[SMU Annual Texas Survey](#)

Volume 9 Article 6

2023

Franchise Law

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DOI: https://doi.org/10.25172/smuatxs.9.1.6

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I. INTRODUCTION

The 2022 Annual Texas Survey on Franchise Law presents an assortment of novel and familiar legal issues in Texas state and federal courts. This year's Survey period contains decisions favorable to franchisors, franchisees, and third parties associated with franchised businesses on disputes involving intellectual property rights, enforceability of forum selection clauses, the essential elements of common law and statutory claims, and remedies available to franchise parties involved in litigation, among other issues. As in prior years, the Survey showcases developments in franchise law that serve as helpful reminders to practitioners advising parties involved in any stage of a franchise relationship.

II. PROCEDURE AND OTHER LITIGATION ISSUES

A. Forum Selection

PH Lodging Tomball, LLC v. Holiday Hospitality Franchising LLC is one of six identical lawsuits filed by plaintiff (Tomball) and a putative class of franchisees against Holiday Hospital Franchising (Holiday).[1] The U.S. District Court for the Southern District of Texas granted Holiday's motion to transfer venue after interpreting an ambiguous forum selection clause.[2] All parties agreed that the following provision applied but disagreed on how to interpret the language:

> Licensee hereby expressly and irrevocably submits itself to the non-exclusive jurisdiction of the U.S. District Court for the Northern District of Georgia, Atlanta Division and the State and Superior Courts of DeKalb County, Georgia[,] for the purpose of any and all disputes. However, Licensor remains entitled to seek injunctive relief in the federal or state courts either of Georgia or of the state of the Hotel's location or of Licensor's principal place of business. Should Licensee initiate litigation against Licensor, its parents, subsidiaries or one of its affiliated entities, Licensee must bring such action in the courts identified above; provided, however, the foregoing will not constitute a waiver of any of Licensee's rights under any applicable franchise law of the state in which the Hotel is located.[3]

While the first sentence required that all actions be brought in Georgia, the second laid out exceptions, including that the franchisor could bring an action in the federal or state courts of "the state of the Hotel's location," which was, in this case, Texas.[4] The final sentence was the source of tension in that it provided that franchisees could initiate litigation in "the courts

1. *See* PH Lodging Tomball, LLC v. Holiday Hospitality Franchising LLC, No. H-21-1803, 2021 WL 5902922, at *1–2 (S.D. Tex. Dec. 10, 2021).
2. *See id.* at *5.
3. *Id.* at *1.
4. *Id.*

identified above."[5] Tomball argued that the final sentence permitted it to file a lawsuit in any state or federal court in Texas, including the Southern District of Texas.[6] The district court disagreed, concluding that the final sentence was ambiguous but nevertheless declaring that the parties' intention was clear.[7] Because adopting Tomball's proposed interpretation would render the language in the second sentence meaningless surplusage by allowing franchisee to sue in any court with jurisdiction, the court construed the ambiguity in favor of Holiday.[8] Finding no other exceptional circumstances and arriving at a neutral evaluation of public interest factors, the court exercised its discretion to grant the motion and transferred the case to the U.S. District Court for the Northern District of Georgia.[9]

In a matter of first impression in *Franlink Inc. v. BACE Services Inc.*, the U.S. Court of Appeals for the Fifth Circuit held that, when non-signatories enjoy a sufficiently close nexus to the dispute or to a signatory, such that it would be foreseeable that they would be bound, the equitable "closely-related" doctrine may bind non-signatories to a forum selection clause.[10] A husband and wife, the Wellses, were owners of a staffing company franchise (BACE) through an agreement they signed with franchisor Franlink Incorporated (Link) which included non-compete and non-solicitation covenants.[11] Four days before the couple purported to terminate their franchise agreement, Morton, the Wells' son/stepson, then a BACE manager, left to manage a competing staffing business (JTL).[12] Pursuant to the forum selection clause, Link filed a complaint in the U.S. District Court for the Southern District of Texas after learning that the husband solicited Link's former BACE clients to JTL and the Wellses started their own competing staffing company (PayDay) that was actively soliciting Link clients.[13]

In a motion to dismiss for lack of personal jurisdiction, the non-signatories—Morton, JTL, and PayDay—argued that the forum selection clause did not apply to them because they were not parties to the franchise agreement.[14] Breaking from the district court decision that dismissed the motion altogether, the Fifth Circuit noted that application of the closely-related doctrine is context specific and found that it applied to bind some (PayDay) to the forum selection provision and not others (Morton and JTL).[15] The court examined case law applying the doctrine in other jurisdictions, as well as the judicial and academic critiques of the doctrine,

5. *Id.*
6. *See id.* at *3.
7. *See id.* at *4–5.
8. *See id.*
9. *See id.* at *5.
10. Franlink Inc. v. BACE Servs. Inc., 50 F.4th 432, 442–43 (5th Cir. 2022).
11. *See id.* at 436.
12. *See id.*
13. *See id.*
14. *See id.* at 437.
15. *See id.* at 442–43.

and expressed its own credulity before begrudgingly deciding to apply it.[16] By applying the closely-related doctrine at all, the Fifth Circuit joined all other circuit courts in recognizing the doctrine.[17]

The Fifth Circuit announced the following factors for determining if a non-signatory is closely related enough: "(1) common ownership between the signatory and the non-signatory, (2) direct benefits obtained from the contract at issue, (3) knowledge of the agreement generally, and (4) awareness of the forum selection clause particularly."[18] Marching through the factors, the court found that Morton and JTL both had no ownership interest in BACE, no direct benefits from the franchise agreement, and no awareness of the forum selection clause.[19] Morton's networking benefits flowed from his employment, not the Wells' contract with Link, and the benefits JTL received via Morton were "attenuated."[20] In contrast, the court found each factor applied to PayDay and affirmed that the district court had jurisdiction over PayDay.[21]

These cases demonstrate that a valid forum selection clause in a franchise agreement will ordinarily be enforced by Texas courts and that courts are likely to enforce a franchise agreement's forum selection provisions even in the face of ambiguous phrasing, as in *Holiday Hospitality*,[22] or against non-signatories to the franchise agreement should they be equitably considered related closely enough to be bound, as in *BACE Services*.[23]

B. Statutes of Limitations

In *Broadway v. Lean on 8, Inc.*, the Court of Appeals for the Third District of Texas at Austin held that the trial court had correctly granted summary judgment in favor of a Chick-fil-A franchisee (Lean) on its statute-of-limitations defense to plaintiff Broadway's personal injury suit against Lean.[24] Even though the Supreme Court of Texas extended the period in which to file pursuant to its COVID emergency orders, the appellate court agreed that the limitations period expired before Broadway tried to extend it.[25] Critical to the running of limitations was the fact that

16. *See id.* at 439–41.

17. *See id.* at 439 (citing In re McGraw-Hill Glob. Educ. Holdings LLC, 909 F.3d 48, 63 (3d Cir. 2018); Magi XXI, Inc. v. Stato della Citta del Vaticano, 714 F.3d 714, 723 (2d Cir. 2013); Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 757–59 (8th Cir. 2001); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1299 (11th Cir. 1998); Baker v. LeBoeuf, Lamb, Leiby & Macrae, 105 F.3d 1102, 1106 (6th Cir. 1997); Hugel v. Corp. of Lloyd's, 999 F.2d 206, 209–10 (7th Cir. 1993); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988)).

18. *Id.* at 442.

19. *See id.* at 442–43.

20. *Id.*

21. *See id.* at 443.

22. *See* No. H-21-1803, 2021 WL 5902922, at *1 (S.D. Tex. Dec. 10, 2021).

23. *See* 50 F.4th 432, 432 (5th Cir. 2022).

24. *See* Broadway v. Lean on 8, Inc., No. 03-21-00663-CV, 2022 WL 3691678, at *1 (Tex. App.—Austin Aug. 26, 2022, no pet.) (mem. op.).

25. *See id.* at *4.

Broadway originally misidentified—not just misnamed—the defendant and failed to establish that the correct defendant had notice within the limitations period.[26] Broadway unsuccessfully argued that notice to the franchisor, Chick-fil-A, established notice to Lean.[27] Interestingly, the court left open the question of "whether the emergency orders would permit the retroactive extension of the statute of limitations" because, even if the trial court had the authority to do so, it had the discretion to the decline to do so under the COVID orders, and Broadway made no argument concerning a constitutional imperative to extend the deadline.[28] Franchisors and franchisees alike should be mindful of all possible defenses to vicarious liability for the bad acts of franchisees' employees, especially as the Federal Trade Commission and other states consider potential expansion of franchisors' liability for the acts of franchisees and franchisees' employees.

C. Summary Judgment

In *Amegy Bank of Texas v. CGI Franchise Systems, Inc.*, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's entry of final judgment after granting a summary judgment motion in favor of interpleader defendant franchisor and its sole shareholder and holding that the franchisor was entitled to interpleaded funds.[29] The case was originally brought by Amegy Bank of Texas (Amegy), seeking a declaration concerning one of its bank accounts after an attempted transfer of funds by a husband—and a letter threatening legal action from a wife—following a French family court divorce decree.[30] The district court noted that the French court held that the husband was the sole owner of the assets of his company, CGI Franchise Systems, Inc. (CGIFSI) and that California community property laws merely granted the wife a monetary interest in CGIFSI's value while denying any "rights pertaining to the operation of CGIFSI."[31] Because the Amegy funds were distinct from CGIFSI's shares-or-stock value and not community property, the undisputed possession and control that the husband exercised over both CGIFSI and the account itself was dispositive for the question whether the husband was authorized to transfer the funds at issue.[32] Even in franchise disputes with complex facts, practitioners should look for opportunities to resolve legal issues where facts are not in dispute. Additionally, as it relates to franchisees' finances, attorneys should counsel their clients to open and maintain their own accounts to preserve clarity of ownership.

