econo Lube's undisputed summary judgment facts established it owned various trademarks and service marks (the Marks) and its predecessor-in-interest had executed a franchise agreement with the Franchisees.²⁵⁸ The Franchisees were authorized to use the Marks under the franchise agreement but, upon termination, obligated to cease further use of the Marks and doing business in any way "that might tend to give the general public the impression that [they were] operating a business as [p]laintiff's

250. *Id.* at *1.

251. *Id.* *2.

252. *Id.* at *9.

253. *Id.*

254. *Id.*

255. *Id.* at *9–10.

256. *Econo Lube Franchisor SPV LLC v. Hafsi*, No. SA-19-CV-01192, 2021 WL 1429524, at *1 (W.D. Tex. Feb. 26, 2021) (Econo Lube moved for summary judgment on liability on each of its claims against Franchisees).

257. *Id.*

258. *Id.* at *2. These claims included: "(1) trademark infringement under 15 U.S.C. § 1125(a); (2) false designation of origin under 15 U.S.C. § 1125(a); (3) trademark counterfeiting under 15 U.S.C. §§ 1114(1)(a)[,] 1116(d); (4) trademark infringement under TEX. BUS. & COM. CODE § 16.102; (5) unfair competition; and (6) breach of contract." *Id.* at *1.

franchisee.”²⁵⁹

Econo Lube offered substantial evidence that the Franchisees failed to pay the fees and royalties required under the franchise agreement, failed to cure their defaults upon notice of the same, and received notice of termination that included explicit instructions to discontinue use of the Marks.²⁶⁰ The summary judgment evidence also established that Hafsi continued to use the Marks after termination and after receiving a cease and desist letter from Econo Lube’s counsel.²⁶¹ Specifically, it was undisputed that Hafsi failed to remove Econo Lube signs from his business and failed to stop using an Econo Lube email address and business cards.²⁶² The district court therefore granted summary judgment in favor of Econo Lube since there was no genuine issue of material fact as to Hafsi’s liability for each of the trademark claims or the breach of contract claim for failure to make all required payments under the franchise agreement.²⁶³

The district court then analyzed the summary judgment evidence against Belbisi and found it “largely devoid of specific evidence” of liability.²⁶⁴ Further, the district court noted Belbisi’s answer stated numerous times he had sold his interest and ceased involvement in the franchised business more than five years earlier, none of which was contradicted by Econo Lube’s voluminous summary judgment evidence.²⁶⁵ As for the contract claims against Belbisi, the district court noted the Franchisees were jointly and severally liable for all required payments under the terms of the Franchise Agreement—which could only be discharged if Econo Lube consented to any assignment or transfer in writing.²⁶⁶ While Belbisi’s alleged transfer to Hafsi escaped liability under the tort-based trademark claims, Econo Lube’s undisputed summary judgment evidence established it had never provided written consent for any such transfer. As a result, the district court granted summary judgment on the contract claim.²⁶⁷ The district court also granted Econo Lube leave to file a separate motion on the trademark claims against Belbisi, provided there was specific evidence to establish it was entitled to summary judgment on those claims—a rare opportunity for successive motions for summary judgment under the Federal Rules of Civil Procedure.²⁶⁸

259. *Id.* at *2 (internal quotations omitted).

260. *Id.* Hafsi never responded to Econo Lube’s requests for admissions under Federal Rule of Civil Procedure 36 and was consequently deemed to have admitted to receiving the default, termination, and cease and desist notices. *Id.* at *3.

261. *Id.* at *2.

262. *Id.*

263. *Id.* at *4–5.

264. *Id.* at *5.

265. *Id.*

266. *Id.* at *6.