26. *See id.*
27. *See id.* at *3.
28. *Id.* at *4.
29. *See* Amegy Bank of Tex. v. CGI Franchise Sys., Inc., No. 22-CV-10190, 2022 WL 17074822, at *1 (5th Cir. Nov. 18, 2022) (per curiam).
30. *See id.*
31. *Id.*
32. *See id.* at *3.

In *Wood v. Mr. Appliance LLC*, the Court of Appeals for the Tenth District of Texas at Waco denied an appeal by a *pro se* franchisee (Mr. Wood) from the franchisor's (Mr. Appliance) successful summary-judgment motion for breach of the franchise agreement after Mr. Wood failed to comply with an audit request.[33] Significant to the opinion of both the trial and appellate courts was that, at the trial court, Mr. Appliance alone had submitted admissible evidence attached to its summary-judgment motion.[34]

Without submitting evidence, argumentation alone will not support claims or defenses on summary judgment. Both *Amegy Bank* and *Mr. Appliance* highlight the importance of compiling and properly authenticating summary-judgment evidence at the trial court level so as to prevail on the motion and preserve the evidence for consideration on appeal.[35] Summary judgment motions are complex legal proceedings that can carry high stakes, and franchise parties should consider consulting a lawyer if one has not already been retained.

III. THE FRANCHISE RELATIONSHIP, TERMINATION, AND NON-RENEWAL

At the heart of franchise law is the franchise relationship. However, not every relationship lasts forever. Whether due to one party's termination of an existing relationship, or a refusal by either party to renew a time-limited franchise relationship for a future term, franchise relationships end. In the past year, courts acknowledged and affirmed the practical realities of this lifecycle.

Perhaps the most significant decision touching on the intricacies of what happens when termination is not a clean break was *Pizza Hut, LLC v. Ronak Foods, LLC*.[36] In findings of fact and conclusions of law issued after a bench trial, the U.S. District Court for the Eastern District of Texas found that the franchisees (Pandya Franchisees) breached their respective franchise agreements, a forbearance agreement (Forbearance Agreement), and an additional agreement designed to facilitate the sale of franchisees' restaurants to a third party (Transfer Agreement).[37] Jignesh Pandya (Pandya and, together with the Pandya Franchisees, the Pandya Defendants) had guaranteed the Pandya Franchisees' performance of the franchise agreements and was a party to the Forbearance Agreement and Transfer Agreement.[38]

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33. *See* Wood v. Mr. Appliance LLC, No. 10-20-00246-CV, 2022 WL 2840245, at *1 (Tex. App.—Waco July 20, 2022, no pet.) (mem. op.).

34. *See id.* at *4.

35. *See generally id.*; *Amegy Bank of Tex.*, 2022 WL 17074822, at *1.

36. No. 5:21-CV-00089-RWS, 2022 WL 3544403, slip op. (E.D. Tex. June 17, 2022), *aff'd sub nom.*, Pizza Hut L.L.C. v. Pandya, No. 22-40555, 2023 WL 5359079 (5th Cir. Aug. 22, 2023). Authors Deborah S. Coldwell and J. Wilson Miller and other colleagues at Haynes and Boone, LLP were trial counsel for the franchisor in this civil action. *See id.* at *1. See also *Pandya*, 2023 WL 5359079 at *1.

37. *See Ronak Foods*, 2022 WL 3544403 at *1, *55.

38. *See id.* at *15, *18, *23.

Pizza Hut terminated the franchise agreements after the Pandya Franchisees defaulted on their obligations.[39] Pizza Hut and the Pandya Defendants then entered into a Forbearance Agreement in which Pizza Hut agreed to forbear from enforcing termination of the franchise agreements to permit the Pandya Defendants to sell the restaurants to a third party.[40] During the pendency of the Forbearance Agreement, the franchise agreements' terms and all brand standards obligations remained in effect, and the restaurants continued to operate.[41] The Pandya Defendants ultimately breached their obligations under the Forbearance agreement by (1) failing to comply with Pizza Hut's brand standards; (2) failing to pay various fees owed under the continuing terms of the franchise agreements; (3) failing to indemnify Pizza Hut; (4) and failing to perform tasks necessary for a sale in a timely manner.[42]

In a final effort to transfer the Pandya Franchisees' restaurants to a new franchisee, Pizza Hut entered into a Transfer Agreement with the Pandya Defendants.[43] Pizza Hut allowed the Pandya Defendants to continue operating select restaurants while Pizza Hut negotiated a sale with potential new franchisees based in part on the Pandya Defendants' representations that there were no tax liens on the restaurants.[44] The Pandya Defendants breached the Transfer Agreement by, among other things, (1) failing to comply with Pizza Hut's brand standards; (2) failing to indemnify Pizza Hut; and (3) failing to show there were no tax liens on the restaurants.[45]

The course of dealing at issue in *Ronak Foods* teaches two important lessons for practitioners with franchise clients.[46] The first is that franchise parties can and often do make alternative arrangements for a smooth transition when a franchise relationship ends. The second is that parties to a franchise relationship can face significant consequences if they do not honor the continuing terms of the franchise parties' arrangements until franchisor and franchisee have finally parted ways. Naturally, a forbearance agreement will not be the right decision in every termination. In certain circumstances, however, a forbearance agreement can bridge what would otherwise be a long gap in operations and mitigate losses for each party. Had the Pandya Defendants kept up adequate operations and diligently effected a sale of their restaurants to a qualified new franchisee, they could have parted ways with Pizza Hut without further harming Pizza Hut or themselves.[47] Instead, the Pandya Defendants unsuccessfully attempted to avoid their post-termination contracts and continuing obligations.[48]

39. *See id.* at *7.
40. *See id.* at *18.
41. *See id.* at *18–19.
42. *See id.* at *39–40.
43. *See id.* at *23.
44. *See id.* at *23–24.
45. *See id.* at *41.
46. *See generally id.* at *1.
47. *See generally id.*
48. *See generally id.*

Ronak Foods reminds franchise parties that a forbearance agreement is a valid mechanism that courts will honor.[49] At trial, the Pandya Defendants argued that the royalties that the franchisees owed were limited to those that had accrued as of the termination date of the franchise agreements.[50] The district court disagreed, holding that royalty payments were due on an ongoing basis per the parties' subsequent agreement that allowed the Pandya Franchisees to continue operating the restaurants.[51] The district court further held that Pandya Defendants' failure to maintain the restaurants in a manner consistent with Pizza Hut's brand standards constituted breach of the Forbearance Agreement and Transfer Agreement.[52] The district court found that the Pandya Defendants were liable to Pizza Hut for damages arising from their breach of contract, among other damages.[53] This case was recently affirmed by the Fifth Circuit.[54]

Terminations are not always followed by a mutually-agreed resolution, and the U.S. District Court for the Northern District of Texas addressed that issue this year in *Cici Enters., LP v. TLT Holdings, LLC*.[55] In light of the COVID-19 pandemic, Cici Enterprises, LP (Cici's) deferred certain payments owed by its franchisee in the spring of 2020.[56] By May, 2021, franchisee TLT Holdings LLC (TLT) had not made the deferred payments.[57] Cici's proposed multiple options for resolution, but the TLT only offered to pay a fraction of the sum, which in turn prompted Cici's to send a default notice giving TLT five days to pay.[58] After the cure period, TLT informed Cici's of a medical issue delaying resolution of the dispute; even though Cici's provided another extension, TLT did not cure its nonpayment.[59] Cici's terminated the franchise agreement, but TLT continued to operate as a Cici's restaurant.[60]

TLT argued that the franchise agreement was not actually terminated or, in the alternative, that Cici's was estopped from recovering on its claims.[61] The court rejected these arguments for two reasons. First, the parties' post-termination discussions were settlement discussions and therefore inadmissible under Federal Rule of Evidence 408.[62] Second, TLT did not tender payment within the cure period, and its ultimate tender of a check

49. *See generally id.*
50. *See id.* at *20.
51. *See id.* at *20–21.
52. *See id.* at *39, *41.
53. *See id.* at *55.
54. *See* Pizza Hut L.L.C. v. Pandya, No. 22-40555, 2023 WL 5359079, at *8 (5th Cir. Aug. 22, 2023).
55. *See* No. 3:21-CV-02121-S-BT, 2022 WL 17657576, slip op. at *6 (N.D. Tex. Nov. 18, 2022), *R & R adopted*, No. 3:21-CV-2121-S-BT, 2022 WL 17631529 (N.D. Tex. Dec. 13, 2022).
56. *See id.* at *1.
57. *See id.* at *1–2.
58. *See id.*
59. *See id.* at *2.
60. *See id.*
61. *See id.*
62. *See id.*

that was rejected did not constitute a cure.[63] Finally, Cici's was clear that the termination remained in effect unless and until the parties reached a new written agreement.[64]

The upshot of *Cici's* is that forbearance, cure periods, and the like are not assumed just because the parties are in negotiations; the parties must explicitly agree to them.[65] Acting as if a terminated agreement has not been terminated can expose a party to breach-of-contract damages and constitute Lanham Act violations.[66] This is an especially important lesson to keep in mind as society emerges from the worst throes of the COVID-19 pandemic when many franchisors were providing leniency rather than terminating struggling franchisees. Oftentimes, this will lead to fact-specific inquiries, but not always: in *Cici's*, the Northern District of Texas granted plaintiff's motion for summary judgment and awarded damages on the summary judgment record.[67]

IV. INTELLECTUAL PROPERTY

Due to the importance of intellectual property rights to the franchise relationship, franchise disputes frequently involve claims of trademark infringement, and this Survey period was no exception. A number of intellectual property decisions reinforced franchisors' rights to protect their intellectual property following termination of the franchise agreement. These decisions also illustrate the care courts take to craft relief that is fair to both parties.

The first in this series of cases is *Pizza Hut v. Ronak Foods*, discussed *supra*.[68] In *Ronak Foods*, the United States District Court for the Eastern District of Texas considered claims Pizza Hut brought against the Pandya Defendants trademark infringement in addition to breach of contract claims.[69] In addition to shirking obligations under the franchise agreements, Forbearance Agreement, and Transfer Agreement, the Pandya Defendants continued using Pizza Hut's distinctive trade dress without a license after the Pandya Defendants' Pizza Hut restaurants were shut down.[70] To enforce its de-identification (i.e. trademark and trade dress removal) rights, Pizza Hut asserted claims under three theories: (1) breach of the parties' franchise

63. *See id.* at *4.
64. *See id.* at *6.
65. *See id.* at *5–7.
66. *See id.*
67. *See id.* at *7.
68. *See* Pizza Hut, LLC v. Ronak Foods, LLC, No. 5:21-CV-00089-RWS, 2022 WL 3544403 (E.D. Tex. June 17, 2022), *aff'd sub nom.*, Pizza Hut L.L.C. v. Pandya, No. 22-40555, 2023 WL 5359079 (5th Cir. Aug. 22, 2023) (discussed *supra* regarding the Franchise Relationship, Termination, and Non-Renewal).
69. *See id.* at *1, *9–10.
70. *See id.* at *31.

agreements, (2) breach of the parties' post-termination agreements, and (3) a violation of the Lanham Act.[71] Pizza Hut prevailed on all three.[72]

As the district court stated in its findings of fact, the franchise agreements required the Pandya Franchisees to de-identify the restaurants upon termination.[73] The Forbearance Agreement extended the Pandya Franchisees' obligations related to Pizza Hut's marks under the relevant franchise agreement while the Franchisee Defendants attempted to sell multiple franchise restaurant locations to third parties.[74] The district court further found that the "Transfer Agreement also sets forth provisions concerning the use and protection of Pizza Hut's trademarks and trade dress," with Section 2 of the Transfer Agreement granting Pandya Defendants a "limited, non-exclusive, non-sublicensable, non-transferrable license to use the Pizza Hut trademarks, service marks and other intellectual property and concepts relating to the Pizza Hut system," including Pizza Hut's trade dress.[75] The district court found that the Pandya Defendants had not only breached these agreements, but that they were continuing to utilize Pizza Hut's trade dress without Pizza Hut's authorization or consent.[76]

The district court began its analysis of the legal standards applicable to Pizza Hut's Lanham Act claim by noting that a claim for trademark and trade dress infringement under the Act requires the claimant to establish that: "(1) plaintiff possesses a legally protectable trademark and/or trade dress; (2) defendants' use of the trademark and/or trade dress 'creates a likelihood of confusion as to affiliation, sponsorship, or source[] of defendants' products or services."[77] The claimant has the burden to prove both elements by a preponderance of evidence.[78] As the district court observed, for a mark to be "legally protect[a]ble" under the Lanham Act, the claimant must show either that: "(1) the mark is inherently distinctive because its intrinsic nature serves to identify a particular source (i.e., the mark is fanciful, arbitrary, or suggestive), or (2) the mark has acquired distinctiveness through the development of secondary meaning (i.e., descriptive marks)."[79] Registration of a mark with the U.S. Patent and Trademark Office (USPTO) is "prima facie evidence that the marks are inherently distinctive," but this presumption can be rebutted if a defendant shows that the marks are not inherently distinctive.[80]

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71. *See id.* at *42–46.
72. *See id.* at *31, *44–45.
73. *See id.* at *12–13.
74. *See id.* at *7.
75. *Id.* at *25.
76. *See id.* at *31, *44–45.
77. *Id.* at *43 (quoting Viacom Int'l, Inc. v. IJR Capital Invs., L.L.C., 891 F.3d 178, 185–92 (5th Cir. 2018)); *see also* 15 U.S.C. § 1114(1)(a) (the Lanham Act's remedies for trademark infringement).
78. *See Ronak Foods*, 2022 WL 3544403 at *43.
79. *Id.* (quoting Amy's Ice Creams, Inc. v. Amy's Kitchen, Inc., 60 F. Supp. 3d 738, 747 (W.D. Tex. Oct. 8, 2014)).
80. *See id.* (citing Nola Spice Designs, L.L.C. v. Haydel Enters., 783 F.3d 527, 537 (5th Cir. 2015)).

Regarding the first element of Pizza Hut's Lanham Act claim, the district court reasoned that Pizza Hut's trademarks were legally protectible because they were inherently distinctive.[81] Not only had Pizza Hut registered the marks with the USPTO—triggering the presumption—but the district court concluded that "Pizza Hut's trade dress intrinsically identifies the source of Pizza Hut's goods and services" and "is not functional."[82] Regarding the second element of Pizza Hut's Lanham Act claim, the district court had little difficulty concluding that there was a likelihood of confusion: the Pandya Defendants conceded that the marks they used were "identical in all respects" to the marks registered by Pizza Hut, and the court noted that Pandya Defendants "are continuing to utilize aspects of the same approximate Pizza Hut trade dress."[83]

To determine the extent of a likelihood of confusion, the district court applied the non-exhaustive eight-factor test utilized within the Fifth Circuit:

> (1) the type of mark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant's intent, . . . (7) any evidence of actual confusion[,] . . . [and] (8) the degree of care exercised by potential purchasers.[84]

The district court found that six of these eight factors weighed in favor of Pizza Hut's claim: factors (1) and (2) "weigh heavily towards Pizza Hut" because the marks at issue "are verbatim the same and the stores are functionally old repurposed Pizza Hut restaurants;" factors (3) and (4) also weighed in favor of Pizza Hut because the disputed restaurants "have similar fast food concept[s] . . . in the same locations with the same customers;" and factor (6), the defendant's intent, also weighed in favor of Pizza Hut because Pizza Hut had made multiple demands to Franchisee Defendants to cease using its marks, and Franchisee Defendants continued to use them.[85] While the district court found factors (7) and (8) to be neutral, it held that the balance of the factors weighed in Pizza Hut's favor, that the Pandya Defendants had infringed Pizza Hut's trademarks and trade dress in violation of the Lanham Act, and that that Pizza Hut was entitled to injunctive relief.[86]

In addition to awarding Pizza Hut damages, attorneys' fees, and pre- and post-judgment interest on its numerous breach of contract and other common law claims, the district court permanently enjoined Franchisee Defendants "from utilizing any Pizza Hut trademark or trade dress in relation to any goods or services offered or provided by the Franchisee

81. *Id.*
82. *Id.*
83. *Id.* at *44.
84. *Id.* (quoting Springboards To Educ., Inc. v. Houston Indep. Sch. Dist., 912 F.3d 805, 812 (5th Cir. 2019)).
85. *Id.* at *44–45.
86. *See id.*

Defendants" and further ordered that the Pandya Defendants must complete their de-identification obligations under the Transfer Agreement.[87]

In another Texas franchise dispute involving Lanham Act claims, the U.S. District Court for the Western District of Texas in Waco awarded $531,458.66 to a plaintiff-franchisor on its claims for trademark infringement and false designation of origin under the Lanham Act as well as common law claims for trademark infringement and unfair competition.[88] In *Choice Hotels International, Inc. v. Gosla Family Trust*, plaintiff Choice Hotels International, Inc. (Choice Hotels) had previously been awarded summary judgment on the liability elements of its claims against franchisee-defendants Gosla Family Trust (GFT), Gosla Family Living Trust (GFLT), Yusuf Gosla, as an individual and trustee of the GFLT (Yusuf), Julekha Gosla, as an individual and trustee of the GFLT and the GFT (Julekha and, together with GFT, GFLT, and Yusuf, the Gosla Defendants).[89] The district court ordered supplemental briefing on damages, but the Gosla Defendants failed to respond.[90]

Choice Hotels entered into a series of franchise agreements with Defendants.[91] Following Defendants' breach of the operative franchise agreement in 2017, Choice Hotels terminated that franchise relationship.[92] Choice Hotels later discovered that the Gosla Defendants were using Choice Hotels' marks without a license after termination, including: (1) using Choice Hotels' road and building signs; (2) answering phones by representing that the hotel was a Choice Hotels branded hotel; and (3) advertising their hotel as a Choice Hotels branded hotel on multiple websites.[93] The Gosla Defendants failed to cease using these marks upon receiving a cease and desist letter from Choice Hotels, and Choice Hotels subsequently filed suit.[94] The district court found in favor of Choice Hotels on the liability elements of its Lanham Act claims in 2019.[95]

The district court began its damages analysis by noting that the Lanham Act provides for a successful claimant to recover "(1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action" with a court being permitted to award "any sum above the amount found as actual damages, not exceeding three times such amount" and having greater discretion to award "such sum as the court shall find to be just" regarding the defendant's profits.[96] The district court added that "[t]reble damages and attorney's fees are available with respect to a trademark

87. *See id.* at *55.