267. *Id.*

268. *Id.*

VII. INTELLECTUAL PROPERTY

A. TRADEMARKS

Nestlé USA, Inc. v. Ultra Distribuciones Mundiales S.A. de C.V. involved allegations of trademark infringement in the international “gray market” context.²⁶⁹ Plaintiff Nestlé USA, Inc. (Nestlé) is the exclusive licensee of Nestlé trademarks in the United States and “is responsible for the marketing, labelling, and distribution of Nestlé food and beverage products in the United States.”²⁷⁰ Seeking to enforce these rights, Nestlé sued defendants Ultra Distribuciones Mundiales and Ultra International (collectively, Ultra) after learning that Ultra was distributing and selling Nestlé products intended for sale only in Mexico in the United States.²⁷¹ Although the products sold by Ultra bore Nestlé’s trademarks, Ultra had no right to use Nestlé trademarks in the United States, nor was it authorized to sell the Nestlé products to U.S. consumers.²⁷² The products were thus “gray market” goods, meaning they were “foreign manufactured goods, for which a valid United States trademark [had] been registered, that [were] legally purchased abroad and imported to the United States without the consent of the American trademark holder.”²⁷³ They also contained notable differences from those authorized for sale in the United States, including noncompliance with various requirements in the Food, Drug, and Cosmetic Act (FDCA) and Food and Drug Administration (FDA) regulations.²⁷⁴

Seeking to stop Ultra’s sales, Nestlé asserted numerous claims including trademark infringement, trademark dilution, false designation of origin and unfair competition claims under the Lanham Act.²⁷⁵ It also asserted a Texas trademark dilution claim.²⁷⁶ Ultra moved to dismiss Nestlé’s claims.²⁷⁷

The court denied Ultra’s motion as to the Lanham Act claims. First, the court disagreed with Ultra’s contention that Nestlé’s claims constituted an impermissible private enforcement of the FDCA and FDA regulation.²⁷⁸ Though Nestlé cited Ultra’s noncompliance with these rules and regulations, Nestlé did not seek to enforce them—rather, it sought to merely highlight a “material difference[]” between the gray-market and the authorized goods.²⁷⁹ Second, the court held that Nestlé had, indeed,

269. *Nestlé USA, Inc. v. Ultra Distribuciones Mundiales S.A. de C.V.*, 516 F. Supp. 3d 633, 641 (W.D. Tex. 2021) (discussed in Section (IV), *supra*, regarding personal jurisdiction).

270. *Id.* at 640.

271. *Id.*

272. *Id.* at 640–41.

273. *Id.* at 641 (quoting *Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 662 n.1 (3d Cir. 1989)).

274. *Id.* at 646–48.

275. *Id.* at 646.

276. *Id.* at 657.

277. *Id.* at 646.

278. *Id.* at 646–49.

279. *Id.* at 647.

adequately pled their false designation of origin claim.²⁸⁰ Notably, the court concluded that Nestlé successfully pleaded Ultra's products had the capacity to deceive customers into thinking they were authorized to be sold in the United States when they were not, and that consumers would likely be injured when their quality expectations were unmet.²⁸¹

The court likewise denied Ultra's motion as to the Texas trademark dilution claim. Ultra argued that Nestlé failed to plead the fame of Nestlé's trademark in Texas as opposed to the United States, more generally.²⁸² The court concluded that Nestlé's pleading of fame in the United States, "including in Texas," coupled with its references to brand rankings and trademarks, sufficed.²⁸³

In *Doe v. YUM! Brands, Inc.*, Doe relied on the control Pizza Hut, the franchisor, and YUM, Pizza Hut's indirect parent company, wielded over a franchisee's advertising in attempting to establish vicarious liability on an ostensible agency theory.²⁸⁴ Ostensible agency, based on the notion of estoppel, applies when a plaintiff shows "(1) she had a reasonable belief in the agent's authority, (2) her belief was generated by some holding out, by act or neglect, of the principal, and (3) she was justified in relying on the representation of authority."²⁸⁵ In Doe's view, Pizza Hut's control over the franchisee's use of its trademarks and the requirement that the franchisee use only Pizza Hut trademarks, trade dress, service mark, and trade name satisfied these elements.²⁸⁶ The Court of Appeals for the First District of Texas at Houston disagreed and affirmed.²⁸⁷ In doing so, it aligned itself with courts in other jurisdictions that hold the "use of a national brand in general advertising is indicative of a franchise relationship," not an agency relationship,²⁸⁸ and "[n]ational advertising and use of brand names do not, without more, represent to third parties that a franchisee acts as the franchisor's apparent agent."²⁸⁹

VIII. CONCLUSION

This Survey period provided a thorough overview of the state of franchise litigation in Texas from a variety of legal perspectives and procedural postures. This Survey involved a variety of common law and statutory claims, nuanced jurisdictional analysis, consideration of grounds for injunctive relief, intellectual property disputes, and the construction of

280. *Id.* at 650–51.