88. *See* Choice Hotels Int'l, Inc. v. Gosla Family Tr., No. 5:18-CV-00648-ADA, 2022 WL 4295362, at *1, *8 (W.D. Tex. Sept. 16, 2022).

89. *See id.* at *1.

90. *See id.*

91. *See id.*

92. *See id.* at *2.

93. *See id.*

94. *See id.*

95. *See id.*

96. *Id.* at *3 (quoting 15 U.S.C. § 1117(a)).

infringement in the nature of intentional and knowing 'counterfeiting' under 15 U.S.C. §§ 1114, 1117(b)."[97] Regarding Choice Hotels' entitlement to the Gosla Defendants' profits, the district court observed that "an award of [] defendant's profits is not automatic" and recited the non-exhaustive six-factor *Seatrax* test in which a court must consider in deciding whether to award profits:

> (1) whether the defendant intended to confuse or deceive; (2) whether sales have been diverted; (3) the adequacy of other remedies; (4) any unreasonable delay by plaintiff in asserting [its] rights; (5) the public interest in making the conduct unprofitable; and (6) whether it is a case of palming off.[98]

Applying these factors to the dispute, the district court concluded that all six weighed in favor of awarding Choice Hotels the Gosla Defendants' profits from the 130-day period during which they infringed Choice Hotels' marks following termination of the franchise agreement.[99] The district court held that (1) the agreements between Choice Hotels and the Gosla Defendants made clear that the Gosla Defendants did not have permission to continue using the marks following termination and their continued use of the marks despite receipt of a cease and desist letter indicated willful infringement; (2) the Gosla Defendants likely diverted sales from Choice Hotels locations by using Choice Hotels' marks on its signs and on websites advertising their hotel; (3) an award of lost royalty fees under the franchise agreement alone would be insufficient to fully redress Choice Hotels for injuries from diverted sales; (4) Choice Hotels did not unreasonably delay in asserting its rights; (5) the public interest is served by awarding profits because "if infringers only compensate markholders in the form of a franchise royalty fee, businesses will be encouraged to use franchisors' marks without permission so long as they can evade a franchisor's awareness;" and (6) "Defendants' blatant disregard for [the p]laintiff's rights demonstrates that [the d]efendant wanted to pass off its hotel as a member of the Choice Hotels franchise."[100]

Having found that Choice Hotels was entitled to recover the Gosla Defendants' profits for a 130-day period, the district court calculated this amount of damages by determining the daily average profits and multiplying that amount by 130.[101] Under the Lanham Act, a plaintiff is only required to prove a defendant's sales, whereas the defendant bears the burden of proving "all elements of cost or deduction claimed."[102] Because the Gosla Defendants—who appeared *pro se* in the lawsuit—failed to present any evidence of costs or deductions, the district court ultimately awarded $412,287.30 in profits to Choice Hotels, which it calculated by dividing the

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97. *Id.*
98. *Id.* (quoting Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 369 (5th Cir. 2000)).
99. *See id.* at *4–6.
100. *Id.* at *3–6.
101. *See id.* at *6.
102. *Id.* (quoting 15 U.S.C. § 1117(a)).

Gosla Defendants' hotel's 2017 gross room revenue of $1,157,579.90 by 365 days, resulting in a daily average of $3,171.44, and then multiplying that daily average amount by the 130-day period during which the district court found that the Gosla Defendants had infringed the marks.[103] Using the same 2017 gross revenue figure of $1,157,579.90, the district court also concluded that Choice Hotels suffered actual damages of $19,171.36 in the form of lost royalty fees.[104]

Having calculated Choice Hotels' actual damages from lost royalty fees and the Gosla Defendant's profits during the infringing period, the district court next concluded that it was appropriate under the Lanham Act to award some form of treble damages.[105] Because the lost royalty fees of $19,171.36 trebled to $57,514.08, and trebling the Gosla Defendant's profits of $412,287.30 equaled $1,236,861.90, the district court concluded that "trebling damages and profits puts the possible award between $57,514.08 and $1,236,861.90."[106] The district court likewise concluded that, due to extensive evidence of willful infringement by the Gosla Defendants, "Defendants' conduct is sufficiently egregious to be an exceptional case under the Lanham Act," which entitled Choice Hotels to an award of attorneys' fees.[107] Ultimately, the district court awarded Choice Hotels its attorneys' fees and $531,458.66 in damages, with the latter figure comprised of "disgorgement of profits in the amount of $412,287.30, royalties as damages in the amount of $19,171.36, additional damages in the amount of $100,000."[108]

In *Cici Enterprises, LP v. TLT Holdings, LLC*, discussed *supra*, the U.S. District Court for the Northern District of Texas sustained several similar claims under the Lanham Act brought by another pizza franchisor—Cici's and its affiliated entities—against its former franchisee TLT.[109] Cici's entered into a franchise agreement with TLT in 2018 in which Cici's granted TLT the right to operate a Cici's Pizza restaurant in Texarkana, Texas, in exchange for TLT's promise to pay royalties, use approved suppliers, and promptly pay such suppliers.[110] Though the franchise agreement was set to expire in 2026, Cici's was entitled to terminate "if TLT failed to pay past due amounts owed to [it] or its affiliates."[111] In the event of termination, TLT was required to cease operations, de-identify the restaurant, cease

103. *See id.*

104. *See id.* at *7.

105. *See id.* at *7–8.

106. *Id.* at *8.

107. *Id.* (observing that, "[i]n exceptional cases, the Lanham Act provides that a [c]ourt may award reasonable attorney's fees to the prevailing party" under 15 U.S.C. § 1117(a)).

108. *Id.*

109. *See* Cici Enterprises, LP v. TLT Holdings, LLC, No. 3:21-CV-02121-S-BT, 2022 WL 17657576, slip op. at *6 (N.D. Tex. Nov. 18, 2022), *R & R adopted*, 2022 WL 17631529 (N.D. Tex. Dec. 13, 2022) (discussed *supra* regarding the Franchise Relationship, Termination, and Non-Renewal).

110. *See id.* at *1.

111. *Id.*

using the Cici's marks and name, return any confidential or proprietary materials, and pay all amounts due and owing.[112]

After TLT failed to pay Cici's and its affiliates despite numerous notices and opportunities to cure, Cici's terminated the franchise agreements on August 27, 2021.[113] Despite its agreement to promptly de-identify and cease using the Cici's marks upon termination, TLT continued operating its restaurant as a Cici's Pizza using the Cici's marks.[114] Weeks later, Cici's sued, alleging trademark infringement and unfair competition claims under the Lanham Act and breach of contract.[115] It sought specific performance, damages, and litigation costs and expenses.[116]

As to the trademark infringement claims, the parties subsequently agreed to a stipulated preliminary injunction order "enjoining [TLT] from using the Cici's Marks and requiring [TLT] to de-identify the shuttered restaurant of all the Cici's Marks and other indicia within 30 days."[117] Despite this order, TLT did not comply until the end of December 2021, and as of November 2022, Cici's had been unable to open a new franchise restaurant in Texarkana.[118]

Cici's filed and the district court granted a motion for summary judgment as to Cici's breach of contract, trademark infringement, and unfair competition claims.[119] Noting that "[u]nfair competition claims under the Lanham Act are governed by the same standard as those for trademark infringement, e.g., the likelihood of confusion," the court analyzed these claims together.[120]

In the Fifth Circuit, "[i]nfringement is established" if five requirements are satisfied:

> if a person 'uses (1) any reproduction, counterfeit, copy, or colorable imitation of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution, or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.'[121]

TLT did not dispute the first, third, or fourth element, and the district court held that, because "[TLT] also used Cici's exact marks, not just similar marks, and held their restaurant out as a Cici's-brand restaurant," the requirement that the infringement is likely to cause consumer confusion was satisfied.[122]

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112. *See id.*
113. *See id.* at *2.
114. *See id.*
115. *See id.*
116. *See id.*
117. *Id.*
118. *See id.*
119. *See id.* at *3–7 (denying Cici's motion as to its equitable estoppel claim).
120. *Id.* at *5 (quoting Mission Pharm. Co. v. Virtus Pharm. LLC, 23 F. Supp. 3d 748, 759 (W.D. Tex. 2014)).
121. *Id.* (quoting Am. Rice, Inc. v. Producers Rice Mill, Inc., 518 F.3d 321, 329 (5th Cir. 2008)).
122. *Id.*

TLT argued that the remaining element—lack of consent by Cici's to its use of the marks—was not met despite the franchise agreement's termination as it "had consent because they were engaged in negotiations with [the p]laintiffs."[123] Rejecting this argument, the district court held that TLT had no admissible evidence to support their position that the termination had been rescinded or stayed.[124] The district court awarded Cici's its four percent royalty (the rate specified by the franchise agreement) on any of TLT's post-termination sales.[125] Because it determined TLT's Lanham Act violations were willful, Cici's was entitled to treble damages.[126] The district court also entered a permanent injunction.[127]

Another recent case illustrates that courts similarly exercise care in crafting equitable injunctive relief.[128] In *UATP IP, LLC v. Kangaroo, LLC*, Urban Air terminated a franchise agreement with Air Entertainment Group, LLC (Air Entertainment), under which it granted Air Entertainment the right to operate a trampoline park using its intellectual property.[129] After Air Entertainment was terminated, its owners created Kangaroo and leased the same premises to operate a similar park.[130]