281. *Id.* at 651.

282. *Id.* at 657.

283. *Id.* at 658.

284. *Doe v. YUM! Brands, Inc.*, No. 01-19-00844-CV, 2021 WL 5113021, at *14 (Tex. App.—Houston [1st Dist.] Nov. 4, 2021, no pet. h.) (mem. op.).

285. *Id.* (citing *Valdez v. Pasadena Healthcare Mgmt., Inc.*, 975 S.W.2d 43, 46 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

286. *Id.*

287. *Id.*

288. *Id.* (citing, e.g., *Braucher v. Swagat Grp.*, 702 F. Supp. 2d 1032, 1045 (C.D. Ill. 2010)).

289. *Id.* (citing *Triplett v. Soleil Grp.*, 664 F. Supp. 2d 645, 657 (D.S.C. 2009)).

overlapping state and federal statutory claims in the context of bankruptcy.

Among the cases involving common law claims, *JTH Tax* reiterated the general rule that Texas law does not recognize a duty of good faith and fair dealing in an arms-length franchise relationship.²⁹⁰ In that case, the court dismissed a franchisee's counterclaim for breach of the covenant of good faith and fair dealing upon concluding that "the requisite special relationship does not exist between a franchisor and franchisee."²⁹¹ And like the *Shree Veer* court, the *JTH Tax* court also applied heightened pleading standards under Federal Rule of Civil Procedure 9(b) to claims of fraud and fraudulent inducement.²⁹² In *JTH Tax*, the district court dismissed the claimant's fraud-based claims, reasoning they failed to plead with sufficient particularity the "circumstances constituting fraud, which at minimum requires the party to 'set forth the 'who, what, when, where, and how' of the alleged fraud.'"²⁹³ In contrast, the court in *Shree Veer* found that the claimant pled fraudulent inducement and other fraud claims with sufficient particularity to meet the requirements of Rule 9(b), but nevertheless dismissed the claimant's fraud-based claims under Rule 12(b)(6) for failing to tie those allegations to the necessary elements of each cause of action.

In *Doe* and *McNeel*, the courts reviewed provisions of franchise agreements to determine whether the defendant-franchisors could be held vicariously liable for personal injuries arising from the alleged negligence of their respective franchisees.²⁹⁴ In *Doe*, the court held that the franchisor's rights to enforce operational standards failed to demonstrate the kind of control of a franchisees' activities necessary to trigger vicarious liability.²⁹⁵ And in *McNeel*, the district court reached the opposite conclusion, holding that the franchisor's right to enter the franchisee's premises and exercise control over the franchisee's operations meant that the franchisor could be held vicariously liable for a claim alleging wrongful death at the franchisee's premises.²⁹⁶

Among this Survey's review of opinions construing statutory claims, *Mr. Appliance* involved an application for preliminary injunction arising from both common law and statutory unfair competition claims.²⁹⁷ In a relatively brief opinion, the district court in that case reasoned that the franchisor was likely to succeed on the merits of its unfair competition

290. *JTH Tax, LLC v. Bazan*, No. 7:20-CV-32, 2021 WL 3929569, at *5 (S.D. Tex. Feb. 3, 2021).

291. *Id.*

292. *See id.* at *3; *Shree Veer Corp. v. OYO Hotels, Inc.*, No. 3:20-CV-03268, 2021 WL 4502347, at *4 (N.D. Tex. Sept. 30, 2021).

293. *JTH Tax*, 2021 WL 3929569, at *3.

294. *Doe*, 2021 WL 5113021, at *1; *McNeel v. Kiddie Academy Domestic Franchising, LLC*, No. 3:19-CV-178, 2021 WL 920108, at *1 (S.D. Tex. Mar. 10, 2021).

295. *Doe*, 2021 WL 5113021, at *13.

296. *McNeel*, 2021 WL 920108, at *2-3.

297. *Mr. Appliance LLC v. JMG Associates, Inc.*, No. 6:20-CV-1077, 2021 WL 5197426, at *1 (W.D. Tex. Aug. 24, 2021).

claims due to the defendants' unauthorized use of the franchisor's trademarks, and granted a broad preliminary injunction which effectively prevented the defendants from operating a "competitive business" near businesses bearing the franchisor's marks.²⁹⁸ In contrast to the relatively cursory treatment of the statutory claims in *Mr. Appliance, In re Essential* involved a highly fact-intensive analysis of the merits of overlapping state and federal statutory fraudulent transfer claims in the context of a franchisee's bankruptcy.²⁹⁹ In that case, the Bankruptcy Court for the Northern District of Texas denied summary judgment in favor of the bankruptcy trustee on all four of the trustee's actual and constructive fraudulent transfer claims under the Bankruptcy Code and TUFTA, reasoning that genuine issues of material fact remained as to whether the defendant actually intended to defraud creditors and whether the transfers were made for a reasonably equivalent value.³⁰⁰ And in *Arruda*, the Fifth Circuit Court of Appeals dismissed a lawsuit for lack of subject matter jurisdiction, finding that the defendant-franchisors' alleged failure to disclose information in violation of an FTCA rule could not sustain plaintiffs' federal statutory claims under the RICO Act.³⁰¹ Lastly, in *Jack in the Box Inc.*, a Texas-based federal court held that a Texas-based franchisee could sue a California-based franchisor under the California Unfair Practices Act where the franchisee alleged that the franchisor engaged in fraudulent conduct within California.³⁰²

This Survey's analysis of procedural issues included a broad array of cases and issues. For example, *OsteoStrong Franchising* involved an international trademark dispute in which a Texas-based federal court rejected UK-based defendants' argument that the court lacked subject matter jurisdiction to adjudicate the US-based franchisor's claims that the defendants were using the franchisor's marks without authorization.³⁰³ A similar threshold procedural issue arose in *APFA Inc.*, in which a defendant-franchisor argued that an association representing multiple franchisees lacked standing to raise claims on behalf of its constituent franchisees. Because the franchisees' claims in *APFA Inc.* involved franchisee-specific facts, the district court concluded that the association was not in the best position to bring a suit on behalf of all its member franchisees and dismissed the suit for lack of subject matter jurisdiction.³⁰⁴

Several procedural cases involved the exercise of personal jurisdiction over foreign defendants. The district court in *OYO Hotels* held that an Alabama-based franchisee was amenable to jurisdiction in Texas due to its breach of an agreement with a Texas-based franchisor and where the

298. *Id.* at *1–2.

299. *See In re Essential Fin. Educ., Inc.*, 629 B.R. 401, 419–30 (Bankr. N.D. Tex. 2021).

300. *Id.* at 428–30, 443.

301. *Arruda v. Curves Int'l, Inc.*, 861 Fed. Appx. 831, 836 (5th Cir. 2021).

302. *Jack in the Box Inc. v. San-Tex Rest., Inc.*, No. SA-20-CV-00328, 2021 WL 148058, at *6 (W.D. Tex. Jan. 14, 2021).

303. *OsteoStrong Franchising, LLC v. Rhodes*, No. 4:20-CV-465, 2020 WL 8970652, at *5–6 (S.D. Tex. Dec. 10, 2020).

304. *APFA Inc. v. UATP Mgmt., LLC*, 537 F. Supp. 3d 897, 910 (N.D. Tex. 2021).

agreement included a Texas choice-of-law provision.³⁰⁵ The court in *Nestlé* similarly held that a Mexico-based distributor of Nestlé products was amenable to jurisdiction in Texas due to the distributor's knowledge that gray market products it sold in Mexico were being resold to customers in Texas.³⁰⁶ In contrast, the court in *Volkswagen* found personal jurisdiction to be lacking where the defendant automaker's alleged activities in skirt-ing state and federal emissions standards were not purposefully directed at Texas.³⁰⁷ The remaining procedural cases involved narrower, but no less relevant, issues involving choice-of-law provisions, contractual waivers of jury trials, discovery disputes, and default judgment.