Urban Air sued, seeking a preliminary injunction, and argued that Kangaroo (1) "infringed on its patent for play equipment" and (2) "infringed on its trade dress rights by using . . . its signature colors, safety warnings, and park layout and attractions."[131] The U.S. District Court for the Southern District of Texas granted Urban Air's request for relief, but it did so only in part.[132] Although the district court determined that Urban Air was likely to succeed on the merits, it was unconvinced that Urban Air suffered sufficient irreparable harm in the form of consumer confusion to order Kangaroo to cease operations.[133] Instead, the district court carefully crafted its relief, enjoining Kangaroo only from "using neon orange, yellow, Urban Air Lime Green, and Cosmic Dust Blue in its facility or on social media, waivers, and advertisements;" from using the Adventure Hub; and from using Urban Air's confidential information.[134]

Taken together, these cases demonstrate the continued effectiveness of the Lanham Act as a tool for remedying past trademark infringements and enjoining future infringement following termination of the franchise relationship. Particularly where franchisees willingly infringe on trademarks by continuing to use identical marks following termination, the availability

123. *Id.* at *6.
124. *See id.*
125. *See id.* at *7.
126. *See id.*
127. *See id.*
128. *See* UATP IP, LLC v. Kangaroo, LLC, No. H-21-2478, 2022 WL 2898951, at *1–2 (S.D. Tex. June 28, 2022), *appeal filed*, No. 22-2047 (Fed. Cir. July 21, 2022).
129. *See id.* at *1.
130. *See id.*
131. *Id.*
132. *See id.* at *1–2.
133. *See id.*
134. *Id.* at *2.

of treble damages under the Lanham Act provides a potent remedy to franchisors that need to protect their marks.

V. COMMON LAW CLAIMS

A. Tortious Interference

One case from the Survey period serves as a reminder that franchise parties alleging tortious interference must satisfy each of its elements with specificity or risk the likely dismissal of their claim at the summary judgment stage.[135] In *Simpson v. OsteoStrong Franchising, Inc.*, a franchisor (OsteoStrong) sued multiple franchisees (Franchisee Defendants) for tortious interference with prospective business relationships and tortious interference with an existing contract.[136] OsteoStrong alleged that it had existing contracts that were intentionally interfered with by the Franchisee Defendants and that the alleged interference caused OsteoStrong to lose actual and prospective franchisees.[137] Defendants sought dismissal of OsteoStrong's counterclaims, alleging that OsteoStrong failed to plead the facts with specificity, including a failure to show how the Franchisee Defendants' alleged independently tortious conduct caused injury to OsteoStrong.[138]

The U.S. District Court for the Southern District of Texas agreed with the Franchisee Defendants, holding that OsteoStrong did not plead either of its tortious interference claims with the required specificity.[139] The district court focused on OsteoStrong's failure to indicate which contracts with franchisees, regional developers, and investors were affected by defendants' actions and to identify which prospective business relationships were prevented by the Franchisee Defendants' actions.[140] Thus, the district court held that OsteoStrong had not adequately pleaded facts to support its tortious interference claims.[141]

When a party alleges interference with prospective business relationships, it must plead and prove five elements:

> (a) a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (b) the [defendants] either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of their conduct; (c) their conduct was independently tortious or unlawful; (d) the interference proximately caused the [plaintiff's] injury; and (e) the plaintiff suffered actual damage or loss . . . .[142]

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135. *See* Simpson v. OsteoStrong Franchising, Inc., No. H-19-2334, 2022 WL 2479164, at *2 (S.D. Tex. July 5, 2022).

136. *See id.*

137. *Id.*

138. *See id.*

139. *See id* at *2–4.

140. *See id.*

141. *See id.*

142. *Id.* at *2.

Similarly, when a party alleges tortious interference with an existing contract, it must establish four elements: "(a) that [the plaintiff] had an existing contract subject to interference; (b) [the defendants] willfully and intentionally interfered with the contract; (c) their interference proximately caused plaintiff-franchisor's injury; and (d) caused actual damage or loss."[143]

Franchise parties enter into many types of contracts with each other and third parties. Examples include franchise agreements, license agreements, advertising contracts, leases, employment contracts, and supply agreements, to name a few. When franchise parties allege tortious interference, they should remember the pleading standards under Rule 9(b) and Rule 12(b)(6) before drafting a complaint, counterclaim, or motion to dismiss and explain how the defendant's misconduct prevented or interfered with one of these contracts.[144] Parties on the receiving end of a tortious interference claim should consider whether the pleadings articulate a theory explaining a connection between alleged wrongful conduct and harm to an existing or prospective contractual relationship. If the facts are not adequately pled, there is an opportunity for early dismissal.

VI. STATUTORY CLAIMS

A. Bankruptcy Issues

In *In re Lager*, franchisor-plaintiff Pirtek U.S., LLC (Pirtek) sued defendant-debtors James Bradley Lager (Mr. Lager) and JBL Hose Service LLC (JBL and, collectively, Debtors) in a Chapter 11 proceeding, alleging that Debtors breached multiple provisions of a bankruptcy settlement agreement the parties had previously executed and objecting to the dischargeability of Debtors' debt.[145] Between 2010 and 2012, Pirtek and Debtors executed two franchise agreements in which Pirtek granted Debtors two Pirtek store franchises in Dallas and Fort Worth, respectively.[146] By 2016, Debtors' businesses were struggling and they had defaulted on a $70,000.00 loan from another creditor.[147] By 2018, Debtors' sales decreased to a level that breached their franchise agreements, and Pirtek gave notice of its intent not to renew the franchise agreement for Debtors' Dallas-based store on November 18, 2019.[148]

To avoid litigation, Pirtek and Debtors executed two settlement agreements that were each allegedly followed by salacious conduct by Debtors.[149] The second settlement agreement contained a broad non-

143. *Id.* (citing Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 926 (Tex. 1993)).

144. *See* Fed. R. Civ. P. 9(b), 12(b)(6).

145. *See In re* Lager, No. 22-30072-MVL-11, 2022 WL 3330421, at *1 (Bankr. N.D. Tex. Aug. 11, 2022).

146. *See id.* at *2.

147. *See id.*

148. *See id.*

149. *See id.* For detailed facts, *see id.* (including allegations that (1) Mr. Lager planned to publish a book titled "HOSED! A Franchise Insider's Expose by Former PIRTEK USA Franchisee Jim Lager" unless Pirtek agreed to pay him $9 million; (2) Mr. Lager made a

disparagement clause (Non-Disparagement Clause) prohibiting Debtors from making disparaging communications about Pirtek as well as a confidentiality agreement (NDA) prohibiting any party from discussing the settlement agreement's existence or terms.[150] The parties proceeded to arbitrate these potential breaches, but Mr. Lager filed for Chapter 11 bankruptcy on the eve of the final arbitration hearing, with JBL filing for bankruptcy six weeks later.[151] Following these bankruptcy filings, Pirtek filed a complaint (Complaint) in an adversary proceeding alleging breach of the two settlement agreements and seeking non-dischargeability of Debtors' debts under two provisions of the Bankruptcy Code: 11 U.S.C.A. § 523(a)(2)(A) ("Exceptions to discharge . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition"); and 11 U.S.C.A. § 523(a)(6) (" . . . for willful and malicious injury by the debtor to another entity or to the property of another entity").[152] In response, Debtors filed a motion to dismiss Pirtek's Complaint.[153]

Regarding the first basis for non-dischargeability under § 523(a)(2)(A), Debtors argued that: (1) the Complaint failed to specify what debt Debtors obtained by a false statement by Mr. Lager to Pirtek; (2) the Complaint failed to allege that Mr. Lager made a false representation with intent to deceive Pirtek or induce Pirtek to pay money; (3) the Complaint failed to allege that Pirtek relied on any representation Mr. Lager made; and (4) more generally, the Complaint failed to meet the heightened pleading standard for allegations of fraud under Federal Rule of Civil Procedure 9(b).[154]

The district court noted in its analysis that § 523(a)(2)(A) had five elements:

> (1) the Debtor made a representation; (2) the Debtor knew that the representation was false at the time it was made; (3) the Debtor made the representation with the intent and purpose to deceive the Plaintiff; (4) the Plaintiff relied on the representation; and (5) the Plaintiff sustained a loss as the proximate result of its reliance on the representation.[155]

Regarding the proper pleading standard, the court agreed with Debtors that Rule 9(b) applied, and observed that "Rule 9(b) generally requires answering the basic information gathering questions of who, what, where,

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series of social media posts after the settlement agreements regarding his negative experience as a franchisee; and (3) Pirtek had discriminated against Mr. Lager because he was a white male in an interracial relationship).

150. *See id.*

151. *See id.* at *3.

152. *See id.* at *4, *8; 11 U.S.C.A § 523(a)(2)(A), (a)(6).

153. *See In re Lager*, 2022 WL 3330421, at *1 (Bankr. N.D. Tex. Aug. 11, 2022).

154. *See id.* at *4.