In the Survey's section on remedies available in franchise disputes, several cases discussed the availability of compensatory damages and injunctive relief. In both *Truist Bank* and *JTH Tax*, federal courts applying Texas law held that the economic loss doctrine precluded claimants from recovering on tort-based claims for damages sounded in contract.³⁰⁸ *Mr. Appliance and Spaghetti Warehouse* applied the familiar four-factor tests for obtaining temporary restraining orders and preliminary injunctions, with the latter case demonstrating the relatively high bar for obtaining injunctive relief under the "highly accelerated" procedure for obtaining a temporary restraining order.³⁰⁹ While all of these cases involved relatively straightforward applications of well-established legal standards, they serve as useful refreshers on claims and remedies that frequently arise in the context of franchise disputes.

The two cases concerning the Texas Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act demonstrate the still-evolving interpretation of the Act's definitions and retroactivity in franchise and non-franchise relationships. *Bodine* and *Survitec* provide useful lessons for defending against claims under the Act and methods to challenge applicability beyond just the exceedingly broad definition of "equipment," which is often the first line of attack for defendants. *Econo Lube* is a reminder that sheer volume of summary judgment evidence will not guarantee success, even if the non-movants fail to file a response to the motion for summary judgment. The case also highlights potential strategies in separating arguments on tort and contract claims—for both a franchisee like Belbisi, who escaped tort liability through cessation of in-

305. *OYO Hotels Inc. v. Om Chamunda, LLC*, No. 3:20-CV-3433-N, 2021 WL 4125194, at *4 (N.D. Tex. Sept. 9, 2021).

306. *Nestlé USA, Inc. v. Ultra Distribuciones Mundiales S.A. de C.V.*, 516 F. Supp. 3d 633, 644–46 (W.D. Tex. 2021).

307. *Volkswagen Aktiengesellschaft v. State*, No. 3-19-00453-CV, 2020 WL 7640037, at *7–8 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem.op.).

308. *Truist Bank v. Mellow Mushroom Three Peat, Inc.*, No. 4:19-CV-00346, 2021 WL 1606017, at *5 (N.D. Tex. Apr. 21, 2021) (granting summary judgment in favor of the bank on the debtor-franchisee's tort-based claims); *JTH Tax v. Bazan*, No. 7:20-CV-32, 2021 WL 3929569, at *5 (S.D. Tex. Feb. 3, 2021) (dismissing tort counterclaims under Texas law but allowing tort claims based on Virginia law to survive the franchisors' motion to dismiss).

309. *Mr. Appliance LLC v. JMG Associates, Inc.*, No. 6:20-CV-1077, 2021 WL 5197426, at *1–2 (W.D. Tex. Aug. 24, 2021); *Spaghetti Warehouse Rest., Inc. v. Spaghetti Warehouse Dayton, LLC*, No. 3:21-CV-00707-N, 2021 WL 4549269, at *1–2 (N.D. Tex. Apr. 9, 2021).

volvement in the franchise, and a franchisor like Econo Lube, who still attached liability on Belbisi via precise requirements in a franchise agreement.

Lastly, two of the cases involved in this year's Survey assessed claims arising from the use and misuse of trademarks. In *Nestlé*, the district court denied the defendant distributor's motion to dismiss claims for trademark infringement and trademark dilution, reasoning that Nestlé had sufficiently stated a claim that the Mexico-based distributor's sale of "gray market" goods that ended up in the U.S. market exceeded the scope of the distributor's license.³¹⁰ And in *Doe*, the court rejected a personal injury plaintiff's argument that a franchisee's use of a franchisor's trademarks created a reasonable belief that the franchisee was acting as an agent of the franchisor, so as to make the franchisor vicariously liable for the franchisee's alleged negligence.³¹¹

Collectively, the cases in this year's Annual Texas Survey on Franchise Law provide a helpful overview of significant franchise-related litigation in Texas state and federal courts over the past year. While some cases, such as those involving franchisors' vicarious liability, signal emerging shifts in the franchisor-franchisee relationship, others serve as pertinent refreshers on common claims, legal standards, and jurisprudential doctrines that have defined the contours of franchise litigation in Texas for decades.

310. *Nestlé USA, Inc.*, 516 F. Supp. 3d at 651, 657–58.

311. *Doe v. YUM! Brands, Inc.*, No. 01-19-00844-CV, 2021 WL 5113021, at *14–15 (Tex. App.—Houston [1st Dist.] Nov. 4, 2021, no pet. h.) (mem. op.).