155. *Id.* (citing Selenberg v. Bates (*In re* Selenberg), 856 F.3d 393, 398 (5th Cir. 2017)).

when, and why."[156] Despite Debtors' arguments in their motion to dismiss, the court found that it "ha[d] little trouble gleaning the answer to each of these questions from the allegations in the Complaint."[157] Namely, the Complaint expressly alleged that Debtors made representations by entering into the second settlement agreement—including the Non-Disparagement Clause and NDA—that Debtors never intended to comply with, that Pirtek would never have offered a settlement payment as consideration were it not for the representations by defendants, and that the settlement agreement provided for the return of this money if a material breach occurred.[158] Because Pirtek sufficiently alleged that it suffered the loss of $453,000.00 as a result of Debtors' false representations that they would comply with the terms of the second settlement agreement, the court denied Debtors' motion to dismiss this claim.[159]

As to the second statutory basis for non-dischargeability alleged in the Complaint, § 523(a)(6), Debtors argued that breach of a contract does not fall within the scope of "willful and malicious injury" described in that section of the Bankruptcy Code.[160] The court acknowledged that it had previously found that this exception to discharge was successfully raised "almost universally in the context of a tort claim" but added that the Fifth Circuit has held that "a knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under Section 523(a)(6)" even absent other tortious conduct.[161] As applied to the Complaint, the court concluded that it "need not engage in the slightest mental gymnastics to discern the asserted willful and malicious injury in this case" because the Complaint detailed twenty separate incidents in which Mr. Lager accused Pirtek of being a racially discriminatory and abusive company after agreeing not to disparage Pirtek in the second settlement agreement.[162] The court therefore denied Debtors' motion to dismiss as to this claim.[163]

Lastly, the court declined to dismiss either of Pirtek's equitable claims—namely Pirtek's claim for injunctive relief to stop Mr. Lager from continuing to breach the Non-Disparagement Clause and the NDA provisions in the second settlement agreement.[164] The Debtors argued that they had repudiated the second settlement and any future performance pursuant to that agreement, and further argued that Pirtek was not entitled to injunctive relief to prevent the Debtors from breaching the Non-Disparagement Clause and the NDA.[165] Quoting the recent United

156. *Id.* (citing *In re* Dual D Health Care Operations, Inc., No. 17-41320-ELM, 2021 WL 3083344, at *5 (Bankr. N.D. Tex. July 21, 2021)).

157. *Id.*

158. *See id.* at *4–5.

159. *See id.* at *8.

160. *Id.*

161. *Id.* (quoting *In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003)).

162. *Id.* at *8–9.

163. *See id.* at *9.

164. *See id.* at *12.

165. *See id.* at *9.

States Supreme Court decision in *Tempnology*, the court noted that "[a] rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive."[166] As applied to the present case, the court found it to be a "*critical* distinction" from Debtors' proffered authorities that the Non-Disparagement Clause and the NDA provisions did not require "affirmative action" from Mr. Lager but merely required him to refrain from disparaging plaintiff and disclosing the terms of the second settlement.[167] Thus, Mr. Lager's rejection of the second settlement agreement was held to be ineffective for extinguishing Pirtek's rights under that agreement, and the court declined to dismiss Pirtek's claims for equitable relief.[168]

Thus, the court denied Debtors' motion to dismiss plaintiff's Complaint in its entirety.[169] The significance of this case for both franchisors and franchisees is that bankruptcy is not a panacea for avoiding damages from contractual breaches. A breakdown of the franchise relationship can cause emotions to run high, and parties can protect themselves from disparagement and extortion with carefully worded forbearance agreements and settlement agreements without fear that a bankruptcy will excuse a counterparty's obligations. In this case, the parties' settlement agreements contained clear non-disclosure and non-disparagement provisions, and the court easily found that Pirtek successfully stated claims of non-dischargeability under the Bankruptcy Code relating to Debtors' flagrant breaches of those provisions.[170]

B. Anti-Injunction Act

In *Luxottica of America, Inc. v. Brave Optical, Inc.*, a trademark dispute arose between franchisor Luxottica of America, Inc. (Luxottica), a former franchisee Gutman Vision, Inc. (Gutman Vision), and a current franchisee and its principals, Brave Optical, Inc., Jeffrey Gray, and Dawn Gray (collectively the current franchisee and its principals are the Brave Parties) concerning the sale of Pearle Vision store 8655.[171] In 2016, the Brave Parties purchased store 8655 from Gutman Vision and assumed operation of that location.[172] In connection with the sale of store 8655, the parties entered into an assignment of the license agreement for store 8655.[173] In 2017, the

166. *Id.* at *10 (quoting Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1662 (2019)).

167. *Id.* at *10–11 (emphasis in original).

168. *See id.* at *10–12.

169. *See id.*

170. *See id.*

171. *See* Luxottica Am., Inc. v. Brave Optical, Inc., No. 4:22-CV-00244, 2022 WL 3566926, at *1 (E.D. Tex. Aug. 18, 2022).

172. *See id.*

173. *See id.*

Brave Parties sued Gutman Vision and its principals in Dallas County Court (the State Action), alleging fraudulent misrepresentation related to the sale of store 8655.[174] In 2019, the Brave Parties joined Luxottica, alleging that Luxottica knowingly assisted in Gutman Vision's fraudulent misrepresentations and also concealed material facts to induce the Brave Parties to complete the sale.[175]

While the State Action was pending, the Brave Parties and Luxottica agreed on August 23, 2021, to extend the expiration date of their license agreement until February 28, 2022.[176] On February 11, 2022, Luxottica delivered a Notice of Non-Renewal to the Brave Parties, informing them that the license agreement would not be renewed after February 28, 2022, and demanding that they cease all business operations and use of the Pearle Vision marks by the expiration date.[177] Shortly before the expiration date, the Brave Parties sought a temporary restraining order in the State Action, arguing that injunctive relief was necessary to maintain the status quo between the parties until their dispute was resolved.[178] The court granted the temporary restraining order and, after a hearing on March 10, 2022, entered a temporary injunction (the State Injunction) ordering the parties to maintain the status they had as of August 23, 2021—the date they agreed to extend the expiration date of the license agreement.[179] The State Injunction prohibited Luxottica from "[i]nterfer[ing] in any way" with the Brave Parties' operation of store 8655.[180]

Following the State Injunction, Luxottica filed an emergency motion for clarification or dissolution of the temporary injunction.[181] Following a hearing, the court entered an order on March 29, 2022 (the Clarification Order), clarifying that the State Injunction was intended to prevent Luxottica from taking actions to "close down Store 8655" (among more specific directives) while the State Action was pending but also clarifying that the State Injunction "does not prohibit Luxottica of America Inc. from pursuing claims against [the Brave Parties] in federal court."[182]

One day before the Clarification Order was issued Luxottica filed the present lawsuit in federal court (the Federal Action) alleging that the Brave Parties infringed on its trademarks by continuing to use the Pearle Vision marks.[183] Specifically, Luxottica sought an order in the Federal Action "temporarily restrain[ing] and enjoin[ing] [the Brave Parties] from use of [Luxottica's] PEARLE VISION® trademark and service mark."[184]

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174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.* at *2.
179. *See id.*
180. *Id.*
181. *See id.*
182. *Id.* at *3.
183. *See id.*
184. *Id.*

In response, the Brave Parties argued that a temporary restraining order in the Federal Action would violate the Anti-Injunction Act by overriding the preliminary injunction entered in the State Action.[185] In reply, Luxottica argued that the State Injunction, as clarified in the Clarification Order, only precluded Luxottica from acting to "close down" store 8655 and did not prevent Luxottica from pursuing trademark claims in the Federal Action or prevent the federal court from enjoining the Brave Parties use of the Pearle Vision marks.[186]

The U.S. District Court for the Eastern District of Texas noted that the Anti-Injunction Act prohibits federal courts from issuing injunctions to "stay proceedings in a [s]tate court."[187] Both the U.S. Supreme Court and Fifth Circuit have interpreted the Act to provide that "a federal court may not issue an injunction countermanding a state court injunction."[188] This broad construction of the Act by federal courts creates "a strong presumption towards noninterference with state court proceedings" unless one of three exceptions apply: "(1) where such injunction is 'expressly authorized by Act of Congress;' (2) where the injunction is 'necessary in aid of [the federal court's] jurisdiction;' or (3) where the injunction is entered 'to protect or effectuate [the federal court's] judgments.'"[189] Both Luxottica and the Brave Parties agreed that no exceptions applied.[190]

Whereas Luxottica attempted to narrow the scope of the State Injunction by arguing that it applied only to efforts to "close down" store 8655 and otherwise allowed Luxottica's to pursue claims in federal court, the district court found that this construction of the State Injunction was far too narrow: "Indeed, though Luxottica argues that the State Injunction *only* prohibits Luxottica from closing the stores, the State Injunction [and Clarification Order] prohibit[] Luxottica from doing much more."[191] Likewise, the district court was unimpressed that the Clarification Order expressly permitted Luxottica to pursue federal claims: the Clarification Order "authorizing Luxottica to bring a federal action against the Brave Parties does not suggest that the state court empowered Luxottica to

185. *See id.*

186. *Id.* at *4.

187. *Id.* at *3 (quoting 28 U.S.C. § 2283); *see also* Harris Cnty., Tex. v. CarMax Auto Superstores Inc., 177 F.3d 306, 312 (5th Cir. 1999) (quoting 28 U.S.C. § 2283).

188. *Harris Cnty.*, 177 F.3d at 313 (5th Cir. 1999) (citing Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970)).

189. *Luxottica Am., Inc.*, 2022 WL 3566926 at *3, *3 n.5 (quoting 28 U.S.C. § 2283); *see also* Swanston v. Windhaven Farm Homeowners Ass'n., Inc., No. 4:19-CV-00151, 2019 WL 12875433, at *3 n.2 (E.D. Tex. Apr. 3, 2019)).

190. *See Luxottica Am., Inc.*, 2022 WL 3566926 at *3, *3 n.5.

191. *Id.* at *4 (emphasis in original) (observing that the State Injunction also "expressly prohibit[s] Luxottica from, for example, taking actions like 'requir[ing] any change of appearance at Store No[ ]. 8655,' 'requir[ing] the disposition of any assets used in the operation of Store No[ ]. 8655' or 'requir[ing] the return of . . . Pearle Vision materials'—actions that Luxottica seeks to accomplish in-effect by its request that the Brave Parties be 'temporarily restrained and enjoined from use of [Luxottica]'s PEARLE VISION trademarks[.]'").

seek relief that countermands its own State Injunction."[192] Ultimately, the district court concluded that, "[w]hile the Lanham Act claims themselves may be brought independent of the state proceedings, the relief presently before the [district c]ourt may not be granted without impeding on the power of the State Injunction."[193] Thus, Luxottica's request for a temporary restraining order in the Federal Action was denied.[194]

This case exemplifies federal courts' broad deference to state courts' injunctions under the Anti-Injunction Act.[195] It is also a good example of the effectiveness of early injunctive relief in shaping franchise litigation. In this case, the Brave Parties were able to obtain broad temporary injunctive relief within a couple weeks of filing a lawsuit challenging the imminent expiration of their license agreement, and the scope of that injunctive relief in the State Action significantly hampered Luxottica's options for prosecuting claims in the parallel Federal Action.[196]

VII. REMEDIES

A. Contract Damages

In *Franlink Inc. v. BACE Services, Inc.*, discussed *supra*, franchisor Link asserted claims against its franchisee BACE and others, including Link's competitor, PayDay, for breach of the non-compete and non-solicitation provisions of the franchise agreement, trademark infringement, unfair competition, tortious interference, and civil conspiracy.[197] The U.S. District Court for the Southern District of Texas conducted a four-day bench trial in August 2020 and granted each of Link's live claims against BACE and all other defendants and denied all of the defendants' counterclaims.[198] In granting Link's claims against the defendants, the district court "awarded Link $378,562.22 in damages for the losses suffered from defendants' breach of contract."[199] The district court also granted injunctive relief enforcing the non-compete and non-solicitation provisions.[200] On appeal, as it relates to compensatory damages, defendants BACE and PayDay asserted that the district court erred in (A) calculating the contractual damages owed and (B) awarding both future damages and injunctive relief.[201]

With respect to contractual damages, BACE and PayDay appealed only the $34,633.22 awarded to Link for lost revenue damages relating to a client

192. *Id.* at *5.
193. *Id.*
194. *See id.* at *6.
195. *See* 28 U.S.C. § 2283.
196. *See Luxottica Am., Inc.*, 2022 WL 3566926 at *5.
197. *See* Franlink Inc. v. BACE Servs., Inc., 50 F.4th 432, 436–37 (5th Cir. 2022) (discussed *supra* regarding forum selection).
198. *See id.* at 437.
199. *Id.*
200. *See id.* at 444.
201. *See id.*

invoice.[202] Under the relevant contract, BACE, as the franchisee, owed Link a percentage of all income received from its clients, which would include a percentage of a $34,633.22 invoice sent to a BACE client.[203] The district court found that BACE never paid Link the required percentage of this amount under the contract and, therefore, concluded that defendants owed Link at least some part of the $34,633.22 invoice.[204] The U.S. Court of Appeals for the Fifth Circuit, however, agreed with BACE and PayDay that the franchise agreement entitled Link to only a percentage of the receivable.[205] The district court's award of the full amount was therefore an erroneous calculation of the damages owed under the contract.[206] This miscalculation, the Fifth Circuit found, warranted reversal and remand for reconsideration.[207]

BACE and PayDay also challenged the district court's award of both future damages and injunctive relief as being duplicative.[208] Specifically, BACE and PayDay appealed the district court's award of future damages in the amount of $147,900.00 and an injunction that enforced the "non-compete and non-solicitation provisions [against all the defendants] . . . for a two-year period, starting from [November 6, 2019], the effective date of the termination of the Franchise Agreement."[209] The Fifth Circuit agreed with BACE and PayDay by relying on the holding in *Schneider Nat. Carriers, Inc. v. Bates* that, in Texas, "future damages cannot be recovered if a permanent injunction issues to abate them in the context of cases involving covenants not to compete."[210] Link cited no evidence that it would sustain separate future damages with an enforced injunction in place.[211] Therefore, the Fifth Circuit reversed and vacated the $147,900.00 award of future damages while leaving the injunction in place.[212]

Franchise parties often have the option of seeking multiple remedies when a counterparty breaches a contract. *Franlink* is a good reminder that franchise parties that bring claims for monetary relief must be aware of how monetary damages are to be calculated and how other forms of relief might limit recovery.[213] This analysis is particularly important in the franchise context where franchisors often seek to continue operation of a franchised

202. *See id.*
203. *See id.*
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. *Id.*
210. *Id.* (quoting Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264, 285 (Tex. 2004), *modified on other grounds*, Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), LP, 449 S.W.3d 474 (Tex. 2014); Eberts v. Businesspeople Pers. Servs., Inc., 620 S.W.2d 861, 864 (Tex. App.—Dallas 1981, no writ) (applying the general rule in a case involving a non-compete covenant)).
211. *See id.*
212. *See id.*
213. *See generally id.*

business after a franchise agreement is terminated or where franchisees continue using the franchisor's intellectual property or resources to run a competing business. Franchisees should also take care to evaluate the remedies available to them where a franchisor reduces support in breach of the franchise agreement or withdraws from the market altogether.

B. Attorneys' Fees as Damages

An often overlooked form of damages that may be available in a franchise dispute governed by Texas law is attorneys' fees as damages. This category of fees is separate and distinct from attorneys' fees incurred in litigation. In *Pizza Hut, LLC v. Ronak Foods, LLC*, discussed *supra*, Pizza Hut sought and recovered attorneys' fees it incurred as a result of the Pandya Defendants' wrongful acts.[214] As a result of the Pandya Defendants' breach of contract and other conduct, Pizza Hut retained multiple law firms for legal services in connection with drafting the Transfer Agreement, closing the Pandya Franchisees' restaurants, and addressing other issues arising from the Pandya Defendants' breaches of the franchise agreements, Forbearance Agreement, and Transfer Agreement.[215] Pizza Hut would ordinarily have been able to recover attorneys' fees as damages that were consequential in nature, but the Transfer Agreement included a waiver of the parties' right to seek consequential damages.[216] Like traditional attorneys' fees awards, attorneys' fees as damages must be shown to include only those fees that were reasonable and necessary.[217] The district court awarded fees as damages after reviewing expert testimony that the fees Pizza Hut sought as damages were reasonable and necessary.[218]

Ronak Foods serves as an important reminder for franchise parties involved in litigation or potential litigation to consider whether attorneys' fees as damages may be an available remedy—particularly in cases where the parties' relationship has necessitated multiple agreements following a termination or non-renewal.[219] Releases should be carefully drafted to reflect all damages that are intended to be waived and nothing more.

C. Injunctive Relief

A preliminary injunction was affirmed by the Court of Appeals for the Tenth District of Texas at Waco in *ABP Holdings, Inc. v. Rainbow Int'l*

214. *See* Pizza Hut, LLC v. Ronak Foods, LLC, No. 5:21-CV-00089-RWS, 2022 WL 3544403, at *51–52 (E.D. Tex. June 17, 2022), *aff'd sub nom.*, Pizza Hut L.L.C. v. Pandya, No. 22-40555, 2023 WL 5359079 (5th Cir. Aug. 22, 2023) (discussed *supra* regarding the Franchise Relationship, Termination, and Non-Renewal and Intellectual Property).

215. *See id.* at *52.

216. *See id.* at *51–52.

217. *See id.* at *53.

218. *See id.*

219. *See generally id.*

LLC.[220] Rainbow International LLC (Rainbow) sought and obtained injunctive relief and monetary damages against its former franchisee, ABP Holdings, Inc. and its shareholders Anderson, Partee, and Breckenridge (collectively, ABP).[221] ABP asserted two relevant issues on appeal: (1) whether Rainbow was entitled to equitable relief in the form of a temporary injunction where it failed to demonstrate that it had no remedy at law; and (2) whether the trial court's temporary injunction must be voided and dissolved under Rule 683 of the Texas Rules of Civil Procedure because it merely recites conclusory statements and fails to state or explain to any degree of specificity what probable, imminent, or irreparable harm the appellee will suffer without the injunctive relief.[222]

Regarding ABP's first issue on appeal, the court of appeals held that a party can obtain temporary injunction to enforce a restrictive covenant without proving irreparable injury for which the applicant has no adequate remedy at law.[223] The court considered only whether the defendant intended to breach the restrictive covenant.[224] The court of appeals found that, although the evidence was sufficient to show no adequate remedy at law, Rainbow was entitled to a temporary injunction to enforce a restrictive covenant without having to make such a showing merely because Rainbow established that ABP intended to breach the restrictive covenant.[225]

Concerning ABP's third issue on appeal, the court held that an injunction order must "set forth the reasons for its issuance [in specific terms that] . . . describe in reasonable detail . . . the act or acts to be restrained."[226] If an injunction meets these requirements, the trial court must have offered reasons why injury will be suffered in the absence of interlocutory relief but need not articulate a theory of why the applicant has asserted a probable right to final relief.[227] The court of appeals found that specific factual findings of violations by ABP supported the trial court's order granting Rainbow's temporary injunction because ABP was (1) continuing and would continue violating the franchise agreement and noncompetition provisions, (2) operating a business that competed with Rainbow International at the same location, (3) advertising with websites that offer services that compete with Rainbow International, and (4) maintaining an internet presence as Rainbow.[228] Moreover, the court of appeals found that ABP agreed in the franchise agreement that harms resulting from violation

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220. *See* ABP Holdings, Inc. v. Rainbow Int'l LLC, No. 10-21-00122-CV, 2021 WL 5920276, at *1, *7 (Tex. App.—Waco Dec. 15, 2021, no pet.) (mem. op.).

221. *See id.* at *1.

222. *Id.* at *5–6.

223. *See id.* at *5 (citing Letkeman v. Reyes, 299 S.W.3d 482, 486 (Tex. App.—Amarillo 2009, no pet.); Jim Rutherford Investments, Inc. v. Terrarmar Beach Community Ass'n, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Munson v. Milton, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, pet. denied)).

224. *See id.* (citing *Letkeman*, 299 S.W.3d at 486).

225. *See id.* at *6 (citing *Letkeman*, 299 S.W.3d at 486).

226. *Id.* (quoting Tex. R. Civ. P. 683).

227. *See id.* (citing State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971)).

228. *See id.* at *7.

of the noncompetition provisions are irreparable.[229] The trial court further found that Rainbow could not be made whole for the harms resulting from violations of the noncompetition provisions with a monetary award because such harms affected the franchise network and were incalculable.[230] The court of appeals concluded that the temporary injunction order complied with Rule 683 and was not void for the failure to state specific reasons why Rainbow will suffer irreparable harm if the interlocutory relief is not ordered, overruling ABP's third issue.[231]

Injunctive relief remains a powerful remedy for franchise parties looking to enforce the terms of franchise agreements and other contractual arrangements. When a franchise party seeks an injunction, the party should take care to articulate the harms and explain why those harms warrant injunctive relief in light of the franchise business model. In *Rainbow*, the franchisor obtained relief in part because it identified how the franchisee's conduct hurt the franchisor's business, took advantage of the resources made available while the franchise relationship was ongoing, and negatively affected other franchisees in the system.[232]

VIII. CONCLUSION

Like its predecessors, this Survey showcases a range of franchise litigation issues for practitioners to consider before and during franchise disputes. This Survey showcases procedural and substantive issues favorable to both franchisors and franchisees, including resolution of statutory and common law claims, enforceability of forum selection clauses, intellectual property disputes, injunctions, remedies, and enforceability of contracts designed to address post-termination issues.

Multiple intellectual property disputes were decided during this Survey period. In *Pizza Hut, LLC v. Ronak Foods*, the district court enforced protections for the franchisor's trademarks and trade dress under the parties' contractual agreements and federal law.[233] Considering the franchisees' obligations and the harms suffered by the franchisor, the district court ordered the franchisees to de-identify the restaurants and permanently enjoined the franchisees from using the franchisor's marks or trade dress.[234] In *Choice Hotels International, Inc. v. Gosla Family Trust*, franchisees were ordered to pay actual damages, give up lost profits, and pay additional damages where franchisor had made a sufficient showing that franchisees' improper use of the franchisor's intellectual property was done with blatant disregard for the franchisor's rights and diverted sales

229. *See id.*
230. *See id.*
231. *See id.*
232. *See id.*
233. *See Pizza Hut, LLC v. Ronak Foods, LLC*, No. 5:21-CV-00089-RWS, 2022 WL 3544403, at *41–46 (E.D. Tex. June 17, 2022), *aff'd sub nom.*, Pizza Hut L.L.C. v. Pandya, No. 22-40555, 2023 WL 5359079 (5th Cir. Aug. 22, 2023).
234. *See id.* at *45–46, *55.

away from the franchisor, among other factors.[235] Intellectual property rights form the foundation of the franchise relationship; at their core, franchise agreements grant a franchisee a license to use the franchisor's intellectual property in exchange for certain fees. Courts' enforcement of franchisors' intellectual property rights during the Survey period reinforces the purpose and strength of the franchise business model in Texas and should encourage franchise parties to be mindful of how a franchisor's intellectual property is being used both during and after the term of a franchise agreement.

Among the cases concerning post-termination agreements, *Pizza Hut, LLC v. Ronak Foods, LLC* affirmed the enforceability of both the terminated franchise agreements and any contracts entered into after termination.[236] In that case, the franchisee was found liable for breach of the franchise agreements and subsequent agreements where the franchisee had failed to pay royalties incurred both before termination and while the franchisee had a post-termination license to operate restaurants while negotiating a sale of the franchised businesses.[237] Notably, the district court also held that the franchisor's brand standards obligations remained in effect and, per the terms of the franchise agreements and subsequent contracts, bound the franchisee to comply with those standards.[238] The franchisee was ultimately held liable for damages incurred under the contracts as well as for the attorneys' fees that the franchisor incurred as damages arising directly from the franchisees' breach of contract.[239] However, not all franchise terminations are followed by post-termination agreements. In *Cici Enterprises, LP v. TLT Holdings, LLC*, the franchisor initially extended a franchisee's deadline to make certain payments in light of the COVID-19 pandemic and the franchisee's own medical issues but ultimately terminated the franchise agreement without granting the franchisee a license to continue operations when the franchisee failed to pay.[240] *Ronak Foods* and *TLT Holdings* should give franchise parties confidence that the terms of their agreements will be enforced.[241] Franchise terminations are serious events that create substantial risk for franchisor and franchisee alike, and confidence in the parties' contractual arrangements is likely to reduce the uncertainty attendant to that risk.

A bankruptcy case decided during the Survey period also reinforced the notion that franchise parties will remain bound to certain agreements they

235. *See* Choice Hotels Int'l, Inc. v. Gosla Family Tr., No. 5:18-CV-00648-ADA, 2022 WL 4295362, at *4–6, *8 (W.D. Tex. Sept. 16, 2022).

236. *See Ronak Foods*, 2022 WL 3544403, at *36–42.

237. *See id.* at *20–21, *37–41, *55–56.

238. *See id.* at *18–19, *23, *39–40.

239. *See id.* at *55–56.

240. *See* Cici Enters., LP v. TLT Holdings, LLC, No. 3:21-CV-02121-S-BT, 2022 WL 17657576, at *1–2 (N.D. Tex. Nov. 18, 2022), *R & R adopted*, No. 3:21-CV-2121-S-BT, 2022 WL 17631529 (N.D. Tex. Dec. 13, 2022).

241. *See generally id.*; *Ronak Foods*, 2022 WL 3544403, at *1.

make despite the protections offered to debtors by bankruptcy laws.[242] In *In re Lager*, debtor franchisees who tried to avoid non-disparagement and non-disclosure provisions they agreed to in settlements after termination of their franchise agreements were held to be enforceable, and the bankruptcy court refused to dismiss the franchisor's claim for damages arising from the debtor franchisees' false representations in the settlement agreements.[243] Although bankruptcy may excuse some obligations, franchise parties should be mindful of what duties will or may survive a bankruptcy. Thoughtful incorporation of these obligations into franchise agreements or post-termination agreements can offer additional protections to a party that anticipates a counterparty may declare bankruptcy.

The Survey's analysis of procedural issues included two cases regarding the enforceability of forum selection clauses in franchise agreements. In *PH Lodging Tomball, LLC v. Holiday Hospitality Franchising LLC*, an ambiguous forum selection clause was interpreted to give effect to a provision that would have been rendered meaningless under the interpretation advanced by the party resisting the forum selection provision.[244] Also, in *Franlink Inc. v. BACE Services Inc.*, the Fifth Circuit held for the first time that the "closely-related" doctrine could render a forum selection provision enforceable against a non-signatory in the Fifth Circuit based on factors including whether a non-signatory shares common ownership or identity with a signatory, benefits from the contract at issue, knows of the agreement generally, and is specifically aware of the forum selection provision.[245] When franchisors are preparing franchise agreements and when franchisees are reviewing the Franchise Disclosure Document and the proposed terms of a franchise agreement, the forum selection and choice of law provisions warrant special attention. Litigation is difficult to contemplate when the excitement of a new franchise relationship is high, but these provisions can prove consequential in resolution of disputes that may arise as the franchise relationship progresses or after it comes to an end.

The cases in this Survey provide a helpful overview of the state of franchise law in Texas. In particular, the decisions covered reinforce the strength of the instruments and laws designed to govern the conduct of franchise parties during and after a franchise relationship. The cases offer pertinent reminders of how carefully drafted franchise agreements and post-termination agreements may protect the rights and interests of franchise parties even when the franchise relationship breaks down. This Survey also offers pertinent reminders for adequate pleading, forum selection, and potential remedies when litigation is inevitable.

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242. *See In re* Lager, No. 22-30072-MVL-11, 2022 WL 3330421, at *1, *3, *12–13 (Bankr. N.D. Tex. Aug. 11, 2022).

243. *See id.*

244. *See* PH Lodging Tomball, LLC v. Holiday Hospitality Franchising LLC, No. H-21-1803, 2021 WL 5902922, at *1, *3–5 (S.D. Tex. Dec. 10, 2021).

245. Franlink Inc. v. BACE Servs. Inc., 50 F.4th 432, 442–43 (5th Cir. 2022).